Not There Yet:

An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System

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Asylum Information Database

Annual Report 2012/2013

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This report was written by Kris Pollet, Hélène Soupios-David and Almaz Teffera of the European Council on Refugees and Exiles (ECRE) as part of the Asylum Information Database (AIDA) project.

The coordinating partners of the AIDA project are ECRE, Forum réfugiés-Cosi, the Hungarian Helsinki Committee and the Irish Refugee Council.

Chapter III of this report brings together findings from national reports produced by:

Austria
Anny Knapp, Asylkoordination Ősterreich

Belgium
Ruben Wissing, Belgian Refugee Council (BCHV-CBAR)

Bulgaria
Iliana Savova, Bulgarian Helsinki Committee

France
Claire Salignat, Forum réfugiés-Cosi

Germany
Michael Kalkmann, Informationsverbund Asyl und Migration

Greece
Spyros Koloucheris, Greek Council for Refugees assisted by Phoebe Kouvelas

Hungary
Marta Pardavi, Grusa Matevzics, Júlia Ivan and Anikò Bakonyi, Hungarian Helsinki Committee

Ireland
Sharon Waters, Irish Refugee Council

Italy
Maria De Donato, Italian Council for Refugees (CIR)

Malta
Neil Falzon, Aditus Foundation and Katrine Camilleri, JRS Malta

Netherlands
Steven Ammeraal, Frank Broekhof and Angelina Van Kampen, Dutch Council for Refugees

Poland
Karolina Rusilowicz, Maja Tobiasz and Ewa Ostaszewska, Helsinki Foundation for Human Rights

Sweden
George Joseph, Caritas Sweden

United Kingdom
Chris Nash, Asylum Aid and Gina Clayton, consultant

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Introduction

The final adoption of the asylum package, a set of legislative instruments revising and completing the first generation European Union (EU) asylum legislation, by the EU institutions in June 2013 marks the beginning of a new important phase in the establishment of the Common European Asylum System (CEAS). As defined in the Stockholm Programme, the key objective of the CEAS is to establish high standards of protection and ensure that similar cases are treated alike and result in the same outcome, regardless of the Member State in which the asylum application is lodged. Despite the recent adoption of an elaborate body of legislation, the road towards achieving this objective in practice is still long. As this report shows, the CEAS as defined in the Stockholm Programme remains a theoretical concept in particular for the men, women and children seeking international protection in the EU.

Persons seeking to exercise the right to asylum laid down in Article 18 EU Charter of Fundamental Rights in the EU today are confronted with a number of challenges throughout the various stages of the process. Reaching the EU has become increasingly difficult due to a number of administrative and external border control measures that EU governments have put in place to prevent asylum seekers from entering the territory. Restrictive visa policies, carrier sanctions and the lack of legal channels to come to the EU for protection reasons force migrants and refugees alike to make use of smugglers often at risk of being subjected to serious human rights violations and a(t times putting their lives in grave danger.

Those asylum seekers who manage to enter the territory of one of the Member States face additional obstacles to having their asylum claim fully examined. Access to a fair and efficient asylum procedure may be hampered by the operation of the Dublin Regulation. This system allocates responsibility for examining asylum applications among EU Member States and four Schengen Associated States on the basis of a hierarchy of objective criteria. However, as it is based on the flawed assumption that protection standards are equal or equivalent in the States applying the Dublin Regulation, it continues to cause hardship for asylum seekers and breaches their fundamental rights. Depending on the Member State responsible for examining their asylum application asylum seekers may face difficulties in having their claim for protection registered and accessing free legal assistance, in particular where it is most needed, such as in accelerated or border procedures. They may be detained during the examination of their application in unacceptable conditions or faced with lack of reception capacity while access to the labour market remains restricted.

This first annual report of the Asylum Information Database (AIDA) is part of a project funded by the European Programme on Integration of Migrants (EPIM) and coordinated by European Council on Refugees and Exiles (ECRE), Forum réfugiés-Cosi, the Irish Refugee Council and the Hungarian Helsinki Committee, aiming at developing a multi-functional database on asylum in Europe. The database contains detailed information on the legal framework as well as the practice with regard to asylum procedures, reception conditions and detention of asylum seekers in 14 EU Member States (Austria, Belgium, Bulgaria, Germany, France, Greece, Hungary, Ireland, Italy, Malta, the Netherlands, Poland, Sweden and the United Kingdom). In addition the database includes testimonies of asylum seekers and refugees who have been through the process and share their positive and negative experiences with asylum systems in those Member States. In doing so, the project aims at providing in-depth analysis of the respective national asylum systems by non-governmental organisations that assist asylum seekers and persons granted international protection on a daily basis, while providing a platform to those for whom those systems are supposed to be built. Through the project the partners hope to contribute to establishing a complete picture of asylum policies and practices in EU Member States and to better identifying the challenges in building the CEAS. The AIDA project and Annual Report aim to add, from an NGO-perspective, to existing analysis on the state of asylum in the EU as included in the annual report on the situation of asylum of the European Asylum Support Office (EASO)[1], the Commission's 4th Annual Report on Immigration and Asylum[2] and the relevant sections in the Annual Report 2012 of the Fundamental Rights Agency.[3]

This report not only presents a number of findings from the national reports that have been drafted in the context of the AIDA project but also reflects on a number of important developments and challenges at the EU level in the field of asylum in 2012 and the first half of 2013. The report consists of three chapters which are structured in such a way that they can be read independently from each other.

1 EASO, *Annual Report on the situation of asylum in the EU 2012, 2013* (hereafter 'EASO Annual Report 2012')

2 COM(2013) 422 final, *Communication from the Comm ission to the European Parliament and the Council. 4th Annual Report on Immigration and Asylum (2012)*, Brussels, 17 June 2013.

3 Fundamental Rights Agency, *Annual Report 2012. Fundamental Rights: challenges and achievements in 2012, 2013.*

Chapter I provides a general background to the issues discussed in this report. It presents a brief overview of the main statistical trends in the reference period with regard to the main countries of origin of asylum seekers arriving in the EU, the number of asylum applications per Member State and recognition rates. This chapter also has a particular focus on the EU's response to refugee flows resulting from the crisis in Syria and the continuing problems with the operation of the Dublin Regulation both from an efficiency and fundamental rights perspective. The chapter concludes by highlighting two other concerning phenomena in the EU today: the rise of xenophobia and racism which affects Greece in particular but not exclusively and the growing number of hunger strikes and other desperate actions undertaken by asylum seekers and migrants in EU Member States.

Chapter II is mainly dedicated to an analysis of the legislation resulting from the second phase of harmonisation and its potential impact on EU Member States' asylum practices. The chapter presents an overview and assessment of key provisions in the new EU asylum *acquis* with a particular focus on the recast Reception Conditions Directive, Asylum Procedures Directive and the Dublin Regulation, as those EU instruments are most relevant in light of the scope of the Asylum Information Database. The chapter concludes with a short reflection on the Early Warning and Preparedness Mechanism that was agreed upon as part of the recast Dublin Regulation and that being set up by the EASO.

Chapter III presents a number of key findings and trends with regard to asylum procedures, reception conditions and detention from the research carried out in the 14 EU Member States covered in the AIDA project and links those findings to the newly adopted standards in the EU recast asylum legislation. The chapter is structured around six crucial aspects of the national asylum systems in the EU Member States concerned: access to the territory and to the procedure; the personal interview, access to legal assistance, access to an effective remedy, detention and reception conditions. The focus in this chapter is on providing an overview of the existing legal frameworks and the challenges asylum seekers face in practice in accessing their fundamental rights within such framework.

Statistical information on overall recognition rates and asylum applications by unaccompanied children in EU Member States and Schengen Associated States in 2012 and summaries of selected asylum-related case-law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) are included in Annex I and II respectively.

The report demonstrates that the EU is still far from having a CEAS worthy of the appellation "common". The task ahead is huge and is further complicated by the fact that support for fair and humane asylum policies in Europe is decreasing. Governments are under pressure from some parts of the public to pursue restrictive policies that deter people from seeking refuge in Europe, in particular as the EU is facing huge economic challenges and is implementing austerity measures. At the same time, EU Member States are confronted with growing numbers of their own nationals facing the consequences of the economic crisis. However, it is exactly in such circumstances that the EU and its Member States must assume leadership in defending and preserving the right to asylum, laid down in Article 18 of the Charter of Fundamental Rights of the European Union, if the CEAS is ever to materialize.

Chapter I

The Bigger Picture of Asylum in the EU : Key Trends and Developments

Despite the fact that the Asylum Information Database is currently limited to 14 EU Member States, with chapter III of this report exclusively dedicated to the key findings on asylum practices in these States, it is useful to situate the practice documented in relation to EU-wide trends in asylum. This chapter will firstly analyse the most important statistical trends in 2012 for the entire EU. The EU's response to the refugee flows resulting from the Syrian crisis will then be discussed as one of the main challenges for the EU's asylum policy in 2012 and the first half of 2013 as well as the continuing flaws in the system that remains at the core of the CEAS: the Dublin Regulation. The chapter concludes with a reflection on the rise of racism and xenophobia with respect to asylum seekers and migrants and the increasing number of hunger strikes and suicides in reception and detention centres reported in EU Member States.

1.1 Key Statistics and Trends

In 2012, 335,380 persons sought asylum in the EU and a total of 373,995 in the EU and the four Schengen associated states (Iceland, Liechtenstein, Norway and Switzerland).[4] This constitutes for the EU an 11% increase compared to 2011, but as emphasised in EASO's Annual Report on the Situation of Asylum in the EU in 2012, this includes a 39% increase of subsequent asylum applications compared to 2011. The significant number of subsequent asylum applications in the EU not only puts the increase of asylum applications into perspective, it also raises questions as to the efficacy of asylum procedures in the EU Member States or at least indicates that a growing number of asylum seekers whose asylum application is rejected considers that their case has been wrongly refused. According to the EASO Annual Report 2012 this was a significant trend in 2012 in Germany (20% subsequent applicants), Belgium (35%), France (12 %) and the Netherlands (26 %)[5]. It is interesting to note that Syria and Afghanistan, the nationalities that together with Somalis were the largest groups granted protection status in the EU in 2012, are represented in the top five of countries of origin submitting subsequent applications in Germany (Syria is third)[6] and Belgium (Afghanistan is fourth).[7]

Based on the absolute numbers of asylum applications lodged in the 27 EU Member States in 2012, the EU Member States receiving the highest numbers in 2012 were Germany (77,650), France (61,455), Sweden (43,945), Belgium (28,285) and the United Kingdom (28,260). This is a change from 2011 when France ranked first with 57,335 applications and Italy third with 34,145 applications. These shifts are at least partly explained by the important increase in applications from Syrian nationals in Germany and Sweden in 2012 following the escalation of the Syrian conflict. Italy experienced a sharp increase of asylum applications in 2011 as a result of the forced migration resulting from the developments in North Africa following the Arab Spring. The significant drop of number of applications in Italy in 2012 (17,350, -49%) may be seen in that context.

The total number of asylum applicants in the 27 EU Member States and the four Schengen Associated States must also be put into perspective of its relative share in receiving and hosting the global refugee population. Despite the 11% increase of asylum applications in the EU in 2012, EU Member States continue to host only a fraction of the world's refugees. According to UNHCR, by the end of 2012, 45.2 million people were forcibly displaced worldwide as a result of persecution, conflict, generalized violence and human rights violations. This is the highest number since 1994, when an estimated 47 million people were forcibly displaced worldwide[8]. According to UNHCR, developing countries host 80% (8.5 million) of the world's refugees under UNHCR's mandate, while wider Europe hosted about 1.8 million refugees at the end of 2012 (17% of the global total). The 49 Least Developed Countries provided asylum to 2.5 million refugees (24% of the global total).[9]

4 See Annex I – Table 1. Asylum applications in the EU and Schengen Associated States in 2012 (top 5 countries of origin), Eurostat, *Asylum and new asylum applicants by citizenship, age and sex Annual aggregated data (rounded),migr_asyappctza*, extracted 27 August 2013.

5 EASO, *Annual Report on the situation of asylum in the EU 2012, 2013*, p. 18 (hereafter 'EASO Annual Report 2012').

6 Asylum Information Database, *Country report Germany – Statistics*, accessed August 2013.

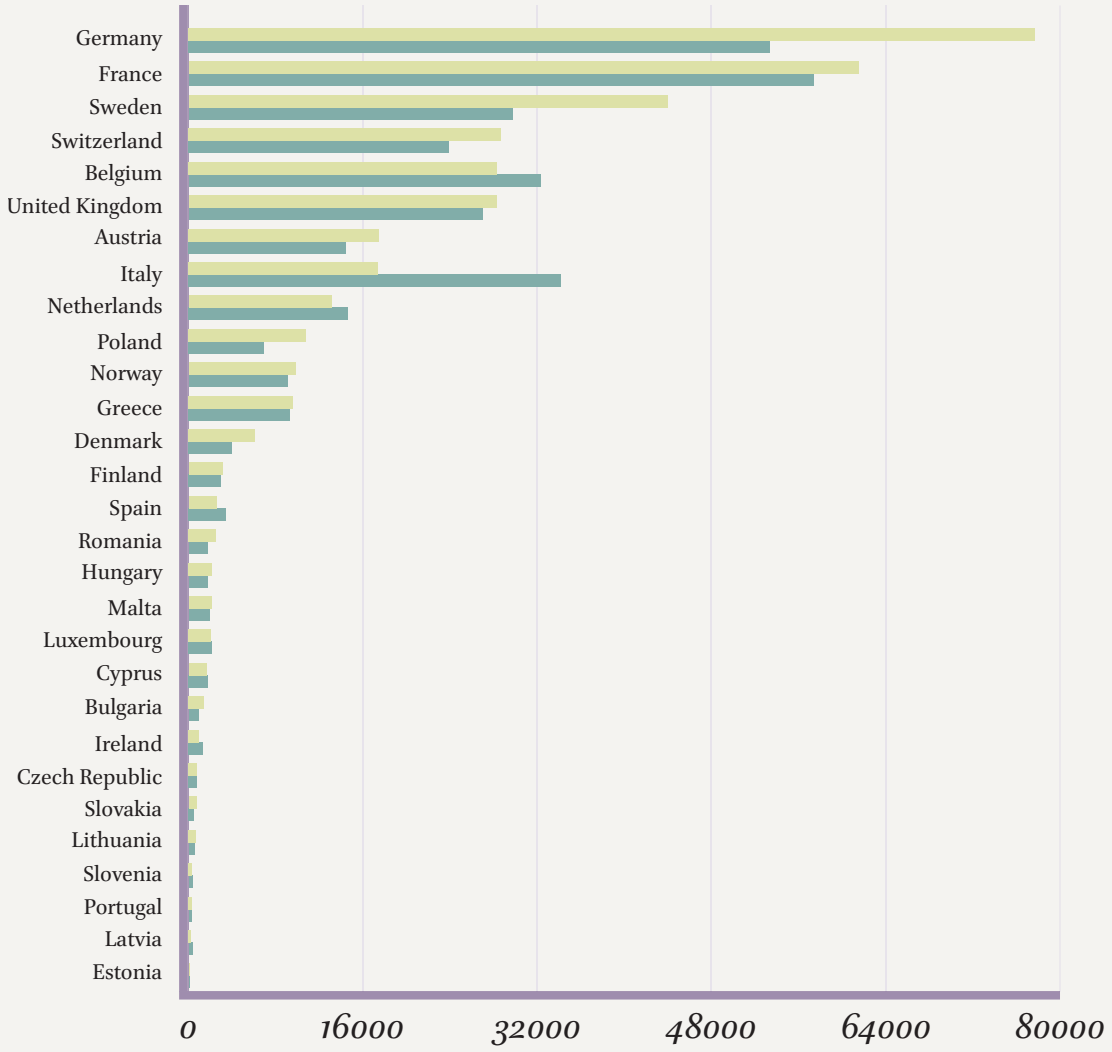
7 Asylum Information Database, *Country report Belgium – Statistics*, accessed August 2013.

8 UNHCR, *Global Trends 2012: Displacement The New 21st Century Challenge*, June 2013, p. 2.

9 UNHCR, *Global Trends 2012: Displacement The New 21st Century Challenge*, June 2013, p. 5.

Asylum Applications in 2011 and 2012 in the EU and the Schengen Associated States

Source: Eurostat, Asylum and new asylum applicants by citizenship, age and sex Annual aggregated data (rounded),migr_asyappctza, extracted on 30 July 2013



The majority of asylum seekers in the EU originated from Afghanistan (28,010 applicants), Russia (24,280), Syria (24,110) followed by Pakistan (19,695) and Serbia (19,065).[10] The number of applicants from Afghanistan remained stable compared to 2011, while there was a small increase in the number of asylum seekers from Russia (which includes Chechens) and a steep rise of applications from Syrians (+206%).[11] However, considerable differences exist between EU Member States as regards the number of applications they received from asylum seekers coming from these countries. For instance, in the five EU countries receiving the largest absolute numbers of asylum applicants, Afghans are only the third largest group in Germany (7,840 applicants) and Sweden (4,760 applicants) while it is the first largest group in Belgium (3,290) and does not even appear in the top three of main groups of asylum applicants in France and the United Kingdom.[12]

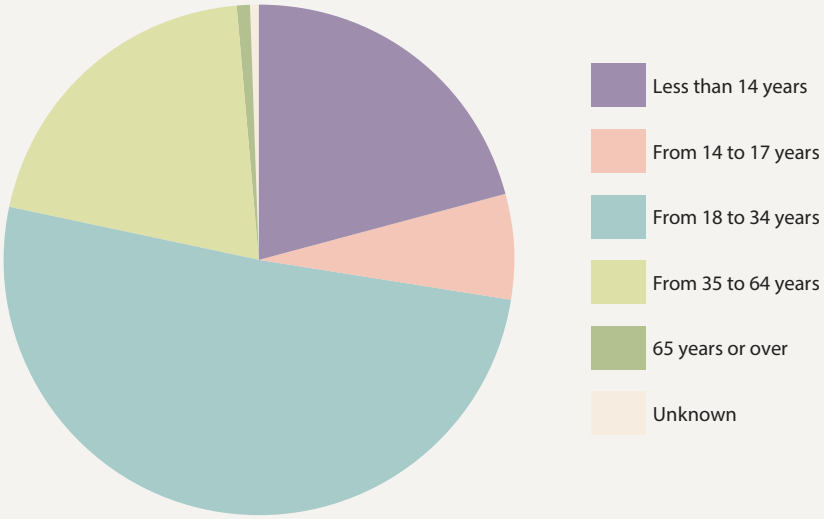
10 See Annex I – Table 1. *Asylum applications in the EU and Schengen Associated States in 2012 (top 5 countries of origin)*, Eurostat, Asylum and new asylum applicants by citizenship, age and sex Annual aggregated data (rounded),migr_asyappctza, extracted 27 August 2013.

11 See, EASO, *Annual Report on the Situation of Asylum in the European Union 2012*, July 2013

12 See Eurostat, *Asylum in the EU27: The number of asylum applicants registered in the EU27 rose to more than 330 000 in 2012*, STAT/13/48, 22 March 2013.

The majority of asylum seekers who applied for asylum in 2012 in the EU Member States and Schengen Associated States were between 18 and 34 years as illustrated in this chart:

Age Distribution of Asylum Applicants in the EU in 2012



Source: Eurostat, Asylum and new asylum applicants by citizenship, age and sex Annual aggregated data (rounded),migr_asyappctza, extracted on 30 July 2013

It should also be noted that children represent 28%, with children younger than 14 years old amounting to 21% of the total number of applicants. The number of asylum applications by unaccompanied children have been stable in the last four years, confirming it is a long term phenomenon, with a total of 13,390 applications in the EU and the four Schengen associated states and 12,715 in the EU alone in 2012.[13] Regarding unaccompanied children, Afghanistan remains the main country of origin, by far, amounting to 40% of the total (5,510 applications). Somalia constitutes the second highest country with 985 applications. The other leading countries of origin, Guinea, Pakistan and Syria, amount to lower numbers with about 400 applicants each. The five main receiving countries are Sweden (3,580), Germany (2,095), Belgium (1,530), Austria (1,375) and the United Kingdom (1,170).

13 See Annex 1 - Table 2. Applications by unaccompanied children in the EU and Schengen associated states in 2012.

Recognition Rates in the EU: The Protection Lottery Continues?

Despite the EU's long standing efforts to harmonise the asylum policies of Member States, it is clear that the objective laid down in the Stockholm Programme[14], i.e. that similar cases should be treated alike and result in the same outcome, regardless of the Member State where the asylum application was lodged, is still far from being achieved.

According to Eurostat data[15], the overall protection rate at first instance in the EU 27 was at 28. 2% (a total of 77,295 positive decisions granting a protection status–refugee status, subsidiary protection status or humanitarian protection status)[16]. Belgium, Bulgaria, Cyprus, Czech Republic, France Greece, Ireland, Latvia, Lithuania, Luxembourg, Poland, Romania, Slovenia, and Spain had an overall recognition rate lower than the EU average in 2012. Among those countries, recognition rates at first instance are very low in Greece (0.9%), Luxembourg (2.5%), and in Cyprus (7.9%), while Ireland, France, Romania, Lithuania, and Slovenia have recognition rates of 17% or lower. According to these statistics, 11 EU Member states have a recognition rate between 30 and 60% (Czech Republic, Estonia, Denmark, Finland, Germany, Italy, the Netherlands, Portugal, Slovakia, Sweden, UK). Very high recognition rates are registered in Italy (61.7%) and Malta (90.1%), while the recognition rate is above 40% in Finland (50.4%), Slovakia (43.4%), Portugal (43.9%) and the Netherlands (41.1%).[17]

This comparison does not allow to draw any final conclusions as to the decision-making practice at the first instance of EU Member States as a range of elements, such as the main countries of origin of asylum seekers, the key characteristics of the caseloads from specific countries of origin and the number of decisions taken with regard to the various nationalities, co-determine the total recognition rate. Nevertheless, the figures show that of the five EU Member States receiving the highest number of asylum applications in 2012, France and Belgium were below average (14.4 and 22.6% respectively) while Germany was only 1 % above the average (29.2%) and Sweden and the United Kingdom have an overall positive recognition rate of 39.3% and 35.4% respectively.

Still according to Eurostat the overall recognition rate at appeal was at 19.1% for final instance decisions on applications for international protection by Member States in 2012.[18] Moreover, of the total number of people granted protection status in 2012, both at first instance and appeal (102.700 persons), 50% were granted refugee status, 36% subsidiary protection and 14% a humanitarian status. Syrians, Afghans and Somalis were the largest groups granted protection status throughout the EU in 2012.[19]

14 European Council, *The Stockholm Programme –An Open and Secure Europe Serving and Protecting Citizens* (hereinafter 'Stockholm Programme'), section 6.2, OJ 2010 C 115/1.

15 Eurostat, *Asylum decisions in the EU27: EU Member States granted protection to more than 100 000 asylum seekers in 2012*, 96/2013, 18 June 2013.

16 For the purpose of this report and for reasons of internal consistency, only statistics published by Eurostat are used, which have been either extracted from the Eurostat online database or from publications or News releases. Some figures are also taken from the EASO Annual report on the situation of asylum in the EU in 2012, but are still based on Eurostat data. However, UNHCR also publishes statistics on asylum applications and recognition rates. It is important to note that UNHCR data, especially with regards to recognition rates may, in some instances, differ considerably from those of Eurostat. For instance, recognition rates for Afghan nationals amount to 35% in Austria in 2012 according to Eurostat while it is of 63% according to UNHCR, in Switzerland the variation is even more striking with a recognition rate of 39% according to Eurostat and 87% according to UNHCR. These discrepancies are also reflected in the overall recognition rate: for Hungary for instance, the recognition rate is 32% at first instance according to Eurostat, and 48% according to UNHCR statistics, while for Sweden it is of 39% and 49% respectively. Those variations probably stem from a difference in the sources, definitions and calculations used.

17 *Idem.*

18 *Idem.* Eurostat defines final decisions on appeal as 'a decision granted at the final instance of administrative/judicial asylum procedure and which results from the appeal lodged by the asylum seeker rejected in the preceding stage of the procedure. The data does not differentiate between the levels of appeals but Eurostat states that it refers in the 'vast majority' to decisions when all normal routes of appeal have been exhausted.

19 *Idem.*

Discrepancies in recognition rates for the same nationalities of asylum seekers continue to exist among EU Member States. By way of example, the map below shows recognition rates with regard to decisions taken at first instance on asylum applications lodged by Afghan nationals in 13 European countries. Recognition rates vary from 6.8% in Greece to 93.7% in Italy, while Denmark and the UK have a recognition rate of 26.7% and 32.3% respectively. Although varying recognition rates are not necessarily exclusively explained by divergent interpretations among EU Member States of protection obligations under EU and international human rights law, this is not exclusively explained by the fact that EU Member States may receive different caseloads with regard to the same nationality either. Many factors, including divergences in the assessment of the risk of persecution or serious harm upon return, the use of country of origin information, the way in which credibility of asylum seekers' statements are assessed but also the observance and quality of procedural guarantees such as legal assistance and interpretation, influence recognition rates. Further in-depth research into the variety of factors determining the outcome of asylum procedures would certainly contribute to a better understanding of such divergences.

Recognition Rates (%) for Afghan Nationals

2012

Note

All rates are for all types of protection status granted (refugee status, subsidiary protection or humanitarian protection) and at first instance only, for EU and Schengen Associated Member states where more than 100 decisions were taken in 2012 on applications by Afghan nationals.

Source: Eurostat

1.2 The EU's Response to the Syrian crisis

The UN High Commissioner for Refugees, Antonio Guterres, qualified the war in Syria as "one of the worst conflicts the world has seen in decades"[20], while the EU itself recognises that it is "one of the worst humanitarian catastrophes of the last decades"[21]. As far as the response of the EU and its Member States to the refugee flows resulting from the conflict in Syria is concerned, a distinction must be made between the treatment of asylum applications of asylum seekers from Syria on EU territory and efforts to assist countries in the region hosting the vast majority of people fleeing the conflict.

20 UNHCR, *UN's High Commissioner for Refugees urges Europe to do more for Syrian asylum seekers*, 18 July 2013.

21 Lithuanian Presidency of the EU, *Discussion paper for the Informal Justice and Home Affairs Minister's Meeting (18-19 July 2013): Syria, Protection of Refugees.*

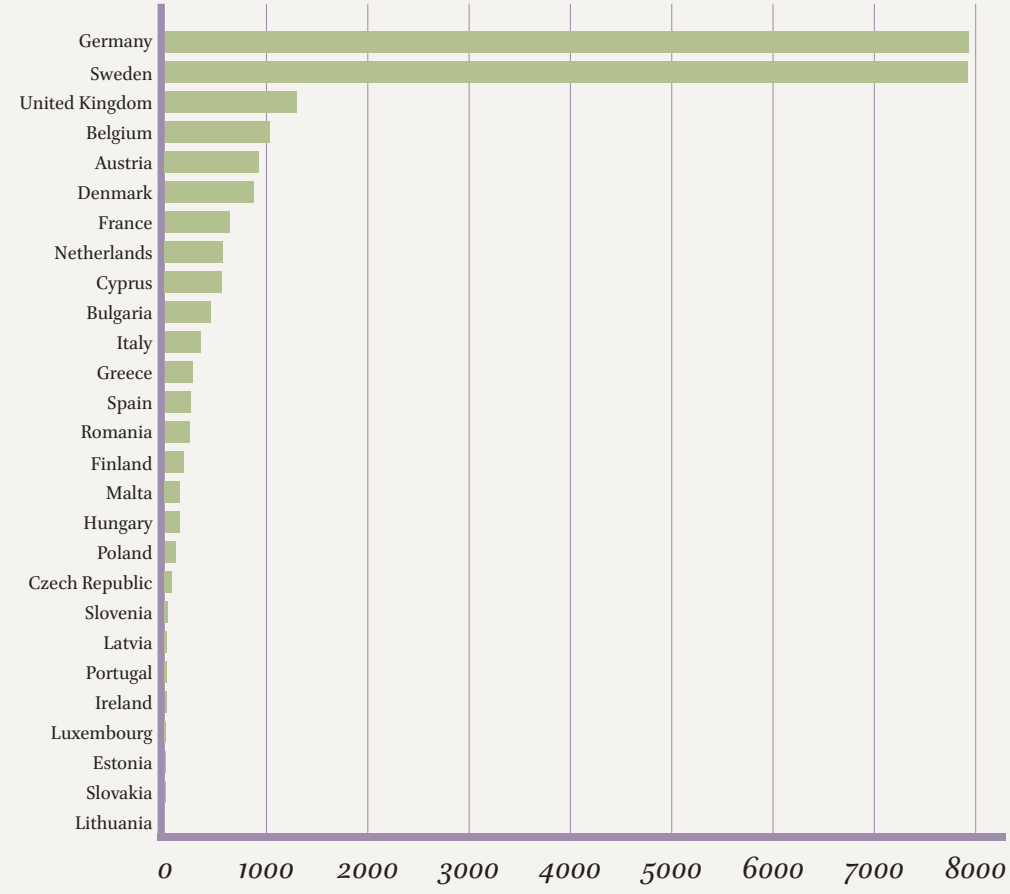
Asylum Seekers from Syria in the Neighbouring Countries and the EU

After more than two years of conflict, the situation is still extremely dire in Syria, with daily reports of indiscriminate violence, killing of civilians, ill-treatment and torture and a grim humanitarian situation. Since the beginning of the conflict, the number of persons fleeing the conflict has grown exponentially. At the end of 2012 about 500,000 Syrians had fled to the neighbouring region, and the one million mark was reached at the beginning of March 2013, with half of the refugees being children[22]. By the end of July 2013, the number was even more worrisome, with close to 2 million 'people of concern' in the region, according to UNHCR[23].

The vast majority of the people fleeing Syria remain in the neighbouring countries (Lebanon, Jordan, Turkey, Iraq and Egypt), leading to extreme pressure on those countries and a serious humanitarian crisis in the region. Resources in the host countries are being strained and access to basic services such as water and health remains problematic.[24]

At the European level, 24,110 Syrian nationals sought asylum in 2012 (25,670 including Switzerland, Norway and Iceland), a 206% rise compared to 2011. In 2012, Syria became the third country of origin of applicants, just after Afghanistan and Russia.[25] Germany and Sweden alone received two thirds of those applications in 2012. As of May 2013 58% of asylum applications lodged in EU and Schengen Associated States have been received by Germany and Sweden. Syrians arriving in the EU are often families, with children, which corresponds to the situation in the neighbouring countries where half of the Syrian refugees are female and half of the total numbers are children.[26]

Asylum Applications from Syrian Nationals in the EU in 2012



Source: Eurostat, Asylum and new asylum applicants by citizenship, age and sex Annual aggregated data (rounded), migr_asyappctza, extracted on 24 July 2013

22 UNHCR, *Number of Syrian refugees reaches 1 million mark*, 6 March 2013.

23 UNHCR, *Syria Regional Refugee Response: Inter-agency Information Sharing Portal*, Accessed 31 July 2013.

24 See, World Visions, *Under pressure: the impact of the Syrian refugee crisis on host communities in Lebanon*, July 2013 ; Norwegian Refugee Council, *Regional dashboard on NRC operations*, Updated 18 July; European Commission and High representative of the EU for Foreign Affairs, *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards a Comprehensive EU Approach to the Syrian Crisis*, 24 June 2013; Christopher Phillips, *The impact of Syrian refugees on Turkey and Jordan*, October 2012.

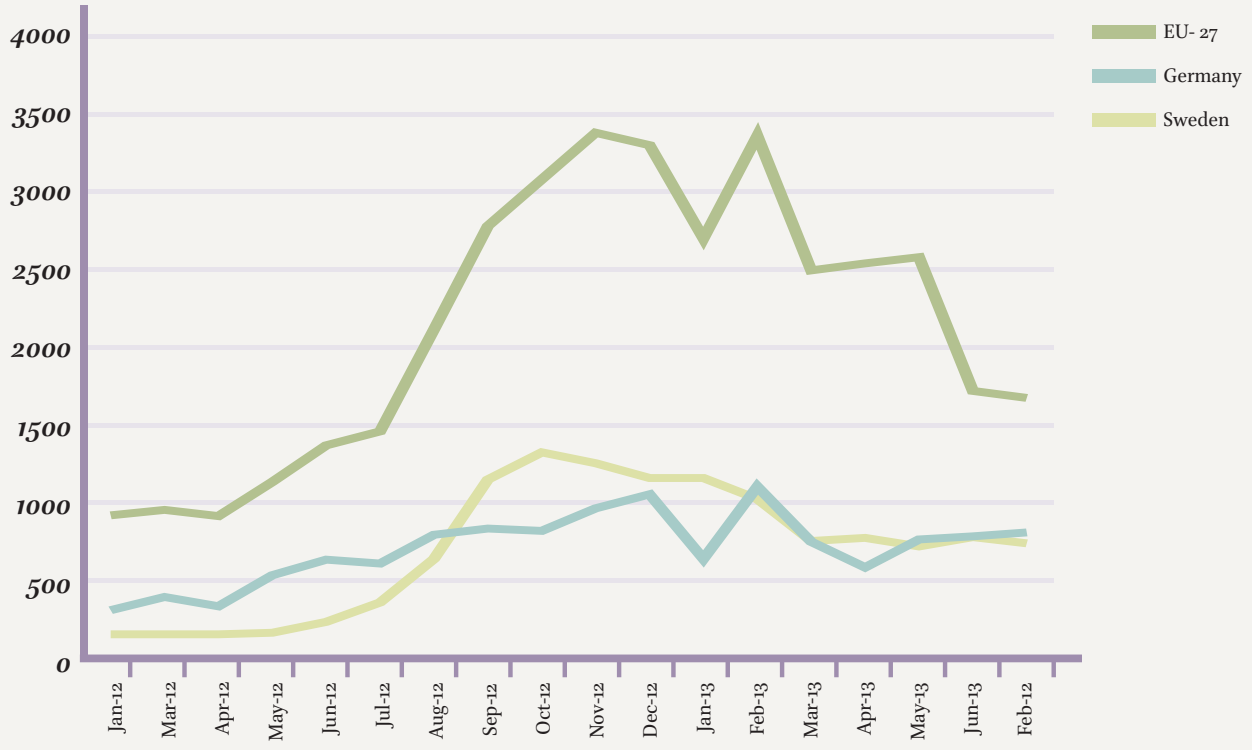
25 Eurostat, Asylum applications 2012

26 UNHCR, *Syria Regional Refugee Response: Inter-agency Information Sharing Portal*, Accessed 31 July 2013.

It has to be noted that the number of Syrians in need of protection, present on the EU territory is probably higher: for instance, only 275 Syrians claimed asylum in Greece in 2012, while close to 8,000 arrests of Syrian nationals for irregular entry were recorded by the Greek authorities.[27] As access to the procedure is extremely difficult in Greece and as the system is seriously dysfunctional, most Syrians arriving in Greece cannot or may have chosen not to submit an asylum claim in Greece.[28]

The table below presents an overview of the evolution of Syrian asylum applications between January 2012 and June 2013 for the EU 27 as well as for the two EU Member States receiving the vast majority of asylum applications from Syria: Germany and Sweden. While the number of applications in EU Member States was high between September and November 2012 it then dropped notwithstanding an increase in the number of Syrian refugees in the region. According to the EASO, the main reason for this phenomenon is the fact that many asylum applications were lodged by Syrians who were already present in the EU and had become "réfugiés sur place", combined with the tightening of border controls at the Greek-Turkish land border.[29]

Evolution of Syrian Applications 2012 - First Half 2013 in the EU, Germany and Sweden



Note: Values for the EU are estimates by Eurostat as some data are not available for a number of Member States

The impact of the strengthened border controls, including through the FRONTEX-led Poseidon Operation at the Greek/Turkish border, on the number of applications from Syria in the EU as well as the above-mentioned problem of access to the asylum procedure in Greece is certainly not to be underestimated. Access to Europe is increasingly difficult, and legal channels of entering the EU are almost non-existent, especially as Member States closed their embassies in Syria.[30] The Swedish Migration Board which had originally estimated that about 54,000 Syrians would apply for asylum in 2013 revised its estimate to 18,000, based on the data for the first six months. The Migration Board attributed this change to "stricter border controls in Greece and Turkey".[31] As the conflict worsens, refugees from Syria seem to be increasingly facing problems reaching EU territory and finding protection in the EU.

27 UNHCR, *Syrians in Greece: Protection Considerations and UNHCR Recommendations*, 17 April 2013.
28 *Ibid.*
29 EASO, *Annual report on the situation of asylum in the European Union 2012*, July 2013, p. 30.
30 *Ibidem.*
31 Swedish Migration Board, *An increase in asylum seekers over the first six months of the year*, 4 July 2013.

Treatment of Asylum Seekers from Syria in the EU

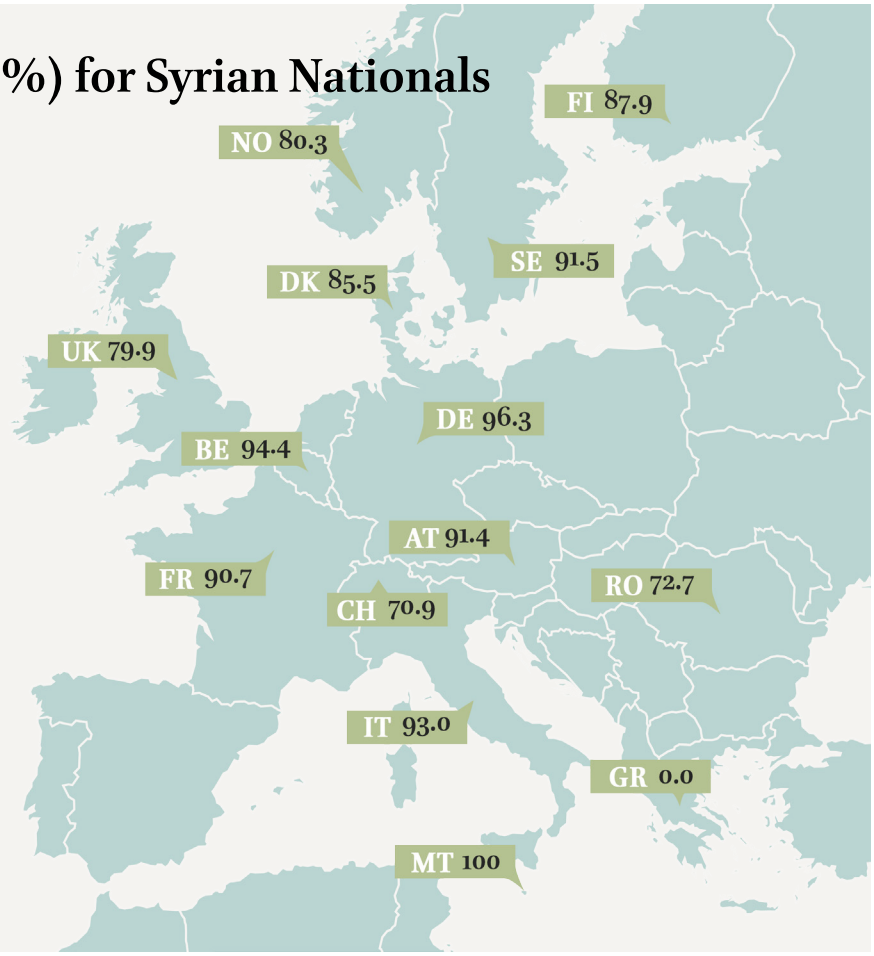
As is the case with other countries of origin, the treatment of asylum seekers from Syria varies among the EU Member States. As far as the treatment of asylum applications is concerned, it is positive that, where asylum applications are being examined and decided upon, overall recognition rates at first instance (all types of protection) are generally high, with the exception of Greece. Another positive development is that returns to Syria at least seem to be suspended in all EU Member States. However, whereas some Member States, such as Denmark have adopted formal moratoria on returns to Syria this is not the case in other Member States.[32]

Recognition Rates (%) for Syrian Nationals

2012

Note

All rates are for all types of protection status granted (refugee status, subsidiary protection or humanitarian protection) and at first instance only, for EU and Schengen Associated Member states where more than 100 decisions were taken in 2012 on applications by Syrian nationals.



Source: Eurostat

At the same time, according to EASO, a number of EU Member States initially "froze" the examination of applications from Syrian nationals between July 2011 and March 2012 because of a "volatile and uncertain situation" and several Member States prioritised manifestly well-founded applications, leading to high rates of refugee status granted in that period. However, according to EASO, since April 2012 and the escalation of the conflict, Syrian asylum seekers are granted in many cases subsidiary protection based on Article 15 (b) or (c) of the Qualification Directive rather than refugee status.[33] Also Eurostat statistics suggest that other forms of protection status are granted more often than convention status. This is, for instance, the case in Germany where in 2012, out of a total of 7,465 positive decisions concerning Syrian applicants 1,985 decisions granting refugee status were taken (26.5%) and 5,480 decisions granting subsidiary protection and humanitarian protection (73.4%). This trend continued during the first half of 2013 with refugee protection status granted in 19.9% of cases and other forms of protection reaching 75.2%.[34] It should be noted that Syrians who entered Germany irregularly and who are not seeking asylum may be eligible for temporary residence permits on humanitarian grounds, according to specific regional regulations.[35] Also in Sweden, a policy was adopted whereby in the majority of cases some form of temporary

32 UNHCR, *Responding to protection needs of displaced Syrians in Europe*, June 2013; and information received from ELENA Coordinators in June 2013.
33 EASO, *Annual report on the situation of asylum in the European Union 2012*, July 2013.
34 Information obtained through national expert AIDA-project.
35 Information provided by AIDA national expert, August 2013.

protection is granted, whereas permanent protection is granted only in some cases based on the person's individual circumstances.[36] In the UK, the government offered new possibilities to Syrians already legally present on the territory to further extend their stay, thereby aiming at managing the situation through temporary immigration schemes rather than encouraging people to seek asylum.[37]

Such policies are likely to undermine the primacy of refugee status, which is established in the recast Qualification Directive and disregard UNHCR's position that "many Syrians seeking international protection are likely to fulfill the requirements of the refugee definition contained in the 1951 Convention Relating to the Status of Refugees and the corresponding provisions of the Qualification Directive, since in many cases their well-founded fear of persecution will be linked to one of the Convention grounds".[38] Under the recast Qualification Directive refugee status and subsidiary protection status are further aligned but Member States may still apply a less favourable regime to beneficiaries of subsidiary protection on certain aspects such as with regard to the duration of the residence permit (initially one year instead of three years for refugees) and entitlement to social welfare, while they are also excluded from the scope of the EU family reunification directive.

Whereas asylum seekers from Syria who managed to reach the EU are generally protected from *refoulement*, there are concerns with regard to the way they are treated in some EU Member States. Notwithstanding their evident protection needs and the often traumatising experiences they have gone through during the conflict, asylum seekers from Syria may be subjected to detention in harsh conditions in addition to the obstacles they may face in accessing EU Member States located at the EU's external borders. Testimonies recorded by UNHCR Greece also make reference to push-backs of asylum seekers from Syria to Turkey.[39]

The UN High Commission for Refugees, Antonio Guterres urged, in July 2013, for a more "generous and consistent approach" to Syrian asylum seekers in Europe, qualifying the situation as a "first real test" for the CEAS. He criticised the discrepancies among Member States and called for better access to asylum procedures, improved treatment of the asylum seekers, higher protection rates and more flexibility with regard to family reunification and visa requirements.[40]

The EU's Response to the Humanitarian Crisis in Syria and the Region

The EU is currently the largest donor of humanitarian assistance to Syrians inside and outside their country[41] and the Council of the European Union reaffirmed in February 2013 that it will continue to provide support to the country with financial and in-kind assistance.[42]

The EU is also developing a Regional Protection Programme, which should be operational by the end of 2013, aiming at strengthening the long-term capacity of Syria's neighbouring countries.[43] The programme, which has a current total budget of €13.3 million, should include assistance to the States and direct assistance to refugees through assistance for registration, administrative capacity building and the enhancement of access to socio-economic rights such as education and health care.

In a joint letter addressed to the EU Justice and Home Affairs Ministers, Amnesty International EU office, ECRE, ICMC and CCME called on the EU not only to remain a generous donor but also to resettle refugees from the region, both Syrians and those third country nationals who were living in Syria when the conflict started.[44] UNHCR also called for the humanitarian admission of an initial 10,000 Syrian refugees from the Middle East and North Africa[45], as well as for the resettlement of an additional 2,000 vulnerable Syrian refugees.[46] Currently, only Germany announced it would provide humanitarian admission to 5,000 vulnerable people: priority will be given to Syrian refugees present in Lebanon and to those who have already family in Germany.[47] In addition, some Member States indicated they would assign some places in their 2013 and 2014 resettlement quotas to vulnerable refugees from the Middle East.[48]

36 Asylum Information Database, *Country Report Sweden – Treatment of specific nationalities*, accessed July 2013.

37 Asylum Information Database, *Country Report UK – Treatment of specific nationalities*, accessed July 2013.

38 UNHCR, *Responding to protection needs of displaced Syrians in Europe*, June 2013, p. 2.

39 UNHCR, *Syrians in Greece: Protection Considerations and UNHCR Recommendations*, 17 April 2013.

40 UNHCR, *News: UN's High Commissioner for Refugees urges Europe to do more for Syrian asylum seekers*, 18 July 2013.

41 The EU (EU budget and Member states) has committed to more than 850 million euros in humanitarian and non-humanitarian assistance to Syrians inside and outside their country. See Council of the EU, *Factsheet: the European Union and Syria*. 4 June 2013.

