



**COMMENTS FROM THE EUROPEAN  
COUNCIL ON REFUGEES AND EXILES**  
on the  
**European Commission Proposal to recast  
the Asylum Procedures Directive**

**MAY 2010**

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<sup>i</sup> References to chapters relate to the chapters in the Commission's proposal to recast the Asylum Procedures Directive.

## Introduction

The adoption of better and more harmonised standards of protection is a general objective for the construction of the Common European Asylum System (CEAS). Today, 10 years after the adoption of the Tampere conclusions, the CEAS is still a myth rather than a reality. Recognition rates for applicants from the same nationality in EU Member States continue to differ widely. For instance, for the period 2005-2008 the recognition rate for asylum seekers from Russia (mostly Chechen asylum seekers) reached 63% in Austria while it was 0% in neighbouring Slovakia. The recognition rate for Somali asylum seekers was as high as 98% in the same period in Malta, while it was 55% in the UK and again 0% in Greece<sup>1</sup>. In a system founded on the principle that only one Member State is responsible for examining the application and which leaves the applicant only one chance to have his/her need for protection examined, such divergences are simply unacceptable and need to be addressed. While ECRE acknowledges that legislative harmonisation alone will not suffice and will need to be complemented with targeted practical cooperation<sup>2</sup>, it is convinced that a solid EU legal framework is a necessary precondition if a CEAS is ever to function properly.

The Commission proposal recasting Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status presents a thorough review of the EU standards on asylum procedures<sup>3</sup>. ECRE has firmly criticised the directive adopted in 2005<sup>4</sup> for setting a disappointingly low standard<sup>5</sup>. It falls short of the standards conducive to a full and fair examination of an asylum claim, is unnecessarily overcomplicated and allows for a large number of permissible derogations from the 'minimum standards' the Directive is supposed to set<sup>6</sup>. Without any doubt, the 2005 Asylum Procedures Directive is one of the most problematic of all the pieces of legislation that have been adopted so far in the area of asylum. Its provisions undermine rather than promote a fair assessment of applications for international protection and because of the wide margin of discretion left to the Member States hardly promotes a more harmonised approach. The crucial importance of solid and clear procedural standards for the construction of a CEAS has been emphasised by the Commission as well as the European Council. In its 2008 Policy Plan on Asylum, the Commission noted that *"diverse procedural arrangements and qualified safeguards produce different results when applying common criteria for the identification of persons genuinely in need of international protection. This can damage the very objective of ensuring access to protection under equivalent*

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<sup>1</sup> See SEC(2009) 1376, *Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection. Impact Assessment* (hereinafter European Commission, *Impact Assessment*), p. 11.

<sup>2</sup> See ECRE, [The Way Forward. Towards Fair and Efficient Asylum Systems in Europe](#) (hereinafter ECRE, *The Way Forward - Asylum Systems*), September 2005, pp. 17 –28.

<sup>3</sup> COM(2009) 554 final, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection*, Brussels, 21 October 2009 (hereinafter recast Proposal).

<sup>4</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter Asylum Procedures Directive), OJ 2005 L 326/13.

<sup>5</sup> ECRE, [ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status](#), October 2006 (hereinafter ECRE, *Information Note Asylum Procedures Directive*); See also UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005.

<sup>6</sup> See ECRE, [Information Note Asylum Procedures Directive](#), p. 4.

*conditions across the EU*<sup>7</sup>. The Stockholm Programme adopted by the European Council in December 2009 reaffirms the objective of a CEAS “based on high protection standards” and considers it crucial that “individuals, regardless of the Member State in which their application for asylum is lodged, are offered an equivalent level of treatment as regards reception conditions, and the same level as regards procedural arrangements and status determination”<sup>8</sup>.

Article 78 of the Treaty on the Functioning of the European Union (TFEU) requires the adoption of “common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status”<sup>9</sup>. Thus, the Treaty sets an obligation to abandon the minimum standard approach of the first phase of harmonisation and requires an advanced level of harmonisation of asylum procedures<sup>10</sup>. Article 78 TFEU also requires the measures adopted to be in accordance with the 1951 Geneva Convention Relating to the Status of Refugees (hereinafter 1951 Refugee Convention) and other relevant Treaties. Unlike the 1951 Refugee Convention, which contains the refugee definition and sets the standards for the rights of refugees, there is no international treaty setting a universal standard for asylum procedures. This lack of clear reference in international law is compensated within Europe by the procedural standards that have developed in the jurisprudence of the European Court of Human Rights (hereinafter ECtHR) and the Court of Justice of the European Union (hereinafter CJEU). The CJEU has developed a set of general principles of EU law which have autonomous existence as EU law concepts and must not only be respected by Member States when implementing and applying EU legislation, but also by the EU institutions when drafting and adopting such legislation. Fundamental rights are an inherent part of the general principles of EU law. These include the right to be heard, the right to a reasoned decision and the right to effective judicial protection. These rights are derived from the common constitutional traditions of Member States and the human rights treaties they adhere to, including the European Convention on Human Rights (hereinafter ECHR). The ECtHR has set procedural benchmarks that are relevant in asylum cases through its jurisprudence on, in particular, Articles 3, 5, 8 and 13 ECHR<sup>11</sup>. Whereas the ECtHR has consistently held that the guarantees included in Article 6 ECHR (right to a fair trial) do not apply in asylum cases<sup>12</sup>, this restriction does not typically apply in the EU asylum law context. Indeed, the ECtHR’s jurisprudence relating to the right to a fair trial as guaranteed under Article 6 ECHR is relevant because the right to an effective remedy as a general principle of EU law is informed by procedural guarantees set by the

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<sup>7</sup> See COM(2008)360 final, *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*, p.5.

<sup>8</sup> European Council, *The Stockholm Programme – An open and secure Europe serving and protecting citizens* (hereinafter Stockholm Programme), par. 6.2, OJ 2010 C 115/1.

<sup>9</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ 2010 C 83/47.

<sup>10</sup> Nevertheless, the recast proposal was presented by the Commission before the entry into force of the Lisbon Treaty and still uses Article 63 EC Treaty as its legal basis, which refers to the adoption of *minimum standards*. The Commission has listed all proposals presented before the entry into force of the Lisbon Treaty and for which the legal basis changes with the entry into force of the Treaty. According to the Commission, “in practice, the institutions must, each for its own account, apply the new numbering in the documents that they draw up following the entry into force of the Treaty of Lisbon”. See COM(2009) 665 final, *Communication from the Commission to the European Parliament and the Council. Consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures*, Brussels, 2 December 2009. The proposals recasting the asylum acquis are included in Annex 4. The title of the recast directive will need to change in order to refer to *common procedures*.

<sup>11</sup> For a comprehensive overview and analysis of relevant jurisprudence, see N. Mole, *Asylum and the European Convention on Human Rights*, Council of Europe, July 2008.

<sup>12</sup> The ECtHR has consistently held that the guarantees included in Article 6 ECHR do not apply in asylum cases as the latter do not concern a civil right or a criminal charge. See ECtHR, *Maaouia v. France*, Application No 39652/98, Judgment of 5 October 2000, par. 40. “Decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights and obligations or of a criminal charge against him, within the meaning of Article 6(1) ECHR”.

ECtHR under both Articles 6 and 13 ECHR<sup>13</sup>. The right to an effective remedy is now consolidated in Article 47 EU Charter on Fundamental Rights, which is not limited to civil rights and obligations or criminal charges<sup>14</sup>. Both sources of fundamental rights protection serve as a basis for the amendments to the Asylum Procedures Directive proposed by the Commission. Seen from this perspective, many of the proposed amendments do little more than codify already existing obligations for EU Member States under EU fundamental rights law and international human rights law.

### Summary of views

The recast Proposal aims at “ensuring higher and more coherent standards on procedures for granting and withdrawing international protection that would guarantee an adequate examination of the protection needs of third country nationals or stateless persons in line with international and Community obligations of Member States”<sup>15</sup>. At the same time, the proposal aims at improving both the efficiency and the quality of decision-making. This is done by promoting frontloading and robust decision-making in the first instance. ECRE has long advocated for such a policy of financing asylum determination systems with the requisite resources and expertise to make accurate and properly considered decisions in the first instance stage of the asylum procedure. While this may lead to faster decision-making, in ECRE’s view frontloading is not about the acceleration of procedures for its own sake, and requires having all necessary safeguards in place from the very start of the asylum procedure. Ensuring quality, first instance decision-making reduces the number of unnecessary appeals and thereby saves time and resources<sup>16</sup>.

ECRE in general welcomes the recast proposal as a significant step toward creating higher procedural standards, while simultaneously reducing the scope for Member States to derogate from these standards. ECRE believes that many of the amendments proposed contribute to the enhancement of both fairness and efficiency. ECRE in particular welcomes:

- The amendments making a single asylum procedure mandatory whilst ensuring that eligibility for refugee status is assessed *before* eligibility for subsidiary protection is explored (recast Articles 2 and 9(2)).
- The mandatory requirement to designate a sufficiently resourced and specialised, well-trained authority as responsible for all asylum procedures (recast Article 4(1) and (2)).
- The provisions enhancing access to asylum procedures through, *inter alia*, strengthened obligations of providing information and counselling at border points and detention facilities; the obligation to register asylum applications within 72 hours and to ensure training on registration of asylum applications for border guards, police and immigration authorities (recast Articles 6 and 7).
- The amendments strengthening the possibility for dependent applicants to have their applications examined separately if they so wish (recast Article 6(2), (3) and (4)).

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<sup>13</sup> See E. Brouwer, “Effective Remedies in Immigration and Asylum Law Procedures: A Matter of General Principles of EU Law”, in A. Baldaccini, E. Guild and H. Toner (Ed.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart Publishing, Oxford, 2007, p. 77.

<sup>14</sup> “In Community law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Community is a community based on the rule of law as stated by the Court in Case 294/83, *Les Verts* v. *European Parliament*, 23 April 1986, [1988] ECR 1339”. See Explanations relating to the Charter of Fundamental Rights of the European Union, Document Convent 49 of 11 October 2000, available at [http://www.europarl.europa.eu/charter/convent49\\_en.htm](http://www.europarl.europa.eu/charter/convent49_en.htm).

<sup>15</sup> See Recast Proposal, Explanatory Memorandum, p. 4.

<sup>16</sup> See ECRE, [The Way Forward - Asylum Systems](#), p. 38.

- The amendments introducing a general obligation to organise a personal interview on the substance of the application, as well as whenever inadmissibility procedures apply (recast Articles 13 and 30).
- The new provisions introducing additional but necessary safeguards at the interview, such as granting applicants the possibility to explain inconsistencies (recast Article 15(b)) and the mandatory transcript of every personal interview (recast Article 16).
- The amendments providing additional guarantees for vulnerable applicants, such as the opportunity for such applicants to have medical examinations in order to substantiate statements relating to past persecution or serious harm (recast Article 17), the obligation to provide applicants with special needs with sufficient time to prepare for the interview (recast Article 20(2)) and the exclusion of such applicants from accelerated procedures (recast Article 20(3)).
- The strengthened safeguards for unaccompanied children (recast Article 21).
- The strengthened provisions on the right to legal assistance and representation, particularly the obligation for Member States to provide for free legal assistance in both first instance and appeal procedures (recast Articles 18 and 19).
- The restrictions on the use of, and enhanced safeguards in the context of, border procedures (recast Article 37(1)).
- The enhanced guarantees ensuring access to an effective remedy (recast Article 41).

ECRE regrets that the recast proposal:

- Maintains the concept of European Safe Third Countries (recast Article 38).
- Maintains the safe country of origin concept and the possibility for Member States to retain or introduce national lists of safe countries of origin (recast Article 33).
- Allows for the use of accelerated procedures for procedural reasons which are not related to the substance of the claim for international protection (recast Article 27(6)(c), (d), (e) and (f)).

## Analysis of key articles

### 1. Scope (Recast Article 3) (Chapter I – General provisions)

ECRE welcomes the recast Proposal's requirement that Member States apply the same procedures and safeguards to applications for subsidiary protection status as to applications for refugee status, as well as the clarification that the directive applies in the territorial waters of the Member States<sup>17</sup>. ECRE is of the view, however, that Member States' responsibility to provide access to an asylum procedure can adhere even beyond territorial waters, at least whenever a Member State actor exercises effective control over an asylum seeker outside third-country territory. There is a strong presumption in international and European law that Member States "*incur obligations under international refugee and human rights law when exercising migration control on the high seas*"<sup>18</sup>. Article 78 TFEU requires the Union to develop a common policy on

<sup>17</sup> Recast Article 3(1).

<sup>18</sup> T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Offshoring and Outsourcing of Migration Control*, PhD Thesis, Aarhus University, May 2009, p. 156. See, e.g., ECtHR, *Xhavera and fifteen v. Italy and Albania*, Application No. 39473/98, 11 January 2001 (admissibility); ECtHR, *Isaak and Others v Turkey*, Application No. 44587/98, 28 September 2006 (admissibility); Inter-American Commission for Human Rights, *Armando Alejandro Jr. and Others v. Cuba ('Brothers to the Rescue')*, Case 11.589, 29 September 1999). In a recent judgment concerning the interception outside its territorial waters by French authorities of a cargo vessel (the Winner), registered in Cambodia and suspected of carrying narcotics, the ECtHR reiterated that the Court has accepted, even if only in exceptional cases, "that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them for the purposes of Article 1 of the Convention". For instance, the responsibility of a Contracting Party may arise when, as a consequence of military action, "it exercised effective control of an area outside its

asylum with a view to ensuring compliance with the principle of non-refoulement and which is in accordance with the 1951 Geneva Refugee Convention and other relevant treaties. As the recast Proposal seeks to promote the application of, *inter alia*, Articles 18 (the right to asylum) and 19 (*non-refoulement*) of the EU Charter on Fundamental Rights<sup>19</sup>, it should reflect established jurisprudence recognising extraterritorial exercise of jurisdiction by states under certain circumstances. This includes an obligation for states to enable asylum seekers access to an asylum procedure in order to ensure that the principle of *non refoulement* is respected<sup>20</sup>. Therefore, ECRE recommends recalling, in the preamble, Member States' obligation to fully respect the principle of *non-refoulement* and the right to asylum which includes access to an asylum procedure for any person who wishes to claim asylum and who is within their jurisdiction, including those under the effective control of an EU or Member State actor<sup>21</sup>.

Furthermore, the limitation of the personal scope of the directive to "*third country nationals and stateless person[s]*," implicitly excluding EU citizens from the definition of 'refugee'<sup>22</sup>, continues to stand at odds with the non-discrimination article in the Refugee Convention<sup>23</sup>. In 2008, according to UNHCR statistics, 285 people from fifteen EU Member States were recognised as refugees<sup>24</sup>.

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national territory". The Court went on to note that "other recognised instances of the extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board aircraft and ships registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have clearly recognised and defined the extraterritorial exercise of jurisdiction by the relevant state". The Court found that in this case France had exercised full and exclusive control over the Winner and its crew in a continuous and uninterrupted manner. The French authorities had ordered the rerouting of the Winner, and the Winner's crew had remained under the control of the French military throughout the voyage to Brest. As a result, the applicants had been effectively within France's jurisdiction for the purposes of Article 1 ECHR. See ECtHR, *Medvedev and Others v. France*, Application No. 3394/03, 23 March 2010 (Grand Chamber), paras. 62-7.

<sup>19</sup> See recast Proposal, recital 13. For an in-depth analysis of the meaning of the right to asylum as a subjective right, see M.-T. Gil-Bazo, "The Charter of Fundamental Rights of the European Union and the Right to be granted asylum in the Union's Law", *Refugee Survey Quarterly*, Vol. 27, No. 3, pp. 33-52.

<sup>20</sup> See UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirshi and Others v. Italy* (Application No. 27765/09), March 2010, par. 4.3.4.

<sup>21</sup> In the context of interception and rescue at sea, a "Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union" was adopted on 26 April 2010. The Council decision includes in an annex a set of binding guidelines which reaffirm the predominance of the principle of *non-refoulement* in such activities and non-binding guidelines with regard to disembarkation. While it does not entirely solve the issue of disembarkation, it does reaffirm the obligation for states to ensure that "persons intercepted or rescued shall be informed in an appropriate way so that they can express any reasons for believing that disembarkation in the proposed place would be in breach of the principle of non *refoulement*". See OJ 2010 L 111/20.

<sup>22</sup> Recast Article 2(g).

<sup>23</sup> Article 3 of the 1951 Refugee Convention states that the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin. On the exclusion of EU nationals from the scope of the Asylum Procedures Directive, see ECRE, [Information Note Asylum Procedures Directive](#), p. 6. Protocol No. 24 on asylum for nationals of Member States of the European Union provides no legal obstacle as such. It states that EU Member States will consider each other as safe countries of origin in asylum matters but also does not totally exclude the examination of asylum applications of EU nationals. Member States may still unilaterally decide to consider such applications or declare them admissible. See OJ 2008 C 115/305.

<sup>24</sup> See UNHCR, *2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, Annex, Table 11. (Belgium (3), Bulgaria (79), Czech Republic (87), Estonia (5), Germany (3), Hungary (22), Italy (2), Latvia (3), Lithuania (2), Netherlands (1), Poland (16), Romania (57), Slovakia (1), Spain (1), United Kingdom (3)), available at <http://www.unhcr.org/4a375c426.html>.

This is a clear illustration of the fact that even EU nationals may be in need of international protection and that the presumed “safety” of a country is never absolute. Additionally, the potential repercussions of this restrictive interpretation may be even greater in the foreseeable future if current refugee-producing countries such as Turkey and Serbia become EU Member States<sup>25</sup>. There is also no guarantee that current EU Member States will always remain free from conflict and gross human rights violations. Although jurisprudence of the CJEU has considerably extended free movement rights for EU nationals, there is still no unconditional right for EU nationals to reside in another EU Member State, and expulsion measures can be taken against them under certain conditions<sup>26</sup>. As a result, EU nationals with a fear of persecution or who are at risk of serious harm in their country of origin may not actually be protected from *refoulement*. Article 78 TFEU only requires the Council to develop a common policy on asylum with regard to third country nationals, and therefore does not provide a legal basis to extend the scope of the directive to EU nationals. However, this does not prevent Member States from examining asylum applications and granting protection to EU nationals on the basis of national legislation<sup>27</sup>.

Furthermore, given the export value of the EU asylum policies, this limitation to third country nationals sets a bad example for other regions of the world. Recital 14 of the preamble to the recast Proposal reminds Member States that “with respect to the treatment of persons falling *within the scope of this Directive*, Member States are bound by obligations under instruments of international laws to which they are party”<sup>28</sup>. However, ECRE reminds Member States of their obligations under international refugee and human rights law with regard to persons in need of international protection regardless of their nationality.

