



EUROPEAN COUNCIL  
ON REFUGEES AND EXILES  
CONSEIL EUROPEEN  
SUR LES REFUGIES  
ET LES EXILES

IN1/10/2006/EXT/JJ

## **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**

#### **1. Introduction**

The *fifth* piece of legislation flowing from the asylum agenda of the Amsterdam Treaty has now been adopted. The Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter ‘the Directive’) was published in the Official Journal of the European Union on 13 December 2005 and came into force on the twentieth day following this date<sup>1</sup>. The Directive applies to all EU Member States, except Denmark<sup>2</sup>. According to the Directive, the 24 Member States bound by it shall have or bring into force domestic legislation necessary to comply with the Directive by 1 December 2007, apart from legislation necessary for Article 15, which Member States shall have or bring into force by 1 December 2008. This legislation will be applied to applications for asylum lodged, and procedures for the withdrawal of refugee status after 1 December 2007<sup>3</sup>.

This paper outlines ECRE’s views on the adopted Council Directive, and provides detailed analysis of some of its key provisions.

#### **2. Background**

The European Commission presented its first proposal in September 2000<sup>4</sup> on which ECRE issued comments<sup>5</sup>. Following considerable debate on this draft, the European Council in Laeken, in December 2001, requested the Commission to bring forward an amended proposal.

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<sup>1</sup> Council Directive 2005/85/EC of 1 December 2001 Official Journal of the European Union L 326/13.

<sup>2</sup> Paragraph 34 of the Preamble states that “*In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application.*”

<sup>3</sup> See Article 44.

<sup>4</sup> *Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, Brussels, 20.9.2000, COM (2000) 578 final.

<sup>5</sup> See *Summary comments from ECRE on the proposal for minimum standards on procedures in Member States for granting and withdrawing refugee status* of 18 April 2001.

This was presented by the Commission in June 2002<sup>6</sup>. The negotiations of the Member States of the Council of the European Union with regard to the amended proposal proved to be particularly lengthy and difficult. Main areas of debate included the establishment of a common minimum list of safe countries of origin, provisions relating to safe third countries, detention, appeal procedures, the right to legal assistance and representation, and procedures in case of implicit withdrawal or abandonment of an asylum application. On 28 April 2004, following further protracted negotiations, the Council agreed on a general approach to the Proposal subject to agreement among Member States on a legally binding list of safe countries. However, unanimous agreement on this issue could not be reached, therefore the Council agreed upon an amended approach on 19 November 2004<sup>7</sup>. It was agreed that the adoption of the list would be postponed until after the adoption of the Proposal (by qualified majority voting in the Council and after consultation of the European Parliament).

Subsequently, on 27 September 2005 the European Parliament endorsed the amended proposal, subject to 102 amendments<sup>8</sup>, which addressed perceived flaws of the Directive. In particular, it called for the observance of existing international obligations; individual processing of applications; the possibility for applicants to refute the presumption that their country of residence or transit is safe; safeguards on detention and for the list on common safe countries of origin to be optional, and adopted by way of co-decision, with no possibility of separate national lists.

At the Justice and Home Affairs meeting on 1-2 December 2005, the Council of the European Union officially adopted the Directive without further debate<sup>9</sup>. Despite the concerns raised by the European Parliament, no account was taken of the amendments proposed. Subsequently, Parliament submitted a challenge to the Directive before the European Court of Justice<sup>10</sup>, calling for the severance of Articles 29(1) and (2) and 36(3) on safe countries of origin, or alternatively, the annulment of the Directive as a whole. The Parliament raised four pleas in law in support of its application. Firstly, it claims the Council has infringed Article 67(5) of the EC Treaty<sup>11</sup> by reserving for itself the adoption and amendment of the minimum common list on safe countries of origin, and the list of European safe countries, whereas the EC Treaty provides for co-decision on these issues. Secondly, in this regard the Council has exceeded its competence, as it has no power to enact, in secondary legislation, successive acts of secondary legislation, where these acts are not implementing measures. Thirdly, the Council has failed to

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<sup>6</sup> *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, Brussels, 18 June 2002, COM (2002) 326 final. For ECRE's comments on this proposal see: *Comments from the European Council on Refugees and Exiles on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* (2000/0238 (CNS)) CO1/03/2003/ext/AB, March 2003.

<sup>7</sup> *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 14203/04 ASILE 64, 9 November 2004.

<sup>8</sup> See *European Parliament legislative resolution on the amended proposal for a Council directive on minimum standards for procedures in Member States for granting and withdrawing refugee status*. P6\_TA(2005)0349. See also the LIBE Report on the proposed Directive, A6-0222/2005, 29.06.2005, Rapporteur, Wolfgang Kreissl-Dorfler.

<sup>9</sup> *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status* OJ L 326/13.

<sup>10</sup> *Case C-133/06 European Parliament v Council of the European Union*. Application OJ C 108, of 06.05.2006, p.12.

<sup>11</sup> *Consolidated Version of the Treaty Establishing the European Community*, OJ C 325, 24 December 2002.

state sufficient reasons in law for reserving the adoption of the minimum common lists for itself, a breach of an essential procedural requirement, and finally the Parliament argues that the Council failed to comply with the duty of loyal cooperation,<sup>12</sup> by disregarding the Parliament's role as co-legislator. This challenge is still pending before the Court.

### 3. Overview of the Directive

The purpose of the Directive is to establish minimum standards for procedures within EU member states for granting and withdrawing refugee status. The Directive only applies to persons who are third country nationals and stateless persons.

The preamble of the Directive sets out some of the principles underlying the instrument as a whole. Paragraph (2) refers to the Council's commitments made at Tampere in 1999, in which it *"agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention...thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution."* Paragraph (7) of the Preamble *emphasises the important fact that "it is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable standards"*, Paragraph (8) declares that *"This Directive respects the fundamental rights and observes the principles recognise in particular by the Charter of Fundamental Rights of the European Union"*, while Paragraph (9) provides that *"Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination"* and Paragraph 14 provides that *"specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability. In this context, the best interests of the child should be a primary consideration of Member States."*

Chapter I outlines some general provisions concerning the Directive. Article 2 sets out the definitions, while Article 3 lays out the scope of the Directive. Article 4 sets out the provisions on responsible authorities, whilst Article 5 importantly confirms that states may introduce more favourable standards.

Chapter II details basic principles and guarantees, including access to the procedure (Article 6), the right to remain in the Member State pending the examination (Article 7), requirements for the examination of applications (Article 8), requirements for a decision (Article 9), guarantees for applicants for asylum (Article 10), obligations of the applicants (Article 11), personal interview provisions (Articles 12-14), provisions on legal assistance and representation (Articles 15 and 16), guarantees for unaccompanied minors (Article 17), detention (Article 18), procedures in cases of explicit or implicit withdrawal of an application (Article 19 and 20), and the role of UNHCR (Article 21).

Chapter III sets out provisions on procedures at first instance, including on the examination procedure (Article 23), inadmissible applications (Article 25), the first country of asylum concept (Article 26), safe third countries (Article 27, 29 and 30), and safe countries of origin (Article 31), subsequent applications (32-34), border procedures (Article 35) and the exceptional application of the safe third country concept (Article 36).

Chapter IV covers procedures for the withdrawal of refugee status, including procedural rules for such cases under Article 38. Chapter V lays out provisions on appeals procedures, namely

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<sup>12</sup> Ibid, Article 10.

the right to an effective remedy under Article 39. Lastly, Chapter VI sets out general and final provisions, including the duty of the European Commission to report to the European Parliament and Council on the application of the Directive (Article 42).

The Directive also contains three Annexes. Annex I details the definition of ‘determining authority’ applicable to Ireland. Annex II concerns the designation of safe third countries of origin for the purposes of Article 29 and 30(1), whilst Annex III lays out the definition of ‘applicant’ or ‘applicant for asylum’ in Spain.

The adoption of this Directive is another step towards the development of a Common European Asylum System, as called for at Tampere in 1999, and the fifth and final provision of the first stage of this process, as laid out in the Amsterdam Treaty<sup>13</sup>, namely, the laying out of common standards and mechanisms in five key areas of asylum<sup>14</sup> within five years after the entry into force of the Treaty<sup>15</sup>.

ECRE acknowledges the importance of developing minimum standards on asylum procedures, which have the potential to be helpful in Member States with less developed asylum systems, particularly some of the new Member States. Nevertheless, ECRE believes that this Directive falls well short of the standards conducive to a full and fair examination of an asylum claim. In 2004, ECRE, along with nine other organisations, called for the Commission to withdraw the then Proposal due to serious concerns that its provisions failed to properly reflect existing minimum guaranteed fundamental human rights standards under international law.<sup>16</sup> ECRE is profoundly disappointed that the recommendations issued during the drafting process of this Directive, by UNHCR, NGOs and other civil organisations, as well as the opinion of the European Parliament, have not been taken into account.

Apart from the fundamental issue of standards that this Directive outlines, its language is at times incoherent and ambiguous. The Directive is unnecessarily overcomplicated, and its purpose as a harmonising instrument is severely undermined by the confusion surrounding admissibility tests and decision-making on the merits of an application, the scope for multiple and different procedures, and the large number of permissible derogations from the ‘minimum’ standards the Directive is supposed to set.

ECRE remains particularly concerned with the following provisions:

- The restriction on the right to remain in the state pending examination of the application to first instance decisions (Article 7), and the non-suspensive effect of appeals (Article 39);

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<sup>13</sup> Title IV, Article 63 of the EC Treaty.

<sup>14</sup> These five key areas were: criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States; minimum standards on the reception of asylum seekers in Member States; minimum standards with respect to the qualification of nationals of third countries as refugees; minimum standards on procedures in Member States for granting or withdrawing refugee status; and minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection. For an evaluation see *Broken Promises-Forgotten Principles: An ECRE evaluation of EU Minimum Standards for Refugee Protection-Tampere 1999-Brussels 2004*. AD4/06/2004/EXT/PC

<sup>15</sup> The Treaty came into force on 1st May 1999, and thus the relevant deadline was 1<sup>st</sup> May 2004.

<sup>16</sup> ECRE, ILGA Europe, Amnesty International, Pax Christi International, Quaker Council for European Affairs, Human Rights Watch, CARITAS-Europe, Médecins Sans Frontières, Churches’ Commission for Migrants, Save the Children in Europe *Call for withdrawal of the Asylum Procedures Directive* (22 March 2004).

- The restrictions on the right to an interpreter (Article 10(1)(b));
- The negative formulation of the right to communication with UNHCR, and the restriction of the scope of the right to communication to with UNHCR and its delegates, and not with other NGOs. (10(1)(c));
- The right to a personal interview is significantly restricted in certain circumstances. (Article 12);
- The provision of free legal assistance is limited to the appeals stage, and “any onward appeals or reviews provided for under national law” are also excluded. (Article 15);
- The inadequate safeguards for the use of detention (Article 18);
- The significant scope for accelerated procedures for asylum applications (Article 23(4)), and the designation of these applications as ‘manifestly unfounded’ even in circumstances not directly related to the substances of merits of the claim (28(2)), combined with an absence of adequate safeguards;
- The discretion afforded to States to establish procedures derogating from the basic principles and guarantees of Chapter II (Article 24);
- The inclusion of a ‘safe third country concept’, which is subject to wholly inadequate safeguards (Article 27) and which also falls under the scope of inadmissible applications (Article 25(2)(c));
- The provisions on ‘safe countries of origin’, which are inconsistent with the proper focus of international refugee law on individual circumstances and which may also constitute a violation of EC law by the Council by obliging States to adopt the minimum list and not complying with the requirement for co-decision. (Articles 29-31);
- The sanction of border procedures that derogate from the principles and guarantees of Chapter II, (35(2)) and which permit confinement at the border without the possibility of judicial review for up to four weeks (35(4));
- The application of the European safe third countries concept, which allows Member States to deny access to the procedure altogether for any applicant who arrives ‘illegally’ from designated countries, creating a clear risk of *refoulement* (Article 36).

