

# ECRE/ELENA LEGAL NOTE ON ACCESS TO LEGAL AID IN EUROPE

**ECRE/ELENA CALL ON EUROPEAN STATES TO ENSURE THAT LEGAL AID IS PROVIDED TO ALL ASYLUM APPLICANTS WITHOUT SUFFICIENT MEANS, AT ALL STAGES OF THE ASYLUM PROCEDURE AND REGARDLESS OF THE SPECIFIC ASYLUM PROCEDURES THAT THEY MAY FALL UNDER.**

# ELENA

EUROPEAN LEGAL  
NETWORK ON ASYLUM

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# I. INTRODUCTION

This legal note gathers national practices in relation to access to legal aid for asylum applicants in a number of European countries<sup>1</sup> and identifies the main problems in that regard. The note is based on the information provided by the European Legal Network on Asylum (ELENA), the European Database on Asylum Law (EDAL) and AIDA Country Reports.<sup>2</sup> The note outlines relevant European legislation and jurisprudence from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), as well as international legal standards. Domestic case law is also referred to as it shapes states' obligations and allows for the identification of positive practices at the national level. The note concludes with a set of recommendations to European states and concerned national authorities to ensure a high-quality and fully available access to legal aid for those applying for asylum.

While the terminology varies considerably in Europe, for the purposes of this note "legal aid" is understood as publicly funded legal assistance and representation.<sup>3</sup> Effective access to legal aid is essential to safeguard the rights of people in need of asylum throughout the asylum procedure and beyond. Without quality legal assistance and representation, asylum applicants often feel disempowered due to the complexity of the procedure,<sup>4</sup> jeopardising the full realisation of their rights. Yet, recent developments in Europe point to a worrying trend of measures undermining asylum applicants' access to legal aid. Even in countries where legal aid is available in general and where good practices can be identified, obstacles regarding the quality, funding or availability of legal aid for asylum applicants<sup>5</sup> are increasingly reported.

# II. LEGAL STANDARDS

Every State must respect, protect and fulfil the human rights of every person on its territory or subject to its jurisdiction, without discrimination. The right to legal aid has been considered under international law as a safeguard for the effective enjoyment of fundamental rights. Moreover, it has been interpreted as a component of the right to an effective remedy and to a fair trial, and crucial to ensure equality of arms.<sup>6</sup>

Under international law, the principle of *non-refoulement* and the right of effective access to justice require that certain procedural safeguards are adhered to within the refugee status determination procedure, central to such guarantees is the right to legal aid for asylum applicants. According to UNHCR's EXCOM Conclusion No. 8<sup>7</sup> and the UNHCR Handbook on procedures,<sup>8</sup> asylum applicants should receive the necessary guidance when applying for asylum. Recently, UNHCR has reminded states of their obligation to provide legal advice to asylum applicants and has acknowledged that the provision of legal aid contributes to the efficiency of

1. The name of countries analysed in this Legal Note have been abbreviated following the two-letter international country codes. This Note gathers information regarding Austria (AT), Belgium (BE), Bulgaria (BG), Croatia (HR), Cyprus (CY), Czech Republic (CZ), Denmark (DK), Finland (FI), France (FR), Germany (DE), Greece (EL), Hungary (HU), Iceland (IS), Ireland (IE), Italy (IT), Malta (MT), Netherlands (NL), Norway (NO), Poland (PL), Portugal (PT), Romania (RO), Serbia (RS), Slovakia (SK), Slovenia (SI), Spain (ES), Sweden (SE), Switzerland (CH) and the United Kingdom (UK).
2. We would like to thank the ELENA coordinators: Gloria Kinsperger and Susanna Paulweber (Austria), Lana Tučorić (Croatia), Corina Drousiotou (Cyprus), Hana Franková (Czech Republic), Line Bøgsted (Denmark), Marjaana Laine (Finland), Prof. Dr. Holger Hoffmann (Germany), Erika Kalantzi and Vasilios Papadopoulos (Greece), Zoltán Somogyvári (Hungary), Arndís Gunnarsdóttir (Iceland), Maria Cristina Romano (Italy), Sadhia Rafi (Netherlands), Halvor Frihagen (Norway), Inês Carreirinho (Portugal), Andreea Mocanu (Romania), Zuzana Številová (Slovakia), Miha Nabergoj (Slovenia), Natalia Cañiz García (Spain), Michael Williams (Sweden), Adriana Romer (Switzerland) and Alison Harvey (United Kingdom) for their invaluable contribution to this Note.
3. For the scope and definition of legal aid in different European states, please refer to: ECRE/ELENA, Survey on legal aid for asylum seekers in Europe (2010), pp. 9-11, available at: <http://bit.ly/2oBIZIE>
4. EU Fundamental Rights Agency, Access to effective remedies: The asylum-seeker perspective (2010), pp. 27-30, available at: <http://bit.ly/2o9EGvI>
5. In this note, the term "asylum applicant" is used in its broader sense, regardless of whether an individual has formally lodged an asylum application. The terms "asylum" and "international protection" are used interchangeably.
6. See, generally, on the legal standards under international and European law for the provision of legal aid: ECRE/ELENA, Survey on legal aid for asylum seekers in Europe (2010), pp. 12-19, available at: <http://bit.ly/2oBIZIE>; on the right to legal aid in EU Law: Elspeth Guid, The Asylum Seeker's Right to Free Legal Assistance and/or Representation in EU Law, available at: <http://bit.ly/2upPjNO>; on the guarantees for legal aid under the EU Charter of Fundamental Rights: ECRE and the Dutch Council for Refugees, The Application of the EU Charter of Fundamental Rights to asylum procedural law, Chapter V, pp. 55-67, available at: <http://bit.ly/2uQ3dK7>
7. UNHCR, Executive Committee Conclusion No 8 (XXVIII) Determination of Refugee Status (1977), available at: <http://bit.ly/2vevzwi>
8. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1979) (re-edited 1992), para. 192, available at: <http://bit.ly/2trngo5r>

the asylum procedure.<sup>9</sup> Moreover, Article 16 of the **1951 Refugee Convention**<sup>10</sup> guarantees refugees equal treatment with nationals in matters pertaining to access to the courts, including legal assistance.