ECRE recommends adding a recital in the preamble reminding Member States of their obligation to fully respect the principle of *non-refoulement* and the right to asylum which includes access to an asylum procedure to any person who wishes to claim asylum and who is within their jurisdiction, including those under the effective control of an EU or Member State actor.

ECRE reminds Member States of their obligations under international refugee and human rights law towards persons in need of international protection regardless of their nationality.

## 2. Responsible authorities (Recast Article 4) (Chapter I – General provisions)

The proposed amendment improves the current Article 4 of the Asylum Procedures Directive in two ways. First, it requires Member States to ensure that the determining authority responsible for an appropriate examination of asylum applications has sufficient numbers of competent and specialised personnel, and provides initial and “follow-up” training for such personnel. Second, it drastically decreases the opportunities for Member States to assign an applicant to an “other authority”.

<sup>25</sup> In 2009 5,868 asylum applications from Turkey and 16,791 asylum applications from Serbia were registered in the EU. See UNHCR, *Asylum levels and trends in Industrialised Countries*, 2009, p. 17.

<sup>26</sup> EU citizens are only entitled to three months of unconditional residence in another EU Member State. See Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 229/35.

<sup>27</sup> This is the case in some EU Member States today. For instance, Belgian legislation does not restrict the definition of refugee or beneficiary of subsidiary protection to third country nationals. In the case of asylum applications by EU citizens, an accelerated procedure applies. See Articles 49 §1, 49/2 §1 and 57/6 Belgian Aliens Act of 15 December 1980.

<sup>28</sup> Italics added.



ECRE welcomes the recast Proposal's requirement that Member States provide sufficient numbers of trained personnel to examine and decide asylum applications within the prescribed time limits<sup>29</sup>. ECRE particularly welcomes that the recast would require staff to be trained in international refugee and human rights law<sup>30</sup>, and in skills and techniques of particular importance to examining asylum applications<sup>31</sup>. A well-resourced asylum procedure with qualified and permanently trained staff not only avoids backlogs, but is also crucial to ensuring that asylum seekers receive a fair and efficient examination of their claim and a high-quality first instance decision. In this regard it should be noted that UNHCR's quality initiatives launched in the UK and Central European EU Member States provide an opportunity for states to improve the quality of first instance decisions through targeted training of decision makers<sup>32</sup>.

ECRE also particularly welcomes the obligation to provide not only initial, but also ongoing and refresher training. As regional and international refugee and human rights law is permanently evolving, it is of paramount importance that the staff of determining authorities receive advanced training on a recurring basis. The complexity of asylum claims also requires innovative procedural methods. The importance of ongoing training has also been acknowledged by the Council of Europe when it observed that "[o]ngoing training is an essential element for an efficient system of public administration. It is the task of the government to offer public officials relevant training in the framework of an appropriate training policy for them"<sup>33</sup>. The European Asylum Curriculum (EAC) project, funded by the European Refugee Fund (ERF), has developed several training modules for decision-makers, incorporating the participation of academics, UNHCR and NGOs, and provides a good model for training across the EU<sup>34</sup>. Recent research conducted by UNHCR shows that there are serious shortcomings in the provision and quality of training in some Member States and that there is a need for a solid standard in the Asylum Procedures Directive as regards training and the skills required for staff responsible for interviewing asylum seekers and taking decisions<sup>35</sup>. ECRE believes that mandatory initial and follow-up training programmes for personnel of determining authorities is an essential precondition to achieving quality decision-making across the EU, and therefore welcomes the Commission's proposal on this point.

The obligation to provide sufficient numbers of trained personnel may raise costs in certain Member States. However, ECRE believes that this is an area where both the future European Asylum Support Office (EASO), as well as an expanded ERF, can provide the necessary technical and financial support to address those challenges. This would not only be a concrete

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<sup>29</sup> According to recast Article 27(3) a procedure must in principle be concluded within 6 months after the application for international protection has been lodged.

<sup>30</sup> Recast Article 4(2)(a), (g).

<sup>31</sup> Recast Article 4(2)(b)-(f).

<sup>32</sup> The UK Quality Initiative reports and the Minister's responses are available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports>.

<sup>33</sup> Council of Europe, Recommendation No. R (2000) 6 of the Committee of Ministers to member states on the status of public officials in Europe, 24 February 2000.

<sup>34</sup> The European Asylum Support Office (EASO) will take over the project as soon as it starts its activities.

<sup>35</sup> For instance, of the 12 Member States in which UNHCR conducted research, only 5 Member States have compulsory training for newly recruited interviewers and decision-makers: Belgium, Finland, France, The Netherlands and the UK. See UNHCR, *Asylum Procedures Study, Section 5: Requirements for a personal interview*, March 2010, p. 18. It should be noted that, in the same study, UNHCR expresses concern over the inability of a significant number of interviewers to manage interpreters effectively, noting documented cases where interpreters did not interpret parts of the asylum seeker's answers, added personal comments, or simply took over the role of the interviewer by asking the asylum seeker questions. ECRE believes that training on interview techniques should therefore preferably also address "the role of interpreters in an asylum interview". See *Ibid.*, p. 40. This is also closely linked to the issue of having a code of conduct for interpreters, which does not exist in a number of member States. See below.

expression of the much acclaimed solidarity encompassed in the Stockholm Programme<sup>36</sup>, but would also be beneficial to asylum seekers as their applications will be dealt with by better-equipped determination authorities.

ECRE has previously expressed concern over the derogation allowed by the Asylum Procedures Directive from the principle that one designated determination authority must assess each asylum application<sup>37</sup>. ECRE has emphasised “*that these less specific procedural guarantees, if applied in such a way that untrained, inexperienced and non-specialist personnel are dealing with complicated matters arising in asylum cases, represent a serious risk of flawed decisions and violation of . . . the Qualification Directive*”<sup>38</sup>. ECRE therefore welcomes that the recast would no longer permit Member States to assign an authority not specialised in asylum determination to process cases for purposes of taking a decision on the application in the light of national security provisions<sup>39</sup>, determining whether to treat an application as a subsequent application<sup>40</sup>, processing cases or deciding whether to admit the applicant to the territory in a border procedure<sup>41</sup>, or establishing that an applicant is seeking to enter or has entered into the Member State from a European safe third country<sup>42</sup>.

However, recast Article 4(3) still allows another authority lacking specific expertise in refugee and human rights law to take responsibility for determination decisions under the Dublin Regulation. Persistent variations in recognition rates demonstrate the danger of assuming that an asylum application will receive a full and fair examination in the Member State determined responsible. In addition, the ECtHR has confirmed on several occasions that the existence of an agreement, such as the Dublin Regulation, between Council of Europe Member States on allocating responsibility for examining asylum applications does not absolve these states from their obligations under the ECHR<sup>43</sup>. Against this background, deciding which state is responsible for the examination of an asylum application never involves a purely technical application of “objective” criteria laid down in the Dublin Regulation, but inevitably necessitates analysis of issues related to whether or not the asylum seeker is in need of international protection. Whether or not the asylum seeker may be able to access protection in another Dublin State is inherently part of such a decision, and therefore this decision should be taken by the authority with expert knowledge on refugee and human rights law.

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<sup>36</sup> “In particular as one of the keys to a credible and sustainable CEAS is for Member States to build sufficient capacity in the national systems, the European Council urges the Member States to support each other in building sufficient capacity in their national systems. The European Asylum Support Office should have a central role in coordinating these capacity-building measures”. See Stockholm Programme, par. 6.2.2.

<sup>37</sup> ECRE, [Information Note Asylum Procedures Directive](#), pp. 6-7.

<sup>38</sup> *Ibid.*, p. 7. See also UNHCR *Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* (Council Document 14203/04, Aisle 64, of November 2004) and *Report on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, Committee on Civil Liberties, Justice and Home Affairs, A6-0222/2005, Amendment 34, Page 21.

<sup>39</sup> Article 4(b) Asylum Procedures Directive.

<sup>40</sup> Article 4(c) Asylum Procedures Directive.

<sup>41</sup> Article 4(d), (e) Asylum Procedures Directive.

<sup>42</sup> Article 4(f) Asylum Procedures Directive.

<sup>43</sup> “Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution”, ECtHR, *T.I. v. The United Kingdom*, Application No. 43844/98, 7 March 2000, p. 15. See also ECtHR, *K.R.S. v. The United Kingdom*, Application No. 32733/08, 2 December 2008, p. 16.

Ensuring that the authority responsible for processing cases pursuant to the Dublin Regulation is also equipped to understand international protection needs and Member States' obligations under refugee and human rights law is likely more cost effective<sup>44</sup>, and it simultaneously offers additional guarantees to the asylum seekers concerned that their rights will be respected in the process. Therefore, it is logical that one specialised authority should be established in Member States to deal with all matters relating to requests for international protection, including examining the responsible Member State under the Dublin Regulation. This would enable a better-informed decision on the application of the discretionary clauses in the recast Dublin Regulation, which would help prevent any transfers that may negatively affect the asylum seekers' chances to access effective protection in the EU<sup>45</sup>. This would thus serve as additional guarantee against an exclusively technical application of the Dublin criteria. If the specialised authority comes to the conclusion that it is responsible for examining the claim, it could at the same time immediately proceed to start the examination of the asylum claim without the additional and time-consuming process of transferring the asylum seeker's file from the "Dublin" authority to the specialised authority.

If the possibility of another authority being responsible for processing cases pursuant to the Dublin Regulation is to be maintained, ECRE recommends a further amendment to recast Article 4(4). Whilst noting that this Article requires that personnel of that authority have 'appropriate' knowledge and 'necessary' training to fulfil their obligations when implementing this Directive<sup>46</sup>, ECRE believes that personnel responsible for decisions under the Dublin Regulation should receive the same comprehensive training programmes as the responsible authorities under recast Article 4(1). This is necessary to ensure compliance with Member States' obligations under refugee and human rights law when applying the Dublin Regulation.

ECRE recommends the deletion of recast Article 4(3) to ensure that the determining authority as defined in recast Article 4(1) is also competent to determine the responsible Member State for examining the application for international protection under the Dublin Regulation.

If recast Article 4(3) is maintained, ECRE recommends further amendment of recast Article 4(4) as follows: "Where an authority is designated in accordance with paragraph 3, Member States shall ensure that the personnel of that authority have the appropriate knowledge *and* receive the *same training referred to in Article 4(2)* to fulfil their obligations under international refugee and human rights law".

### **3. Access of Asylum Seekers to the Asylum Procedure (Chapter II. Basic Principles and Guarantees)**

#### **3.1. Access to the procedure (Recast Article 6)**

Although recast Article 6(1) allows Member States discretion to "*require that applications for*

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<sup>44</sup> Both from an organisational point of view and in view of the fact that this could result in the reduction of judicial challenges to Dublin transfers based on erroneous decisions in violation of Member States' obligations.

<sup>45</sup> In the Commission proposal recasting the Dublin Regulation, the sovereignty clause (Article 3(2)) and humanitarian clause (Article 15) are brought together in a new Article 17 entitled 'discretionary clauses'. See COM(2008) 820 final, *Proposal for a Regulation of the European Parliament and of the Council 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)*, Brussels, 3 December 2008.

<sup>46</sup> This is in line with new Recital 37, which explicitly states that the basic principles and guarantees of the Asylum Procedures Directive should apply in Dublin procedures.

*international protection be made in person and/or at a designated place*<sup>47</sup>, recast Article 6(2) introduces an important safeguard by placing a strong duty on the state to “ensure . . . an effective opportunity to lodge the application with the competent authority as soon as possible”. This reflects the rule that “a procedural system for exercising a right to residence permits provided for in Community Law should be easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time”<sup>48</sup>. The fundamental principle, under which a right requires a procedural means of access to that right, is firmly established in other substantive areas of EU law<sup>49</sup>. ECRE welcomes recast Article 6(1)’s requirement that Member States explicitly designate authorities competent to receive and register asylum applications; the clear obligation for Member States in recast Article 6(2) to ensure an applicant an effective opportunity to lodge an application with the competent authority as soon as possible and recast Article 6(9)’s guarantee that applications shall be registered within 72 hours of an application for international protection.

The recast Proposal also addresses some of the potential practical difficulties in gaining access to asylum procedures, such as the difficulty a person in detention might face in making an application for asylum “*in person and/or at a designated place*”<sup>50</sup>. ECRE welcomes the addition of recast Article 6(8), requiring Member States to “ensure that border guards, police and immigration authorities, and personnel of detention facilities” and “all other authorities likely to be addressed” by an asylum seeker are trained to respond to asylum requests, or at least to direct the applicant to an authority able to facilitate an application<sup>51</sup>. In particular, at the border, asylum seekers may be prevented from lodging an asylum application as (formal or informal) readmission agreements may be applied immediately, thereby depriving asylum seekers of any effective opportunity to claim asylum. ECRE believes that, if adopted, this provision will be an important safeguard for ensuring asylum seekers’ effective access to asylum procedures in the EU. However, it is clear that this will have to be accompanied by an effective monitoring system of Member State authorities’ practices, particularly at the external borders of the EU. In contrast to the detailed provisions on required training of staff of the responsible authority, recast Article 6(8) requires border guards, police and immigration authorities and personnel of detention facilities to have “instructions and receive necessary training for dealing with applications for international protection”. The meaning of “dealing with applications for international protection” is very unclear. As it is part of recast Article 6, which deals with the receipt and registration of applications for international protection, paragraph 8 should be understood as referring to their role in facilitating the receipt and registration of applications for international protection<sup>52</sup>. Any other interpretation would undermine the degree of specialisation and expertise of responsible authorities required under recast Article 4(1) and (2). Recast Article 6(8) should be amended accordingly.

ECRE has previously highlighted the importance of affording each “*dependent adult*” the opportunity for an individual interview, and of informing them adequately and privately of their

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<sup>47</sup> Recast Article 6(1).

<sup>48</sup> Court of Justice, C-327/02, *Panayotova v. Minister voor Vreemdelingenzaken en Integratie*, 16 November 2004, par. 27.

<sup>49</sup> “[A] procedure which requires prior authorisation, in the interest of public health, for the addition [to foodstuffs intended for particular nutritional uses] of a nutrient authorised in another Member State complies with Community law only if it is readily accessible and can be completed within a reasonable time and if, when it is refused, the refusal can be challenged before the courts”. See Court of Justice, C-24/00, *Commission v. France*, 5 February 2004, para. 36.

<sup>50</sup> Article 6(1) Asylum Procedures Directive.

<sup>51</sup> Recast Article 6(8).

<sup>52</sup> This is supported by recast recital 19 requiring officials who first come into contact with persons seeking international protection to be able to provide asylum applicants, including at the border, in the territorial waters or in the transit zones of the Member States “with all relevant information as to where and how applications for international protection may be lodged”.

right to make a separate application, and of the procedures for exercising that right<sup>53</sup>. For instance, in some cases, women may have a well-founded fear of persecution or experienced past persecution separately from their husbands. In these cases women may be reluctant to reveal what happened to them in the presence of their husbands, such as when they have become the victim of rape or where they have been subjected to domestic violence. ECRE therefore welcomes the introduction of language into Article 6(4) of the Asylum Procedures Directive requiring private communication of that information before consent of the dependent adult is requested. This amendment is supported by the requirement in recast Article 13(1) to give each dependent adult the opportunity<sup>54</sup> to express his/her opinion in private and to be interviewed on his/her application<sup>55</sup>.

Furthermore, ECRE welcomes the strengthened safeguards for children in recast Article 6. ECRE has expressed concern that Article 6(4) Asylum Procedures Directive (recast as Article 6(7)) allows Member States to determine when a minor can make an application on his or her behalf, whereas all children are entitled to seek asylum in their own right<sup>54</sup>. By its own terms, Article 6(7) places no specific obligation on Member States regarding who can or should make an application for asylum in the case of a minor<sup>55</sup>. However, by requiring Member States to “ensure that a minor has the right to make an application for international protection either on his/her own behalf, or through his/her parents or other adult family members”, Article 6(5) at least affirms the right of each minor to make an application for international protection. This reflects Article 22(1) of the UN Convention of the Rights of the Child<sup>56</sup> and it serves as a welcome reminder that Member States may not exercise their discretion under Article 6(7) to deny children the right to apply for asylum on their own or with their families. ECRE further welcomes the clarification that the rights and safeguards introduced in recast Article 6(5)-(8) take precedence over Member States’ right to require the application be made “in person and/or at a designated place”<sup>57</sup>, and the introduction of recast Article 6(6) ensuring that the appropriate bodies (other than the authorities enforcing return) assisting unaccompanied children in the context of a return procedure under Article 10 of Directive 2008/115/EC must be able to lodge an asylum claim for an unaccompanied child where appropriate<sup>58</sup>.

Finally, recast Article 6(7)(c) should be further amended in order to include both married and unmarried minors within the scope of the provision. The provision allows Member States to determine, in national legislation, the cases in which the lodging of the application is deemed to also constitute the lodging of an application for any unmarried minor. There is no reason why married minors should not also benefit from this procedural guarantee. The marital status of a minor has no bearing on his or her maturity and consequent need for special treatment<sup>59</sup>. Where

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<sup>53</sup> ECRE, [Guidelines on Fair and Efficient Procedures for Determining Refugee Status](#), September 1999, Recommendation 23.

<sup>54</sup> ECRE, [Information Note Asylum Procedures Directive](#), p. 9.

<sup>55</sup> Recast Article 6(7) (“Member States may determine in national legislation.”).

<sup>56</sup> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. See COM(2009)554 final ANNEX, Detailed Explanation of the Proposal, p. 4.

<sup>57</sup> According to recast Article 6(1), “[w]ithout prejudice to paragraphs 5, 6, 7 and 8, Member States may require that applications for international protection be made in person and/or at a designated place”.

<sup>58</sup> 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, OJ 2008 L 348/98.

<sup>59</sup> ECRE, [Information Note Asylum Procedures Directive](#), p. 9. The European Parliament LIBE Committee shared this view in its report on the proposed Asylum Procedures Directive. See Committee on Civil

it is in the best interest of the child, an application of a married minor should be deemed included in an application of a parent or other carer. This should be clearly reflected in the recast Directive by deleting the word “unmarried”.

ECRE fully supports the amendments in recast Article 6 as necessary safeguards to ensure access to a fair and efficient asylum procedure and as important components of a policy of frontloading.