ECRE is gravely concerned that these and other provisions do not properly reflect or ensure respect for Member States’ obligations under international refugee and human rights law. Although the Directive only provides for minimum standards, a number of these provisions, if interpreted without reference to such obligations, would either require or entail fundamental rights violations. ECRE emphasises that in the event that the Directive implies lower standards than those guaranteed by other international refugee and human rights obligations, states are obliged to implement the higher standards guaranteed by those other obligations. Indeed, the ECJ, in its recent ruling with regard to the Family Reunification Directive<sup>17</sup>, confirmed that “*the requirements flowing from the general principles recognised in the Community legal order, which include fundamental rights, are also binding on Member States when they implement Community rules, and that consequently, they are bound, as far as possible to apply the rules in accordance with those requirements*”<sup>18</sup>. The requirement that Member States adhere to their obligations under international human rights and refugee law is acknowledged by Paragraph 9 of the Preamble<sup>19</sup>, and it is crucial that this principle is

<sup>17</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

<sup>18</sup> Case C-540/03 *European Parliament v Council*, Para.105.

<sup>19</sup> “*With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination*”.

respected by Member States when implementing the Directive. ECRE further reminds Member States that these are minimum standards and urges them to maintain any higher standards they have, as envisaged by Article 5 of the Directive.

#### **4. Analysis of the key articles of the Directive**

##### ***Chapter I – General Provisions***

##### **Article 2 Definitions**

ECRE is disappointed at the failure to expressly include decisions on subsidiary protection<sup>20</sup> within the definition of a final decision in Article 2(d). To so do would have helped avoid the risk of deporting individuals whose applications for refugee status have been rejected before their need for subsidiary protection has been examined and would have been in accordance with Member States' obligations under Articles 3 and 13 of the European Convention on Human Rights<sup>21</sup>. Article 2(f) is also a cause for concern as it restricts the refugee definition to third country nationals and stateless persons, thus excluding EU citizens from the definition. This is not consistent with Member States' obligations under Article 1A of the 1951 Geneva Convention<sup>22</sup>. Not only is this restriction discriminatory and therefore in breach of Article 3 of the 1951 Geneva Convention, but the potential repercussions may be greater as the EU enlarges. Given the export value of EU asylum policies, it also sets a very bad precedent for other regions of the world.

##### **Article 3 Scope**

Articles 3(3) and 3(4) only require those Member States who already apply a single procedure<sup>23</sup> to apply the provisions of the Directive to claims for international protection other than that which is granted under the Geneva Convention. This represents a missed opportunity to more quickly develop an EU wide single procedure, which would not only be more efficient by avoiding multiplicity of procedures; but, if it contained appropriate guarantees, would also help ensure that Member States respect their obligations under international law.

##### **Article 4 Responsible authorities**

ECRE welcomes Article 4(1), which provides that Member States must designate a determining authority responsible for 'an appropriate examination of the applications in accordance with [the] Directive', and with it the requirements for examining applications and decision-making detailed in Articles 8(2) and 9. However, the derogations permitted by this article severely negate its positive effect. Article 8(2) requires Member States to designate a

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<sup>20</sup> Subsidiary forms of protection here refers to the definition as covered in Article 15 of the EU *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, OJ L 304/12, 30.9.2004, other forms of complementary protection granted to individuals whose return would be in breach of states obligations under international law, and wider forms of discretionary leave granted to individuals who cannot return because of their particular circumstances.

<sup>21</sup> See for example *Jabari v Turkey* Application No. 40035/98 Judgement of 11 July 2000.

<sup>22</sup> See ECRE *Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* IN1/10/2004/ext/CN.

<sup>23</sup> A single procedure is one where a state applies the same procedure, with the same minimum guarantees, to determine whether applicants qualify for protection under the 1951 Geneva Convention or for subsidiary or complementary protection on international human rights grounds. ECRE has consistently advocated that it is both in the interests of Member States and asylum applicants to apply a single procedure. See: *The Way Forward- Europe's role in the global refugee protection system – Towards Fair and Efficient Asylum Systems in Europe*, ECRE, Sept 2005.

determining authority covered by basic procedural guarantees, including access to ‘precise and up to date information from various sources’ as to the situation in the country of origin, and the requirement of knowledge of the relevant standards applicable in the field of asylum and refugee law. However, Article 4(2) allows Member States to have a range of other bodies with administrative responsibilities including for: transfers under Dublin II<sup>24</sup>; transfers to third countries; decisions in light of national security provisions and refusing permission to enter in the context of Article 35(2) and (5). These personnel are only required to have the vague ‘appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this Directive’<sup>25</sup>.

ECRE is concerned 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 principle of *non-refoulement*<sup>26</sup>, and non-compliance with the requirements in other asylum provisions, especially in the Qualification Directive. ECRE reminds Member States that under the Qualification Directive they have the duty to assess, in cooperation with the applicant, all relevant elements of the application (article 4(1)), and take into account all relevant country of origin information, statements and documentation presented by the applicant, and the individual position and circumstances of the applicant (Article 4(3)), as well as whether the applicant has already been subject to persecution or serious harm (Article 4(4)). In ECRE’s view this can only be done by personnel who are properly trained on asylum matters, and who have expertise in dealing with traumatised people. The ‘appropriate knowledge’ or ‘necessary training’ should therefore be interpreted and applied in a way that ensures compliance with international law and the Qualification Directive.

ECRE further reminds Member States that under Article 39 of the Procedures Directive they have the obligation to give the applicant an effective remedy against a decision taken on their application; such remedies must be capable of repairing flaws in the assessment of the relevant elements and decisions on asylum applications. It is obvious that flaws in earlier stages of an asylum procedure, which are the likely result of untrained and unspecialised staff, will lead to longer and less efficient procedures. The ECJ has recently recalled with regard to the Family Reunification Directive<sup>27</sup>, that Member States have an obligation to interpret standards in secondary legislation so that their practice is in compliance with general principles of community law, which include fundamental rights<sup>28</sup>. In ECRE’s view, this means that staff dealing with asylum cases should have sufficient and appropriate expertise.

In addition, the provision would have benefited from an explicit guarantee that border guards should have no role in processing applications, but rather should only have the responsibility

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<sup>24</sup> Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Official Journal of the European Union, 25 February 2003, L50/1(‘Dublin II’).

<sup>25</sup> Article 4(3).

<sup>26</sup> This is also the view of UNHCR and the European Parliament. See *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>27</sup> *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.*

<sup>28</sup> Case C-540/03 *European Parliament v Council*, para. 35.

of registering applications made at the border and referring them on to the relevant determining authority<sup>29</sup>.

### **Article 5 More favourable conditions**

Article 5 allows Member States to introduce or maintain more favourable standards. ECRE welcomes this provision and encourages Member States with higher standards to maintain or improve rather than lower them, and those introducing legislation to provide for higher standards.

However, it is noted that these more favourable standards may only be introduced or maintained, “*insofar as those standards are compatible with this Directive*”. In ECRE’s view this provision should never mean that states could not apply more favourable standards, especially when international law and general principles of Community law prescribe more favourable treatment<sup>30</sup>. This may appear to conflict with the Directive’s provisions that are mandatory and exhaustive, for example the common lists of safe countries of origin (Article 29), and European safe third countries (Article 36). Indeed these Articles are the subject of European Parliament’s challenge of this Directive, and will be considered by the ECJ<sup>31</sup>. These provisions could be interpreted to prohibit Member States from introducing or maintaining more favourable standards in these areas. However, ECRE is of the view that such mandatory and exhaustive provisions are not by their nature minimum standards. Their enactment therefore exceeds the competence of the EC as it is incompatible with Article 63 under Title IV EC<sup>32</sup>.

## ***Chapter II Basic principles and guarantees***

### **Article 6 Access to the procedure**

ECRE welcomes the principle set forth in Article 6, as clearly, in order to have an effective right to seek asylum, applicants must have access to an asylum procedure in the country of asylum. There are, however, areas of concern with this Article. Paragraph 1 specifies that Member States may require that applications for asylum be made in person and/or in a designated place. This provision should be interpreted to ensure access to an asylum procedure for potential claimants. To take the example of a detained claimant, it will be necessary to either allow for applications to be made by a legal representative on an applicant’s behalf in certain circumstances or, if states demand applications in person, to designate prisons and detention centres as places where an application for asylum can be made. Otherwise the provision could hinder access to a procedure.

ECRE welcomes Paragraph 2, which provides that all adults with legal capacity have the right to make an asylum application. However, this is undermined by the qualification in Paragraph 3 allowing ‘dependent adults’ to have applications submitted ‘on their behalf’. It is

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<sup>29</sup> See ECRE *Guidelines on Fair and Efficient Procedures for Determining Refugee Status* – September 1999, Para. 25 and *The Way Forward- Europe’s role in the global refugee protection system – Towards Fair and Efficient Asylum Systems in Europe*, ECRE, Sept 2005 pp39-41, Recommendation 34, for ECRE’s position on the role of border guards.

<sup>30</sup> See also Case C-540/03 *European Parliament v Council*, Para.105 and related commentary on p 5 above.

<sup>31</sup> See Case C-133/06. *European Parliament v Council* of the European Union. Application OJ C 108, of 06.05.2006, p.12.

<sup>32</sup> Specifically Article 63(d) EC which provides that the Council shall adopt minimum standards in this area. See also Immigration Law Practitioners’ Association (ILPA) *Analysis and Critique of Council Directive on Minimum Standards on procedures in Member States for granting and withdrawing refugee status* (July 2004) for further comment on this subject.

acknowledged that the provision is intended to enable Member States to deal with all protection claims of one family together; nevertheless there is a risk that dependent adults may be prevented from substantiating their claim, particularly as Article 12(1) does not require Member States to interview dependent adults. All dependent adults should be entitled, if they so wish, to an interview, which should take place without the presence of family members. In order to ensure access to the procedure they should be informed in private of their right to make an individual application for asylum at any stage<sup>33</sup>.

Paragraph 4, which allows Member States to determine when a minor can make an application on his or her behalf, is similarly of concern. Member States must ensure that their domestic law provides that all children are entitled to seek asylum in their own right and are entitled to an individual determination of their application. Domestic law should also provide that Member States act in the best interests of the child, otherwise the broad discretion given to Member States by this provision risks permitting violations of their international refugee and human rights law obligations. Article 6(4)(d) provides that Member States may determine in national legislation, cases where the lodging of an asylum application should also constitute the lodging of an application on behalf of an unmarried minor. Thus is also regrettable in that it apparently permits the exclusion of married minors from this procedural protection. The marital status of a minor has no bearing on his or her maturity and consequent need for special treatment<sup>34</sup>.

#### **Article 7 Right to remain in the Member State pending the examination of an application**

ECRE is disappointed with the formulation of Article 7, which merely provides that the right to remain in the territory of the Member State only lasts until the first instance decision has been taken. The already narrow scope of the right to remain is further restricted by Paragraph 2, which allows Member States to make an exception in cases of subsequent applications, which are not subject to further examination in accordance with Article 32 and 34. This is of concern given that the preliminary examination to consider whether there should be further examination of a subsequent application is part of an accelerated procedure<sup>35</sup>, presenting a risk of *refoulement*.

Further, as Article 6(2) also allows derogation from the right to remain where the applicant is subject to extradition to another Member State or a third country, or international criminal courts or tribunals, ECRE is concerned that there are no express safeguards to ensure that the relevant prosecution or extradition procedures are in line with international refugee or human rights law<sup>36</sup>.

A right of appeal becomes meaningless if the asylum seeker has already been sent to the country where they face persecution, torture, or inhuman or degrading treatment. Applicants for asylum should have an absolute right to remain in the territory of the asylum state until a final decision on their application has been made; anything less than such a right represents a

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<sup>33</sup> See ECRE *Guidelines on Fair and Efficient Procedures for Determining Refugee Status* – September 1999, page 14 Recommendation 23.

<sup>34</sup> This is also the view of the European Parliament. See *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 43

<sup>35</sup> Article 23(4)(h).

<sup>36</sup> See 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 November 2004).

risk of *refoulement* contrary to the 1951 Geneva Convention, and/or to torture or inhuman or degrading treatment contrary to Article 3 ECHR. In most EU Member States there is a high rate of success for appeals against refusals of asylum applications<sup>37</sup>. ECRE reminds Member States that although under Article 39(3)(a) there is no specific provision that appeal procedures will automatically have suspensive effect, the right to an effective remedy as provided in Article 39(a) combined with the right interpreted in ECHR case law implies that Article 39(3)(a) may not be applied in a way which would limit the right to a remedy without suspensive effect, where there is an arguable claim under a substantive article of the Convention<sup>38</sup>.