The **European Court of Human Rights (ECtHR)** has found in a number of cases<sup>11</sup> that the lack of legal aid can render a remedy under Article 13 ECHR inaccessible. In *M.S.S. v. Belgium and Greece*, the ECtHR noted that the applicant had no practical means of paying a lawyer and received no information on the organisations offering legal advice and assistance in Greece. This, coupled with the shortage of legal aid practitioners, meant he was unable to effectively access the asylum procedure and did not have access to an effective remedy. Therefore, the ECtHR found that there had been a violation of Article 13 taken in conjunction with Article 3. In *A.A. v. Greece*, the ECtHR found that the lack of legal aid for a detained Palestinian asylum seeker made the remedy available purely theoretical and, therefore, amounted to a violation of Article 5(4) ECHR.<sup>12</sup>

The Parliamentary Assembly of the **Council of Europe (CoE)** has acknowledged the necessity of providing legal aid for asylum applicants in Europe, particularly in accelerated asylum procedures and for those at border zones and in detention facilities.<sup>13</sup> The Committee of Ministers of the CoE has also called for the facilitation of effective access to legal aid for those in financial need.<sup>14</sup>

## EU LAW

The **EU Charter of Fundamental Rights (CFR)** is a source of primary EU law, which is binding on Member States when implementing EU secondary legislation, including obligations under the EU asylum *acquis*. Effective access to rights guaranteed by the Charter, including Articles 18 of the CFR (the right to asylum) and Article 19 of the CFR (the principle of *non-refoulement*), are contingent on the effective access to legal aid.

Article 47 of the CFR codified the EU *acquis* on effective judicial protection, bringing the right to an effective remedy (Article 13 ECHR) and that to a fair trial (Article 6(1) ECHR), under the same provision.<sup>15</sup> While Article 47(1) CFR mirrors Article 13 ECHR when it comes to the right to an effective remedy and should be applied in light of the relevant ECtHR jurisprudence, in Union law the protection is more extensive. The explanations to the CFR in relation to its Article 47(2) make it expressly clear that the standards and requirements of Article 6(1) ECHR apply in the interpretation of its provisions.

In other words, Article 47 CFR applies to matters of EU law, including migration and asylum, that are not governed by Article 6 as a matter of ECHR law.<sup>16</sup> It is clear that the explanations to the CFR explicitly extend the right to a 'fair and public hearing [...] within a reasonable time by an independent and impartial tribunal established by law' beyond 'disputes relating to civil law rights and obligations', to the right to 'being advised, defended and represented' and the right to be granted legal aid in situations where the person concerned 'lack[s] sufficient resources' and 'in so far as [it] is necessary to ensure effective access to justice'.<sup>17</sup> In sum, the protection enshrined in Article 47 applies to all rights contained in the Charter, including the right to asylum set out in Article 18 CFR and principle of *non-refoulement* set out in Article 19, and, therefore, guarantees the provision of legal aid to everyone lacking sufficient resources in order to ensure effective

9. See, among others: UNHCR, Global Consultations on International Protection, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, para. 50 (g), available at: <http://bit.ly/2rtjSl6>; UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice, March 2010, pp. 87-88, available at: <http://bit.ly/2eK0viU>.

10. Geneva Convention relating to the Status of Refugees, 1951, 189 UNTS 150, and its 1967 Protocol Relating to the Status of Refugees, 1967, 606 UNTS 267. Article 16 is generally understood as applying after refugee status recognition and in relation to civil proceedings. See commentary on Article 16: <http://bit.ly/2idFT1a>

11. ECtHR, *M.S.S. v. Belgium and Greece* [GC] (No. 30696/09), para. 319, available at: <http://goo.gl/7Ljxh2>. In *Sharifi and Others v Italy and Greece* (No. 16643/09), para. 173-181, available at: <http://goo.gl/Z4wSg2>, the lack of legal aid was also taken into consideration to find a violation of Article 13 in conjunction with Article 3.

12. ECtHR, *A.A. v. Greece* (No. 12186/08), para. 78, available at: <http://goo.gl/9MqZch>.

13. Council of Europe, Parliamentary Assembly, Resolution 1471(2005), Accelerated Asylum Procedures In Council of Europe Member States, para. 8.10.2, available at: <https://goo.gl/x84wQ1>

14. See Council of Europe, Committee of Ministers, "Recommendation No. R (93) 1 of the Committee of Ministers to Member States on effective access to the law and to justice for the very poor", available at: <https://goo.gl/tzjg3S>

15. Explanations Relating to the Charter of Fundamental Rights (2007/c 303/02), in particular references to: Case 222/84 Johnston [1986] ECR 1651; and others (Title VI, Explanations to Art. 47), available at: <https://goo.gl/GvmPof>

16. See e.g. Case C-199/11 *Europese Gemeenschap v. Otis NV and Others* [2012] ECLI:EU:C:2012:684, para 49; Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland* [2010] ECLI:EU:C:2010:811, para 60; see also International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: a Practitioners' Guide* (International Commission of Jurists 2006), 46-49.