ECRE welcomes the additional safeguards for minors and dependent adults to lodge a separate asylum application in recast Article 6(4)-(6).

ECRE recommends the deletion of the word “unmarried” in recast Article 6(7)(c).

ECRE recommends amending recast Article 6(8) as follows: “Member States shall ensure that border guards, police and immigration authorities, and personnel of detention facilities have instructions and receive necessary training *on their role in facilitating the receipt and registration of applications for international protection*”.

### **3.2. Safeguards at border crossing points and detention facilities: the importance of information and counselling (Recast Article 7)**

It is generally acknowledged that the provision of full and reliable information to asylum seekers regarding the asylum procedure and their situation is a basic requirement for a fair asylum system. Asylum seekers who are in detention or arrive at the border are particularly vulnerable, as they often have limited access to legal assistance services and organisations that provide assistance and information. In particular, information on how to apply for asylum in detention, at the border, or in transit zones is crucial in order for asylum seekers to have “effective access to procedures”<sup>60</sup> and an “effective opportunity to lodge the application with the competent authority as soon as possible”<sup>61</sup>. ECRE therefore particularly welcomes the new proposed recast Article 7 which imposes an obligation on Member States to make information available on the procedure to be followed in order to make an application for international protection at border crossing points (including transit zones), at external borders, and at detention facilities. Also, the provision of interpretation arrangements and access to organisations providing advice and counselling in such locations are necessary tools to ensure that asylum seekers who are stranded in such locations will have access to the procedures in practice. However, as “counselling” is a vague notion, open to many interpretations in various legal systems, the term should be clarified to include organisations providing legal representation of asylum seekers during asylum procedures.

Due to their location and the security aspects involved, ECRE accepts that access to asylum seekers in detention or at the border by organisations providing counselling and information may be subject to specific rules. However, such rules should never render access impossible. ECRE considers it important for this principle to be clearly reflected in this provision and therefore recommends amending recast Article 7 accordingly. A similar guarantee already exists in the current directive with regard to access to detention facilities of legal advisors or other counsellors<sup>62</sup>.

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Liberties, Justice and Home Affairs, *Report on the amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 29 June 2005, AG-0222/2005, Amendment 43.

<sup>60</sup> See recast recital 18 which states that “every applicant should have an effective access to procedures”, explicitly deleting the possibility of “certain exceptions”.

<sup>61</sup> See recast Article 6(2).

<sup>62</sup> See Article 16(2) Asylum Procedures Directive.



ECRE welcomes recast Article 7 as an important and necessary tool to ensure asylum seekers' "effective opportunity to lodge the application with the competent authority as soon as possible" and their effective access to the asylum procedure.

ECRE recommends amending recast Article 7(3) by adding the words "provided that access of organisations providing advice and counselling to applicants for international protection is not thereby rendered impossible".

ECRE recommends amending recast Article 7(3) as follows: "Member States shall ensure that organisations providing *legal advice and representation* and counselling to applicants for international protection shall have access...."

#### 4. The right to remain (Recast Article 8) (Chapter II - Basic Principles and Guarantees)

The right to remain in the territory of the Member State pending the examination of the asylum application is key to ensuring that the principle of *non-refoulement* is fully respected. In light of jurisprudence of the ECtHR interpreting the right to an effective remedy<sup>63</sup>, the examination of the asylum application must be understood as including not only the first instance stage of the asylum procedure, but also the appeals stage. Taking wrong decisions on asylum applications may literally be a matter of life and death for the persons concerned, as they may be sent back to life-threatening situations. In the EU today, the percentage of negative asylum decisions that are overturned on appeal reaches about 30%, which illustrates the paramount importance of an effective remedy and hence the right to remain in the territory until a final, rather than a first instance, decision is taken on an asylum application<sup>64</sup>. ECRE acknowledges that recast Article 41(5) and (6) guarantees the right of asylum seekers to remain on the territory pending appeals in almost all cases, and therefore remedies a significant flaw in the Asylum Procedures Directive<sup>65</sup>. By doing so, it also addresses a major concern with regard to Article 7 of the Asylum Procedures Directive, which only guarantees the right to remain in the territory for the sole purpose of the first instance procedure.

ECRE welcomes the clarification of the paramount nature of the right of *non-refoulement*, which the recast Proposal adds in Article 8(2) on the exception to the right to remain in the territory in the case of a subsequent application for international protection that has been considered inadmissible or rejected as unfounded. In such cases, an exception to the right to remain in the territory can only be made where the determining authority is satisfied that a return decision will not lead to direct or indirect *refoulement*<sup>66</sup>.

ECRE also welcomes the prohibition in recast Article 8(2) on extraditing or surrendering applicants for international protection to their country of origin pending a final decision on their application, or to a third country where this would result in direct or indirect *refoulement*, as this reflects Member States' obligations under international human rights and refugee law. Recast Article 8(3) serves as a welcome reminder for Member States that extradition can only take place whilst respecting the international obligation of *non-refoulement*. It is a fundamental principle of international refugee and human rights law that protection needs are assessed before an asylum seeker is extradited to the country of origin<sup>67</sup>. Where extradition is to take place to another

<sup>63</sup> For an overview of the jurisprudence see below, section 9.

<sup>64</sup> See European Commission, *Impact Assessment*, p. 10.

<sup>65</sup> See comments below.

<sup>66</sup> See recast Article 35(8)(a).

<sup>67</sup> UNHCR, *Guidance Note on Extradition and International Refugee Protection*, April 2008, par. 64. See also G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Third Edition, Oxford, 2007, p. 262: "State practice, and the greater body of opinion representing those most active in the protection of refugees and the development of refugee law, regards the principle of non-refoulement as likewise protecting the refugee from extradition".

country than the asylum seeker's country of origin, extradition may occur before the asylum application has been finally determined. But even in those cases, it must be established by the requested state that extradition will not expose the asylum seeker to a risk of persecution, torture or other irreparable harm, and that the asylum seeker will have access to a fair and efficient asylum procedure<sup>68</sup>. Stronger wording is needed in order to properly reflect the absolute nature of the principle of non *refoulement*. Therefore, ECRE recommends amending recast Article 8(3) to simply require that an extradition decision will not result in indirect or direct *refoulement* rather than the vague test of competent authorities being satisfied that extradition will not have such result.

ECRE recommends deleting the words "the competent authorities are satisfied that" in recast Article 8(3).

## **5. Procedural Guarantees at first instance (Chapter II. Basic Principles and Guarantees)**

### **5.1. Guarantees applicable to all asylum seekers**

#### **5.1.1. Requirements for examination of applications (Recast Article 9)**

Nearly all Member States now consider applications for Convention refugee status and subsidiary protection in a single procedure<sup>69</sup>. ECRE has consistently argued that such a procedure benefits Member States and asylum applicants alike, as it "*is the clearest and quickest means of identifying those in need of international protection*"<sup>70</sup>. ECRE also particularly welcomes the explicit recognition in recast Article 9(2) of the primacy of eligibility for refugee status over subsidiary protection by requiring Member States to examine first whether applicants for international protection qualify as refugees. This is important in order to emphasise the primacy in general of refugee law over other forms of international protection, and is also in line with the definition of a "person eligible for subsidiary protection" as used in the EU Qualification Directive<sup>71</sup>.

The recast Proposal's requirement that the determining authority share with applicants and their legal advisers any country of origin information (COI) that the authority "*takes into consideration for the purpose of taking a decision*" reflects the general principle that a person whose rights are the subject of a judicial proceeding has the right to know the information the decision maker relies upon. In the *Kadi* case, the European Court of Justice ruled that failure to disclose to the appellants the evidence used to support their designation as supporters of terrorist activities, and thus block their financial assets, placed them at an unacceptable procedural disadvantage. As a result, "*the appellants' rights of defence, in particular the right to be heard, were not respected.*"<sup>72</sup>

<sup>68</sup> See ECRE, [Position on exclusion from Refugee Status](#), March 2004, par. 61. See also UNHCR, *Guidance Note on Extradition and International Refugee Protection*, April 2008, par. 67.

<sup>69</sup> At the time of the adoption of the recast proposal by the Commission, 26 EU Member States applied a single procedure. See European Commission, *Impact Assessment*, p. 25 (footnote 103).

<sup>70</sup> ECRE, [The Way Forward – Asylum Systems](#), p. 47.

<sup>71</sup> According to Article 2(c) of the EU Qualification Directive, a person eligible for subsidiary protection means "a third country national or a stateless person who does not qualify as a refugee but...". See Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 2004 L 304/12 (hereinafter Qualification Directive).

<sup>72</sup> Court of Justice, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland*, Judgment of the Court (Grand Chamber) of 3 September 2008, par. 348.



According to the general principle of equality of arms asylum seekers must have access to any information relied upon by the determining authority for the purpose of taking a decision. As a general rule and in a spirit of promoting frontloading of asylum procedures, asylum seekers should receive such information before a decision is taken as much as possible and have the opportunity to respond to it.

As already mentioned in the introduction, well-reasoned and informed decisions at the first instance of the asylum procedure will avoid unnecessary appeals. Where the asylum seeker has had the opportunity already before the first instance decision is taken to respond to the COI relied upon by the responsible authority, it may further reduce the need for appeals. In case an appeal is lodged, a coherently reasoned decision which takes into account all the applicant's observations on the material relied upon by the responsible authority may enable the appeal body to deal with the appeal more quickly and effectively.

ECRE welcomes the obligation in recast Article 9(3)(d) to ensure that personnel examining applications can seek advice when needed from experts for instance on medical, cultural, child or gender issues. This obligation provides a useful tool to enhance the early identification of and procedural guarantees for vulnerable asylum applicants and may contribute to a general improvement of the quality of decisions taken as it encourages the active involvement of experts in such cases.

ECRE also welcomes that the recast proposal makes it mandatory for Member States to “provide for rules concerning the translation of documents relevant for the examination of applications.”<sup>73</sup> As discussed below with regard to recast Article 11, asylum applicants should have the right to participate in proceedings in *a language that they understand*. Translation services constitute part of this right.

Finally, for reasons of consistency, ECRE recommends to add an explicit reference in recast Article 9(3)(c) to the training requirements under recast Article 4(2) and to knowledge, not only with respect to the relevant standards applicable in the field of asylum and refugee law but also the broader range of human rights law.

ECRE welcomes the amendments to recast Article 9 as they better ensure access for asylum seekers to information taken into consideration for the purpose of taking a decision and further promote the use of expert advice where necessary. This will contribute to better-informed decision making on asylum applications.

ECRE recommends adding to recast Article 4(3)(c): “and human rights law and receive training in accordance with Article 4(2)”.

### **5.1.2. Requirements for a decision by the determining authority (Recast Article 10)**

Recast Article 10(2) deletes Member States' discretion not to provide a written decision in cases where the person is not granted refugee status but a status which provides equivalent rights and benefits under national and EU law. General principles of EU law establish a right to a reasoned decision generally, which means that, in the context of individual decisions, the decision-maker must give an account of its factual and legal assessment<sup>74</sup>. As a result, whenever refugee status or subsidiary protection status is denied, reasons need to be stated even in cases such as those envisaged in Article 10(2) of the Asylum Procedures Directive.

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<sup>73</sup> Recast Article 9(5).

<sup>74</sup> See C. Costello, “The European asylum procedures directive in legal context” in *UNHCR New Issues in Refugee Research*, Research Paper No. 134, November 2006 (hereinafter C. Costello (2006), p.27, available at [www.unhcr.org](http://www.unhcr.org).

In addition, ECRE recommends further amending recast Article 10(2) so that it is no longer possible for Member States not to provide written information on how to challenge a negative decision where this was provided at an earlier stage. The right of individuals, under Article 13 ECHR, to be correctly and clearly informed about possibilities to challenge immigration-related decisions was confirmed by the ECtHR<sup>75</sup>. In this respect, the current provision unnecessarily undermines this right by creating an opportunity for responsible authorities to rely on previous communications of legal remedies. As stated by one commentator, “this restriction seems at best petty, and at worst as an attempt to prevent the utilisation of appeals procedures”<sup>76</sup>. ECRE recommends clarifying this provision by requiring communication of information on how to challenge a negative decision in writing at the time of issuing the decision. This requirement can easily be met by systematically introducing an appropriate standard clause in all negative decisions on applications for international protection.

ECRE also welcomes the guarantee in recast Article 10(4) ensuring a separate decision for each family member where taking one decision for all family members may jeopardise a person’s interest through the disclosure of his or her particular circumstances. This complements the enhanced right for family members to a separate assessment of their need for international protection as provided in recast Article 6(4).

ECRE supports the amendments proposed in recast Article 10 enhancing the right to a reasoned decision in asylum procedures, reflecting general principles of EU law.

ECRE recommends further amending recast Article 10(2), by adding to the first sentence: “...on how to challenge a negative decision is given in writing *at the time of issuing the decision*”.

ECRE recommends the deletion of the last sentence of recast Article 10(2).

### 5.1.3. Guarantees for and obligations of applicants (Recast Articles 11 and 12)

Recast Article 11 extends the guarantees Member States must afford to asylum seekers in two ways. Recast Article 11(1)(c) requires Member States not to deny asylum seekers the opportunity to communicate not only with UNHCR but also “*with any other organisation providing legal advice or counselling to asylum seekers in accordance with national legislation*”<sup>77</sup>. ECRE welcomes the extension of the duty to allow communication beyond UNHCR or organisations “*acting on behalf of*” UNHCR<sup>78</sup>, but remains disappointed that it is phrased as a negative rather than a positive obligation<sup>79</sup>. A positive obligation for Member States to provide this opportunity is preferable, as it would acknowledge the indispensable role of organisations providing legal advice and legal representation, particularly in light of the legal complexity of asylum procedures. A positive obligation to allow communication with UNHCR would also strengthen the agency’s privileged supervisory role under Article 35 of the 1951 Geneva Convention.

<sup>75</sup> See ECtHR, Application. No. 51564/99, *Conka v. Belgium*, Judgment of 5 February 2002, par. 80, “The Court is bound to observe, however, that an application for a stay of execution under the ordinary procedure is one of the remedies which, according to the document setting out the Commissioner-General’s decision of 18 June 1999, was available to the applicants to challenge that decision. As, according to that decision, the applicants had only five days in which to leave the national territory, applications for a stay under the ordinary procedure do not of themselves have suspensive effect and the *Conseil d’Etat* has forty-five days in which to decide such applications (section 17(4) of the consolidated Acts on the *Conseil d’Etat*), the mere fact that that application was mentioned as an available remedy was, to say the least, liable to confuse the applicants”.

<sup>76</sup> See C. Costello (2006), p. 27.

<sup>77</sup> Recast Article 11(1)(c).

<sup>78</sup> Article 10(1)(c) Asylum Procedures Directive.

<sup>79</sup> ECRE, [Information Note Asylum Procedures Directive](#), p. 12.

ECRE has expressed concerns regarding potentially unjustifiable restrictions on asylum seekers' rights to information, and if necessary, interpretation in the Asylum Procedures Directive. Asylum seekers have the right to information about asylum procedures and about their rights and obligations in a language they understand, not a language "*they may reasonably be supposed to understand*"<sup>80</sup>. This grants the responsible authority a margin of discretion that is not allowed, for instance, in criminal law proceedings, where anyone arrested or charged with a criminal offence must be informed of the charges and the reasons for those charges "*in a language he understands*"<sup>81</sup>. ECRE recommends clarifying that asylum seekers have the right to participate in all proceedings simply "*in a language they understand.*"

ECRE welcomes that the recast Proposal extends the right to interpretation alongside the strengthened right to a personal interview during admissibility proceedings,<sup>82</sup> but is concerned that it still allows Member States to provide interpretation only when "*necessary*"<sup>83</sup>. Notwithstanding the clarification that interpretation must be deemed necessary in any personal interview when "*appropriate communication cannot be ensured without such services*"<sup>84</sup>, the latter phrasing still represents an unwelcome margin of discretion for Member States to decide against providing interpretation for an applicant who does not actually understand the language in which the proceedings are conducted.

In ECRE's view, an interpreter should be available to all applicants who do not fluently speak a language understood by the interviewing officer and legal representative<sup>85</sup>. Given the complex nature of an asylum procedure, it must be presumed that an interpreter is always "*necessary*" where the asylum seeker and the interviewing officer do not share the same native language. The presence of a qualified interpreter is a basic requirement for conducting an asylum interview, which should be unambiguously guaranteed under EU law. In this regard it should be noted that the ECHR provides for a right of interpretation to anyone charged with a criminal offence who "*cannot understand or speak the language used in court*"<sup>86</sup>. This right extends to all phases of a criminal proceeding, such that "*Member States have to provide an interpreter as soon as possible after it has come to light that the suspect is in need of an interpreter*"<sup>87</sup>.

In general, ECRE does not oppose the requirements listed in recast Article 12, and acknowledges that, if applied in a reasonable manner by states, the obligations listed in paragraph 2 reflect accepted practice. ECRE especially welcomes the additional requirement for searches of the applicant to be carried out by a person of the same sex, and suggests adding an additional reference – either in the text of the provision or in a recital – to the fact that such searches should also be age and culture-sensitive<sup>88</sup>.

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<sup>80</sup> Recast Article 10(1)(a).

<sup>81</sup> Articles 5(2), 6(3)(a) ECHR.

<sup>82</sup> Recast Article 30.

<sup>83</sup> Recast Article 11(1)(b).

<sup>84</sup> Recast Article 11(1)(e).

<sup>85</sup> ECRE, [Information Note Asylum Procedures Directive](#), p. 12.

<sup>86</sup> Article 6(3)(e) ECHR.

<sup>87</sup> T. Spronken and M. Attinger, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, European Commission, Directorate General Justice, Freedom, and Security, 12 December 2005, p. 10.

<sup>88</sup> See ECRE, [Information Note Asylum Procedures Directive](#), p. 12.

ECRE welcomes the increased standards enshrined in recast Article 11 but recommends:

- formulating recast Article 11(1) (c) positively by deleting the words “they shall not be denied the opportunity to”
- consistently referring to “a language which they understand” throughout the provision.

#### **5.1.4. The right to a personal interview and safeguards surrounding a personal interview (Recast Articles 13-17)**

Recast **Articles 13 to 16** address the issue of the right to a personal interview in the asylum procedures, the conditions in which such an interview ought to take place, and the guarantees that need to be in place in order to ensure that the statements of the asylum seeker in the interview are correctly transcribed or reported.