### **Article 8 Requirements for the examination of applications**

ECRE welcomes that Paragraph 1 prevents Member States from rejecting or excluding applications on the sole ground that they have not been submitted as soon as possible. Member States should interpret this to mean that mandatory time limits for submitting applications are not appropriate, and indeed, the European Court of Human Rights has held that strict application of short time limits risks violation of Article 3 ECHR<sup>39</sup>. It is of concern however that delay in applying may be considered as one of the grounds for rejection or exclusion, and for the failure to apply earlier ‘without reasonable cause’ to be a ground upon which Member States can apply an accelerated procedure and treat applications as manifestly unfounded<sup>40</sup>. ECRE reiterates that there can be numerous valid reasons for a delay in applying, such as trauma, lack of access to information and the need to consult UNHCR, NGOs or legal advisors. Indeed the UN Committee Against Torture have indicated in its case law that it is not uncommon for torture survivors in particular to delay giving information<sup>41</sup>. As such, the lateness of an application, even without ‘reasonable cause’ does not necessarily have any bearing on the merits of the claim, and certainly should not be given undue or decisive weight.

In general, ECRE welcomes the requirements for the examination of asylum applications as set out in Article 8(2), particularly, that applications be examined and decisions taken individually, objectively and impartially; a necessary pre-requisite for any fair asylum system. Nevertheless, the positive attributes of this Article are somewhat limited by the restrictive scope of its application, given that it does not apply to authorities given responsibilities under Article 4(2)<sup>42</sup>.

Paragraph 2 (b) provides for the availability of country of origin information from various sources, such as UNHCR, and as such is welcomed, especially because this material is likely to be subject to public scrutiny. In this respect, ECRE emphasises the importance that *all*

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<sup>37</sup> As UNHCR has argued “*as the text stands, ‘the vast majority’ of rejected asylum seekers who lodge an appeal will not be permitted to remain in the EU until their appeals are decided – despite the fact that in several European countries 30-60 percent of initial negative decisions are subsequently overturned on appeal.*” UNHCR Press Release: *Lubbers calls for EU asylum laws not to contravene international law* (29 March 2004).

<sup>38</sup> See *Conka v Belgium*, Judgement of 5 February 2002, stating as regards the deportation of asylum seekers: “*it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention*”.

<sup>39</sup> *Jabari v Turkey*, Application No. 40035/98 (11 July 2000), para. 40.

<sup>40</sup> See Article 23(3)(i and j) and Article 28(2).

<sup>41</sup> See Communication No. 15/1994 *Tahir Houssain v Canada* (18 November 1994) para 12.3).

<sup>42</sup> See analysis on Article 4 above.

country of origin information relied upon by determining bodies is fully transparent<sup>43</sup>. It should also be made available to applicants, and their legal advisors<sup>44</sup>.

Paragraph 2(c) requires that examining and determining authorities have knowledge of relevant standards in the field of asylum and refugee law. ECRE reiterates the fundamental need for appropriate regular training, covering areas such as interviewing technique or working with interpreters and with vulnerable applicants<sup>45</sup>. Furthermore it is noted that under Paragraph 3 the requirement of the availability of country of origin information is limited to the *general* situation prevailing in countries of origin and transit, when it should include *specific* information relevant to the application, where it is available.

Finally, the potential positive effect of the provision contained in Paragraph 3, which provides that appeals authorities are given access to the information referred to in Paragraph 2(b) is limited by the fact that the appeals authorities are not also subject to the other requirements contained in Articles 2(a) and (b)<sup>46</sup>.

### **Article 9 Requirements for a decision by the determining authority**

ECRE generally welcomes the requirements in this Article ensuring that applicants for asylum are informed about the decision on their application, and on how to challenge a negative decision. However the Article is disappointing as it fails to specify that applicants must be informed in a language they understand<sup>47</sup>. This risks impeding the effectiveness of the remedy of an appeal as, if the applicant is not guaranteed an explanation of the reasons why their claim has been refused in a language they understand, they will have difficulty in correcting any factual errors or misunderstandings in an appeal. Furthermore Paragraph 2 allows States to derogate from the obligation to inform applicants on how to challenge a negative decision where the applicant has been provided with this information at an earlier stage. This may also limit access to an effective appeal.

### **Article 10 Guarantees for applicants for asylum**

ECRE welcomes a specific article on guarantees for applicants; such an article should apply to the whole procedure. However, Paragraph 1 limits the guarantees to first instance decisions. There are no reasonable grounds to differentiate between first and second instance decisions, and indeed, Article 2(c) of the Directive defines an applicant for asylum as a person who ‘*has made an application for asylum in respect of which a final decision has not yet been taken*’

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<sup>43</sup> See *The Way Forward- Europe’s role in the global refugee protection system – Towards Fair and Efficient Asylum Systems in Europe*, ECRE, Sept 2005, pp22-24.

<sup>44</sup> This view is also taken by UNHCR. See 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).

<sup>45</sup> For further information on ECRE’s proposals for training of personnel, specifically in the form of practical cooperation between Member States see *The Way Forward- Europe’s role in the global refugee protection system – Towards Fair and Efficient Asylum Systems in Europe*, ECRE, Sept 2005, pp19-22; See also UNHCR *Observations on the Communication from the Commission to the Council and the European Parliament on Strengthened Practical Cooperation – New Structures, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System* [COM(2006) 67 final, 17 February 2006], p.6.

<sup>46</sup> A view also expressed by ILPA, see ILPA, *Analysis and Critique of Council Directive on Minimum Standards on procedures in Member States for granting and withdrawing refugee status* (July 2004).

<sup>47</sup> This view is supported by the European Parliament, see *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 53.

The right to be informed, a basic requirement for any fair asylum procedure, is unjustifiably restricted under Article 10(1)(a) in that it provides that applicants will be informed only in a “*language they may be reasonably supposed to understand*”. Instead, information should be given in a language applicants are known for sure to understand<sup>48</sup>. Similarly, the right to an interpreter (Article 10(1)(b)) is also restricted to whenever this is ‘necessary’, an undefined term save for the provision that an interpreter is deemed necessary where there will be an interview, and ‘*appropriate communication cannot be ensured without such services.*’ ECRE believes that an interpreter is always ‘necessary’ and thus should be available to all applicants who do not speak fluently a language understood by the interviewing officer and legal representative. They should be available at all stages of the procedure, including initial screening interviews with border officials. Furthermore, given that poor quality interpretation can lead to misrepresentation of factual evidence or incorrect decision-making, it is important that interpreters are professionally qualified, trained and impartial. Otherwise the fair and efficient examination of asylum applications will be jeopardised.

Given that the right to the services of a competent interpreter is an essential procedural requirement, it is inappropriate to limit the use of public funds for interpreters to cases where the determining authority called upon their services. In view of the interest of examining Member States in obtaining relevant information and of mutual understanding between applicants and authorities, interpreting services should always be paid for out of public funds where the applicant lacks the financial means.

The negative formulation of Article 10(1)(c), precluding Member States from denying applicants the opportunity to communicate with UNHCR (or organisations working on its behalf) is also disappointing. A positive obligation, requiring Member States to provide this opportunity, would have been preferable, particularly in light of UNHCR’s privileged supervisory role under Article 35 of the 1951 Geneva Convention. Furthermore it is regrettable that this provision is restricted to UNHCR and does not include the right to access under other refugee assisting NGOs; this risks undermining the fundamental right of asylum seekers to seek independent advice on their claims.

### **Article 11 Obligations of the applicants for asylum**

Article 11 allows Member States to impose obligations on asylum applicants to cooperate with authorities. In general ECRE does not oppose the mere presence of these requirements; however the consequences of failing to comply are unclear, and therefore potentially could leave a wide margin of discretion to states. Consequently it is noted that these obligations may only be imposed ‘insofar as [they] are necessary for the processing of an application’. ECRE therefore urges Member States to implement this Article in such a manner as to not place over-burdensome or arbitrary obligations on applicants, (a possibility with the reporting requirements under Article 11(2)(a) for example), or to prevent a fair examination of an applicant’s claim in the event of non-compliance. Member States should also ensure that this Article is implemented in accordance with international human rights standards, in particular, searches of applicants under Article 11(2)(d) should fully comply with Article 8 ECHR, and should be gender, age, and culturally sensitive.

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<sup>48</sup> This view is supported by the European Parliament, see *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 56.

## Article 12 Personal interview

ECRE notes that 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 and individual, thorough examination of all the relevant facts in cases where there is a risk of *refoulement*.<sup>49</sup> Indeed this principle was even explicitly reflected in the 1995 Council Resolution on Minimum Guarantees for Asylum Procedures, which provided that “*before a final decision is taken on the asylum application, the asylum seeker must be given an opportunity of a personal interview with an official qualified under national law*”<sup>50</sup>. ECRE is therefore particularly concerned that Article 12 adds several new exceptions to this requirement, which could gravely undermine the reliability and fairness of asylum determinations.

Article 12(2) sets out a list of sweeping exceptions to the entitlement to an interview. These include where: -

- The competent authority has already had a ‘meeting’ with the applicant under the Qualification Directive (Article 12(2)(b)). ECRE considers that the term ‘meeting’ is inadequately and imprecisely defined, and thus creates the potential for applicants to be denied the opportunity to fully and fairly present their claims.
- It is not ‘reasonably practicable’ to hold an interview (Article 12(3)). A specific example of where an interview is deemed not to be ‘reasonable practicable’ is where the authority is of the opinion that the “*applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his / her control.*” The only limited safeguard is that “*when in doubt, Member States may require a medical or psychological certificate*” (Article 10(3)). Although ECRE considers that an interview should not be held when the applicant has a mental or emotional disturbance preventing the normal examination of his/her case, there must be an explicit requirement that the interviewer seeks medical advice and/or a medical report, to include an assessment of whether the condition is temporary or permanent.
- The competent authority considers the application unfounded where the circumstances in Article 23(4) (a), (c), (g), (h) and (j) apply (Article 12(2)(c)). The grounds mentioned are respectively where the applicant raises little relevant evidence (23(4)(a)); safe country of origin/safe third country cases (23(4)(c)); the claim is ‘clearly unconvincing’ due to the applicant’s “*inconsistent, contradictory, unlikely or insufficient representations*” (23(4)(g)); the applicant has made a subsequent application raising no new issues (23(4)(h)); the application is made “*to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/ her removal*” (23(4)(j)).

ECRE considers that this section potentially renders the guarantee to an interview meaningless. In this context it should be reiterated that the Directive does not guarantee that an asylum seeker would typically receive any independent advice, legal or otherwise, when filling out the initial application, which generally takes the form of a long and complicated

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<sup>49</sup> For example see *Chitat Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994). *Mutombo v. Switzerland*, Report of 27 April 1994, (CAT/C/12/D/13/1993); *T.I v UK* Application No. 43844/98, Decision as to Admissibility, 7 March 2000.

<sup>50</sup> *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, [1996] OJ C274/3, para 14.

questionnaire. The interview is necessary in order to allow the applicant to provide all relevant information and to clarify any discrepancies, inconsistencies or omissions in his/her account. Instead, the Directive appears to provide that such applications can be regarded as ‘clearly unconvincing’ and thus no interview need be provided. This would signal the end of reliable asylum determinations, and ECRE therefore reminds Member States of their obligations under international law, and particularly those expressly codified under Article 4 of the Qualification Directive.<sup>51</sup> It is equally difficult to see how, in the absence of an interview, Member States would be able to fulfil their obligations under international law in relation to the examination required in the application of either the safe third country or safe country of origin concepts. ECRE emphasises that when transposing the Directive States will therefore need to carefully ensure that provisions adequately guard against violation of the principle of *refoulement*, and that individuals are not placed at risk of being returned to face persecution, torture or death.

Paragraph 4 provides that if the right to an interview is refused, the authority may nonetheless decide on the application. Given the potentially serious consequences of erroneous determinations (particularly given the lack of clarity regarding the right to a guaranteed suspensive appeal), ECRE considers that only a decision to recognise a refugee should be able to be taken without a full and personal interview.