17. European Union, Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1, Article 47, available at <http://bit.ly/2hx3nkV>.

access to justice.<sup>18</sup>

The **Court of Justice of the European Union (CJEU)** has also considered that access to legal aid is an important aspect of the general principle of effective judicial protection in EU law.<sup>19</sup> The CJEU has provided some guidance on the link between access to legal aid and Article 47 CFR.<sup>20</sup> It instructed national courts, when assessing whether the grant of legal aid is necessary to ensure compliance with the EU general law principle of effective judicial protection, to take into account, *inter alia*: the subject matter and importance of what is at stake for the applicant, applicants' capacity to represent themselves effectively, the complexity of the procedure, and the applicant's prospect of success. Except for the likelihood of success,<sup>21</sup> applicants for asylum would as a rule satisfy all the criteria listed.<sup>22</sup> Thus, effective access to legal aid is deemed necessary to ensure respect for the rights under the Charter including Articles 18, 19 and 47.

Pursuant to Article 20 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (hereinafter recast **Asylum Procedures Directive** or rAPD), applicants are entitled to free legal assistance and representation upon request in the case of a negative decision by the domestic authorities, in order to lodge an appeal and be represented at the appeal hearing. Member States may limit legal aid to those appeals with tangible prospects of success ("merits test") and to applicants without the financial means to cover the cost of their legal assistance ("means test"). According to Article 23 rAPD legal advisers must have access to the applicant's file and to clients if held in detention facilities or transit zones.<sup>23</sup>

The Commission proposal for an Asylum Procedures Regulation strengthens the right to legal aid by making it in principle mandatory at both stages of the procedure, including the first instance procedure, while keeping the possibility to make such assistance conditional on merits testing.<sup>24</sup>

### III. OBSTACLES TO EFFECTIVE ACCESS TO LEGAL AID IN SELECTED EUROPEAN COUNTRIES

Despite the safeguards at the international and European levels outlined above and research evidencing legal aid as being beneficial for both asylum applicants and asylum national authorities,<sup>25</sup> in practice access to legal aid for asylum applicants remains problematic in many European countries. This section provides an overview of the main obstacles and gaps in legal aid provision identified by legal practitioners in the ELENA Network.

#### LEGAL AID AT FIRST INSTANCE:

The existence of quality legal aid<sup>26</sup> at an early stage of the procedure shapes asylum applicants' understanding of their rights and obligations before asylum authorities. Early legal assistance also increases the confidence

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18. Explanations Relating to the Charter of Fundamental Rights, Title VI – Justice, Explanation on Article 47, Official Journal of the European Union C 303/17 - 14.12.2007, available at: <http://bit.ly/2tTOdGI>

19. *Ibid.* and, by analogy, CJEU, Case C-63/01, Evans and the Secretary of State for the Environment, Transport and the Regions, and The Motor Insurers' Bureau, judgment of 4 December 2003, para. 77; Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, judgment of 22 December 2010, para. 42.

20. ECRE and the Dutch Council for Refugees, The Application of the EU Charter of Fundamental Rights to asylum procedural law, Chapter V, pp. 63-64, available at: <https://goo.gl/4MJE1T>

21. Case C-279/09, DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, judgment of 22 December 2010, para. 61.

22. Elspeth Guid, The Asylum Seeker's Right to Free Legal Assistance and/or Representation in EU Law, pp. 20-23, available at: <http://bit.ly/2upPjNO>

23. ECRE's Comments on the European Commission Proposal to recast the Asylum Procedures Directive (May 2010), available here: <https://goo.gl/PQrTKH>

24. The European Commission's proposal for an Asylum Procedures Regulation here: <http://bit.ly/2pp5xCy> and ECRE's comments on this proposal here: <http://bit.ly/2oSYS2x>

25. Irish Refugee Council, Providing Protection: Access to early legal advice for asylum seekers (2014), available at: <http://bit.ly/117X9dz>

26. For more information on guiding principles for quality legal aid see: Information Centre about Asylum and Refugees, Review of quality issues in legal advice: measuring and costing quality in asylum work - Executive Summary, available at: <http://bit.ly/2zHl5GQ>; ECRE, Right to Justice: Quality Legal Assistance for Unaccompanied Children – Annex I, Guiding Principles for Quality Legal Assistance for Unaccompanied Children, available at: <http://bit.ly/2zAwACp>; ECRE/ELENA, Survey on legal aid for asylum seekers in Europe (2010), pp. 156-162, available at: <http://bit.ly/2oBIZIE>

of both parties in the asylum process and improves the quality of the asylum decision.<sup>27</sup> In the long term, early legal assistance for asylum applicants is deemed cost-efficient, as it reduces possible costs of detention or social support throughout longer asylum procedures.<sup>28</sup>

Yet, in many European countries (*CY, DE, EL, HU, IT, MT, PL, RS*) asylum applicants generally do not have access to legal aid at first instance in practice. In others, legal aid is insufficient (*AT, CH, RO*) or is limited to legal advice (*AT, FR, HR, HU, IE, PL, PT, RO*<sup>29</sup>, *England and Wales*), thus not usually covering representation at the interview.

In *HU*, asylum applicants are often unable to receive legal advice from NGOs, let alone accessing legal aid at first instance. In *SK*, legal aid is provided in reception centres for asylum applicants, but not in detention centres, where legal aid is provided to a limited number of asylum applicants by NGOs. In *FI*, the right to legal aid was restricted in September 2016 and no longer covers lawyers' participation in interviews, except when extraordinary reasons apply or if the applicant is an unaccompanied minor.