##### **Personal interview**

The centrality of the interview to the asylum determination process is reflected in UNHCR EXCOM Conclusions No. 8 and 30, while the case law of the ECHR, the UN Human Rights Committee, and the UNCAT Committee have all stressed the need for an individual, thorough examination of all the relevant facts in cases where there is a risk of *refoulement*<sup>89</sup>. General principles of EU law include the right to a hearing and in some cases the right to an oral hearing. Court of Justice case law confirms the existence of a “general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known”<sup>90</sup>, and it is now acknowledged that this principle is applicable in all procedures concerning measures that affect any person. As general principles of EU law should apply in the same way where national authorities are implementing EU legislation, which is the case when taking a decision on an asylum application, asylum seekers must be granted the right to a personal interview. Such a right also results from Article 41 of the EU Charter on Fundamental Rights, which guarantees the “right of every individual to be heard, before any individual measure which would affect him or her adversely is taken”. Although the Article addresses EU institutions and bodies of the Union, it can be invoked when national authorities are implementing EU law<sup>91</sup>.

Recast **Article 13** merely reflects these general principles of EU law and usefully codifies in EU legislation what is elementary to every status determination procedure: an interview which gives the applicant the opportunity to present his or her case and the determining authority a chance to interact with the applicant in order to establish the facts of the case as a joint effort<sup>92</sup>. Therefore, ECRE welcomes the fact that recast Article 13(2) makes it no longer possible for Member States to omit a personal interview in a range of situations, including, for instance, when an asylum seeker comes from a safe country of origin<sup>93</sup>. ECRE believes that the list of exceptions allowed under the current Directive potentially renders the guarantee of a personal interview meaningless, and is unacceptable as an EU standard. ECRE supports the approach taken by the Commission in only allowing the omission of a personal interview on the substance of an asylum application where the determining authority can take a positive decision with regard to refugee status, or

<sup>89</sup> For example, see *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), *Mutumbo v. Switzerland*, Report of 27 April 1994, (CAT/C/12/D/3/1993); ECtHR, *Saadi v. Italy*, Application No. 37201/06, Judgment of 28 February 2008, paras. 128, 130.

<sup>90</sup> Case 17/74 *Transocean Marine Paint* [1974] ECR 1063, par. 15.

<sup>91</sup> See C. Costello (2006), p. 26.

<sup>92</sup> See UNHCR, *Handbook on procedures and criteria for determining refugee status under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, January 1992, par. 196.

<sup>93</sup> See Article 12(2)(b) Asylum Procedures Directive.

where the asylum applicant is unfit or unable to be interviewed because of enduring circumstances. However, in the latter case, the determining authority should always be under an obligation not only to consult a medical expert on the temporary or permanent nature of the medical condition, but also to have the authority's opinion on whether the applicant is unfit to be interviewed confirmed by a medical expert. For example, in the case of traumatised asylum seekers, subjecting them to a personal interview may provoke re-traumatisation in certain cases. Both a decision to omit a personal interview on the basis that the applicant is unfit and, in the cases of vulnerable applicants, the decision to organise a personal interview should therefore require consultation of a medical expert, as it may have serious consequences for the applicant's health. Recast Article 13(2)(b) should be amended accordingly.

Recent UNHCR research on 12 EU Member States<sup>94</sup> shows that a number of Member States guarantee a personal interview at some stage in the asylum procedure to first-time applicants. However, the research conducted by UNHCR also identified France as an example of a Member State where personal interviews may be omitted almost arbitrarily. Indeed, in France, a personal interview may be omitted in case of a manifestly unfounded application. As French legislation does not define which applications are to be considered manifestly unfounded, and this instead depends on the internal guidelines and practices of OFPRA, personal interviews are omitted at the discretion of caseworkers and for a variety of reasons that may even go beyond the reasons listed in Article 12 of the Asylum Procedures Directive<sup>95</sup>. Such practice is also questionable under general principles of EU law relating to the right to be heard<sup>96</sup>.

This illustrates the need for a clear EU standard guaranteeing the unequivocal right to a personal interview. As stated above, given the importance of a personal interview in an asylum procedure, depriving an asylum seeker of such a guarantee should only be used in exceptional situations and only where the enduring nature of the asylum seeker's condition has been established by a qualified expert. Recast Article 13(2)(b) makes such consultation mandatory only where the determining authority is "in doubt". As determining authorities do not have medical expertise to assess the mental or physical condition of asylum seekers, this should remain the task of qualified experts. Therefore, ECRE recommends deleting the words "when in doubt" in recast Article 13(2)(b).

### **Requirements for a personal interview**

As to the requirements for a personal interview, recast **Article 14** adds important safeguards with regard to ensuring that the person conducting the interview is competent to take gender into account, the need to have a same sex-interviewer if the applicant requests it, ensuring that interviews are child-friendly, and the need for the interviewer not to wear a uniform. Nevertheless, ECRE believes that recast Article 14(3)(a) could be further clarified to require that the person who conducts the interview must be competent to take account of the "personal *and* general circumstances" of the asylum application<sup>97</sup>. This would make it mandatory for interviewing officers to prepare for the interview not only at a general level by, for instance, consulting COI, but also, where possible, to use what is already known about the personal circumstances of the asylum seeker concerned to prepare for the interview. This would allow the interviewing officer to conduct a more targeted interview, thus contributing to a general approach of frontloading.

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<sup>94</sup> UNHCR, *Improving Asylum Procedures. Comparative Analysis and Recommendations for Law and Practice*, Brussels, March 2010 (hereinafter UNHCR, *Asylum Procedures Study*).

<sup>95</sup> See UNHCR, *Asylum Procedures Study - Section 4, Opportunity for a personal interview*, p. 37.

<sup>96</sup> See above, p. 20.

<sup>97</sup> Article 13(3)(a) Asylum Procedures Directive requires Member States to ensure that the person who conducts the interview is sufficiently competent to take account of the personal *or* general circumstances surrounding the application (emphasis added).

Recast Article 14(3)(c) furthermore raises the standard by requiring that communication should be either in the language preferred by the applicant, or another language which he/she understands and is able to communicate in clearly, rather than “another language which he/she may reasonably be supposed to understand”<sup>98</sup>. It should be noted that this standard is already included in the national legislation and practice of some Member States<sup>99</sup>. As asylum interviews are key tools for determining protection needs and are complex processes, effective and accurate communication is of paramount importance. Therefore, ECRE recommends rephrasing recast Article 14(3)(c) so as to positively require interpretation in the language preferred by the applicant, and where this is not possible, in the language the applicant understands and in which he or she is able to communicate clearly. Initiatives developed between Member States aiming at the creation of a pool of interpreters at EU level can be used to address capacity concerns of states<sup>100</sup>.

Moreover, UNHCR’s recent study on asylum procedures in 12 EU Member States has uncovered serious problems in certain cases regarding the quality of interpretation in asylum interviews and the conduct of interpreters during such interviews. For instance, it found that in a number of EU Member States, no specific qualification requirements for interpreters exist at all, while the provision of training for interpreters across the 12 Member States in which research was conducted was described as “at best limited, and in many cases non-existent”<sup>101</sup>. Secondly, the study also reports cases of misconduct of interpreters in personal interviews. These include cases where the interpreter modified the statements of the asylum applicant by only interpreting conclusions of answers given by the asylum seeker, or where the interpreter added personal observations to the asylum seeker’s statements and adopted a hostile attitude towards the asylum seeker. Nevertheless, good practice exists in a number of EU Member States that have a code of conduct in place for interpreters in asylum procedures that clearly define the role and tasks of interpreters<sup>102</sup>. ECRE believes that there could be added value in adopting a code of conduct for interpreters involved in asylum procedures at the EU level. One option would be to adopt guidelines on qualification requirements and a code of conduct of interpreters within the context of the EASO. At a minimum, an obligation for Member States to adopt a code of conduct for interpreters involved in asylum procedures should already be added in recast Article 14(3)(b).

### **Content of a personal interview**

Recast **Article 15** provides the applicant with an adequate opportunity to present the elements needed to substantiate the claim. ECRE particularly welcomes the obligation for Member States to ensure an adequate opportunity for the applicant to provide explanations on substantive elements of the claim which may be missing and on the inconsistencies and contradictions in his/her statements. It is widespread practice for states to focus on inconsistencies and contradictions in asylum seekers’ declarations as a means to question their general credibility<sup>103</sup>.

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<sup>98</sup> Article 13(3)(b) Asylum Procedures Directive.

<sup>99</sup> This is, for instance, the case in Italy and Belgium. UNHCR identified good practice in this respect in the Czech Republic, Finland and Slovenia. See UNHCR, *Asylum Procedures Study - Section 5: Requirements for a personal interview*, p. 45.

<sup>100</sup> See, for instance, the ongoing project creating an ‘interpreters pool’ within the context of the General Directors’ Immigration Services Conference (GDISC). More information is available at <http://www.gdisc.org>.

<sup>101</sup> See UNHCR, *Asylum Procedures Study - Section 5: Requirements for a personal interview*, p. 36.

<sup>102</sup> The UNHCR Study on Asylum Procedures identified Belgium, Finland, the Netherlands and the UK as countries with a code of conduct for interpreters adopted and imposed by the determining authority. Where interpreters are hired through external agencies providing interpretation and translation services, the service provider may have its own code of conduct such as in Italy. See UNHCR, *Asylum Procedures Study - Section 5: Requirements for a personal interview*, p. 40.

<sup>103</sup> For an analysis of policy instructions on assessment of credibility in asylum cases in the UK see J.A. Sweeney, “Credibility, Proof and Refugee Law”, (2009) 4 *IJRL*, 700-726.



Where this is done without giving those applicants an opportunity to explain such inconsistencies, it is often perceived as unfair by asylum seekers, while at the same time it undermines a policy of frontloading as any erroneous assessment due to misinterpretations of so-called “inconsistencies” can only be addressed at the appeal stage.

### **Transcript and report of personal interview**

Adequate and accurate documentation of asylum seekers’ statements during the interview is crucial for the conduct of a fair and efficient asylum procedure. It provides the very basis for the assessment of the protection needs of the asylum applicant, and therefore it is in the interests of both the applicant and the determining authority and appeal bodies to have a detailed and correct transcript of what has been said during the interview. ECRE therefore welcomes new recast **Article 16** which makes a transcript of every personal interview mandatory and ensures an opportunity for the applicants to make comments and provide clarifications with regard to the transcript<sup>104</sup>, as well as to approve or refuse to approve the transcript before the determining authority takes a decision. ECRE considers the latter aspect crucial to ensuring that the transcript of the interview serves its main purpose, which is to ensure that the determining authority is able to make a decision based on a correct understanding of the asylum applicant’s statements. This will avoid unnecessary discussions at a later stage in the procedure regarding the asylum seeker’s statements and thus will contribute to the general objective of frontloading.

An additional tool for guaranteeing that the asylum seeker’s statements are recorded correctly is audio-taping of interviews with the consent of the asylum seeker as a back-up to the verbatim transcript of the interview. Provided that confidentiality of audio-recording is fully guaranteed and that it can only be used for the purpose of the examination of the application for international protection, audio-taping usefully complements a verbatim transcript of the interview. The combination of both tools precludes any discussion about what has been said during the interview. ECRE notes that some Member States already have experience with audio-taping of interviews as back-up to the transcript of the interview<sup>105</sup>. As further discussed in section 5.1.5., ECRE takes the view that free legal assistance and representation should be available at all stages of the asylum procedure, including during the first instance. Where this is not the case, audio-taping of interviews should be mandatory in order to compensate for the absence of legal assistance and representation during the interview<sup>106</sup>.

### **Medico-legal reports**

ECRE in particular welcomes recast **Article 17** introducing an obligation for Member States to allow applicants, upon request, to have a medical examination in order to substantiate their statements relating to past persecution or harm, and to ensure that a medical examination is carried out whenever there are serious indications that the applicant suffers from post-traumatic stress disorder. As indicated in the Commission’s impact assessment, a considerable number of asylum seekers arriving in the EU have been subject to various forms of torture or widespread

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<sup>104</sup> An appropriate way to do this is by “reading back” the transcript of the interview to the applicant at regular intervals during the interview in the presence of a competent interpreter. See ECRE, [The Way Forward – Asylum Systems](#), p. 51. This is good practice in *inter alia* Ireland.

<sup>105</sup> For instance, Finland and Germany as well as the Netherlands (unaccompanied minors only) and Spain and the UK (in Early Legal Advice Pilot cases). See UNHCR, *Asylum Procedures Study - Section 5: Requirements for a personal interview*, p. 81.

<sup>106</sup> This is, for instance, the case in the UK. In the *Dirshe* case, the Court of Appeal decided that “[t]here is, therefore, real procedural unfairness as a result if a tape recording is not permitted when no representative or interpreter is present on behalf of the applicant. A tape recording provides the only sensible method of redressing the imbalance which results from the respondent being able to rely on a document created for him without an adequate opportunity for the applicant to refute it. *Dirshe, R (on the application of) v. Secretary of State for the Home Department* [2005] EWCA Civ 421 (20 April 2005).

violence and require specific treatment<sup>107</sup>. As those experiences may have an impact on the coherence and consistency of their statements during interviews and eventually their perceived credibility, it is important that this is taken into account as early as possible in the asylum procedure.

Practice in the Netherlands and the UK has shown that medico-legal reports are a useful tool to document asylum applications based on allegations of torture and ill treatment and contribute to a fair assessment of such claims. In the Netherlands, for instance, a group of organisations developed a project to ensure that psychological problems of asylum seekers are identified as soon as possible after their arrival<sup>108</sup>. The project trained lawyers and staff members of the Dutch Council for Refugees to recognise and signal psychological problems. For extended psychological examination, a protocol is developed on the basis of the Istanbul Protocol<sup>109</sup>. In the UK a specialised organisation, the Medical Foundation for the Care of Victims of Torture, drafts medico-legal reports after referral by NGO's, general practitioners, legal representatives and occasionally by case workers of the UK Border Agency. Special arrangements have been made with the Home Office, allowing for extension of time for post-interview representations to be submitted<sup>110</sup>. The specific purpose of the examination is to inform the determining authority about any mental health problems interfering with the asylum seeker's ability to make coherent and consistent statements in the asylum procedure.

ECRE welcomes the acknowledgment of the Istanbul Protocol's added value in recital 21 of the recast proposal stating that the national rules and arrangements for identification and documentation of symptoms of torture and other forms of physical, sexual or psychological violence as required under recast Article 17(4) should, *inter alia*, be based on the Istanbul Protocol. Nevertheless, ECRE questions why Member States should only ensure a medical examination in cases of post-traumatic stress disorder. It can not be ignored that medical examinations of serious medical conditions, other than post-traumatic stress disorder, may be useful for supporting statements relating to past persecution. Therefore, ECRE recommends amending recast Article 17(2) accordingly.

Finally, it is also important for the recast Directive to fully acknowledge the importance of the role of expert advice for the early identification of mental health problems that have an impact on asylum seekers' ability to make coherent and consistent statements in the asylum procedure.

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<sup>107</sup> For a breakdown of the numbers of asylum seekers treated by European member organizations of the International Rehabilitation Centres for victims of torture see SEC(2009)1376 (part II), pp. 112-119.

<sup>108</sup> See MAPP (Meldpunt Asielzoekers met Psychische Problemen), a project for asylum seekers with mental health problems, which aims at assessing the mental health conditions of asylum seekers by means of checklists and examinations. For further information see [www.askv.nl](http://www.askv.nl).

<sup>109</sup> 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. See Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), 9 August 1999, available at <http://www2.ohchr.org/english/about/publications/docs/8istprot.pdf>. 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 *Ibid.*, par. 121.

<sup>110</sup> See UK Border Agency, Asylum Policy Instructions, Medical Foundation, p. 4, API/May 2006 (rebranded Jan. 2009), available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/>. For the policy on non-Medical Foundation cases, see [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/medicalevidence.pdf](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/guidance/medicalevidence.pdf). On the UK practice see also M. Wijnkoop, "Country Assessments: how do EU Member States deal with medico-legal reports in asylum procedures?" in CARE FULL, *Medico-legal reports and the Istanbul Protocol in asylum procedures*, 2006, pp. 164-9.



ECRE generally supports recast Articles 13, 15 and 16, as they constitute basic but necessary safeguards to ensure that a personal interview is conducted in the best possible circumstances.

ECRE recommends further amending recast Article 13(2)(b) by deleting the words “When in doubt” and reformulating the sentence as follows: “The competent authority shall consult a medical expert to establish *whether the applicant is unfit or unable to be interviewed* and whether the condition is temporary or permanent”.

ECRE recommends further amending recast Article 14(3)(a) to require that “personal *and* general circumstances” are taken into account.

ECRE recommends using a positive formulation in recast Article 14(3)(c) in order to better promote the principle that interpretation should be in the language preferred by the applicant, and only if this is not possible, in another language that the asylum seeker understands and is able to communicate in clearly.

ECRE recommends adding an obligation in recast Article 14(3)(c) for Member States to adopt a code of conduct for interpreters involved in asylum procedures.

ECRE recommends further amending (new) recast Article 17(2) by adding “or other serious medical condition” after ...post-traumatic stress disorder...

### **5.1.5. The right to and scope of legal assistance and representation (Recast Articles 18–19)**

The provisions in the Asylum Procedures Directive regarding the right to legal assistance and representation, and the scope of such assistance and representation, set a very low standard. As a rule, Member States are only under an obligation to provide free legal assistance at the appeals stage, but may still subject such assistance or representation to certain conditions such as a merits and/or means test, or the restriction to legal advisors or counsellors specifically designated by national law (Article 15(1) and (3)). Monetary and time-limits may be imposed, and there is considerable allowance for Member States to restrict legal advisors’ or counsellors’ access to the asylum seekers’ file, especially where disclosure of information would jeopardise national security, the security of the persons to whom the information relates, or even where it would compromise the “international relations of the Member States” (Article 16(1)).

In its jurisprudence on the right to access to a Court, which is inherent to the right to a fair trial under Article 6 ECHR, the ECtHR has found that the obligation for states to provide legal aid depends on the complexity of the case and national procedure, the applicant’s capacity to represent him/herself in court, and the issue at stake<sup>111</sup>. Although according to the ECtHR the guarantees of Article 6 are not applicable in asylum cases, general principles of EU law require that Article 6 standards are respected whenever rights guaranteed under EU law are being invoked<sup>112</sup>. Also Article 47 of the EU Charter on Fundamental Rights guarantees that legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice. Although it may not be possible to conclude that there is a right to free legal assistance in asylum cases in all circumstances as such from the case law of the CJEU and the ECtHR, it is clear that the availability of legal assistance and representation is at

<sup>111</sup> According to the ECtHR Article 6 §1 “may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case”. ECtHR, *Airey v. Ireland*, Application No. 6289/73, Judgment of 9 October 1979 ; par. 26 (emphasis added). See also ECtHR, *P., C. and S. v. United Kingdom*, Application No. 56547/00, Judgment of 16 July 2002.