#### **Article 13 Requirements for a personal interview**

Notwithstanding the restrictions of Article 12, ECRE welcomes the guarantees contained in Article 13, in particular that under Paragraph 3(a), when appointing the interviewer and interpreter, attention should be given to the specific personal or general circumstances of the individual interviewees, including particular cultural origin and vulnerability. ECRE urges Member States to also include ‘gender’ and ‘age’ as relevant personal or specific circumstances, as this would imply, for instance, choosing female interpreters for female applicants, if necessary, and interpreters trained to work with children.

Paragraph 3(b) obliges Member States to select an interpreter who is able to ensure “appropriate communication” between the applicant and the person who conducts the interview. This vague wording is in danger of being interpreted unduly widely. To avoid any lowering of standards, ECRE repeats its recommendation that interpreters should be professionally qualified, trained and impartial<sup>52</sup>.

Article 13(2)(b) further qualifies the right to an interpreter by providing that an interview need not take place in the applicant’s preferred language, where there is ‘*another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate in.*’ This qualification fails to recognise the difficult and possible traumatic nature of the interview for the applicant, and the paramount importance of facilitating effective and open communication.

#### **Article 14 Status of the report of a personal interview in the procedure**

Member States are required to produce a written report of every personal interview “*containing at least the essential information regarding the application*”; however ECRE urges Member States to create an obligation in national law to produce a transcript, as was

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<sup>51</sup> See commentary under Article 8 above.

<sup>52</sup> ECRE *Guidelines on Fair and Efficient Procedures for Determining Refugee Status* – September 1999, Para. 81.

envisaged earlier on in the drafting process<sup>53</sup>. Fact-finding is a crucial element in the consideration of an asylum application, and the personal interview provides the primary opportunity to establish facts. A requirement for a full transcript of the interview is therefore essential for a fair and efficient asylum procedure.

Under Article 14(3), Member States “may request” the applicant’s approval of the content of the report and are not required to do so, as ECRE previously recommended<sup>54</sup>. It is important that applicants have this opportunity to comment, in order to avoid any misunderstandings or misinterpretation of the applicant’s account.

### **Article 15 Right to legal assistance and representation**

ECRE regrets the Directive’s inadequate provisions on legal assistance for first instance procedures. Article 15(1) contains merely a basic entitlement to consult a lawyer at the applicant’s own cost, while Article 15(2) only requires Member States to provide “*free legal assistance and/or representation*” for appeals (many of which may have no suspensive effect)<sup>55</sup>. This approach is counterproductive; many errors made at first instance arise where claimants misunderstand procedures and processes. Such errors are often difficult to correct at the appeal stage. Accordingly, states would be better advised to operate a policy of ‘frontloading’ by providing legal advice/representation at the initial stage in order to ensure fair and reliable determinations, avoiding lengthy appeals<sup>56</sup>.

The right to free legal assistance/representation under Article 15(2) is also heavily qualified. Paragraph 2(a) allows Member States to provide assistance only for procedures before a Court or tribunal under Chapter V and ‘*not to any onward appeals of reviews provided for under national law*’. It is of concern that this could exclude legal aid for judicial review of administrative decisions. Paragraph 3(d) permits Member States to restrict the provision of assistance to where the appeal or review is likely to succeed. Although this latter ground is qualified so that assistance/representation is not ‘arbitrarily restricted,’ this provision could be applied unduly restrictively and without being subject to proper scrutiny or review. Further restrictions are permitted under Articles 15(5), which allows monetary and temporal restrictions. ECRE considers that greater clarity is required as to where and how such restrictions are applied in order to ensure that an applicant is able to properly present his/her claim.

By limiting free legal assistance to the appeals stage, Article 15 renders the right to legal assistance meaningless in cases where accelerated procedures are used and suspensive effect of appeals denied. The right to legal assistance and representation is an essential safeguard in the asylum process.<sup>57</sup> Legal aid is also an aspect of EU fundamental rights law, as is evident

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<sup>53</sup> *Amended proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status* 18.6.2002 COM(2002) 326 Final.

<sup>54</sup> *Comments from the European Council on Refugees and Exiles on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* (2000/0238 (CNS)) CO1/03/2003/ext/AB, March 2003, p.9.

<sup>55</sup> Although see comments above on Article 7, and below on Article 39.

<sup>56</sup> *The Way Forward- Europe’s role in the global refugee protection system – Towards Fair and Efficient Asylum Systems in Europe*, ECRE, Sept 2005, pp38-39.

<sup>57</sup> For further discussion on this see Immigration Law Practitioners’ Association (ILPA) *Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* (June 2004) p 40.

in the formulation of Article 47 of the Charter of Fundamental Rights<sup>58</sup>. In practice, refugee law has become so extremely complex that often it may not be possible for applicants to make their case without legal assistance.<sup>59</sup> ECRE therefore strongly recommends that applicants have the right to legal assistance at all stages of the procedure, and that representation should be free to those who lack the resources.

### **Article 16 Scope of legal assistance and representation**

Article 16(1) is unsatisfactory due to its significant limitations on the information accessible by the applicant's legal representative. Firstly, the content of the information available is limited to information deemed "*relevant to the examination of the application*". It is fundamental to the fair examination of an asylum application for the legal representative (and indeed the applicant) to have *full* access to the information upon which a decision is made<sup>60</sup>. This is in the interests of transparency, and in order to ensure that decisions are based on assessment of facts that are up to date, accurate and relevant to the application.

Even more worrisome is that legal representatives may be denied access to any information in the applicant's file where this is deemed a risk to national security, security of organisations providing the information or of the persons to whom the information relates, and even where the investigative interests relating to the examination of applications of asylum by Member State authorities, or the 'international relations' of Member States would be compromised. In ECRE's view, information should only be withheld in clearly defined situations. These sweeping exceptions afford an unacceptable level of discretion to states to restrict the information available to legal representatives, and thus their ability to effectively represent applicants. This leaves asylum seekers and decision-makers in unequal positions, and has the potential to jeopardise the fair and efficient examination of applications for asylum. ECRE therefore urges Member States to legislate clearly on this matter, and in a manner that limits the possibility for information to be withheld as far as possible.

### **Article 17 Guarantees for unaccompanied minors**

ECRE welcomes that a specific article is devoted to the guarantees to be provided to the particularly vulnerable group of unaccompanied minors, and in particular that the best interests of the child shall be a primary consideration for Member States when implementing this Article<sup>61</sup>. Unfortunately the scope of these guarantees in some respects fall below acceptable standards, particularly those set by the UN Convention on the Rights of the Child.

ECRE welcomes the fact that unaccompanied minors are granted a representative, who in ECRE's understanding is a guardian who advises and protects them. The Article is silent as to the qualifications of such representatives. Member States should ensure that representatives are carefully selected, trained and supported in their work. As far as possible, they should be able to take into account the child's ethnic, cultural, religious and linguistic background. They should have expertise in child welfare, refugee law and an understanding of the situation in the child's country of origin. In addition to receiving training, they should be given

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<sup>58</sup> Article 47 EUCFR provides that "*Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.*"

<sup>59</sup> This is illustrated by cases like *Shah and Islam* in the UK House of Lords, which could not possibly have been argued by claimants themselves- see *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* (Conjoined Appeals), 25 March 1999.

<sup>60</sup> See ECRE *Guidelines on Fair and Efficient Procedures for Determining Refugee Status* – September 1999, Paragraph 154.

<sup>61</sup> Article 17(6).

continuing professional support and undergo police checks<sup>62</sup>. Their primary role should be to ensure that decisions on status determination are conducted in the child's best interests.

The qualifications in Paragraph 2 to the obligation to appoint a representative are unacceptable. States are reminded that they must be interpreted under their existing obligations under the UN Convention on the Rights of the Child and other relevant human rights instruments<sup>63</sup>. Article 17(2)(a) allows states to make such an exception when the child is likely to reach the age of maturity before a first instance decision is taken and Article 17(3) allows for exceptions when the child is 16 years or older. Article 17(2)(a) only serves to encourage unnecessary delays, which will extend the case until the age of maturity has been reached. It also goes against ECRE's position that 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 individual<sup>64</sup>. Both Articles contravene the UN Convention on the Rights of the Child, which defines a child as any person under the age of 18. Article 17(2)(c) also allows for exceptions if the minor is married or has been married. ECRE reiterates its view that whether a child is or has been married has no bearing on his or her maturity, and as such, need for special treatment<sup>65</sup>. This is particularly the case given that children are able to marry at a young age in some countries. There is also a possibility that the marriage may be linked to the child's fear of persecution, in the case of a forced marriage for example.

ECRE strongly welcomes Article 17(4), which requires interviews and decisions to be taken by someone with specialist knowledge/competence in dealing with children. In this regard states must ensure that relevant decision-makers and interviewers are provided with the requisite training in order to comply with this requirement<sup>66</sup>.

Some aspects of Paragraph 5, which provide for the possibility of medical assessment to determine age, are also of concern. Paragraph 5(a) stipulates that Member States must inform unaccompanied minors of the possibility of medical assessment; however they are only required to do so in a language the applicant may be "*reasonably supposed to understand*". In order to prevent misunderstanding, the child should be informed in a language he is known for sure to understand, this is especially important due to the particular vulnerability of unaccompanied children, and the possible upset that a medical examination may cause to already traumatised individuals. This provision also leaves too much scope to Member States to determine the nature of the assessment and the consequences if a child refuses to undergo the examination. ECRE repeats its position that in determining age, young asylum seekers should be given the benefit of the doubt. Age assessments should be carried out by an independent medical paediatrician and take into account the child's physical appearance and psychological maturity as well as cultural and ethnical variation in these factors. It should always be borne in mind that such assessments are subject to a wide margin of error<sup>67</sup>.

Finally, Article 17(5)(c) allows a child's refusal to undergo a medical examination as a factor in a decision to reject an application. This is deplorable given that there could be countless

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<sup>62</sup> See *Separated Children in Work Programme*, Third Edition, 2004, p.16.

<sup>63</sup> See for in particular International Covenant on Civil and Political Rights, Article 24 and International Covenant on Economic, Social and Cultural Rights, Article 10(3).

<sup>64</sup> See ECRE *Position on Refugee Children*, November 1996, Paragraph 30.

<sup>65</sup> See analysis of Article 6, above.

<sup>66</sup> See *The Way Forward- Europe's role in the global refugee protection system – Towards Fair and Efficient Asylum Systems in Europe*, ECRE, Sept 2005, p.19.

<sup>67</sup> See ECRE *Position on Refugee Children*, November 1996, Paragraph 30.

reasons for a child's refusal to be examined, and therefore such a refusal may have no bearing on the merits of an asylum claim.

### **Article 18 Detention**

ECRE considers that Article 18 does not adequately prescribe standards that would properly limit Member States in their use of detention of asylum seekers, and ensure that they comply with their existing obligations under international law, particularly with regard to Article 5 ECHR. The only safeguards prescribed in Article 18 are that persons are not detained solely for seeking asylum, and that detention is subject to "speedy judicial review". The provision provides no definition of detention, the permitted reasons for it, or any guidelines as to time limits. ECRE reiterates its view, that, as a general rule, asylum seekers should not be detained<sup>68</sup>. Member States should therefore set out clear criteria under which asylum seekers may be detained and that such measures should only be taken as a last resort, in exceptional cases and where non-custodial measures have been proven on individual grounds not to achieve the stated, lawful and legitimate purpose. Asylum seekers in detention should also have unrestricted access to free, qualified and independent legal advice, as well as to NGOs and UNHCR. Under no circumstances should persons seeking protection be detained in penal institutions holding convicted criminals. Unaccompanied minors should never be detained on immigration grounds under any circumstances. Instead, asylum seekers should be accommodated in reception centres or supported in the community. Reporting conditions should be applied if necessary to ensure compliance with immigration controls.

It is also disappointing that the Article does not provide that there should be a maximum duration for detention specified under national law<sup>69</sup>. ECRE reiterates that detention should be for the minimum period necessary. Member States should take into account ECHR case law, which states that deprivation of liberty should not be prolonged excessively<sup>70</sup>. In the case of *Amuur*<sup>71</sup>, it was deemed excessive within the meaning of Article 5 ECHR to hold someone in a transit zone for more than 20 days. On the whole, ECRE is extremely disappointed with the missed opportunity to lay out firm guidelines in this Directive with regards to detention of asylum seekers that comply with established norms of international human rights law.