**Positive practice:** In *BE, ES, IS, NL*<sup>30</sup>, *NO, SE* and *SL* legal aid at first instance is generally available and also covers legal representation in the interview. In *CH*, while legal aid is not available at present, a new asylum system is foreseen for 2019 and will include access to legal aid at first instance. In *ES*, the Supreme Court has also, on numerous occasions, found a violation of the right to legal aid which is guaranteed in national legislation except where asylum applicants renounce it. That same Court has also ruled that administrative authorities must go beyond informing asylum applicants about the possibility to receive legal aid and must indicate in their asylum file whether they accept or reject legal aid.<sup>31</sup> In *SI*, legal aid is not guaranteed by law, but free legal assistance and representation is generally provided by the PIC (Legal-Informational Centre for NGOs) financed by the EU Asylum, Migration and Integration Fund (AMIF) and partly by the Slovenian government. This also includes representation in the interview.<sup>32</sup> In the *NL*, asylum applicants, as a general rule, meet with their assigned legal representative before the actual start of the asylum procedure. The legal representative prepares the asylum applicant for the interviews. Legal representatives get a fixed compensation for the first instance procedure and can choose to be present during the asylum interview (compensation is, however, the same whether they are present or not). In *PT*, legal aid providers are not present in asylum interviews (with the exception of interviews with asylum applicants who are children). However, legal advice provided at first instance by the Portuguese Refugee Council under an agreement with the Portuguese Government goes beyond mere initial advice and covers the revision of statements provided by the applicant to the authorities, preparation of legal requests to amend information given at interview, providing additional evidence and other contacts with the authorities. In *IS*, the provision of legal aid at the administrative procedure is considered of very good quality and is implemented by the Icelandic Red Cross through an agreement with the Ministry of Justice.<sup>33</sup>

## LEGAL AID AT THE APPEALS STAGE:

In a number of European countries (*EL, HU, RS*), legal aid is generally not provided at second instance in practice. In *CH*, the Asylum Act foresees legal aid upon request before the court, which decides on a case by case basis if legal aid will be provided. Furthermore, the Court applies a merits test. If the court considers the appeal as manifestly unfounded, the applicant will be asked to pay a fee in advance which will be paid back in case the appeal is successful. Independent legal advisory offices provide information on the chances of success of a possible appeal, if their assessment is positive, they may support the asylum applicant during the appeal stage. The legal advisory offices are not funded by the state, but by non-governmental organizations and churches. As previously indicated, a new and comprehensive legal aid system is expected

27. Irish Refugee Council, *Providing Protection: Access to early legal advice for asylum seekers* (2014), available at: <http://bit.ly/117X9dz>.

28. *Ibid.*, p. 16.

29. In Romania, free legal counselling and assistance is provided by NGOs through projects funded by the EU Asylum, Migration and Integration Fund (AMIF) scheme and UNHCR. The state legal aid system only covers legal counselling, not legal representation by a lawyer, during the administrative phase of the procedure.

30. In October 2017, different Dutch parties agreed to form a coalition government based on an agreement which includes changes to the asylum procedure and legal aid system. It is unclear when and to which extent the proposals, which have been severely criticised by NGOs, will be implemented. Yet, the proposal is to limit the availability of legal aid only from the moment an intention to reject an application is issued. If this proposal is agreed upon, legal aid would no longer cover assistance during first instance interviews or the possibility to amend interview statements before an intention to reject the application is made. More information is available at the *Verblijfblog* of the Vrije Universiteit Amsterdam, <http://bit.ly/2zW6x9n>, or at *Vluchtelingenwerk Nederland's* website at: <http://bit.ly/2zr7qqd> and <http://bit.ly/2jsXTIE>.

31. Supreme Court of Spain, Case STS 4316/2015, 19 October 2015, p. 4, available at: <https://goo.gl/BJdXEM>; Supreme Court of Spain, Case STS 2731/2008, 5 October 2015, available at: <https://goo.gl/F5SzkG>.

32. More information available in Slovene at the NGO's website: <http://bit.ly/2zloXWZ>.

33. See: Iceland's Directorate of Immigration, 'Rights and services for asylum seekers', at: <https://goo.gl/6k7h7b>.

to enter into force in CH in 2019.<sup>34</sup> In *EL*, a legal aid scheme has been recently introduced. However, the information available indicates that the number of lawyers currently part of the scheme is totally insufficient.<sup>35</sup> Moreover, under the Greek Ministerial Decision<sup>36</sup> legal aid is provided under EU funding, which has raised concerns about the financial sustainability of the scheme.<sup>37</sup> Prior to the entry into force of the legal aid scheme, only NGOs provided free legal assistance.<sup>38</sup> In *HU*, information on the right to legal aid, provided to asylum applicants by case officers lacks detail on what legal aid actually entails. Moreover, a major problem is that asylum applicants can hardly communicate with their lawyers as the legal aid system does not cover translation or interpretation cost,<sup>39</sup> which means that only very few can actually make use of the legal aid system. In *IS*, legal aid is provided in order to challenge a decision before the Immigration and Asylum Appeals Board, but is extremely limited for court proceedings (onward appeals). In *NO*, while legal aid is generally granted to all appeals, this is not the case where a person appeals to obtain refugee status rather than another form of international protection or where the rejection is based on the concept of “first country of asylum”. In *RS*, the State does not provide legal aid to asylum applicants, despite it being guaranteed by the Asylum Act.<sup>40</sup>

In other countries (*BG, CY, DE, IT*), legal aid is limited to representation in courts or is only available once the request passes a strict ‘merits test’ (*CY, DE, FR, IT, UK*). In practice, this might result in asylum applicants relying entirely on NGOs and volunteers for free legal advice and representation at the appeals stage.