42 Council of the EU, *Council Conclusions on Syria, 3222nd Foreign Affairs Council meeting*, Brussels, 18 February 2013.

43 European Commission and High representative of the EU for Foreign Affairs, *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards a Comprehensive EU Approach to the Syrian Crisis*, 24 June 2013.

44 Amnesty International EU office, ECRE, ICMC and CCME, *Joint Statement: Syria Refugee Crisis- EU should do more*, 17 January 2013.

45 UNHCR, *Syria Regional Response Plan: January to December 2013*.

46 See European Commission and High representative of the EU for Foreign Affairs, *op.cit.*

47 UNHCR is supporting Germany in 'selecting' the admissible refugees and established a hotline to that purpose. See Bundesministerium des Innern (BMI), *Flüchtlinge aus Syrien* (Ministry of the Interior, Refugees from Syria), 20 March 2013; BMI, *Aufnahme syrischer Flüchtlinge* (*Reception of Syrian Refugees*), 27 June 2013 and UNHCR Germany's dedicated *webpage*.

48 Lithuanian Presidency of the EU, *Discussion paper for the Informal Justice and Home Affairs Minister's Meeting (18-19 July 2013): Syria, Protection of Refugees.*

1.3 Cracks in the CEAS

Notwithstanding the final adoption of the asylum package in June 2013, the CEAS was further put to the test in 2012 and the first half of 2013 by the on-going asylum and immigration crisis in Greece and new research further documenting the fundamental flaws of the Dublin Regulation which is at the heart of the CEAS.

EU Member States and institutions have repeatedly confirmed the central role of the Dublin Regulation in building the CEAS despite its many deficiencies and the human rights concerns it continues to raise. Two major comparative research reports were published in the first half of 2013 that further document the flaws of the Dublin system as well as the negative impact it can have on asylum seekers' fundamental rights.

Research on the application of the Dublin Regulation in 11 EU Member States coordinated by Forum réfugiés-Cosi, ECRE and the Hungarian Helsinki Committee Member States revealed inconsistent practice among Member States in the way they apply the criteria in the Regulation determining the State responsible for the examination of an asylum application lodged in one of the Member States. The hierarchy of criteria in the Dublin Regulation is not always respected which results in separation of families and the sovereignty and humanitarian clauses are in practice rarely applied. The latter provisions allow Member States to examine asylum applications even where according to the Dublin Regulation another EU Member State is responsible, for instance on the basis of humanitarian reasons. The report also found that frequently inadequate procedural safeguards are in place to guarantee asylum seekers' rights, such as the right to be informed correctly about the decision taken in their individual case or the right to an effective remedy. Also the frequent use of detention and the length of detention as part of Dublin procedures were identified as key concerns. Moreover, the report raised serious questions about the efficiency of the Dublin system as such. Statistics for 2009 and 2010 showed that only 34.86% of accepted requests by Member States actually resulted in asylum seekers being transferred. Moreover, States bound by the Regulation frequently exchanged equivalent numbers of Dublin requests between themselves. For instance, on the basis of the average number of requests for 2010, Germany sent 306 outgoing requests to Switzerland and received in the same period 350 requests from Switzerland.[49]

A report conducted by JRS Europe on the application of the Dublin Regulation from the perspective of the asylum seeker, based on interviews with 257 asylum seekers and migrants in nine EU Member States highlighted the lack of procedural safeguards in a number of EU Member States, in particular the lack of suspensive effect of appeals in Dublin procedures and the lack of access to legal assistance. It also emphasised the extensive use of detention in the context of Dublin procedures as well as the importance of providing asylum seekers with correct information about the operation of the Dublin system in order for their rights to be effectively respected.[50]

Following two landmark rulings from the ECtHR and the CJEU issued in 2011,[51] all EU Member States have suspended all transfers of asylum seekers to Greece under the Dublin regulation in 2012 and the first half of 2013. However, national courts have suspended transfers of asylum seekers in 2012 and 2013 to EU Member States other than Greece as well. For instance, German courts have suspended Dublin transfers to Italy in more than 200 cases between January 2011 and January 2013. Courts in Italy have suspended transfers to Malta and Hungary in view of the conditions there.[52] The ECtHR in the recent case of Mohammed v. Austria found that the applicant, who challenged his transfer to Hungary under the Dublin Regulation, had no access to an effective remedy as required under Article 13 European Convention on Human Rights (ECHR) whereas his claim that he would be subjected to inhuman or degrading treatment in Hungary was arguable at the material time.[53]

As further discussed in Chapter II of this report the Dublin Regulation was significantly amended as part of the second phase of harmonisation. However, the legislative change does not question the fundamental principles underlying the Dublin system and the intrinsically flawed premise that equal standards of protection apply across the EU and associated Schengen States. The overview of findings in Chapter III of this report show that this is clearly not the case today and that a CEAS is far from being achieved, despite the adoption on the asylum package in June 2013.

The situation in Greece continued in 2012 and the first half of 2013 to be extremely problematic despite the investment of considerable EU resources in the implementation of the Greek Action Plan. Greece received €3,601,857 from

49 See European Network for Technical Cooperation on the Application of the Dublin II Regulation, *Dublin II Regulation. Lives on hold. European Comparative Report* (hereafter 'Lives on Hold'), February 2013.

50 JRS Europe, *Protection Interrupted. The Dublin Regulation's Impact on Asylum Seekers' Protection (The DIASP project)*, June 2013.

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

52 See European Network for Technical Cooperation on the Application of the Dublin II Regulation, *Lives on Hold*, p. 113.

53 ECtHR, *Mohammed v. Austria*, Application No. 2283/12, Judgment of 6 June 2013.

the European Refugee Fund (ERF) in 2012 while the implementation of the Greek Action Plan was a key priority for EASO that provided support to Greece via Asylum Support Teams as well as EASO's own staff. Despite the suspension of Dublin transfers to Greece, asylum seekers in Greece continued to suffer the consequences of a still largely dysfunctional system, in addition to the racism and xenophobia they experience on a daily basis.

The asylum crisis in Greece remained high on the agenda of Human Rights Treaty monitoring bodies and reputable human rights organisations in 2012 and 2013 while a series of judgments of the ECtHR was issued in the same period condemning Greece among others for the detention conditions asylum seekers and migrants are subjected to and the absence of effective remedies. The AIDA country report on Greece further confirms the deplorable conditions asylum seekers have to face in Greece and a number of concrete examples are included in Chapter III of this report.

It is encouraging that finally steps have been taken in the right direction and that at the end of June 2013 the First Asylum Service finally became operational as part of the Greek Action Plan.[54] Nevertheless, progress is slow and it is clear that it will take a very long time before the Greek asylum system is up to standard and asylum seekers have access to a fair and efficient asylum procedure and adequate reception conditions. In a recent statement UNHCR expressed continued concern about the treatment of asylum cases for which the police Directorates across the country, and in particular the Attica Aliens Directorate at Petrou Ralli remains competent, the lack of capacity and adequate institutional framework for reception facilities, the lack of safeguards to address specific needs of unaccompanied children and the systematic use of administrative detention for irregular entry and stay without adequate procedural guarantees.[55]

Meanwhile thousands of asylum seekers and persons in need of international protection remain trapped in Greece while those who manage to leave Greece and reach another EU Member State are not returned as a result of the suspension of Dublin transfers to Greece mentioned above and have a higher chance of finding protection in the EU. Moreover, while considerable efforts have been made to set up the new Asylum Service, address the backlog of asylum cases and install the Appeal Committees, the possibility of addressing immediate protection and humanitarian needs of the most vulnerable asylum seekers in Greece by relocating them to other Member States has never been an option. This is in contrast to the situation in Malta, where EU Member States with the support of the EU, implemented programmes to relocate persons with protection status in Malta on their territories.

Both the on-going asylum crisis in Greece and the structural flaws of the Dublin system undermine the overall credibility of the CEAS and the principles of solidarity on which it is supposed to be built. As discussed in Chapter III, the amendments to the Dublin Regulation are expected to contribute to improved fundamental rights protection of asylum seekers in the context of Dublin procedures. However, ultimately the underlying principles of the Dublin Regulation will need to be fundamentally revised, as the Regulation remains premised on the fundamentally flawed premise that protection standards are at an equal level across the EU. In addition, in particular in times of austerity, the financial cost of such a system must be taken into account and must be properly assessed in the fitness check that has been announced by the Commission. This should be part of a fundamental debate about alternative systems to allocate responsibility that are both more efficient and fully respect the fundamental rights of asylum seekers. The upcoming discussions on the European Council strategic guidelines for legislative and operational planning within the area of freedom, security and justice as a successor of the Stockholm Programme provide an excellent opportunity to launch such a debate.

54 Greek Ministry of Citizens Protection, *Launch of the new Asylum Service: announcement (Έναρξη λειτουργίας της νέας Υπηρεσίας Ασύλου)*, 26 June 2013.

55 UNHCR Greece, *Current Issues of Refugee Protection in Greece*, July 2013.

1.4 Seeking Protection – Finding Xenophobia and Despair

While the legal framework for protection and State practice, discussed in the next chapters, are important to assess asylum policies in the EU, it is equally essential to have an appreciation of the societal and political context for asylum seekers and refugees in Europe. The rise of racism and the drastic actions to which asylum seekers resort in EU Member States to draw attention to their situation are two worrying trends that are not to be ignored in the debate on asylum in the EU today. Contrary to misleading perceptions created by certain media and political forces, asylum seekers arriving in the EU after difficult and dangerous journeys in many cases are not finding their El Dorado but can be confronted with an increasingly hostile environment and conditions inciting them to undertake desperate actions.

Firstly, asylum seekers and migrants in the EU are much too often the victims of xenophobia, racism, discrimination and physical violence. In Greece, in particular, racist violence is increasingly commonplace, with some cases even resulting in the death of asylum seekers and irregular migrants. Impunity seems to be the rule rather than the exception as such crimes are often not a priority for law enforcement authorities in Greece. Human rights organisations have frequently reported about the Greek police refusing to register complaints by asylum seekers and irregular migrants, or discouraging them from filing complaints by imposing registration fees that they cannot afford. Most worrying is the fact that racist violence and hate crime is quite probably seriously underreported as many migrants choose not to contact the police for fear of deportation.[56] In this respect, Operation Xenios Zeus, a large scale operation to address irregular migration which has resulted in the arrest of thousands of migrants mainly based on ethnic profiling seems to have worsened the situation as migrants in Greece are at an even higher risk of arbitrary deprivation of liberty now.[57] Although a number of legislative initiatives have been taken that, if adopted, should improve the situation,[58] it is clear that in practice asylum seekers and migrants today still face the risk of becoming the victim of racism and hate crime in Greece. Although Greece may be the EU Member State where asylum seekers are most openly confronted with racism and violence, it is unfortunately not the only EU Member State where racism is on the rise. As a recent Fundamental Rights Agency (FRA) study has shown, "violence and crimes motivated by racism, xenophobia, religious intolerance or by a person's disability, sexual orientation or gender identity – often referred to as 'hate crime' – are a daily reality throughout the EU.[59]

In recent years, there has been an increase in negative political discourse around the issue of asylum, both in politicians' statements as well as through the media. The University of Oxford Migration Observatory has recently published a report on the portrayal of migrants, asylum seekers and refugees in the British press.[60] It found that the word "illegal" is the most common adjective associated to the word "immigrant", and "failed" with the word "asylum seeker". The study also shows that the words "illegal" and "criminal" are also often used to qualify asylum seekers. In Hungary, asylum seekers are commonly negatively depicted by the Hungarian government and the media as "criminals", a "danger" or associated to the expression "mass influx".[61]

In the United Kingdom, a heated debate on racism emerged when the Home Office started a pilot campaign for a period of one week using placards on vans stating 'Go home or face arrest'. The campaign stirred widespread indignation, most notably on social media, where it was referred to as the "racist vans". NGOs have denounced the campaign as likely to polarize the society, "fuel fears", "generate hostility and intolerance".[62] Following a legal complaint by two migrants, the Home Office agreed to consult with local communities before launching such campaign again.[63]

The recent statements from the government in Malta in early July announcing its intention to push back Somalis to Libya and its refusal to let the MS Salamis vessel disembark the migrants it had rescued in Malta in early August 2013, have led to increasing xenophobic comments and feelings according to local NGOs and opposition leader MEP Simon Busuttil.[64] Similarly, in Germany increased racism towards asylum seekers and foreigners was illustrated by the recent reactions in relation to the construction of a

56 See Human Rights Watch, *Hate on the streets. Xenophobic Violence in Greece*, July 2012, p. 76.

57 See AIDA Report on Greece. See also Human Rights Watch, *Unwelcome Guests*, July 2013.

58 See Human Rights Watch, *Greece: Strengthen Response to Racist Violence*, 30 May 2013.

59 See Fundamental Rights Agency, *Making hate crime visible in the European Union: acknowledging victims' rights, 2012*. The forthcoming FRA fundamental rights conference 2013 organized in cooperation with the Lithuanian Presidency of the EU in November is dedicated to combating hate crime in the EU.

60 The Migration Observatory at the University of Oxford, *Migration in the News: Portrayals of Immigrants, Migrants, Asylum Seekers and Refugees in National British Newspapers, 2010-2012*, August 2013.

61 UNHCR, *Hungary as a country of asylum*, April 2012, Chapter XV.

62 Letter from Amnesty International UK, Freedom from Torture and Refugee Action: *Van campaign turning back the clock*, The Guardian, 8 August 2013; Liberty, *"Go Home" Vans: Nasty, Racist and Likely Unlawful*, 1 August 2013.

63 The Guardian, *Home Office backs down over 'go home' vans after legal complaint*, 12 August 2013.

64 See People for Change Foundation, *Migrant Arrivals 2013* and TVM, *PM's pushback declarations fan xenophobia – Simon Busuttil*, 7 July 2013.

new accommodation centre in Berlin for asylum seekers, which resulted in protests by extreme right inhabitants and even instances of racist violence.[65] After the opening of the centre, extreme-right groups continued their protests, including putting up banners with racist slogans around the area, causing many of the asylum seekers to leave the centre. However, on a positive note counter-protesters have gathered to support the asylum seekers and have outnumbered the right wing protesters.[66]

Secondly, several European countries have witnessed an increasing number of hunger strikes and other demonstrations organised by asylum seekers protesting against the way they are treated in the asylum system for a variety of reasons. Recent examples include Greece, where recently 2,000 detained asylum seekers were reported to have gone on hunger strike calling attention to intolerable living conditions[67] and where detainees set a fire in one of Greece's detention centres, in Amygdaleza, in protest against the extension of the detention period.[68] Another example is Austria, where, since November 2012, many asylum seekers have engaged in protests and hunger strikes complaining about their living conditions, to which the conservative government reacted by issuing deportations orders to several of the protesters.[69] Asylum seekers have also gone on hunger strikes in Germany[70], the United Kingdom[71] and the Netherlands[72] but other EU Member States are also to a greater or lesser extent confronted with such actions. While the method is extreme and controversial at the same time, and often places authorities before an impossible dilemma, it is invariably an expression of despair of persons who have left everything behind in their home countries to find safety or a better life elsewhere. This obviously even more so applies to the suicides or attempted suicides of migrants waiting for their removal in detention centres some European countries have witnessed.[73]

This comes in addition to the numbers of asylum seekers who have been traumatised or even died on the way to finding safety in Europe. According to the UNHCR an estimated 1,500 persons died in the Mediterranean in 2011 trying to reach the southern shores of Europe, which for many refugees, asylum seekers and migrants remains the only possible way to access EU territory. The gravity of such events cannot be underestimated and are witness of the flaws of the CEAS. Such developments should be taken seriously and addressed effectively by governments and EU institutions if the right to asylum is indeed the core value the EU claims it to be.

65 Sueddeutsche Zeitung, *Festnahmen bei Protest gegen Asylbewerberheim* (*Arrests at protest against refugee center*), 20 August 2013.

66 Der Spiegel, *Streit ueber Asylbewerberheim in Berlin: "Haut ab"*, 21 August 2013 and Tagesspiegel, *150 Neonazis marschierten in Hellersdorf auf - 700 Gegendemonstranten*, 24 August 2013.

67 Greek Reporter, *Detained Immigrants on Hunger Strike*, 8 April 2013;

68 The Guardian, *Illegal immigrants riot against extended stay in Greek detention centre,* 11 August 2013.

69 Tagesspiegel, *Wien schiebt protestierende Asylbewerber ab* (*Vienna deports protesting asylum seekers*), 1 August 2013; see also, Asylum Information Database, Video Austria: *"They don't trust us"*.

70 DW, *Police raid Munich camp of migrants seeking asylum in Germany,* 30 June 2013.

71 The Guardian, *Increasing number of asylum detainees freed after near-fatal hunger strikes*, 14 June 2013.

72 NRC, *Asielzoekers op Schiphol in hongerstaking* (*Asylum seekers in Schipol in hungerstrike*), 6 May 2013.

73 See Asylum Information Database, *Death in detention: two suicides within a month in Greece*, 18 July 2013; Institute of Race Relations, Manchester: *Death in Immigration Detention*, 31 July 2013.

Chapter II

The New Legal Framework for the CEAS: Fit for Purpose?

In 2012 and 2013 further steps were taken in the establishment of the CEAS. This included the finalisation of the second phase of legislative harmonisation with the adoption of the four outstanding legislative proposals of the asylum package as well as the further negotiations on the Asylum and Migration Fund as part of the new Multi-annual Financial Framework 2014–2020[74], the further consolidation of EASO and the establishment of an early warning and preparedness mechanism. Moreover, both the ECtHR and the CJEU issued a number of key judgments that further interpret States' obligations under the ECHR and EU asylum legislation as laid down in the first phase of legislative harmonisation.

This chapter provides an initial overall assessment of the new legal framework for the future common European asylum policy and its potential implication for the protection of asylum seekers' fundamental rights.[75] Without entering into an extensive analysis, reference will be made to key judgments of the ECtHR and the CJEU that will have to be taken into account by EU Member States when transposing and implementing the recast EU asylum legislation. Furthermore, the challenges surrounding the development of the early warning and preparedness mechanism, envisaged in the recast Dublin Regulation and one of the key priorities of EASO as an important tool for achieving the objectives of the CEAS, is discussed.

2.1 The New Legal Framework for the CEAS

In March 2013, trilogue negotiations on the Commission proposal recasting the Asylum Procedures Directive and the EURODAC Regulation were concluded. Both instruments were finally adopted by the European Parliament together with the recast Reception Conditions Directive and the recast Dublin Regulation in June 2013.[76] This marked the end of a legislative harmonisation process that started in December 2008 when the Commission presented its first recast proposals in the area of asylum. As with the first phase of harmonisation, finding agreement on procedural standards and guarantees for asylum seekers proved to be the most challenging task. Rooted in national administrative law and legal traditions, the organisation of asylum procedures is still considered to belong to the core of national sovereignty. Hence the resistance of most Member States to agree on common standards on asylum procedures, notwithstanding the fact that the recast Asylum Procedures Directive, to a certain extent, further restricts national procedural autonomy.

Both the United Kingdom and Ireland have made selective use of their possibility to opt out of the adoption of new EU legislation in the area of freedom, security and justice as laid down in Protocol No 21 on the position of the United Kingdom and Ireland annexed to the Treaty of European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Both countries are not bound by the new recast Reception Conditions Directive, the recast Asylum Procedures Directive and the recast Qualification Directive. Although the recast legislation repeals the first generation asylum Directives and Regulations, both Member States remain bound by those instruments. However, Ireland already opted out from the 2003 Reception Conditions Directive as well. However, they have opted in to the recast Dublin and EURODAC Regulations, which also apply to the Schengen Associated States (Norway, Iceland, Lichtenstein and Switzerland). In accordance with Protocol No. 22 on the position of Denmark, annexed to the TEU and TFEU, the recast legislation will not apply to Denmark, except the recast Dublin and EURODAC Regulation.

This further adds to the complexity of the legal framework underpinning the CEAS and in particular the operation

74 For an analysis and specific recommendations on the Commission proposals see ECRE, *Comments and Recommendations of the European Council on Refugees and Exiles on the Commission Proposals on the future EU funding in the area of migration and asylum*, August 2012.

75 Detailed information notes on the recast Asylum Procedures Directive, recast Reception Conditions Directive, the recast Qualification Directive and the Dublin Regulation from ECRE are forthcoming.

76 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereinafter '*recast Asylum Procedures Directive*'), OJ 2013 L 180/60; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (hereinafter '*recast Reception Conditions Directive*), OJ 2013 L 180/96; Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (hereinafter '*recast Dublin Regulation*'), OJ 2013 L 180/31.

of the Dublin Regulation as lower standards may apply in the countries opting out which will have to be taken into account when effecting Dublin transfers. It also raises a range of legal questions as to the potential impact of CJEU judgments interpreting the recast asylum legislation on the countries opting out of such legislation. Although as a general rule, such jurisprudence would not be binding on those Member States[77], it is less clear where a provision of the recast legislation is merely giving effect to pre-existing general principles of Union law.

The new legislation must eventually serve the purpose of establishing a CEAS as defined in the TFEU and the Stockholm Programme. Article 78 TFEU requires among others the adoption of a uniform status of asylum and subsidiary protection, common procedures for granting and withdrawing international protection standards on reception conditions and rules on establishing the Member State responsible for examining an asylum application lodged in one of the Member States. In the Stockholm Programme, EU Heads of State and Government committed to the establishment of a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection. It is stated that the CEAS should be based on high protection standards while due regard should also be given to fair and effective procedures capable of preventing abuse. The ultimate objective should be that "similar cases are treated alike and result in the same outcome" regardless of the Member State in which the application is lodged.[78] The existing differences between EU Member States must be addressed and in order to achieve harmonisation common rules are needed. This is obviously a very ambitious project which is certainly today still far from being accomplished, as is illustrated by the current report.

It should be noted that according to the Stockholm Programme, the adoption of such rules and a common application of these rules, must prevent secondary movements of asylum seekers among EU Member States, thereby increasing mutual trust. It appears therefore that asylum law is the only area of Union law that aims to prevent rather than encourage free movement of persons, one of the four freedoms that form the foundations of European integration.

Prior to the adoption of the Stockholm Programme and following evaluations carried out by the Commission as well as UNHCR and NGOs and a public consultation, the Commission announced amendments to the EU asylum *acquis* that had been adopted between 2000 and 2005 in its policy plan on asylum, published in June 2008.[79] The policy plan presented the Commission's views on a coherent, comprehensive and integrated CEAS which should ensure access to protection, a single common procedure, uniform statuses for asylum and subsidiary protection; be gender sensitive; and take into account the special needs of vulnerable groups. Further legislative harmonisation would need to be complemented by increased practical cooperation and enhanced solidarity mechanisms. In order to achieve these objectives, a three-pronged strategy was proposed based on (1) better and more harmonised standards of protection through further alignment of Member States' asylum laws; (2) effective and well-supported practical cooperation; and (3) a higher degree of solidarity and responsibility among the Member States as well as between the EU and third countries.

As a cross-cutting approach to the revision of the EU asylum *acquis* the Commission proposals aimed to pursue two main objectives: enhance the level of harmonisation of asylum law in the EU Member States by reducing the possibilities for Member States to derogate from standards set in EU law and increase the level of protection for asylum seekers and refugees in EU asylum legislation. In addition, the revision of EU legislation had to be in line with international human rights law, in particular the 1951 Geneva Refugee Convention and the evolving jurisprudence of the ECHR and the jurisprudence of the CJEU.

The following sections illustrate that overall these objectives are only partly met in the second phase legislation. Unsurprisingly, the negotiations between the Council and the European Parliament have diluted the level of harmonisation as well as protection initially proposed, in particular with regard to the recast Dublin Regulation, Reception Conditions Directive and Asylum Procedures Directive. Nevertheless, progress with regard to protection standards has been achieved on a number of aspects, in particular when read in combination with general principles of EU law developed by the CJEU and relevant provisions of the EU Charter of Fundamental Rights, as referenced throughout this section. This chapter does not claim to present an exhaustive analysis of the second generation of EU legislative instruments in the field of asylum. The assessment made in this report is limited to the key issues addressed in the respective instruments and

77 Article 2 Protocol on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

78 European Council, *The Stockholm Programme –An Open and Secure Europe Serving and Protecting Citizens* (hereinafter 'Stockholm Programme'), section 6.2, OJ 2010 C 115/1.

79 Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Policy Plan on Asylum. An Integrated Approach to Protection across the EU*, Brussels, 17 June 2008.

with respect to the two core objectives the Commission has put forward at the start of the process: enhancing harmonisation and ensuring high standards of protection.

2.1.1. The Recast Qualification Directive and the Long Term Residence Directive

Before entering into a more detailed discussion of the four instruments agreed in 2012 and 2013, it should be recalled that three other important legislative instruments considered to be part of the 'asylum package', the recast Qualification Directive[80], the amended Long Term Residence Directive[81] and the Regulation establishing EASO[82] had been adopted already in 2011 and 2010 respectively.

The recast Qualification Directive further aligns the status of refugee and of beneficiary of subsidiary protection; brings the Directive in line with the cessation clause of the 1951 Geneva Refugee Convention and includes a slightly broader definition of family member.[83] However, it does not address a number of concerns that had been raised both by UNHCR and NGOs with regard to provisions in the 2004 Directive that are at odds with the 1951 Refugee Convention, such as with regard to the provisions on exclusion, the definition of particular social group and non-state actors of protection.[84] Moreover, the option was taken not to amend Article 15 (c) Qualification Directive relating to subsidiary protection notwithstanding the fact that, even after the judgment of the CJEU in the case of *Elgafaji*[85], Courts and administrations still seem to have very divergent interpretations as to when a person fleeing generalised violence qualifies for subsidiary protection under the Qualification Directive.[86]

The amendment to the Long Term Residence Directive adopted in May 2011, extends its scope to persons granted international protection under the Qualification Directive. The 2003 Long Term Residence Directive granted long term residence status to third country nationals who have been legally residing on the territory of a Member State for at least five years. Long term residence holders are entitled to free movement rights within the EU subject to certain conditions, including having sufficient means of subsistence. Refugees and beneficiaries of subsidiary protection now also can obtain long term residence status after five years of legal residence in a Member State. Member States could not agree to simply take into account the duration of the asylum procedure preceding the granting of protection status for the calculation of the five years of legal residence required to obtain long term residence status. Finally, the agreement between the European Parliament and the Council was to include the entire duration of the asylum procedure where the procedure lasted more than 18 months and only half the duration of the procedure where it lasted less than 18 months.[87] This is incompatible with the declaratory nature of the refugee status under the Refugee Convention. The compromise illustrates the fundamental distrust that exists today among Member States on asylum-related matters and the reluctance of Member States to extend full free movement rights to migrants and persons granted international protection.

Furthermore, these obstacles to their freedom of movement send the signal that, still today, EU Member States do not consider refugees and persons granted subsidiary protection as members of society who should be able to enjoy all the achievements of European integration in the same way as EU citizens.

2.1.2. The Reception Conditions Directive

An evaluation of the implementation of the 2003 Reception Conditions Directive by the Commission and the Odysseus academic network revealed three major problems with regard to the reception of asylum seekers in EU Member States.[88] Firstly, the minimum level of reception conditions provided in a number of Member States proves to be too low to ensure their subsistence and

80 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 of persons eligible for subsidiary protection, and for the content of the protection granted (recast) (hereinafter '*recast Qualification Directive*', OJ 2011 L 337/9.

81 Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection (hereinafter '*Long Term Residence Directive*'), OJ 2011 L 132/1.

82 *Regulation (EU) No 439/2010* of the European Parliament and of the Council of 19 May 2010 establishing the European Asylum Support Office, OJ 2010 L 132/11.

83 The definition of family member, adopted in all recast instruments, drops the requirement of dependency with regard to minor children of couples and adds the father, mother or another adult responsible for the beneficiary of international protection when that beneficiary is an unmarried minor. See Article 2(j) recast Qualification Directive.

84 See for instance, ECRE, *Comments from the European Council on Refugees and Exiles on the Commission Proposal recasting the Qualification Directive,* March 2010.

85 See CJEU, Case C-465/07, *Elgafaji v Staatssecretaris van Justitie*, Judgment of 17 February 2009.

86 On the diverging application of asylum related judgments of the CJEU, including Elgafaji, see Hungarian Helsinki Committee, *Luxembourg Court: Conductor for a Disharmonious Orchestra?*, 2012. Recently the Advocate-General issued his opinion on a preliminary reference question relating to the interpretation of Article 15(c) by the Belgian Council of State. See Conclusions de Avocat Général M. Paolo Mengozzi, Affaire C-285/12, *Aboubacar Diakité contre Commissaire général aux refugiés et aux apatrides*, 18 juillet 2013 (French only).

87 Persons granted international protection are subject to the same conditions as other legally residing third country nationals as regards subsistence and health insurance requirements as well as integration conditions, disregarding their often disadvantaged position during the examination of the asylum application. Specific provisions have been included to ensure protection from expulsion in case the person concerned moves to another Member State. However, the directive explicitly does not deal with the transfer of protection status to the Member State of residence after making use of the right to free movement. A communication on this issue is announced in the Stockholm Action Plan of the Commission but has not been published yet.

88 See Odysseus, *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States*, October 2003 and COM (2007) 745 final, *Report on the application of the Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, 26 November 2007.

full health. This is particularly the case in those Member States providing a financial allowance to asylum seekers, as in some States such allowance is lower than the level of the minimum social support granted to nationals.Even where asylum seekers are granted the same level of social support as nationals, it can still prove to be insufficient as asylum seekers do not usually dispose of additional support from other family members etc, which is often necessary to ensure an adequate level of subsistence. Secondly, detention of asylum seekers was identified as a growing problem in many Member States with varying practice as to the duration of detention and detention conditions across the EU. The detention of vulnerable groups such as children and victims of torture was highlighted as a cause of particular concern. Thirdly, most Member States lack an effective system to identify vulnerable asylum seekers, in particular asylum seekers who have been victims of torture or other serious violence, as well as adequate facilities and treatment for these asylum seekers.

It is widely acknowledged that the 2003 Reception Conditions Directive in general allowed Member States considerable room for manoeuvre in implementing its standards. One such example is the provision relating to access to the labour market which required Member States to provide such access after one year but only where a decision at first instance has not been taken. Moreover, Member States were allowed to impose conditions under national law for granting access to the labour market that are not further specified. In practice, this leeway constitutes an important obstacle, as in some Member States asylum seekers can only work in certain sectors of the labour market or are only authorised to work for a few weeks per year.[89] Such conditions make employing asylum seekers obviously very unattractive for employers in those countries.

2.1.2.1. Level of Material Reception Conditions

The recast Reception Conditions Directive only partly addresses the key gaps and weaknesses of the 2003 Reception Conditions Directive. As regards the level of reception conditions, Article 17 (1) recast Directive now requires material reception conditions to provide "an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health". Where reception conditions are provided in the form of financial assistance or vouchers, the recast Directive now requires that the amount thereof must be determined on the basis of levels established by Member States to ensure adequate standards of living for their nationals. However, Article 17(5) explicitly allows Member States to grant less favourable treatment to asylum seekers compared with nationals, which ultimately results in limited progress compared to the current Directive. The amount of social welfare benefits for nationals is an important point of reference in assessing what amount is acceptable under the Directive but Member States are under no obligation to provide the same amount and there is no minimum level defined except the requirement to ensure an adequate standard of living. The Directive still allows for material reception conditions to be reduced where a person has not lodged an asylum application "as soon as practically possible" and even to exceptionally withdraw it, for instance when a person does not comply with requests to provide information concerning the asylum procedure. However, in such cases, Member States must still ensure access to health care and a dignified standard of living, although the latter is not defined in the Directive.

Substandard reception conditions for asylum seekers are a growing problem in many EU Member States.[90] In addition, destitution of persons whose asylum application has been finally rejected but who are unable to return to their country of origin is increasing. The recast Directive maintains the possibility for Member States to withdraw material reception conditions where a subsequent asylum application is introduced, although this can only be done in exceptional and duly justified cases.[91] To what extent this will indeed only be applied in exceptional and duly justified cases in practice remains to be seen. Restrictive interpretation of such possibility is all the more important in light of the considerable number of subsequent asylum applications across the EU.[92]

2.1.2.2. Identification of Vulnerable Asylum Seekers and Special Reception Needs

Although the new Article 22 recast Reception Conditions Directive does not impose an obligation to establish a specific mechanism or a procedure to identify vulnerable asylum seekers or special reception needs, it does create an obligation to assess whether an asylum seeker has special reception needs and to indicate what those special needs are. The assessment must be initiated within a reasonable period of time after the application is made and the special needs must be addressed also when they only become apparent at a later stage of the asylum procedure. Monitoring of the situation of asylum seekers with special reception needs must be ensured throughout

89 Such as in the Netherlands where asylum seekers can only work for a maximum of 24 weeks per 12 months. See Asylum Information Database, *Country Report the Netherlands – Access to the Labour Market*, accessed July 2013.

90 See below, Chapter III, section 6.

91 Article 20(1)(c) of the recast Reception Conditions Directive.

92 According to EASO the number of subsequent asylum applications in the EU increased by approximately 39 % in 2012. Countries with a significant increase include Germany (73% over 2011), Belgium (47% increase over 2011), France (38% increase over 2011) and the Netherlands (13 % increase over 2011). See European Asylum Support Office, *Annual Report on the Situation of Asylum in the European Union 2012, 2013*, at p. 18 and above Chapter I.

the procedure. Member States enjoy flexibility as to how they will organise such an assessment as Article 22(2) explicitly states that this need not take the form of an administrative procedure.

At the same time, it is hard to see how in practice Member States will be able to comply with the obligation to assess special reception needs without making arrangements for a systematic screening of all asylum applicants. The Directive does not explicitly require Member States to take a separate decision on the special reception needs of asylum seekers which may be problematic to enforce the guarantees laid down in Article 22 and 21 recast Directive in practice. However, as general principles of EU law require states to take the necessary measures to ensure that rights granted under EU law can be enjoyed effectively, this may give rise to preliminary questions to the CJEU.

A positive development is that safeguards for unaccompanied children now include a list of factors to take into account when assessing the best interests of the child, including family reunification possibilities, the minor's well-being and their views as well as stricter requirements with regard to children's representatives.[93] Member States now also have an obligation to start tracing family members of the unaccompanied child as soon as possible after the asylum application has been lodged, while protecting the best interests of the child and ensuring that the safety of the persons concerned is not jeopardised.[94]

2.1.2.3. Access to the Labour Market

The Commission's proposal to grant access to the labour market at the latest six months after the asylum application is lodged regardless of whether a first instance decision on the asylum application is taken before such time, proved unacceptable to a majority of Member States. Although providing asylum seekers access to the labour market contributes to reducing the costs of the reception system, the fear of creating a so-called pull factor for asylum seekers prevailed with most Member States. The final outcome of that debate is rather disappointing. Although Article 15 recast Reception Conditions Directive now requires Member States to grant access to the labour market for asylum seekers after nine months, this is still provided that no first instance decision is taken within that period and that any delay in the assessment of the claim cannot be attributed to the asylum seeker. In addition, Member States may still decide the conditions for granting access to the labour market in accordance with national law, although discretion for Member States is somewhat limited as such conditions may only be imposed "while ensuring that applicants have effective access to the labour market".

Overall, this constitutes little progress, in particular since the condition of absence of a first instance decision on the asylum application is maintained and Article 31 of the recast Asylum Procedures Directive encourages Member States to conclude the procedure at the first instance within six months. The reduction of the time limit from 1 year (as in the 2003 Directive) to nine months is in this respect almost symbolical for many Member States as it may result in a *status quo*. All options remain open to Member States, from providing access to the labour market to asylum seekers from day one as it is the currently the case in Sweden for instance,[95] to *de facto* blocking access to the labour market for the entire asylum procedure by ensuring a first instance decision is taken within nine months.

Regarding the conditions for access to the labour market, it remains to be seen how the requirement that effective access to the labour market is to be ensured will be interpreted by national administrations and courts in light of the general principles of EU law as established in the jurisprudence of the CJEU referred to above.

2.1.2.4. Detention of Asylum Seekers

The provisions on the detention of asylum seekers are without any doubt the most controversial of the whole asylum package agreed in 2013. The objective of the Commission, when submitting its proposal in 2008, was to include safeguards in EU law to prevent asylum seekers from arbitrary detention and to ensure that detention of asylum seekers is only used as a last resort. The final result, however, raises a number of concerns as to the impact it may have on Member States' detention practices.

Some of the initially proposed safeguards have been watered down during the negotiations and much will depend on their actual transposition in national legislation and application in practice as to whether or not they will indeed result in higher protection from arbitrary detention for asylum seekers. The attempt to regulate detention of asylum seekers more strictly in EU asylum legislation has in any case produced mixed results.

The recast Directive addresses four main issues: grounds for detention, procedural safeguards, detention conditions and detention of vulnerable asylum seekers. So far EU asylum legislation only marginally dealt with the detention of asylum seekers, leaving it up to national legislation.

93 See Article 23(2) recast Reception Conditions Directive.
94 See Article 24(3) recast Reception Conditions Directive.
95 See Asylum Information Database, *Country Report Sweden – Access to the Labour Market*, accessed July 2013.

Exhaustive but Broadly Defined Grounds for Detention

Article 8 recast Reception Conditions Directive reiterates the principle already established in Article 18 2005 Asylum Procedures Directive that asylum seekers shall not be detained for the sole reason that they have made an asylum application. It furthermore introduces two important principles that can be seen as the expression in EU law of the presumption against the detention of asylum seekers that is established in international human rights law as well as in standards set by UNHCR[96] and the Council of Europe.[97]

Firstly, it clearly establishes an obligation for Member States to apply a necessity and proportionality test by stipulating in Article 8(2) that asylum seekers may only be detained when it proves necessary, on the basis of an individual assessment of each case. Recital 15 adds that asylum seekers may be detained only under very clearly defined circumstances laid down in the Directive and subject to the principle of necessity and proportionality with regard to both the manner and the purpose of such detention. This is to be welcomed as it goes beyond a strict reading of the jurisprudence of the ECtHR that so far does not explicitly require a necessity test in the case of immigration detention.[98]

Second, Article 8(2) explicitly states that asylum seekers can only be detained "if other less coercive alternative measures cannot be applied effectively". Article 8(4) furthermore requires that alternatives to detention are laid down in national legislation and includes a non-exhaustive list of possible alternatives to detention which includes regular reporting to the authorities, the deposit of a financial guarantee or an obligation to stay at an assigned place. As a result, Member States are now under an obligation to establish and develop alternatives to detention for asylum seekers and apply such alternatives first before resorting to detention. Good practice on alternatives to immigration detention has been developed in a number of States, including EU Member States and innovative models have been developed by NGOs.[99]

From this perspective the Directive constitutes an opportunity to further develop and implement such models which are invariably less costly than detention and have high success rates.

At the same time, Article 8(3) establishes an exhaustive list of grounds for detention of asylum seekers. It is positive that the directive limits the grounds for detention in light of current practice in a number of Member States allowing detention of asylum seekers on a variety of grounds often linked to the grounds for applying accelerated procedures.[100]

However, it remains worrying that the grounds as defined in the directive leave too much room for manoeuvre to Member States as regards the detention of asylum seekers.

Detention of an asylum seeker "to determine or verify his or her identity or nationality" or "in order to decide, in the context of a procedure, on the applicant's right to enter the territory" may result in systematic detention of asylum seekers, in particular where legal aid systems are insufficient to ensure that asylum seekers are properly assisted in practice to enforce the procedural guarantees to challenge their detention, including as laid down in Article 9 recast Reception Conditions Directive. Today, many asylum seekers arrive without proper documentation of their nationality and identity for many reasons such as because it was not possible or too dangerous to obtain a passport or other document that proves their identity; because smugglers facilitating their travel to the EU confiscated their documents; or because they destroyed those documents whether following the advice of smugglers or not. At the same time, verification of identity or nationality under this provision will have to be consistent with Member States' obligation not to disclose the fact that an asylum application has been made to the alleged actor of persecution or serious harm under Article 30 recast Asylum Procedures Directive. In absence of valid documentation, fully ascertaining a person's identity or nationality will, in most cases, only be possible by asking confirmation from the authorities of the country of origin. At least in the case of an alleged persecution by a State agent, this may preclude Member States from detaining asylum seekers on this ground as such detention could not be considered necessary and proportional whereas it would be clear from the outset that such verification could not be executed with due diligence as required under Article 9(1) recast Reception Conditions Directive.[101]

96 UNHCR, *Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (hereinafter 'Detention Guidelines')*, 2012.

97 See for instance, Council of Europe, *Committee of Ministers, Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers*, adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies.

98 ECtHR, *Saadi v. the United Kingdom*, Application No. 13229/03, Judgment of 29 January 2008, para. 72. See on this issue also N. Mole and C. Meredith, *Asylum and the European Convention on Human Rights*, Human Rights files, No. 9, p.158-162.

99 See for instance, International Detention Coalition, *There are Alternatives. A Handbook for preventing unnecessary immigration detention*, 2011.

100 This is for instance the case in the United Kingdom. See below chapter III and Asylum Information Database, *Country Report United Kingdom – Grounds for detention*, accessed July 2013.

101 Procedural guarantees in case of detention under the recast Reception Conditions Directive are discussed below.

The possibility for Member States to detain an asylum seeker "in order to decide, in the context of a procedure, on the applicant's right to enter the territory" risks allowing systematic detention of asylum seekers in any entry procedure, including at the border.

However, such interpretation would be contrary to Member States' obligations under international law and human rights standards. Article 31 of the 1951 Refugee Convention exempts refugees coming directly from a territory where they have a well-founded fear of persecution from any penalty on account of their illegal entry or presence in the country of refuge provided that they present themselves without delay to the authorities and show good cause for such illegal presence or entry. This provision not only applies to persons who have obtained refugee status but also to asylum seekers pending the examination of their claim as a result of the declaratory nature of refugee status.[102] Article 31(2) Refugee Convention only allows for restrictions on the movements of refugees that are "necessary" and only "until their status in the country of refuge is regularised or they obtain admission into another country". The latter means that their free movement may only be restricted until the formalities with regard to the lodging of the asylum application have been fulfilled and can certainly not be extended on that ground for the entire duration of the procedure.

Another ground for detaining asylum seekers is to determine those elements on which their asylum application is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant. The wording changed considerably during the negotiation process as the 2011 Commission amended proposal restricted detention on this ground to a preliminary interview, in line with UNHCR Detention Guidelines, and had no reference to the risk of absconding of the asylum seeker. What constitutes a risk of absconding of asylum seekers is not even defined in the recast Reception Conditions Directive and is therefore open to wide interpretation by Member States. It should be noted that according to the UNHCR Detention Guidelines, detention on this ground is only permissible in order to record the elements on which the application for international protection is based, which necessarily implies that detention for such purpose would necessarily be very limited in time.[103] Should States choose to apply this ground, in line with the principle that asylum applicants may only be detained in "clearly defined exceptional circumstances",[104] at a minimum the reference to "determine" those elements in Article 8(3) (b) should be interpreted as having the restrictive meaning of "recording" those elements that in absence of detention would be lost.

A fourth ground of detention was added at the explicit request of the Council and relates to an asylum application lodged after the person concerned was detained for the purpose of his or her removal from the territory. In order to address a legal vacuum in EU law that would have resulted from the fact that asylum seekers are excluded from the scope of the Return Directive,[105] the recast Reception Conditions Directive now explicitly allows for the detention of asylum seekers who apply for asylum after they have been detained for the purpose of removal.[106] Member States must be able to substantiate on the basis of objective criteria that there were "reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision". One of the objective criteria is the fact that the person had the opportunity to access the asylum procedure before. As highlighted already in Chapter I and further illustrated in Chapter III, asylum seekers arriving in the EU face sometimes serious obstacles in accessing the asylum procedure. The most obvious example is Greece where at the time of writing, access to the procedure is still difficult. In practice, in Athens, asylum seekers can only have their asylum application registered on Saturday morning, with the notable exception of vulnerable asylum seekers who may also apply on other days of the week.[107] However, until their asylum application is registered, they could be arrested in the context of Xenios Zeus, the operation carried out by the Greek government to arrest and detain irregular migrants with the purpose of preparing their removal. Theoretically, all these persons have had an opportunity to lodge an asylum application, but in reality no such possibility exists in practice or at least no effective

102 See J. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p. 386.

103 UNHCR, *Detention Guidelines*, par. 28.

104 See recital 15 recast Reception Conditions Directive.

105 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter '*Return Directive*'), OJ L 348/98. Recital 9 of the Return Directive stipulates that "a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision ending his or her right of stay as an asylum seeker has entered into force".