<sup>112</sup> C. Costello 2006, p. 31.

least a crucial element that must be taken into account when assessing whether or not the general principle of effective judicial protection is respected in practice.

The right to legal assistance and representation is an essential safeguard in an asylum procedure. Due to the growing complexity of asylum procedures, professional legal advice and assistance during the procedure has become almost indispensable for asylum seekers in order to ensure that all aspects of their case are taken into account by asylum bodies<sup>113</sup>. ECRE believes that where asylum seekers have insufficient financial resources to consult a lawyer at their own cost, they should have access to free legal assistance and representation at all stages of the asylum procedure. This is also in line with the objective of frontloading. Many errors in first instance decisions result from miscommunications or from applicants misunderstanding procedures and processes. Such errors are often difficult to correct at the appeal stage. Ensuring asylum seekers access to legal assistance from the start may help to avoid unnecessary complications at the appeal stage. This is illustrated by the findings of the Solihull project that was carried out in the UK. This pilot project showed that ensuring asylum seekers' access to quality information and advice from legal advisors from the earliest stage of the asylum process, as well as allowing the legal representative an active role at interviews, contributed to improving the quality of decision-making and resulted in faster, higher quality, and more sustainable asylum decisions<sup>114</sup>. It should also be noted that the European Commission indicates a possible link between the availability of free legal assistance at first instance and recognition rates because "indicatively, MS which make free legal assistance available to applicants in procedures at first instance are above or close to an EU average as regards first instance positive decisions on asylum applications, whilst MS which do not follow this approach, with a few exceptions, have lower rates"<sup>115</sup>.

The recast Proposal reduces Member States' discretion with regard to the provision of legal assistance and representation and makes free legal assistance and/or representation mandatory on request. Recast Article 18(2) specifies that Member States must provide for free legal assistance in first instance examination procedures and for free legal assistance or representation in appeals procedures. ECRE welcomes this as an important improvement to the current directive for the reasons stated above. However, the provision should be further improved by making it mandatory for Member States to at least allow the presence of legal advisors or other counsellors during interviews in the first instance procedure as well. Recast Article 18(2)(a) only creates an obligation to provide at least free legal assistance in first instance procedures while it leaves it to the discretion of Member States to provide asylum seekers with free legal representation at first instance procedures. As mentioned above, ECRE believes that free legal representation should be available at all stages of the asylum procedure for those who lack resources, including at first instance procedures. Providing free legal representation to asylum seekers from the start of the procedure contributes to frontloading of asylum procedures. It allows legal representatives to ensure more efficient cooperation with responsible authorities by, for example, highlighting important aspects of their client's case which may otherwise only be addressed after a first instance decision has been taken, or by timely clarifying certain statements by their client which could potentially create confusion. Asylum seekers are often in a particularly vulnerable and disadvantaged position as they are not familiar with the asylum procedure of the state where they seek asylum, often do not speak the language, and are in some cases, due to events in their country of origin, distrustful of persons in positions of authority<sup>116</sup>. Free legal assistance and representation from the start of the asylum procedure is an important tool to overcome this procedural disadvantage and contribute to a more effective asylum procedure.

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<sup>113</sup> ECRE, [The Way Forward – Asylum Systems](#), p. 44.

<sup>114</sup> See J. Aspden, *Evaluation of the Solihull Pilot for the United Kingdom Border Agency and the Legal Services Commission*, March 2008, pp. 9-17.

<sup>115</sup> See European Commission, *Impact Assessment*, pp. 13-14.

<sup>116</sup> See ECRE, [The Way Forward – Asylum Systems](#), p. 44.

Consequently, ECRE believes that recast Article 18(1)(a) and (b) should be further amended in order to require Member States to provide for free legal assistance **and** representation at all stages of the procedure.

Moreover, recast Article 19(3) requires Member States to allow applicants to bring legal advisors or other counsellors admitted or permitted as such under national law to the personal interview. Whereas this is optional for Member States under Article 16(4) of the Asylum Procedures Directive, it becomes mandatory for Member States under the recast Proposal. ECRE welcomes this but understands this provision as requiring that Member States allow applicants to bring a legal advisor or other counsellor to the personal interview, but that national legislation may contain rules as to whom can be admitted as adviser or counsellor in an asylum procedure. Such rules may contribute to the general quality of legal assistance to asylum seekers but should not make such guarantee meaningless by imposing conditions that are in practice impossible to comply with.

ECRE in particular welcomes the increased safeguards with regards to access to information in the applicant for international protection's file for legal advisors or counsellors representing that applicant. However, it is disappointing that the recast Proposal still allows for ill-defined exceptions, such as where disclosure would jeopardise "investigative interests relating to the examination of applications" or where "the international relations of the Member States would be compromised". It is fundamental to a fair examination of the asylum application for the legal advisor or representative to have full access to the information upon which a decision is based. Information should only be withheld in clearly defined, exceptional situations.

ECRE welcomes the inclusion of an obligation for Member States to provide legal assistance at first instance examination procedures but recommends further amending recast Article 18(1)(a) and (b) to include an obligation for Member States to provide for free legal assistance **and** representation in procedures in accordance with Chapter III and V.

ECRE recommends deleting the words "or where the investigative...compromises" in recast Article 19(1) (second sentence).

#### **5.1.6. Procedure in the case of withdrawal or abandonment of the application (Recast Articles 23 - 24)**

ECRE welcomes the clarification in recast Article 24(1) that if an application is implicitly withdrawn or abandoned, it may not be rejected on that ground. There may be many reasons for 'implicitly withdrawing' an application which are beyond the control of the asylum seeker. For instance, he or she may not have responded to a request for information or not have appeared at an interview simply because the invitation never reached the asylum seeker due to administrative errors or due to failure of the postal services. The asylum seeker concerned may have been hospitalised at the time of the invitation, etc. Excluding the possibility of rejection of the asylum claim in cases of implicit withdrawal is crucial for avoiding the possibility of *refoulement*, and also necessary to maintaining consistency with the Dublin regulation requiring that each asylum application made to a Member State "*shall be examined by a single Member State*"<sup>117</sup>. The reminder in recast Article 24(3) that implicit abandonment or withdrawal cannot prejudice this rule is a further useful

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<sup>117</sup> Dublin Regulation, Article 3(1) (emphasis added). This is particularly relevant in light of the practice in certain states that restrict or deny access to individuals returned under the Dublin Regulation, in particular take back-cases. See ECRE/ELENA, Report on the Application of the Dublin II Regulation in Europe, March 2006, pp. 150-3. See also Dutch Council for Refugees, Pro Asyl, Refugee Advice Centre and Refugee and Migrant Justice, *Complaint to the Commission of the European Communities concerning failure to comply with Community Law. Failing Member State: Greece*, Amsterdam, 10 November 2009.

safeguard<sup>118</sup>. ECRE also welcomes the amendment to recast Article 24(2), clarifying that a request to reopen a discontinued application must be distinguished from a subsequent application. It is inappropriate to treat as subsequent an application that has never been evaluated on its merits. Requiring the asylum seeker in those cases to submit new elements substantiating his or her claim in order to have access to the asylum procedure may be very problematic in some systems because of a restrictive definition of what constitutes a new element.

ECRE notes that recast Article 24(1) continues to allow Member States considerable discretion in laying down time limits or adopting guidelines for the implementation of this provision. Recent UNHCR research has indicated that Member States apply various time limits within which a decision will be taken on the basis of implicit withdrawal<sup>119</sup>. At the same time, some Member States apply grounds for implicit withdrawal which go beyond the grounds mentioned in recast Article 20(1) and do not relate to a failure to respond to and cooperate with the asylum authorities<sup>120</sup>. In order to avoid the use of arbitrary grounds for considering an asylum application implicitly withdrawn, the list of grounds in recast Article 24(1) should be exhaustive. In addition, recast Article 24(1)(b) should be amended to explicitly include a possibility for asylum seekers to explain their failure to report or comply with other obligations to communicate, as this is the case under recast Article 24(1)(a).

Notwithstanding the reminder of the paramount nature of *non-refoulement*,<sup>121</sup> the fact that recast Article 24(2) entitles the applicant only “to *request that his/her case be reopened*” appears to leave a margin of discretion to Member States to let an application remain indefinitely discontinued, even against the wishes of the applicant.<sup>122</sup> Such an applicant would be left in legal limbo. ECRE calls for further amendment to recast Article 24(2), clarifying that an applicant’s request to reopen a discontinued application must be honoured, taking into account any relevant evidence that has since come to light.

ECRE furthermore notes that recast **Article 23** on explicit withdrawal of the asylum application still allows for the rejection of the application. ECRE would prefer the possibility in recast Article 23 of discontinuation of the examination without taking a decision but including a notice in the applicant’s file becoming the only option. This would allow the determining authority, if necessary, to resume the application at the point where it was discontinued without having to apply the more cumbersome procedure for subsequent applications. This would allow a more flexible approach in those cases where an applicant would wish to resume the application where the same or similar protection needs arise at a later stage or where he or she was put under pressure to “withdraw” the asylum application. Moreover, as highlighted by UNHCR, asylum seekers may not always be fully aware of the consequences of the explicit withdrawal of the application. This is, for instance, the case when asylum seekers withdraw their asylum application for reasons that are not related to their protection needs, such as when they assume that they may remain on the territory on

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<sup>118</sup> “[T]he amendments make it clear that the notion of implicit withdrawal or abandonment of the application is not applicable where the person concerned is transferred to the responsible Member State in accordance with the Dublin Regulation”. See COM(2009) 554, Annex – Detailed Explanation of the Proposal.

<sup>119</sup> In the UK, for instance, the UKBA considers the application withdrawn if the applicant does not respond within 5 days to a letter from the UKBA requesting an explanation for the asylum seeker’s failure to appear for an interview while in Bulgaria such a decision is taken after approximately 4 months. See UNHCR, *Asylum Procedures Study. Section 7- The withdrawal or abandonment of applications*, p. 22.

<sup>120</sup> For example, the fact that the applicant has made an unauthorized or attempted unauthorized entry in to the territory (Czech Republic); applicant has received another form of protection granting the same rights (Bulgaria) etc. See UNHCR, *Asylum Procedures Study. Section 7- The withdrawal or abandonment of applications*, p. 20.

<sup>121</sup> Recast Article 24(2).

<sup>122</sup> Recast Article 24(2) (emphasis added).

other legal grounds. In cases where it turns out that no such legal ground exists, asylum seekers would find themselves in a very precarious situation while at the same time their protection needs would not have been assessed by the determining authority<sup>123</sup>. A flexible system, whereby no decision is taken but the case is left dormant avoids the additional burden of a possible subsequent application for the responsible authority should the asylum seeker request to re-open the case and it also guarantees that a final decision will take into account all relevant facts and circumstances of the case in accordance with Article 4 of the Qualification Directive.

ECRE recommends removing the possibility to reject an application in cases of explicit withdrawal from recast Article 23.

ECRE supports the suggested amendments in recast Article 24 but calls for further amendment in order to:

-Restrict the grounds on the basis of which an asylum application may be considered as withdrawn by rephrasing the second sentence of recast Article 24(1) as follows: "Member State may *only* assume that the applicant has implicitly withdrawn or abandoned his/her application for international protection when it is ascertained that:"

-Add a possibility for asylum seekers to explain their failure to report in the situations covered by recast Article 24(1)(b) by adding the words: "unless the applicant demonstrates within a reasonable time that his/her failure to comply with such duties was due to circumstances beyond his/her control".

-Include an obligation for Member States to honour a request to reopen an application after implicit withdrawal by replacing the words "is entitled to request that his/her case be reopened" with "is entitled to have his/her case re-opened".

## 5.2. Specific guarantees for vulnerable asylum seekers (Recast Articles 20 – 21)

Recast **Article 20** introduces a general obligation to take into account the specific situation of applicants with special needs and to grant them time extensions where this is needed to submit additional evidence or elements in order to ensure that the claim presented is as complete as possible. It includes additional safeguards specifically for traumatised asylum seekers as they must be given sufficient time to prepare for an interview on the substance and their claims can never be examined under an accelerated procedure or be considered as manifestly unfounded<sup>124</sup>. The latter is in line with the Council of Europe's recommendation that victims of torture and sexual violence be excluded from accelerated procedures due to their vulnerability and the complexity of their cases<sup>125</sup>. While unnecessary delay in the asylum procedure is not in anybody's interest, sufficient time must be allowed to gather information, especially where individuals have been subjected to traumatic experiences. Moreover, such experiences may affect the asylum seeker's ability to recall events and the consistency of his or her statements<sup>126</sup>. As a result, more time may be required to assess the asylum application in such cases, and therefore, the possibility for time extensions – not only to enable the submission of evidence, but also to "take other necessary steps in the procedure"<sup>127</sup> – is particularly welcome. At the same

<sup>123</sup> See UNHCR, *Asylum Procedures Study*, p. 46.

<sup>124</sup> Recast Article 20(3).

<sup>125</sup> Resolution 1471 (2005). See Parliamentary Assembly of the Council of Europe, Accelerated asylum procedures in Council of Europe Member States, Resolution 1471 (2005).

<sup>126</sup> In such cases, the asylum interview itself can be a stressful experience which may have an impact on the asylum seeker remembering other events. See E. Bloemen et al., "Psychological and psychiatric aspects of recounting traumatic events by asylum seekers" in Care Full, *Medico-legal reports and the Istanbul Protocol in asylum procedures*, Amsterdam, 2006, p. 62.

<sup>127</sup> Recast Article 20(1).

time, ECRE believes that this should not prevent Member States, where appropriate, from prioritising the examination of such cases as allowed under recast Article 27(5), when the application of an asylum seeker with special needs is likely to be well-founded. These additional guarantees for asylum seekers with special needs are in line with the jurisprudence of the ECtHR in *Thlimennos v. Greece*, which held that persons whose situations are significantly different should be treated significantly differently<sup>128</sup>.

Determining the protection needs of unaccompanied and separated children seeking asylum pose specific challenges as they are in a particularly vulnerable situation. ECRE acknowledges that recast **Article 21** raises the procedural standards for unaccompanied children considerably as compared to the current standard laid down in Article 17 Asylum Procedures Directive. Representation is not only required with regard to the examination of the claim but also with regard to the lodging of the claim, while at the same time, a requirement of impartiality and expertise is added for such representatives. Unaccompanied children must also be granted free legal assistance with respect to all procedures provided for in the directive, subject, however, to conditions set out in recast Article 18. Additionally, the least invasive medical age assessment examinations must be selected when Member States decide to use such examinations in those cases where statements or other relevant evidence is inconclusive as to the age of the applicant<sup>129</sup>. Finally, unaccompanied children are explicitly excluded from the application of accelerated procedures, the safe third country concept (including in the context of inadmissibility procedures) and border procedures. ECRE considers these improvements essential to bringing the directive in line with international standards, including Article 3 and Article 22 of the UN Convention on the Rights of the Child (UNCRC). As mentioned previously, ECRE in particular also welcomes recast Article 6(6). Ensuring that the appropriate bodies assisting unaccompanied children in the context of a return procedure under Article 10 of Directive 2008/115/EC (Return Directive) must be able to lodge an asylum claim for an unaccompanied child where appropriate contributes to ensuring access to the asylum procedures for this particularly vulnerable group. There may be many reasons why an unaccompanied child has not lodged an application for international protection, for instance because they were instructed not to do so by smuggling networks, because they were trafficked to the State, or because they were simply not aware of the possibility or were too young to comprehend the situation. In such cases, the bodies assisting unaccompanied children in the process of return should at all times have the ability to lodge an application on their behalf where they believe that the child has protection needs and/or where it is in their best interest to do so. This also requires a sufficient level of knowledge of international refugee and human rights law for the personnel of those “appropriate bodies” in order to identify protection needs, and a sufficient degree of independence of those bodies from the authorities enforcing return. It may be questionable in some cases whether “an appropriate body other than the authorities enforcing return” meets the latter requirement, as Article 10 of the Return Directive is open to wide interpretation and could potentially include a division of the same department responsible for enforcing return. ECRE recommends clarifying in the preamble that, for the purposes of the recast Asylum Procedures Directive, appropriate bodies referred to in recast Article 6(6) must be independent from the authority responsible for return.

At the same time, ECRE recommends further amendment of this provision in order to ensure that remaining protection gaps are effectively addressed. Recast Article 21(1)(b) requires Member States to ensure that “a representative and/or a legal advisor or other counsellor” are present at the personal interview. However, representatives are defined in recast Article 21(1)(a) as persons with necessary expertise in childcare. Their role should be distinguished from legal advisors or counsellors who are responsible for providing legal assistance and legal representation. The particular vulnerability of unaccompanied minors requires both representatives and legal advisors

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<sup>128</sup> ECtHR, *Thlimennos v. Greece*, Application No. 34369/97, Judgment of 6 April 2000, par. 44.

<sup>129</sup> In a welcome amendment, the recast proposal now states that unaccompanied children must be informed of the possible consequences of the result of the examination, as well as the consequences of refusing such an examination in “a language which they understand”. See recast Article 21(5)(a).



to be present during personal interviews and recast Article 21(1)(b) should be amended accordingly. Recast Article 21(2) still allows Member States to refrain from appointing a representative where the unaccompanied minor “will in all likelihood reach the age of maturity before a decision at first instance is taken or” “is married or has been married”. ECRE maintains its position that the first exception only serves to encourage unnecessary delays whereas States should have a generous approach in the handling of cases where the child reaches the age of maturity during either the determination procedure or during the process of finding the best solution for the child<sup>130</sup>. Also, the possible exception to appointing a representative where the child is married or has been married is unacceptable. Whether a child is married or not has no bearing on his/her maturity and need for special treatment and assistance. The recast Directive should duly take into account that children are able to marry at a young age in some countries, and that their marriage may be linked to their fear of persecution, for example in the case of a forced marriage.

As medical age assessments are subject to a wide margin of error<sup>131</sup>, ECRE believes in principle that, in determining age, young asylum seekers should be given the benefit of the doubt. Where states use medical age determination techniques, these should be carried out by an independent paediatrician and handled with utmost care, taking into account the child’s physical appearance and psychological maturity, as well as cultural and ethnical variations in these factors. The child’s refusal to undergo such a medical examination should never be taken into account when assessing the merits of the asylum application, as there could be countless reasons for such refusal that may be unrelated to their age or the reasons for seeking protection.