**Positive practice and relevant case-law:** In *AT, DK, ES, MT, NL*<sup>41</sup>, *SI, SE* and *SK* legal aid at the appeals stage is provided without ‘merits’ or ‘means’ tests being applied. In *DE*, the Constitutional Court has ruled that, due to the lack of consistent jurisprudence and the complexity of the matter, the Administrative Court had erred in denying by means of a “merits test” the requests for legal aid by Syrian nationals who wished to appeal against the decision of the national authorities to grant them subsidiary protection instead of refugee status.<sup>42</sup> In *RO*, legal counsellors from NGOs help asylum applicants draft a request for legal aid to the competent court which in virtually all cases will grant legal aid. In *PT*, access to state-funded legal representation before the courts is guaranteed by the Portuguese Asylum Act and subject to a “means test”. However, the latter is applied in a flexible way and it is not considered an impediment to asylum applicants’ access to legal aid. Legal aid also includes assisting asylum applicants with submitting the request for legal representation before the courts. While legal aid at the appeal stage is subjected to a merits test, this has not resulted in a significant number of refusals of legal aid requests.

The Administrative Court of Austria ruled in September 2016 that legal advice and representation has to include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the asylum applicant.<sup>43</sup> Similarly, in March 2016 the Constitutional Court of Austria ruled that “representation” at the appeals stage, as defined in the Austrian legislation, means that those representing asylum applicants must act fully on their behalf beyond mere counselling and legal support.<sup>44</sup>

## LEGAL AID IN DUBLIN AND FAMILY REUNIFICATION PROCEDURES:

In addition to the general obstacles identified in the provision of legal aid during the regular asylum procedure, applicants falling under the Dublin and family reunification procedures are often subjected to more restrictive practices regarding legal aid. In some countries (*CY, DE, EL, HU, MT, PL, SE*) access to legal aid during the Dublin procedure at first instance is generally not available, whereas it is available during the regular procedure (*MT, SE*). In others, access to legal aid is met with various practical obstacles, such as short timeframes to lodge an appeal (*CH, DE, HU*) and insufficient time to study the case and prepare before a hearing (*AT*).

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34. AIDA Updated Report 2016: Switzerland, pp. 24-25, available at: <https://goo.gl/Xw9CMH>.

35. According to the information provided by the ELENA coordinators in September 2017, only 23 lawyers were a part of the legal aid scheme in order to provide legal aid to asylum applicants both on the islands and mainland.

36. Available, in Greek, at: <http://bit.ly/2kPSjzE>.

37. See more information on the legal aid scheme at ECRE’s website: <http://bit.ly/2u7GgPB>.

38. AIDA Updated Report 2016: Greece, pp. 47-48, available at: <http://bit.ly/2nwd9nA>.

39. AIDA Updated Report 2016: Hungary, pp. 23-25, available at: <http://bit.ly/2k3zGE9>.

40. AIDA Updated Report 2016: Serbia, p. 24, available at: <http://bit.ly/2pSRBA1>.

41. In *NL* the provision of legal aid at the appeals stage is subject to a means test, but this is almost always met in the case of asylum applicants.

42. Constitutional Court of Germany, Joint decision in case 2 BvR 351/17 and 8 other cases, 29 August 2017, available at: <https://goo.gl/8E3QDi>.

43. Administrative Court of Austria, Case 2015/21/0032, 3 September 2015, available at: <https://goo.gl/q3dFuW>.

44. Constitutional Court of Austria, Case G 447/2015, 9 March 2016, available at: <https://goo.gl/EYNP3Z>.

In *NL*, while asylum applicants under the regular procedure can meet with a legal representative before the start of the procedure, this is not the case for applicants in a Dublin procedure, where a legal representative is assigned only after the Dublin interview and an intention to reject the application has been issued (e.g. if another State is considered responsible for the application under the Dublin III Regulation). In the *UK*, legal aid is available for the judicial review of a Dublin decision in all jurisdictions – however, in England and Wales remuneration is reportedly uncertain as it is only guaranteed if the permission to bring a judicial review is granted, otherwise it is at the discretion of the Legal Aid Agency. With regard to family reunion appeals in the *UK*, these are publicly funded in Scotland, but not in England and Wales, where an application for funding on an exceptional basis would have to be made.

**Positive practice:** In *NO*, legal aid is granted to all applicants falling under the Dublin procedure and a “lawyer on duty” system is established to ensure that appeals can be made within the 48 hours deadline. In *PT*, the Portuguese Refugee Council provides assistance in family reunification procedures, drafts the necessary requests and helps applicants to request a legal aid lawyer in order to appeal against a negative decision.

## LEGAL AID IN BORDER PROCEDURES:

Additional challenges to obtain legal aid during borders procedures are identified in a large number of European states (*AT, BE, CZ, DE, DK, EL, ES, FR, HU, IE, NO, SK, UK*), even when it is generally available within the regular asylum procedure. In some states, this is due to obstacles to receive legal information and to access to lawyers in practice (*BE, ES, FR, HU, NO, UK*), problems with the quality of the legal aid provided (*BE, FR*) and/or due to short procedural timeframes under border procedures (*DE, EL, ES, FR, HU, PT, SK*). As reported in *CZ*, asylum applicants who are denied access to the territory<sup>45</sup> at the airport are also unable to receive legal aid due to the lack of access to the police facilities at the border. Similar problems have been identified at the Norwegian-Russian border where legal aid is not provided to those who crossed the border and are deemed to be safe from persecution in Russia under the “safe country” concepts.<sup>46</sup> The situation at the Spanish enclaves of Ceuta and Melilla is another example of the difficulties in accessing legal aid at the external borders in *Spain*.<sup>47</sup> Despite being required by law, asylum applicants have difficulty in accessing legal aid in the Spanish enclaves, both due to short procedural timeframes to lodge an appeal and to the recurrence of summary returns at the border. In *PT*, the provision of legal aid in the context of border procedures at first instance faces additional obstacles due to factors such as shorter timeframes, the lack of a legal obligation for the Immigration and Borders Service (SEF) to communicate the written report of the applicant’s interview to the legal aid provider, and the fact that the law does not allow the asylum seeker to provide a written reply to the interview record.