### **Article 19 Procedure in case of withdrawal of the application**

Article 19(1) allows Member States to either discontinue or reject an application, which has been explicitly withdrawn. This is problematic, as the reasons for withdrawal of an application may not necessarily be related to a lack of need for protection. In the case of explicit withdrawal of an application, Member States should instead discontinue the procedure, and place a note on the file of the applicant that allows appropriate consideration of the facts around the withdrawal if the case is re-opened.

### **Article 20 Procedure in case of implicit withdrawal or abandonment of the application**

Paragraphs 1(a) and (b) lay out the reasons under which Member States may assume that the applicant has implicitly withdrawn or abandoned his or her application for asylum, namely when an applicant has failed to respond to requests for information or to attend an interview, or where the applicant has left without authorisation or failed to report to authorities. Applicants are afforded "reasonable time" to demonstrate that his or her failure to respond or

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<sup>68</sup> See *ECRE Position on the Detention of Asylum Seekers*, April 1996. See also UNHCR EXCOM Conclusions No. 44 (1986) and No. 85 (1998).

<sup>69</sup> See *ECRE Position on the Detention of Asylum Seekers*, April 1996, Para. 23

<sup>70</sup> *Amuur v France* – 19776/92 [1996] ECHR 25 (25 June 1996), para. 43.

<sup>71</sup> *Ibid.*

attend an interview were due to “circumstances beyond his control”, or to contact the authorities after absconding. ECRE is concerned that the term “reasonable time” may be applied restrictively, resulting in applicants having their case discontinued or rejected even though they have complied with the relevant obligations (albeit not within ‘reasonable time’), and have valid reasons for the initial failure. This risk is further increased by the fact that there appears to be no opportunity for applicants to explain their failure to report under Paragraph 2(b)

Article 20(1) is a serious cause for concern in that it allows Member States to reject applications in the case of implicit withdrawal of an application and, furthermore, even where cases have only been discontinued, the opportunity for re-opening can also be subject to time limits under Article 20(2). ECRE believes that there is no legal basis or practical need to reject applications in the case of explicit or implicit withdrawal or abandonment of the application. Such a rejection, as well as the setting of time limits allowed for the re-opening of claims, may cause problems in cases where applicants have been sent back from one Member State to another, for example under the Dublin II Regulation. This is the case, for example, if an applicant is transferred back to a Member State where he or she had previously submitted an application, but which was rejected following implicit abandonment/withdrawal. On being returned, the applicant is likely to have missed deadlines for appeal, and in the event of a discontinuation, the time limit for having the case re-opened may well have passed<sup>72</sup>. This is of major concern where states then deny applicants access to any substantive determination procedure, as evidenced by the recent practice of the Greek authorities of ‘interrupting’ the claims of individuals transferred under Dublin II<sup>73</sup>. Research by ECRE has revealed that a number of other states also restrict or deny access to individuals returned under Dublin II, particularly those who have been ‘taken back’<sup>74</sup>. In ECRE’s view, applications that are withdrawn, implicitly or otherwise, should be discontinued only, and the file should be closed with a note on the file explaining that the application has not been examined substantively. The possibility of re-opening should not be subject to time limits.

The re-opening of claims may also be problematic as, according to Article 20(2) they may be treated as a subsequent application under Articles 32 and 34, as are claims that have been rejected after implicit withdrawal or abandonment<sup>75</sup>. This is unsatisfactory, as Article 24(1)(a) allows Member States to derogate from the basic principles and guarantees of Chapter II when undertaking a preliminary examination to consider whether there should be further examination of a subsequent application. This would present a further curtailment of the rights and safeguards of the applicant, and is of particular concern given that applicants whose decisions are not subject to further examination by virtue of Article 32 and 34, may be denied

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<sup>72</sup> This concern was raised by the European Parliament, see *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 see page 46, Amendment 100.

<sup>73</sup> The basis of these interruption decisions is Article 2(8) of the Presidential Decree 61/99,12, which allows the Ministry of Public Order to interrupt the examination of an asylum claim when the applicant ‘arbitrarily leaves his/her stated place of residence’. In practice, the Greek authorities use this provision to ‘interrupt’ the asylum claims of individuals having transited illegally to other Member States and subsequently use this as a justification for denying these individuals access to an asylum procedure when returned to Greece under Dublin. Thus, when the applicant is returned to Greece, upon arrival they are informed of the interruption decision, issued with a deportation order and are detained prior to expulsion.

<sup>74</sup> See *Report on the Application of the Dublin II Regulation in Europe*, ECRE/ELENA March 2006, AD3/3/2006/EXT/MH, pp 150-153.

<sup>75</sup> Article 32(2)(a) allows Member States to apply a specific procedure where a person makes a subsequent application for asylum: after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 and 20 and (b) after a decision has been taken on a previous application.

the right to remain pending a final decision<sup>76</sup>. In addition, subsequent applications in the event of a previous application may not be permitted unless the applicant provides new information<sup>77</sup>.

### **Article 21 The role of UNHCR**

ECRE welcomes Paragraph 1 in that it provides that Member States shall allow UNHCR access to applicants for asylum as well as to information on individual applications and explicitly refers to UNHCR's supervisory responsibilities under Article 35 of the 1951 Geneva Convention. ECRE also welcomes the fact that Paragraph 2 extends access to applicants and information on their cases to NGO's working on behalf of UNHCR. However, as per the comments on Article 10 above, ECRE regrets the limitation to NGOs working on UNHCR's behalf.

### **Article 22 Collection of information on individual cases**

ECRE welcomes Article 22, which goes some way towards preventing alleged actors of persecution from being informed about an individual's application for asylum. However, Member States are only prohibited from *directly* disclosing such information regarding individual applications, or the fact that an application had been made, to alleged actors of persecution, or from obtaining information from alleged actors of persecution, which would result in the actor being *directly* informed of the application. The drafting of this provision therefore does not properly reflect the strict duty of confidentiality owed by states to all applicants for asylum<sup>78</sup>.

## ***Chapter III Procedures at first instance***

### ***Section I***

### **Article 23 Examination procedure**

Article 23 (4) sanctions the use of accelerated procedures for any asylum application, while offering a long list of indicative examples, including: applications that raise little relevant evidence (23(4)(a)), applicants from a safe country of origin or a safe third country (23 (4) (c)), applicants who cannot prove their identity or nationality (23(4)(f)), applicants who provide inconsistent information (23(4)(g)), and applicants who do not file their applications as soon as they have the opportunity to do so (23(4)(i)).

While the guarantees of Chapter II still apply to the non-exclusive list of categories in this article, ECRE believes that the standards contained in Chapter II are insufficient to ensure fair and efficient access to protection for all applicants for asylum<sup>79</sup>. Such concerns are exacerbated by the fact that the Directive does not guarantee a suspensive right of appeal, and that subsidiary protection needs are not taken into account in this Article. The channelling of certain groups of applications through specific procedures with reduced safeguards creates the risk of *refoulement* if states are not careful to ensure that domestic provisions properly reflect their obligations under international law.

In view of the inclusion of so many inappropriate categories of application, and the cumulative absence of adequate safeguards, this Article is wholly unacceptable and not conducive to a fair and efficient asylum determination procedure. ECRE agrees with Article

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<sup>76</sup> See Commentary on Article 7.

<sup>77</sup> See Article 32(3).

<sup>78</sup> See *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, para. 200.

<sup>79</sup> See commentary on Articles in Chapter II above.

23(2), which provides that an examination procedure should be concluded as soon as possible without prejudice to an adequate and complete examination. However, ECRE considers that the most effective way to increase the efficiency and the speed of decision-making is for States to adopt a policy of frontloading by investing sufficient resources in order to enhance the quality and efficiency of first instance decision making, thus avoiding unnecessary appeals<sup>80</sup>. Equally, the first stage of the asylum procedure should contain minimum time limits to allow applicants to properly prepare their claims.

Rather than the acceleration of cases, States should prioritise particularly vulnerable and manifestly well-founded cases<sup>81</sup>, and in this regard ECRE welcomes Article 23(3) which provides for this. However, if Member States insist on using accelerated procedures then they should only be applied to cases that are ‘clearly abusive’, (i.e. clearly fraudulent), or ‘manifestly unfounded’ (i.e. not related to the grounds for granting international protection) which could then be considered for distinct treatment with simplified reviews<sup>82</sup>. ECRE also takes the view that acceleration of manifestly unfounded or clearly abusive cases could most effectively occur at the appeal level, through shorter but reasonable time limits for submitting an appeal. This would ensure that acceleration of an asylum procedure only takes place after a full and individual examination of the substance of the claim subject to all the necessary legal safeguards.

#### **Article 24 Specific procedure**

Article 24 permits Member States to provide for procedures derogating from the basic principles and guarantees of Chapter II of the Directive with regard to the preliminary examination to consider whether a subsequent application should be subject to further examination (Article 32), border applications (Article 35), and cases falling under the ‘European safe third countries concept’ (Article 36). ECRE finds this provision unacceptable and repeats its recommendation that there should be one examination procedure for all categories of applicants, to which all procedural safeguards and guarantees in Chapter II of the Directive apply. Without the guarantees and safeguards of Chapter II, applicants may not have the opportunity to rebut the presumption of a safe return as applied to their individual applications. For further analysis of these Articles, see the commentary of Articles 32, 35 and 36 below.

Furthermore, the Article does not specify clearly from which procedures and guarantees there may be derogation. This increases the risk of *refoulement* and goes against the objective of harmonising procedural standards.

### ***Section II***

#### **Article 25 Inadmissible application**

Article 25 allows States to consider applications for asylum inadmissible in a number of circumstances that ECRE considers to be of concern. While it is acceptable that Member States may consider an application inadmissible if another EU Member State has granted refugee status (25(2)(a)), there is a need for an explicit guarantee from the Member State that refugee status has been granted and that the applicant will be readmitted.

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<sup>80</sup> See *The Way Forward- Europe’s role in the global refugee protection system – Towards Fair and Efficient Asylum Systems in Europe*, ECRE, Sept 2005, pp38-39.

<sup>81</sup> See further *The Way Forward- Europe’s role in the global refugee protection system – Towards Fair and Efficient Asylum Systems in Europe*, ECRE, Sept 2005, pp38-39.

<sup>82</sup> UNHCR Executive Committee Conclusion No. 30 (XXXIV) of 1983.

ECRE disagrees with the inclusion of safe third country cases in the admissibility procedural stage under Article 25(2)(c). The question whether a country can be considered safe for a particular applicant needs to be dealt with in the substantive determination procedure.

It is also inappropriate that applications may be declared inadmissible under Articles 25(2)(d) and (e) where they have been granted another form of protection under the Qualification Directive or is protected from *refoulement* from the Member State pending a decision under the Qualification Directive<sup>83</sup>. ECRE reiterates the centrality of the 1951 Geneva Convention and the protection it provides. Article 25(2)(d) and (e) present a risk of undermining the Convention by allowing States to resort to other forms of protection for applicants who should in fact qualify for Convention status. In addition, the Qualification Directive does not incorporate all Convention rights, in particular it contains no provision in relation to Article 34 of the 1951 Geneva Convention concerning the naturalisation of refugees, on Articles 12-16 of the Convention regarding juridical status, freedom to practice religion, and the right for religious education for children<sup>84</sup>, and affords fewer rights to beneficiaries of subsidiary protection than are granted to recognised refugees<sup>85</sup>. ECRE therefore urges Member States to include in national legislation a provision to ensure that all applicants for national protection are first assessed on their eligibility for Convention status before any consideration of subsidiary protection takes place. This view is supported by the European Commission<sup>86</sup>.

#### **Article 26 The concept of first country of asylum**

Article 26 contains inadequate safeguards for considering a country as a first country of asylum for an applicant. ECRE welcomes the guarantee that the applicant must still be able to avail himself of the protection of the first country of asylum. However, the lack of definition of the term “sufficient protection” in Article 26(b) does not sufficiently guarantee a full determination of whether a country represents a safe country of asylum for an applicant. In particular, ECRE urges States to take into account the country’s ability to provide effective protection *in practice*, particularly if the country has a large refugee population. For protection to be effective, refugees must not only benefit from the principle of *non-refoulement*, but also must enjoy all civil and political rights, economic, social and cultural rights, the right to legal protection, including access to legal status and necessary documentation, access to a durable solution, and particular attention should be given to the needs of vulnerable groups in accordance with relevant international human rights law<sup>87</sup>. Furthermore, it is not appropriate for countries where UNHCR undertakes refugee status determination to be considered as safe in the context of a ‘first country of asylum’, as often, UNHCR is required to carry out refugee status determination because the State does not have the capacity to do so itself, or indeed to provide effective protection<sup>88</sup>.