106 It should be noted that this ground was introduced at a later stage of the negotiations to address the potential legal vacuum in EU law resulting from the fact that according to Recital 9 of the EU Return Directive asylum seekers are not considered to stay irregularly on the territory as long as their asylum application is pending. This issue was addressed by the CJEU in the case of Arslan. The Court ruled that the Return Directive indeed does not apply to asylum seekers until a final decision has been taken on their asylum application. However, at the same time it ruled that the 2003 Reception Conditions Directive and the 2005 Asylum Procedures Directive, which do not specify the grounds for detention of asylum seekers 2003/9 2005/85 "do not preclude a third-country national who has applied for international protection within the meaning of Directive 2005/85 after having being detained under Article 15 of Directive 2008/115 from being kept in detention on the basis of a provision of national law, where it appears, after an assessment of a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the enforcement of the decision and that it is objectively necessary to maintain in detention to prevent the person concerned from permanently evading his return". CJEU, Case C-534/11, *Arslan*, Judgment of 30 May 2013.

107 Asylum Information Database, *Country Report Greece – Registration of the Asylum Application*, accessed July 2013 and Chapter 3, section 1 below.

opportunity exists. The latter is required under the Article 6(2) recast Asylum Procedures Directive and should apply in this context as well. Detaining those asylum seekers based on the assumption that they have had an opportunity to lodge an asylum application and therefore that they only apply for asylum in order to delay their removal, is simply ignoring the realities of seeking asylum in the EU today and may therefore be arbitrary.

Finally, the Directive also allows asylum seekers to be detained for reasons of national or public security and in accordance with Article 27 recast Dublin Regulation. The latter allows for the detention of asylum seekers to secure and carry out the transfer of asylum seekers to the Member State responsible.[108] The detention of asylum seekers for reasons of public security is again open to wide interpretation and is already applied in a number of EU Member States. Malta is one example where this ground has been extensively used to detain asylum seekers systematically for often long periods of time.[109]

It is worrying that EU law now consolidates these broadly defined grounds for detention as this may legitimise increased use of detention of asylum seekers by EU Member States. In Hungary, the detention grounds laid down in the recast Reception Conditions Directive are already transposed in national law and entered into force on 1 July 2013. NGOs in Hungary fear that this may reverse recent positive changes in the country with regard to the detention of asylum seekers.[110] At the same time, it sets a standard that may have repercussions far beyond its jurisdiction as other States outside the EU may find "inspiration" in these grounds for detention.

Member States still have the option not to detain asylum seekers for any reason that is related to the examination of the asylum application.

Detention of asylum seekers is inherently undesirable and should be avoided. It should only be used in very exceptional circumstances and where no alternative measures can be applied effectively. From the perspective of enhancing the quality of decision-making on asylum applications, detention during the examination of the asylum claim is counterproductive. Detention centres are by definition not appropriate places for asylum seekers to prepare themselves for asylum interviews. They contribute to creating a feeling of distrust towards the authorities and may result in persons being less willing to cooperate with the authorities in establishing the facts of their case. Moreover, access to legal assistance and representation in detention is, in most cases, subject to a range of practical and administrative obstacles, which also negatively impacts on the quality of the procedure and the interaction between the asylum seekers and the asylum authorities. In particular, for victims of torture or other serious violence, detention may lead to re-traumatisation, which may make it even more difficult for the authorities to establish all the facts of the case in a timely and comprehensive manner.

The financial and human cost of any immigration-related detention, including of persons seeking international protection is very high and disproportionate to the potential gain governments may see in implementing detention policies.

Reports show that individuals become vulnerable when detained and the devastating effect of detention on the physical and mental health of vulnerable groups such as children is widely documented.[111] Throughout the negotiations, the financial implications of a number of Commission proposals relating to improved procedural guarantees for asylum seekers such as with regard to free legal assistance, interview reports, level of reception conditions and medical reports and examinations were often raised as reasons for diluting the standards initially proposed. However, the financial cost argument seemed to have been less prominent in the debate on the provisions dealing with the detention of asylum seekers, despite reports evidencing that the costs related to detention policies of states can be extremely high compared to alternatives to detention.[112]

Procedural Guarantees

Procedural guarantees for asylum seekers to challenge their detention are laid down in Article 9 recast Reception Conditions Directive. Unlike Article 15 of the Return Directive, it does not set an explicit maximum time limit for the detention of asylum seekers but it states the important principle that detention shall be for "as short a period as possible" only as long as one of those grounds discussed above are applicable. Furthermore, detention must always be ordered in writing by administrative or judicial authorities and the detention order must state the reasons in fact and in law. Asylum seekers must be informed in writing of the reasons for detention, the procedures laid down in national law for challenging the detention order and the possibility to request free legal assistance and representation. They must have access to speedy judicial review of the lawfulness of detention where detention is

108 See below, section 2.1.4.
109 See also below chapter 3.
110 See Asylum Information Database, *Country Report Hungary – Grounds for detention*, accessed July 2013. See also Chapter 3, section 5.
111 See JRS Europe, *Becoming Vulnerable in Detention*, June 2010.
112 See for instance Matrix evidence, *An economic analysis of alternatives to long-term detention*. Final Report, September 2012.

ordered by administrative authorities. Member States may provide for such speedy judicial review *ex officio* and/or at the asylum seeker's request while detention must also be reviewed by a judicial authority at reasonable intervals of time. They must also have access to free legal assistance and representation in case of judicial review of their detention.

It is a positive development that the Directive now consolidates in EU law crucial procedural guarantees to ensure that the asylum seeker is effectively protected from arbitrary detention and that if detained, it is for the shortest possible time. However, these constitute basic procedural guarantees Member States already need to comply with as a result of their obligations under regional and international human rights law such as the ECHR and the International Covenant on the Protection of Civil and Political Rights (ICCPR).

In this respect, it is unfortunate that the recast Directive does not unambiguously require an automatic judicial review of the detention in case it was ordered by an administrative authority nor set a time frame within which such review must take place as this would have contributed to more legal certainty and have provided added value vis-à-vis what is already required under international human rights law. According to the UNHCR Detention Guidelines, judicial review should "ideally be automatic, and take place within 24-28 hours of the initial decision to hold the asylum seeker".[113]

On the right to be informed the recast Reception Conditions Directive establishes a weaker standard as compared to what is required under Article 5(2) ECHR. Whereas Article 5 ECHR requires everyone arrested to be informed promptly, in a language which they understand, of the reasons for the arrest and any charge against them, the corresponding Article 9(4) recast Reception Conditions Directive only requires detained asylum seekers to be informed in writing, in a language which they understand or "are reasonably supposed to understand". The latter is obviously open to interpretation and sets a very ambiguous standard with regard to the right to be informed of the reasons for depriving a person from their liberty. A basic precondition to ensure that detained asylum seekers have an effective opportunity to challenge their detention is that they fully understand why they are detained and how they can challenge such detention. According to the ECtHR Article 5(2) ECHR requires that any arrested person is told in simple, non-technical language that they can understand, the essential and factual grounds for their arrest so that they can challenge the lawfulness of their detention.[114]

The recast Reception Conditions Directive does not allow for Member States to make access to free legal assistance and representation subject to a test whether or not the appeal has a tangible prospect of success. This so-called "merits test" is still included in the provisions governing legal assistance and representation in the recast Asylum Procedures Directive and can also be applied with regard to appeals lodged against any other decision taken under the recast Reception Conditions Directive.[115] While merits testing generally creates additional obstacles for asylum seekers in accessing justice this is particularly problematic in detention cases, where the right to liberty is at stake. In this regard, excluding the application of merits-testing in detention cases is to be welcomed as it removes a potentially important obstacle for asylum seekers to having their detention order properly reviewed in practice.

Finally, as mentioned above, Article 9(1) of the recast Reception Conditions Directive also explicitly requires Member States to conduct administrative procedures relevant to the grounds for detention with due diligence. This is further defined in recital 16 as requiring at least that "concrete and meaningful steps are taken to ensure that the time needed to verify the grounds for detention is as short as possible and that there is a real prospect that such verification can be carried out successfully in the shortest possible time". This may be an important additional guarantee to ensure that detention of asylum seekers remains as short as possible provided that administrations and national courts interpret the notion of due diligence strictly within the context of the necessity test that is now explicitly required in the case of detention of asylum seekers. This is to be clearly distinguished from the due diligence test required under the Return Directive, which relates to verifying whether or not the necessary steps have been taken to enforce removal of a third country national who is no longer legally residing on the territory. The due diligence test in the context of the recast Reception Conditions Directive must necessarily relate to the progress made by the authorities in verifying the reasons why it was considered necessary to detain the asylum seeker and which in any case are not connected to the applicants' removal.

113 UNHCR, *Detention Guidelines*, par. 47 (iii). Furthermore, UNHCR considers that good practice indicates that "following an initial judicial confirmation of the right to detain, review would take place every seven days until the one month mark and thereafter every month until the maximum period set by law is reached". *Ibid*, par. 47 (iv).

114 ECtHR, *Abdolkhani and Karimnia v. Turkey*, Application No 30471/08, Judgment of 22 September 2009, par. 136.

115 See Article 26 (3) recast Reception Conditions Directive.

Detention Conditions

The added value of Article 10 recast Reception Conditions Directive dealing with detention conditions of asylum seekers is limited. It states the principle that as a rule detention of asylum seekers shall take place in specialised detention facilities and that asylum seekers must be kept separate from other third country nationals who have not submitted an asylum application. Furthermore, it imposes an obligation to ensure that UNHCR, family members, legal advisors and NGOs can communicate with detained asylum seekers and visit them. Asylum seekers must also be systematically provided with information on the rules of the detention facility as well as their rights and obligations, although derogations are possible in duly justified cases and for a short period where the asylum seeker is detained at the border or in the transit zone.

It is very disappointing that the recast Reception Conditions Directive does not exclude the detention of asylum seekers in prison accommodation as a matter of principle. Member States are allowed to detain asylum seekers in prisons simply where they cannot provide accommodation in a specialised detention facility and are obliged to resort to prison accommodation. The wording used is vague and does not even explicitly require a lack of capacity in specialised detention facilities, although this must be assumed for the principle to have any practical meaning. Here again, an opportunity was missed.

Indeed, an approach consolidating the truly exceptional nature of detention of asylum seekers would simply have excluded the use of prisons for the detention of asylum seekers for one of the grounds listed in the Directive if no specialised facilities were available.

Instead the Directive makes detention of asylum seekers possible in all circumstances, even where it is only possible by using prison accommodation. If detention of asylum seekers is really to become exceptional, then the opposite approach should have been taken. Member States should in such cases not detain at all rather than detain in prison accommodation on the basis of the detention grounds included in Article 8(3) recast Reception Conditions Directive as this further adds to the stigmatisation of asylum seekers and migrants in public perception by linking them to criminal activities.

Detention of Vulnerable Asylum Seekers

The safeguards with regard to the detention of vulnerable persons and asylum seekers with special reception needs have been particularly watered down in the course of the negotiations. Article 11 recast Reception Conditions Directive now only includes a very weak standard stating that the health and mental health of asylum seekers in detention who are vulnerable persons shall be of primary concern to national authorities.[116] In light of the devastating effects of detention on the mental health of detainees and the fact that in many cases individuals become vulnerable as a consequence of detention, initial as well as periodic assessments of detainees' health carried out by qualified medical personnel are at a minimum required.[117] In particular, in the case of asylum seekers who have been subjected to torture or experienced trauma, such factors must be taken into account when assessing the necessity to detain.[118]

With regard to the detention of children, the safeguards have also been weakened during the negotiating process. It is regrettable that no consensus could be found on prohibiting at least the detention of unaccompanied children as was initially proposed by the European Commission. Nevertheless, Article 11(3) explicitly states that unaccompanied children shall be detained only in exceptional circumstances whereas all efforts must be made to release the detained unaccompanied child as soon as possible. In addition, unaccompanied children can never be detained in prison accommodation and as far as possible they must be provided with accommodation in institutions with personnel and facilities which take their needs into account. Children in families must only be detained as a measure of last resort, only where less coercive alternative measures do not work and for the shortest period of time. The same obligation to make all efforts to release the detained children and place them in suitable accommodation applies with regard to children in families. Overall, the best interests of the child must always be a primary consideration for Member States. While this will necessarily remain a case-by-case assessment, it is hard to see in which cases the detention of asylum-seeking children could be seen to be in their best interest. In combination with Member States' obligation to establish alternatives to detention and to provide appropriate accommodation for children as soon as possible, this may further contribute to reducing the detention of asylum-seeking children in practice.

116 Both the 2008 and 2011 Commission recast proposals included a clear presumption against the detention of vulnerable asylum seekers by precluding the detention of vulnerable asylum seekers unless it is established that their health will not significantly deteriorate as a result of detention.

117 UNHCR, *Detention Guidelines*, par. 50.

118 *Ibid*, par. 50.

The trend in the jurisprudence of the ECtHR indicates further limiting the situations and conditions in which detention of children and in particular unaccompanied and separated children would be lawful under the Convention to the extent that it becomes almost unjustifiable for States to detain children and in particular unaccompanied children.

In the case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*,[119] which was confirmed in *Rahimi v. Greece*,[120] the Court explicitly categorised the situation of unaccompanied and separated children as extremely vulnerable. This adds to the explicit wording of the Court in *M.S.S. v. Belgium and Greece* according to which it considers asylum seekers as a particularly vulnerable group of migrants because of the hardship they had to suffer throughout their journey but also when arriving in Europe.[121]

This requires that additional safeguards apply to prevent arbitrary deprivation of liberty of this particularly vulnerable group because the vulnerability of the child takes precedence over its status as an irregular migrant. This also implies a positive obligation on States to fully take into account their extreme vulnerability and to take the appropriate measures to accommodate such vulnerability. In the cases of Mubilanzila and Rahimi, the fact that Belgium and Greece did not take into account their specific situation and had not taken the appropriate measures to ensure special care for these children, was an important aspect of the Court's finding that there was a violation of Article 3 ECHR.

The Court also has on a number of occasions referred to the detrimental impact detention in inappropriate conditions has on the health and mental health of children as well as of their parents in case of detention of families.[122] Even in absence of specific medical reports on the individual situation of the applicant, it attached great importance to the fact that detention in and of itself has a negative impact on the health of children and on the role of the parent vis-à-vis their children.[123]

Finally, in the case of *Popov v. France*, concerning the detention of a family with two underage children whose asylum application was rejected, in finding that the children's detention was unlawful under Article 5 §1 (f) ECHR, the ECtHR referred to the fact that the specific situation of the children and whether alternatives to administrative detention could be applied, was not examined by the authorities.[124]

Member States should end the immigration detention of children and interpret the detention provisions in the recast Reception Conditions Directive in light of the abovementioned ECHR jurisprudence and guidance provided by Human Rights Treaty Monitoring Bodies.

Meanwhile, in absence of a clear prohibition of child detention under the recast Reception Conditions Directive it is paramount to ensure that asylum seeking children have effective access to quality legal assistance and a functioning system of judicial review to ensure that the strong presumption against the detention of children enshrined in the Directive as well as international human rights law is fully observed in practice.

2.1.3. The Recast Asylum Procedures Directive

The 2005 Asylum Procedures Directive has undergone a significant number of changes. While some of the changes are fundamental, others are more cosmetic in nature and may not substantially change Member State practice.[125] One of the main objectives of the Commission was to enhance the level of procedural safeguards for asylum seekers in the Directive and promote the frontloading of asylum procedures. In ECRE's view frontloading is the policy of investing adequate resources in asylum systems to ensure that accurate and well-considered decisions are taken at the first instance of the asylum procedure. While the increased investment of resources will facilitate quicker decision-making, frontloading is not about the acceleration of procedures for its own sake and requires the inclusion of all necessary safeguards from the start of the procedure. Better initial decision-making reduces the length and expense of the system as a whole by refining the issues to be dealt with at appeal and avoiding unnecessary appeals.[126]

This was reflected in strengthened provisions on access to free legal assistance during first instance procedures, reduction of the possibilities for Member States to examine asylum applications in accelerated or admissibility procedures and access in principle to a personal interview including in admissibility procedures.[127] Another key

119 ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No 13178/03, Judgment of 12 October 2006, par. 55.
120 ECtHR, *Rahimi v. Greece*, Application No. No 8687/08, Judgment of 5 April 2011, para. 86.
121 ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011, para. 251.
122 See ECtHR, *Muskhadzhiyeva and Others v. Belgium*, Application No. 41442/07, Arrêt de 19 January 2010, para. 60 and ECtHR, *Popov v. France*, Application No. 39472/07 and 39474/07, Judgment of 19 January 2012, para. 104.
123 See ECtHR, *Kanagaratnam and Others v. Belgium*, Application No. 15297/09, Judgment of 13 December 2011, para. 67.
124 ECtHR, *Popov v. France*, Application No. 39472/07 and 39474/07, Judgment of 19 January 2012, para. 119.
125 See Steve Peers, *The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig?*, Statewatch analysis, April 2013.
126 See ECRE, *The Way Forward. Towards Fair and Efficient Asylum Systems in Europe*, September 2005, p. 5.
127 *COM(2009) 554 final*, p. 6-8.

objective of the Commission proposal was to achieve a higher level of harmonisation of asylum procedures *inter alia* by reducing the number of exceptions and discretion for Member States in the 2005 Asylum Procedures Directive to derogate from the standards laid down in the Directive.

Confronted with fierce criticism of Member States as to the level of procedural safeguards required under the Commission proposal, the costs entailed and the lack of procedural tools in the proposal to adequately counter "abuse" of the asylum procedure, which resulted in a deadlock in the negotiations, the Commission presented its amended recast proposal in June 2011. The amended Commission proposal generally re-emphasised the frontloading approach but, at the same time, extended the possibilities for Member States to examine certain caseloads in accelerated procedures and inserted more flexibility for States when dealing with situations of increased numbers of persons applying for asylum simultaneously.[128]

In this section an initial assessment of the recast Asylum Procedures Directive is made in light of the two main objectives put forward by the Commission: a higher level of procedural guarantees and a higher level of harmonisation of asylum procedures in the Member States.

2.1.3.1. Enhancing Frontloading through a Higher Level of Procedural Safeguards

Frontloading as defined above requires not only sufficiently resourced and specialised asylum authorities to ensure quality decision-making. Strong and effective procedural safeguards enabling asylum seekers to fully substantiate their asylum claims are as important. Undeniably, the level of procedural safeguards for asylum seekers under the recast Procedures Directive has considerably improved compared to the 2005 Asylum Procedures Directive. In particular with regard to the right to a personal interview, access to an effective remedy, guarantees with regard to the level of specialisation of first instance authorities and the quality of the interview and the interview report. However, as the 2005 Asylum Procedures Directive was problematic on all the aspects mentioned, this is not necessarily to be considered as a major achievement and the recast Directive does not necessarily establish an extremely high level of protection. Many of the improved standards also simply reflect minimum requirements established in the jurisprudence of the ECHR and the CJEU and therefore consolidate existing obligations of EU Member States. Nevertheless, legal certainty is enhanced by consolidating those standards in the Directive.

Access to the Procedure

Important obstacles to accessing protection in the EU result not only from a range of border control measures making it more difficult for refugees to enter the territory of EU Member States. As this report illustrates, in a number of EU Member States technical and administrative obstacles may impede the registration of asylum applications even when they managed to enter the territory, thus delaying or even preventing asylum seekers from accessing their rights under EU asylum legislation.

The recast Asylum Procedures Directive usefully introduces maximum time limits for the registration of asylum applications and further strengthens the referral obligations of border and other authorities who may receive such applications but are not competent to register them.[129] At the same time, the Directive leaves considerable flexibility for Member States in case of simultaneous applications by a large number of persons, in which case Member States are allowed to register the application only within 10 working days after the application has been made. In particular, where accelerated readmission procedures are being implemented, this may lead to situations where in practice asylum seekers may not have their asylum applications officially registered before being readmitted to another country.

Member States are required to ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible, they may consider the application as implicitly withdrawn or abandoned where the applicant does not lodge their application. The latter implies that the application may be discontinued or even rejected if it is considered unfounded on the basis of an adequate examination of its substance but without a personal interview. Where the applicant reports again to the authorities after a decision to discontinue the examination, the application can in such case eventually be treated as a subsequent asylum application, which requires the submission of new elements or findings compared to the "first" asylum application. As discussed above, the situation in Greece illustrates the importance of a strict interpretation of an "effective" opportunity to lodge an asylum application in this regard.

128 *COM(2011) 319 final*, p. 5-6.

129 Article 6(1) recast Asylum Procedures Directive provides that in case the application is made before the authority competent for registration, registration must take place within three working days. In case the application is made before another authority, registration must take place within six working days.

Whereas information on how and where to apply for asylum is of course key to ensure effective access to the procedure, the recast Asylum Procedures Directive remains ambiguous with regard to Member States' obligations in particular in situations where such information is most needed: detention centres and border crossing points. Instead of imposing a clear obligation on Member States to inform every third country national of the possibility to apply for asylum, the Directive only requires Member States to do so where there are "indications" that third country-nationals in detention facilities or at the external border may wish to make an application for international protection. Furthermore, Member States must provide for interpretation in detention facilities but only "to the extent necessary to facilitate access to the asylum procedure".[130] What constitutes an "indication" that triggers the obligation to inform is not further specified and risks being interpreted very strictly by Member States in practice, which may prevent persons in need of international protection from accessing an asylum procedure.

However, in order to ensure effective access to the asylum procedure States should simply inform third country nationals at the border or in detention facilities of this possibility as a matter of principle, rather than applying an ambiguous standard as the one laid down in Article 8 recast Asylum Procedures Directive.

This is also required under the jurisprudence of the ECtHR which in the cases of *M.S.S. v. Belgium and Greece* and *Hirsi Jamaa and Others v. Italy*, emphasised that the lack of access to information is a major obstacle in accessing asylum procedures.[131]

Right to a Personal Interview

The recast Asylum Procedures Directive now finally consolidates the principle that before a first instance decision is taken, the asylum seeker must be given the opportunity for a personal interview, with a person who is competent to conduct such an interview.[132] Member States will no longer be able to omit a personal interview except where they can take a positive decision on refugee status without an interview or where the determining authority is of the opinion that the applicant is unfit or unable to be interviewed. This is now not only required in the context of the examination of the substance of the asylum application but in principle also before taking a decision on the admissibility of the asylum application.[133]

Nevertheless, Member States have still some flexibility with regard to who conducts the interview in situations of large numbers of asylum seekers applying simultaneously. Personnel from other authorities than the specialised asylum authority can be used temporarily to conduct interviews on both the substance and admissibility of the asylum application in such situations, provided they have received in advance the necessary training.[134] Whereas it is important to ensure a personal interview within a reasonable time after the application has been lodged, the quality of the personal interview must be ensured, which may be compromised when using non-specialised personnel. This should therefore be considered as an exceptional measure and where it is applied it may require the development of specific programmes adapted to the specific training needs of non-specialised staff with regard to asylum and refugee law.

Safeguards on Quality of the Personal Interview and Interview Report

The recast Asylum Procedures Directive further reinforces a number of procedural safeguards that have a direct impact on the quality of the asylum interview at the first instance. These include the provision of properly trained interviewers and interpreters, where possible of the same sex of the applicant,[135] the requirement to conduct interviews with children in a child appropriate manner and in the presence of the child's representative, legal advisor or counsellor[136] and the principle that interviews of family members must be conducted separately[137]. Furthermore, the recast Asylum Procedures Directive emphasises the importance of an accurate report of the interview as a tool to enhance the quality and fairness of the procedure as well as its efficiency. It is a positive development that the recast Asylum Procedures Directive now explicitly establishes the important principle that applicants must have the opportunity to make comments and clarifications to the report of the interview before the asylum authority takes a first instance decision.[138]

130 See Article 8 recast Asylum Procedures Directive.

131 See for instance ECtHR, *Hirsi Jamaa and Others v. Italy,* Application No. 27765/09, Judgment of 23 February 2012, par. 204 and ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011, par. 304.

132 Article 14 recast Asylum Procedures Directive.

133 With the possible exception of subsequent asylum applications. See Article 34(1) recast Asylum Procedures Directive.

134 A more in-depth training covering *inter alia* international human rights law and the Union asylum *acquis*, interview techniques, evidence assessment, use of country of origin information, issues relating to handling of asylum applications from children and vulnerable persons with special needs etc. is required in case of personal interviews on the substance of the asylum application, while in the case of admissibility interviews only necessary basic training is required with respect to international human rights law, the Union asylum *acquis* and interview techniques.

135 Article 15(3) recast Asylum Procedures Directive.

136 Article 15 (3) and 25(1) recast Asylum Procedures Directive.

137 Article 15(1) recast Asylum Procedures Directive.

138 Article 17(3) recast Asylum Procedures Directive. However, such opportunity must not be given where Member States provide for both a transcript and audio or audio-visual recording of the personal interview.

This promotes good practice already existing in a number of countries which contributes to avoiding any mis-translations and misconceptions of the applicant's statements that may result in the wrong decisions being taken and appeal procedures that could have been avoided in the first place.[139]

Contrary to the Commission proposal, the recast Asylum Procedures Directive does not include a provision with regard to the role of medical reports in the asylum procedure. The Directive now only includes an obligation for Member States to arrange for a medical examination concerning signs that might indicate past persecution or serious harm. However, this must only be paid for out of public funds where the asylum authority deems it relevant for the assessment of the asylum application and is therefore at that authority's discretion. In all other cases, the medical examination is to be carried out at the asylum seeker's expense.[140] This is a significant departure from the initial proposal of the Commission which institutionalised the use of specialised medico-legal reports and provided for a specific role of such reports in the assessment of the asylum application and in particular the credibility of the applicant's statements. This was based on the fact that the number of victims of torture and traumatised asylum seekers arriving in the EU is rising and that the assessment of their applications poses specific challenges for decision-makers. Medico-legal reports on the basis of the Istanbul Protocol constitute useful tools assisting asylum authorities in examining such asylum applications.[141] The lack of political agreement at the EU level to include a strong provision on the use of medico-legal reports in the Directive is therefore disappointing. However, this missed opportunity does not prevent States from introducing such tools in their legislation and provide the necessary support to projects promoting the use of such reports at the national level. In this regard, it should be noted that in the case of *R.C. v. Sweden*, the European Court held that the Swedish Migration Board was under an obligation to obtain an expert opinion in a case where an asylum seeker had initially produced a medical certificate before the first instance asylum authority containing evidence of him having been tortured.[142]

Access to Legal Assistance and Representation

Despite the introduction of a new Article 19 on the provision of legal and procedural information free of charge in procedures at first instance, the provisions on legal assistance and representation constitute more or less a status quo compared to the 2005 Asylum Procedures Directive. Member States are only required to ensure free legal assistance and representation on request in appeals procedures.[143] They may but are not obliged to provide free legal assistance at the first instance although they must allow asylum seekers to consult legal advisors at their own cost at all stages of the procedure. The role of non-governmental organisations as potential legal assistance providers is explicitly acknowledged but Member States maintain the flexibility to only grant free legal assistance and representation through services provided by legal advisers specifically designated by national law to assist and represent applicants.[144]

Furthermore, despite the obligation to ensure in principle access to free legal assistance and representation in appeals procedures, the recast Asylum Procedures Directive continues to allow Member States not to grant such free legal assistance and representation where the applicant's appeal is considered to have no tangible prospect of success.[145] Such systems may seriously undermine asylum seeker's effective access to justice, in particular where their asylum application has been rejected in an accelerated procedure or admissibility procedure at the first instance stage of the procedure as this usually consists of a less thorough examination of their claim for international protection.

> The opportunity was lost to ban the use of such merits-testing in asylum procedures or at least only allow it at the level of onward appeals.

Being basically an exercise in predicting the outcome of an examination of the need for international protection before such examination is carried out at the appeal level, it is in any case difficult to reconcile with Member States' obligations to ensure access to an effective remedy which requires *inter alia* a close and rigorous scrutiny of any complaint that expulsion to another country will expose the individual to inhuman or degrading treatment and that the competent body is able to examine the substance of the claim and afford proper reparation.[146]

139 See also Chapter III, section 2.

140 Article 18 recast Asylum Procedures Directive.

141 The Istanbul Protocol provides a set of guidelines for the assessment of persons who allege torture and ill treatment, for investigating cases of alleged torture, and for reporting such findings to the judiciary and any other investigative body. Although these guidelines were intended for medical documentation or torture within criminal proceedings, the Protocol explicitly refers to the usefulness of medical evaluations of torture in other legal contexts such as asylum procedures. See *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*Istanbul Protocol*), 9 August 1999.

142 ECtHR, *R.C. v. Sweden*, Application No. 41827/07, Judgment of 9 March 2010, para. 53.

143 Article 20(1) recast Asylum Procedures Directive.

144 Article 22(1) recast Asylum Procedures Directive.

145 Article 20 (3) recast Asylum Procedures Directive.

146 See ECtHR, *M.S.S. v. Belgium and Greece*, para. 387.

In its jurisprudence relating to the right to an effective remedy under Article 13 ECHR the ECtHR has pointed several times to the importance of effective access to legal assistance in the context of asylum procedures.[147] In addition, Article 47 EU Charter of Fundamental Rights guarantees that "legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". In the case of DEB, the CJEU identified the elements that necessarily need to be included in the assessment by national courts of whether the conditions for granting legal aid amount to a limitation of the right to access the court which undermines the very core of that right. Whereas the CJEU allows to take into account the question whether the applicant has a reasonable prospect of success, this must also include the subject-matter of the litigation, the importance of what is at stake for the applicant in the proceedings, the complexity of the applicable law and procedure and the applicant's capacity to represent themselves effectively.[148] In view of the growing complexity of asylum procedures and the inherently disadvantaged position of asylum seekers in such procedure, in particular their capacity to represent themselves may be fundamentally undermined.

2.1.3.2. Access to an Effective Remedy

Access to an effective remedy is a fundamental safeguard to ensure protection from *refoulement* and therefore an inherent part of a fair and efficient asylum procedure. This is now more strongly guaranteed in Article 46 recast Asylum Procedures Directive. In line with the jurisprudence of the ECHR and the CJEU and Article 47 EU Charter of Fundamental Rights, the recast Directive explicitly requires the possibility of a remedy that provides for a full and *ex nunc* examination of both facts and points of law at least in appeals procedures before a Court or tribunal of first instance. This includes appeals against decisions taken in admissibility procedures, border procedures or even where an application has been rejected on the basis of the existence of a European safe third country. This is important in particular for those EU Member States where the scope of the judicial review is limited and only allows for a marginal scrutiny of the first instance asylum decision.

Furthermore, reasonable time limits, which shall not render the applicant's right to exercise their right to an effective remedy impossible or excessively difficult, must be ensured. The latter reflects a general principle of EU law established by the Court of Justice. This is particularly relevant in the case of border, admissibility or accelerated procedures where national legislation often provides for extremely short time limits for lodging an appeal as it the case for instance in the United Kingdom (two working days in detained fast track cases) or France (48 hours in the case of border procedure). In the case of *Samba Diouf* concerning the appeal procedures in the case of an accelerated asylum procedure in Luxembourg, the CJEU stressed the fact that in order to be effective the "period prescribed must be sufficient in practical terms to enable the applicant to prepare and bring an effective action".[149] In this regard, the Court considered in that case that the 15-day time limit for bringing an action provided for in Luxembourg seemed generally not to be insufficient in this respect and "reasonable and proportionate in relation to the rights and interests involved".[150] Whereas the Court does not explicitly state that any time limit below 15 days would in all circumstances be insufficient, it stresses the fact that this is to be determined by the national court in view of the circumstances, which does not exclude that in certain cases also a 15-day time limit to lodge such an appeal may indeed not be sufficient.

Finally and most importantly, Article 46 in principle requires a remedy with suspensive effect in all cases, although unfortunately it allows Member States to apply a system whereby the Court or Tribunal, acting either *ex officio* or at the applicant's request, has the power to rule separately on the applicant's right to remain on the territory pending the outcome of the appeal *inter alia* in accelerated procedures and inadmissibility procedures. Such a system may not only be counterproductive as it adds to the workload of the courts having to take two separate decisions, it also raises serious concerns as to whether this constitutes an effective remedy in practice, in particular where the Court rules strictly at the request of the applicant. The right to an effective remedy as interpreted by the ECtHR and the CJEU requires a remedy which is effective in practice as well as in law, including a close and rigorous scrutiny and automatic suspensive effect. Although in principle a system whereby provisional measures can be taken by courts upon request may be considered as constituting such an effective remedy, this is only to the extent that it does not create obstacles which render the EU right to an effective remedy virtually impossible or excessively difficult.[151] This is acknowledged in the recast Directive with regard to border procedures where States can only apply such a system where the applicant has the necessary interpretation, legal assistance and at least one week to prepare the request for suspensive effect and where the Court or tribunal examines the negative

147 See *Hirsi Jamaa v. Italy*, *I.M. v. France* and *M.S.S. v. Belgium and Greece*.

148 CJEU, Case C-279/09, *DEB Deutshce Energiehandles-und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland,* Judgment of 22 December 2010, paras. 60 and 61.

149 CJEU, Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, para. 66.

150 *Idem*, par. 67.

151 See A.M. Reneman, *EU asylum procedures and the right to an effective remedy*, Uitgeverij BOXPress, 2012, 150.

decision of the first instance authority in fact and in law. If the latter simply reiterates what is already stipulated in general terms, the specific conditions with regard to the procedural safeguards constitute an important guarantee, provided that they are complied with in practice.

However, given the crucial importance of access to an effective remedy in ensuring compliance with their obligation to fully respect the principle of *non refoulement*, Member States should provide for a system whereby the appeal itself has automatic suspensive effect in all cases, without requiring the submission of a separate request for suspensive effect by the asylum seeker.

Without explicitly considering a system whereby a provisional measure must be requested to obtain suspensive effect as incompatible with Article 13 ECHR, the ECtHR nevertheless recalled in the recent case of *M.A. v. Cyprus* that there are risks involved in "a system where stays of execution must be applied for and are granted on a case-by-case basis".[152]

2.1.3.3. Framework for Common Asylum Procedures in the EU?

As mentioned above, Article 78 TFEU and the Stockholm Programme require the establishment of common asylum procedures as an essential tool to ensure that "similar cases are treated alike and result in the same outcome" regardless of the Member State in which they have been lodged. As Member States have traditionally developed their asylum procedures within the framework of their national administrative law, the harmonisation of such procedures is obviously a challenging task. In addition, EU Member States have developed long standing and very divergent practices with regard to the application of procedural tools such as safe country concepts, admissibility criteria etc. The 2005 Asylum Procedures Directive was characterised by a high level of discretion for Member States allowing them to maintain their national procedural tools existing at the time of adoption of the Directive. From that perspective, the 2005 Asylum Procedures Directive constituted a collection of national practices rather than a solid set of minimum standards common to all EU Member States.

Generally speaking, there is seemingly only limited progress with regard to the second objective at the origins of the recast process, which was to increase the level of harmonisation of national asylum procedures and their procedural tools. Admittedly, the principle of procedural autonomy is less prominently established in the recast Asylum Procedures Directive as a result of the deletion of recital 11 of the 2005 Asylum Procedures Directive. But this does not prevent that Member States generally maintain considerable discretion and flexibility to maintain national procedural tools and derogate from certain standards set in the Directive. This is in particular the case in the provisions concerning the criteria of accelerated procedures and time limits for taking a decision, safe country of origin and safe third country concepts and procedural safeguards for unaccompanied children and victims of torture.

Under the 2005 Asylum Procedures Directive, Member States could examine any asylum application in an accelerated procedure without any further conditions except that the basic principles and guarantees relating to interpretation, the right to a reasoned decision, legal assistance etc. laid down in the Directive must be respected.[153] A key objective of the Commission was to reduce the number of situations in which the use of accelerated procedures is allowed by introducing an exhaustive list of six grounds. Eventually the recast Asylum Procedures Directive now lists 10 grounds for the use of accelerated procedures which at the same time determine the grounds for conducting asylum applications at the border or in transit zones. As this is now an exhaustive list of grounds, the possibilities for States to apply accelerated asylum procedures have been reduced, which is an important positive development.

On the other hand, some of the criteria used to determine which asylum applications can be accelerated or conducted at the border are open to broad interpretation and may in practice be used by States to justify continued examination of a large proportion of their caseloads in accelerated or border procedures. For instance, this is the case with the grounds referring to the applicant misleading the authorities by presenting false information or documents or the likelihood that the applicant has in bad faith destroyed an identity or travel document. Other grounds for accelerated or border procedures include the fact that the applicant is making an application merely in order to delay or frustrate removal, that the applicant has entered the territory unlawfully and has not presented her/himself as soon as possible to the authorities or that the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State. What constitutes bad faith or misleading of authorities or whether an application is lodged as soon as possible or only to prevent removal is obviously

152 ECtHR, *M.A. v. Cyprus*, Application No. 41872/10, Judgment of 23 July 2013, para. 137 (with reference to the case of *Conka v. Belgium*).

153 See Article 23(3) and (4) 2005 Asylum Procedures Directive.

open to interpretation and difficult to assess objectively. Moreover, asylum seekers in most cases arrive without documentation or may have been forced by smugglers to dispose of their identity documents.

In view of the broadly formulated criteria for accelerated and border procedures and the flexibility of Member States with regard to the time-frames for taking decisions and lodging appeals in such cases, it is questionable whether Article 31(8) recast Asylum Procedures Directive will result in a more harmonised approach across the EU and reduced use of such procedures.

Even larger flexibility exists with regard to the use of safe country of origin and safe third country concepts. The recast Asylum Procedures Directive deletes the provision on the common minimum list of safe countries of origin after the annulment of the provision by the Court of Justice.[154] However, both with regard to safe countries of origin and with regard to safe third countries, Member States may retain or introduce national lists. Current practice in Member States with regard to the use of the safe third country and safe country of origin concepts and lists varies enormously. This raises fundamental problems both from a protection and from a harmonisation perspective. Safe country concepts may fundamentally undermine asylum seekers' access to a fair and efficient asylum procedure as they often result in an excessively high burden of proof being placed on the applicant.

Moreover, the use of national lists of safe countries of origin and safe third countries is difficult to reconcile with the establishment of a CEAS as defined in the Stockholm Programme and Article 78 TFEU.

This is because Member States have fundamentally different views as to which countries should be considered safe and why. This results in at times absurd situations such as when in March 2012, the Belgian government adopted for the first time a safe country of origin list including Albania and Kosovo, where in neighbouring France the Conseil d'Etat annulled the inclusion of both countries on the French list of safe countries of origin that same week.[155] This raises fundamental doubts as to the relevance and reliability of such concepts within the context of a CEAS. The recast Directive foresees a more active role of EASO in the assessment of the situation in the countries concerned for the purpose of the use of both concepts at the national level[156] but it is doubtful whether this will be sufficient to align Member States' practices and to ensure that safe country concepts and lists do not undermine a full and substantive examination of asylum applications in the EU.

Furthermore, the opportunity was missed to abolish the concept of European safe third country, allowing Member States not to examine asylum applications of applicants who have entered or seek to enter their territory illegally from a third country that has ratified and observes the Geneva Refugee Convention and has an asylum procedure prescribed by law in place. Although this is no longer applied in practice in the only EU Member State that has this concept in its legislation, it is unfortunately still part of the EU asylum *acquis*. Whereas Article 39 now requires that the applicant must be able to challenge the presumption of safety in their particular circumstances, the application of the concept by Member States no longer is conditional on the adoption of a common list of European safe third countries. Paradoxically, the latter means that instead of abolishing a concept which is at odds with the Geneva Refugee Convention[157], the recast Directive seems to make it easier for Member States to apply the concept and even introduce it in their national legislation.

In principle, the recast Directive requires Member States to conclude the first instance of the asylum procedure within six months of the lodging of the application but at the same time allows Member States to extend this by another nine months in complex cases, where a large number of persons apply simultaneously or where the delay can be clearly attributed to the failure of the applicant to comply with their obligations to provide information or documents or to appear for an interview. This can be further extended by another three months where necessary to ensure a complete examination of the claim.[158] Moreover, the asylum authority may even simply postpone taking a decision if such authority cannot be reasonably expected to decide within the above-mentioned time limits "due to an uncertain situation in the country of origin which is expected to be temporary". The latter notion is extremely vague and potentially qualifies for every country of origin as by definition no situation lasts for ever and is a 100% certain. This provision risks encouraging the systematic use of "freezing" caseloads whereby no decisions are being taken when this is convenient for administrative or even political reasons, e.g. in case a government intends to discourage other potential asylum seekers from a particular country. Such practices, which have recently also been used by certain Member States with regard to Syrian applications at a time when the conflict in Syria was

154 CJEU, Case C-133/06, *European Parliament and Commission v. the Council*, Judgment of 6 May 2008.

155 See *ECRE Weekly Bulletin, 30 March 2012* and EASO, *Annual Report on the situation of Asylum in the European Union 2012, 2013*, p. 55.

156 See recitals 46 and 48 recast Asylum Procedures Directive.

157 Both ECRE and UNHCR call for its abolition. See ECRE, *Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to recast the Asylum Procedures Directive (COM(2011) 319 final)*, p. 32. UNHCR, *UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final*, January 2012, p. 30.

158 Article 31(3) recast Asylum Procedures Directive.

clearly escalating,[159] create situations of legal uncertainty and prevent refugees from accessing their Convention and EU law rights. The recast Asylum Procedures Directive determines that in all cases the first instance procedure must be concluded at the latest within 21 months, whereas the Commission proposal did not include a maximum time-limit. Whereas the inclusion of such a maximum time-limit is to be welcomed it should be noted at the same time that Member States have until July 2018 to transpose this provision, whereas for the majority of provisions in the recast Directive the deadline for transposition is 20 July 2015.[160]

In any case, leaving individuals in uncertainty about the outcome of their asylum application for almost two years clearly does not constitute good practice and risks violating the right of good administration laid down in Article 41 EU Charter.[161]

Finally, also the provisions relating to applicants in need of procedural safeguards and guarantees for unaccompanied minors continue to leave considerable discretion to Member States.[162] At the same time, both provisions, due to their extreme complexity lack the necessary legal clarity which may complicate transposition in national legislation. Once more, the added value from a harmonisation as well as, in particular in the case of unaccompanied children, a protection perspective is highly questionable. The initial objective to make particularly vulnerable asylum seekers exempt from accelerated and border procedures and from the application of safe country concepts and the merits test with regard to legal assistance was clearly not achieved. The recast Asylum Procedures Directive still allows Member States to process their applications in border procedures and accelerated procedures although this is in the case of unaccompanied children restricted to an exhaustive list of circumstances drawn from the list of grounds for accelerated or border procedures in Article 31(8). However, as they include grounds that are open to wide interpretation such as misleading the authorities, having destroyed in bad faith identity documents and being considered a danger to national security or public order of the Member States, this may not prevent systematic application of such procedures in practice to the most vulnerable asylum seekers. Moreover, the recast Directive does not even guarantee access to an appeal with automatic suspensive effect in such cases as it allows Member States to make use of the system whereby the Court rules separately on the right of the traumatised asylum seeker or unaccompanied child to remain on the territory pending the outcome of the appeal.[163]

This is an example of where the obsession with creating possible pull factors has finally prevented a more ambitious and protection-oriented approach for two of the most vulnerable groups among the asylum population in the EU today.

2.1.4. The Recast Dublin Regulation

Although the Stockholm Programme refers to the Dublin Regulation as a cornerstone in building the CEAS, the fundamental flaws of the system have been highlighted in Chapter I. Although these flaws were well-known at the time of the submission of the Commission proposal recasting the Dublin Regulation, the opportunity was not taken to review the underlying principles in the Regulation, as there was no political will for a fundamentally different approach to determining the Member State responsible for examining an asylum application. The stated aim was to increase the system's efficiency while ensuring higher protection standards within a Dublin procedure.

Strengthened Procedural Safeguards for Asylum Seekers in Dublin Procedures

At a glance, the new legislative standards in the recast Dublin Regulation will certainly improve the level of protection for asylum seekers within a Dublin procedure. This is, for instance the case with regard to the provisions relating to personal interview, right to information, access to an effective remedy and safeguards with regard to vulnerable groups.

Firstly, the recast Dublin Regulation now explicitly requires States to organise a personal interview on the application of the Dublin criteria in principle, although derogations are possible. This is important as this will allow Member States to better take into account the individual circumstances of the asylum seeker and avoid Dublin transfers in breach of asylum seekers' fundamental rights under the EU asylum *acquis* as well as international human rights and refugee law. It will also ensure the correct application of the hierarchy of criteria under the Dublin Regulation. In addition, Member States now will have an obligation to inform applicants among others about the objectives of the Regulation, the possibility to challenge a transfer decision and the consequences of moving on to another Member State. A common leaflet, as well as a specific leaflet for unaccompanied children is in

159 See above and EASO, *Annual Report on the Situation of Asylum in the European Union 2012, 2013*, p. 32.

160 See Article 51 recast Asylum Procedures Directive.

161 "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*". Article 41(1) EU Charter of Fundamental Rights.

162 Articles 24 and 25 recast Asylum Procedures Directive respectively.

163 See the discussion above with regard to access to effective remedy for further details.

the process of being drafted by means of an implementing act by the Commission. This is an important guarantee in light of recent research showing that a considerable level of misinformation about the Dublin Regulation among asylum seekers exists and in some cases asylum seekers have a complete lack of knowledge of the impact of the Regulation.[164]

A better understanding of the applicant's individual situation through a personal interview will hopefully contribute to an increased use of discretionary clauses where appropriate and a better consideration of family links when determining the State responsible.

