



**ECRE Comments on the Regulation of the European Parliament
and of the Council establishing a common procedure for
international protection in the Union and repealing Directive
2013/32/EU**

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Table of contents

Table of contents	2
Summary	1
Introduction	12
Analysis of Key Provisions	14
Chapter I: General Provisions	14
Article 3: Scope	14
Article 4: Competent authorities.....	16
Article 5: Assistance	19
Article 6: The role of the United Nations High Commissioner for Refugees (UNHCR).....	20
Chapter II: Basic Principles and Guarantees.....	22
SECTION I – RIGHTS AND OBLIGATIONS OF APPLICANTS	22
Article 8: General guarantees for applicants	22
Article 9: Obligations of applicants	22
Article 10: Right to remain during the administrative procedure.....	24
SECTION II – PERSONAL INTERVIEWS.....	26
Articles 11 to 14: The right to a personal interview	26
Article 13: Requirements for personal interviews	26
Article 14: Reporting and recording of interviews.....	30
SECTION III – PROVISION OF LEGAL COUNSELLING, LEGAL ASSISTANCE AND REPRESENTATION.....	31
Article 15: Right to legal counselling, legal assistance and representation.....	31
Article 16: Free legal counselling in the administrative procedure	32
Articles 17: Free legal assistance and representation in the appeal procedure.....	35
Article 18: Scope of legal counselling, legal assistance and representation and Article 19: Conditions for the provision of free legal counselling, assistance and representation.....	35
SECTION IV – SPECIAL GUARANTEES	36
Article 20: Assessment of the need for special procedural guarantees	36
Article 21: Applicants in need of special procedural guarantees.....	36
Article 23: Special guarantees for unaccompanied minors	38
Chapter III: Administrative Procedure.....	39
SECTION I – ACCESS TO THE PROCEDURE.....	39
Articles 26 to 28: the three stages to access the procedure	39
Article 26: Making an application for international protection	40
Article 27: Registering applications for international protection.....	42
Article 28: Lodging of an application for international protection.....	43
Article 29: Documents provided to the applicant	46

Article 30: Access to the procedure in detention facilities and at border crossing points	48
SECTION II – EXAMINATION PROCEDURE.....	50
Article 34: Examination of applications.....	50
Article 35: Duration of the examination procedure	51
SECTION III – DECISIONS ON APPLICATIONS	58
Article 36: Decisions on applications and Article 37: Rejection of an application and issuance of a return decision.....	58
Article 38: Decision on the admissibility of the application	59
Article 38(2): inadmissibility subsequent applications	63
Article 39: Decisions on the merits of an application	63
Article 40: Explicit withdrawal of applications	64
Article 41: Implicit withdrawal of applications	64
SECTION IV – SPECIAL PROCEDURES.....	67
Article 42: Accelerated examination procedure	68
Article 42(3): Unaccompanied children in accelerated examination procedures	73
Article 43: Conditions for applying the asylum border procedure.....	74
Article 44(2) prioritisation when adequate capacity has been reached.....	77
Article 44(3): prioritisation in the border procedure	77
Article 45: Mandatory application of the asylum border procedure	77
Article 46 to 50: Adequate capacity	79
Article 46: The adequate capacity at Union level	80
Article 47: The adequate capacity of a Member State	80
Article 48: Measure applicable in case the adequate capacity of a Member State is reached	82
Article 49: Notification by a Member State in case the adequate capacity is reached.....	82
Article 50: Notification by a Member State in case the annual maximum number of applications is reached	82
Article 51: Deadlines.....	85
Article 52: Determination of the Member State Responsible.....	86
Article 53: Exceptions to the asylum border procedure.....	86
Article 54: Locations for carrying out the border procedure	89
Article 55: Subsequent applications	90
Article 56: Exception from the right to remain in subsequent applications.....	93
SECTION V – SAFE COUNTRY CONCEPTS	93
Article 57: The notion of effective protection	94
Article 58: The concept of first country of asylum.....	95
Article 59: The concept of safe third country	97
Article 61: The concept of safe country of origin	101
Articles 60 to 64: Designation of safe countries	103
Article 64: Designation of third countries as safe third countries or safe countries of origin at national level.....	103