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<sup>83</sup> In ECRE’s view refugee status should only be excluded if the ‘other’ status granted is equal to that of nationals, in line with Article 1E of the 1951 Convention.

<sup>84</sup> See further Lambert, *The EU asylum Qualification Directive, its impact on the jurisprudence of the United Kingdom and international law*, ICLQ 55 1 (161)

<sup>85</sup> See ECRE *Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*.

<sup>86</sup> Communication from the Commission to the Council and the European Parliament- *A More Efficient Common European Asylum System: The Single Procedure as the Next Step*, COM (2004) 503 Final, para. 22

<sup>87</sup> See *The Way Forward: Europe’s role in the global refugee protection system Guarding refugee protection standards in regions of origin*, ECRE, December 2005.

<sup>88</sup> A concern raised by UNHCR. See 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), pp. 34-35.

### **Article 27 The safe third country concept**

ECRE reiterates its grave concerns regarding the ‘safe third country’ notion, and in particular the failure of this Article to adequately set the parameters to properly limit its application. It is extremely regrettable that the safe third country notion as defined in Article 27 rests on a unilateral decision by a Member State to invoke the responsibility of a third State to examine a claim, without adequately guaranteeing the necessary safeguards. The Article fails to comply with international standards and potentially fundamentally undermines asylum in the EU. This Article is superseded by the Dublin II Regulation within the 25 Member States of the EU, as well as in neighbouring states such as Norway and Iceland. The potential application of the concept in relation to many of the States on the periphery of the Union, which lack efficient asylum systems and where serious human rights violations persist, is therefore particularly concerning<sup>89</sup>.

Under international law the primary responsibility to provide protection remains with the State where the claim is lodged. The European Court of Human Rights has clarified that the application of safe third country procedures does not absolve the country of asylum of responsibility under Article 3 ECHR<sup>90</sup>. This clearly illustrates that transfers to third countries, without sufficient safeguards are not compatible with the ECHR. ECRE therefore underlines the need for very strict criteria for the designation of third countries as safe. Namely, it must have ratified and implemented the 1951 Geneva Convention, without geographic limitation, and other international human rights treaties, especially the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR), and the respective Optional Protocols and crucially, respect its obligations in practice and have a fair and efficient asylum procedure in place able to provide recognition of refugee status and respect for attendant rights.

The criteria set out in Article 27(1)(a) – (d) are inadequate as they prescribe only minimal requirements, namely “*life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion*”, respect of the principle of *non-refoulement* under the 1951 Geneva Convention and other international instruments; and the possibility to request refugee status and, if found to be a refugee, “*to receive protection in accordance with the Geneva Convention.*” While Article 27 (1) (d) appears to presume ratification of the 1951 Convention and/or 1967 Protocol, ECRE is concerned by the absence of an explicit requirement that receiving third countries have both ratified without geographic limitation and implemented *in practice* the 1951 Geneva Convention and/or 1967 Protocol. Refugee protection involves more than mere protection from *refoulement*, which is part of customary international law<sup>91</sup>. It also requires the recognition of a set of rights accompanying refugee status under the 1951 Geneva Convention. ECRE regrets that greater emphasis is not given to the need for the careful examination of the receiving State’s implementation in practice of the international

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<sup>89</sup> See for example *Amnesty International Annual Report 2005*, European Commission against Racism and Intolerance, Third Report on Turkey, 25 June 2004, p. 16 and comments below on Article 36 The European safe third countries concept.

<sup>90</sup> *T.I. v UK* Application no. 43844/98 (Admissibility) page 14.

<sup>91</sup> See for example ExCom Conclusion No 55 ‘*General Conclusion on International Protection*’ (1989), para (d); and “*Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*” UN Doc. HCR/MMSP/2001/09, Dec, 13, 2001, in which the States parties acknowledged “the principle of *refoulement*, whose applicability is embedded in customary international law”.

obligations it has assumed, which necessarily requires thorough consideration of the capacity of third States to readmit applicants, examine their claims and grant effective protection<sup>92</sup>.

ECRE believes that the third country must be considered safe for the individual applicant and the burden of proof on safety of the third country lies with the country of asylum. Article 27(2)(b) simply requires Member States to set out “rules on methodology” to determine whether the concept is applicable to “*a particular country or to a particular applicant*”. Member States are granted an option to ignore the individual circumstances and instead favour a generalised determination of safety. However, the effect of this Article is limited by Article 27(2)(c), which provides that Member States must elaborate rules “*in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.*” In addition, in relation to the effective remedy under Article 39(1), Member States are required to provide for rules “*in accordance with their international obligations*” on the “*grounds of challenge for a decision*” under these provisions. ECRE reiterates as per the comments on Articles 7 and 12 above, that in accordance with Member State’s obligations under international human rights and refugee law, there should be an individual examination of all applications for asylum, and appeals should have suspensive effect. When transposing the Directive, states are obliged to provide such guarantees in national rules in order to prevent unlawful *refoulement* or chain *refoulement* of individuals in need of international protection.

Article 27(2)(a) leaves it to national legislatures to elaborate “*rules requiring a connection between the person seeking asylum and the third country concerned based on which it would be reasonable for that person to go to that country*”. It is regrettable that this Article fails to provide adequate clarity concerning this important principle limiting the proper application of the safe third country concept. ECRE therefore reminds Member States when implementing this Article that in line with EXCOM Conclusion 15 (XXX), asylum should not be refused solely on the grounds that it could be sought from another State. The person must have a connection or close links with the third State, such as family ties and/or substantial cultural ties with the country. Additionally, the reasons why the asylum applicant lodged the application in the receiving state should be taken into account as far as possible<sup>93</sup>. Thus, Member States should consider assuming responsibility for the asylum application, for instance, where the applicant has close family ties in and/or substantial cultural ties with the country; has been in transit in the third country, with which s/he has no links or contacts, for a limited period of time, and for the sole purpose of reaching his/her destination; is in poor physical or psychological health, or otherwise belongs to a particular vulnerable group.

Furthermore, if Member States are to avoid possible conflict with their obligations under ECHR they must allow for individual examination of a claim that the application of the safe third country provisions would not violate the particular applicant’s rights under Articles

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<sup>92</sup> In this regard ECRE reminds Member States that Article 18 of the EU Charter of Fundamental Rights, guarantees the right to asylum with “*due respect to the rules of the Geneva Convention*”. Although not binding, the Charter has recently been acknowledged by the ECJ as a source of fundamental rights law in the EU (Case C-540/03 European Parliament v Council, para. 38). Therefore, in the context of the safe third country concept, Article 18 of the Charter should be interpreted to mean that, where the right to asylum is not guaranteed in the EU itself, it should be guaranteed in the third country. The right to asylum under the Charter, by referring to the “*rules of the Geneva Convention*”, necessarily also encompasses the rights accompanying refugee status in the Convention.

<sup>93</sup> See EXCOM Conclusion No. 15 (XXX) – 1979, para. (h) (i), (ii) and (iii).

other than Article 3 ECHR<sup>94</sup>. For example, the application of such provisions may violate the particular applicant's right to a private and family life under Article 8 ECHR<sup>95</sup>. Consequently, Member States are obliged by their other international obligations to provide for greater possibility for applicants to challenge the application of the safe third country concept than the apparent minimum requirement for individual examination contained in Article 27(2)(c).

It is indispensable that the third state has given its explicit consent to (re)admit the asylum seeker and to provide him/her full access to a fair and efficient determination procedure before any transfer may take place. ECRE welcomes Article 27(3)(b), which requires Member States to provide the applicant with "*a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance*". In addition, under Article 27(4), where the third country does not admit the asylum applicant 'to its territory' Member States must admit him/her to a procedure. By only making reference to the third country's territory, Article 27(4) fails to explicitly guarantee access to an asylum determination procedure in the third country. In ECRE's view, the problem of an applicant not being admitted to the territory could not even arise if the transfer was conditional on the prior and explicit consent of the receiving country to accept responsibility for the claim. Nevertheless, Article 27(1)(d), which provides that a third country cannot be considered safe unless "*the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention*", combined with Article 27(1)(c) "*the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected*" should be interpreted by Member States to mean that transfer to a third country is not possible unless the applicant will have a guaranteed individual access to a refugee status determination and subsidiary protection procedure.

In sum, ECRE believes the safe third country concept should be strictly limited, and would be concerned about its application in relation to many states on the periphery or outside the EU. However, if states are to operate this concept, it should be as part of an individual examination with essential safeguards, and the criteria and requirements for the use of the concept should be clearly defined, and include, as a minimum:

- a) Ratification (without geographic limitation) and implementation of the 1951 Geneva Convention and other international human rights treaties.
- b) Existence of an asylum procedure in place leading to the recognition of refugee status.
- c) Explicit consent of the third country to (re)admit the asylum seeker and to provide her full access to a fair and efficient determination procedure before any transfer may take place.
- d) Close link of the applicant with the third country, such as family ties. Mere transit through a country does not constitute a meaningful link.
- e) Rebuttability of the presumption of safety, and an effective remedy against any decision to remove the applicant to a third country.

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<sup>94</sup> See *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26, House of Lords, UK.

<sup>95</sup> See *R v Secretary of State for the Home Department ex parte Razgar* [2004] UKHL 27, House of Lords, UK.

### ***Section III***

#### **Article 28 Unfounded applications**

In ECRE's view, an application for asylum should only be considered as unfounded in cases that clearly do not relate to the grounds for granting international protection. Instead Article 28(2) allows Member States to designate any applications under the categories listed in Article 23(4)(a) and (c) to (o)) as 'manifestly unfounded' if it is so defined in national legislation. ECRE reiterates its view that this list includes circumstances that do not directly relate to the substance or merits of the claim yet could still be used to designate an application as 'manifestly unfounded', with unclear and undefined consequences.

In addition, Article 28(1) allows states to make such a consideration "*if the determining authority has established that the applicant does not qualify for refugee status pursuant to [the Qualification Directive]*". States should ensure that applications are only rejected as unfounded if the applicant also does not qualify for subsidiary protection, and return would not otherwise be prohibited under international law. This problem would be avoided if states operated a single procedure, as ECRE has suggested<sup>96</sup>.

#### **Article 29 Minimum common list of third countries regarded as safe countries of origin**

ECRE has consistently criticised the safe country of origin concept as being inconsistent with the proper focus of international refugee law on individual circumstances<sup>97</sup>. In addition to fears concerning the potential breaches of international law resulting from application of the concept, the Directive also arguably violates EC law itself. The Directive requires the Council to adopt a minimum common list of countries, which all Member States must treat as 'safe countries of origin'. Many Member States do not currently operate safe country of origin systems. Accordingly, it would appear that this is the first time that EU Member States would be required to dilute their standards of protection by a measure of EC law. Article 29(1) states that countries on the common list 'shall be regarded by the Member States' as safe countries of origin. Thus, they are apparently precluded from adopting higher standards in this field. In this respect ECRE would wish to reiterate its comments on Article 5 above that the Directive should never be interpreted so as to preclude states from applying more favourable standards, particularly when international law and general principles of Community law would preclude this<sup>98</sup>.

ECRE emphasises that even if it were possible to designate countries as generically and absolutely safe it must be borne in mind that human rights situations can change rapidly. ECRE is therefore concerned with Article 29(4) – (7) in that the process is not sufficiently receptive to the possibility of deterioration of human rights standards. Where an individual Member State requests the Commission to propose an amendment to the list, that Member State is then temporarily freed of the requirement to treat applications from that country as unfounded. However, until the Commission proposes the formal amendment to the list (this must be done within three months for the suspension to remain effective), and until/if that

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<sup>96</sup> See commentary on Article 3 above.

<sup>97</sup> See ECRE, *Guidelines on Fair and Efficient Procedures for Determining Refugee Status*, 1999, paras. 21(c) and 119(c).

<sup>98</sup> See also Case C-540/03 *European Parliament v Council*, Para.105 and related commentary on p 5 above.

amendment is agreed by the Council by QMV, other Member States remain obliged to treat the country as safe, thus putting affected individuals at risk of *refoulement* during this period.