Secondly, Article 27 (1) of the recast Dublin Regulation now explicitly acknowledges the asylum seeker's right to an effective remedy, in the form of an appeal or a review, in fact and in law against a transfer decision, before a court or tribunal. Similar to the approach taken in the Asylum Procedures Directive, the Regulation allows both for an appeal with automatic suspensive effect or a system whereby suspensive effect must be requested separately. In both systems, no transfer can take place without a close and rigorous scrutiny of the applicant's claim, which means that a marginal scrutiny of the applicant's submission that a transfer under the Dublin Regulation would violate his or her fundamental rights without reviewing the facts would not be sufficient.[165] Furthermore, Member States must provide for a reasonable period of time to exercise the right to an effective remedy while access to free legal assistance must be ensured. However, the latter can be refused where the appeal or review is considered to have no tangible prospect of success.[166]

The safeguards with regard to access to an effective remedy and the right to information reflect the jurisprudence of the ECtHR and in particular the *M.S.S. v. Belgium and Greece* judgment. As consistently stated by the ECtHR, access to an effective remedy before a court or tribunal in law and in practice is crucial to ensure compliance with the principle of *non refoulement* in view of the irreversible nature of damage that may result if the risk of torture or ill-treatment materialises including in the context of agreements between Member States to allocate responsibility for the examination of asylum applications, such as the Dublin system. This requires among others a close and independent scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3; a particularly prompt response and access to a remedy with automatic suspensive effect.[167] Whereas the jurisprudence of the Court seems to allow for both appeal systems that have been laid down in the recast Dublin Regulation, the remedy must in any case meet the abovementioned requirements. In particular, the requirement of a close and rigorous scrutiny reduces the added value of a system whereby suspension must be requested separately. Moreover, if the court or tribunal decided, on the basis of the preliminary assessment, that the asylum seeker need not remain in the territory but after a full examination of the appeal concludes that the asylum seeker is nevertheless in need of international protection, the individual may have already been returned and subjected to irreversible harm. As a result, the appeal could be disadvantaged on the basis of a rapid, incomplete assessment of the case. Granting automatic suspensive effect and conducting a full examination of appeals in a single judicial hearing would avoid such risk while also speeding up the final assessment of the protection claim and reducing overall judicial and administrative burdens.

While the explicit inclusion of an obligation for Member States to provide an effective remedy in Dublin cases is an improvement with regard to the 2003 Dublin Regulation[168], it is to be noted that this codifies already existing Member States' obligations under the jurisprudence of the ECHR and Article 47 EU Charter of Fundamental Rights.

The provisions relating to vulnerable asylum seekers subject to Dublin procedures including (unaccompanied) children are further improved. The best interests of the child must be a primary consideration for Member States with respect to all procedures under the Regulation and unaccompanied children must have a qualified representative.[169] Moreover, in the case of unaccompanied children, responsibility for examining their application is now also determined on the basis of a legally present sibling or family member in a Member State. The legal presence of a relative of the unaccompanied child in a particular Member State should also be taken into account to the extent that it is established that that relative can take care of the child. These criteria apply provided it is in the best interest of the child to be reunited with

164 JRS Europe, *Protection Interrupted. The Dublin Regulation's Impact on Asylum Seekers' Protection (The DIASP project)*, June 2013, p. 28-30.

165 *"...any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny and that, subject to a certain margin of appreciation left to the States, conformity with Article 13 requires that the competent body must be able to examine the substance of the complaint and afford proper reparation"*. See ECtHR, *M.S.S. v. Belgium and Greece*, para. 387.

166 However, always "*without arbitrarily restricting access to legal assistance*". See Article 27(6) recast Dublin Regulation. The explicit requirement that the applicant's effective access to justice is not hindered, laid in Article 20(3) recast Asylum Procedures Directive, is not explicitly repeated here.

167 See ECtHR, *M.S.S. v. Belgium and Greece*, para. 293.

168 The issue of access to an effective remedy against decisions taken under the Dublin Regulation is left entirely to the discretion of the EU Member States. In fact, it is stated in Article 20(1) relating to the notification of the decision that this may be subject to appeal or review but that such "*appeal or review concerning this decision shall not suspend the implementation of the transfer except when the courts or competent bodies so decide in a case-by-case basis if the national legislation allows for this*".

169 Article 6 recast Dublin Regulation.

the family member, sibling or relative concerned. In the absence of a family member, sibling or relative, the recast Dublin Regulation states that the Member State where the unaccompanied child has lodged his or her application for international protection is responsible, again provided this is in the best interest of the child. The latter provision still remains ambiguous as to whether this is to be understood as the Member State where the child first lodged his or her asylum application or the Member State where the child lodged his or her most recent asylum application. In the case of *MA BT and DA*, the CJEU interpreted the corresponding provision in the 2003 Dublin Regulation as meaning that "the Member State in which that minor is present after having lodged an asylum application there is to be designated the 'Member State responsible'.[170]

At the time of the adoption of the recast Dublin Regulation, the European Parliament and the Council adopted a declaration inviting the Commission to revisit the wording of recast Article 8(4) Dublin Regulation once the Court had ruled on the case of MA, BT and DA as part of the political compromise.[171] Although EU Member States are already bound by the CJEU's interpretation, amendment of Article 8(4) recast Dublin Regulation would be welcomed to ensure legal certainty and consistency in the application of these provisions. In line with the Court's ruling, it should be clarified that where an unaccompanied child lodged asylum applications in more than one EU Member State or Schengen Associated State and in absence of a legally present family member, sibling or relative, the responsible Member State is the one in which the child is present and lodged its most recent application, provided this is in the child's best interest. Any such amendment should also address situations where children do not claim asylum in the present Member State, in accordance with the best interest assessment of the child and the objective of ensuring effective and prompt access to an asylum procedure.

Detention Provisions

The recast Dublin Regulation now includes a specific provision on the detention of asylum seekers in order to secure transfer procedures. Detention is possible only when there is a significant risk of absconding and must always be done on the basis of an individual assessment, only where it is proportional and necessary and in so far as alternative measures that are less coercive cannot be applied effectively. Contrary to the recast Reception Conditions Directive, Article 28 recast Dublin Regulation introduces a maximum time limit for detention of three months after a take back or take charge request has been submitted to the responsible Member State. However, this can be prolonged with the time necessary for a court to deal with an appeal or review of the Dublin transfer decision that has suspensive effect. This is potentially creating an impossible dilemma for the asylum seeker detained for the purpose of transfer who will have to decide between agreeing with the transfer to another Member in order to end detention and challenging the transfer to another Member State at the risk of prolonging the detention.

Moreover, detention triggers shorter time periods for the Member States to reply to requests for taking charge or taking back an asylum seeker under the Dublin Regulation. In case of detention a reply must be given within two weeks and failure to meet that deadline results in tacit acceptance or responsibility by the requested Member State irrespective of whether this is in compliance with the correct application of the Dublin criteria.

This link between detention and extremely short time-limits for responding to take back or take charge requests may have perverse effects as it may mean detention used by Member States to shift responsibility to other Member States by default. As Member States consider detention as an important tool to enforce Dublin transfers, the application of this provision in practice must be closely monitored by the Commission.[172]

The provisions relating to procedural safeguards for detainees, detention conditions and detention of vulnerable asylum seekers in the recast reception conditions Directive discussed above apply in case of detention of asylum seekers under the recast Dublin Regulation. This is applicable to all Member States participating in the application of the Dublin Regulation, including the Member States opting out of the recast Reception Conditions Directive.

Asylum seekers should, as a general rule, not be detained in line with the presumption against the detention of asylum seekers established in international human rights law. As it concerns deprivation of liberty to secure the operation of a fundamentally flawed system such as the Dublin Regulation, this presumption should apply even stronger. Unfortunately, the Dublin Regulation does not explicitly prohibit the use of detention prior to the acceptance of responsibility by the Member State requested to take back or take charge of an asylum seeker as was proposed by the Commission. This would have excluded at least detention

170 See CJEU Case C-648/11, *The Queen, MA, BT, DA v. Secretary of State for the Home Department,* Judgment of 6 June 2013. The Court emphasised the fact that it is important in the interest of the unaccompanied children concerned not to prolong unnecessarily the Dublin procedure and to ensure unaccompanied children prompt access to the asylum procedure. This implies, according to the Court that, as a general rule, unaccompanied minors should not be transferred to another Member State. See paras. 55 and 61.

171 Council of the European Union, *Statement by the Council, the European Parliament and the Commission*, Doc. No. 17712/12 Add 2, Brussels, 18 December 2012.

172 See also European Network for Technical Cooperation on the Application of the Dublin II Regulation, *Dublin II Regulation. Lives on Hold. European Comparative Report*, February 2013, p. 86.

while examining which Member State is responsible for examining the asylum application. Once again, this represents a missed opportunity by the EU institutions to further restrict the possibilities for detaining asylum seekers in the framework of the operation of the Dublin Regulation.

Time Limits for Determining the Responsible Member State and Carrying Out Transfer

The operation of the Dublin Regulation essentially creates an additional procedure prior to the one examining the individual's protection needs. As such, this undermines the overall aim of achieving more efficient asylum procedures including reducing the total processing time of asylum applications and ensuring rapid and effective access to an asylum procedure. The recast Dublin Regulation constitutes only limited progress in this respect. Stricter time limits for submitting and responding to a take charge request apply in case of a EURODAC hit for instance. Furthermore, the recast Dublin Regulation now introduces specific time limits for submitting a take back request, both in the case where a new asylum application has been lodged in the requesting Member State and where no such application has been lodged.[173] This is to be welcomed as the 2003 Dublin Regulation does not include any time limit for Member States to submit a take back request, which has resulted in asylum seekers being in such a situation for long periods of time. In certain cases, an urgent reply can be requested in take charge cases, which means that a reply is required within the time limit set by the requesting Member State with, in exceptional circumstances, a possible extension to maximum one month.

The shorter time limits are in the interest of both Member States and asylum seekers, as they contribute to a faster determination of the responsible State. However, this does not prevent that, in particular outside the context of urgent replies, asylum seeker's access to a substantial examination of their protection needs can still be considerably delayed by the mere application of the Dublin provisions. A final response from the requested Member State may take up to five months after receipt of the request under the Regulation and actual transfer of the asylum seeker to the responsible Member State may in principle take place up to six months after the acceptance of the request before responsibility is shifted under the Regulation to the requesting Member State. This means that the recast Dublin Regulation allows for an 11-month delay before the examination of an individual's need of international protection even starts. As mentioned, this is hard to reconcile with the overall objective of the asylum package to install fair and efficient procedures that allow for a swift determination of whether or not an asylum seeker arriving in the EU is in need of international protection.

2.1.5. The Recast EURODAC Regulation

The recast EURODAC Regulation includes not only a number of amendments of a technical nature to improve the operation of the system, it also lays down the conditions under which designated law enforcement authorities in the Member States as well as EUROPOL can have access to data stored in EURODAC for the purposes of the prevention, detection and investigation of terrorist offences[174] or of other serious criminal offences. Access is possible only if comparisons with other databases did not result in establishing the identity of the data subject. Moreover, the comparison with EURODAC is only possible where (1) it is necessary, defined as where there is an overriding public security concern which makes the searching of the database proportionate and (2) it is necessary in a specific case, defined as where there are reasonable grounds to consider that the comparison will substantially contribute to prevention, detection or investigation of any of the criminal offences mentioned above. This means that systematic comparisons are forbidden

Access to EURODAC for law enforcement agencies and EUROPOL was a key issue for the Council during the negotiations and was an important bargaining chip between the EU institutions. This is despite the fact that experts doubt the usefulness and added value of providing such access for the purposes of preventing terrorist activities or detecting and identifying those planning or committing such criminal offences. Law enforcement agencies of different EU Member States can already exchange fingerprints and other law enforcement data on the basis of other legal instruments.[175] Moreover, it is unlikely that those planning such activities would present themselves to the authorities as asylum seekers, knowing that their fingerprints are taken and can be stored for ten years.

173 At the latest within two months after receiving a EURODAC hit, three months in case the take back request is based on other evidence than EURODAC data. See Article 23(2) and Article 24(2).

174 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) (hereinafter '*recast EURODAC Regulation*), OJ 2013 L180/1.

175 See European Data Protection Supervisor, *Opinion of the European Data Protection Supervisor on the amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EU) No* [.../...] [.....] (*Recast version*), 5 September 2012, p. 7-9.

Indeed, the meagre added value for actual law enforcement stands in contrast to the risk this access entails for those seeking protection.

Due to the fact that police intelligence is increasingly shared with law enforcement authorities worldwide, opening up EURODAC to law enforcement agencies obviously raises the risk of information relating to asylum seekers being shared with actors of persecution in the countries of origin of asylum seekers applying for protection in the EU. This is acknowledged in the recast EURODAC Regulation as it prohibits that personal data, obtained by EUROPOL or a Member State from the central EURODAC database, is made available to any third country, international organisation or private entity. Furthermore, it also states that personal data originating in a Member State and exchanged among Member States following a EURODAC hit shall not be transferred to third countries if there is a serious risk that the individual concerned may be subjected to torture, inhuman and degrading treatment or punishment or any other violation of their fundamental rights.[176]

However, the recast EURODAC Regulation does not define what information may be shared among law enforcement agencies following a EURODAC hit and therefore this is subject to the rules in EU instruments on information sharing between law enforcement agencies. As those instruments do not include a prohibition to transfer data to third countries, the prohibition in Article 35 recast EURODAC Regulation may provide no guarantee in practice.[177] As a result, this may result in sensitive information about asylum seekers case files being shared with authorities in their country of origin, thus jeopardising their safety and that of their family members and relatives who remained in the country of origin.

Finally, many experts have raised the fear that access of law enforcement agencies to EURODAC may lead to further stigmatisation of asylum seekers and add to the general climate of "criminalisation" of migrants and asylum seekers.[178]

Asylum seekers now have a higher chance than other population groups of being linked to crime investigations simply because of the fact that their fingerprints are systematically being stored in EURODAC. As highlighted by UNHCR "[t]his increased exposure of asylum-seekers to investigation, simply because their fingerprints are in an accessible database, could fuel misperceptions that there is a link between asylum-seekers and crime, and feed xenophobia and racism". It is concerning and disappointing that in times of rising racism and xenophobia and increasing violence against asylum seekers and migrants in Europe, this was never given prominent weight in the political debate. Following the entry into force of the recast EURODAC Regulation as of 20 July 2015, the stigmatising effects of the recast EURODAC Regulation should be properly assessed by the EU institutions and the Fundamental Rights Agency.

176 See Article 35 recast EURODAC Regulation.

177 See UNHCR, *An efficient and protective Eurodac. UNHCR comments on the Commission's amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EU) No [.../...] [.....] (Recast version)*, November 2012, p. 7.

178 See Meijers Committee, *CM0910*, 30 December 2009 and *CM1216*, 10 October 2012.

2.2. The Early Warning and Preparedness Mechanism

The establishment of an Early Warning and Preparedness Mechanism was an essential part of the political compromise between the European Parliament and the Council on the recast Dublin Regulation. Whereas the initial Commission proposal of a temporary suspension mechanism was unacceptable to a majority of Member States as it was perceived to potentially undermine the rationale behind the Dublin Regulation, EU institutions finally agreed on the much weaker option of a mechanism that would assist Member States and EU institutions in identifying, at an early stage, pressures on Member States' asylum systems and addressing those pressures and possible protection gaps through a series of actions in close consultation with the Commission and with the support of EASO. The mechanism, laid down in Article 33 recast Dublin Regulation, is based on a sequence of actions to be taken by Member States under pressure or where a flaw in the asylum system has been identified. The mechanism includes two phases. In the preventive stage, the Commission can invite a Member State to draw up a preventive action plan, to which a Member State may or may not respond. In a second phase, where the Commission establishes, on the basis of EASO's analysis that the preventive action plan has not remedied the deficiencies, it may request the Member State concerned to draw up a crisis management action plan. Such plan is compulsory and must be submitted by the Member State concerned within three months. The Member State must also report on the implementation of the crisis management plan with regard to specific data such as the length of the procedure, the detention conditions and the reception capacity in relation to the inflow of applicants.

Article 33 remains silent as to the threshold for initiating the mechanism other than the fact that the application of the Dublin Regulation may be jeopardised. Furthermore, the failure of the Member State concerned to take the necessary measures to address the deficiencies identified or to comply with the crisis management action plan does not trigger any legally binding consequences under Article 33 recast Dublin Regulation. The Council may give "political guidance" throughout the process and the Council and the European Parliament may discuss and provide guidance on any solidarity measures as they deem appropriate, which may stir the political debate at EU level but certainly does not guarantee any binding measure at EU level to prevent transfers of asylum seekers to such Member State under the recast Dublin Regulation.

Obviously such a mechanism is not an alternative to a temporary suspension mechanism as initially envisaged by the Commission because it does not include the option of a collective suspension of Dublin transfers to a Member State with a dysfunctional asylum system or where access to asylum seekers' fundamental rights is no longer guaranteed. However, ECRE has acknowledged the potential of such a mechanism as a monitoring tool to contribute to a better understanding of Member States' practice and better identification of the necessary measures to address such protection gaps, provided that such mechanism is comprehensive, is based on all available sources of information relating to Member States' asylum practice, including non-governmental organisations, and incorporates quality assessment of asylum systems into its methodology.[179]

Rather than becoming a life-insurance of the Dublin Regulation, the mechanism should function as a Permanent Health and Quality Check of the CEAS as a whole in the interest of ensuring effective protection of asylum seekers' fundamental rights when entering the EU's "common area of protection and solidarity".

The development of an early warning and preparedness mechanism has been identified as a core activity of EASO in particular in the context of its task to contribute to the implementation of the CEAS following discussions at EASO's Management Board Meeting and at the Justice and Home Affairs Council. While EASO's focus is, in the initial stage, primarily on the development of relevant statistical indicators,[180] it at the same time acknowledges that collecting statistical data on asylum alone "is of little utility if it is not accompanied by knowledge of the systems which produce it".[181]

As mentioned, the effectiveness of the early warning and preparedness mechanism is premised on all relevant information and sources, including non-governmental sources being taken into account in EASO's and the Commission's analysis of the situation in a Member State.

179 See ECRE, *Enhancing Intra-EU solidarity tools to improve quality and fundamental rights protection in the Common European Asylum System*, January 2013.

180 According to EASO's newsletter a list of indicators has been proposed that is as far as possible compatible with EUROSTAT data collection. Furthermore a "Group for the Provision of Statistics" (GPS), consisting of persons nominated by EU Member States as contact points in regard to statistical and data-collection questions, should operate in a similar way as the Frontex Risk Analysis Network. See EASO, *Newsletter - January/February 2013*, p. 7.

181 *Idem.*

Establishing an early warning mechanism primarily on the basis of information provided by governmental sources would result in an incomplete picture of the reality on the ground and would not be compatible with EASO's key function as an independent centre of expertise on asylum in the EU as envisaged under the EASO Regulation. One of the important objectives of the Asylum Information Database is exactly to contribute to a better understanding of the practice in EU Member States and the concrete implications of Member States' policy options on the human rights of individual asylum seekers arriving in the EU. Clearly, the early warning and preparedness mechanism will have to take into account the perspective of NGOs active in the field in order to make a proper and unbiased assessment of the situation in the Member States.

Finally, the early warning and preparedness mechanism's key function of information gathering with regard to the functioning of Member States' asylum systems will inevitably overlap with the Commission's role in monitoring implementation of EU legislation as a guardian of the Treaty. An early warning and preparedness mechanism must be implemented without prejudice to the Commission's powers as guardian of the Treaty and should be used as an additional, not an exclusive tool for information for the Commission to fulfil this task. It should complement, not replace the Commission's channels for monitoring compliance with the EU asylum acquis. Moreover, non-compliance with the EU asylum acquis as an indicator in the context of the early warning and preparedness mechanism should not be reduced to infringement procedures being actually launched. Whereas an infringement procedure will in most cases be a clear indicator of a protection gap in a Member State, absence of such procedure cannot automatically lead to the conclusion that State practice fully complies with the EU asylum acquis either.

2.3. Concluding Remarks

The finalisation of the asylum package marks the end of an important stage in the establishment of the CEAS. The assessment of the outcome of almost five years of negotiations is mixed.

It is a positive development that the position of the asylum seeker with regard to various aspects of the asylum process has been strengthened. In particular, key procedural guarantees such as access to an effective remedy and the right to a personal interview and safeguards with regard to the interview report are now more strongly consolidated in the recast Asylum Procedures Directive as well as the recast Dublin Regulation. Increased requirements of training of staff and the strengthened requirement of a specialised authority to take decisions on asylum applications at the first instance should contribute to better quality of decision-making. Also as regards the level of material reception conditions for asylum seekers, some progress has been made, while the possibilities for Member States to withdraw material reception conditions during the examination of the asylum procedure have been further restricted.

Other aspects of the package are less promising and constitute less progress as initially envisaged or even a status quo with regard to the first generation of EU asylum legislation. This is, for instance, the case with regard to access to free legal assistance during the first instance of the asylum procedure, an important aspect in the frontloading of asylum procedures. With regard to the position of vulnerable asylum seekers in the asylum process the result is disappointing as the opportunity was missed to make vulnerable asylum seekers such as victims of torture and unaccompanied children exempt from procedures that are inapt to address their particular vulnerability.

The broadly defined grounds for detention of asylum seekers and the potential perverse effects of the detention provision in the recast Dublin Regulation are extremely worrying as they may result in systematic detention of asylum seekers in certain cases. Strengthened procedural safeguards may contribute to protecting asylum seekers from arbitrary detention, provided asylum seekers have effective access to quality legal assistance, which is often not the case, as further illustrated in chapter III. A unique opportunity was missed to set strong standards in EU law to make the detention of asylum seekers truly exceptional and prohibit the detention of asylum-seeking children.

The recast Asylum Procedures Directive and the recast Reception Conditions Directive generally still allow for considerable flexibility for Member States such as with respect to the form of material reception conditions, the use of accelerated, admissibility and border procedures and the application of safe country concepts. Consequently, both Directives may also result in a lower level of harmonisation than initially intended. In this respect, the variety of options for Member States under the recast Asylum Procedures Directive is difficult to reconcile with the concept of "common procedures" referred to in its title.

EU Member States now enter the phase of transposition of the newly adopted standards in the recast Reception Conditions and Asylum Procedures Directive into national legislation and implementation of the revised *acquis* in practice. Here lies an important opportunity for the EU Member States to establish high protection standards in national legislation and to build on examples of good practice in other Member States. The Directives explicitly provide the possibility for Member States to retain or introduce more favourable provisions than the standards laid down in the recast legislation. EU Member States should make full use of such possibility and should not settle for the *minimum minimorum* but instead aim for high protection standards. Moreover, national transposition measures must fully comply with standards set in the relevant jurisprudence of the ECtHR and the CJEU and the EU Charter of Fundamental Rights.

In transposing and applying the recast legislation, EU Member States should also fully pursue the frontloading of asylum procedures by creating the necessary safeguards in national legislation and investing the necessary resources to enhance and maintain high quality first instance decision-making as a means to further improve the overall fairness and efficiency of the asylum procedure. EU Member States opting out of the recast Directives must implement asylum policies that are based on high standards of protection, inspired by the recast legislation where such legislation established good practice, and on the frontloading of the asylum system.

The Early Warning and Preparedness Mechanism that is being set up has the potential of becoming a useful tool to support the establishment of the CEAS by ensuring a permanent health and quality check of the performance of Member States' asylum systems. In order to achieve this, it must serve the purpose of improving protection standards and quality of all aspects of the CEAS and not merely of ensuring the functioning of the Dublin Regulation. It must guarantee rigorous and comprehensive monitoring of all aspects of the Member States' asylum systems, including quality of reception conditions, asylum procedures and individual decision-making, based on a variety of sources, including information provided by expert non-governmental organisations and practitioners.

Chapter III

Getting the Real Picture: Procedural Safeguards, Detention and Reception in 14 EU Member States

This section highlights a number of key developments and trends with regard to selected aspects of asylum procedures, reception conditions and detention of asylum seekers in the 14 EU Member States covered by the database: access to the asylum procedure, personal interview, access to legal assistance, access to an effective remedy, reception conditions and detention. It does not intend to present a comprehensive and detailed description of the situation of asylum seekers in the countries concerned as this is the purpose of the national reports available on the AIDA website. Where relevant, sections are introduced by a short overview of the applicable legal framework in each of the 14 countries on the basis of a number of indicators that have been developed in order to facilitate comparison among the national asylum systems. This is followed by a short description of examples of good practice or key obstacles that asylum seekers face in accessing their rights. Each section also includes a short description of the most relevant provisions in the recast EU asylum legislation with regard to the selected topics, as well as references to key judgments of the CJEU and of the ECtHR. A short summary of the jurisprudence referred to throughout this report is annexed to this report.

All examples included in this section are taken from the national reports as drafted by the national experts and edited by ECRE. The state of the law and practice described with regard to the country concerned is valid at the time of the country report's publication, unless indicated otherwise. The tables used in this section of the AIDA Annual Report only provide a basic overview of the situation with regard to specifically selected topics and must be read in the context of the additional information provided in the relevant section of each country report. The cited State practice or challenges for asylum seekers are by no means exhaustive. The fact that a Member State is not explicitly mentioned with regard to specific topics does not necessarily mean that no concerns exist with respect to that Member State nor that no good practice exists in that country. Likewise, national asylum systems and practices are inherently complex and the comparative information included in this chapter as well as on the AIDA website must be read in this context.

3.1 Access to the Procedure

In order to access asylum procedures in an EU Member State, asylum seekers need to be on EU territory, as it is currently not possible to apply for asylum at any of the Member States' diplomatic representations abroad.[182]

However, it is extremely difficult, in reality, for people in need of international protection to access EU territory by means of legal entry, often forcing them to take life-threatening risks.[183]

While the EU states have the sovereign right to control their borders, this should always be done in respect of their international obligations - above all the principle of *non refoulement*.

Push-Backs at the Borders of Europe

In 2012, the Eastern Mediterranean border (Greece, Bulgaria, and Cyprus) was still the main entry point for people trying to enter the EU irregularly. There were 37,224 detections at this border and 10,379 at the borders of Italy and Malta in 2012 alone.[184] However, according to Frontex, detections of unauthorised crossings dropped "to almost negligible levels" in the second half of 2012 at the Greek-Turkish borders following the implementation of Greek and Frontex Joint Operations of border surveillance.[185]

The strengthened surveillance of the land border between Turkey and Greece, in the Evros region, as well as the

182 *EASO Annual Report 2012*, p 65.

183 The principle of *non refoulement* is enshrined *inter alia* in Article 33 of the 1951 Geneva Convention relating to the Status of Refugees, Article 3 ECHR, Article 3 Convention against Torture and Article 19 EU Charter of Fundamental Rights.

construction of a fence in the northern part of the border make it very difficult to cross the border via land. As a consequence more and more people are now again attempting crossings by sea to the Greek islands close to Turkey.

Not only is this route more dangerous, but instances of push-backs and *refoulement* have been reported. In a report published in July 2013, Amnesty International denounces serious human rights violations at the **Greek** border with Turkey, and provides evidence of push-backs by Greek border guards and coast guards, without an examination of the situation of the individuals and without giving them an opportunity to apply for asylum.[186] Amnesty further asserts that peoples' lives are being put at risk: "*13 of the 14 interviewees who described being pushed-back to Turkey in the Aegean Sea described similar experiences of their inflatable boats being rammed or knifed, or nearly capsized while they were being towed or circled by a Greek coastguard boat, their engines disabled, their oars removed, and their occupants left in the middle of the sea on unseaworthy vessels.*"[187]

Yet, Greece is not the only country where "push-backs" have taken place. In the past years, the practice was also denounced, for instance, in **Italy**,[188] **Hungary**[189] and in Malta.

With respect to **Malta**, the ECtHR issued, on 9 July 2013, a Rule 39 interim measure to the Maltese government, blocking the return of mostly Somali nationals who had just arrived by boat from Libya.[190] The move from the Maltese government was denounced as a push back effort, as the people about to be returned were neither informed nor given the chance to request international protection. A group of 11 Maltese NGOs had urged the government not to return the individuals concerned as they faced a real risk of being exposed to inhuman and degrading treatments or even death in Libya in violation of international human rights law. They referred *inter alia* to a recent ruling from the Maltese Court of Appeal which held that the expulsion of Somalis to Libya in 2004 had violated their human rights. Four of the six people who were returned at that time later died in the desert when they were deported to the border.[191]

The practice of push-backs on the high seas was condemned by the ECtHR, in February 2012, in its *Hirsi Jamaa and Others v. Italy* judgment.[192] In this case, where about 200 Somali and Eritrean nationals intercepted by **Italian** coastguards on the high seas were immediately returned to Libya, the Court ruled that Italy had violated the principle of *non refoulement*, even if the persons concerned did not explicitly apply for asylum. According to the Court, it was for the Italian authorities, faced with a situation in which human rights were being systematically violated, to "find out about the treatment to which the applicants would be exposed after their return" (§ 133) and to ascertain "how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees" (§ 157). The Court considered that Italy knew or should have known that upon return those people would be at risk of being subjected to treatments contrary to Article 3 of the European Convention on Human Rights, which provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".

Access to the Procedure on the Territory and at the Borders

Even those who do manage to reach Europe do not always have effective access to the asylum procedures in all Member states. Ensuring access to the procedure for people in need of protection entails granting access to the territory, but also providing guarantees that claims made are actually registered and that people are effectively informed about the possibility to apply for asylum.

The right to asylum is explicitly guaranteed in the EU Charter of Fundamental Rights (Art. 18). The Stockholm Programme also reaffirmed that a "person in need of international protection must be ensured access to legally safe and efficient asylum procedures".[193]

In the majority of Member States covered by the Asylum Information Database, applicants already on the territory are required to lodge their application at one specific central location, usually the office of the authorities competent to register and sometimes to examine the claim (Austria, Belgium, Bulgaria, Hungary, Ireland, Malta, the Netherlands, Poland and the UK). This requirement is deemed problematic in some countries, such as the **UK** and **Ireland**, where there is no or very few possibilities for asylum seekers to receive assistance to travel to the registration place.[194]

184 Frontex, *Annual Risk Analysis 2013*, April 2013, p 21.

185 Greek operations: operation Xenios Zeus (on the territory) and Aspida (land border surveillance); Frontex Joint Operations (Aeneas, Hermes and Poseidon Sea). See Frontex, *Annual Risk Analysis 2013*, April 2013, p 22.

186 Amnesty International, *Frontier Europe: Human rights abuses on Greece's border with Turkey*, July 2013.

187 *Ibidem*, p 12.

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

189 Border Monitoring Project Ukraine, *Access to Protection Denied: Refoulement of Refugees and Minors on the Eastern Borders of the EU – the case of Hungary, Slovakia and Ukraine*, 2011; See also risks of chain *refoulement* highlighted in UNHCR, National Police Headquarters, Hungarian Helsinki Committee, *Access to Territory and Asylum Procedure in Hungary 2012*, June 2013.

190 Malta Today, *Pushbacks suspended as European Court demands explanation from Malta*, 9 July 2013.

191 JRS Malta and 10 other NGOs, *Government must not return migrants back to Libya*.

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

193 European Council, *Stockholm Programme – An open and secure Europe serving and protecting citizens,* OJ 115/02, 4 May 2010, section 1.1.

In other countries applications can be lodged in decentralized locations, but usually still at offices of competent authorities (branches of the Federal Office in **Germany**, Prefectures in **France** and at a Questura (State police office) in **Italy**). By law, in **Greece**, applications can be lodged at local police Directorates; however, in reality, at the moment this is not the case (see below).

At the borders, States apply various forms of registration. While some Member States have specific border procedures where applications are examined at the borders, others grant access to the territory or transfer asylum seekers to detention centres.

In **Malta**, all persons arriving undocumented by boat who are intercepted are systematically detained. However, while in detention, access to the asylum procedure is ensured and people are given the opportunity to request protection.[195]

Some issues have been highlighted in the countries researched with regard to the effective possibility to make an asylum application at the border and for the application to be transmitted to the responsible authorities. In **Bulgaria**, the Bulgarian Helsinki Committee highlights the very low number of asylum claims registered by the border police and notes that in 2012, '91% of the newly arrived asylum seekers were in practice denied registration and detained'.[196] In **Hungary**, UNHCR and the Hungarian Helsinki Committee have repeatedly raised concerns about the effective access to the asylum procedure of people intercepted at the borders.[197] They have called for improved practices and guarantees in that regard.

The impossibility of accessing the asylum procedure at the borders is also a concern in **Poland** where, in 2012, a number of cases were reported of asylum seekers who were denied entry at the Terespol border crossing with Belarus, or detained.[198]

As far as **Greece** is concerned, access to the procedure is still extremely difficult. In practice, asylum applications are only received at the Attica Aliens Directorate in Athens (Petrou Ralli), once a week, on Saturdays, from around 6am. Approximately 20 applications are registered per week, while thousands of people may be queuing to submit an asylum claim. Some people start queuing from Thursday mornings in harsh conditions. A group of NGOs who carried out a monitoring operation between February and April 2012 noted that there were some weeks where no applicants were allowed to register. They also noted that the situation leads to exploitation, violence and tensions among the asylum seekers. People who still try to apply for asylum, despite those obstacles may have to return to Petrou Ralli for many months before having their claim registered. In addition, asylum seekers are expected to provide an address in Greece, which proves to be impossible for many. People in need of protection, who cannot or have not yet managed to register their claim, constantly face the risk of being arrested and returned at any time.[199] A new law adopted in 2011 established a new Asylum Service responsible for examining asylum applications but that only became operational in July 2013.[200]

In a nutshell

Relevant EU standards in recast legislation

The recast Asylum Procedures Directive stipulates that asylum seekers should have an "effective access to procedures" (recital 25) and an "effective opportunity to lodge [their application] as soon as possible" (Article 6(2). The Directive applies to all applications for international protection, including those made at the border, in territorial waters or in transit zones (Article 3(1)). Member states must also ensure that authorities likely to receive asylum applications inform applicants on the practical modalities of lodging an asylum claim (where and how) (Article 6(1)).

194 See Asylum Information Database, Individual country reports – *Registration of the Asylum Application*.
195 Asylum Information Database, *Country Report Malta – Registration of the Asylum Application*, accessed July 2013.
196 Asylum Information Database, *Country Report Bulgaria – Registration of the Asylum Application*, accessed July 2013.
197 Asylum Information Database, *Country Report Hungary – Registration of the Asylum Application*, accessed July 2013.
198 Asylum Information Database, *Country Report Poland – Registration of the Asylum Application*, accessed July 2013.
199 Asylum Information Database, *Country Report Greece – Registration of the Asylum Application*, accessed July 2013.
200 Greek Ministry of Citizens Protection, *Launch of the new Asylum Service: announcement* (*Έναρξη λειτουργίας της νέας Υπηρεσίας Ασύλου*), 26 June 2013.

Delays before the Formal Registration of Asylum Claims

The fact that in many countries the formal registration of asylum claims does not happen at the time when the claim is made, may put asylum seekers in a difficult situation and create additional obstacles to access their rights under EU asylum law. In particular, this is the case where such a delay prevents them from accessing the material conditions to which they are entitled.[201]

In **France**, applicants need to obtain a temporary residence permit from the 'Prefecture', which is the local administration, before their application can be lodged. Whereas in some prefectures the issuance of this permit may take only a few days, in others it can take weeks to months, because on the one hand, asylum seekers need to provide a postal address for their claim registration (*domiciliation*), which can be long and complicated; and on the other hand because some Prefectures have long waiting periods for appointments. Before receiving their temporary permit to stay asylum seekers are not entitled to material support.[202]

Similarly, in **Italy**, the registration of an asylum application is divided into two steps: an identification and registration process (*fotosegnalamento*) and a formal registration through a form (*verbalizzazione*). The second step can sometimes take place only some weeks after an asylum seeker has made a claim, especially in big cities, during which applicants have no access to the reception system and the national health system (except for emergency health care).[203]

In **Bulgaria**, the procedure only legally starts once the registration is made in person at the State Agency for Refugees (SAR). For people who claimed asylum in detention (including those detained after crossing the border illegally), it means that they first have to be released and taken to a SAR office for their claim to be registered, which has, in the past, taken up to several months.[204]

In the **UK**, initial asylum applications must be made in person at a single office, with very limited exceptions. This can create delays between making a telephone appointment and travelling to claim asylum, during which asylum seekers are left without any access to funds, right to work, or government-provided accommodation. In addition, there is no funding to cover the costs of the journey to claim asylum.[205]

In a nutshell

Relevant EU standards in recast legislation

Article 6 of the recast Asylum Procedures Directive requires Member states to register an asylum application within three working days if the application is made to the authority competent under national law for such registration, or no later than six working days if it is made to other authorities who are likely to receive asylum applications but are not competent to register them, such as for instance at the border or in detention. The time limit for registration can be extended to ten working days in case of large numbers of third country nationals applying for asylum simultaneously.

A person who has *made* an asylum application must have an effective opportunity to lodge the asylum application as soon as possible. Member States may require that asylum applications are lodged "in person and/or at a designated place".[206] According to Article 6(4) of the recast Asylum Procedures Directive an asylum application is deemed to have been lodged once a form submitted by the applicant, or where provided for in national law, an official report, has reached the competent authorities of the Member State. Where the applicant does not lodge his or her asylum application, Member States may consider the asylum application as implicitly withdrawn or abandoned and either discontinue the examination of the asylum application or reject the application in case it is considered as unfounded on the basis of an adequate examination of its substance.

According to Article 17 (1) of the recast Reception Conditions Directive, Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection.

201 Article 17(1) of recast Reception Conditions Directive (and previously article 13(1) of the 2003 Reception Conditions Directive) states that 'Member states shall ensure that material reception conditions are available to applicants when they make their application for international protection.'

202 Asylum Information Database, *Country Report France – Registration of the Asylum Application*, accessed July 2013.

203 Asylum Information Database, *Country Report Italy – Registration of the Asylum Application*, accessed July 2013.

204 Asylum Information Database, *Country Report Bulgaria – Registration of the Asylum Application*, accessed July 2013.

205 Asylum Information Database, *Country Report UK – Registration of the Asylum Application*, accessed July 2013.

206 Article 6 (3) recast Asylum Procedures Directive.

3.2 Personal Interview

Ensuring that asylum seekers have the opportunity of a personal interview is essential for a fair asylum determination procedure, as it allows them to present their story and the reasons for applying for protection in a comprehensive manner. In many cases, asylum seeker's statements in combination with country of origin information are the only elements for asylum authorities to make a decision on the asylum application as often asylum seekers are not able to present material evidence substantiating their asylum claim. But even where asylum seekers do present material evidence, a personal interview with the asylum seeker is essential to complement or clarify the information that is at the disposal of the decision-maker. It is also the forum through which the duty of cooperation between the decision-maker and the applicant in establishing the facts of their individual case, *inter alia* laid down in Article 4 of the Qualification Directive finds its most direct expression. Finally, personal interviews constitute an essential component of credibility assessment. [207]

Therefore, a personal interview of the applicant in all cases, even when an application is deemed unfounded, is a crucial part of a fair and efficient asylum procedure.

However, in order for the interview to contribute to a fair assessment of the applicant's need for international protection, it also requires that it is conducted by properly trained and qualified interviewers and interpreters, using a gender or child sensitive approach when appropriate.[208]

Furthermore, the interview needs to be recorded accurately in a detailed report, and the applicant should be given the opportunity to make additions and corrections to this report, in order to ensure the quality and the fairness of the procedure.

In the asylum context, a personal interview is the most concrete expression of the right to be heard that is enshrined in Article 41 of the EU Charter of Fundamental Rights establishing the right to good administration. The CJEU's jurisprudence[209] relating to the right of every individual to be heard with respect to any decisions that would affect him or her adversely, as a general principle of EU law, further informs the content of the right to a personal interview and related provisions in the recast Asylum Procedures Directive. Also the ECtHR takes into account whether a personal interview was conducted and the conditions in which it was conducted in its jurisprudence relating to national asylum procedures.

207 See UNHCR, *Beyond Proof. Credibility Assessment in EU Asylum Systems. Summary*, Brussels, May 2013, p. 24. According to UNHCR, "*contradictions, inconsistencies, a lack of detail and omissions in the applicant's statements may be indicative of shortcomings in the conduct and environment of the interview rather than indicative of the non-credibility of the applicant*".

208 The importance of interviews, in all asylum procedures, and of key safeguards on interpreters and interviewers is reflected, among others, in *UNHCR's ExCom Conclusions 8 and 30*.

209 See for instance Case 17/74 *Transocean Marine Paint* [1974] ECR 1063, para. 15.; Case 322/81 *Nederlandsche Banden-Industrie-Michelin v. Commission* [1983] ECR 3461, para. 7; Case 374/87 *Orkem v. Commission* [1989] ECR 3283, para. 32; Case C-277/11, *M.M. v, Minister for Justice, Equality and Law Reform, Ireland* [2012], para. 95.

Personnal Interview Conducted in Most Cases

	AT	BE	BG	DE	FR	GR	HU	IE	IT	MT	NL	PL	SE	UK
In the regular procedure	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
In the border procedure	Y	Y	N/A	Y	Y	N	Y	Y[210]	N/A	N/A	N/A[211]	N/A	N/A	N/A[212]
In the accelerated procedure	Y	Y	Y	Y	Y	N	N/A	Y	N/A	Y	N/A	N	Y	Y

Y: Yes, N: No, N/A: Not Applicable

While the 14 countries covered in the Asylum Information Database foresee at least one substantial personal interview in the regular procedure, the law in a number of countries (France, Germany, Greece, Italy, Malta, Poland, UK) states a number of grounds permitting the omission of the personal interview. These grounds include the possibility to waive the interview in case a positive decision can be taken on the basis of available evidence, if the applicant is unfit to be interviewed, or in very few countries, in case the claim is considered manifestly unfounded.

In **France**, for example, an interview may be omitted if "the evidence submitted in support of the application is manifestly unfounded". However, in practice, 94% of the asylum seekers are actually called for an interview.[215]

In most countries covered by the Asylum Information Database, asylum seekers personal interviews are organised in most cases in other than regular procedures in the countries included in the Asylum Information Database. This is with the exception of Dublin procedures where only half of the countries organise personal interviews. All countries, with the exception of Greece, formally applying a border procedure conduct personal interviews in practice.

However, a number of concerns were raised with regard to the way interviews are conducted in admissibility, border or accelerated procedures.

In **Belgium**, where the border procedure is de facto an accelerated procedure and where asylum seekers are detained, interviews take place quickly and therefore, applicants have limited time to prepare their application and gather the necessary evidence to substantiate their claim. In addition, as no vulnerability assessment takes place before people are placed in detention, those factors might not be taken into account either for the interview or for the decision on the case.[216]

In **France**, interviews in the border procedure take place within 96 hours in the vast majority of cases and concerns have been voiced that interviews go beyond their purpose and enter into examining the credibility of the applicant's account, while they should only focus on establishing whether the claim is manifestly unfounded.[217]

In the **Netherlands**, where there is per se no accelerated procedure, but where all cases in first instance are channelled in a 'short regular procedure', it is interesting to highlight that all asylum seekers are entitled to a 'rest and preparation period' before the asylum procedure actually starts except in the case of subsequent applications. During this period, which lasts at least six days, applicants are able to prepare for the asylum procedure, including through advice from the Dutch Council for Refugees and meeting with their lawyer, while the authorities perform a number of preparatory checks (e.g. medical examination, fingerprinting and consultation of Eurodac).[218]

As far as the Dublin procedure is concerned, information is often gathered through an initial or screening interview (e.g. in Hungary, Ireland, UK) and/or focuses only on the travel route or possibility of transfer (e.g. in Germany, Netherlands, Sweden). In **France**, information is taken from a specific form the asylum seeker has to fill[219] and in **Poland** from[220] the asylum claim form. However, in the latter case, the applicants may be contacted in writing or by phone for the authorities to obtain further information.

210 The interview conducted in the context of the border procedure only seeks to establish that the person wishes to seek protection. Leave to enter the territory is granted following the interview.

211 No specific border procedure formally exists. However, asylum seekers arriving in Schiphol Airport and applying for asylum are in most cases detained and their asylum application is assessed according to the short regular asylum procedure, which includes a personal interview.

212 An application can be made at the port of arrival and a screening interview may be carried out by immigration officers but the substance of the claim is not examined at the border.

213 According to the law the only accelerated procedure is the airport procedure (part of the border procedure). Certain caseloads are "accelerated or prioritised" but within the regular procedure. Acceleration consists mainly of a shorter time period for submitting the appeal. See below section 4.

214 Technically no accelerated procedure applies per se in the Netherlands. However, all cases are channelled first through the short regular procedure, where a personal interview is guaranteed.

215 The 6% of cases in which a personal interview is omitted includes the four grounds for omitting a personal interview. In addition to manifestly unfounded cases, a personal interview may be omitted where a positive decision can be taken, where the applicant is from a country where the cessation clause is applied and in case of medical reasons. See Asylum Information Database, *Country Report France – Regular Procedure*, accessed July 2013 and OFPRA, *2012 Activity report*, 25 April 2013.