As already mentioned, the recast Proposal also contains a number of provisions that strengthen the procedural safeguards for children in general. Examples include the introduction of a new recital 23 stating that the best interests of the child should be a primary consideration of Member States when implementing the directive, the mandatory requirement for personnel of the determining authority to be trained on age awareness (recast Article 4(2)(b)), the right of minors to make an application on his/her own behalf (recast Article 6(5)) and the general requirement that interviews with minors are conducted in a child-friendly manner (recast Article 14(3)(c)). ECRE welcomes these improvements to the current directive as they acknowledge that children in general – and not only unaccompanied or separated children – require specific procedural safeguards in order to ensure that their dependency and relative immaturity is duly taken into account when assessing their application for international protection<sup>132</sup>.

ECRE welcomes new recast Article 20 as an important safeguard for ensuring that applicants with special needs can present their claims under the best possible circumstances.

ECRE welcomes the additional safeguards in recast Article 21 for unaccompanied minors, but recommends further amendment of this provision through deletion of recast Article 21(2) and (5)(c). Recast Article 21(1)(b) should also be amended to require both a representative and a legal advisor or other counsellor to be present during personal interviews of unaccompanied minors.

ECRE recommends adding a recital to the preamble clarifying that, for the purposes of the recast asylum procedures directive, appropriate bodies referred to in recast Article 6(6) must be organisationally and operationally independent from the authority responsible for return.

<sup>130</sup> ECRE, [Position on Refugee Children](#), November 1996, par. 30.

<sup>131</sup> On the lack of conclusiveness of existing age assessment techniques, see Separated Children in Europe Programme, “Report of the workshop on age assessment and identification, Bucharest”, 20-22 March 2003.

<sup>132</sup> See UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, p. 25.

## 6. Procedural tools and safe country concepts (Chapter III–Procedures at First Instance)

### 6.1. Tools to speed up the asylum procedure (Recast Articles 27 to 30)

#### Acceleration v. prioritisation (Recast Article 27)

Recast Article 27 is a central provision in the Commission's proposal as it sets the framework for the examination procedures at first instance. Whereas the current directive provides an incentive for accelerated procedures to become the norm rather than the exception<sup>133</sup>, the recast proposal adopts a more balanced approach. This is necessary as the large majority of EU Member States have accelerated procedures in place that differ widely as to the time limits within which decisions need to be taken and the grounds for acceleration. Notable examples of the "mainstreaming" of accelerated asylum procedures are the Netherlands and the UK, where potentially all asylum applications are processed in accelerated procedures as long as they can be decided within 48 hours (the Netherlands)<sup>134</sup> or can be subject to a quick decision (the UK)<sup>135</sup>.

ECRE cautiously welcomes the time limits introduced in recast Article 27(3), and the strengthened information provision requirement of recast Article 27(4). The obligation for an asylum procedure to be completed within six months, extendable for another six months in complex cases, will help to limit the period persons in need of international protection remain in limbo, unable to fully integrate into the host society. Similarly, ECRE welcomes the requirement in recast Article 27(8) that time limits in an accelerated procedure be "reasonable". Rights guaranteed by EU law necessitate a procedural system that ensures the persons concerned will have their applications dealt with objectively and within a reasonable time period.<sup>136</sup> The principle of effectiveness requires that detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law should not render the exercise of such rights virtually impossible or excessively difficult<sup>137</sup>.

While ECRE favours a fair and speedy examination of each application for international

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<sup>133</sup> As the basic guarantees in the directive are neither considered sufficient nor effective, and also because of the absence of a clear guarantee for a suspensive right of appeal, ECRE has criticised Article 23(4) as creating "the risk of refoulement if states are not careful to ensure that domestic provisions properly reflect their obligations under international law". ECRE, *Information Note Asylum Procedures Directive*, p. 20.

<sup>134</sup> The Dutch government's plans for reform of the asylum procedure includes, as a general rule, that all asylum claims, with a few exceptions, should be dealt with within a maximum of 8 days. Cases involving unaccompanied children below age 12 or medical cases would be dealt with in the so-called "prolonged asylum procedure", which would last a maximum of 28 days. See Ministerie van Justitie, Directie Vreemdelingenbeleid, "Naar een effectievere asielprocedure en een effectiever terugkeerbeleid", 5525460/08/DVB, 24 June 2008.

<sup>135</sup> "There is a general presumption that the majority of asylum applications are ones on which a quick decision can be made, unless there is evidence to suggest otherwise". See UKBA, Asylum Policy Guidance – DFT and DNSA – Intake selection (AIU instruction), available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/detention/guidance/dftanddnsaintakeselection?view=Binary>. In the UK those subjected to accelerated asylum procedures are detained either in the detained fast track procedure or the detained non-suspensive appeals procedure (no right to remain in the UK pending the appeal). For an analysis of the impact of the detained fast track procedure on women asylum seekers, see Human Rights Watch, *United Kingdom. Fast-Tracked Unfairness. Detention and Denial of Women Asylum Seekers in the UK*, February 2010.

<sup>136</sup> See Court of Justice, Case C-327/02, *Panayotova*, 16 November 2004, par. 27 concerning the Dutch system of temporary residence permits that was applied vis-à-vis Bulgarian nationals, and its compliance with the provisions relating to the right to establishment under the then EC-Bulgaria Association Agreement.

<sup>137</sup> See Court Of Justice, Case C-62/00, *Marks and Spencer plc and Commissioners of Customs and Excise*, 11 July 2002, par. 34, with further reference to Case C-228/96, *Aprile* [1998] ECR I-7141, par. 18.



protection, a number of factors beyond the control of the determining authorities and the asylum seekers concerned have an influence on the length of the asylum procedure. In many cases, the assessment of an asylum application takes time. This may be because the procurement of a document substantiating the asylum application is delayed or because the applicant suffers from trauma due to past experiences and is unable to undergo lengthy interviews. States' objectives of increased efficiency and speed should never undermine the applicants' right to a fair examination of his or her application.

ECRE also believes that prioritisation mechanisms as a caseload management tool are to be preferred over acceleration mechanisms. In ECRE's view, prioritisation means that the determining authorities try to process the asylum application as soon as possible, but with the same legal safeguards and within the same time limits provided for by law. Acceleration of procedures means that for certain cases, more stringent time limits can apply or that a more simplified procedure is followed at the appeal stage than in other cases<sup>138</sup>. ECRE welcomes the recast Proposal's clarification of when Member States may 'prioritise' an application, and agrees that this should particularly be the case where the application is likely to be well founded or, when appropriate, where the applicant has special needs<sup>139</sup>.

ECRE maintains the view that if a provision on accelerated procedures is considered necessary in the context of the recast proposal, it should be limited to cases within the scope of UNHCR's EXCOM Conclusion No. 30 – cases which are clearly fraudulent or not related to the grounds for granting international protection.”<sup>140</sup>

It is acknowledged that the recast proposal considerably reduces the scope for acceleration of asylum procedures. This is to be welcomed, as acceleration may lead to less careful consideration of asylum claims, notwithstanding the fact that any accelerated procedure must accord with the basic principles and guarantees of Chapter II<sup>141</sup>. However, especially due to the absence of guidance regarding how to interpret 'accelerate,' ECRE remains deeply concerned by the provisions within recast Article 27 that seem to suggest using acceleration as a method for sanctioning insufficient cooperation. This is worrying because it asks the responsible authority to apply a value judgment to circumstances unrelated to the need for protection, whereas the only purpose of an asylum procedure is to examine whether there is a reasonable likelihood of persecution or serious harm should the applicant be returned to the country of origin or habitual residence. In addition, acceleration may be incompatible with the need to afford each application a *rigorous scrutiny* as required under the jurisprudence of the ECtHR<sup>142</sup>. ECRE takes the view

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<sup>138</sup> See ECRE, [The Way Forward – Asylum Systems](#), p. 42.

<sup>139</sup> Recast Article 27(5) (a) and (b).

<sup>140</sup> See ECRE, [The Way Forward – Asylum Systems](#), p. 43. Defined in EXCOM Conclusion No 30 as “applications which are considered to be so obviously without foundation as to merit full examination at every level of the procedure”. It should be noted that the EXCOM conclusion at the same time reminds states that such applications can also be processed through other mechanisms for speeding up procedures, such as allocating sufficient personnel and resources to determining authorities, and measures that would reduce the time required for the completion of appeals procedures.

<sup>141</sup> See recast Article 27(6). It should be noted that the recent research by UNHCR on asylum procedures in 12 EU Member States has again showed how accelerated procedures in most cases undermine procedural safeguards for asylum seekers and put them in a disadvantaged position. Negative effects of accelerated asylum procedures include less time for asylum seekers to submit an application form to the determining authority, reduced time to prepare for an interview – which is in some cases conducted the same day the application is lodged – and less time to consult a lawyer. It should also be noted that some interviewers and case workers expressed concern to UNHCR that, because of the short time limits that apply in accelerated procedures, they have not enough time to investigate and assess evidence. See UNHCR, *Study on Asylum Procedures. Section 9 – Prioritized and accelerated examination of applications*, p. 35-38.

<sup>142</sup> “The assessment of the existence of a real risk must necessarily be a rigorous one”. See ECtHR, *Case of NA. v. The United Kingdom*, Application No. 25904/07, Judgment of 17 July 2008, par. 111 (citing *Chahal v. the United Kingdom* and *Saadi v. Italy*).

that acceleration of an asylum procedure should only occur after a full and individual examination of the substance of the claim observing all necessary legal safeguards. If those conditions are met, acceleration of cases falling under the narrow definition of EXCOM Conclusion No. 30 could most effectively occur at appeal level through shorter but reasonable time limits for hearing an appeal. Acceleration should also only take place for reasons that concern the substance of the asylum claim<sup>143</sup>.

Combined recast Article 27(6)(c), (d) and 27(9) address the relationship between the use/destruction of false documents or identity documents and accelerated procedures. Under recast Article 27(6)(c), Member States may accelerate an application if “*the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision*”. Under recast Article 27(d), acceleration is permitted if “*it is likely that, in bad faith, [the applicant] has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality*”. At the same time, irregular entry or “*the lack of documents or use of forged documents shall not per se entail an automatic recourse to an accelerated examination procedure*”<sup>144</sup>. The presentation of false documents in good or bad faith is in principle immaterial to the question of whether the person is in need of international protection. The question is whether the applicant has a well-founded fear of persecution or is at risk of serious harm. Moreover, recast Article 27(6)(d) includes a low evidentiary test (“*likely*”) for deciding whether documents were destroyed or lost “*in bad faith*”. Accordingly, ECRE calls for further amendment to recast Article 27, in the form of deleting clauses 27(6)(c) and (d).

Furthermore, ECRE is opposed to the use of a safe country of origin rule to accelerate applications as allowed under recast Article 27(6)(b), and recommends deleting this clause. ECRE has consistently expressed its reservations with regards to the concept of a safe country of origin. It is inconsistent with the proper focus of international refugee law on individual circumstances. The assessment of the risk in the country of origin should never primarily be based on general presumptions regarding country-related criteria, but instead, always on an individual basis. Application of the safe country of origin concept can also amount to discrimination between refugees in violation of Article 3 of the Geneva Refugee Convention, Article 21 of the EU Charter on Fundamental Rights, and Article 26 of the International Covenant on Civil and Political Rights<sup>145</sup>. The use of the safe country of origin concept is undesirable, is in conflict with the principle of non-discrimination, and it enhances the risk of erroneous decision-making, so it should not be used as a ground for acceleration of the asylum procedure.

ECRE recommends deleting recast Article 27(6) (b),(c),(d) and strictly limiting the use of accelerated procedures to those cases that are covered by EXCOM Conclusion No. 30.

ECRE recommends further amendment of recast Article 27 in order to reflect the principle that acceleration of asylum procedures should only occur after a full examination of the asylum application and only at the appeal stage through the use of shorter but reasonable time limits for appeal.

<sup>143</sup> See ECRE, [The Way Forward - Asylum Systems](#), pp. 43-44 .

<sup>144</sup> Recast Article 27(9).

<sup>145</sup> ECRE, [Guidelines on Fair and Efficient Procedures for Determining Refugee Status](#), 1999, par. 21(c), 119(c) and ECRE, [Comments on the Amended Proposal for a Council Directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status as agreed by the Council on 19 November 2004](#), March 2005, p. 8.

## Unfounded applications (Recast Article 28)

Recast Article 28 only allows Member States to consider applications as unfounded if the determining authority has established that the applicant does not qualify for international protection as defined in the Qualification Directive or if the application has been explicitly withdrawn. ECRE believes that asylum applications should only be considered unfounded if they clearly do not relate to grounds of international protection<sup>146</sup>. ECRE welcomes the proposed deletion of the provision granting discretion to Member States to designate applications listed under current Article 23 of the Asylum Procedures Directive as manifestly unfounded if so defined in national legislation.

## Inadmissible applications (Recast Articles 29 – 30)

Recast Article 29(2) clarifies that the list of cases where an application may be considered inadmissible is exhaustive, and removes the possibility for Member States to consider applications inadmissible in cases where an “equivalent status” is granted or is under consideration. ECRE welcomes this amendment as it emphasises the primacy of the 1951 Refugee Convention and the protection it provides<sup>147</sup> and enhances the procedural requirement in recast Article 9(2) for determining authorities to examine eligibility for refugee status first. Finding an application inadmissible allows Member States to avoid examining the merits of a claim (Article 29(1)). This may be acceptable where refugee status has been granted in another state (recast Article 29(2)(a) and (b)), provided that there is an explicit guarantee that the applicant’s refugee status is still valid in that country and that he or she will be readmitted. However, ECRE opposes the inclusion of safe third country cases in inadmissibility procedures. In light of the potential irreversible harm that may result (directly or indirectly) from returning an applicant to a third country, the question of whether a country can be considered safe for a particular applicant must be the subject of rigorous scrutiny and must be dealt with in a substantive determination procedure<sup>148</sup>. ECRE therefore strongly recommends deleting recast Article 29(2)(c).

The additional guarantee in new recast Article 30 of a personal interview before a decision on the admissibility is taken is essential to ensuring that the right to be heard as general principle of EU law is fully observed. The only exception to this rule is in the case of a subsequent application. ECRE believes this exception is undesirable, as asylum seekers may not always be able to present material proof of “new elements or findings...which significantly add to the likelihood of the applicant qualifying as a refugee or a person eligible for subsidiary protection”, even where new elements exist. It is hard to see how the existence of new elements or findings in these cases could be verified without organising a personal interview. Nevertheless, ECRE accepts that in some cases a personal interview to assess the admissibility of a subsequent application may not be necessary or in fact possible. This is the case where the existence of a new element is evident or where the applicant is unfit or unable to be interviewed (recast Article 13(2)(b)). In order to emphasise the paramount importance of the right to be heard, the exception laid down in recast Article 30(1) should be restricted to those cases where it is possible to consider a

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<sup>146</sup> ECRE, [Information Note Asylum Procedures Directive](#), p. 26.

<sup>147</sup> It should be noted that the Qualification Directive does not incorporate all Convention rights. For instance it does not include provisions on naturalization (Art. 34 Geneva Convention), juridical status, freedom to practice religion and the right for religious education for children (Art. 12-16 Geneva Convention). The recast Qualification Directive proposal also does not address these issues. For an analysis of the recast Qualification Directive proposal see ECRE, [Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Qualification Directive](#), March 2010.

<sup>148</sup> ECtHR, *Chahal v. UK*, Application No. 70/1995/576/662, 11 November 1996, par. 96. A rigorous scrutiny implies a “meaningful assessment of the applicant’s claim”. See ECtHR, *Jabari v. Turkey*, Application No. 40035/98, 11 July 2000, paras. 39-40.

subsequent application admissible solely on the basis of the written material provided by the applicant or where the applicant for international protection is unfit or unable to be interviewed.

ECRE strongly recommends the deletion of recast Article 29(2)(c).

ECRE recommends amending recast Article 30(1) by adding: “*Such an exception should only be applied where a subsequent application can be considered admissible on the basis of the written material provided by the applicant for international protection or where the applicant for international protection is unfit or unable to be interviewed*”.

## 6.2. Safe country concepts (Recast Articles 31 to 34 and Recast Article 38)

### The concept of first country of asylum (Recast Article 31)

ECRE remains concerned that recast Article 31(b) allows an applicant to be returned to a country where he or she has not been recognised as a refugee but “otherwise enjoys sufficient protection”<sup>149</sup>. The lack of definition of “sufficient protection” is worrying as it potentially allows for the application of very low standards. Mere protection against *refoulement* in the first country of asylum cannot be considered “sufficient protection”. The full range of refugee rights enumerated in the 1951 Refugee Convention, the Qualification Directive, and other international and European human rights instruments must be guaranteed<sup>150</sup>. Such protection must also be available in practice in the country concerned, and must be assessed on an individual basis by the State intending to apply the concept. Changing the language to ‘effective protection’ instead of ‘sufficient protection’ would better reflect this requirement. Moreover, it is not appropriate for countries where UNHCR undertakes refugee status determinations – because the state does not have the capacity to do so or to provide effective protection – to be considered safe in the context of a first country of asylum situation. In a recent case concerning the planned deportation of two Iranian nationals, former members of the Peoples Mojahedin Organisation in Iran (PMOI) to Iraq, the ECtHR found that their deportation to Iraq would violate Article 3 ECHR, notwithstanding the fact that they both had been recognized as refugees by UNHCR in Iraq<sup>151</sup>. The ECtHR in *Abdolkhani and Karimnia v. Turkey* also confirmed that the indirect removal of an alien to an intermediary country does “not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention”<sup>152</sup>. Consequently, an individual evaluation of safety is needed before protection may be refused, including on first country of asylum grounds. In this regard, the obligation laid down in recast Article 30 for Member States to conduct a personal interview on the admissibility of the application is necessary in order to ensure that such an individual assessment takes into account the particular circumstances of the asylum seeker as required under recast

<sup>149</sup> ECRE, [Information Note Asylum Procedures Directive](#), p. 22.

<sup>150</sup> See UNHCR, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*, 13 October 1989. No. 58 (XL) – 1989, available at: <http://www.unhcr.org/refworld/docid/3ae68c4380.html>; ECRE, [The Way Forward: Europe’s role in the global refugee protection system Guarding refugee protection standards in regions of origin](#), December 2005 and S. Legomsky, “Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection”, (2003) 15 *International Journal of Refugee Law*, p. 640.