**Positive practice:** Despite the obstacles identified above, in *PT*, according to the Asylum Act,<sup>48</sup> the Immigration Borders Service shall immediately inform the UNHCR representative and the Portuguese Council for Refugees that an application for asylum has been lodged at the borders, which helps to ensure that asylum applicants at the borders are, at the very least, able to access legal aid provided by the Portuguese Council for Refugees.

## ACCESS TO LEGAL AID IN THE ACCELERATED PROCEDURE:

The recast Asylum Procedures Directive envisages the possibility of applying special procedures to accelerate the examination of certain categories of asylum applications, such as manifestly unfounded or subsequent applications. This may have important repercussions on asylum applicants’ access to legal aid in practice, especially when legal aid is subject to a “merits test” and when circumscribed timeframes apply.

Legal aid during the accelerated procedure is generally or mostly unavailable in practice in a significant number of states (*BG, CY, DE, EL, HU, MT*). In others (*BE, FR, IE*), while it is normally available, access might be hindered largely because of short procedural timeframes. In *FI*, the fixed fee paid to private counsels working under the legal aid system is reduced for cases falling under an accelerated procedure. In *NL*, the fees paid to lawyers working under the legal aid system is considerably reduced in the case of subsequent

45. ECRE/ELENA Case Law Note on Access to the Territory and the Asylum Procedure, April 2017, available at: <https://goo.gl/RtFM5o>.

46. Not only legal aid, but also legal assistance paid by the applicant is also generally not available due to the remoteness of the border.

47. The 2017 Annual Report by the Spanish Commission for Refugees (CEAR), pp. 66-75, available at: <https://goo.gl/NjcMk4>. ECtHR: *N.D. and N.T. v Spain* (Applications Nos. 8675/15 and 8697/15), para. 120, 3 October 2017, available at: <https://goo.gl/qyUPPt>.

48. The Portuguese Asylum Act (Act 27/2008 of June 30, amended by Act 26/2014 of May 5), Article 13(3), available in English at: <https://goo.gl/qgf5UN>.

applications,<sup>49</sup> which is a disincentive for lawyers to take up such cases due to the high cost of running a law firm in the country.

**Positive practice:** In *NO*, a “lawyer on duty” system is established to secure that legal aid is provided for applicants channelled in the accelerated procedure.

## ACCESS TO AND QUALITY OF LEGAL AID FOR UNACCOMPANIED CHILDREN THROUGHOUT THE ASYLUM PROCEDURE:

The vulnerability of unaccompanied asylum-seeking children and their need to receive special assistance by national authorities has been firmly established in international and European law.<sup>50</sup> While the legal representation of unaccompanied children is laid down by law in most states covered in this note,<sup>51</sup> substantial problems have been reported in relation to access to state-funded legal assistance and representation by unaccompanied children in the asylum procedure in practice (*BE, BG, CY, DE, EL, FR, HR, IT, MT, PL, SK, UK*). This is in most cases due to the overburdening and insufficient number of guardians available, who are supposed to apply for legal aid on behalf of the child; and due to a lack of specific knowledge of asylum law by guardians or their unclear role in the asylum procedure (*AT, BG, CH, CY, DE, EL, HR, IT, PL, SK*). In *HU*, asylum seeking children below the age of 14 are accommodated in open reception centres do not receive state-funded legal aid, but receive legal advice from NGOs. However, those aged between 14 and 18 years old are detained in the transit zones and usually are unable to meet with lawyers or legal guardians before their asylum interview.

**Positive practice and relevant case-law:** The Swiss Federal Administrative Court has ruled<sup>52</sup> that, although the national provisions prioritise asylum procedures for unaccompanied children, the available timeframes cannot be unduly short and that those providing legal assistance to children should be given enough time to prepare for the interview. To assess whether minors were sufficiently prepared for the interview, the Court considered it necessary to evaluate whether the applicant understands what asylum means, the importance of the interview, and what is expected of him or her during the asylum procedure.

In *CY*, so far all unaccompanied children have been provided with legal aid at the appeal stage by the national Commissioner for Children’s Rights in 2017, who allocates cases to private lawyers previously trained by the Commissioner. In *FI*, legal aid does not usually cover a lawyer’s presence at the interviews for adult asylum applicants, but this is covered in case of an unaccompanied asylum-seeking child. In *PT*, the Portuguese Refugee Council (acting as a legal aid provider) runs a dedicated centre for asylum seeking children and ensures that they are assisted and accompanied by a Legal Protection Officer in the interview before the asylum authorities.

## LEGAL AID FOR ADULT ASYLUM APPLICANTS WITH SPECIAL PROTECTION AND RECEPTION NEEDS:

The lack of predetermined mechanisms to identify asylum applicants with special protection needs,<sup>53</sup> such as those with mental or physical disabilities, has been generally acknowledged as an important protection gap and has a negative impact on applicants’ access to legal aid.<sup>54</sup> In *CZ*, this is particularly the case at airport police centres, where detention decisions are issued immediately upon arrival, typically before any interview

49. Please note that there is no accelerated procedure per se in the Netherlands. However, since subsequent applications are subject to a swifter examination procedure, they have been included under this section for the purpose of this Note. For more information, please see: AIDA Updated Report 2016: Netherlands, p. 36, available at: <https://goo.gl/kLYTK2>.

50. Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (No. 13178/03) and CJEU: C-648/11, The Queen, on the application of MA and Others v. Secretary of State for the Home Department, 6 June 2013. See also: ECRE, Comparative Report: Right to Justice: Quality Legal Assistance for Unaccompanied Children (2014), pp. 9-11, available at: <http://bit.ly/2vSDEF0>; EU Fundamental Rights Agency (FRA), Current migration situation in the EU: separated children (2016), available at: <http://bit.ly/2usGQrh>; and Chapter 9 of FRA’s “Handbook on European Law relating to the rights of the child” (2015), available at: <http://bit.ly/1QSWxyp>.

51. The content, quality and accessibility of the provisions that guarantee the legal representation of unaccompanied minors throughout the asylum procedure vary considerably among European states. See AIDA country reports for detailed information at <http://www.asylumineurope.org/>.

52. Swiss Federal Administrative Tribunal, Decision D-7700/2015, 22 August 2016, available at: <https://goo.gl/ks2asn>.

53. Article 2(d) of the recast Asylum Procedures Directive defines an “applicant in need of special procedural guarantees” as “whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances”.

54. ECRE/AIDA, “The concept of vulnerability in European asylum procedures”, August 2017, available at: <https://goo.gl/4nW3iT>.

or any access to legal aid can happen, in violation of the Czech Aliens Act which allows vulnerable persons access to the territory and requires their transfer to a more suitable facility.

**Positive practice and relevant case-law:** In FI, as it is the case for unaccompanied asylum-seeking children, legal aid covers the presence of a lawyer at the interview in case of applicants with special needs (for instance, traumatised victims of torture and illiterate individuals), whereas such presence is not covered in other cases. In *England* and *Wales*, it might be possible to obtain permission to represent an adult with mental health problems or learning difficulties at the first-instance interview under the legal aid scheme.

## ACCESS TO LEGAL AID IN DETENTION FACILITIES:

Access to legal aid for asylum applicants in detention is essential to protect them from arbitrary detention. It is also crucial since persons in detention often face more obstacles when applying for asylum.<sup>55</sup> In some countries (*CY, EL, ES, SK, UK*), a substantial number of detainees do not have access to legal aid in practice. In others (*MT, UK*), recurring problems have been reported regarding the conditions in detention facilities, which pose practical challenges to the provision of legal aid (e.g. inadequate facilities or privacy concerns). For instance, while detained asylum applicants have access to legal aid in *NO*, privacy concerns have been reported at Trandum detention centre in *NO*. In practice, detained asylum applicants quite often do not have effective access to legal aid to review a decision to detain in a considerable number of countries (*BG, CH, CY, DE, EL, HU, PL, UK*), while in others, practical challenges include insufficient time to initiate appeal proceedings (*AT, ES, SE*).

**Relevant case-law:** In *Suso Musa v. Malta*, the ECtHR found that, although the authorities were not obliged to provide free legal aid in the context of detention proceedings, the lack thereof may raise an issue as to the accessibility of effective remedies.<sup>56</sup> In that case, the ECtHR also criticised “the apparent lack of a proper system enabling immigration detainees to have access to effective legal aid”.<sup>57</sup> In the *UK* the Court of Appeal ruled that the “detained fast-track procedure”, which was suspended in June 2015, did not strike a balance between speed and fairness, in light of the practical difficulties when trying to fulfil the procedural requirements of lodging an appeal and having limited access to legal aid while detained.<sup>58</sup> The Constitutional Court of the *Czech Republic*, in a pre-removal detention case, ruled that no effective remedy was available to the detainees against a real risk of breach of Articles 2 and 3 ECHR because of the lack of access to legal aid. It also considered that the presence of NGOs in detention centres alone did not meet the State’s obligation to guarantee access to legal advice and representation.<sup>59</sup>

## BUDGET CUTS AND COMPLEX ADMINISTRATIVE RULES:

Complex administrative rules can be an impairment to asylum applicants’ access to legal aid in practice. In order to ensure that legal aid is available in practice, it is paramount that national authorities provide clear and sufficient information to asylum applicants regarding the national legal aid system and their rights and obligations under that system.

A high-quality, fair and efficient national system for the provision of legal aid during the asylum procedure is fundamental to ensure that those providing legal aid are able to properly conduct their work, to which they should be fairly compensated. Nonetheless, problems such as uncertain, insufficient or complex financing have been widely identified (*AT, BE, CH, DE, FI, FR, HU, IT, MT, PL, RO, SE, UK* (particularly in *England* and *Wales*)). Recent governmental reduction in legal aid funding has also severely impacted the provision of legal aid (*PL, UK*).

**Positive practice and relevant case-law:** As previously mentioned, in 2019 a new Swiss asylum system will enter into force, which will provide legal aid to all asylum applicants, both during the regular and admissibility procedures. The amendment is expected to solve many of the current complexities regarding financing and

55. AIDA Legal Briefing No 4 “The Legality of Examining Asylum Claims in Detention from the Perspective of Procedural Rights and their Effectiveness” (October 2015), available at: <http://bit.ly/2rmlwwd>.

56. ECtHR: *Suso Musa v Malta* (Application No. 42337/12), 23 July 2013, available at: <http://bit.ly/2q95Bpl>, summary available at EDAL: <http://bit.ly/2qbZhgq>.

57. *Ibid*, para. 61.

58. UK Court of Appeal, *The Lord Chancellor (appellant) v Detention Action (respondent) and the Secretary of State for the Home Department (interested party)*, C4/2015/2134, 29 July 2015, summary available at EDAL: <http://bit.ly/2qOhiD8>. See also: Human Rights Law Centre: “Fast Track screening of refugee claims unlawful” at: <http://bit.ly/2r98nPY>.