216 Asylum Information Database, *Country Report Belgium – Border procedure*, accessed July 2013.

217 Asylum Information Database, *Country Report France – Border procedure*, accessed July 2013.

218 Asylum Information Database, *Country Report Belgium – Short overview of the asylum procedure*, accessed July 2013.

219 Asylum Information Database, *Country Report France – Dublin procedure*, accessed July 2013.

220 Asylum Information Database, *Country Report Poland – Dublin procedure*, accessed July 2013.

In **Ireland**, where no specific interview takes place, it is up to the asylum seeker to make submissions in writing explaining why they want their application to be examined in Ireland.[221]

In **Austria**, where a personal interview in the Dublin procedure is required by law, applicants are also appointed a legal adviser who must be present at the interview. However, legal advisers are often informed only shortly before the interview takes place which does not give them enough time to prepare.[222]

In **Belgium**, a specific Dublin interview exists, where the applicant can state their reasons for opposing a transfer to another country. In addition, following the *M.S.S. v. Belgium and Greece* ruling of the ECtHR,[223] some more questions have been added to the questionnaire relating to elements to help determining the risk of inhuman treatment upon return and whether Belgium should apply the so-called sovereignty clause.[224] On the contrary, in **Germany**, personal interviews are sometimes omitted and there is no procedural safeguard ensuring that the application of the 'humanitarian' or 'sovereignty' clauses have been properly considered.[225]

In **Ireland**, where asylum seekers who receive a negative decision on their request for refugee status may lodge a separate application for subsidiary protection, no personal interview is guaranteed for the applicant in the latter procedure. In the case of *M.M. v Minister for Justice, Equality and Law Reform, Ireland*, the CJEU ruled that in a system such as in Ireland, with two separate procedures for examining applications for refugee and subsidiary protection status, it is important that "the applicant's right to be heard, in view of its fundamental nature, be fully guaranteed in each of those two procedures".[226] Although the CJEU did not explicitly refer to the necessity of organising a personal interview, following this judgment the Irish Naturalisation and Immigration Service (INIS), announced that they will modify the procedure for examining subsidiary protection applications: by October 2013, the procedure should provide, among others, an oral interview for each applicant.[227]

As mentioned above, the ECtHR has in a number of cases referred to the absence[228] or quality of a personal interview when assessing procedures in light of Member States' obligations under the ECHR. In *I.M. v. France* for instance, the fact that the interview before the OFPRA was in that case of "limited duration" (30 minutes) in what was considered to be a complex case, was taken into account in finding a violation of Article 3 in conjunction with Article 13 ECHR.[229]

In a nutshell

Relevant EU standards in recast legislation

Article 14 of the recast Asylum Procedures Directive requires Member states to give applicants the opportunity of a personal interview on their application with a competent person. Personal interviews on the substance of their application must be conducted by personnel of the determining authority. In case of large numbers of third country nationals applying for asylum simultaneously, personnel of another authority may be temporarily involved in conducting such interviews, provided they have received in advance relevant training. The new Directive only provides two grounds for omitting the interview: where a positive decision can be taken on the basis of the evidence available and where the applicant is unfit or unable to be interviewed. Article 34 (1) also obliges Member States to conduct a personal interview on the admissibility of the asylum application, where admissibility procedures apply, except in case of subsequent applications. Personnel of authorities other than the determining authority may conduct admissibility interviews provided such personnel received necessary basic training in advance.

Article 5(1) of the recast Dublin Regulation establishes the obligation to conduct a personal interview in principle, before any decision on transfer is taken. A personal interview may be omitted if relevant information has been provided by other means (Article 5.2(b)).

221 Asylum Information Database, *Country Report Ireland – Dublin procedure,* accessed July 2013.

222 Asylum Information Database, *Country Report Austria – Dublin procedure,* accessed July 2013.

223 The Court condemned Belgium for sending an asylum seeker to Greece where they knew or ought to have known that he would be at risk of asylum seekers to be subject to inhuman and degrading treatments in Greece, ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011.

224 Asylum Information Database, *Country Report Belgium – Dublin procedure*, accessed July 2013.

225 Asylum Information Database, *Country Report Germany – Dublin procedure*, accessed July 2013.

226 Court of Justice of the European Union, *M.M. v Minister for Justice, Equality and Law Reform, Ireland* (Case C-277/1), 22 November 2012, par. 91.

227 Irish Naturalisation and Immigration Service, *Revision of Subsidiary Protection Application Procedures*, 26 July 2013 (accessed 29 July 2013).

228 See for instance ECtHR, *Charahili v. Turkey*, Application No. 46605/07, Judgment of 13 April 2010, para. 57.

229 ECtHR, *I.M. v. France*, Application No. 9152/09, Judgment of 2 February 2012, para. 155.

Gender Sensitive Interviews

Interviews are an essential component of the refugee status determination procedure but as it can be difficult for people who suffered persecution or serious harm to recount their experience, it is important that asylum seekers feel at ease and are treated in a sensitive manner. It is all the more important for vulnerable applicants, such as people who suffered trauma, children and certain categories of women, for instance women fleeing gender-based persecution. Women may be reluctant, or not feel comfortable talking about some of their experiences to a male interviewer or interpreter. Vice-versa, men could be reluctant to speak openly about their experiences with female interviewers. The importance of providing an opportunity to be interviewed by a person of the same sex, in case the asylum seeker so wishes, is widely acknowledged by all stakeholders.

Although there is no mandatory requirement for female applicants to be interviewed by women in most of the 14 countries covered by the Asylum Information Database, the possibility is almost always provided by the legislation, upon request from the applicant. However, in a number of countries, the law provides this safeguard only "as far as possible" or at the discretion of the authorities.

In **Hungary**, the law requires that asylum seekers who claim they are facing gender-based persecution are appointed a case officer of the same sex, if they so request.[230]

In 2012, the Gensen project report noted that while the possibility to choose same sex interviewers and interpreters existed in the nine countries surveyed[231], this possibility was yet not always explained to applicants and in very few cases applicants were systematically asked about the choice.[232] Furthermore, a study conducted in the **UK** in 2011 by Asylum Aid found that some women did not fully understand the implications of requesting a same sex interviewer; even if they were asked, they would not use the possibility for fear of appearing "difficult". [233] Good practice in the **UK**, **Malta** and **Sweden** includes the adoption of Gender Guidelines to inform appropriate interviewing decision-making in cases of gender-related and gender-based persecution.[234] Also the provision of childcare during asylum interviews in all but one region of the UK is considered an important step to improving the quality of information available to officials, as it means that no asylum seeker is forced to choose between disclosing potentially traumatising information in front of a child or holding back information relevant to their claim.[235]

In **Austria**, all asylum seekers whose claims are based on gender-related grounds should be interviewed by a same sex case officer, unless they request otherwise. The law also requires the authorities to prove that they have duly informed the applicant. It is also possible to have a same sex judge at the hearing on appeal, if the gender related acts are mentioned in the written appeal. The Constitutional Court also ruled that UNHCR Gender Guidelines should be applied both to female and male asylum seekers.[236]

In a nutshell

Relevant EU standards in recast legislation

Article 15 of the recast Asylum procedures Directive requires Member States to "take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their application in a comprehensive manner." This includes an obligation to ensure that competent interviewers take into account the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability. Wherever possible, interviews should be conducted by a person of the same sex with the assistance of an interpreter of the same sex, if the applicant so requests. This may be refused if the determining authority "has reason to believe that [the] request is based on grounds which are not related to difficulties on the part of the applicant to present grounds of his or her application on a comprehensive manner."

The recast Dublin Regulation does not explicitly require gender sensitive procedures and only states in Article 5(5) that interviews should be conducted by a qualified person. However, the recast Asylum Procedures Directive applies in addition and without prejudice to the provisions concerning the procedural safeguards regulated under the recast Dublin Regulation (recital 12 recast Dublin Regulation).

230 Asylum Information Database, *Country Report Hungary – Regular Procedure*, accessed July 2013.

231 The Gensen project covered the following countries: Belgium, France, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom. See Asylum Aid, France Terre d'Asile, CEAR, CIR and Hungarian Helsinki Committee, *Gender related asylum claims in Europe. A comparative analysis of law policies and practices focusing on women in nine EU Member States* (hereafter 'Gender related asylum claims in Europe'), May 2012.

232 *Ibid*, pp. 123-125.

233 Asylum Aid, *Unsustainable: the quality of initial decision-making in women's asylum claims*, January 2011, pp. 35-36.

234 Asylum Aid, France Terre d'Asile, CEAR, CIR and Hungarian Helsinki Committee, *Gender related asylum claims in Europe*, pp. 31-33.

235 Asylum Information Database, *Country Report United Kingdom – Regular Procedure*, accessed July 2013.

236 Asylum Information Database, *Country Report Austria – Regular Procedure*, accessed July 2013.

Interpretation

Asylum seekers rarely speak the language of the country where they claim asylum or even where they speak a language spoken by the interviewers, it is often not at a sufficient level. As a key step in determining an applicant's protection needs, it is of paramount importance that asylum seekers are able to clearly explain the reasons behind their asylum request in an interview.

It is therefore preferable that asylum seekers are able to communicate in their mother tongue during the asylum interview, or at least in a language they speak fluently, and essential that interpreters are qualified and trained in working in the context of asylum procedures.

Availability of Interpreters in Practice

	AT	*BE*	*BG*	*DE*	*FR*	*GR*	*HU*	*IE*	*IT*	*MT*	*NL*	*PL*	*SE*	*UK*
In the regular procedure	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y
In the border procedure	Y	Y	N/A	Y	Y	N	Y	Y[237]	N/A	N/A	N/A[238]	N/A	N/A	N/A[239]
In the accelerated procedure	Y	Y	Y	Y[240]	Y	N	N/A	N	N/A	Y	N/A[241]	N[242]	Y	Y

Y: Yes, N: No, N/A: Not Applicable

Most Member States included in the Asylum Information Database seem to have interpreters available in the languages spoken by the main groups of asylum seekers. However, in **Germany**, where the Federal Office stated that their pool of interpreters covers 400 languages and dialects, there have been reports of asylum seekers being interviewed in an official language of their country of origin even though it is not their native language, or cases where interpreters did not speak the same dialect as the applicant.[243]

In a number of countries (**Austria**, **Bulgaria**, **France**, **Germany**, **Hungary**, **Malta**, **Poland**), there were cases where interpretation was provided in a language the applicant did not understand well or in a language they were thought to be able to understand, even if it was not the case (e.g. Russian for Chechens).

It is worth noting as well that in **Malta**, interpreters are not available in the Dublin procedure and in **France** they are not systematically available to help applicants fill in the questionnaire/form used in the Dublin procedure, whereas the form (available in English and French) must be filled by the applicant in French. In addition, in the **UK**, where no interviews on the substance of the asylum application but interviews dealing with the question of entry may take place at the border or transit zone, interpreters are also not always available in practice. In **Ireland**, in practice, interpreters are generally accessible by phone in practice with regards to interviews at the border establishing that a person wishes to seek international protection after which leave to enter is granted.

Furthermore, even where interpreters are available, in order for the asylum seeker to feel at ease and feel they can trust the interviewer and interpreter when speaking about their experience, it is important that the interpreters behave in a neutral and impartial way and respect the applicant's confidentiality. UNHCR and ECRE have recommended that in addition to proper training, Member States should adopt a code of conduct for interpreters working in asylum procedures.[244]

In **Belgium**, the determining authority, the Commissioner General for Refugees and Stateless Persons (CGRS) published a code of conduct in the form of an "interview

237 According to S.8.b of the Refugee Act 1996 persons arriving at the border must be informed where possible in a language the person understands of the possibility to apply for a declaration and to consult a solicitor and the High Commissioner. As far as is known in practice there is generally access to an interpreter by phone.

238 Formally no specific border procedure exists. However, asylum seekers arriving in Schiphol Airport and applying for asylum are in most cases detained and their asylum application is assessed according to the short regular asylum procedure, which includes a personal interview.

239 An application can be made at the port of arrival and a screening interview may be carried out by immigration officers but the substance of the claim is not examined at the border.

240 According to the law the only accelerated procedure is the airport procedure (part of the border procedure). Certain caseloads are "accelerated or prioritised" but within the regular procedure. Acceleration consists mainly of a shorter time period for submitting the appeal. See below section 4.

241 Technically no accelerated procedure applies per se in the Netherlands. However, all cases are channelled first through the short regular procedure, where interpreters are available.

242 The vast majority of cases examined in an accelerated procedure are considered as manifestly unfounded. In such cases there is no mandatory interview, unless the asylum applicant is an unaccompanied child.

243 Asylum Information Database, *Country Report Germany – Regular Procedure*, accessed July 2013.

244 See ECRE, *Comments on the Amended Commission Proposal to recast the Asylum Procedures Directive (COM(2011)319 final)*, September 2011; UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, March 2010.

charter" in 2011, which complements a briefing note on interview techniques and a training module on intercultural communication.[245] The document is available publicly on the CGRS website in English, French and Dutch. In 2009, the CGRS had already published guidelines on deontology for translation and interpretation.[246] Codes of conduct are available in some other States as well (e.g. Bulgaria, Netherlands, Sweden, the UK) but in **Bulgaria**, it was noted that they are not used[247] and in **Sweden**, there is only a general code of conduct issued for all interpreters and last updated in 2010.[248]

Overall concerns and issues related to the quality, reliability, or behaviour of the interpreters have been raised in most of the Member States covered by the Asylum Information Database (e.g. Bulgaria, France, Germany, Hungary, Italy, Poland, Sweden, the UK).

In the **Netherlands**, even though the immigration and naturalisation Service (IND) has their own code of conduct and even though interpreters are certified and work under oath, in March 2013, the IND made public that they suspended two Uyghur interpreters suspected of being spies for the Chinese authorities. Uyghurs are a minority persecuted and discriminated in China and it seems that the interpreters may have passed information about the applicants' cases to the Chinese authorities. It is estimated that about 1000 Uyghur asylum seekers whose claim was rejected had been in contact with those interpreters. The IND launched an investigation and announced that until further notice no Uyghur would be sent back to China.[249]

In the case of *I.M. v. France* the ECtHR, when finding a violation of the right to an effective remedy under Article 13 ECHR in conjunction with Article 3 ECHR, attached great importance to the fact that the applicant had not received proper legal and linguistic assistance in the accelerated procedure. No interpretation had been available to help the applicant lodge his claim and this constituted an important obstacle to an effective remedy, especially as the supporting evidence provided during the interview had had a determining negative impact on the decision.[250] Also in the case of *M.S.S. v. Belgium and Greece*, the ECtHR quoted the shortage of interpreters as one of the "shortcomings in access to the asylum procedure and in the examination of applications for asylum".[251]

In a nutshell

Relevant EU standards in recast legislation

Article 15 of the Recast Asylum procedures Directive now requires that an interpreter is selected that could ensure "appropriate communication" and that such communication takes place in the language preferred by the applicant unless there is another language which he or she "understands" and in which they can "communicate clearly".

Article 15(4) of the recast Dublin Regulation only requires the interview to take place in a language the applicant understands or "is reasonably supposed to understand" and in which they are "able to communicate". The Regulation also only requires providing interpretation "where necessary".

245 CGRS, *Interview Charter*, January 2011.
246 CGRS, *Deontology for translations and interpretations*, October 2009.
247 Asylum Information Database, *Country Report Bulgaria – Regular Procedure*, accessed July 2013.
248 Asylum Information Database, *Country Report Sweden – Regular Procedure*, accessed July 2013.
249 Asylum Information Database, *Country Report Netherlands – Regular Procedure*, accessed July 2013.
250 ECtHR, *I.M. v. France*, Application 9152/09, Judgment of 2 February 2012, paras. 145 and 155.
251 ECtHR, *M.S.S. v. Belgium and Greece,* Application No 30696/09, Judgment of 21 January 2011, para. 301.

Interview Reports

In addition to trained, qualified interviewers and interpreters and a cultural and gender- sensitive approach to interviews, the interview report is another crucial element in order to ensure a fair and efficient procedure.

It is in the interest of all parties involved – the asylum seeker, the determining authorities but also the appeal bodies - to have a transcript of the interview that is as detailed and as accurate as possible. This further contributes to the frontloading of the asylum procedure which enhances the cost and time-efficiency of asylum procedures, as it helps determining authorities to make better first instance decisions which may also limit the number of appeals.

In most countries researched in the framework of the Asylum Information Database, interview transcripts are almost verbatim and often translated to the asylum seeker before they sign it for approval. However, in **Bulgaria**, in practice, most interview records are not read or translated for the applicants when they are asked to sign.[252] In addition, problems with the quality of the reports have been highlighted in **Hungary**[253] and in the **Netherlands** in the short procedure.[254]

In most cases, the applicant is allowed to make comments either immediately or soon after the interview. Although it is important to allow asylum seekers to make clarifications or corrections to the interview transcript, the end of the interview may not be the best time to do so, in particular where there was a lengthy interview or where the interview itself has been distressing for applicants for instance because they have had to recount traumatising events. A few countries included in the Asylum Information Database provide good practice in this regard as they allow for applicants to submit comments on the transcript a few days or weeks after the interview and before a decision is taken at first instance. This is the case in the Netherlands, Sweden and the UK. In the **Netherlands**, asylum seekers and their lawyers may submit corrections and additions the day after the interview in the short regular procedure.[255]

In the **UK**, the time limit for additional submission is 5 working days[256] and in **Sweden**, applicants and their legal adviser may be granted one to two weeks for comments and additional submissions.[257]

In **Austria**, asylum seekers may send a written statement to the Federal Asylum Agency highlighting mistakes in the transcript, as soon as possible[258]; while in Belgium, applicants are allowed to send additional remarks or supporting documents to the Commissioner General for Refugees and Stateless Persons that will be taken into consideration in the decision.[259]

On the contrary, in **France**, applicants only receive the interview report together with a negative decision and are not afforded a possibility to comment beforehand.[260] Similarly, in **Malta**, a copy of the interview notes are usually attached to a negative decision, but in some instances, they are not provided and asylum seekers have to make a specific request to access the information in preparation of an appeal. Applicants can only make comments on the application form and not on the interview notes themselves.[261]

In **Ireland** the applicant is not given a copy of the interview transcript until they receive a decision on their application. This means that an applicant who wishes to make submissions on matters that arose during the interview would have to do so by memory alone.[262]

252 Asylum Information Database, *Country Report Bulgaria – Regular Procedure*, accessed July 2013.
253 Asylum Information Database, *Country Report Hungary – Regular Procedure*, accessed July 2013.
254 Asylum Information Database, *Country Report Netherlands – Regular Procedure*, accessed July 2013.
255 *Ibid*.
256 Asylum Information Database, *Country Report UK – Regular Procedure*, accessed July 2013.
257 Asylum Information Database, *Country Report Sweden – Regular Procedure*, accessed July 2013.
258 Asylum Information Database, *Country Report Austria – Regular Procedure,* accessed July 2013.
259 Asylum Information Database, *Country Report Belgium – Regular Procedure*, accessed July 2013.
260 Asylum Information Database, *Country Report France – Regular Procedure*, accessed July 2013.
261 Asylum Information Database, *Country Report Malta – Regular Procedure*, accessed July 2013.
262 Asylum Information Database, *Country Report Ireland – Regular Procedure*, accessed July 2013.

In the case of *M.M. v Minister for Justice, Equality and Law Reform, Ireland*, the CJEU found that by its very wording, Article 41(2) of the EU Charter of Fundamental Rights, guaranteeing the right of every person to be heard before any individual measure which would affect him or her adversely is taken, the right to have access to his or her file and the obligation to the administration to give reasons for its decisions, is of general application. It reaffirmed the broad scope of the right to be heard in the EU legal order and considered that it guarantees every person the "opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely".[263] It also requires the authorities to "pay due attention to the observations thus submitted by the person concerned".[264]

For this right to be respected in practice, the applicant must be given an effective opportunity to make further submissions after the interview, which means that a reasonable amount of time is given to the individual. The right to be heard is a corollary to the rights of the defence according to the jurisprudence of the CJEU. In *Mediocurso v. Commission*, the Court found that the rights of the defence were breached when the applicants were given the documents on the very same day that they needed to comment on them. It found that they were not given an effective opportunity to put forward their views on documents which directly concerned them.[265]

In a nutshell

Relevant EU standards in recast legislation

Article 17 of the recast Asylum Procedures Directive contains detailed provisions on the 'report and recording of personal interview'. Member States must provide either a 'thorough and factual report' or a transcript of the interview. Member States must provide the applicant with an opportunity to make comments or clarifications on the report, either after the interview or within a limited time before the first instance decision. The only exception to this rule is in case an audio or video recording is available together with a transcript.

The assistance of an interpreter must in principle be provided to ensure that the asylum seeker understands the content of the report and for access to the interview report by the applicant and their legal adviser prior to a first instance decision. However, a derogation is possible in the case of accelerated or border procedures, where States may grant access to the interview report only at the same time as the decision is made.

Article 5(6) of the recast Dublin Regulation only requires a "written summary" including the "main information" which can be take the form of a report or a standard form. In addition, the Regulation provides that the asylum seeker and their legal adviser should have "timely access" to this summary.

263 CJEU, C-277/1, *M.M. v Minister for Justice, Equality and Law Reform, Ireland*, Judgment of 22 November 2012, para. 87.
264 *Ibid*, para. 88.
265 CJEU, C-462/98 *P, Mediocurso v. Commission*, Judgment of 21 September 2000, para. 42.

3.3 Legal Assistance and Representation

As asylum applications in Europe are increasingly being processed through sophisticated and complex legal procedures, effective access to quality legal assistance and representation is an essential safeguard to ensure that those who are in need of international protection are recognised as such. Asylum seekers find themselves in a disadvantaged position vis-à-vis the authorities processing their asylum application, as they face important language barriers and lack knowledge of the national and EU legal frameworks within which asylum procedures operate. As discussed above, the recast Asylum Procedures Directive increases the procedural safeguards for asylum seekers during the first instance of the asylum procedure and considerably strengthens the right to an effective remedy. This is further complemented and reinforced by general principles of EU law as developed in the jurisprudence of the CJEU,[266] standards developed in the jurisprudence of the ECtHR and relevant provisions of the EU Charter of Fundamental Rights, such as Article 1 on human dignity, Article 41 on the right to good administration and Article 47 on the right to an effective remedy. However, all this is of little practical value to the protection of the fundamental rights of asylum seekers in case they do not have access in practice to a legal practitioner who is sufficiently qualified to make effective use of those tools and see to it that those safeguards are enforced and respected in practice. Moreover, EU standards laid down in EU asylum law must be read together with a growing body of jurisprudence of the CJEU on general principles of EU law often in cases that are not related to asylum as well as the vast jurisprudence of the ECtHR to fully use their potential in enhancing the rights of asylum seekers. This not only adds another layer of complexity to the task of legal practitioner in asylum cases, in absence of quality training of legal practitioners the full potential of new EU asylum standards risk to remain unexplored.

Access to free legal assistance and representation is increasingly compromised in the 14 EU Member States covered in the Asylum Information Database, to a greater or lesser extent. Decreasing budgets for free legal assistance and practical and procedural obstacles to access legal assistance directly related to the use of special procedures and the location where asylum seekers are being accommodated or detained, are among the most important reasons for such a trend.

Securing such access in the future will no doubt become more challenging, in particular as the economic and financial crisis in Europe continues.

Access to Free Legal Assistance in Practice in the Regular Procedure

	AT	BE	BG	DE	FR	GR	HU	IE	IT	MT	NL	PL	SE	UK
First instance	NW	Y	NW	N	Y[267]	NW	Y[268]	NW[269]	NW	N	Y	NW	Y	NW
Appeal	Y	Y	Y	NW	Y	NW	Y	Y	NW	Y	Y	NW	Y	NW

NW: Not always/With difficulty, Y: Yes, N: No

This table provides an overview of the general assessment by the national NGO experts of whether asylum seekers have access to legal assistance free of charge in their respective countries, both at the first instance and at the appeal stage of the regular asylum procedure. For the purpose of the report, regular procedures are distinguished from special procedures, the latter including border, admissibility, accelerated and Dublin procedures. It should be noted that, according to the law, in all 14 EU Member States asylum seekers are entitled to access legal assistance and representation at their own expense at all stages of the asylum procedure. However, in the vast majority of cases asylum seekers do not have sufficient resources of their own and cannot afford to pay for legal counsel.

Access to legal assistance and representation for asylum seekers varies considerably in the 14 EU Member States concerned, both with regard to the stage of the procedure, in which they can access free legal assistance and the practical obstacles they face in effectively accessing free legal assistance where it should be available according to the law.

266 One of the key general principles of EU law developed in the CJEU jurisprudence that is relevant in this context is the principle of effectiveness, which requires that individuals have effective access to their rights under EU law. It is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, but this is provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). CJEU, Case C-13/01, *Salafero Drl v. Prefetto di Genova*, Judgment of 11 September 2003, para. 49. It is furthermore specified that "*while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection*", see par. 50.

267 Legal assistance during the first instance does not include representation during the personal interview.

268 In Hungary asylum seekers are entitled to free legal aid but this does not include legal representation during public administrative procedures, which means that legal aid does not include representation during the asylum interview conducted by the Office of Immigration and Nationality, the body responsible for taking a first instance decision on the asylum application.

269 Strictly speaking a small fee of 10 € is to be paid for legal advice and 40 € for legal representation but this is invariably waived by the Refugee Legal Service which is part of the state-funded Legal Aid Board.

Access to Free Legal Assistance at the First Instance of the Regular Asylum Procedure

Effective access to quality free legal assistance and representation early on in the asylum process is considered an important aspect of the frontloading of asylum procedures as it contributes to a better understanding of the applicant's case and contributes to well-informed first instance decision-making. The general assessment in **Belgium**, **France**, **Sweden**, **Hungary** and the **Netherlands** is that asylum seekers have access to free legal assistance during the first instance of the regular procedure. However, such assessment does not mean that asylum seekers do not face any challenges at all in accessing free legal assistance at the first instance of the regular asylum procedure.

For example in **France** the modalities and the degree of legal assistance that is provided to asylum seekers during first instance procedures are dependent in practice on the type of reception conditions they enjoy. Where asylum seekers are accommodated in a reception centre for asylum seekers (CADA), asylum seekers receive support from the reception centre staff with regard to submitting their application form in writing to the OFPRA (the determining authorities), which must be done in French and within a period of 21 calendar days after a temporary residence permit has been granted to the asylum seeker.[270] Furthermore, CADA teams of legal advisers may assist the applicant in the preparation of the personal interview or the hearing at the National Court of Asylum (CNDA). Those asylum seekers who cannot be accommodated in the CADA-centres (in 2012 there was a total capacity of 21.410 places, whereas 55,255 asylum applications were registered) can receive legal assistance through the orientation platforms.[271] Legal assistance provided by the orientation platforms consists mainly of support to asylum seekers with regard to administrative requirements such as renewal of the temporary residence permit or the application for legal aid at the appeal stage. These asylum seekers may also be assisted with submitting their asylum application but in theory preparation for the personal interview at the OFPRA is excluded. Legal support for the preparation of appeals to the CNDA is not funded under the framework that is in place for the orientation platforms.[272]

In **Belgium**, the **Netherlands** and **Sweden** good practice is identified with regard to free legal assistance at the first instance of the regular procedure. In the **Netherlands**, all asylum seekers are entitled to free legal assistance from day one during the regular procedure. Such assistance is provided by asylum lawyers appointed free of charge by the Legal Aid Board (Raad voor de Rechtsbijstand), who are physically present in the reception centres where asylum seekers are accommodated or by representatives of the Dutch Council for Refugees who are present in most reception centres in the Netherlands.[274] In **Belgium**, free legal assistance by a lawyer is guaranteed under the Aliens Act to all asylum seekers, at every stage of the asylum procedure (first instance, appeal, and cassation) and in all types of procedures. In Sweden, asylum seekers are also provided free legal assistance at all stages of the regular asylum procedure, except in cases that are considered as manifestly unfounded where normally no free legal assistance is provided at all.[275] Recently the "Kortare väntan"-project has been implemented resulting in good practice whereby public counsel is appointed at a very early stage of the procedure, which in most cases allows the lawyers to meet their clients before the asylum interview takes place. Lawyers also attend the personal interview and can make submissions afterwards with regard to the personal interview and any additional information relating to the substance of the case.[276]

In **Austria**, **Bulgaria**, **Germany**, **Greece**, **Italy**, **Ireland**, **Malta**, **Poland** and the **United Kingdom**, there is either no free legal assistance required under the law for asylum seekers at the first instance or it is considered that asylum seekers do not always have access to free legal assistance or experience difficulties in accessing free legal assistance at the first instance in practice, even where this should be available according to the law. Where free legal assistance at first instance is not required under national law, in practice the only way for asylum seekers to receive free legal assistance is through NGOs or committed lawyers willing to take cases on a pro bono basis. Where legal assistance at the first instance is not part of the general legal aid system, the provision of free legal assistance through NGOs is often predominantly depending on funding under the European Refugee Fund, which is often not sufficient to cover the need for legal assistance and is at times interrupted. This is for instance reported in Bulgaria, Poland and Hungary.

270 Asylum Information Database, *Country Report France – Registration of the Asylum Procedure*, accessed July 2013.

271 With the exception of those accommodated in some emergency reception structures who can benefit from the assistance provided there.

272 Asylum Information Database, *Country report France – Regular Procedure*, accessed July 2013.

273 However, it should be noted that lawyers are only financially remunerated for 8 hours during the first instance procedure, which has been criticised by the Dutch Council for Refugees as being insufficient. Asylum Information Database, *Country report the Netherlands – Regular Procedure*, accessed July 2013.

274 The only exception applies to the procedure before the Aliens Office, which at the time of writing is still in charge of determining the Member State responsible for the examination of the asylum application under the Dublin Regulation, where assistance by a lawyer during the interview is not allowed; although legal advice otherwise provided with regard to the Dublin procedure is covered by free legal assistance. Where free legal assistance is guaranteed in the Aliens Act, this does not necessarily imply that a lawyer, let alone a specialized one, will be present at the interview. See Asylum Information Database, *Country report Belgium – Regular Procedure* and *Country report Belgium – Dublin*, accessed July 2013.

275 Also in Dublin Procedures asylum seekers have no access to legal assistance. See below.

276 Asylum Information Database, *Country report Sweden – Regular Procedure*, accessed July 2013.

In **Ireland** the Refugee Legal Service, part of the Legal Aid Board (which provides civil legal aid in Ireland) is responsible for providing legal advice and representation at all stages of the process. At first instance, an applicant is given legal information about the process by a caseworker under the supervision of a solicitor. Unless the applicant is a minor or a particularly vulnerable person (eg. a victim of trafficking), a legal advice appointment with a solicitor, where advice is offered on the particular facts of the case, is not normally offered until appeal stage. Full legal advice and representation is provided at appeal stage by in-house solicitors and through a panel of private solicitors and barristers maintained by the Refugee Legal Service.[277]

In **Bulgaria** it is reported that, while the State Agency for Refugees (SAR) included in all annual programmes implementing ERF resources for the funding of legal aid, this proved not to be systematic. This means that at times there were serious delays in renewing the ERF-funding which resulted in long periods up to 18 months during which no funding was available for legal assistance. However, where funding for legal assistance at the first instance is available it covers legal advice and representation during the personal interview, including in the context of a subsequent application, as well as assistance to lodge an appeal in case of a negative decision.[278] A recent positive development is the amendment of the Article 22 § 8 of the law on Legal Aid which introduces mandatory legal aid for asylum seekers covered by State funding.[279] Asylum seekers will have the right to ask for an appointment of a legal aid lawyer from the moment of the registration of their asylum application, if such aid was not already provided under the ERF by the SAR. According to the Bulgarian Helsinki Committee, once the system is in place, it would fill the present gap in the provision of the legal aid during status determination procedures.

In **Poland**, free legal assistance to asylum seekers and beneficiaries of international protection during the administrative procedure is only provided through ERF-funded projects run by NGOs, whereby NGOs are required to provide 15% co-financing. The latter requirement is considered to be a major obstacle for NGOs to be granted projects, as they are often in practice unable to provide such co-funding. Moreover, the delays in launching calls for proposals created funding gaps for the NGOs engaged in legal assistance activities, while the delays in payment of already granted projects as well as the recent reduction of already granted ERF projects additionally impacted on the ability of Polish NGOs to provide legal assistance in practice, even resulting in redundancies of lawyers working in some of the NGOs.[280] Consequently, NGOs are able to provide legal assistance to only a small proportion of asylum seekers arriving in Poland due to limited resources. Moreover, even in those cases where they provide legal assistance, this is subject to limitations resulting from insufficient resources. For instance, while they are allowed to represent asylum seekers during their personal interview during the administrative first instance procedure, NGOs simply do not have the capacity to do so in all cases where they provide legal assistance to asylum seekers.

Similar challenges exist in **Hungary** where legal assistance was exclusively provided by the Hungarian Helsinki Committee between 2004 and 2013 through ERF-funding. While the general legal aid scheme run by the Legal Aid Service has also been available to them, asylum seekers hardly made use of the legal aid system because they were not aware of its existence, it does not cover interpretation costs and most Hungarian lawyers in towns where reception and detention facilities are located do not speak foreign languages. As of January 2013, the implementation of the ERF-project has been awarded to the Legal Aid Service operating under the responsibility of the Ministry of Justice and Public Administration. Whereas this ERF-project now covers the so far lacking translation and legal representation costs at the first instance of the asylum procedure, and legal aid lawyers are available in principle in all detention and reception facilities, in practice very few asylum seekers have received assistance from the legal aid providers under the project.[281]

Also in **Germany**, legal assistance is not systematically available to asylum seekers at the first instance (and problematic at the appeal stage). Some NGOs and welfare organisations provide basic legal advice, including in some of the initial reception centres which are usually located on the same premises as the branch office of the Federal Office for Migration and Refugees. However, NGOs are not present in all initial reception centres and therefore not all asylum seekers are provided with such basic legal advice before the first interview takes place. Moreover, NGOs are not allowed to represent asylum seekers, including during the first interview conducted by the Federal Office for Migration and Refugees. During the first instance interview only lawyers may assist asylum seekers but as this is not covered by the legal aid scheme, it is at the asylum seeker's expense. Once asylum seekers have left the initial reception centre, access to legal advice varies

277 Asylum Information Database, *Country Report Ireland – Regular procedure*, accessed July 2013.
278 Asylum Information Database, *Country report Bulgaria – Regular Procedure*, accessed July 2013.
279 State Gazette №28/13.
280 Asylum Information Database, *Country report Poland – Regular Procedure*, accessed July 2013.
281 Asylum Information Database, *Country report Hungary – Regular Procedure*, accessed July 2013.

according to the place of residence which is imposed upon them on the basis of the distribution key between the *Länder* (Federal States), and which, as a rule, they are not allowed to leave without permission.

In **Austria**, asylum seekers are offered free legal advice at the branch offices of the Federal Asylum Agency (FAA), responsible for taking a decision at the first instance. However, such legal advice is in six out of seven FAA-branches provided by Verein Menschenrechte Österreich, which only provides limited services and, on the basis of a strict interpretation of the contract with the Ministry of Interior, refuses to act as a legal representative of asylum seekers during their interview. Moreover, these legal advisers are required to inform asylum seekers about assistance with regard to voluntary return during the asylum procedure, which undermines their confidence in the legal advice offered. NGOs in Austria question the role of this organisation in view of its close links with the Ministry of Interior and in particular whether the legal advice provided always serves the interests of the asylum seeker. It is reported that asylum seekers generally lack trust in legal advisers working with this organisation because of the fact that they only pass on information about the asylum procedure without proactively representing them and because their offices are located in the branch offices of the FAA.[282]

Access to Free Legal Assistance at the Appeal Stage of the Regular Asylum Procedure

In accordance with the 2005 Asylum Procedures Directive (and the recast Asylum Procedures Directive), access to free legal assistance at the appeal stage for asylum seekers is foreseen in the legislation in all 14 EU Member States covered in the Asylum Information Database. However, this does not mean that in practice it is effectively guaranteed in those 14 EU Member States.

In practice, asylum seekers face a number of obstacles accessing free legal assistance at the appeal stage in the 14 countries, which are often specific to the national context and legal framework of those countries. However, low remuneration under the legal aid scheme in this field of law is frequently cited as a disincentive for lawyers to fully engage in asylum cases, which may have an impact on the quality of legal assistance. This has been acknowledged, for instance, by the Ministry of Justice in **France** that has announced to double the units value, the basis for calculating the remuneration for lawyers under the legal aid system, for appeals to the CNDA in 2013. However, this is still deemed insufficient by some stakeholders in France, in particular as this would still not be sufficient to cover interpretation costs during the preparation of the case. As a result, some lawyers refuse to work under the legal aid scheme and in practice lawyers are in many cases appointed by the legal aid office of the CNDA, often about three weeks before the hearing. In many cases they only meet with the asylum seekers at a very late stage, as these lawyers are mostly based in Paris, whereas asylum seekers are accommodated across the country.[283] Low remuneration under the national legal aid scheme is also mentioned as problematic in **Malta**, the **Netherlands**, **Belgium**,[284] and **Sweden**.

Also in **Austria**, where free legal aid at the appeal stage is provided by two organisations contracted by the Federal Chancellery, the compensation per case has been criticised by NGOs as insufficient to ensure quality legal assistance. Moreover, this compensation is reduced by 25% as soon as the organisation has provided legal advice in more than 4,000 cases and by 30% as of 7,000 cases, without taking into account the additional time needed in more complex cases such as unaccompanied children. Costs for interpreters, travel and staff remaining equal regardless of the number of cases, this entails the risk of these organisations refusing to accept cases once they have reached the indicated number of cases.[285] Commissioner for Human Rights Nils Muiznieks also expressed concern and called for further efforts to ensure that free, independent and confidential legal counselling and representation is ensured during the entire asylum procedure.[286]

An important obstacle for asylum seekers to access free legal assistance at the appeal stage is merits-testing, whereby free legal assistance is made dependent on the chance of the appeal being successful. This is the case in the **United Kingdom** (except in Scotland) where lawyers are obliged to assess the merits of the case before granting legal aid for an appeal. In practice, the fee payable at the pre-appeal stages of a claim is generally too low to warrant a thorough examination of the case. The system is therefore operating to "discourage lawyers from granting legal aid at appeal".[287] Also in **Germany** the granting of legal aid at the appeal stage is dependent on a merits test. This may take a considerable amount of time which means that lawyers often have to accept cases before knowing whether legal aid will be granted or not. Moreover, as the merits

282 Asylum Information Database, *Country report Austria – Regular Procedure*, accessed July 2013.

283 Asylum Information Database, *Country report France – Regular Procedure*, accessed July 2013.

284 Also the fact that lawyers are only paid once a year for all their cases they have closed during the previous year is cited as problematic. This is because cases can only be closed once all procedures have been finalised, which can be long after the actual intervention of the lawyer thus causing serious delays in receiving their remuneration under the legal aid system. Asylum Information Database, *Country report Belgium – Regular Procedure*, accessed July 2013.

285 Asylum Information Database, *Country report Austria – Regular Procedure,* accessed July 2013.

286 Commissioner for Human Rights of the Council of Europe, *Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe following his visit to Austria from 4 to 6 June 2012 (2012)*, Strasbourg, 11 September 2012, p 15.

287 Asylum Information Database, *Country report United Kingdom – Regular Procedure*, accessed July 2013.

test is carried out by the same judge who is responsible for deciding on the appeal, some lawyers advise against applying for legal aid to avoid that a refusal of legal aid on the basis of the merits test may negatively impact the examination of the appeal.[288]

In **Belgium** merits testing is possible under the legislation but hardly applied in practice.[289] In **France**, according to the law, legal aid at the appeal stage can be granted in case the appeal does not appear to be manifestly inadmissible or unfounded. In 2012, it has been granted in 79% of the requests made to the CNDA.[290] Good practice exists also in **Malta** and **Austria**, where the legislation does not provide for merits testing and the **Netherlands** where no merits test applies. However, in the **Netherlands** it is most likely that the principle of 'no cure less fee' will be applied with regard to legal assistance in the case of subsequent asylum applications. This would mean that lawyers would receive lower remuneration fees in case of a negative decision of the regional court or the Council of State.[291]

A particularly worrying practice is reported in **Italy** with regard to means testing as a condition for granting free legal aid. In Italy, the Rome Bar Council systematically requires an official certificate from the consular authorities of the country of origin of the asylum seeker relating to their income. This is requested in order to comply with the obligation under Italian law to prove that the asylum seeker's income is below a minimum amount set in law. Such practice ignores the possibility provided by law to comply with this obligation by way of self-declaration where the person is unable to obtain such a certificate. More importantly it results in many asylum seekers being effectively denied access to free legal aid, in particular where they fear persecution by State agents. In such case, contacting the consular authorities of the country of origin could be interpreted as re-availing themselves of the protection of their own country which may be a reason for rejecting the asylum application.[292]

Obstacles to Accessing Free Legal Assistance in Accelerated, Border and Dublin Procedures

Access to free legal assistance in practice is often further compromised in the case of accelerated, border and Dublin procedures, in particular where those procedures apply to asylum seekers in detention. This is mainly due to reduced time limits applicable to first instance decision-making and lodging appeals, and reduced accessibility and communication between asylum seekers, and those providing legal assistance and representation in cases of procedures conducted at the border or while the asylum seeker is in detention. To a greater or lesser extent this is a general finding in those countries covered by the Asylum Information Database where such procedures apply. The challenges that lawyers and NGOs face in providing quality legal assistance in such procedures and that asylum seekers face in accessing such legal assistance are illustrated in this section, using the examples of the situation in **France**, the **United Kingdom** and **Belgium**.

Access to (free) legal assistance is problematic in the context of the **border procedure** in **France** as there are generally no legal advisers or NGOs present in the French waiting areas, except occasionally at Roissy Charles de Gaulle Airport. First instance interviews are conducted by the border department of the OFPRA without a legal adviser being present. There are many practical obstacles to lodging an appeal at the border and in particular the requirement that appeals must be submitted in French within 48 hours after the notification of the negative decision means that access to legal assistance is crucial. The only way for asylum seekers to obtain legal assistance while being held in the waiting areas at the border is by telephone, which are only accessible to those who have the means to buy a phone card, while there is no information as to how to use them. Moreover, sometimes the negative decision on the asylum application is notified in the middle of the night, which triggers the start of the 48 hour time limit to lodge the appeal. As a result, de facto the time to lodge the appeal in such cases is even shorter, as valuable time is lost by the time asylum seekers are able to contact a lawyer under the legal aid scheme. Legal assistance by a lawyer or appointed by the Administrative Court is available under the law to challenge the decision to refuse entry to the territory which is based on asylum.[293]

In the **United Kingdom**, access to quality legal assistance during **accelerated procedures** is compromised. This is particularly the case in the detained fast-track procedure, which applies to any case that after a screening interview is considered to be capable of being decided quickly and that is entirely conducted in detention. In this procedure, a decision must be taken within three days of detention and appeals must be made within two working days of receiving the decision. Publicly funded legal advice in making their claim can only be obtained from representatives of solicitors firms with a contract to do work in the detained fast track procedure and who are available. This has created a situation whereby asylum

288 Asylum Information Database, *Country report Germany – Regular Procedure*, accessed July 2013.
289 Asylum Information Database, *Country report Belgium – Regular Procedure*, accessed July 2013.
290 Asylum Information Database, *Country report France – Regular Procedure*, accessed July 2013.
291 Asylum Information Database, *Country report the Netherlands – Subsequent applications*, accessed July 2013.
292 Asylum Information Database, *Country report Italy – Regular Procedure*, accessed July 2013.
293 Asylum Information Database, *Country report France – Border Procedure*, accessed July 2013.

seekers are often dissatisfied with the quality of legal representation and lawyers who work in this procedure complain that it is very difficult to do their work effectively. They may have no opportunity to meet their client before the asylum interview; after refusal only one day is allowed for preparing the appeal, during which the representative must advise on the merits of the appeal and draft it.[294] Moreover, in view of the high refusal rate in detained fast-track appeals, lawyers are likely to advise that chances of success are less than 50%, meaning that public funding for representation at an appeal will be refused. Research has shown that 63% of asylum seekers were unrepresented at their appeal in the detained fast track procedure.[295]

In **Belgium**, asylum seekers are entitled to free legal assistance during border procedures but this is mostly provided by junior trainee lawyers, who are generally considered to lack the necessary experience to assist asylum seekers properly in these very complicated and technical procedures. Moreover, the quality of the legal assistance provided is also undermined by fact that communication between lawyers and asylum seekers in detention at the border is often difficult and that lawyers are usually not present during the personal interview on their asylum application in such cases. It has also been noted that lawyers in such cases often discourage lodging appeals against a negative first instance decision without providing reasons.[296] Also the assignment of a lawyer in the case of subsequent asylum applications has at times been problematic.