Article 29(1) provides that Member States may consider a country as a safe country of origin only in accordance with the principles set out in Annex II. ECRE considers that there is a fundamental flaw in the requirements set out in Annex II, which is inherent in the concept of ‘safe countries of origin.’ Annex II requires that “*there is generally and consistently no persecution*” and after taking into account “*observance of the rights and freedoms laid down in the European Convention for the Protection of Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture*”. However, refugee law is not about what happens *generally*, it is about the protection needs of *individuals*. A country may well provide *generally* effective remedies against violations of civil and political rights whilst denying remedy and persecuting a particular individual or group on grounds of their race, religion, political opinion, nationality or social group. ECRE therefore reiterates its reservations concerning the concept of declaring countries as generally safe without a proper examination of the individual circumstances of a claim. When implementing this Article and Annex II, Member States are reminded that Article 4(3) of the Qualification Directive requires that all Country of Origin information and the individual circumstances of the applicant must be considered. Furthermore, the failure to have regard to other international instruments which provide for the protection of economic, social and cultural rights<sup>99</sup> or of particular groups<sup>100</sup> are significant oversights. Member States should also take these instruments into consideration particularly as the discriminatory denial of the rights guaranteed by those instruments can constitute a basis for a claim for refugee status<sup>101</sup>.

The complexity involved in determining whether a country is safe may itself lead to errors or conflicting assessments. The politicised decision-making process may also lead to foreign policy concerns tainting the objectivity of the assessment<sup>102</sup>. Finally, from a practical point of view, if countries are in fact safe, efficient refugee determination processes will quickly weed out unfounded applications by nationals of those countries, and there should be no need for a safe country list. Moreover, an efficient procedure will identify individuals whose exceptional and particular circumstances are such that they have a valid claim, despite their country being *generally* safe.

ECRE also considers that the procedure for agreeing (29(1)) or amending (29(2)) this common list does not guarantee democratic control as neither the European Parliament nor national parliaments have the power of veto; it is to be determined by the Council by Qualified Majority Voting (QMV), with mere consultation of the European Parliament, as opposed to co-decision which is envisaged by Article 67(5) EC. This is an argument raised by the European Parliament in its challenge of this Directive<sup>103</sup>.

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<sup>99</sup> For example see The International Covenant on Economic, Social and Cultural Rights 1966.

<sup>100</sup> See United Nations Convention on the Rights of the Child 1989, International Convention for the Elimination of all forms of Discrimination against Women 1979 and the International Convention on the Elimination of All Forms of Racial Discrimination 1965.

<sup>101</sup> See James C. Hathaway “The Law of Refugee Status” Butterworth’s, Canada 1991 p105-112 and p119-124

<sup>102</sup> The difficulties and contradictions inherent in this process were aptly illustrated by the fact that protracted negotiations in the Council failed to achieve consensus on a designated common list of safe countries and thus resulted in amendments to the Directive providing for the common list to be agreed by QMV after its adoption.

<sup>103</sup> See Case C-133/06. *European Parliament v Council* of the European Union. Application OJ C 108, of 06.05.2006, p.12. See page 2 above. For a full discussion of these issues see Immigration Law Practitioners’ Association (ILPA) *Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* (June 2004), p.47.

### **Article 30 National designations of third countries as safe countries of origin**

While ECRE reiterates its opposition to the use of the safe countries of origin concept altogether, if it is to be applied, it is noted with regret that under Article 30(1) Member States may treat additional countries as ‘safe’ countries of origin, using the criteria set out in Annex II. Furthermore, in derogation from Article 30(1), Article 30(2) provides that Member States may maintain in force provisions treating countries as safe (or under Article 30(3) parts of countries) where it is established merely that persons are generally not subjected to persecution, torture, or inhuman or degrading treatment. Permitting such national designations can hardly be considered to help achieve the objective of greater harmonisation. It is also unfortunate that Article 30(2) permitting national derogation introduces the unsatisfactory formulation ‘generally neither subject to’ persecution, torture or ill-treatment.

Paragraph 3 allows Member States to retain legislation allowing for national designation of part of a country as safe, or for a country or part of one to be safe for specified groups. In ECRE’s view, in principle a country should not be considered ‘safe’ if it is so for only part of the territory. The designation of a safe part of a country does not necessarily signify the existence of a reasonable internal protection alternative for the particular applicant<sup>104</sup>.

### **Article 31 The safe country of origin concept**

In ECRE’s view the Directive does not prescribe necessary minimum standards for an adequate examination of whether the particular country is safe for the individual applicant. Under Article 31(2) all applications from designated safe countries of origin under Articles 29 and 30 are to be treated as unfounded, provided that it is safe for the particular applicant. However, this is presumed when the applicant is a national of the country. In the case of stateless persons, it is sufficient if the applicant was formerly habitually resident in the country ‘of origin.’ The entire burden of rebutting the presumption that a country is safe for the individual rests on the applicant, who is required in the context of an accelerated procedure, to submit “*serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances in terms of his/her qualification as a refugee*” (Article 31(1)).

Article 31(3) provides that “Member States shall lay down in national legislation further rules and modalities in national legislation for the application of the safe country of origin concept”. ECRE emphasises that when setting out these rules and modalities in national legislation it will be incumbent on Member States to ensure that these adhere strictly to their international obligations, in particular to guarantee a full individual examination of each case, to ensure a suspensive right of appeal, and to comply with the principle of *non-refoulement*.

States are reminded that, when implementing this Article, their obligations under the international law, and the Qualification Directive still apply. Specifically they must adhere to the principle of *non-refoulement* and, according to Article 13 and Article 18 of the Qualification Directive, must grant refugee status and subsidiary protection to those who qualify.

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<sup>104</sup> For ECRE’s position on the internal protection alternative, see ECRE *Position on the interpretation of Article 1 of the Refugee Convention*, September 2000, Para. 34-38.

## **Section IV**

### **Article 32 Subsequent applications**

Article 32(3) provides that subsequent applications for asylum be subject to a preliminary examination to decide whether they should be further examined. ECRE agrees in principle that subsequent applications should be subject to such an admissibility procedure to ascertain whether new elements have arisen to merit a substantive examination. However, ECRE stresses that this is not appropriate in the context of cases of explicit or implicit withdrawal of a previous application under Article 19 and 20 that have never been substantively examined. ECRE is further concerned that this preliminary examination may be carried out as part of an accelerated procedure by virtue of Article 23(4)(h), and which is subject to only limited procedural safeguards under Article 34.

ECRE reiterates its view as per the comments on Articles 19 and 20 above that cases of explicit or implicit withdrawal of the application, should not be rejected, but rather should be discontinued, with the possibility provided for in national legislation for re-opening of the procedure. They should therefore not be considered as a ‘subsequent application’. This should also be the case where states take back applicants under the Dublin Regulation who have never had their asylum application substantively considered, as this can place them at risk of *refoulement*<sup>105</sup>.

ECRE is also concerned that the Article does not create an obligation for states to examine subsequent applications, instead providing that Member States “*may examine these further representations*”. ECRE wishes to point out that there can be numerous legitimate reasons why an asylum seeker might not fully disclose relevant facts and circumstances during an initial application, therefore requiring a subsequent application even if it does not raise ‘new’ facts that had arisen since the original application. This is supported by studies on memory, and the particularly difficulties traumatised individuals or victims of rape or torture may have in recounting their experiences.<sup>106</sup> In particular, ECRE emphasises ECHR<sup>107</sup> and UNCAT<sup>108</sup> case law, which underline the need for flexibility in dealing with late submissions in cases of traumatised or tortured victims.

ECRE welcomes the provisions in Article 32(5), which give states the discretion to examine subsequent applications “*where there are other reasons why a procedure has to be re-opened*”. ECRE urges Member States to apply this provision in cases where special circumstances may have delayed early substantiation of a claim, for example in the case of trauma, language difficulties, or age, gender or cultural related sensitivities<sup>109</sup>. ECRE also

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<sup>105</sup> See commentary on Articles 19 and 20 above, and *Report on the Application of the Dublin II Regulation in Europe*, ECRE/ELENA March 2006, AD3/3/2006/EXT/MH, pp 150-153

<sup>106</sup> See Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers*, (2001) IJRL Vol. 13 No. 13, p.293; European Union Foundation for Human Rights, *Gender Guidelines for Asylum Determination*, 1999; *Asylum applicants - medical reports: guidelines for examining doctors*- Joint guidelines from the British Medical Association and the Medical Foundation for the Care of Victims of Torture January 1993.

<sup>107</sup> *Hatami v Sweden* Application No 32448/96 (23 April 1988) Para 106.

<sup>108</sup> See Communication No 15/1994 *Tahir Houssain Khan v Canada* (18 November 1994) para. 12.3 and Communication No 13/93 *Matumbo v Switzerland* (27 March 1994).

<sup>109</sup> See 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), page 43.

welcomes Paragraph 7, which provides that a subsequent application may be applicable in the case of a dependent's application.

### **Article 33 Failure to appear**

Article 33 provides that applicants who fail to go to a reception centre or appear before the competent authorities at a specified time may have their application examined as part of the subsequent application procedure. This could mean that applicants would only have their claim examined if they are able to present new elements or grounds for protection since the time when they were due to report to the authorities. This provision is unfair as the failure to report may be unrelated to the merits of an asylum claim, and is also unnecessary; Article 20 already provides for implicit withdrawal of an application in the event of an applicant failing to comply with reporting duties within a 'reasonable time', and thus Article 33 seems to be a purely punitive measure to give States more opportunity to deny applicants the right to a full examination of their claim.

### **Article 34 Procedural rules**

Article 34 lays out the procedural rules for subsequent applications under Article 32. ECRE welcomes that applicants subject to a preliminary examination under Article 32 shall enjoy the guarantees provided for in Article 10(1), however these applicants should benefit from all of the minimum procedural standards envisaged by Chapter II, including the right to legal assistance and representation and guarantees in case of detention. The rights of applicants under this preliminary examination are further limited by the provision that Member States may lay down entirely undefined additional rules. ECRE welcomes the assurance in Article 34(2) that conditions shall not render access to a new procedure or result in the effective annulment or severe curtailment of such access. However, ECRE is concerned that the restricted guarantees for the applicant during the preliminary examination, such as time limits to submit new information (34(2)(a)) and no guarantee of an interview (34(2)(c)), would in practice severely curtail access to the procedure, or indeed render it impossible for many applicants.

## ***Section V***

### **Article 35 Border procedures**

ECRE notes that according to EXCOM Conclusion No. 82, special border procedures with limited safeguards run counter to the acknowledged need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs. As a matter of principle, border procedures cannot provide all necessary procedural guarantees and safeguards due to the limited facilities *sur place* (housing, qualified examiners, interpreters, legal assistance). ECRE is therefore disappointed that, despite the provision in Paragraph 1 that Member States may provide for border procedures in accordance with the basic principles and guarantees of Chapter II, Paragraph 2 allows Member States to maintain procedures derogating from Chapter II.

ECRE acknowledges that Article 35(3) provides that those subject to border procedures under Article 35(2) will still benefit from some of the guarantees under Chapter II such as the right to remain pending a decision, access to an interpreter, the right to a personal interview, to consult a legal advisor, and to have a representative in the case of unaccompanied minors. Nevertheless, Article 35(2) goes against the principle of non-discrimination, which provides that all asylum seekers should benefit from the same basic principles and guarantees. ECRE is particularly concerned that applicants subject to Article 35(2) procedures do not benefit from

the guarantee that they will not be detained for the sole reason that they are applicants for asylum, and that detention will be subject to special judicial review (Article 18). Furthermore, under Article 35(4), such applicants may be confined at the border without the possibility of judicial review for up to four weeks. ECRE reminds Member States that according to the decision of the European Court on Human Rights in *Amuur*, confinement at the border can constitute ‘detention’ and may amount to a deprivation of liberty under Article 5 ECHR<sup>110</sup>. In particular, ECRE notes the Court’s assertion that such confinement requires ‘speedy judicial review’ of its length and necessity. Furthermore, not only must detention comply with the rules of national law, it must conform to the purpose of Article 5 that is to protect individuals from arbitrariness<sup>111</sup>.