59. Czech Republic, Constitutional Court, I. ÚS 630/16, 29 November 2016, available at: <http://bit.ly/2rsXgkE>.

reimbursement of legal aid in the country.

## IV. ECRE / ELENA NETWORK RECOMMENDATIONS

Access to quality legal aid is an indispensable feature of a fair asylum system and safeguard against erroneous decisions and arbitrariness. ECRE/ELENA firmly believes that the provision of legal aid is crucial to safeguard the fundamental rights of people applying for asylum and is beneficial to both applicants/beneficiaries of international protection and asylum authorities. Access to legal aid at an early stage of the asylum process not only enhances the fairness and efficiency of the procedure, it may also reduce financial costs by strengthening the quality of decisions with the potential reduction of appeal rates. Importantly, it enables asylum applicants to fully understand their rights and obligations during the procedure and helps to establish trust in the asylum authorities, which is essential to ensure quality and efficiency in decision-making.

For that purpose, ECRE/ELENA call on European states to ensure that legal aid is provided to all asylum applicants without sufficient means, at all stages of the asylum procedure and regardless of the specific asylum procedures that they may fall under.

ECRE/ELENA call on European states to ensure access to quality legal aid for asylum applicants by implementing the following recommendations:

### Legal aid at all stages of the asylum procedure:

- » Along with quality legal information regarding the asylum procedure and their relevant rights, asylum applicants must receive timely information on the system in place to appoint and contact a lawyer, in a language they understand.
- » Before any action or decision being taken that may adversely affect their rights, asylum applicants shall have the right to effective and confidential access to competent legal assistance and representation, including by an independent lawyer of their own choosing.
- » In case they lack sufficient resources to avail themselves of legal assistance and representation, quality legal aid should be made available to them at all stages of the asylum procedure.
- » Legal aid at the earliest stage is vital to guarantee a fair and efficient asylum procedure, and must include the preparation and the submission of an asylum application.
- » Legal aid should cover the presence of a lawyer or a legal advisor at asylum interviews at first instance. Legal aid providers must be permitted to accompany asylum applicants to all interviews, with a possibility to postpone in case the legal aid provider is unable to attend due to circumstances beyond their control. Their presence should be mandatory for interviews with asylum applicants with special protection needs, including unaccompanied children.
- » Legal aid should be ensured not only for the initial appeal but also for any onward appeal. This should include both preparations for the appeal as well as the legal representatives' participation in any appeal hearing.

### Merits and Means testing:

- » Access to legal aid should not be subject to a 'merits' test so as not to hinder access to an effective remedy, accessible in law and in practice, in line with the fundamental rights safeguards under international and EU law.
- » Where States apply a means test this should be based on the presumption that asylum applicants do not have sufficient resources to afford legal assistance and representation outside the legal aid system, unless there is clear evidence to the contrary. Moreover, if a State applies a means test, the threshold must not be set too low and shall only take into consideration funds to which an asylum applicant has access. The assessment of the available means for the purposes of a means test shall not be intrusive and shall respect the privacy of the applicant, family, friends and other persons involved.
- » If an asylum applicant is able to partially cover the cost of legal assistance and representation, a contribution-based system should be in place, rather than exclusion from the legal aid system entirely.
- » Rules on the reimbursement of legal aid where asylum applicants have knowingly concealed their own financial resources should only include sanctions which are proportionate to the offence and an

applicant involved should have access to an effective remedy in order to challenge the decision.

Legal aid in special procedures:

- » Asylum applicants in border procedures should have prompt access to legal aid in order to be enabled to submit and substantiate their asylum application effectively and before any action or decision is taken that may adversely affect them.
- » In order to ensure effective access to legal aid, legal aid providers should be granted unimpeded and confidential access to asylum applicants at the border and in transit zones. This also involves the relevant border authorities informing legal advisors of the presence of asylum applicants at the border and allowing legal advisors and lawyers to meet with asylum applicants before the interviews and to participate in any asylum interviews held at the border.
- » Where States apply accelerated procedures, legal aid should always be made available particularly to appeal the decision to process the application as a manifestly unfounded claim. In accelerated procedures, sufficient time must be given to asylum applicants and their legal representatives to consult before the interview with decision-making authorities.
- » In case asylum applicants are detained, a legal aid provider must be automatically appointed both for the purposes of legal aid concerning their asylum application and review of their detention. Privacy and effective communication between legal representatives and their clients should be ensured.
- » Legal aid must be made available for appeals against transfers under the Dublin system. Legal representatives must be given sufficient time to consult with their clients in order to challenge Dublin transfers effectively and must be informed of any request of information or take charge or take back requests to other Member States. Timeframes to appeal against a Dublin transfer cannot be so strict as to render impossible the provision of high-quality legal aid.

Legal aid resources:

- » Sufficient public funding should be available to ensure that all legal aid providers can effectively provide free legal assistance and representation to asylum applicants.
- » States must ensure that free high-quality interpretation and translation services are available to ensure effective communication between legal aid providers and asylum applicants.
- » Where the number of legal aid providers is insufficient to cover the demand, States must take positive actions to increase their capacity while ensuring, at the same time, the quality of the legal aid service.
- » States must maximise the proportion of the legal aid budget spent on assisting asylum applicants and reduce costs related to administering the legal aid system as much as possible. Legal aid systems should not act as a disincentive for lawyers to take challenging and resource-intensive cases.
- » Lawyers providing legal aid should be promptly and fairly paid. All legal aid providers should receive both initial and ongoing training in refugee and human rights law, as well as other special training necessary to ensure the provision of quality legal aid to asylum applicants.