In addition, in relation to **Dublin procedures**, in practice, access to legal assistance is often not guaranteed as is the case in **Greece**, **Bulgaria** (only where provided through and ERF-project), **Germany**, **Poland** (only through ERF-projects); **Ireland** (legal information as opposed to legal advice), **Sweden** and **Italy**. In **Sweden**, the Migration Court of Appeal decided in 2008 that there are no legal grounds for appointing a legal counsel in Dublin cases. As a result, in practice, asylum seekers must lodge appeals against Dublin decisions themselves, which consequently means that in many cases no appeal is lodged at all.[297]

Access to Free and Independent Legal Assistance in Austerity Europe

As mentioned above, effective access to legal assistance from the start of the procedure is essential to safeguard asylum seekers' fundamental rights in asylum procedures. Also the ECtHR has on various occasions acknowledged the crucial role of legal assistance in ensuring compliance with the principle of *non refoulement*.[298] Quality legal assistance also contributes to improved quality of decision-making and where it is available at the first instance to the frontloading of asylum procedures.Yet the evolution in the 14 countries covered by the Asylum Information Database seems to be towards less accessibility of legal assistance in asylum procedures, resulting from a range of practical, legal and institutional obstacles.

This results in a paradox whereby effective access to quality legal assistance is least available where it is most needed, such as in accelerated procedures, at the border or in detention.

Access to quality legal assistance is increasingly threatened by budget restrictions as a result of austerity measures throughout Europe, including the countries covered by the Asylum Information Database. This is a particular concern in the **United Kingdom** where the number of representatives offering publicly funded advice and the amount payable per case in England and Wales had already been reduced in October 2011. In 2011/2012 about €14 million less was spent on legal aid for asylum cases despite an increase in asylum claims. Moreover, a new Act on legal aid entered into force in April 2013 abolishing legal aid in most immigration cases, creating further shortage of good quality publicly funded advice and representation for asylum seekers after the closure of two major non-governmental organisations, offering immigration and asylum advice in 2010 and 2011.[299] It is already evident that drastic cuts to legal aid reduce the number of high-quality legal representatives available to provide assistance to asylum seekers and refugees.

Budget cuts affecting the provision of quality free legal assistance are also being discussed or proposed in other countries. In **Belgium** for instance, the government recently proposed to introduce a fee to be paid by asylum seekers to access State-funded legal assistance, which is strongly opposed by refugee organisations in Belgium for creating an insurmountable hurdle to access to justice for one of the most vulnerable groups in society.[300] It should be noted that in **Ireland** asylum seekers have to pay a small fee of €10 for legal advice and €40 for legal representation, whereas adults accommodated in Direct Provision receive a weekly allowance of about € 19 and asylum seekers are not entitled to work during the asylum procedure. However, it should be noted that so far such fees are invariably waived.[301]

294 Asylum Information Database, *Country report United Kingdom – Accelerated Procedures*, accessed July 2013.
295 Tamsin Alger and Jerome Phelps, *Fast Track to Despair, Detention Action,* 2011.
296 Asylum Information Database, *Country report Belgium – Border Procedure,* accessed July 2013.
297 Asylum Information Database, *Country report Sweden – Dublin*, accessed July 2013.
298 See for instance ECtHR, *I.M. v. France*, *Hirsi Jamaa and Others v. Italy*.
299 Asylum Information Database, *Country report United Kingdom – Regular Procedure,* accessed July 2013.
300 See Vluchtelingenwerk Vlaanderen, *Actie voor het behoud van de juridische bijstand* (*Action to save legal assistance*), 13 June 2013.
301 Asylum Information Database, *Country report Ireland – Regular Procedure,* accessed July 2013.

In **Greece**, NGOs providing legal assistance to asylum seekers are severely hit by the financial crisis and austerity measures and are struggling to survive. Recently concerns have been raised that the transfer of competences to manage European funding to the Ministry of Civil Protection and Public Order may further increase the allocation of EU money to border control and return activities, rather than supporting measures to improve the asylum system, including the provision of quality legal assistance.[302]

As mentioned in Chapter II, the ECtHR has highlighted the importance of effective access to legal assistance in order to ensure access to an effective remedy in the context of asylum procedures. In *M.S.S v. Belgium and Greece*, the Court referred to the "lack of legal aid effectively depriving the asylum seekers of legal counsel" as one of the shortcomings in access to the asylum procedure and in the examination of applications for asylum in Greece.[303]

Establishing and maintaining quality legal assistance at all stages of the asylum procedure is one of the key challenges for the CEAS in the coming years if Member States are serious about building a system based on high standards of protection. Innovative cost-effective ways will have to be found without undermining asylum seekers' access to justice. The policy dialogues set up in the context of the future Asylum and Migration Fund with each Member State provide an opportunity to prioritise access to free legal assistance for asylum seekers.

In a nutshell

Relevant EU standards in recast legislation

According to Article 20 **recast Asylum Procedures Directive**, Member States must provide free legal assistance and representation for asylum seekers at their request in appeal procedures and may provide such assistance in first instance procedures. In the latter case asylum seekers must be provided on request with "legal and procedural information free of charge" in light of the asylum seeker's particular circumstances (Article 19). Such information may be provided by NGOs or by professionals from government authorities or from specialised services of the State (Article 21(1), whereas Member States may also allow non-governmental organisations to provide legal assistance and or representation to asylum seekers in all procedures at the first instance and in appeal procedures in accordance with national law (Article 22(2)). Free legal assistance and representation may not be granted where the asylum seeker's appeal is considered by a court or other authority to have no tangible prospect of success. However, where such decision is not taken by a court or tribunal, asylum seekers must have an effective remedy against such decision before a court or tribunal. The recast Asylum Procedures Directive also requires Member States to lay down time limits for the adoption of a decision at first instance in accelerated procedures or border procedures that are reasonable (Article 31(9)).

Article 27 of the **recast Dublin Regulation** requires Member States to ensure that the person concerned has access to legal assistance and where necessary linguistic assistance and provides that legal assistance in the context of the Dublin procedure must at least include the preparation of procedural documents and representation before a court or tribunal. Furthermore, the relevant provisions in the recast Asylum Procedures Directive, including the obligation to provide legal and procedural information free of charge at first instance and the possibility to do so through NGOs, also apply to Dublin procedures (recital 54 recast Asylum Procedures Directive).

The right of detained asylum seekers to access free legal assistance and representation in case of judicial review of the detention order is explicitly guaranteed in Article 9(6) **recast Reception Conditions Directive**. No merits test can apply in such cases and legal assistance and representation must be provided by suitably qualified persons as permitted under national law whose interests do not (potentially) conflict with those of the applicant.

302 See ECRE, *Letter to Commissioner Malmström regarding transfer of competences in Greece*, 26 February 2013.

303 ECtHR, *M.S.S. v. Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011, para. 301.

3.4 Access to an Effective Remedy

The right to an effective remedy is an essential safeguard to ensure effective protection against *refoulement* and has since long been affirmed in the jurisprudence of the ECtHR in its case-law relating to Article 3 and 13 ECHR and is also guaranteed under Article 47 of the EU Charter of Fundamental Rights and general principles of EU law.

The right to an effective remedy in asylum procedures is now more strongly enshrined in Article 46 recast Asylum Procedures Directive, as discussed in Chapter II of this report. Assessing a person's well-founded fear of persecution or risk of serious harm upon return to their country of origin or habitual residence is a complex and challenging task. The outcome of such assessment has important consequences for the individual and, in light of the potentially irreparable harm that may result from a negative decision, careful scrutiny by an independent appeal body of such a decision is a key procedural safeguard to ensure that the principle of *non refoulement* is respected in practice.

Despite the clear standards set out in the jurisprudence of the ECtHR and the CJEU, with regard to the minimum requirements for an effective remedy in procedures where the principle of *non refoulement* is at stake, access to an effective remedy in practice remains problematic in a number of the 14 EU Member States covered by the Asylum Information Database. This section focuses in particular on the effectiveness of remedies for asylum seekers in the context of regular procedures, as well as in the framework of special procedures (accelerated, admissibility, border and Dublin procedures), in light of two core aspects: the time limits within which appeals must be lodged and their suspensive effect.

Access to an Effective Remedy in a Regular Asylum Procedure

The table below provides a general overview of three characteristics (judicial or administrative nature of appeals, time limits for lodging the appeal and suspensive effect) of the first appeal against a negative first instance decision of an asylum application that is at the applicant's disposal during **the regular procedure** in relation to the 14 countries covered by the Asylum Information Database. While the characteristics of a further appeal before a Higher Court is an important aspect in the jurisprudence of the ECtHR and the CJEU to assess the effectiveness of the remedy in light of a State's administrative and judicial system as a whole,[304] the main focus of this section is on the first appeal as this is the most relevant level in asylum cases.

First appeal in regular asylum procedure

	AT	BE	BG	DE	FR	GR	HU	IE	IT	MT	NL	PL	SE	UK
Judicial or administrative appeal	J	J	J	J	J	A	J	QJ	J	A	J	A	J	J
Time limit for lodging appeal	2 weeks	30 calendar days	14 days	14 calendar days	1 month	30 calendar days	8 days	15 working days	30 calendar days[305]	2 weeks	1 week in short regular procedure[306]	14 calendar days	3 weeks	10 working days
Suspensive effect	Y[307]	Y	Y	Y	Y	Y	Y	Y	YW[308]	Y	Y[309]	Y	Y[310]	Y

A: Administrative, J: Judicial, QJ: Quasi-Judicial, Y: Yes, N: No, YW: Yes with exceptions

Time limits for lodging an appeal against a first instance negative decision taken in a regular procedure range from 8 to 30 days after notification of the decision. Whether the respective time limits are sufficient for asylum seekers and their lawyers/legal advisers to properly prepare the appeal depends, *inter alia*, on the availability of quality legal assistance in practice, which was discussed in the previous section. However, in light of the growing complexity of asylum law in general, the time limits for lodging the appeal displayed in the table above can certainly be considered

304 See for instance CJEU, Case C-175/11, *H.I.D., B.A. v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Judgment of 31 January 2013, para. 102.

305 15 calendar days in detention centre or reception centre (CARA).

306 4 weeks in extended regular procedure.

307 Except where the FAA does not allow the appeal to have suspensive effect, such as when the application is considered to be without substance.

308 Suspensive effect must be requested in case the asylum application was made after notification of an expulsion order, in case of a manifestly unfounded application; where the applicant is accommodated in a CIE or CARA after being apprehended while trying to avoid border controls or where the applicant left the CARA without justification.

309 Suspensive effect must be requested in short regular procedure, whereas automatic suspensive effect in case of extended regular procedure.

310 Not in manifestly unfounded cases.

to be very short in **Hungary**, the **United Kingdom**, and the **Netherlands** (in the case of the short regular procedure). It should be noted that in **Hungary**, the time limit for lodging the appeal was 15 days before the recent change of legislation, which entered into force on 1 July 2013. Such short time limits for lodging the appeal are extremely problematic and in practice are very likely to undermine the effectiveness of the remedy as well as the quality of the appeal. Neither international law, nor the recast Asylum Procedures Directive determines a minimum time limit for lodging the appeal except for such time limits to be reasonable. However, as mentioned in Chapter II of this annual report, the CJEU in the case of *Samba Diouf*, concerning the appeal procedures in the context of an accelerated asylum procedure in Luxembourg, at least gave an indirect indication of what could be considered reasonable and proportionate in relation to the rights and interests involved in the context of an accelerated procedure (15 days). It also stressed the fact that in order to be effective the "*period prescribed must be sufficient in practical terms to enable the applicant to prepare and bring an effective action*".[311]

In the majority of countries covered in the Asylum Information Database, the first appeal against the negative first instance decision is judicial and is lodged before a Court or Tribunal. However, this is not the case in **Malta**, **Poland**, **Greece** and **Ireland**. In **Malta** asylum seekers can lodge an appeal against a negative decision of the Refugee Commissioner before the Refugee Appeals Board, an administrative body, which examines both facts and points of law on the basis of written submissions, with limited possibility of a hearing with the asylum seeker and taking into account new evidence that was not submitted to the Refugee Commissioner.[312] In **Ireland**, the appeal is considered to be quasi-judicial. The Refugee Appeals Tribunal is ostensibly independent in function, as the Tribunal Members are appointed by the Minister for Justice and are paid on a per case basis. A full judicial review is only available against the decision of the Refugee Appeals Tribunal before the High Court. However, this is a review on a point of law only, the High Court cannot examine the facts of the case and it a very lengthy process. Recent figures show that the average waiting time for a pre-leave hearing was 27 months with a further four month delay for a full hearing.[313] In **Poland**, a negative first instance decision in the regular procedures must be challenged before the Refugee Board, which is not a Court but an Administrative Body. A negative decision by the Refugee Board can be further challenged by the asylum seeker before the Administrative Court in Warsaw. In **Greece**, according to the law asylum seekers have a right to an appeal before one of the 10 Appeals Committees established by Presidential Decree 114/10. However, although these Appeals Committees had been installed, they ceased functioning in May 2013; due to issues related to their members' professional licenses as well as the employment contracts of their staff that were allegedly abusive. At the time of writing the country report on Greece, the appeals committees have not resumed their activities. In addition, it has been reported that in locations other than Athens, asylum seekers receiving a negative first instance decision are often not properly informed in a language they understand about the appeal procedure which has resulted in applicants not complying with the time limits for lodging an appeal.[314]

As regards suspensive effect of the appeal against a negative first instance decision taken during the regular procedure, the systems of the Member States covered in the Asylum Information Database vary considerably. An important aspect of the appeal in some countries is that lodging the appeal does not automatically result in the suspension of the removal order. In those countries suspensive effect of the appeal in the regular procedure must be requested by the applicant in certain cases, which results in very complicated systems; consequently risking to undermine the applicant's access to an effective remedy in practice. Examples of countries applying such a system include the **Netherlands**, **Italy** and **Austria**.

In the **Netherlands**, during the short regular procedure, suspensive effect must be explicitly requested by way of provisional measure within 24 hours after the negative decision has been notified, in order for the Court to take a decision on the appeal and the provisional measure within four weeks. During the short regular procedure, asylum seekers are entitled to reception conditions up to four weeks after the negative decision at the first instance has been notified. Where the Court is not able to decide within four weeks (on the provisional measure or the appeal), the asylum seeker must re-apply for an urgent provisional measure to ensure continued access to reception conditions. This is considered to be overly complicated by many organisations in the Netherlands, including the Dutch Council for Refugees.[315]

In **Italy**, the appeal has no automatic suspensive effect in a number of cases, such as when the asylum application was made after being notified with an expulsion order and where the asylum application is considered

311 CJEU, Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, 28 July 2011, par. 66.
312 Asylum Information Database, *Country report Malta – Regular Procedure*, accessed July 2013.
313 Asylum Information Database, *Country report Ireland – Regular Procedure*, accessed July 2013.
314 Asylum Information Database, *Country report Greece - Regular Procedure*, accessed July 2013.
315 Asylum Information Database, *Country report the Netherlands - Regular Procedure*, accessed July 2013.

to be "manifestly unfounded". This is also the case where the asylum seeker is accommodated in a CIE or Accommodation Centre for Asylum Seeker (CARA) after being apprehended because they avoided or tried to avoid border controls or where the applicant has left the CARA without justification. In such cases the applicant can request a suspension of the return order to the Court. Appeals must be lodged within 30 calendar days to the Civil Tribunal but asylum seekers held in CIE and CARA only have 15 calendar days to lodge an appeal.[316] These short time frames for lodging the appeal are considered problematic in view of, *inter alia*, the linguistic barriers between lawyers and asylum seekers, and the long distance between the centres where asylum seekers are accommodated and the tribunals competent for dealing with their appeal. At the same time, concerns exist with regard to the quality of the appeals lodged by lawyers, who have not always received adequate training.[317]

A slightly different system applies in **Austria** where appeals against a refusal on the merit of the case have suspensive effect, unless the Federal Asylum Agency (FAA) does not allow the appeal to have suspensive effect, for instance when the applicant has tried to deceive the FAA on their identity or nationality or if the application is considered to be without substance. In such cases, the Asylum Court may grant suspensive effect in case of a risk of *refoulement*. However, the appeal must be in German and legal aid providers often do not assist asylum seekers during the Asylum Court hearing.[318]

As mentioned above, in **Poland**, a negative first instance decision taken in the context of regular procedures must be challenged before the Refugee Board, which is not a court but an administrative body. This appeal has an automatic suspensive effect. A negative decision by the Refugee Board can be further challenged by the asylum seeker before the Voivodeship Administrative Court in Warsaw. However, such an appeal has no automatic suspensive effect upon the submission of the appeal and is limited to points of law. Suspensive effect pending the examination of the appeal by the Administrative Court can be requested by the asylum seeker and is in most cases granted. However, this may take some months. In 2012, there were some cases where asylum seekers were returned to their country of origin without having had access to the Court. In January 2012, for instance, the Polish Helsinki Foundation for Human Rights together with three NGOs intervened before the Ombudsman in a case of a traumatised woman from the Democratic Republic of Congo, who was deported some hours after she received the negative decision of the Refugee Board.[319] Recently, a Dutch court suspended a Dublin transfer from the Netherlands to Poland on the basis that asylum seekers do not have access to an effective remedy in Poland.[320]

Access to an Effective Remedy During Accelerated, Admissibility, Border and Dublin Procedures

Asylum seekers' access to an effective remedy is often compromised when their asylum application are dealt with in special procedures, such as accelerated procedures, admissibility procedures, border procedures and Dublin procedures. The effectiveness of the remedy may be undermined by a variety of factors, including reduced time limits for lodging an appeal, the lack of automatic suspensive effect of the appeal and lack of access to legal assistance and representation. This section highlights a number of examples where access to an effective remedy is problematic in practice, with regard to each of the special procedures covered by the database.

Accelerated Procedures

Huge differences exist among the 14 EU Member States as regards the definition, as well as the use and modalities of accelerated procedures. What is considered an accelerated procedure in one Member State is considered an admissibility procedure in another State, which makes it difficult to compare the systems. In **Italy** and the **Netherlands** for instance, the national legislation does not strictly speaking provide for an accelerated asylum procedure. Nevertheless, both countries examine certain cases in an accelerated manner, either at the first instance stage of the procedure or at the appeal stage, or both. Also in **Hungary**, no accelerated procedure exists, but extremely short time limits for lodging appeals and reduced time limits for decision-making at first instance apply in the admissibility procedure.[321]

In **Germany**, the law provides in theory only for an accelerated procedure in cases dealt with under an airport procedure, but in reality certain other caseloads are often prioritised. This was the case, for instance in the second half of 2012 when, following an increase of asylum applications from Serbia and Macedonia, an "absolute direct procedure" was put in place as an administrative practice. According to this procedure, interviews with asylum seekers from these countries should be conducted on the day of registration or the day after and a first

316 Italian legislation only distinguishes between regular procedures and Dublin procedures. Contrary to most other countries, no specific admissibility, border or accelerated procedures are applied in Italy. The mentioned different time limits for lodging an appeal apply within the regular procedure.

317 Asylum Information Database, *Country report Italy - Regular procedure*, accessed July 2013.

318 Asylum Information Database, *Country report Austria - Regular procedure*, accessed July 2013.

319 Asylum Information Database, *Country report Poland – Regular Procedure*, accessed July 2013.

320 See *Rb Haarlem*, 13/11314, 18 June 2013.

321 See below.

instance decision should be taken within one week. This resulted in the vast majority of asylum applications from these countries being rejected within one week. While the government claimed that all procedural guarantees and quality criteria were being applied in these procedures, German NGOs considered these procedures as "summary procedures", which did not allow for a thorough examination of asylum applications as it was based on the assumption that asylum seekers from these and other Balkan countries were "abusing" the German asylum system. Moreover, as the Federal Office of Refugees and Migration allocated many resources and manpower to expedite the examination of these cases and managed to deal with those cases within one week, the average length of procedures for asylum seekers from other countries, such as Afghanistan increased, as 75% of Afghan asylum seekers had not received a decision within three months by the end of December 2012.

The following table provides an overview of the time limits for lodging an appeal in accelerated and border procedures in the 14 countries covered by the Asylum Information Database as well as whether the appeal has suspensive effect in such procedures. The information relates only to the first appeal against decisions taken in accelerated and border procedures.

First Appeal in Accelerated and Border Procedures

	Time-limits for lodging appeals		Suspensive effect	
	Accelerated	*Border*	*Accelerated*	*Border*
AT	1 week	7 calendar days	Yes, is suspensive effect was granted	Yes, is suspensive effect was granted
BE	30 calendar days[322]	15 calendar days	Y[325]	Y
BG	7 calendar days	N/A	Y	N/A
DE	7 calendar days	3 calendar days (airport procedure)	No, suspensive effect must be requested to the Court	No, suspensive effect must be requested to the Court
FR	1 month	48 hours	N	Y
GR	15 calendar days	10 calendar days	Y	Y
HU	N/A	3 calendar days	N/A	Y
IE	4 working days	N/A[323]	Y	N/A[327]
IT	N/A	N/A	N/A	N/A
MT	Recommendation of the Refugee Commission automatically referred to Refugee Appeals Board	N/A	Y	N/A
NL	N/A	N/A[324]	N/A	N/A
PL	5 calendar days	N/A	Y	N/A
SE	3 weeks	N/A	N	N/A
UK	28 days in non suspensive appeal cases 2 working days in detained fast track cases	N/A	Y[326]	N/A

N/A: Not applicable, Y: Yes, N: No

322 In case of accelerated procedure in detention (whether at the border or on the territory) the time limit for lodging an appeal is 15 calendar days.

323 No appeal exists in the border procedure in Ireland. According to the law a person arriving at the border seeking asylum shall be given leave to enter the State by the immigration officer concerned.

324 No specific border procedure formally exists. However, asylum seekers arriving in Schiphol Airport and applying for asylum are in most cases detained and their asylum application is assessed according to the short regular asylum procedure. The time limit for submitting the appeal is one week. Suspensive effect of the appeal must be requested.

325 Except for *de facto* decisions of inadmissibility (EU nationals, safe countries of origin, subsequent asylum applications), in which case suspensive effect is not automatic. In these cases a separate request to suspend execution of the removal order must be lodged.

326 Suspensive effect only exists under the detained fast track. No suspensive effect exists in cases certified as clearly unfounded.

327 No appeal exists in the border procedure in Ireland. According to the law a person arriving at the border seeking asylum shall be given leave to enter the State by the immigration officer concerned

In countries where an accelerated procedure formally exists, reduced procedural guarantees at the appeal stage may seriously undermine the effectiveness of the remedy. This is, for instance the case in **France** where the appeal before the National Asylum Court (CNDA) has no suspensive effect vis-à-vis the return decision issued together with a negative decision on the asylum application at first instance.[328] As these cases are hardly supported by NGOs because of the new reference framework for the 'orientation platforms' excluding assistance for drafting the appeal since 2011, many asylum seekers face serious difficulties in submitting well-motived appeals, even if they can be granted free legal assistance by lawyers (see above). The lack of suspensive effect of the appeal in accelerated procedures has been strongly criticised by NGOs as well as UNHCR in its submission for the Universal Periodic Review of the situation in France by the Human Rights Council in 2013.[329]

This is also the case in **Germany** where applications are rejected as manifestly unfounded. In such cases, the appeal does not have automatic suspensive effect and a reduced time limit applies of seven calendar days for lodging the appeal. Suspensive effect of the appeal must be requested separately to the competent Administrative Court.

There is a very short time limit of five calendar days (14 calendar days during the regular procedure) for lodging an appeal in an accelerated procedure in **Poland**. This is considered to be a significant obstacle for lodging an appeal in practice, in particular where the five days run over a weekend.[330]

An example of where the right to an effective remedy in accelerated asylum procedures is even more undermined in practice, is the **United Kingdom**. In the UK, two kinds of accelerated procedures are applied. The first type of accelerated procedure is applied to asylum applications certified as clearly unfounded. In such case, an appeal has no suspensive effect. An appeal against the first instance negative decision in these cases can only be lodged from outside the UK within 28 calendar days of leaving the UK, which in practice is very difficult to do. In the vast majority of cases it concerns applicants from a deemed safe country of origin, but this type of procedure is sometimes also applied in cases considered clearly unfounded on an individual basis. The second type of accelerated procedure is the detained fast-track procedure, which is entirely conducted in detention and which in theory applies to all applications which can be decided quickly. In such cases, there is a suspensive appeal but it must be submitted within two working days of receiving the decision. Moreover, the appeals are made to a special sitting of the Immigration and Asylum Chamber of the First Tier Tribunal, which is conducted in the detention centre. Despite the fact that the tight timescales for taking a decision in the detained fast-track procedure are often not observed, there is an increase in the use of that procedure. Moreover, guidance according to which cases that appear to require further enquiries or complex legal advice, must be considered not suitable for the detained fast-track procedure is in practice not always observed. Moreover, this procedure is also used for nationals of countries with wide ranging and complex protection issues such as Afghanistan and Iraq.[331]

Admissibility Procedures

There are no specific admissibility procedures established by national legislation in **France**, **Greece**, **Ireland**, **Italy**, **Sweden** and the **Netherlands**, while an admissibility procedure is foreseen in **Maltese** legislation, but not applied in practice. However, in other countries, such as **Hungary** and **Poland**, admissibility procedures are systematically applied to all cases.

In the case of **Hungary**, an extremely short time limit of three calendar days applies to applications found to be inadmissible. Grounds for inadmissibility include, *inter alia*, the submission of a subsequent asylum application on the same factual grounds or the application of the safe third country concept. The appeal against an inadmissibility decision has automatic suspensive effect, except in the case of a subsequent asylum application. In the latter case, the applicant must submit a separate request to have the removal order suspended, which many asylum seekers fail to do because they are not properly informed. The asylum seeker does not receive a written translation of the inadmissibility decision in a language they understand which considerably complicates the lodging of an appeal in such a short time frame, in particular in the absence of legal assistance for that purpose. The effectiveness of the appeal is further undermined by the fact that oral hearings at the regional Administrative Courts in such cases are exceptional.[332]

In **Belgium**, the first instance asylum authority, the Commissioner General for Refugees and Stateless Persons, can decide not to take into consideration asylum applications lodged by EU citizens or by nationals of countries included in a list of safe countries of origin, which are de facto inadmissibility grounds, although technically they are not considered as such in Belgian legislation.

328 Asylum Information Database, *Country Report France - Accelerated procedures*, accessed July 2013.

329 *Submission of the High Commissioner of the United Nations for Refugees, based on the summary provided by the High Commissioner for Human Rights*, Universal Periodic Review, *France report*, July 2012.

330 Asylum Information Database, *Country Report Poland - Accelerated Procedures*, accessed July 2013.

331 Asylum Information Database, *Country Report UK - Accelerated procedures*, accessed July 2013.

332 Asylum Information Database, *Country Report Hungary – Admissibility Procedures,* accessed July 2013.

In such cases only a non-suspensive annulment appeal is possible, consisting of a judicial review of the legality of the first instance decision as opposed to a full review of both facts and points of law in the regular procedure. Suspension of the removal order must be requested separately, in certain cases this must be done through an "extremely urgent necessity" procedure. However, the same time limit for lodging an appeal applies as in the regular procedure (30 calendar days), unless the person is detained (15 calendar days).[333]

Border and Dublin Procedures

In the case of border and Dublin procedures, access to an effective remedy is often very problematic in practice within the countries covered by the Asylum Information Database, even where the legislation seems to provide for an effective remedy in line with Member States' obligations under EU and international human rights law. Here too, reduced time limits for lodging the appeal as well as the lack of automatic suspensive effect of the appeal in such procedures are the main factors undermining the effectiveness in practice of the remedy. As highlighted in the section above, relating to legal assistance and representation, this is further amplified by the practical obstacles asylum seekers are facing to access free legal assistance, in particular when such procedures are conducted in detention.

No specific border procedure exists formally in **Bulgaria**, **Ireland**, **Italy**, **Malta**, the **Netherlands**, **Poland**, **Sweden** and the **United Kingdom**. However, in some of these countries, asylum applications can nevertheless be examined at the border, such as in the **Netherlands**, where asylum seekers arriving at the airport are in most cases detained. Good practice exists in **Ireland** where asylum seekers arriving at the border and applying for asylum are given leave to enter the territory to proceed with their asylum application.[334]

Access to an effective remedy at the border is particularly problematic in Greece, where the law provides that appeals against negative asylum decisions at the border must be lodged within 10 calendar days of the notification of the negative decision. However, border authorities frequently refuse to even register asylum applications, as well as entry and interpretation services, and legal assistance is in most cases not available at the border, which renders the guarantees in legislation with regard to the right to an effective remedy meaningless in practice.[335]

In border procedures in **France** and airport procedures in **Germany**, time limits for lodging the appeal are extremely short (48 hours and 3 calendar days respectively). This is problematic in particular in **France** as appeals must be submitted in French and in most cases without free legal assistance or interpretation being available. In **Germany**, in case of a negative decision taken in the airport procedure, a request for an interim measure must be submitted within three calendar days to the Administrative Court. The Court decides without organising an oral hearing, if no decision is taken within 14 calendar days, the asylum seeker must be granted access to the territory.[336] The quality of the airport procedure is regularly criticised by NGOs as being of poor quality and "structurally flawed".[337] This is illustrated in the case of two Eritrean asylum seekers whose asylum applications based on the fact that they deserted the Eritrean army were rejected as manifestly unfounded and were subsequently returned in an airport procedure in Frankfurt/Main in December 2007. They were arrested upon their return but meanwhile the Frankfurt Administrative Court obliged the German authorities to grant them refugee status after which they managed to return to Germany in 2010.[338]

In relation to Dublin procedures, reduced time limits for lodging an appeal against a decision, considering another EU Member State or Schengen Associated State responsible on the basis of the Dublin Regulation also apply in most countries. Moreover, only in two Member States covered by the Asylum Information Database, asylum seekers have access to an appeal with automatic suspensive effect: **Poland** and **Greece**. It should be noted that in the case of Poland, such appeal is lodged before an administrative body (Refugee Board) and not the court. In all other EU Member States covered, lodging an appeal against the Dublin decision itself, does not automatically suspend the transfer to another State; although in most of the Member States concerned suspension can be requested from a court through a separate submission. However, as it is the case in other special procedures, this constitutes an additional obstacle in practice for the asylum seeker to access a remedy against a decision to transfer them to a country where their human rights may be breached.[339]

333 Asylum Information Database, *Country Report Belgium – Admissibility Procedures,* accessed July 2013

334 Asylum Information Database, *Country Report Ireland – Border Procedure*, accessed July 2013.

335 Asylum Information Database, *Country Report Greece – Border Procedure*, accessed July 2013.

336 Asylum Information Database, *Country Report Germany – Border Procedure,* accessed July 2013.

337 In April 2013 Pro Asyl highlighted the case of Davinder Pal Singh, an Indian national at risk of execution in India who was deported from Germany in 1994 and subsequently spent 18 years in prison after his return. The negative decision on his asylum application in the airport procedure had been overruled two years after the deportation took place. Asylum Information Database, *Country Report Germany – Border Procedure*, accessed July 2013.

338 See Pro Asyl, *Nach Abschiebung aus Frankfurt knapp dem Tod entkommen* (*After deportation from Frankfurt barely escaped death*), Press release, 9 September 2010.

339 Further information on the right to effective remedy in the context of Dublin procedures is also available in European Network for Technical Cooperation on the Application of the Dublin II Regulation, *Dublin II Regulation. Lives on hold. European Comparative Report*, February 2013.

A positive development was noted in **Germany** where until very recently according to Section 34a of the Asylum Procedure Act, an appeal against a Dublin decision did not have suspensive effect and could not be suspended on the basis of an interim measure ordered by the Administrative Court.[340] In a letter of the Federal Office for Migration and Refugees of July 2013, it announced that following a change in legislation, asylum seekers will have the possibility to request an interim measure within one week after notification of the Dublin decision to prevent removal during the examination of the appeal.[341]

As mentioned in Chapter II, according to the jurisprudence of the ECtHR in order to be effective under Article 13 ECHR, a remedy must have automatic suspensive effect and "must allow for an independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant's expulsion to the country of destination".[342] Given the importance which the Court attaches to Article 3 of the Convention and to the irreversible nature of the damage liable to be caused if the risk of torture or ill-treatment materialises, it is inconsistent with Article 13 ECHR if expulsion measures are executed before national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. In the case of *Conka v. Belgium*, the Court highlighted the risks involved in a system where stays of execution must be applied for and are granted on a case-by-case basis by stating that "it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13".[344]

In a nutshell

Relevant EU standards in recast legislation

Article 46 of the recast Asylum Procedures Directive obliges Member States to ensure that asylum seekers have the right to an effective remedy before a court or tribunal against any decision taken on their application for international protection, including inadmissibility decisions and decisions taken at the borders. An effective remedy is furthermore defined as providing for a full and *ex nunc* examination of both facts and points of law at least in appeals procedures before a court or tribunal at first instance. The Directive does not impose specific time limits for lodging appeals but requires Member States to provide for reasonable time limits, and other necessary rules for the applicant to exercise the right to an effective remedy. Reasonable time limits shall not render the exercise of the right to an effective remedy impossible or excessively difficult (Article 46(4) recast Asylum Procedures Directive).

Asylum seekers must have access to an appeal with suspensive effect pending the outcome of the remedy (Article 46(5) recast Asylum Procedures Directive). In certain cases, including cases that have been decided in accelerated procedures or border procedures and inadmissibility decisions, a system may be applied whereby a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory either upon the applicant's request or ex officio. This may only be applied in procedures at the border provided that the applicant has the necessary interpretation, legal assistance and at least one week to prepare and submit the appeal, and the court or tribunal in such case has the competence to examine the negative decision of the determining authority in terms of fact and law.

The right to an effective remedy, in the form of an appeal or review, in fact and in law against a transfer decision before a court or tribunal is explicitly laid down in the new Article 27 recast Dublin Regulation. National legislation must provide for 1) automatic suspensive effect of the appeal, 2) a system whereby transfer is automatically suspended for a reasonable period of time during which a court or tribunal must decide whether the grant suspensive effect to the appeal or review or 3) a system whereby the asylum seeker can request a court or tribunal within a reasonable time to suspend the implementation of the transfer decision. In any case a close and rigorous scrutiny of the suspension request is required.

340 Asylum Information Database, *Country Report Germany – Dublin*, accessed July 2013.
341 Informationsverbund Asyl und Migration, *"Änderungen im Dublin-Verfahren"*, 2/8/2013.
342 See e.g. ECtHR, *Abdolkhani and Karminia v. Turkey*, Application No. 30471/08, Judgment of 22 September 2009, para. 108.
343 See ECtHR, *Gebremedhin v. France*, Application No. 25389/05, Judgment of 26 April 2007, para. 58.
344 See ECtHR, *Conka v. Belgium*, Application No. 51564/99, Judgment of 5 February 2002, para. 82. See also ECtHR, *M.A. v. Cyprus*, Application No. 41872/10, Judgment of 23 July 2013, para. 137.

3.5 Detention

Detention of asylum seekers remains a major concern in the EU, including in many of the countries included in the Asylum Information Database. Deprivation of liberty of persons who are seeking protection in EU Member States not only creates hardship for those involved, it also obstructs and undermines the operation of a fair and efficient asylum procedure. As mentioned above, an important consequence of detention is that asylum seekers have less or no access to legal assistance and representation and to information about the procedure as well as documentation to substantiate their asylum applications. Moreover the devastating physical and psychological impact of detention on the individuals concerned, which has been widely documented, adds to the vulnerability of asylum seekers and is likely to undermine the asylum seekers' trust in the asylum system as such.[345]

A clear presumption against the detention of asylum seekers is established in international human rights law which presupposes that, as a general rule, asylum seekers should not be detained and that detention should only be used in exceptional circumstances and in respect of all procedural safeguards. The ECtHR continues to remind States in its jurisprudence on Article 5 ECHR that where asylum seekers and migrants are deprived of their liberty the strongest safeguards must apply to protect them from arbitrariness bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country".[346] States often see detention as a necessary tool of migration management, disregarding the enormous human and financial cost. However, there is no evidence that detention would have a deterrent effect on irregular migration and as emphasised by UNHCR, "*regardless of any such effect, detention policies aimed at deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain*".[347] Yet some EU governments continue to detain asylum seekers, sometimes in appalling conditions, despite repeated convictions by the ECtHR on behalf of their detention practices. This is also illustrated in this short overview of the main characteristics of detention policies in the 14 EU Member States covered in the Asylum Information Database.

Detention of Asylum Seekers

	AT	BE	BG	DE	FR	GR	HU	IE	IT	MT	NL	PL	SE	UK
Maximum duration of detention in law	10 months	5 months	18 months 3 months[348]	18 months[349]	45 days	18 months	12 months[350] 6 months[351] 30 days[352]	21 days[353]	18 months	12 months	18 months	12 months	12 months	No max. period
Average length of detention in practice	N/A	N/A[354]	33 days	N/A	N/A	N/A	4-5 months	N/A	38 days	6-8 months	39 days	5 months	6 days	N/A
Number of AS detained at end of 2012	N/A[355]	N/A	418	N/A	N/A[356]	N/A	N/A[357]	N/A	N/A[358]	497[359]	50	249	169[360]	2.685[361]
Automatic detention at the border	N	Y	N	Y	N	Y	Y	N	N	N[362]	Y	N	N	N[363]
Are unaccompanied children detained	Y	N	Y[364]	Y[365]	Y[366]	Y	N	N	N	Y	N	Y	N	Y[367]

Y: Yes, N: No, N/A: Not available

345 See JRS Europe, *Becoming Vulnerable in Detention*, June 2010.

346 See for instance ECtHR, Case of *Suso Musa v. Malta*, Application No. 42337/12, Judgment of 23 July 2013, para. 93.

347 UNHCR, *Detention Guidelines. Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, at p. 7.

348 Since an amendment of the Law on Aliens in March 2013, the maximum period of detention of families with children is three months.

349 Asylum seekers are generally not detained as long as their application is pending (with the exception of the airport procedure). However, it is possible that asylum applications by persons who are already detained are not dealt with by the authorities and those persons may be kept in detention. Eighteen months is the maximum duration in case of detention pending deportation.

350 Asylum seekers submitting a subsequent asylum application.

351 Asylum seekers submitting a first asylum application.

352 Families with children (both first and subsequent asylum application).

353 This period of detention may be renewed indefinitely where asylum seekers are detained under Article 9A Refugee Act 1996. The maximum period for detention pending deportation is eight weeks.

354 No figures are available for detained asylum seekers. Figures on the average length of detention (both asylum seekers and irregular migrants) for the closed centres in Belgium were as follows in 2011: INAD: 2.4 days; TC 127: 21.7 days; RC 127 bis: 23.9 days; CIB: 32 days; CIM: 32.4 days and CIV: 30.3 days.

355 In Austria, 919 asylum seekers entered detention at some point in 2012.

356 In 2012 in France, 1,140 third country nationals have lodged an asylum application while in administrative detention.

357 According to UNHCR, in 2011, on average 93 asylum seekers were detained at any given day in 2011. The Hungarian Helsinki Committee estimated that the number is more or less the same for 2012. In 2012, 1266 asylum seekers applied for asylum from detention.

358 A total of 7,944 migrants out of which 120 asylum seekers have been detained in CIE (Centre of Identification and Expulsion) in 2012.

359 This includes asylum seekers and persons whose asylum application has been rejected and are awaiting removal.

The focus of this section is mostly on States' general approach with regard to the detention of asylum seekers and certain aspects relating to detention conditions as well as the detention of children, but additional information on other aspects of detention practices with regard to asylum seekers of the 14 EU Member States covered is available in the Asylum Information Database. As a preliminary remark, it is important to highlight that statistical material in the 14 EU Member States do not always distinguish between the detention of asylum seekers and irregular migrants, with many persons being detained first as asylum seekers (either during the whole procedure or part of the procedure) and consequently as irregular migrants after a final rejection of their asylum application. This means that even if detention during the examination of the asylum application may in some Member States be relatively short, it may not prevent such individuals from being detained for very long periods of time before their return or release.

Grounds for Detention of Asylum Seekers

While asylum and immigration detention falls under different legal regimes in EU legislation,[368] in most of the Member States covered by the Asylum Information Database no such clear distinction exists in national legislation. An exception is **Hungary** where since July 2013 asylum detention is based on different legal grounds than immigration detention, although many of the rules relating to judicial review and detention conditions are similar. This is due to a remarkably fast transposition of (parts of) the recast Reception Conditions Directive, which according to NGOs in Hungary, risks undermining the positive changes to detention practices that were introduced by the Hungarian Government in the beginning of 2013. Detention practice in Hungary in 2012 raised a number of serious human rights concerns and was heavily criticised by UNHCR and NGOs, including the Hungarian Helsinki Committee (HHC), as it resulted in systematic detention of asylum seekers arriving in Hungary and returned to Hungary from other EU Member States under the Dublin Regulation. As of 1 January 2013, the practice changed in a positive manner and asylum seekers, who immediately ask for asylum upon apprehension by the police were no longer detained but accommodated in an open reception centre. In addition, asylum seekers returned to Hungary under the Dublin Regulation were also no longer detained and provided access to a full examination of their asylum application, unless they had already received a final decision on the merits of their asylum application. The recent amendment to the Asylum Act, which entered into force on 1 July 2013, already transposes the detention provisions in the recast Reception Conditions Directive. The law introduces all grounds for detention in Article 8(3) recast Reception Conditions Directive into Hungarian legislation.[369] The HHC already expressed serious concern that these grounds leave too much room for interpretation fearing that these provisions will lead to a significant increase in the number of detained asylum seekers. The HHC is also concerned that the Office for Immigration and Nationality (OIN) will fail to carry out a proper individual assessment of cases before taking a decision to detain asylum seekers which may at least for asylum seekers from certain countries of origin result in quasi-automatic detention.[370] Furthermore, in practice asylum seekers do not have access to an effective remedy against the OIN's detention decision. The lawfulness of the detention decision is only reviewed at 60-day intervals by the district courts that generally fail to take into account the individual circumstances of the persons detained. In this respect, the HHC reported a case in December 2011 in the immigration detention facility in Kiskunhalas where the court decided on detention in groups of 5, 10 or 15 detainees in 30 minutes, which makes a fair and individual review of the lawfulness of detention almost impossible. It should also be noted that according to a survey conducted by the Curia, the highest court in Hungary, in only three out of about 5,000 court decisions in 2011 and 2012,

360 2,550 asylum seekers, including 24 children, have entered detention at some point in 2012.

361 Estimated figure: 13.161 asylum seekers entered detention at some point in 2012.

362 No border procedure exists in Malta. According to Article 14 of the Immigration Act, asylum seekers refused admission to Malta on the basis of their irregular immigration status are detained after being issued with a removal order. According to Article 10 of the same Act, a person refused admission into Malta may be detained on land but while in detention they shall be deemed to be in legal custody and not to have landed. In practice, the vast majority of asylum seekers arriving in Malta are detained.

363 However, during the accelerated procedure of the Detained Fast Track asylum seekers are by definition detained.

364 Only in border/transit zones.

365 Only in border/transit zones.

366 Only held in waiting areas at the border.

367 Only in border/transit zones.

368 The detention of irregularly staying third country national prior to forced return is dealt with in the EU Return Directive. Recital 9 of that Directive explicitly states that persons who have applied for asylum should not be considered as staying irregularly in the territory. See *Directive EU 2008/115/EC* of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals, OJ 2008 L 348/98.

369 Moreover, contrary to what is allowed under the recast Reception Conditions Directive the new law seems to expand even further the already broadly formulated grounds for detention in the directive. It adds a vague reference to the asylum seeker obstructing the course of the asylum procedure in another manner and with regard to detention in the context of a Dublin procedure, reference is made to the applicant not fulfilling his/her obligation to appear on summons and is thereby obstructing the Dublin procedure. The latter seems to suggest that a one-time failure to appear before the authorities would suffice as a reason to detain the person concerned whereas it is questionable whether this would qualify as a significant risk of absconding as explicitly required under Article 28 recast Dublin Regulation.

370 See Hungarian Helsinki Committee, *Brief Information Note on the main asylum-related legal challenges in Hungary as of 1 July 2013*.

immigration detention was considered unlawful. In all other cases, detention was simply prolonged without any specific justification.[371]

In three judgments concerning the detention of asylum seekers in Hungary, the ECtHR found that Article 5§1 ECHR had been violated because the applicants remained in detention, even after their asylum application has been referred to the in-merit examination. The refugee authority did not initiate their release and the absence of elaborate reasoning for the applicant's deprivation of liberty rendered the detention measure incompatible with the requirement of lawfulness inherent in Article 5 ECHR.[372]

A variety of detention grounds for asylum seekers apply in the 14 EU Member States covered by the Asylum Information Database, which generally seem to correspond to the six grounds laid down in Article 8(3) of the recast Reception Conditions Directive.

Legislation in most of the EU Member States covered by the Asylum Information Database allows for the detention of asylum seekers to verify nationality or identity, for public safety and security reasons and where a risk of absconding exists. Most countries also allow for detention upon arrival at the border to carry out Dublin transfers and in case an asylum seeker applies for asylum when already detained for other reasons (for the purpose of removal).