ECRE feels that there is no justification for applicants who submit their claims at the border to be treated differently, and indeed, it is a norm of international law that states are equally responsible for applicants at the border as they are those who are in the country<sup>112</sup>. This provision also risks encouraging asylum seekers to circumvent border controls and enter the country illegally, or to delay making an application in order to ensure they are subject to higher standards.

## ***Section VI***

### **Article 36 The European safe third countries concept**

ECRE reiterates its comments on Article 27 concerning the necessary limitations and safeguards inherent in a proper application of the safe third country concept, and therefore notes with grave concern that Article 36 allows Member States to deny access to the procedure altogether to any applicant who arrives ‘illegally’ from designated countries. Although Article 36(4) does require Member States to lay down ‘modalities’ for implementing [Article 36] ... “*in accordance with the principle of non-refoulement under the Geneva Convention including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law*”, it is striking that the Directive itself abdicates any responsibility for setting any explicit standards to ensure respect of Member States’ most fundamental obligations. ECRE cannot envisage how Member States could meet their obligations while implementing provisions that systematically deny access to a determination procedure on the basis of a designated list determined by generic criteria<sup>113</sup>. Therefore, when transposing this provision, it will be incumbent on states to provide for relevant safeguards to ensure compliance with their obligations under international law and respect for the principle of *non-refoulement*. In this regard it should be noted that Article 39(1)(a)(iii) provides for an effective remedy against decisions not to examine a request under Article 36. In order to ensure an effective remedy and to aid the smooth administration of asylum systems in these circumstances, Member States must ensure that there is an individual examination of the application and the actual consequences of return to a designated third country.

Article 36 does not expressly require any individual assessment of the safety of the third country for the particular applicant. ECRE strongly reiterates that no category of applicant can

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<sup>110</sup> *Amuur v France* – 19776/92 [1996] ECHR 25 (25 June 1996).

<sup>111</sup> See *Kemmache v France* (no.3) judgement of 24 November 1994, Series A no. 296-C pp. 19-20, para. 42.

<sup>112</sup> See Immigration Law Practitioners’ Association (ILPA) *Analysis and Critique of Council Directive on Minimum Standards on procedures in Member States for granting and withdrawing refugee status* (July 2004), p.29

<sup>113</sup> See commentary on Article 27 above.

lawfully be denied access to an asylum procedure completely. Some form of assessment, at minimum by way of an admissibility determination, must be in place to ensure that refugees can access the rights conferred by the 1951 Geneva Convention; complete denial of access to the procedure clearly risks being at variance with international refugee law. No country can be labelled as a 'safe third country' for all asylum seekers. A decision on the safety of a country for the particular applicant must always be reached within an individual examination on the claim and not on a general presumption of safety based on country-related criteria. There must also be an opportunity for the applicant to rebut the presumption of safety in the particular circumstances of his/her case. ECRE therefore urges Member States, to provide for this when laying out its 'modalities' for implementing Article 36, as provided for in Paragraph 4.

ECRE reiterates that a Member State's international obligations are engaged as soon as an asylum applicant arrives at a border, including at any international transit zone<sup>114</sup>, since s/he actually has at that point already reached the territory<sup>115</sup>, this includes that there be no rejection at frontiers without fair and efficient procedures for determining status and protection needs<sup>116</sup>. In particular, UNHCR EXCOM Conclusion No. 87 (L) – 1999 (j) affirms that the notion of 'safe third country' should not lead to the improper denial of access to asylum procedures or, indeed, to violations of the principle of *non-refoulement*.

Human rights and refugee protection concerns exist not only in countries bordering the EU, but also in EU Member States themselves, as identified by ECRE and other international organisations, including the EU itself<sup>117</sup>, and international human rights monitoring bodies (such as the European Court of Human Rights). Countries neighbouring the enlarged EU include Albania, Belarus, Bulgaria, Croatia, Macedonia, Romania, the Russian Federation, Serbia, Montenegro, Turkey, and Ukraine. An un rebuttable presumption of safety for all asylum seekers arriving from any of these countries could result in breaches of international law.

Furthermore, the mere existence of an asylum procedure in law is insufficient to ensure that a third country will be able to deal fairly and efficiently with asylum applicants. Many countries have neither the structures nor the resources to deal with more than a very small number of asylum seekers. Excluding persons who have travelled through such countries from an individual determination procedure would amount to an effective denial of the right to seek asylum under international law. It is gravely disturbing that the Directive envisages the Council adopting a common designated list, and thus facilitating this practice across the European Union.

Also of concern is Article 36(7) which permits Member States who have designated safe third countries in accordance with national legislation in force at the date of the adoption of the Directive to apply the provisions of Paragraph 1 (i.e. deny access to the procedure altogether) until such time as the Council has adopted the common list pursuant to paragraph 3, the only

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<sup>114</sup> *Amuur vs France*, Application No 19776/97 of 25 June 1996.

<sup>115</sup> Application No. 23366/94 *Nsona v Netherlands* (28 November 1996) which confirmed that Member States' obligations under the ECHR arise as soon as an individual seeks admission to its territory, provided he/she is within the State's jurisdiction.

<sup>116</sup> This has been repeatedly reaffirmed by UNHCR's Executive Committee. See (Conclusion No. 81 (XLVIII) – 1997 (h), No. 82 (XLVIII) – 1997 (d) (iii), No. 85 (XLIX) – 1998 (q)).

<sup>117</sup> See, for instance, the European Parliament *Annual Report on human rights in the world in 2002 and European Union's human rights policy* (Doc. A5-0274/2003, of 16 July 2003) and the European Parliament Report 'Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Doc. A5-0378/2003, of 5 November 2003).

requirement being that the third country satisfies the inadequate criteria in paragraph 2(a) to (c). The adoption of the common list by the Council may also infringe the requirement for co-decision with the Parliament in this area, an issue raised as part of the Parliament's challenge of this Directive<sup>118</sup>.

#### ***Chapter IV Procedures for the withdrawal of refugee status***

##### **Article 37 Withdrawal of refugee status**

Article 37 creates an obligation on States to provide for an examination to withdraw the refugee status of a particular individual when new elements or findings arise indicating that there are reasons to reconsider its 'validity'. The use of the term 'validity' is regrettable, given that the Article is also intended to deal with cases of cessation due to changed circumstances<sup>119</sup>. The Article is also worded vaguely, presenting uncertainty as to when it may be applied. Instead the Article should clearly lay out circumstances in which refugee status can be reconsidered in accordance with the 1951 Geneva Convention<sup>120</sup>.

##### **Article 38 Procedural rules**

Article 38 sets out the procedural rules applicable for the withdrawal of refugee status under Article 37. ECRE welcomes the guarantees in Article 38(1), including the right of the applicant to be informed in writing of the fact and reasons for the reconsideration of refugee status, although it is disappointing that this does not include a guarantee that the information will be provided in a language the individual is known for sure to understand or indeed that he is can be "*reasonably supposed to understand*"<sup>121</sup>. ECRE also welcomes the provisions that individuals will have the opportunity to submit reasons why refugee status should not be withdrawn, as well as guarantees that the competent authority is able to obtain up to date information, and that the collection of information under Article 22 will not result in an actor of persecution being directly informed of the reconsideration of the individual's refugee status<sup>122</sup>. ECRE is disappointed however that other procedural guarantees, notably the right to free legal advice, to an interpreter, and access to UNHCR are not afforded to individuals whose refugee status are being reconsidered. These guarantees are fundamental to a fair and efficient reconsideration of refugee status, and if provided would limit the number of incorrect decisions taken at first instance. Instead Article 38(3) provides that these guarantees are applicable only when a negative decision has been taken.

Of further concern is Paragraph 4 which allows Member States to avoid affording any procedural guarantees in that they "*may decide that the refugee status shall lapse by law in case of cessation in accordance with Article 11(1)(a)-(d)*" of the Qualification Directive (i.e. in the event of changed circumstances) or when the refugee has unequivocally renounced his/her recognition as a refugee. This provision is unacceptable in ECRE's view, as the decision to withdraw refugee status should always be taken under a procedure in which the applicant has the right to refute the State's contention that refugee status should be withdrawn,

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<sup>118</sup> Case C-133/06. European Parliament v Council of the European Union. Application OJ C 108, of 06.05.2006, p.12. See also comments on Article 27 above.

<sup>119</sup> See Preamble Paragraph 26.

<sup>120</sup> See ECRE *Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* IN1/10/2004/ext/CN, in particular commentary on Articles 14 and 16

<sup>121</sup> See commentary on Article 10.

<sup>122</sup> Although see commentary on relevant Articles above: 8(2)(b), 10(1)(b), 12, 13, 14 and 22.

and should be safeguarded by essential legal safeguards such as the right to an interview, interpretation, suspensive appeal, access to UNHCR and legal representation.

### *Chapter V Appeals procedures*

#### **Article 39 The right to an effective remedy**

ECRE welcomes the right, set out in Article 39(1), to an effective remedy before a court or tribunal. However, it is regrettable that Article 39(3)(a) to (c) purport to allow Member States significant discretion to determine the type of appeal available and whether or not it has suspensive effect (i.e. permitting an applicant to remain on the territory pending the final determination of the claim). Article 39(3)(b) explicitly envisages that Member States might conceivably deny suspensive effect, in which event, Member States need only consider the ‘possibility’ of other and undefined ‘legal remedy or protective measures.’

The right to an effective remedy before a court or tribunal is embodied in EC Law<sup>123</sup>, Article 47 of the Charter of Fundamental Rights of the European Union, and in Article 13 of the European Convention of Human Rights. As held by the European Court of Human Rights, it implies that where there is an ‘arguable’ claim on a substantive provision of the Convention, there is a right to remain in the territory of a Member State until a final decision on the application has been taken<sup>124</sup>. Thus the right of asylum applicants to remain pending a final decision on their cases is essential for Member States to comply with their *non-refoulement* obligations and international law provisions relating to the right to an effective remedy<sup>125</sup>. Indeed the ECtHR has held that “*the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned.*”<sup>126</sup> ECRE therefore emphasises that Member States must take this into account, that when providing for ‘rules in accordance with their international obligations’ under paragraph 3.

It is vital that asylum seekers have a right to remain on the territory until their appeal is decided because a right to appeal becomes meaningless if the asylum seeker has already been sent to the country where they face persecution, torture, inhuman, or degrading treatment. Moreover, it becomes impossible to assess at a distance essential elements of a case, such as the credibility of the applicant.

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<sup>123</sup> See for example C-222/84 *Johnstone*, the ECJ court held that individuals must be able to invoke before a national court the rights which Community law confers to them. The requirement of judicial control regarding those rights is a general principle of law, which underlies the constitutional traditions common to the EU Member States.

<sup>124</sup> See *Conka vs. Belgium*, Judgement of 5 February 2002, stating as regards the deportation of asylum seekers: ‘it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention.’

<sup>125</sup> UNHCR also supports the view that in order to ensure compliance with the principle of *non-refoulement*, appeals should, in principle, have suspensive effect, and the right to stay should be extended until a final decision is reached on the application. Executive Committee Conclusions No. 8 (XXVIII) of 1977 and No. 30 (XXXIV) of 1983 confirm that the automatic application of suspensive effect can be waived only where it has been established that the request is manifestly unfounded or clearly abusive. In such cases, a court of law or other independent authority should review and confirm the denial of suspensive effect, based on a review of the facts and the likelihood of success on appeal.

<sup>126</sup> *Jabari v Turkey* Application No. 40035/98, Decision of 11 November 2000, Para. 50.

## ***Chapter VI General and final provisions***

### **Article 42 Report**

ECRE welcomes this provision which obliges the Commission to review the application of this Directive within two years of the date set for its transposition, and hopes that the Commission will consider the concerns raised in this paper at this time. ECRE believes that asylum procedures should be efficient and workable, but above all should uphold the essential safeguards and fundamental principles of international refugee and human rights law.

### **Article 43 Transposition**

While Member States are given two years from the date of the Directive to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive, this time limit is extended to three years for Article 15 on the right to legal assistance and representation. ECRE recognises the financial implications of this provision to states that do not already provide free legal assistance to applicants, nevertheless, it is disappointing that States should be allowed to delay implementation of Article 15 for an extra year, potentially putting claimants at risk of refoulement. ECRE therefore urges states to implement this provision within two years, in line with the rest of the Directive.

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