<sup>151</sup> “Given that the applicants’ deportation to Iraq would be carried out in the absence of a legal framework providing adequate safeguards against risks of death or ill-treatment in Iraq and against the applicants’ removal to Iran by the Iraqi authorities, the Court considers that there are substantial grounds for believing that the applicants risk a violation of their rights under Article 3 of the Convention if returned to Iraq”. See European Court of Human Rights, *Abdolkhani & Karimnia v. Turkey*, Application No. 30471/08, 22 September 2008, par. 89.

<sup>152</sup> *Ibid.*, par. 88.

Article 31, and that the asylum seeker is given an effective opportunity to rebut the presumption of safety.

ECRE recommends amending recast Article 31 by replacing the word "sufficient" with "effective".

### The safe third country concept (Recast Article 32)

ECRE continues to have serious concerns regarding the 'safe third country' concept contained in recast Article 32<sup>153</sup>. ECRE deeply regrets that recast Article 32 permits a Member State to unilaterally invoke the responsibility of a third state to examine a claim, without adequate safeguards<sup>154</sup>. ECRE would prefer the abolition of the safe third country concept, as it potentially undermines access to protection while at the same time it is hardly applied in practice by EU Member States. Indeed, recent research conducted by UNHCR on the legislation and practice in the EU Member States indicated that the safe third country concept as laid down in the Asylum Procedures Directive<sup>155</sup> is reflected in national legislation of only five of the 12 EU Member States covered by the research<sup>156</sup>. In six EU Member States the concept is laid down in national legislation, but is either not applied in practice, or it is unclear to what extent it is applied<sup>157</sup>, and in three EU Member States the concept is not laid down in national legislation or applied in practice<sup>158</sup>. This leads UNHCR to the conclusion that "while Member States appear to support the notion, the concept is largely symbolic, and holds little practical use"<sup>159</sup>.

However, if it is to remain in the recast Directive, ECRE recommends a number of amendments in addition to those proposed by the Commission in order to ensure full compliance with Member States' obligations under international refugee and human rights law.

Safe third country procedures may create a risk of chain *refoulement*, and do not absolve a state of its duties under article 3 ECHR<sup>160</sup>. Beyond avoiding a risk of persecution or serious harm, the concept must also take into account the substantive rights Member States are obliged to uphold, such as reception conditions and the social rights extended to recognised refugees.<sup>161</sup> ECRE therefore emphasises the need for strict criteria for the designation of third countries as safe. These criteria should at least include: (1) ratification and implementation – without geographic limitation – of the Refugee Convention and other human rights treaties such as the Convention

<sup>153</sup> For an extensive analysis see ECRE, [Information Note Asylum Procedures Directive](#), p. 23.

<sup>154</sup> ECRE, [Information Note Asylum Procedures Directive](#), p.23.

<sup>155</sup> In Germany, the safe third country concept only exists and is applied outside the scope of the Asylum Procedures Directive. See UNHCR, *Study on Asylum Procedures. Section 12 – The Safe Third Country Concept (Article 27)*, p. 7.

<sup>156</sup> Spain, the UK, Austria, Hungary and Portugal. However, in those countries, the relevance of the concept in practice is also limited, for instance, because it is applied in a very small number of cases (Austria) or require the adoption of lists of safe third countries which have never been adopted (the UK). See *Ibid.*, p. 8.

<sup>157</sup> Bulgaria, Czech Republic, Finland, Greece, The Netherlands, Slovenia. See *Ibid.*, p. 7.

<sup>158</sup> Belgium, France, Italy. See *Ibid.*

<sup>159</sup> See *Ibid.*, p. 10.

<sup>160</sup> See ECtHR, *T.I. v. U.K.*, Application No. 43844/98, Admissibility Decision of 7 March 2000 and *Abdolkhani and Karimnia v. Turkey*, par. 88.

<sup>161</sup> See, e.g., UNHCR, *Conclusion on International Protection*, 9 October 1998. No. 85 (XLIX) – 1998, available at <http://www.unhcr.org/refworld/docid/3ae68c6e30.html>; UNHCR, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection\**, 13 October 1989. No. 58 (XL) – 1989, available at: <http://www.unhcr.org/refworld/docid/3ae68c4380.html>. See also, *R. v. Special Adjudicator ex parte Ullah*, [2004] UKHL 26.



Against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); (2) a fair, efficient, and accessible asylum procedure<sup>162</sup>; (3) agreement to readmit the applicant and assess the claim; and (4) willingness and ability to provide protection for as long as the person remains a refugee<sup>163</sup>.

In outlining prerequisite conditions for applying the safe third country notion, recast Article 32(1) requires only the absence of a risk of persecution or serious harm, respect for the *non-refoulement* principle, and the possibility to request and, if merited, to receive international protection<sup>164</sup>. While recast Article 32(1)(e) appears to presume the third country's ratification of the 1951 Refugee Convention, ECRE is concerned by the absence of an explicit requirement that receiving third countries have both ratified the Convention and implement its standards *in practice*<sup>165</sup>. ECRE regrets that the recast does not emphasise the need for careful examination of the receiving state's capacity to readmit applicants, examine their claims, and provide full and effective protection.

Furthermore, the recast proposal continues to refer to national legislation for the adoption of rules regarding the connection between the person seeking international protection and the third country, the methodology by which competent authorities satisfy themselves that the third country is safe, and the rules on rebuttal of the presumption of safety. As a result, the recast proposal does not address the considerable room for discretion left to Member States to apply the safe third country concept, which potentially undermines asylum seekers' effective access to protection and encourages divergent practices across the EU. Therefore, ECRE recommends further amending recast Article 32(2) in order to unambiguously require a meaningful connection between the applicant and the third country concerned, an in-depth assessment of the safety of the third country in the particular circumstances of the applicant, and the exclusion of the use of safe third country lists.

ECRE regrets that the recast still allows Member States to apply "*national designations of countries considered to be generally safe*"<sup>166</sup>, but welcomes the limitation that Member States must at least "*permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his/her particular circumstances*"<sup>167</sup>. Another welcome addition is the requirement that the applicant "*be allowed to challenge the existence of a connection between him/her and the third country*"<sup>168</sup>, which for example would allow applicants to challenge decisions to transfer them to a country through which they merely transited, or to which they had only had links in the past which now no longer exist. In line with EXCOM Conclusion No. 15 (XXX), asylum should not be refused solely because it could be sought from another state. The person must have a connection or close links, such as family or substantial

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<sup>162</sup> Battjes argues that *T.I. v. UK* implies that ECHR Article 3 requires that the third state offer "*effective protection*" and "*effective procedural safeguards*." See H. Battjes, *European Asylum Law and International Law*, Martinus Nijhoff Publishers, Leiden/Boston, 2006, p. 401.

<sup>163</sup> See also, S. Peers, *EU Justice and Home Affairs Law*, Oxford University Press, 2<sup>nd</sup> edition, 2006, pp. 339-341; S. Legomsky, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection", 15 *International Journal of Refugee Law*, 2003, pp. 673-675; ECRE, [Information Note Asylum Procedures Directive](#), p. 23.

<sup>164</sup> Recast Article 32(1)(a)-(e).

<sup>165</sup> C. Costello (2006), p. 11.

<sup>166</sup> Recast Article 32(2)(b).

<sup>167</sup> Recast Article 32(2)(c).

<sup>168</sup> *Ibid.*

cultural community ties, with the other state, and the reasons for which the asylum applicant lodged the application in the receiving state should be taken into account as far as possible<sup>169</sup>.

The recast helpfully reminds the Member State concerned of its duty to assess the asylum application if the third country does not admit the applicant “*to its territory*”<sup>170</sup>, but ECRE is still concerned by the lack of an explicit requirement that the third country provide access to an asylum procedure. Recast Article 32(4) should be further amended to specify that transfer to a third country is not possible unless the applicant is guaranteed individual access to an asylum procedure there.

In sum, ECRE believes that, if the safe third country concept is to be maintained in the recast Directive, it must be strictly limited. Although the recast proposal includes additional guarantees, it still lacks a concise framework to bring the concept into full compliance with Member States’ international obligations.

If the safe third country concept is to be maintained, ECRE recommends further amending Article 32 of the recast proposal to ensure that it can only be applied as part of an individual examination with essential safeguards and clear requirements that include, at a minimum:

- a) Ratification (without geographic limitation) and implementation of the Refugee Convention and other applicable instruments;
  - b) Existence of an accessible, fair and efficient asylum procedure;
  - c) Explicit consent of the third country to (re)admit the asylum seeker and to provide full access to the asylum procedure;
  - d) Willingness and ability to provide effective protection for as long as the person is in need of international protection;
  - e) Close links with the third country, such as family ties;
  - f) The effective possibility to rebut the presumption of safety on the basis of potential violation of non-refoulement and/or absence of effective protection in the third country concerned;
- and
- g) Access to an effective remedy against any removal decision.

### **The safe country of origin concept and National designation of third countries as safe countries of origin (Recast Articles 33 - 34)**

As indicated above, ECRE has consistently criticised the safe country of origin concept as being inconsistent with the proper focus of international refugee law on protection needs of individuals<sup>171</sup>. It may amount to discrimination between refugees contrary to States’ obligations under Article 3 of the 1951 Geneva Refugee Convention. For the purpose of an asylum procedure, countries should never be presumed to be safe on the basis of general assumptions. The purpose of an asylum procedure is to determine the protection needs of the individual applicant on the basis of the *individual* circumstances of the case. The human rights and security situation in the country of origin of the applicant is the background against which the individual

<sup>169</sup> See EXCOM Conclusion No. 15 (XXX) – 1979, paras. (h) (i), (ii) and (iii)

<sup>170</sup> Recast Article 32(4).

<sup>171</sup> ECRE, [Information Note Asylum Procedures Directive](#), p. 26. “[T]he blanket designation of States as ‘safe’ neglects to take into account the individual circumstances of the asylum seeker, which may in fact make the country unsafe for him or her, for example by reason of membership of a minority group”, G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law (Third Edition)*, Oxford University Press, 2007, p. 392.

situation of the applicant needs to be assessed and obviously sets the general context within which the application must be examined. However, considering a country as safe from the outset of the procedure often puts an insurmountable burden on the applicant to rebut that presumption, especially where he or she is subjected to an accelerated procedure.

Following the CJEU judgment annulling it<sup>172</sup>, the recast proposal deletes Article 29 of the Asylum Procedures Directive, which had envisaged a common list of safe countries of origin, but maintains the possibility of national designation of safe countries of origin<sup>173</sup>. ECRE welcomes the deletion of the common list provision, particularly because it could have been read to require all Member States to employ the safe country of origin concept<sup>174</sup>. However, ECRE questions why the ability to use national lists should be maintained, as this risks undermining the objective of a common asylum procedure in the EU and will inevitably increase divergences between EU Member States in practice. Current practice in the EU shows that those Member States which apply national lists of safe countries of origin all apply different lists, while many of the countries included hardly produce any asylum applications in the EU Member States<sup>175</sup>. The fact that EU Member States disagree which countries can be considered safe raises fundamental doubts with regard to the relevance and reliability of the concept as such, particularly in the context of a Common European Asylum System. Therefore, ECRE calls for the deletion of recast Article 33.

However, if the provision is to be maintained, ECRE particularly welcomes the proposed deletion of Article 30(3) Asylum Procedures Directive, which permits Member States to designate “*part of a country as safe, or . . . as safe for a specified group of persons*”<sup>176</sup>. Safety in only part of a country may indicate a situation too unstable for ‘safe country’ treatment to be reasonable or reliable. ECRE also welcomes the strengthened substantive requirements for ‘safe’ designation resulting from the replacement of Article 30(2) Asylum Procedures Directive with the rules laid out in recast Annex II<sup>177</sup>. ECRE also considers crucial the added requirement that Member States applying a safe country of origin rule “*ensure a regular review of the situation in third countries designated as safe*”<sup>178</sup>. Even if it were possible to designate countries as generically and absolutely safe, it must be taken into account that human rights situations can change rapidly.

Finally, as indicated above, according to 2008 UNHCR statistics, EU Member States themselves cannot be considered safe countries of origin as a number of EU citizens have been recognised as refugees outside the EU<sup>179</sup>. This was illustrated again with the recent case of a German family

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<sup>172</sup> Court of Justice, Case C-133/06, *European Parliament and Commission v. the Council*, 6 May 2008.

<sup>173</sup> Recast Article 33(1).

<sup>174</sup> Article 31(2) Asylum Procedures Directive. See also ELENA, [The Application of The Safe Country of Origin Concept in Europe: An Overview](#), Brussels, 2005.

<sup>175</sup> See SEC(2009)1376, Impact Assessment part II, p. 37. The overview of national lists of safe countries of origin mentions 8 EU Member States that apply national lists. Austria, Czech Republic and Romania only include industrialized countries in the list, which hardly produce any asylum applications. Germany, France, Luxembourg, Slovakia and the UK include various countries that may produce asylum applications (and refugees), but of those countries, only Ghana (and only for male asylum seekers) is on the national lists of the mentioned EU Member States.

<sup>176</sup> Article 30(3) Asylum Procedures Directive.

<sup>177</sup> For example, the new Annex requires Member States to assess not only the country’s laws and regulations, but also “*the manner in which they are applied.*” Recast Annex II is also explicitly coextensive with the Qualification Directive, and adds welcome reminders of Member States’ obligations under international instruments such as the ICCPR and the CAT.

<sup>178</sup> Recast Article 33(2).

<sup>179</sup> See comments above on the scope of the recast directive.



who was granted refugee status in the US in 2010 on the basis of their persecution on religious grounds in Germany and their membership of a particular social group<sup>180</sup>.

ECRE favours the deletion of recast Article 34 on the safe country of origin concept as it risks creating an insurmountable burden of proof on the individual applicant while detracting from the true purpose of the asylum procedure: the individual determination of the protection needs of the asylum seeker. However, if the safe country of origin concept is to remain in the recast Directive, ECRE would welcome an amendment to clarify that recast Article 34(2) operates without prejudice to recast Article 33(1). Recast Article 34(2)'s language ("*Member States shall*" lay down rules for applying the safe country of origin concept) could be misread to require Member States that did not previously apply safe country of origin, to do so. Such a reading would be inconsistent with recast Article 33(1), which does not impose an obligation on Member States to retain or introduce national lists.<sup>181</sup>

ECRE recommends the deletion of Article 33 allowing national lists of safe countries of origin to be maintained.

ECRE recommends the deletion of the concept of a safe country of origin in the recast Directive, as its relevance in the context of the CEAS can be seriously questioned, and it also creates a disproportionate procedural disadvantage for the applicant.

If the concept is to be maintained, ECRE recommends further amending recast Article 34(2) so as to clarify that it operates without prejudice to recast Article 33(1).

### **The European safe third countries concept (Recast Article 38)**

In the recast Proposal, the definition of a European safe third country remains virtually unchanged, while the provisions relating to a common list of such countries have been removed<sup>182</sup>. This reflects the ECJ judgment, annulling Article 36(3) Asylum Procedures Directive on the grounds that the EU list should be adopted through co-decision rather than consultation with the European Parliament<sup>183</sup>. ECRE remains convinced that the application of the "*European safe third*" concept is highly problematic, and thus would welcome the decision not to maintain such a list at the EU level.

However, leaving the provision, as amended, in place would still raise a number of problems. Under the current Asylum Procedures Directive, as long as no common list is adopted, only those Member States having designated European safe third countries before 1 December 2005 may apply the concept. Because of the deletion of the standstill clause (recast Article 38(7)), all Member States could individually designate 'safe' European countries, potentially leading to inconsistency across the EU.

Moreover, the possibility to completely deny an examination of the applicant's "*particular circumstances*" could amount to a violation of *non-refoulement*<sup>184</sup>. Current guidelines for determining that a country is safe are very general: ratification and observance of the Refugee Convention without geographic limitations<sup>185</sup>; an asylum procedure established by law<sup>186</sup>; and

<sup>180</sup> See NY Times, "Judge grants asylum to home schoolers", 28 February 2010.

<sup>181</sup> Recast Article 33(1) ("*Member States may retain or introduce legislation . . . for the national designation of safe countries of origin*").

<sup>182</sup> Article 36(2)(d), 36(3), 36(7) Asylum Procedures Directive.

<sup>183</sup> Court of Justice Case C-133/06, *European Parliament and Commission v. the Council*, 6 May 2008.

<sup>184</sup> Recast Article 38(1).

<sup>185</sup> Recast Article 38(2)(a).

<sup>186</sup> Recast Article 38(2)(b).

ratification and observance of the ECHR, including its provisions on effective remedies<sup>187</sup>. At this moment, this means that EU Member States located at the Eastern borders of the EU could decide not to conduct any examination of asylum applications from individuals who entered their territory illegally from Ukraine. As Ukraine is a critical entry point for Chechen asylum seekers, maintaining this provision may in practice indeed result in *refoulement*<sup>188</sup>.

Country conditions are part of any asylum evaluation, but a decision must consider individual circumstances, and the applicant must have the opportunity to rebut a presumption of safety. The requirement that each Member State “provide modalities for implementing the provisions according with the principle of non-refoulement” is not sufficient to ensure compliance with Member States’ international obligations unless the ‘modalities’ include an individual examination<sup>189</sup>. In 2005, the LIBE Committee of the European Parliament called for the deletion of this concept “because no minimum principles and guarantees apply to this procedure and access to the asylum procedure and territory may be denied altogether. Such denial risks being a violation of international refugee law. No category of applicant should be denied access to an asylum procedure completely. UNHCR also strongly recommends the deletion of this article, which was not foreseen in the Commission proposal”<sup>190</sup>.

Finally, to ECRE’s knowledge, no Member State currently applies the European safe third country concept in practice. As a result, there is no justification for maintaining this provision in the recast Directive; not only is it not applied, but it is in itself contrary to international human rights and refugee law.

In order to ensure respect for the principle of *non-refoulement*, ECRE strongly recommends the deletion of recast Article 38.

## **7. Subsequent applications and procedural rules (Recast Articles 35-36) (Chapter III – Procedures at first instance)**

In recent years, the number of subsequent asylum applications has become a matter of serious concern in a number of EU Member States. Such applications obviously place additional administrative burdens on the competent authorities as they increase the caseloads of asylum bodies and may affect the proper functioning of the asylum system in general. Whereas the issue of subsequent asylum applications is often addressed from the perspective of “abuse of the asylum system” or failing return policies, it is clear that the growing percentage of subsequent applications in the EU may also be indicative of the failure of asylum systems to effectively identify protection needs during the first procedure<sup>191</sup>. Therefore, it is important that the necessary safeguards are in place for applicants to be able to submit to the determining authority any new elements or elements that were not properly taken into account. In this respect, ECRE welcomes the deletion of recast Article 4(3)(c) allowing authorities, other than those specialised determining authorities who are qualified to examine asylum applications, to conduct preliminary

<sup>187</sup> Recast Article 38(2)(c).