However, a number of countries covered by the Asylum Information Database also make use of detention grounds that, strictly speaking, do not qualify under the recast asylum legislation. This is the case for instance in the **United Kingdom**, where in addition to grounds such as the verification of identity or a risk of absconding, asylum seekers can be detained simply because the application can be decided *quickly* using the detained fast-track procedure. However, as the United Kingdom opted out from the recast Reception Conditions Directive, this policy remains unaffected by the exhaustive list of grounds for detention of asylum seekers in that Directive. During the accelerated procedure of the detained fast-track, asylum seekers are by *definition* detained, while they are in practice often detained in the accelerated procedure with non-suspensive appeal and *very often* in the Dublin procedure. In the regular procedure, on the other hand, asylum seekers are not usually detained, at least at the beginning of the procedure. In **Greece**, there is also legislation referring to the possibility to detain asylum seekers "*where it is considered necessary for speedy and effective completion of the asylum procedure*".[373]

A number of countries allow for the detention of asylum seekers, who submit a subsequent asylum application. This is, for instance, the case in **Austria** (in case an asylum seeker submits a subsequent asylum application without being granted protection from removal) and **Belgium**. If this were solely relied upon as a ground for detention of an asylum seeker, this would arguably not be compatible with the exhaustive list of grounds for detention laid down in the recast EU asylum legislation.

Legislation in **Belgium** also allows for the detention of asylum seekers on the grounds that they did not respect the duty to report at a certain reception centre or on a presumption of fraud. In **Ireland**, according to the law, asylum seekers may be detained if it is suspected that they have committed a serious non-political crime outside Ireland. In **Italy**, the law stipulates that the chief of the Quaestura (Immigration Office of the Police) can detain an asylum seeker who falls under the exclusion clauses laid down in Article 1F of the 1951 Refugee Convention.[374] Such detention grounds are also arguably incompatible with the exhaustive list of detention grounds laid down in Article 8(3) recast Reception Conditions Directive.

A positive finding is that in a number of the EU Member States covered by the Asylum Information Database, detention of asylum seekers who apply for asylum on the territory during the examination of their application is reported to be exceptional. This is the case for instance in **Germany** and **France**, where detention of asylum seekers usually only occurs in the context of airport procedures (Germany) or border procedures (France). Also in **Ireland**, detention of asylum seekers is reportedly not used on a regular basis, although there is little information with regard to detention practice immediately after arrival due to lack of access of NGOs and UNHCR to asylum seekers arriving at the border.

Detention Conditions and Access to Detention Centres

Where asylum seekers are detained, detention conditions must respect the human dignity of the person and comply with standards set out *inter alia* under Article 5 ECHR, EU law and by International Treaty Monitoring Bodies such as the Committee for the Prevention of Torture. Article 17(2) recast Reception Conditions Directive also requires an adequate standard of living of asylum seekers in detention, which guarantees their subsistence and protects their physical and mental health.

371 Asylum Information Database, *Country Report Hungary – Grounds for detention*, accessed July 2013.

372 See ECtHR, *Lokpo and Touré v. Hungary*, Application No. 10816/10, Judgment of 20 September 2011; ECtHR, *Al-Tayyar Abdelhakim v. Hungary*, Application No. 13058/11, Judgment of 23 October 2012 and ECtHR, *Hendrin Ali Said and Aras Ali Ali Said v. Hungary*, Application No. 13457/11, Judgment of 23 October 2013.

373 Asylum Information Database, *Country Report Greece – Grounds for detention*, accessed July 2013.

374 See Article 21 of the Legislative Decree 25/2008 on asylum procedures. See Asylum Information Database, *Country Report Italy – Grounds for detention*, accessed July 2013.

Serious concerns with regard to the living conditions in detention centres are reported in **France** (with regard to the detention centre in Mayotte), **Greece**, **Italy** and **Malta**.

Asylum seekers (as well as irregular migrants) are systematically detained in **Malta** in military barracks which are overcrowded, offer inadequate sanitation and hygiene facilities and allow no privacy for the detainees. Moreover, there is little or no heating or ventilation, exposing the detainees to extreme cold and heat. There are also no recreational or educational activities provided and Hermes Block at Lyster Barracks, a center with a capacity of 450 places, access to the open air court yard is limited to only one hour and a half per day. The situation in detention centres in Malta has been the subject of fierce criticism of reputable human rights organisations and the Commissioner for Human Rights of the Council of Europe in recent years.[375] Recently the ECtHR held in the case of *Aden Ahmed v. Malta* that the detention of the applicant in Hermes Block amounted to degrading treatment within the meaning of Article 3 ECHR. The cumulative effect of the detention conditions complained of (no outdoor exercise possible for two months in 2012, lack of privacy in dormitories, inadequate diet and suffering from extreme heat and cold) during a period of 14 months "diminished the applicant's human dignity an aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical and moral resistance.[376]

In **Greece**, asylum seekers also face detention in appalling conditions. This has been consistently documented in recent years by UNHCR and the Committee for the Prevention of Torture of the Council of Europe, as well as the Council of Europe Commissioner for Human Rights. The UN Special Rapporteur on the Rights of Migrants recently reported that the conditions in the 11 detention facilities he visited in Greece between 25 November and 2 December 2012 were inappropriate and raised concerns in particular with regard to limited access to toilets, lack of heating and hot water, insufficient clothing and blankets and poor quality of food.[377] The ECtHR has on numerous occasions found the conditions of detention of migrants in Greece to be in violation of Article 3 ECHR.[378] In a judgment of the Criminal Court of Igoumenitsa of 2 October 2012, a group of 17 migrants who escaped from a Greek detention centre were acquitted because the conditions of detention in the centre were considered to be inhuman and in breach of Article 3 ECHR.[379] Amnesty International also documented poor detention conditions in a number of detention facilities, border guard and police stations in the Evros region and neighbouring Rodopi Prefecture, highlighting in particular the severe restrictions on communication with the outside world for detainees.[380]

In **Hungary** asylum seekers have faced harsh detention conditions in recent years. The majority of immigration detention facilities were subject to conditions equal to maximum security prisons with limited possibilities for detainees to leave their cells. Conditions have improved recently with the arrival of social workers and psychiatrists in the detention facilities. However, widespread police brutality, random use of isolated detention as a disciplinary measure, poor health assistance, collective punishment, shortening of time allowed outdoors, for meals or to use the internet all remain areas of concern. The Hungarian Helsinki Committee submitted a complaint regarding the overcrowding in two immigration detention centres. The recently adopted legislation relating to asylum detention includes minimum requirements with regard to the material conditions such as freedom of movement, access to open air and internet and phones in "closed asylum reception centres".[381]

Detention of asylum seekers in prison for the purpose of the asylum procedure is possible in practice in **Austria**, **Greece**, the **Netherlands** and **Ireland**. Detention of asylum seekers in prisons further contributes to stigmatising asylum seekers as criminals and in most cases complicates access to information and specialised legal assistance relating to their asylum case. In **Ireland** the detention of asylum seekers, although not widely used, occurs exclusively in ordinary prisons. This raises serious concerns as Irish prisons have been subject to international criticism in particular for over-crowding and the practice of "slopping out", referring to the fact that in some Irish prisons, prisoners do not have toilets in their cells and therefore have to use buckets.

Good practice was reported in **Bulgaria**, **Belgium**, **Germany**, **Poland**, **Sweden**, **France**, **Malta**, **Hungary** and **Italy** where asylum seekers are never detained in

375 See for instance, International Commission of Jurists, "*Not here to stay: Report of the International Commission of Jurists on its visit to Malta on 26-30 September 2011*", May 2012 and Council of Europe, Commissioner for Human Rights, *Report by Thomas Hammerberg following his visit to Malta from 23 to 25 March 2011*, 2011.

376 ECtHR, *Aden Ahmed v. Malta*, Application No. 55352/12, Judgment of 23 July 2013, para. 99.

377 See United Nations Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Mission to Greece*, 17 April 2013, p. 12-13.

378 The Commissioner for Human Rights of the Council of Europe notes that between 2009 and 2012 no less than 11 judgments were issued against Greece finding a violation of Article 3 ECHR because of detention conditions of migrants. See Council of Europe, Commissioner for Human Rights, *Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe following his visit to Greece from 28 January to 1 February 2013,* 16 April 2013, CommDH(2013)6.

379 Asylum Information Database, *Country Report Greece – Detention Conditions,* accessed July 2013.

380 See Amnesty International; *Frontier Europe. Human Rights Abuses on Greece's Border with Turkey*, July 2013, at p. 20.

381 Asylum Information Database, *Country Report Hungary – Detention Conditions,* accessed July 2013.

prisons, solely for the purpose of examining their asylum application.

Access of NGOs and UNHCR to asylum seekers in detention is allowed under the law in the vast majority of countries covered by the Asylum Information Database, but restrictions to such access may be imposed in practice. Even where such restrictions are not imposed as a matter of law or administrative instructions, limited capacity within NGOs or UNHCR to visit detention centres may in reality mean that organisations are only able to provide services or information to a limited number of detainees.

In **France**, five accredited NGOs are present quasi-permanently in administrative detention centres (5-6 days a week) as part of their mission to provide information to the detainees and assist them with exercising their rights.

In **Italy**, NGOs continue to face difficulties in accessing Centres for Identification and Expulsion (CIE) despite the relaxation in December 2011 of the initial prohibition in an April 2011 circular for media, independent organisations (with some explicitly mentioned exceptions) and civil society to access the CIEs. However, the new circular still leaves considerable discretion to the Prefectures in authorising access to CIEs.

In **France** and **Italy**, NGOs advocate alongside journalists for open access to detention centres within the framework of the "Open Access Now" campaign. As part of the campaign, a series of parliamentary visits to detention centres in a number of EU Member States was organised, some of them with the participation of Members of the European Parliament.[382] For the first time, two journalists were allowed to enter the administrative detention centre in Lyon on 16 July 2013.

Detention of Children

Immigration detention of children, both with regard to families with children and unaccompanied children, remains an area of particular concern to many NGOs active in the field of asylum and migration in Europe. In March 2012, a global campaign to end immigration detention of children was launched[383] while 166 NGOs in and outside of Europe signed an appeal to EU institutions calling, *inter alia*, for a ban on the detention of unaccompanied asylum-seeking children which was launched in May 2012 at the start of the trilogue negotiations on the proposed recast Reception Conditions Directive.[384]

The situation with regard to the detention of children in the countries included in the Asylum Information Database varies considerably. Generally speaking, detention of unaccompanied asylum-seeking children appears to be rarely used in the vast majority of countries in the Asylum Information Database and is reported to happen only in the border and/or transit zone in the **United Kingdom**, **Germany**, **France**, and **Bulgaria**. Unaccompanied asylum-seeking children are reported not to be detained in practice in **Sweden**, the **Netherlands** (not detained when there is doubt about their age), **Belgium**, **Ireland**, **Hungary** and **Italy**.

However, it may happen that children are detained when going through an age assessment procedure because their declared age is being questioned. For instance, in **Malta**, where all people arriving irregularly are detained, the age assessment is carried out while the young person is in detention, and they will be released only if it concludes they are younger than 18.

In **Belgium**, the detention of unaccompanied children is explicitly prohibited by the Aliens Act and in principle unaccompanied children arriving at the border are assigned to an "Observation and Orientation Centre for unaccompanied children". However, this only applies to unaccompanied children who have been identified as such; where there are any doubts as to their age they can still be kept in detention for the time necessary to assess their age through medical examination.[385] Also in **Bulgaria**, the Law on Aliens was amended in March 2013 to prohibit the detention of unaccompanied children in general, although as of April 2013 in practice unaccompanied children, including those seeking asylum, continued to be detained. **Hungarian** legislation also explicitly excludes the detention of unaccompanied children, both under the asylum and immigration detention legislation. It should be noted that in 2011, both the Hungarian Helsinki Committee and the UNHCR have identified cases where separated children had been detained following an incorrect age assessment.[386] This is setting a standard that is higher than what is established both in the recast Reception Conditions Directive and the Return Directive.

382 For more information on the campaign see *www.openaccessnow.eu*.

383 See International Detention Coalition, *Global Campaign to end the immigration detention of children*.

384 See Amnesty International and ECRE, *Open letter - Appeal to EU Institutions. Ensure respect for asylum seekers' right to liberty in EU asylum legislation, Joint letter to EU institutions*. Trilogues negotiations are part of the EU legislative process. The term trilogue refers to the negotiations between the three EU institutions (Commission, Council and European Parliament) on Commission proposals for EU legislation.

385 Asylum Information Database, *Country Report Belgium – Grounds for detention*, accessed July 2013.

386 *Idem*.

On the contrary, in **Austria**, unaccompanied children as young as 14 can be detained. In addition, children above 16 are considered to have legal capacity and are not required to be legally represented by a guardian. Unaccompanied children are however separated from adults in detention and since 2010, a special detention centre for unaccompanied children and families opened in Vienna. Children in families of all ages can be detained together with their parents if the latter do not wish to be separated from them.[387]

In **Greece**, (unaccompanied) children intercepted for crossing the border irregularly are systematically detained, in the same conditions as adults. In the beginning of December 2012, the government announced that women and children would be accommodated in two specific reception centres instead of being detained but those centres still have to be built.[388] It is worth highlighting that because of the lengthy age assessment procedure, some children claim to be adults to be released faster from detention.[389]

In view of the well-documented devastating effects of detention on their health, children should never be detained for immigration or asylum-related purposes. Instead EU Member States should set the example and make use of alternatives to detention that respect the human rights and needs of children. An example of such an approach is found in **Belgium** where families with children applying for asylum at the border are explicitly excluded from detention in closed centre and placed in specific facilities adapted to the needs of such families. Following the *Muskhadzhiyeva* judgment concerning the detention by Belgium of a Chechen mother with her four small children, which the ECtHR found to be a violation of Article 3 and 5§1 of the ECHR,[390] as of October 2009 families with children arriving at the border and who are not deemed removable within 48 hours after arrival, are no longer detained in a closed centre. Instead these families are accommodated in one of four housing sites, under the supervision of so-called "return coaches". Adults may leave the individual house or apartment if they receive permission to do so and children are able to go to school.[391]

In a nutshell

Relevant EU standards in recast legislation

According to Article 8 recast Reception Conditions Directive asylum seekers may be detained when it proves necessary, on the basis of an individual assessment, if other less coercive measures cannot be applied effectively. Rules on alternatives to detention must be laid down in national law. Asylum seekers may only be detained for one of six grounds exhaustively listed in Article 8(3). The grounds include *inter alia* detention in order to verify identity or nationality, to determine aspects of the claim which may be lost without detention, in particular in case of a risk of absconding and to secure a transfer to another Member State in the context of a Dublin procedure. Procedural guarantees include a requirement to execute the administrative procedures relevant to the grounds of detention with due diligence, access to a speedy judicial review and free legal assistance. Detention of unaccompanied children may only take place in exceptional circumstances while all efforts must be made to release unaccompanied children as soon as possible.

Article 28 Dublin Regulation allows for the detention of asylum seekers to secure transfer procedures when there is a significant risk of absconding on the basis of an individual assessment and only insofar as detention is proportional and other less coercive measures cannot be applied effectively. Articles 9, 10 and 11 of the recast Reception Conditions Directive apply to asylum seekers detained in the context of a Dublin Procedure.

387 Asylum Information Database, *Country Report Austria – Grounds for detention and Age assessment and legal representation of unaccompanied children,* accessed July 2013.

388 Asylum Information Database, *Country Report Greece – Grounds for detention*, accessed July 2013.

389 Asylum Information Database, *Country Report Greece – Age assessment and legal representation of unaccompanied children*, accessed July 2013.

390 See European Court of Human Rights, *Muskhadzhiyeva and Others v Belgium,* Application no. 41442/07, Judgment of 19 January 2010 (French only). See also European Court of Human Rights, *Kanagaratnam and Others v Belgium*, Application no. 15297/09, Judgment of 13 December 2011 (French only). In this case the Court found a violation of Article 3 and 5§1 ECHR because of the detention of a Sri Lankan asylum seeking (who was eventually recognised as a refugee) mother with three underage children for more than three months.

391 Asylum Information Database, *Country Report Belgium – Grounds for detention*, accessed July 2013.

3.6 Reception Conditions

Access to adequate reception conditions for asylum seekers during the examination of their application for international protection is an essential part of any asylum system. Absence of adequate reception conditions not only undermines their human dignity as guaranteed under Article 1 of the EU Charter of Fundamental Rights, it may also undermine the fairness and effectiveness of the asylum procedure and arouse feelings of despair and marginalisation. Adequate reception conditions are crucial to ensure that applicants are prepared for both possible outcomes of the asylum procedure, i.e. integration into the host society upon recognition or sustainable, dignified return upon a negative decision as to their need of international protection. Lack of such reception conditions during the asylum procedure may prevent them from being able to properly cooperate with the asylum authorities during the asylum procedure, as their psychological and physical ability to deal with asylum interviews and to respond timely to requests for information on their application to the asylum authority is inhibited.

The reality in the EU today is that asylum procedures are often lengthy and complex and that the level of reception conditions is problematic in a considerable number of EU Member States. This section focusses on asylum seekers' access to accommodation and to the labour market in the 14 EU Member States covered by the Asylum Information Database.

Access to and Level of Reception Conditions

The table below provides an overview of reception capacity in the Member States covered by the Asylum Information Database as general background information for this section. In many Member States, reception for asylum seekers is provided through a combination of open reception centres as well as systems of private accommodation. The information is provided with regard to both forms of housing, where this is available.

Total Capacity in Reception Centres and Private Accommodation

	AT	BE	BG	DE[392]	FR	GR	HU	IE	IT	MT	NL[393]	PL	SE	UK
Total number of places in reception centres	10,824	23,790	N/A	N/A (at least one initial reception centre and then several accomodation centres in each of the 16 Federal States)	21,410	1,006	1,763	5,522	773 in CSPA and 360 in CDA (first arrivals); 3,747 in CARA centres (accomododations centres for asylum seekers); 3000 in SPRAR system (System of Protection for Asylum Seekers and Refugees); 19,000 in North Africa emergency centres	Not available (but 8 reception centres are available)	N/A	1,850	26,663	Around 1,200
Total number of places in private accomodation	2,922	11,310	0	N/A	N/A	N/A	0	N/A[394]	N/A	0	N/A	N/A	14,818	17,594 asylum seekers are in dispersed accomodation

N/A: Not available

In many Member States covered by the Asylum Information Database insufficient capacity to accommodate asylum seekers entering their territory and poor quality of reception centres is reported in varying degrees.

While **the Netherlands**, **Sweden** and **Poland** are reported to dispose of sufficient places within reception centres to house all asylum seekers, without facing problems of overcrowding, many of the 14 Member States covered by the Asylum Information Database struggle to provide accommodation to a large number of asylum seekers arriving on their territory.

In **Hungary**, an amendment came into force in January 2013 that no longer allowed authorities to detain apprehended asylum seekers. Up until the end of June, this resulted in a drastic increase of asylum seekers to be accommodated in reception centres without having sufficient reception

392 In Germany, numbers are not available due to a unique federal system. Places in reception centres are allocated according to a distribution system, with several in each of Germany's 16 Federal States.

393 A change in the computing system prevents the publication of statistics.

394 All reception centres are operated privately.

capacity at its disposal. However, in summer 2013, two new open reception centres were opened to reduce overcrowding and provide more places.[395] In **France**, the problem of limited reception capacity remains to be an issue as well, with only one third of all applicants accommodated in a reception centre.[396] Asylum seekers who cannot be accommodated in one of the reception centres due to shortage of available places receive a payment for the time-being, the so-called "temporary waiting allowance" of €11.01 a day/per adult (which has, however, been criticised by the national consultative commission on Human Rights as being insufficient to cover both accommodation and basic needs).[397] Where asylum seekers refuse an offer to be housed in one of the reception centres, they are automatically excluded from the payment of the temporary waiting allowance. Despite the fact that **Bulgaria** has introduced 300 new places in its reception centres it remains to be a problem that where asylum seekers have not been provided with accommodation they are frequently kept in detention centres until rooms are available.[398] Lack of places in reception centres also led authorities to house new arrivals in medical premises and common rooms in reception centres.[399] In **Italy**, concerns have been raised about the high variability in standards of reception centres. Problems identified include lack of training of staff, overcrowding and limited space for assistance and legal advice and difficulties in accessing appropriate information.[400] Even though Italy had adopted emergency accommodation in response to the large influx of asylum seekers in 2012, these remain sub-standard of minimum care.[401] Similar problems are faced by asylum seekers in **Malta** due to overcrowded reception facilities caused by increased releases of asylum seekers from detention. In exceptional cases, shelters for homeless persons are used as alternative accommodation facilities.[402]

With regard to access to reception conditions during Dublin procedures and when submitting subsequent applications, practice varies considerably among the Member States covered in the Asylum Information Database.

Good practice has been adopted in **Belgium**, **Germany** and **Sweden** where asylum seekers subjected to the Dublin procedure have the same access to reception conditions as other asylum seekers, including access to accommodation, food, daily subsistence allowance, health care and legal assistance.[403] In **Austria**, asylum seekers have access to the same reception conditions during the Dublin procedure, although in such case they are housed in facilities of the state.[404] However, in certain cases they may still be detained, pending their transfers to other EU Member States.[405] In contrast, asylum seekers transferred back to **Greece** or waiting for transfer from Greece to another EU Member State, do not generally benefit from access to reception conditions, despite the fact that legislation requires the provision of accommodation and payment of minimum financial assistance.[406] In **France**, asylum seekers subjected to the Dublin procedure are also excluded from access to reception centres and are only eligible for accommodation in emergency housing until the notification of their transfer decision.[407] As a positive development, instructions have been given by the ministry of Interior at the end of April 2013 to provide the abovementioned "temporary waiting allowance" to asylum seekers under the Dublin procedure who request it at "Pôle Emploi"[408] (when the requirements are met)[409]. However, due to shortage of available places many Dublin asylum seekers – including vulnerable persons – find themselves living in night shelters or on the street.[410] In **Italy**, the legal framework does not foresee any particular reception system for Dublin cases. Dublin returnees to Italy who had not had access to the reception system while they were in Italy, may still enter reception centres. However, returnees who were granted some form of protection and had been accommodated in the reception centre while they were in Italy, no longer have a right to be accommodated in the Centres for asylum seekers, except where places are available. Due to the lack of available places in reception structures and to the fragmentation of the reception

395 Asylum Information Database, *Country Report Hungary - Types of Accommodation*, accessed July 2013.
396 Asylum Information Database, *Country Report France - Forms and Levels of Material Reception Conditions and Types of Accommodation*, accessed July 2013; and EASO, *Annual Report on the Situation of Asylum in the European Union 2012*, p. 72 (footnote 275).
397 Asylum Information Database, *Country Report France - Forms and Levels of Material Reception Conditions*, accessed July 2013.
398 Asylum Information Database, *Country Report Bulgaria - Types of Accommodation*, accessed July 2013; and EASO, *Annual Report on the Situation of Asylum in the European Union 2012*, p. 72 (footnote 273).
399 Asylum Information Database, *Country Report Bulgaria - Types of Accommodation*, accessed July 2013.
400 Asylum Information Database, *Country Report Italy - Criteria & Restrictions to Access Reception Conditions*, accessed July 2013.
401 Asylum Information Database, *Country Report Italy - Types of Accommodation*, accessed July 2013
402 Asylum Information Database, *Country Report Malta - Types of Accommodation*, accessed July 2013.
403 Jesuit Refugee Service (JRS), '*Protection Interrupted – The Dublin Regulation's impact on asylum seekers' protection (The DIASP Project)*', June 2013, pp. 68-69.
404 Asylum Information Database, *Country report Austria – Criteria and restrictions to access reception conditions*, accessed July 2013.
405 Jesuit Refugee Service (JRS), *'Protection Interrupted – The Dublin Regulation's impact on asylum seekers' protection (The DIASP Project)'*, June 2013, p. 39.
406 Asylum Information Database, *Country Report Greece - Criteria & Restrictions to Access Reception Conditions*, accessed July 2013.
407 Asylum Information Database, *Country Report France - Forms and Levels of Material Reception Conditions*, accessed July 2013.
408 Employment centre in France.
409 Asylum seekers under the Dublin procedure who had requested the allowance after 27 September 2012 and who had received a negative response can request a retroactive payment.
410 Jesuit Refugee Service (JRS), '*Protection Interrupted – The Dublin Regulation's impact on asylum seekers' protection (The DIASP Project)*', June 2013, p. 68.

system, the length of time necessary to find again availability in the centres is – in most of the cases – too long. Since, there is no general practice, it is not possible to evaluate the time necessary to access accommodation. In recent years, temporary reception systems have been established to house persons transferred to Italy on the basis of the Dublin II Regulation. However, it concerns a form of temporary reception that lasts until their legal situation is defined or, in case they belong to vulnerable categories, an alternative facility is found. However, it happens that Dublin returnees are not accommodated and find alternative forms of accommodation such as self-organized settlements.[411]

With respect to subsequent applications, both **Poland**[412] and **Hungary**[413] have adopted good practice by providing material reception conditions also to asylum seekers submitting subsequent asylum applications. On the other hand, since recently, **Belgium** has excluded such applicants from reception and material aid.[414] The same applies to asylum seekers lodging a subsequent application in **Bulgaria**,[415] **Austria**[416] (where, in practice those asylum seekers might still receive the basic care, i.e. the material reception conditions, that every asylum seeker is entitled to) and **Malta** (where material reception conditions are no longer provided to those that had benefitted from them earlier and subsequently departed from the open centre system).[417]

In the context of reception conditions granted during Dublin procedures, the CJEU ruled in *CIMADE, Groupe d'information et de soutien des immigrés* (*GISTI*) *v Ministre de l'Intérieur, de l'Outre-Mer, des Collectivités Territoriales et de l'Immigration*[418] that Member States' obligations to provide reception conditions to asylum seekers in accordance with EU law also apply during the procedure to determine the Member State responsible for examining the asylum application lodged in one of the EU Member States. The Court ruled that the requesting Member States remain responsible for the provision of minimum reception conditions for asylum seekers and assume the financial burden until the transfer of the asylum seeker has been effected.

Adequate access to reception conditions for asylum seekers demands a certain quality in order to guarantee asylum seekers an adequate standard of living in their country of asylum. UNHCR has raised concern of **Italy**'s failure to systematically monitor the quality of its reception centres and to address complaints lodged by asylum seekers on the poor quality of its overcrowded centres.[419] In **Greece**, EU funding has helped in refurbishing some reception centres but further funding is needed to ensure on-going effective management, staffing and maintenance of such facilities.[420] In **Ireland**, a privatized reception system of "Direct Provision", by which asylum seekers receive full board and basic needs, in addition to a weekly financial allowance applies. However, reception centres are reported to be of poor quality, with concerns raised over malnourishment, and fear of asylum seekers to complain about poor conditions in reception centres. The 2012 report by the Special Rapporteur on Child Protection highlighted the 'real risk' of child abuse in DP arising from the shared sleeping arrangements.[421]

As to the amount of additional financial allowance paid to asylum seekers, the **German** Federal Constitutional Court issued in 2012 a milestone judgment. The Court ruled that the financial allowance to be granted according to German law as it stands is insufficient and unconstitutional, as it prevents asylum seekers from securing a dignified minimum level of subsistence. For a transitional period until amendment of the Act, the Court demanded calculations of the cash allowance to be based on the amount laid down in the German Social Code, i.e. the amount granted to German nationals.[422]

411 Asylum Information Database, *Country Report Italy - Criteria & Restrictions to Access Reception Conditions*, accessed July 2013.

412 However, practice has shown that the amount granted does not ensure an adequate standard of living in Poland. See Asylum Information Database, *Country Report Poland - Forms and Levels of Material Reception Conditions,* accessed July 2013; and EASO, *Annual Report on the Situation of Asylum in the European Union 2012*, p. 73 (footnote 285).

413 In Hungary, persons submitting a subsequent asylum application can receive reduced material conditions. See Asylum Information Database, *Country Report Hungary - Criteria & Restrictions to Access Reception Conditions*, accessed July 2013.

414 EASO, *Annual Report on the Situation of Asylum in the European Union 2012*, p. 72 (footnote 277).

415 Asylum Information Database, *Country Report Bulgaria - Criteria & Restrictions to Access Reception Conditions*, accessed July 2013.

416 Asylum Information Database, *Country Report Austria - Reduction or Withdrawal of Reception Conditions*, accessed July 2013.

417 Asylum Information Database, *Country Report Malta - Forms and Levels of Material Reception Conditions*, accessed July 2013.

418 CJEU, C-179/11 *CIMADE, Groupe d'information et de soutien des immigrés* (*GISTI*) *v Ministre de l'Intérieur, de l'Outre-Mer, des Collectivités Territoriales et de l'Immigration*, 27 September 2012.

419 Asylum Information Database, *Country Report Italy - Types of Accommodation*, accessed July 2013; and *UNHCR Recommendations on Important aspects on Refugee Protection in Italy*, July 2012.

420 Asylum Information Database, *Country Report Greece - Forms and Levels of Material Reception Conditions*, accessed July 2013.

421 Asylum Information Database, *Country Report Ireland - Forms and Levels of Material Reception Conditions and Types of Accommodation*, accessed July 2013.

422 Asylum Information Database, *Country Report Germany - Criteria & Restrictions to Access Reception Conditions*, accessed July 2013; and Federal Constitutional Court, decision of 18 July 2012, reference no. 1 BvL 10/10, 1 BvL 2/11.

Despite the good practice of not suspending the payment of a financial allowance to families with children even if they no longer meet the eligibility criteria, but do remain destitute and have not breached the conditions for the provision of support, the **UK** has adopted a high eligibility threshold in relation to proof of destitution.[423] As access to financial assistance involves a complex procedure – with information only available in English – asylum seekers encounter difficulties gathering the necessary evidence to prove their need for support. It has been revealed that decisions on the applicant's destitution are of poor quality, with 82% of decision being overturned during appeal proceedings in favour of the applicant.[424]

In a nutshell

Relevant EU standards in recast legislation

Where housing is provided in kind, Article 18(1) of the **recast Reception Conditions Directive**, Member States are required to provide accommodation in the form of either a) premises for the purpose of housing applicants during the examination of an asylum application made at the border or in transit zones, b) accommodation centres which guarantee an adequate standard of living, or c) private houses, flats, hotels or other premises adapted for housing asylum seekers or a combination of those forms. Furthermore, Member States are obliged to take into consideration gender and age-specific concerns and the situation of vulnerable persons when choosing the appropriate accommodation for the asylum seeker (Article 18 (3) and 22 (1)).

With regard to the level of material reception conditions, the recast Reception Conditions Directive requires by means of Article 17 (5) that material reception conditions are provided in the form of financial allowance or vouchers and calculated on the basis of the amount provided to nationals to ensure adequate standards of living. However, at the same time, the recast Directive grants Member States certain leeway, allowing them to treat asylum seekers less favourably than their own nationals. The recast Directive lays down more specific rules on granting, reducing and withdrawing material reception conditions for asylum seekers, permitting Member States to reduce or, in exceptional justified cases, withdraw material reception conditions when an applicant has lodged a subsequent application (Article 20 (1) (c)). The recast Directive also provides Member States with certain discretion in "duly justified cases", which will result in the provision of "exceptional material reception conditions", i.e. different from those regularly applicable, both in the context of the assessment of the specific needs of asylum seekers and where housing capacity is temporarily exhausted (Article 18 (9)).

423 Asylum Information Database, *Country Report UK – Forms and Levels of Material Reception Conditions*, accessed July 2013.
424 Asylum Information Database, *Country Report UK - Criteria & Restrictions to Access Reception Conditions*, accessed July 2013.

Access to the Labour Market

Giving asylum seekers the right to work within a reasonable time after they have made their asylum application is in the interests of both asylum seekers and the host state. For asylum seekers it is essential to avoid social exclusion and prolonged dependency on state provided reception conditions and to allow them to become self-sufficient. Lack of access to the labour market may seriously hinder their integration prospects in the host state in the long term. At the same time, the work experience they have gained during the asylum procedure may positively affect their reintegration into the country or origin upon return in case their asylum application was unsuccessful and make it more sustainable. It is also in the State's interest that asylum seekers engage in gainful employment as it obviously reduces the cost of reception conditions and generates contributions to the fiscal system through taxation. It is interesting to note that in the impact assessment of its 2008 recast Reception Conditions Directive, the Commission pointed to the fact that relaxing restrictions regarding employment for asylum seekers would have insignificant impact on the national labour markets.[425]

Practice of the 14 EU Member States covered in the Asylum Information Database with regard to access to the labour market for asylum seekers during the examination of their asylum applications varies considerably both with regard to the time frame within which asylum seekers gain access to the labour market and with regard to conditions for such access in national legislation. Moreover, if and when granted permission to work, asylum seekers may face a range of additional difficulties to finding employment which include their provisional and uncertain residence status, their limited knowledge of the national language of their country of asylum, the fact that many foreign qualifications are not considered equivalent to national diplomas, lack of education and the fact that they may be accommodated in remote locations, far from big cities with employment opportunities. Furthermore, asylum seekers, as other migrants, are often confronted with discrimination on the labour market and first victims of recession in the host state.

As a result asylum seekers often find themselves barred from accessing the labour market, often resorting to illegal employment, which not only deprives them of access to basic social rights, provided to workers in the respective Member States, but also makes asylum seekers vulnerable to exploitation.

The following table presents an overview of the time limit within which access must be granted to asylum seekers in the 14 EU Member States covered by the Asylum Information Database:

Maximum Time Limit for Granting Access to the Labour Market Pending the Examination of the Asylum Application

	AT	*BE*	*BG*	*DE*[426]	*FR*	*GR*	*HU*	*IE*	*IT*	*MT*	*NL*	*PL*	*SE*	*UK*
Time limit for access to labour market	3 months	6 months	1 year	12 months (after 1 July 2013: 9 months for asylum seekers – those persons with "tolerated status" will only have access after 12 months)	1 year if no first instance decision within 1 year	No time limit but discretion of authorities	12 months (after 1 July 2013 9 months)	No right to work	6 months	12 months	6 months	6 months	The day after lodging application	1 year

N/A: Not available

425 "According to available EU data in 2006 there were 216,525,000 economically active persons between 15 and 64 years old, of whom 198,226,000 were actually employed. Asylum applications in 2007 reached 227,000. Thus, assuming that requests for employment were made by all asylum seekers and that they all have in practice gained access to the labour market, their number would represent an increase of just 0.11% in the employed population and 0.10% in the economically active population. See European Commission, SEC(2008) 2944, *Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers. Impact Assessment*, Brussels, 3 December 2008, p.41.

426 In Germany, numbers are not available due to a unique federal system. Places in reception centres are allocated according to a distribution system, with several in each of Germany's 16 Federal States.

In **Sweden**, asylum seekers can access the labour market immediately after applying for asylum and they maintain the right to work until a final decision is taken on their asylum application. This can even be extended after a negative decision has been taken on the asylum application if the person is willing to return voluntarily and cooperates with the authorities. Generally asylum seekers cannot work in sectors that require specific skills (such as the health care sector). However, those who find a job may change their status from being an asylum seeker to a "labour market immigrant" if they manage to work six months before receiving a negative decision at the second instance or after their appeal to the Migration Court of Appeal is refused. If their employer offers, at that stage, a one- year contract or longer, they can apply for a permission to work in Sweden within two weeks of the final decision in the asylum procedure. This possibility was introduced by the Swedish government as part of its labour migration policy and to respond to a shortage of qualified workers to be able to make use of specific skills that highly qualified asylum seekers possess.[427]

Whereas asylum seekers in the **Netherlands** and **Poland** are entitled to access the labour market at the latest six months after they have made an asylum application, in both countries it is very difficult for asylum seekers to access the labour market. In the case of the Netherlands this is among others because of the very restrictive conditions in national legislation stipulating that asylum seekers are only able to work during a very short period of maximum 24 weeks a year and the administrative hurdles employers are facing to hire asylum seekers, which makes them less eager to do so.[428] In the case of **Poland**, employers do not want to hire persons for short period of times, as they are unaware of the fact that the asylum procedure takes longer than the validity of their temporary ID document, which is six months.[429]

In **Austria**, asylum seekers have access to the labour market three months after the asylum application was lodged, provided no final decision on the asylum procedure was taken within that time frame. However, in practice it is almost impossible to obtain a working permit due to the bureaucratic obstacles that employers must overcome and the fact that access to the labour market for asylum seekers is restricted to seasonal work in agriculture, tourism or forestry.[430]

Access to the labour market in **Germany**, **France** and the **UK** is granted after 12 months of having submitted their asylum application, where the applicant is not responsible for the delay in the processing of their application, and after having examined whether no national, EU citizen or other third country national with priority qualifies for that particular job offer.[432] In France, asylum seekers are only granted a temporary work permit, which cannot exceed the duration of a residence permit, i.e. three months renewable if they can provide proof of a job offer or an employment contract.[433] In the **UK**, access to the employment market is also not automatic but asylum applicants have to apply for a permit and are restricted to an exhaustive list of jobs included in the list of shortage occupations released by the UK government, which contains jobs that are specialist trades and professions which are in short supply in the UK and defined very specifically.[434] Such restrictions render it practically difficult, if not impossible, for asylum seekers to enter the Member States' job market and become self-sufficient.

427 Asylum Information Database, *Country report Sweden - Access to the Labour Market*, accessed July 2013.
428 Asylum Information Database, *Country report The Netherlands - Access to Labour Market*, accessed July 2013.
429 Asylum Information Database, *Country report Poland - Access to Labour Market*, accessed July 2013.
430 Asylum Information Database, *Country report Austria – Access to the Labour Market*, accessed July 2013.
431 Soon asylum seekers (excluding those with merely "tolerated status" in Germany) will be able to access the employment market after 9 months; thus in line with the recast Reception Conditions Directive.
432 Asylum Information Database, *Country Reports Germany, France and the UK - Access to Labour Market*, accessed July 2013.
433 Asylum Information Database, *Country Reports France - Access to Labour Market*, accessed July 2013.

Administrative obstacles also exist in **Malta** where the issuance of a renewable work permit for six months depends on two requirements: a) proof of a specific employment offer and b) employers having to apply for the asylum seeker's licence for that particular job, i.e. requiring each new employer to obtain a new work permit for the respective asylum seeker.[435] However, in practice, most asylum seekers are detained in Malta and therefore unable to access the labour market until either a positive decision on their asylum application or no final decision on their application is reached within twelve months form the date they lodged the asylum application, at which point they are released from detention.

Access to the labour market in **Ireland** is not possible at any stage and in **Greece**, where no deadline for access has been regulated, it depends on the decision of the competent authority on when to grant and issue a work permit.[436]

In a nutshell

Relevant EU standards in recast legislation

Article 15 of the recast Reception Conditions Directive imposes on Member States the obligation to grant access to the labour market no later than nine months from the date when the application for international protection was lodged. This is required only if a first instance decision on the asylum application has not been taken within that period and the delay cannot be attributed to the applicant.

Conditions for granting access to the labour market for the asylum seeker must be decided by the Member States in accordance with national law, while ensuring that asylum seekers have effective access to the labour market.

434 For instance, consultant in neuropsychology, electricity subs-station, or electrical engineer; see Asylum Information Database, *Country Reports UK - Access to Labour Market*, accessed July 2013.

435 Asylum Information Database, *Country Reports Malta - Access to Labour Market*, accessed July 2013; and Jesuit Refugee Service (JRS), *'Protection Interrupted – The Dublin Regulation's impact on asylum seekers' protection (The DIASP Project)'*, June 2013, p. 171.

436 Asylum Information Database, *Country Reports Ireland and Greece - Access to Labour Market*, accessed July 2013.

Concluding Remarks

As mentioned in the introduction, this first annual report on the situation of asylum in 14 EU Member States does not aim to present a complete picture of the state of asylum in the countries concerned but rather to provide an overview of the key protection gaps, positive developments and challenges identified by NGO experts in the countries concerned.

This first phase of research into the asylum systems of a number of EU Member States highlights the magnitude of the task that EU Member States and EU institutions have set for themselves when they embraced the concept of a CEAS where similar cases should be treated alike and result in the same outcome, regardless of the EU Member State responsible for examining the asylum application. The challenges are diverse and often closely linked to the specific characteristics of national legal systems and legal traditions as well as the economic and political situation in the Member State concerned. National recognition rates with regard to caseloads from the same country of origin as well as procedural safeguards and reception conditions continue to differ among EU Member States, despite the many efforts to enhance harmonisation through legislation and practical cooperation coordinated by EASO.

However, the EU and its Member States have a variety of tools at their disposal to honour the commitment of Stockholm Programme. In addition to the body of EU legislation it has recently adopted, EASO has the potential of further assisting EU Member States in complying with their obligations in a spirit of solidarity. It will take strong political will and courage from decision-makers at EU and national level to make the CEAS based on high standards of protection a reality for those seeking protection as well as for those having the important task to examine and decide on their applications. In that respect both the transposition of the asylum package in national legislation and the discussions on the allocation of EU funding in the framework of the Asylum and Migration Fund provide an opportunity to make substantial progress in achieving this objective.

The main focus of this report is on the operation of asylum systems in the 14 EU Member States covered by the Asylum Information Database and the challenges identified by national NGO experts in upholding the human rights of asylum seekers in practice. The quality of asylum systems and their ability to fulfil their core function, i.e. recognising and providing international protection to those in need of such protection, is also dependent on the quality and effectiveness of procedural safeguards and the conditions in which asylum seekers are accommodated during the examination of their asylum application.

This first annual report does not seek to make specific recommendations with regard to the variety of both shortcomings and good practice identified by the national NGO experts in their respective countries as this must be addressed at the national level. Rather and by way of conclusion, a number of general recommendations from an NGO-perspective are presented here that relate to some of the key findings in this report and that should be addressed by EU institutions and EU Member States in the next phase of establishing the CEAS.

Asylum seekers arriving in EU Member States covered by the Asylum Information Database continue to face obstacles in **accessing the territory** and **asylum procedure**. Instances of push-backs at sea and at the external land and sea borders of the EU in violation of Member States' obligations to fully respect the principle of *non refoulement* continue to be reported. Access to the asylum procedure may be impaired by bureaucratic obstacles creating delays or even preventing asylum seekers from having their asylum application officially registered.

EU Member States must ensure those wishing to apply for international protection have an effective opportunity to do so, have their asylum application registered upon arrival and provided with a document certifying the person's status as asylum seeker and their right to remain on the territory pending the asylum procedure.

External border controls, including in the context of Frontex operations, must be implemented in a protection-sensitive manner to ensure that the right to asylum under Article 18 EU Charter of Fundamental Rights and the principle of *non refoulement* as enshrined in Article 19 EU Charter and international human rights law and EU law is fully respected in practice.

Asylum applications in the EU Member States covered by AIDA are being processed through sophisticated legal procedures where asylum seekers find themselves in a disadvantaged position as they often face important language barriers and lack necessary knowledge of the legal framework within which national asylum systems operate. At the same time, asylum seekers increasingly face obstacles in practice in accessing **quality free legal assistance** during the asylum procedure. This is particularly the case where asylum applications are channelled through procedures that are characterised by reduced processing times and time limits for lodging appeals and whenever they are detained.

Effective access to legal assistance and interpretation is increasingly acknowledged by the jurisprudence of the ECtHR as constituting an essential safeguard in ensuring access to an effective remedy and is part of Article 47 of the EU Charter of Fundamental Rights. However, due to budgetary constraints as well as practical obstacles, asylum seekers see themselves confronted with a growing paradox whereby free legal assistance is becoming less available where it is most needed but is acknowledged as being indispensable to ensure access to an effective remedy.

In addition, standards laid down in EU recast asylum legislation are increasingly informed by the developing jurisprudence of the CJEU relating to general principles of EU law and the EU Charter of Fundamental Rights, including in areas of EU law that are unrelated to the EU asylum *acquis* as well as the jurisprudence of the ECtHR. This increases the need for permanent training of lawyers and legal practitioners that reflects this development in order to ensure that they are fully equipped to provide the quality legal assistance that is needed to ensure that asylum seekers' rights are effectively respected in practice. Member States could also consider supporting more intensive forms of legal advice, early in the asylum procedure, to ensure that the claim is fully presented to the first instance decision maker.

EU Member States must take the necessary measures to ensure asylum seekers' effective access to quality free legal assistance, in particular where such access is likely to be undermined most in practice, such as in the context of accelerated, border and admissibility procedures and where the asylum seeker is in detention.

Appeal systems in the EU Member States covered by AIDA vary considerably, both with regard to suspensive effect and the time limits for the asylum seeker to lodge an appeal against a first instance negative decision. Systems whereby suspensive effect must be requested separately from the appeal body generally add to the complexity of the system and the workload of appeal instances and lawyers and may undermine the effectiveness of the remedy for the asylum seeker in practice.

Access to an effective remedy may also be undermined in practice where short time limits for lodging an appeal apply. This is predominantly the case in the EU Member States covered by AIDA where they apply special asylum procedures such as accelerated, border, admissibility or Dublin procedures but the examples of the Netherlands, Hungary and the United Kingdom illustrate that short time limits for lodging an appeal may also apply in the regular asylum procedure.

The **right to an effective remedy** is a key procedural safeguard to ensure full compliance with the principle of *non refoulement* and is enshrined in Article 13 ECHR, Article 47 EU Charter as well as in Article 46 recast Asylum Procedures Directive and Article 27 recast Dublin Regulation. According to the jurisprudence of the ECtHR, the right to an effective remedy implies *inter alia* that the remedy has automatic suspensive effect, allows for a close and rigorous scrutiny and is guaranteed in law and in practice. Under the EU recast asylum legislation, access to an effective remedy also requires reasonable time limits for lodging an appeal against first instance asylum decisions and a full and *ex nunc* examination of both facts and points of law, including where suspensive effect is to be requested separately.

EU Member States must ensure access to an effective remedy with automatic suspensive effect which guarantees a full and *ex nunc* examination of both facts and points of law and provides for reasonable time limits for lodging an appeal enabling asylum seekers to exercise the remedy effectively. This is best guaranteed by ensuring that appeals against negative first instance decisions are automatically suspensive with regard to any removal decision that may accompany such decision, without the need for asylum seekers to lodge a separate request for such suspension. While shorter time limits for lodging appeals may be acceptable in certain cases, they should never be so short as to render the effective exercise of the remedy extremely difficult or practically impossible.

Today, asylum seekers face serious problems in accessing **adequate reception conditions** in a number of Member States covered by AIDA. Some EU Member States lack sufficient capacity to ensure that every asylum seeker arriving on the territory has effective access to reception conditions that meet the standards laid down in EU law. Access to reception conditions may also be refused in practice in the context of special asylum procedures such as in Dublin procedures, contrary to the jurisprudence of the CJEU or when submitting a subsequent asylum application. Asylum seekers' access to the labour market continues to be impaired *inter alia* by restrictive conditions in national legislation while time limits for accessing the labour market vary considerably between EU Member States.

Lack of access to adequate reception conditions undermines the fairness and efficiency and the overall quality of the asylum procedure and may obstruct asylum seekers from pursuing their case or even appealing against a negative decision. Failure to ensure access to adequate reception conditions may amount to inhuman and degrading treatment prohibited under Article 3 ECHR as the ECtHR established in the case of M.S.S v. Greece and Belgium. As employment promotes self-sufficiency among asylum seekers, early and effective access to the labour market is in the interests of both asylum seekers and States.

EU Member States must take the necessary measures to ensure that they comply with their obligations under EU law and international human rights law and provide material reception conditions that provide a standard of living to asylum seekers that ensures their subsistence and health and respects the independence and dignity of asylum seekers. Sufficient capacity must be created within the reception system of EU Member States allowing swift responses to temporary and sudden changes in the number of arrivals. Asylum seekers should have early access to the labour market and in any case no later than six months after the asylum application was lodged. EU Member States must refrain from imposing conditions which undermine asylum seekers' effective access to the labour market.

Detention of asylum seekers remains an area of great concern, including in a number of EU Member States covered by AIDA. Detention not only has a devastating impact on the (mental) health of asylum seekers, it inevitably undermines asylum seekers' access to key procedural safeguards such as the right to an effective remedy and legal assistance. While some EU Member States covered by AIDA do not or hardly detain asylum seekers, it unfortunately remains to be systematically applied in other EU Member States.

In addition, in a number of EU Member States included in AIDA, asylum seekers are detained in conditions that have been considered as inhuman and degrading by the ECtHR as well as the Committee on the Prevention of Torture and the Commissioner for human rights of the Council of Europe.

EU Member States must consolidate in national legislation the general presumption that exists in international human rights law against the detention of asylum seekers. As a general rule, asylum seekers should not be detained, except in the most exceptional cases and only as a measure of last resort. Where asylum seekers are detained they must have effective access to the full range of procedural safeguards laid down in EU and international law to protect them against arbitrary detention, including automatic judicial review and free legal assistance. As they are particularly vulnerable, the detention of asylum seeking-children, whether unaccompanied or with families, should be prohibited by law.

As EU Member States are transposing the new recast asylum legislation into national legislation they should do so in the spirit of achieving a CEAS based on high standards of protection. The recast EU asylum Directives explicitly provide the possibility for Member States to retain or introduce **more favourable provisions** than the standards laid down in the recast legislation. A number of standards laid down in the recast asylum legislation simply consolidate existing national practice in EU law resulting in a status quo. Some examples of State practice referred to in this report illustrate how this will be insufficient to ensure asylum seekers' effective access to a fair asylum procedure in practice. EU Member States should not settle for the *minimum minimorum* but instead aim for high protection standards that fully support the frontloading of asylum systems in the interest of enhancing both the efficiency and the fairness of asylum procedures in the EU.

The transposition of EU asylum legislation, as well as the national policy dialogues that are taking place between the Commission and the Member States in the context of the Asylum and Migration Fund constitute an opportunity for governments to engage in **meaningful consultation with NGOs** to identify the protection gaps that need to be addressed by legislative and/or non-legislative measures.

At the EU level **intensified dialogue among EU institutions, EASO and expert non-governmental organisations** is needed, in particular in the context of contact committees on the various EU legislative instruments on asylum and the development of the Early Warning and Preparedness Mechanism. In order to fully exploit its potential as a tool to support the establishment of a CEAS based on high standards it should ensure comprehensive monitoring of all aspects of EU Member States' practices. If the Early Warning and Preparedness Mechanism is to provide the real picture it is essential to ensure that information gathered and processed in the mechanism is based on a variety of sources, including information and expertise provided by expert non-governmental organisations and legal practitioners. As initiatives such as the Asylum Information Database illustrate, there is a wealth of expertise and practical experience on the functioning of asylum systems in the EU Member States within the NGO-community in the EU. It would be a mistake for the EU institutions not to use it.

Annexes

Annex I

Statistical Tables

Table 1: Asylum Applicants in the EU and Schengen Associated States in 2012 (Top 5 Countries of Origin)

Country of destination / Country of origin	Total	Afghanistan	Russia	Syria	Pakistan	Serbia
Total	**373,995**	**30,390**	**25,000**	**25,675**	**20,020**	**21,085**
EU 27 countries	**335,380**	**28,010**	**24,280**	**24,110**	**19,695**	**19,065**
Austria	17,450	4,015	3,110	930	1,825	300
Belgium	28,285	3,290	2,655	1,030	840	1,095
Bulgaria	1,385	110	10	450	25	0
Cyprus	1,635	50	10	565	110	0
Czech Republic	755	10	40	70	10	5
Denmark	6,075	565	510	875	65	555
Estonia	75	5	10	5	5	0
Finland	3,115	210	225	185	20	85
France	61,455	570	6,015	635	2,000	840
Germany	77,650	7,840	3,415	7,930	3,555	12,810
Greece	9,575	585	35	275	2,340	5
Hungary	2,155	880	5	145	325	20
Iceland	120	10	5	5	5	0
Ireland	955	30	10	15	105	0
Italy	17,350	1,495	25	355	2,600	95
Latvia	205	15	10	20	0	0
Liechtenstein	75	5	10	0	0	10
Lithuania	645	100	95	0	5	0
Luxembourg	2,055	10	20	10	0	385
Malta	2,080	0	0	150	25	5
Netherlands	13,100	1,620	825	575	170	145
Norway	9,785	985	370	325	145	115
Poland	10,755	105	6,085	105	45	0
Portugal	295	5	5	20	5	0
Romania	2,510	200	10	245	335	15
Slovakia	730	90	20	5	15	0
Slovenia	305	65	5	30	10	15
Spain	2,565	45	35	255	85	5
Sweden	43,945	4,760	940	7,920	285	2,670
Switzerland	28,640	1,385	340	1,230	170	1,890
United Kingdom	28,260	1,340	160	1,300	4,880	10

Source: Eurostat, Asylum and new asylum applicants by citizenship, age and sex Annual aggregated data (rounded), migr_asyappctza, extracted 27 August 2013

Table 2: Unaccompanied Children Applicants in the EU and Schengen Associated States in 2012

Country of destination /Country of origin	Total	Afghanistan	Somalia	Guinea	Pakistan	Syria
Total	**13,390**	**5,510**	**985**	**455**	**430**	**415**
EU (27 countries)	**12,715**	**5,355**	**940**	**430**	**415**	**385**
Austria	1,375	900	35	0	140	25
Belgium	1,530	700	35	240	45	10
Bulgaria	60	25	0	0	0	15
Croatia	70	35	10	0	5	5
Cyprus	25	0	0	0	0	0
Czech Republic	5	0	0	0	0	0
Denmark	355	115	45	0	0	15
Estonia	0	0	0	0	0	0
Finland	165	35	30	0	0	0
France	490	40	5	30	0	5
Germany	2,095	1,005	125	60	110	135
Greece	75	30	0	5	20	0
Hungary	185	130	5	0	15	10
Iceland	5	0	0	0	0	0
Ireland	25	0	0	0	0	0
Italy	970	115	30	60	25	0
Latvia	0	0	0	0	0	0
Liechtenstein	0	0	0	0	0	0
Lithuania	5	5	0	0	0	0
Luxembourg	15	0	5	0	0	0
Malta	105	0	90	0	0	0
Netherlands	:	:	:	:	:	:
Norway	105	60	10	:	0	:
Poland	245	10	0	0	0	5
Portugal	10	0	0	5	0	0
Romania	135	30	5	0	25	10
Slovakia	30	5	25	0	0	0
Slovenia	50	20	5	0	0	5
Spain	15	0	0	0	0	0
Sweden	3,580	1,940	450	10	5	120
Switzerland	495	60	25	25	5	25
United Kingdom	1,170	255	40	10	15	25

Source: Eurostat, Asylum applicants considered to be unaccompanied minors by citizenship, age and sex Annual data (rounded), migr_asyunaa, extracted on 30 July 2013, data for the Netherlands is not available and the calculation of the total for the EU is an estimate by Eurostat.

Table 3: Recognition Rates in the EU in 2012

	First instance positive decisions				Final positive decisions on appeal			
	Number	Rate of recognition (%)*			Number	Rate of recognition (%)*		
	Total	Total	Refugee and subsidiary protection status	Humanitarian status	Total	Total	Refugee and subsidiary protection status	Humanitarian status
EU27	77 295	28.2	25.3	2.9	25 410	19.1	14.4	4.7
BE	5 555	22.6	22.6	-	325	2.6	2.6	-
BG	170	26.6	26.6	-	25	95.8	95.8	-
CZ	175	24.6	24.2	0.4	25	5.5	5.5	0.0
DK	1 695	36.2	33.7	2.5	410	27.5	27.4	0.1
DE	17 140	29.2	26.8	2.4	5 025	17.1	11.0	6.0
EE	20	32.8	17.9	14.9	0	25.0	25.0	0.0
IE	95	10.2	10.2	-	45	6.8	6.8	-
EL	95	0.9	0.7	0.2	530	32.2	16.8	15.4
ES	525	20.2	19.8	0.5	40	3.6	1.0	:
FR	8 645	14.4	14.4	-	5 680	15.7	15.7	-
IT	8 480	61.7	47.6	14.1	790	64.0	25.8	38.2
CY	105	7.9	6.7	1.1	45	3.0	1.4	1.7
LV	25	17.8	17.8	-	5	12.5	12.5	-
LT	55	13.9	13.9	-	0	0.9	0.9	-
LU	40	2.5	2.5	-	5	0.6	0.6	-
HU	350	31.8	28.0	3.8	110	27.8	26.6	1.2
MT	1 435	90.1	79.9	10.2	20	5.0	4.1	0.9
NL**	5 505	41.1	29.5	11.6	415	39.0	33.9	5.1
AT	4 455	28.0	28.0	-	1 540	19.4	19.4	-
PL	475	19.5	9.3	10.2	70	7.2	4.4	2.8
PT	100	43.9	43.9	-	0	0.0	0.0	-
RO	230	14.3	14.3	0.0	275	12.4	12.4	0.0
SI	35	15.6	15.6	-	0	0.0	0.0	-
SK	190	43.4	24.8	18.6	10	12.5	12.5	0.0
FI	1 555	50.4	42.7	7.7	280	84.6	70.8	13.9
SE	12 400	39.3	36.0	3.4	2 890	18.1	13.6	4.5
UK	7 735	35.4	30.5	4.9	6 835	43.7	25.5	18.2
IS	10	18.0	16.0	2.0	0	0.0	0.0	0.0
NO	5 180	48.8	45.8	3.0	945	11.6	7.1	4.5
CH	4 280	25.7	17.8	7.9	300	7.8	2.1	5.7
LI	5	5.6	5.6	0.0	20	26.1	26.1	0.0

Data are rounded to the nearest five. 0 means less than 3. (:) Not available (-)Not applicable

** Rate of recognition is the share of positive decisions (first instance or final on appeal) in the total number of decisions at the given stage. In this calculation, the exact number of decisions has been used instead of the rounded numbers presented in this table.*
*** Data for the Netherlands are provisional and do not include resettled refugees from 2012.*

Source: Table initially published in Eurostat, Asylum decisions in the EU27: EU Member States granted protection to more than 100 000 asylum seekers in 2012, 96/2013. 18 June 2013.

Annex II

Selected Asylum-related Case-law of the ECtHR and the CJEU

Court of Justice of the European Union

Asylum Procedures

In ***Samba Diouf***[437], the CJEU held that Article 39 of the Asylum Procedures Directive does not preclude national rules, under which no separate action may be brought against the decision of the competent national authority to deal with an application for asylum under an accelerated procedure, provided that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in the action which may be brought against the final decision rejecting the application.

In ***M.M.***[438], the CJEU ruled that, where a Member State chooses to establish two separate procedures for examining asylum applications and applications for subsidiary protection, one following another, it is important that the applicant's right to be heard, in view of its fundamental nature, be fully guaranteed in each of those two procedures.. It is for the national court to ensure observance, in each of those procedures, of the applicant's fundamental rights and, more particularly, of the right to be heard in the sense that the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested. In such a system, the fact that the applicant has already been duly heard when his application for refugee status was examined does not mean that that procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection.

The ***HID, B.A.***[439] case concerned a preliminary reference on the interpretation of provisions in the Asylum Procedures Directive relating to accelerated procedures and the right to an effective remedy in relation to the asylum procedure in Ireland. According to the CJEU Article 23(3) and (4) of the Procedures Directive must be interpreted as not precluding a Member State from examining by way of prioritised or accelerated procedure certain categories of asylum applications on the basis of the asylum applicant's nationality or country of origin. Concerning the right to an effective remedy, the CJEU considered that the Irish system of granting and withdrawing refugee status as a whole satisfies the criterion of independence required to ensure the right to an effective remedy. It ruled that Article 39 of the Asylum Procedures Directive must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows an applicant for asylum either to lodge an appeal against the decision of the determining authority before a court or tribunal such as the Refugee Appeals Tribunal (Ireland), and to bring an appeal against the decision of that tribunal before a higher court such as the High Court (Ireland), or to contest the validity of that determining authority's decision before the High Court, the judgments of which may be the subject of an appeal to the Supreme Court (Ireland).

Dublin

In the joined cases of ***N.S.*** and ***M.E.***[440] the CJEU gave a preliminary ruling on whether under certain circumstances a state may be obliged to examine an application under the sovereignty clause included in Article 3 (2) of the Dublin II Regulation even if, according to the Dublin criteria, responsibility lies with another EU Member State. The Court clarified that EU Member States must act in accordance with the fundamental rights and principles recognised by the EU Charter of Fundamental Rights when exercising their discretionary power under Article 3 (2). Therefore, Member

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

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

439 CJEU, C-175/11 *HID, BA v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, Judgment of 31 January 2013.

440 CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department* and *M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011 (Summary taken from the FRA Handbook on European law relating to asylum, borders and immigration).

States may not transfer an asylum seeker to the Member State responsible within the meaning of the regulation when the evidence shows – and the Member State cannot be unaware of – systemic deficiencies in the asylum procedure and reception conditions that could amount to a breach of Article 4 of the EU Charter of Fundamental Rights (prohibition on torture). This also obliges the Member State to examine the other criteria in the regulation and identify if another Member State is responsible for examining the asylum application. If identifying another Member State is not possible or the procedure to do so takes an unreasonable amount of time, the Member State itself must examine the application in accordance with Article 3 (2). In the context of the facts of the case, the CJEU looked at whether Article 4 of the EU Human Rights Charter, which corresponds to Article 3 of the ECHR, would be breached if the individuals were transferred to Greece under the Dublin II Regulation. By the time the CJEU considered the cases, the ECtHR had already held that the reception and other conditions for asylum seekers in Greece breached Article 3 of the ECHR. The CJEU held that the Member States could not be "unaware" of the systemic deficiencies in the asylum procedure and reception conditions in Greece that create a real risk for asylum seekers to be subjected to inhuman or degrading treatment. It stressed that the Dublin II Regulation had to be implemented in conformity with Charter rights, which meant that the United Kingdom and Ireland were obliged to examine the asylum claims, despite the fact that the applicants had lodged their asylum claims in Greece.

In ***K***,[441] the CJEU interpreted Article 15 of the Dublin II Regulation, allowing every Member State, erven where it is not responsible for examining the asylum application, to bring together family members as well as other dependent relatives, on humanitarian grounds. Article 15(2) provides that where the person concerned is dependent on the other *inter alia* on account of serious illness or handicap, Member States shall normally keep or bring together the asylum seeker with the relative present in another Member State. K applied for asylum in Poland first but travelled on to Austria to join her adult son and his family and applied for asylum there. K's daughter-in-law was dependent on K because of a serious illness handicap and illness following a serious and traumatic occurrence. The CJEU affirmed that where the conditions listed in Article 15 (2) are satisfied, the humanitarian clause must be interpreted as meaning that a Member State that is not responsible for examining an application for asylum, pursuant to the criteria laid down in Chapter III of the Dublin Regulation becomes so responsible, even though the Member State responsible under the Dublin criteria did not make a request as required by Article 15 (1).

In **MA, BT *and* DA**[442] the CJEU held that a child's best interest must be a primary consideration in all decisions under the Dublin II Regulation in accordance with Article 24 of the Charter of Fundamental Rights. Unaccompanied children form a category of particularly vulnerable persons and prompt access to an asylum procedure and the prevention of unnecessary delays in the Dublin procedure are central to their best interests. This means that, as a rule, unaccompanied children who claim asylum in a Member State should not be transferred to another Member State. With that in mind, the Court concluded that Article 6 of the Dublin II Regulation should be interpreted to mean that "[w]here an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the Member State responsible."

Reception Conditions

In the case of ***CIMADE***[443] the CJEU was asked rule on the question whether Member States' obligations to provide reception conditions to asylum seekers under the Reception Conditions Directive also apply to cases in which another Member States is called upon as the responsible Member State under the Dublin Regulation, when such obligations cease in such cases, and which Member State should assume the financial burden of providing those minimum conditions. The CJEU stated that the obligation to provide minimum reception conditions begins when the applicant applies for asylum even if this is on the territory of a State which is not the responsible Member State pursuant to the criteria laid down by the Dublin Regulation and that Union law implies that asylum seekers have a right to remain on the territory not only of the responsible Member State but also, until the actual transfer of the person concerned, in the territory of the Member State in which that application was lodged. The CJEU ruled that Member States are obliged to grant minimum conditions for reception of asylum seekers, even where it calls upon another Member State to take

441 CJEU, C-245/11, *K v. Bundesasylamt*, Judgment of 6 November 2012.

442 CJEU, C-648/11 *MA, BT, DA v Secretary of State for the Home Department,* Judgment of 6 June 2013.

443 CJEU, C-179/11 *CIMADE, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-Mer, des Collectivités Territoriales et de l'Immigration*, Judgment of 27 September 2012.

charge of or take back an asylum seeker under the Dublin procedure. This obligation ceases only once the asylum applicant has actually been transferred. The financial burden of granting those minimum conditions is to be assumed by the requesting Member State.

Return

In ***Arslan***[444], the question referred to the Court concerned the applicability of the EU Return Directive to asylum seekers applying for asylum after having been detained for the purpose of removal. The CJEU ruled that Article 2(1) in conjunction with recital 9 of the EU Return Directive must be interpreted as meaning that the Return Directive does not apply to persons who have made an application for international protection until a final decision on their asylum application is made. However, the Asylum Procedures Directive and the Reception Conditions Directive do not preclude a third-country national, who after having been detained in accordance with Article 15 of the EU Return Directive has applied for asylum, from being kept in detention on the basis of a provision of national law, where it appears, after an assessment of a case-by-case basis of all the relevant circumstances that the application was solely made to delay or jeopardise the enforcement of the decision and that it is objectively necessary to detain the person concerned to prevent them from permanently evading their return. The Court emphasised that the mere fact that an asylum seeker is subject of a return decision and is being detained on the basis of Article 15 EU Return Directive does not allow it to be presumed that the application was made solely to delay or jeopardise the enforcement of the return decision.

ECtHR

Access to the territory

The case of ***Hirsi Jamaa and Others v. Italy***[445] concerned the interception at the high seas by the Italian authorities of 24 Somali and Eritrean nationals who were part of a group of about 200 migrants who left Libya with the aim of reaching the Italian coast. The group was taken on board the Italian ship and handed over to the Libyan authorities without having their claim examined that they would be subjected to treatment in breach of Article 3 ECHR and without having had access to legal assistance and interpretation. The ECtHR affirmed that the Court unambiguously affirmed that human rights obligations of States under the Convention, including the non-derogable prohibition of *refoulement*, apply on the high seas, i.e. extraterritorially, wherever the State concerned exercises control and authority over the individuals concerned. It held that Italy had violated Article 3 ECHR by transferring the applicants to Libya, in full knowledge of the situation in Libya and he risk of treatment proscribed by the Convention. Moreover, the transfer to Libya also violated Article 3 ECHR because the Italian authorities had full knowledge or should have knowledge of the fact that there were insufficient guarantees protecting the applicants from the risk of being arbitrarily returned to their countries of origin from Libya. The Court explicitly stated that the obligations of States under Article 3 ECHR apply regardless of whether the person intercepted has explicitly applied for asylum Furthermore, the ECtHR found a violation of Article 4 of Protocol No. 4 to the ECHR, i.e. the prohibition of collective expulsions, as the Italian authorities failed to carry out an identification procedure, examining each individual's circumstances; instead they were merely disembarked in Libya. Finally, Italy was also found in breach of Article 13 ECHR taken together with Article 3 ECHR and Article 13 taken together with Article 4 of Protocol No. 4 because the applicants were deprived of any remedy which would enabled them to lodge their complaints under both Articles with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced.

Dublin

The case of ***M.S.S. v. Belgium and Greece***[446], concerned the expulsion of an Afghan asylum seeker to Greece – his first entry point to the EU – by the Belgian authorities – where he applied for asylum – in application of the EU Dublin II Regulation. Upon being transferred back to Greece he was placed immediately in detention. There had been various reports

444 CJEU, C-534/11, M*ehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie–Czech Republic*, Judgment, of 30 May 2013.

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

446 ECtHR, *M.S.S. v. Belgium and Greece,* Application no. 30696/09, Judgment, 21 January 2011 (Summary taken from the FRA Handbook on European law relating to asylum, borders and immigration).

by international bodies and NGOs concerning the Greek authorities' systematic placement of asylum seekers in detention. The applicant's allegations that he was subjected to brutality by the police were consistent with witness reports collected by international organisations, in particular the CPT. Findings by the CPT and the UNHCR also confirmed the applicant's allegations of unsanitary conditions and overcrowding in the detention centre next to Athens international airport. Even though the applicant was detained for a relatively short time, the conditions of detention in the holding centre were unacceptable. The ECtHR held that the applicant must have experienced feelings of arbitrariness, inferiority and anxiety, and that the detention conditions had undoubtedly had a profound effect on his dignity, amounting to degrading treatment. In addition, he was particularly vulnerable as an asylum seeker because of his migration and the traumatic experiences he had likely endured. Therefore, the ECtHR held firstly, in relation to Article 3 ECHR, that the applicant's general living and detention conditions in Greece had breached Article 3 ECHR. The Court found also that Greece had violated Article 13 ECHR in conjunction with Article 3 because of the deficiencies in the asylum system, and the risk he faced of being directly or indirectly returned to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy. 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 organisations 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. In relation to Belgium, the ECtHR found that based upon evidence Belgian authorities knew, or ought to have known, that there was lack of access to an asylum procedure in Greece and a consequent risk of onward *refoulement*, if the applicant was transferred to Greece. Belgian authorities were therefore also found liable under Article 3 for a Dublin transfer to Greece, having exposed the applicant to risks linked to the deficiencies in the asylum procedure in Greece and to detention and living conditions in Greece that were in breach of Article 3. With regards to Article 13 ECHR taken together with Article 3, Belgium was found to be in violation due to the applicant's lack of access to an effective remedy against the expulsion order. The Court found that the extremely urgent procedure available to the applicant before the Belgian court did not meet the requirements of close and rigorous scrutiny of any complaints against an expulsion order which could expose an individual to treatment prohibited by Article 3 by a competent body, affording proper redress.

Access to an Effective Remedy

In ***Gebremedhin*** **[*Gaberamadhien*]** ***v. France***[447], the ECtHR considered that the applicant's allegations as to the risk of ill-treatment in Eritrea had been sufficiently credible to make his complaint under Article 3 of the ECHR an "arguable" one. The applicant could therefore rely on Article 13 taken in conjunction with Article 3. In this case concerning asylum applications lodged at the border, the Court held that the applicant did not have access to an effective remedy. Asylum seekers arriving at the border without proper documentation had to apply for leave to enter the territory on asylum grounds. They were then held in a "waiting area" while the authorities examined whether their intended asylum application was "manifestly ill-founded". If the authorities deemed the application to be "manifestly ill-founded", the person was refused leave to enter and was automatically liable to be removed without having had the opportunity to apply for asylum. The possibility to challenge such decision before the administrative courts to have the ministerial decision refusing leave to enter set aside, such an application had no suspensive effect and was not subject to any time limits. The appeal before the urgent applications judge, as the applicant had done without success did not have an automatic suspensive effect either, meaning that the person could be removed before the judge had given a decision. Given the importance of Article 3 of the ECHR and the irreversible nature of the harm caused by torture or ill-treatment, it is a requirement under Article 13 that, where a state party has decided to remove a foreign national to a country where there was a substantial reason to believe that he or she ran a real risk of torture or ill-treatment, the person concerned must have access to a remedy with automatic suspensive effect. The requirements of Article 13 must take the form of a guarantee and not of a mere statement of intent or practical arrangement.

In ***Abdolkhani and Karimnia v. Turkey***[448], both the administrative and judicial authorities remained passive regarding the applicants' serious allegations of a risk of ill-treatment if they were returned to Iraq or Iran. Moreover, the national authorities failed to consider their requests for temporary asylum, to notify them of the reasons thereof and to authorise them to have access to legal assistance, despite their explicit request for a lawyer while in police detention. These

447 ECtHR, *Gebremedhin* [*Gaberamadhien*] *v. France*, Application no. 25389/05, Judgment, 26 April 2007.

448 ECtHR, Abdolkhani and Karimnia v Turkey, Application no. 30471/08, Judgment, 22 September 2009 (Summary taken from FRA Handbook on European law relating to asylum, borders and immigration, 2013).

failures by the national authorities prevented the applicants from raising their allegations under Article 3 ECHR within the relevant legislative framework. Furthermore, the applicants could not apply to the authorities for annulment of the decision to deport them as they had not been served with the deportation orders or notified of the reasons for their removal. Judicial review in deportation cases in Turkey could not be regarded as an effective remedy since an application for annulment of a deportation order did not have suspensive effect unless the administrative court specifically ordered a stay of execution. The applicants had therefore not been provided with an effective and accessible remedy as required by Article 13 ECHR in relation to their complaints based on Article 3 of the ECHR.

I.M. v. France[449] concerned a Sudanese national who, after receiving a removal order, applied for asylum and was therefore automatically processed under an accelerated procedure without sufficient safeguards. Despite the stricter time limit (e.g. lodging an application reduced from 21 to 5 days) and practical and procedural difficulties given that the applicant had been in detention pending removal, the applicant was still expected to adhere to the requirements of the normal procedure – submitting a comprehensive application in French, with supporting documents. While the applicant could have challenged his deportation order before an administrative court, under the accelerated procedure he had only 48 hours to do so, as opposed to the ordinary procedure's one month. The ECtHR concluded that the applicant's asylum application was rejected without the domestic system, as a whole, offering him a remedy concerning his complaint under Article 3 ECHR, prohibiting torture and inhuman or degrading treatment. Remedies thus had merely been available in theory as their accessibility in practice led to a violation of Article 13 ECHR.

Singh and Others v. Belgium[450] concerned an Afghan family, who lodged an asylum application in Belgium, claiming that if they were removed to Russia they would face a risk of *refoulement* to their country of origin, where they would face ill-treatment, as they formed part of the Sikh minority in Afghanistan. Their asylum application was dismissed by the Belgian authorities, who did not believe them to be Afghan nationals. The ECtHR found that UNHCR documents supporting their application – including attestations from UNHCR New Dehli that the applications had been registered as refugees by UNHCR– had been rejected by the Commissioners for Refugees and the Belgian Administrative Court without sufficient investigation. In light of the material produced, it found that the applicants' allegations called for a detailed examination by the Belgian authorities and that their complaints under Article 3 were thus "arguable". In view of the importance that the Court attached to Article 3 and the irreversible nature of the potential harm, Article 13 required close and rigorous scrutiny of individual situations by the reviewing authority. To that end, it was not sufficient for that authority to place itself artificially at the time of the removal decision in order to assess its validity under Article 3. Whereas the Belgian authorities could have easily verified the key documents produced by the applicants, for instance by contacting UNHCR, they had not done so. Therefore, the applicants' complaint that they risk to be subjected to inhuman and degrading treatment contrary to Article 3 ECHR had not been the subject of a rigorous scrutiny as required under Article 13 ECHR. Moreover, in order to be effective, a domestic remedy must have automatic suspensive effect, staying the execution of the removal order.

In ***M.A. v. Cyprus***[451], the applicant, a Syrian Kurd, was detained by Cypriot authorities upon his irregular entry to Cyprus and was subsequently issued with a deportation order to Syria, despite pending asylum proceedings. As the applicant was eventually granted refugee status and no longer at risk of deportation, his alleged violations of Articles 2 and 3 ECHR were no longer admissible; however, this did not deprive him from his "victim" status, making his alleged violation of Article 13 ECHR – ineffectiveness of the judicial review proceedings – still "arguable". The ECtHR emphasised that the effectiveness of the domestic remedy for the purposes of Article 13 ECHR required close scrutiny by a national authority, a particularly prompt response, and access to a remedy with automatic suspensive effect. The ECtHR noted that the deportation and detention orders were based on a mistake committed by the authorities and the Maltese system did not provide him with counter the authorities' error and thus with effective safeguards protecting him from wrongful deportation. A Supreme Court recourse against the deportation decision and an application for a provisional order for suspension of his deportation in that context did not offer an adequate remedy as they did not have automatic suspensive effect. The ECtHR found a violation of Article 13 juncto Articles 2 and 3 ECHR, as the applicant was denied an effective domestic judicial remedy as he had to apply for suspensive effect, rendering the guarantees in Article 13 ECHR unavailable in practice. The ECtHR also found a violation of Article 5 (1) and (4) ECHR as the applicant did not have an effective remedy at his disposal to challenge the lawfulness of his immigration detention.

449 ECtHR, *I.M. v. France*, Application no. 9152/09, Judgment, 2 February 2012.
450 ECtHR, *Singh and Others v. Belgium*, Application no. 33210/11, Judgment, 2 October 2012.
451 ECtHR, *M.A. v. Cyprus*, Application no. 41872/10, Judgment, 23 July 2013.

Mohammed v. Austria[452], the case of a Sudanese asylum seeker, who arrived in Austria via Greece and Hungary and applied unsuccessfully for asylum. His transfer to Hungary was not given suspensive effect despite the fact that he submitted a second asylum application. The ECtHR relied on reports concerning Hungary, particularly from UNHCR, attesting to serious hygiene shortcomings in detention facilities for asylum seekers, systematic treatment of asylum seekers with tranquilisers, and violent abuses by guards. Report had also pointed to practices that resulted in real risk of *refoulement* without the transferred asylum seekers having effective access to an examination of the merits of their claims. The ECtHR concluded then that Mr Mohammed claims under Article 3 had been arguable and that the Austrian authorities had been aware of the problems of Hungary as a country of asylum. The Court considered that the applicant's second asylum request could not be considered as abusive. It observed that, owing to the absence of suspensive effect, Mr Mohammed could have been transferred to Hungary while the application was still being processed in spite of the fact that he had an arguable claim of violation of Article 3. It concluded that the applicant had been deprived of protection against forced transfer in the course of the processing of his second asylum application while having an arguable claim under Article 3. Therefore, it found a violation of Article 13 ECHR in conjunction with Article 3 ECHR. In contrast, the ECtHR did not find an independent violation of Article 3 ECHR in case of transfer to Hungary, as UNHCR had never requested EU Member States to refrain from transferring asylum seekers to Hungary under the Dublin II Regulation and that it had welcomed in December 2012 a package of legislative amendments adopted by the Hungarian Parliament that eliminated detention of asylum seekers who filed their applications immediately upon arrival and introduced guarantees concerning detention. It therefore concluded that Mr Mohammed would not be subject to treatment in violation to Article 3 in Hungary. Finally, given that the applicant had not submitted his individual reasons to flee his country and seek asylum, the Court was not in a position to assume a real risk for Mr Mohammed upon deportation to his country of origin.

Detention

The case of ***Firoz Muneer v. Belgium***[453] concerns the detention of an Afghan asylum seeker pending his transfer to Greece under the Dublin Regulation. A first detention order was successfully challenged before the first instance court which ordered his release because the risk run upon return in Greece had not been taken into account. This was confirmed by the appeals Court but quashed by the Cassation Court because the appeals court had not indicated the international reports on which it had based its assessment of the situation in Greece. Meanwhile a new detention order had been issued extending the detention for another two months, which was confirmed by the first instance court but then again successfully challenged before the appeals court. The decision of the latter court was challenged again by the State again before the Cassation Court. The applicant was released before the Cassation Court decided on the appeal. The ECtHR noted that the applicant had been detained for 4 months and 5 days and found a violation of Article 5(4) ECHR as the applicant did not have access to a court deciding speedily on the legality of the detention and ordering release in case the detention was found to be unlawful. After lodging a second asylum application the applicant was granted subsidiary protection status. Therefore, the ECtHR did not consider potential violations of Article 3 ECHR, if returned to Greece where he claimed to face a real risk of ill-treatment.

In ***Riad and Idiab v. Belgium***[454], the detention of two Palestinian asylum seekers in the transit zone of Brussels airport was held to be unlawful under Article 5 (1) of the ECHR and to amount to treatment prohibited under Article 3 ECHR because of the conditions they had to endure in the transit zone while being detained for more than ten days causing them mental suffering and undermining their dignity. The Court had not accepted the authorities' argument that there had not been a deprivation of liberty because the person concerned could avoid detention at the airport by taking a flight out of the country.

S.D. v. Greece[455], concerns the detention of a asylum seeker of Turkish nationality for more than two months in extreme conditions. The Court found the detention unlawful under Article 5(1) ECHR as the applicant had been detained while according to national law expulsion was not possible pending a decision on the asylum application. In addition the applicant had had no access to a judicial review of the legality of the detention in accordance with Article 5(4) ECHR. Finally the Court found the applicant's detention in a prefabricated hut for more than two months without access to

452 ECtHR, *Mohammed v. Austria*, Application no. 2283/12, Judgment, 6 June 2013.
453 ECtHR, *Firoz Muneer v. Belgium*, Application no. 56005/10, Judgment, 11 April 2013.
454 ECtHR, *Riad and Idiab v. Belgium*, Application no. 29787/03 and no. 29810/03, Judgment, 24 January 2008.
455 ECtHR, *S.D. v. Greece, Application* no. 53541/07, Judgment, 11 June 2009.

telephone, without possibility of going outside and without basic hygienic products amounted to inhuman and degrading treatment prohibited under Article 3 ECHR.

In ***Muskhadzhiyeva and Others v. Belgium***,[456] a Chechen asylum seeker with her four under age children were detained pending their transfer to Poland under the Dublin Regulation. The children had been detained for over a month in a closed centre that was inapt for the reception of children. The Court attached importance to the state of health of the children, who exhibited serious physical and psychosomatic symptoms as a consequence of trauma. Taking into account the young age of the children, a medical report stating that the children showed serious psychological and psycho-traumatic symptoms and the duration of their detention, the Court concluded that their detention had violated Article 3 ECHR. The ECtHR also found a violation of Article 5 (1) ECHR is so far as the four children, although accompanied by their mother, were detained in a closed centre designed for adults and ill-suited to their extremely vulnerability.

In ***Kanagaratnam and others v. Belgium***,[457] a Sri Lankan asylum seeker and her three under age were detained upon arrival at the airport. After the refusal of the asylum application they remained in detention for the purpose of removal as well as while a second asylum application was being considered. The ECtHR held that there had been a violation of Article 3 ECHR with regard to the children. The Court considered that by placing the children in a closed centre the Belgian authorities had exposed them to feelings of anxiety and inferiority. The detention of the mother and her four children for almost four months in clearly inappropriate conditions for a family was held to be unlawful under Article 5(1) ECHR.

In ***Rahimi v. Greece***,[458] the applicant was an unaccompanied Afghan child who had been detained in an adult detention centre and later released without the authorities offering him any assistance with accommodation. The ECtHR concluded that the applicant's conditions of detention and the authorities' failure to take care of him following his release had amounted to degrading treatment proscribed by Article 3. The Court found a violation of Article 5(1) (f) as the detention order appeared to have resulted from automatic application of the Greek legislation. The national authorities had given no consideration to the best interests of the applicant as a minor or his individual situation as an unaccompanied minor. Furthermore, they had not examined whether it had been necessary as a measure of last resort to place the applicant in the detention centre or whether less drastic action might not have sufficed to secure his deportation. Finally the Court also found a violation of Article 5(4) as the Court failed to see how the applicant could have exercised the available remedies, even assuming that they had been effective. This was because the applicant had been unable in practice to contact a lawyer and the information brochure outlining some of the remedies available had been written in a language which he would not have understood.

In ***Popov v. France***[459] the ECtHR found that France had violated Article 3 ECHR when ordering administrative detention of children due to the inevitably harmful effects of detention, thereby satisfying the minimum level of severity in order to trigger Article 3. In that context France also violated Article 5 (1) and (4) as children accompanying their parents found themselves in a legal void, unable to challenge the lawfulness of their detention. Whereas the ECtHR ruled that the administrative detention of the parents did not amount to a violation of Article 3; it, however, held that Article 8 ECHR had been violated as a social pressing need for their detention was lacking, thus constituting an interference with their enjoyment of family life.

In ***Lokpo and Touré v. Hungary***[460], the applicants from Ivory Coast, who entered Hungary irregularly, claimed asylum whilst they were detained. Although their asylum application had reached the in-merit phase of the asylum procedure, the refugee authority had not initiated their release as national legislation allowed it to do. As a result, the applicants were deprived of their liberty by virtue of the mere silence of an authority, a procedure which according to the ECtHR verges on arbitrariness. The ECtHR held that due to the fact that the applicants' detention for five months, with a view to deportation, was not based on a decision elaborating on the reasons for their detention, their deprivation of liberty was disproportionate to the aim pursued. The ECtHR concluded that the applicants' detention was arbitrary and 'unlawful' within the meaning of Article 5 (1) ECHR. This was confirmed in the cases of ***Al-Tayyar Abdelhakim v. Hungary***[461] and ***Hendrin Ali Said and Aras Ali v. Hungary***.[462]

456 ECtHR, *Muskhadzhiyeva and Others v. Belgium*, Application no. 41442/07, Judgment of 19 January 2010.
457 ECtHR, *Kanagaratnam and others v. Belgium*, Application no. 15297/09, Judgment, 13 March 2012.
458 ECtHR, *Rahimi v. Greece*, Application no. 8687/08, Judgment, 5 April 2011.
459 ECtHR, *Popov v. France*, Application no. 39472/07 and 39474/07, Judgment, 19 January 2012.
460 ECtHR, *Lokpo and Touré v. Hungary*, Application no. 10816/10, Judgment of 20 September 2011.
461 ECtHR, *Al-Tayyar Abdelhakim v. Hungary*, Application no. 13058/11, Judgment, 23 January 2013.
462 ECtHR, *Hendrin Ali Said and Aras Ali Said v. Hungary*, Application no. 13457/11, Judgment, 23 January 2013.

In ***Mahmundi and others v. Greece***[463] the applicants had been placed in detention by the Greek authorities pending their deportation to Afghanistan. Over the course of their detention, several applicants were separated from their accompanying children, provided inadequate accommodation, or had spent part of their detention in an overheated shipping container without access to medical or social care. The ECtHR held that Greece had violated Article 3 ECHR due to inhumane conditions and detention of children and pregnant women within Greece's detention centres. Further, as applicants were physically unable to exercise any legal action to challenge their detention conditions the ECtHR found also a violation of Article 13 ECHR. Finally, the ECtHR found that Greece also breached Article 5 (4) ECHR as Greek law did not guarantee access to an effective judicial review of the lawfulness of the detention but only provided for a review of a detention order examining whether there is a risk of the person absconding or being a threat to public order.

The ECtHR ruled in ***Aden Ahmed v. Malta***[464] for the first time that immigration detention conditions in Malta violated Article 3 ECHR. The case concerned a Somali asylum seeker, who had been detained upon entering Malta irregularly. The Court found that Maltese authorities failed to take account of the female applicant's vulnerability, emotional and health conditions when detaining her, while no steps were taken remove her from the territory, resulting in 14 and a half months unlawful detention. The proceedings before the court to challenge the lawfulness of her detention had failed to produce a decision after more than six months at which point it was discontinued as she had been released. The ECtHR found a violation of Article 5(1) and (4) ECHR, as the applicant had no access to speedy judicial review of the lawfulness of her detention.

Suso ***Musa v. Malta***[465], concerns a Sierra Leonean asylum seeker, who had been detained upon entering Malta irregularly. The Court found that Mr Suso Musa's detention preceding the determination of his asylum request had been arbitrary and that the detention conditions had been highly problematic from the standpoint of Article 3 ECHR. Moreover, it had taken the authorities an unreasonable amount of time to determine whether the applicant should have been allowed to remain in Malta. As regards the period of detention following the determination of Mr Suso Musa's asylum request, it found a violation of Article 5(1) and (4) ECHR, as the deportation proceedings had not been prosecuted with due diligence.

Horshill v. Greece[466] concerned a Sudanese national, who was held successively for fifteen days in two police stations after having applied for asylum. Mr Horshill, who had no travel documents, was placed in detention pending his deportation. In relation to Article 3 ECHR, the ECtHR condemned Greece for subjecting Mr Horshill to degrading treatment during his detention. For four days he had suffered from conditions of overcrowding and was deprived of physical activity and exposure to natural light. The Court held that the police stations were not appropriate premises for the detention of persons who were awaiting the application of an administrative measure.

M. and others v. Bulgaria[467] concerned the detention for two years and eight and a half months of an Afghan national who had obtained refugee status in Bulgaria but whose residence permit had been withdrawn on the ground that he was a serious threat to national security. He remained detained notwithstanding the fact that the ECtHR had adopted interim measures under Rule 39 of the Rules of the Court. The ECtHR held that the detention of M was unlawful under Article 5(1) as the Bulgarian authorities had not conducted the proceedings with regard to M's removal to a third country with due diligence, while after the adoption of the interim measure there was a legal obstacles to M's deportation to Afghanistan. As it was only after two and a half years that the applicant obtained a judicial decision establishing that one of the detention orders had been signed by an unauthorised officer, the Court also found that Article 5(4) ECHR had been violated. Furthermore the Court found that in case of deportation Article 8 ECHR would be violated as the interference with the applicant's right to family life with his wife and 2 children would not be in accordance with the law, as required by Article 8(2) ECHR. The deportation order was based on a declaratory statement in an internal document of the National Security Service of the Ministry of the Interior, to which the Supreme Administrative Court considered itself bound without reviewing the reasons for the decision and the relevant evidence. As there was no meaningful independent scrutiny of the deportation order, the applicants did not enjoy the minimum degree of protection against arbitrariness inherent in the concept of lawfulness within the meaning of the Convention. Finally the Court found that the first applicant had not had access to an effective remedy as under Bulgarian law at the time, whenever the executive chose to mention national security as a ground for a deportation order, appeals against such an order had no automatic suspensive effect, even if an irreversible risk of ill-treatment in the receiving country was claimed.

463 ECtHR, *Mahmundi and Others v. Greece*, Application no. 14902/10, Judgment, 24 October 2012; see also ECtHR, Bygylashvili v Greece, Application no. 58164/10, Judgment, 25 December 2012 and ECtHR, Ahmade v. Greece, Application no. 50520/09, Judgment, 25 December 2012.

464 ECtHR, *Aden Ahmed v. Malta*, Application no. 55352/12, Judgment, 23 July 2013.

465 ECtHR, *Suso Musa v. Malta*, Application no. 42337/12, Judgment, 23 July 2013.

466 ECtHR, *Horshill v. Greece*, Application no. 70427/11, Judgment, 1 August 2013.

467 ECtHR, *M. and others v. Bulgaria*, Application no. 41416/08, Judgment, 26 July 2011.

Qualification Directive

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Dublin

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Return Directive

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ecre
European Council
on Refugees and Exiles

European Council on Refugees and Exiles

Rue Royale 146
1000 Brussels
Belgium

T. +32 2 234 38 00
F. +32 2 514 59 22

ecre@ecre.org

www.ecre.org