<sup>188</sup> The chances of finding effective protection in Ukraine are very small. Recognition rates for refugees in Ukraine were as low as 3% between 2003 and 2007. See ECRE, [“Here to stay?”. Refugee voices in Belarus, Moldova, The Russian Federation and Ukraine](#), p. 70.

<sup>189</sup> Recast Article 38(3).

<sup>190</sup> European Parliament, LIBE Committee, LIBE Report on the Amended Proposal for a Council Directive on Minimum Standards for Procedures in Member States for Granting and Withdrawing Refugee Status, A6-0222/2005, 29 June 2005.

<sup>191</sup> In 2008, subsequent applications reached 36,4% in the Czech Republic, 28,5% in Belgium, 20,7 % in Germany, 15,4% in Poland and 12,3 % in The Netherlands. See European Commission, *Impact Assessment*, p. 20.

examination procedures in the case of subsequent applications. The determining authority is best placed to assess whether or not a new element or finding exists in light of the previous procedure, while other authorities may take an overly formalistic approach which may effectively prevent persons in need of international protection from re-entering the asylum procedure<sup>192</sup>.

Recast Article 35 also strengthens safeguards for asylum seekers in the case of subsequent applications by requiring that Member States examine subsequent applications or further representations within the framework of the examination from the previous application or within the framework of a review or appeal procedure<sup>193</sup>. Furthermore, recast Article 35(2) maintains the possibility of applying a specific procedure for considering an identical application, but restricts such procedures to the framework of an admissibility procedure and the safeguards it entails, as allowed under recast Article 29(2)(d)<sup>194</sup>. This is also limited to situations where an application was explicitly withdrawn or where a final decision was taken on a previous application. In a welcome amendment, the recast no longer allows for such a procedure where the application was implicitly withdrawn or where the decision taken on the previous application is not yet final, as in both cases, no final decision is possible under the recast proposal.

The definition of what constitutes a new element or finding that justifies the examination of a subsequent application is rather vague in the Asylum Procedures Directive and is not addressed in the recast Proposal as such. Certain Member States apply a very restrictive definition either in the law or in practice, making it very difficult in reality for asylum seekers to submit a subsequent application<sup>195</sup>. This is particularly problematic in cases where the substance of the asylum application was not fully examined in the previous asylum application, or where, due to trauma, the asylum seeker was unable to reveal all aspects of his or her claim during the first procedure. The recast Proposal would benefit from a recital in the preamble calling for further guidance as to the interpretation of recast Article 35(4), which requires that new elements or findings “significantly add to the likelihood of the applicant qualifying as a refugee or a person eligible for subsidiary protection”.

ECRE welcomes recast Article 35(8), relating to situations where a subsequent application is lodged after a final inadmissibility decision or final rejection of an application deemed unfounded is given, and before a return decision has been enforced. ECRE accepts that in those cases, fewer procedural guarantees can be applied, provided that the first application was subject to a full and fair substantive examination. ECRE considers the safeguard in recast Article 38(8)(a) as a necessary standard for ensuring that Member States fully comply with the principle of *non-refoulement*.

Finally, recast Article 35(6) continues to allow Member States the discretion to decide not to examine a subsequent application because the applicant could have raised the new elements

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<sup>192</sup> This is the case in Belgium where the Aliens Office, and not the Commissioner-General for Refugees and Stateless persons, conducts the preliminary examination of subsequent applications. This not only creates additional administrative burdens for both authorities, but it also in practice requires the Aliens Office to assess the new elements submitted by the applicant in light of the 1951 Refugee Convention and grounds for subsidiary protection established in the Aliens Act whereas it no longer has any competence in the examination of first asylum applications in the Belgian asylum procedure. See Vluchtelingenwerk Vlaanderen –CIRE, Evaluation de la procedure d'asile a l'occasion de l'audition au sein de la Commission de l'Intérieur et des Affaires administrative du Senat, 24 Mars 2009, p. 23. See also UNHCR, *Study Asylum Procedures. Section 14 – Subsequent applications*, p. 24.

<sup>193</sup> Recast Article 35(1): “that Member State *shall* examine...”.

<sup>194</sup> Recast Article 35(2).

<sup>195</sup> An example is the Netherlands, where evidence existing during the first instance procedure but which was not obtained by the asylum seeker during the first instance procedure cannot be considered new simply because it existed before the decision was taken. See UNHCR, *Study Asylum Procedures. Section 14 – Subsequent applications*, p. 55.

and findings during the previous procedure, and in particular during the appeals procedure. ECRE reiterates that there may be numerous legitimate reasons why an asylum seeker might not fully disclose relevant facts during an initial application and therefore a subsequent application may be necessary, even if no “new facts” have been raised<sup>196</sup>. ECRE shares the Commission’s analysis of the main root causes of subsequent applications<sup>197</sup>, but believes that deletion of Article 35(6) is necessary to ensure effective safeguards against *refoulement*.

As to the procedural rules on subsequent applications subject to a preliminary examination laid down in recast Article 36, ECRE reiterates its concern that asylum seekers should be granted the full range of procedural guarantees, including the right to legal assistance and the right to a personal interview, and should not be limited to the guarantees laid down in recast Article 11(1)<sup>198</sup>.

ECRE recommends deleting recast Article 35(6) and further amending Article 36 to ensure that applicants for international protection, in the subsequent application procedure, enjoy all guarantees provided for in Chapters II and V of the Directive.

## **8. Border procedures (Recast Article 37) (Chapter III – Procedures at first instance)**

The recast proposal simplifies the provision on border procedures considerably by deleting all derogations currently existing in Article 35 Asylum Procedures Directive and removing the stand still clause. Member States may only allow for procedures at the border or in a transit zone that are aimed at making decisions regarding the admissibility or the substance of an application in an accelerated procedure pursuant to recast Article 27(6). Asylum applications at the border must be processed according to the basic guarantees and principles that are obligatory in all asylum procedures<sup>199</sup> as required under the non-discrimination principle. However, as there is no reference to the exhaustive list of circumstances in which an application may be considered inadmissible, and there is no specific definition of admissibility in the context of border procedures, the provision is unclear and may give rise to very broad interpretations by Member States in practice. ECRE recommends including a reference to recast Article 29 in order to ensure that the same restrictive interpretation of inadmissible applications applies in all circumstances. ECRE believes that there is no justification for applicants who submit their claims at the border to be treated differently.

In practice, border procedures often do not provide all guarantees for a fair and efficient examination of the asylum application due to restraints on access to legal assistance as well as availability of interpreters and qualified personnel. This negatively impacts the quality of the examination procedure and therefore makes border procedures almost by definition ill-suited to deal with the substance of an asylum application. EXCOM Conclusion No. 82 emphasises “the need to admit refugees into the territories of States, which includes no rejection at frontiers

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<sup>196</sup> This is especially the case for traumatised individuals or victims of rape and torture who may have difficulties recounting their experiences. ECtHR and UNCAT case law underlines the need for flexibility in such cases. See ECtHR, *Hatami v. Sweden*, Application No. 32448/96, 23 April 1988, par. 106 and UNCAT, Communication No. 13/93, *Matumbo v. Switzerland*, 27 March 1994.

<sup>197</sup> See COM(2009) 554 final, Impact Assessment. Detailed Analysis of the Proposal, pp. 16-17.

<sup>198</sup> ECRE, [Information Note Asylum Procedures Directive](#), p. 30.

<sup>199</sup> This includes the guarantees in recast Article 22 that no asylum seeker may be detained for the sole reason that he/she is an applicant for international protection and that detained asylum seekers must have access to a speedy judicial review in accordance with the Commission proposal recasting the Reception Conditions Directive. See COM(2008) 815 final/2, *Proposal for a Directive of the Council and of the European Parliament laying down minimum standards for the reception of asylum seekers (recast)*, Brussels, 3 December 2008. See also ECRE, [Comments from the European Council on Refugees and Exiles on the European Commission proposal to recast the Reception Conditions Directive](#), April 2009.

without fair and effective procedures for determining status and protection needs<sup>200</sup>. As a consequence, where such fair and effective procedures are not available in practice at the border, an inland procedure is mandatory.

ECRE recommends inserting a reference to recast Article 29 in recast Article 37(1)(a), and deleting recast Article 37(1)(b).

## 9. Right to an effective remedy (Recast Article 41) (Chapter V - Appeals Procedure)

As mentioned above, the recast proposal takes important steps toward aligning asylum procedures in the Member States with the procedural rules that apply generally in EU law as interpreted by the CJEU. This is particularly the case with recast Article 41, which reflects the right to an effective remedy as laid down in Article 47 of the EU Charter on Fundamental Rights<sup>201</sup>. According to the latter provision, everyone whose rights and freedoms are guaranteed by the law of the Union has the right to an effective remedy before a tribunal.

It is important to note that with regard to the meaning of effectiveness of a remedy, Article 47 of the Charter codifies the jurisprudence of the ECtHR on Article 6 and 13 ECHR, and the jurisprudence of the CJEU on the right to an effective appeal. It includes the right to a fair and public hearing within a reasonable time, by an independent and impartial tribunal previously established by law, where everyone shall have the possibility of being advised, defended and represented, and where legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice. As a result, recast Article 41, combined with recast Articles 18 and 19, does little more than incorporate into the directive existing safeguards, which Member States must already respect in light of the ECHR and the CJEU's jurisprudence.

ECRE particularly welcomes the recast's reinforced provisions regarding the nature of an appeal (recast Article 41(3)); the extension of the right of appeal to types of decisions that are currently not explicitly within the scope of Article 38 Asylum Procedures Directive (recast Article 41(1)(a)(i) and 41(2)); and the strengthened right to remain in the territory of the Member State while an appeal is pending (recast Article 41(5)-(7)).

In requiring a "*court or tribunal*" to carry out "a full examination of both facts and points of law", recast Article 41(3) reflects a fundamental rule developed in the jurisprudence of the Court of Justice. To provide an effective appeal, a court or tribunal must be organisationally and operationally independent of the authority whose decision it is reviewing, and not subject to external intervention or pressures. It must also be impartial, which requires "objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law"<sup>202</sup>. General principles of EU law also require a procedural system to be "*easily accessible and capable of ensuring that the persons concerned will have their applications dealt*

<sup>200</sup> EXCOM Conclusion No. 82 (XLVIII), Conclusion on Safeguarding Asylum, 1997.

<sup>201</sup> The Lisbon Treaty has removed any ambiguity concerning the legally binding nature of the EU Charter of Fundamental Rights as according to Article 6(1) TEU, the EU Charter "shall have the same legal value as the Treaties".

<sup>202</sup> Case C-506/04, *Graham Wilson*, 19 September 2006, paras. 49-53. For further analysis see M. Reneman, *Access to an Effective Remedy in European Asylum Procedures*, Amsterdam Law Forum, Vol. 1, No. 1, 2008, pp. 75-8.

with objectively and within a reasonable time”<sup>203</sup>. A full *ex nunc* examination of fact and law is implicitly required to fulfil the right to an effective appeal in EU law<sup>204</sup>.

ECRE welcomes the recast’s clarification that the right of appeal extends to decisions deeming applications unfounded,<sup>205</sup> and to those denying refugee status in favour of subsidiary protection.<sup>206</sup> ECRE further welcomes the clarification that time limits placed by Member States on an applicant’s ability to exercise the right to an effective remedy must be “reasonable” and must not make access “impossible or excessively difficult”<sup>207</sup>. The latter reflects the principle of effectiveness of the judicial protection of an individual’s rights under EU law as established by the Court of Justice<sup>208</sup>. ECRE also welcomes the introduction of a requirement that Member States establish time limits “for the court or tribunal . . . to examine the decision of the determining authority”<sup>209</sup>, as long as such limits are not imposed with the effect of reducing the applicant’s ability to prepare and present an appeal.

ECRE acknowledges that the recast proposal introduces significant improvements in this respect, as it requires suspensive effect during “normal appeals”<sup>210</sup>. The right to remain in the territory until a final decision has been taken on the appeal is essential in order to ensure that the principle of *non-refoulement* is respected in all circumstances. The ECtHR has, on several occasions, reaffirmed that “the notion of an effective remedy under Article 13 requires (i) 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, and (ii) a remedy with automatic suspensive effect”<sup>211</sup>. It is vital that asylum seekers have a right to remain in the territory until their appeal is decided. A right to appeal becomes

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<sup>203</sup> Case C-327/02 *Panayotova v Minister voor Vreemdelingenzaken en Integratie*, 16 November 2004.

<sup>204</sup> See Case C-136/03, *Dörr and Ünal*, 2 June 2005, par. 55 –57 and Joined Cases C-65/95 and C-111/95, *The Queen v Secretary of State for the Home Department, ex parte Mann Singh Shingara and Abbas Radiom*, 17 June 1997, par 34 (“Where the right of appeal is restricted to the legality of the decision, the purpose of the intervention of the competent authority referred to in Article 9(1) is to enable an exhaustive examination of all the facts and circumstances, including the expediency of the proposed measure, to be carried out before the decision is finally taken”). See also Marcelle Reneman, *Access to an Effective Remedy in European Asylum Procedures*, Amsterdam Law Forum, Vol. 1, No. 1, 2008, p. 94 citing ECtHR, *Schmautzer v. Austria*, 28 September 1995, Application No. 31/1994/478/560, 28 September 1995, para 36 (article 6 ECHR requires an appeal to a “judicial body” with “the power to quash in all respects, on questions of fact and law, the decision of the body below”).

<sup>205</sup> Recast Article 41(1)(a)(i).

<sup>206</sup> Recast Article 41(2). ECRE notes that because an asylum seeker must be presumed to be a refugee until finally determined otherwise, people in this situation are entitled to all rights of people ‘lawfully staying’ in the host state. The ‘lawfully staying’ designation unambiguously applies, as subsidiary protection under the Qualification Directive carries the right to a residence permit for at least one year.

<sup>207</sup> Recast Article 41(4).

<sup>208</sup> See, e.g., Case C-432/05, *Unibet v. Justitiekanslern*, 13 March 2007, par. 43 (“In this regard the detailed procedural rules governing actions for safeguarding an individual’s rights under Community law...must not render practically impossible or excessively difficult the exercise of rights conferred by Community law”).

<sup>209</sup> Recast Article 41(9) (replacing “may” with “shall”).

<sup>210</sup> Recast Article 41(5). The recast Proposal requires a suspensive appeal against: 1) decisions to consider an application unfounded; 2) decisions to consider applications inadmissible pursuant to Article 29; 3) decisions taken at the border or in a transit zone as described in Article 37(1); 4) decisions not to conduct an examination pursuant to the application of the European Safe Third Country concept; 5) a refusal to reopen the examination after its discontinuation pursuant to Articles 23 and 24 and 6) a decision to withdraw international protection status pursuant to Article 40.

<sup>211</sup> See ECtHR, *Baysakov and others v. Ukraine*, Application No. 54131/08, Judgment of 18 February 2010, par. 71. See also *Gebremedhin v. France*, Application No. 25389/05, Judgment of 26 April 2007, par. 66 and *Muminov v. Russia*, Application No. 42502/06, Judgment of 11 December 2008, par. 101.



meaningless if the asylum seeker has already been sent back to the country where they face persecution, torture, or inhuman or degrading treatment. No automatic suspensive appeal is required with regard to cases processed in accelerated procedures and inadmissibility decisions on identical asylum applications. In these cases, recast Article 41(6) and (7) only requires access to a court or tribunal empowered to rule whether or not the applicant must remain in the territory during an appeal in accelerated procedures (recast Article 27(6)) or against an inadmissibility decision on an identical application after a final decision (recast Article 29(2)(d))<sup>212</sup>. In those cases the applicant must be allowed to remain in the country pending that ruling.<sup>213</sup>

ECRE considers that such a system may be acceptable in the case of an appeal against an inadmissibility decision on an identical asylum application in light of the additional procedural guarantees to ensure compliance with *non-refoulement* obligations laid down in recast Article 35(8), and provided that a full examination of the merits of the first asylum application has taken place in accordance with the procedural safeguards laid down in the directive.

However, considering the potential consequences of removal before protection needs have been fully and finally ascertained, ECRE urges the Council and the European Parliament to ensure that appeals against negative asylum decisions taken in accelerated procedures have full automatic suspensive effect. This is necessary to ensure compatibility with the jurisprudence of the ECtHR with regard to Article 13 ECHR, which clearly requires an automatic suspensive effect. As mentioned above, ECRE believes that, if acceleration is to take place, it should take place at the appeal stage. However, such acceleration at the appeal stage must never deprive an applicant of access to an automatic suspensive appeal, as this is an inherent part of the right to an effective remedy as interpreted by the European Court of Human Rights.

The appeal procedure proposed in recast Article 41(6) does not necessarily cover an independent and rigorous scrutiny of a risk of *refoulement*. Essentially, in its examination of whether an appeal in those cases would have suspensive effect, the court or tribunal would begin examining the merits of the appeal, but would only later complete the examination and rule on the appeal itself. This process creates double scrutiny of the same material, burdening the already stretched judicial systems. 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 burdens. Therefore, ECRE recommends deleting, at a minimum, the reference to accelerated asylum procedures in recast Article 41(6).

ECRE recommends deleting the words “of a decision taken in the accelerated procedure pursuant to Article 27(6) and” in recast Article 41(6).

## Conclusion

ECRE and its member organisations have consistently advocated for asylum procedures that are efficient, manageable and capable of identifying those who qualify for international protection and those who do not. However, this should never be at the expense of fundamental rights of asylum seekers and correct decision-making. In order to be efficient and fair, asylum procedures need to ensure that all conditions are in place for asylum seekers to submit their cases in a

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<sup>212</sup> Recast Article 41(6).

<sup>213</sup> Recast Article 41(7).

comprehensive manner to qualified and well-trained decision makers with a real opportunity to appeal a possible negative outcome. ECRE welcomes the Commission's proposal as a significant step towards setting procedural standards at a high level that combine both fairness and efficiency. However, in this document, ECRE has also made several suggestions to further amend the recast Proposal where it considers it necessary to clarify certain standards or to bring them in line with existing obligations of the Member States under EU law and international human rights and refugee law and standards. ECRE calls on the Council, Commission and the European Parliament to take this opportunity to go beyond the rhetoric and work constructively towards the adoption of high standards of procedural protection.

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