Chapter V: Appeal procedure..... 105

- Article 67: The right to an effective remedy 106
- Article 67(7): Deadlines for appealing a decision 106
- Article 68: Suspensive effect of appeal 106
- Article 70: Duration of the first level of appeal 108

Summary

Summary of key provisions

Chapter I: General Provisions

Article 3: Scope and definitions

The scope of the Asylum Procedures Regulation (APR) covers applications made in the territory of the Member States, including at the border, on the territorial sea and in transit zones. The APR does not apply extraterritorially, leading to questions on its applicability in relation to plans for external processing of asylum applications. For example, the Italy-Albania arrangement is based on the state applying national law, with the applicants under Italian jurisdiction, while avoiding a situation in which the people affected are on Italian territory because EU law including the APD (and later the APR) would then apply.

At Article 3(14) and in the Recitals, definitions of vulnerability are included. As with the recast RCD, the terminology has shifted further away from explicit references to vulnerability. The overall category is “applicant in need of special procedural guarantees” which is not identical to “vulnerable applicants”, as there may be applicants in need of special procedural guarantees who are not vulnerable and vice versa. Nonetheless, jurisprudence and practice in relation to vulnerability should still apply. Although probably the opposite of the intention behind the shift in terminology, a larger number of applicants may be covered. There is additional complexity, however, compounded by the refusal to legislate for clear-cut exemption of vulnerable applicants from special procedures. Instead, a series of tests must be applied, to assess first whether applicants have special needs and then whether these needs can be met in the applicable procedure.

The change in the definition of subsequent application to encompass new applications made in any Member State is perhaps the most significant change in definition from the APD to the APR (see below).

Article 4: Competent authorities

The Member States must designate a single determining authority to be responsible for status determination, respecting the requirements set out in the APR. The Article defines and separates out other responsibilities in the asylum procedure, including the responsibilities to receive and to register applications. The obligation to receive applications must be allocated at a minimum to the four authorities listed. Member State may provide that an authority other than the determining authority is charged with determining the Member State responsible which involves applying the rules in the AMMR. ECRE argues that determination of responsibility should be exclusively allocated to the determining authority but that competence for receiving and registering applications should be expanded to all relevant authorities in order to support better access to the procedure.

Article 5 – Assistance

New provisions cover assistance provided to the Member State for the tasks of receiving, registering and examining applications (but not for status determination), referring to assistance from experts deployed by the EUAA (as per the EUAA Regulation), and support from the authorities of other Member States arranged on a bilateral basis. ECRE believes that the deployment of experts under the auspices of the EUAA is usually preferable to bilateral deployment because it offers a stronger guarantee that the assistance meets EU standards, along with other advantages such as contributing to a convergence of decision-making.

Article 6: The role of the United Nations High Commissioner for Refugees (UNHCR)

The role of UNHCR is replicated from the APD, obliging Member States to allow UNHCR to have access to applicants and to information on individual applications (with the applicant's consent) and allows UNHCR to present its views on individual applications. The same rights are granted to any organisation working "on behalf of UNHCR pursuant to an agreement with that Member State." ECRE urges UNHCR to make use of these provisions and to support access for implementing partners, especially given the expanded use of detention.

Chapter II: Basic Principles and Guarantees

SECTION I – RIGHTS AND OBLIGATIONS OF APPLICANTS

Article 8: General guarantees for applicants

As per the APD, Article 8 provides that applicants shall be informed "in a language which they understand or are reasonably supposed to understand" of their rights and obligations. They must also be informed of the consequences of not complying with obligations "particularly as regards explicit or implicit withdrawal" and on the rights to free legal counselling and to legal assistance and representation. As an additional safeguard for the applicant, they "shall be given the opportunity to confirm" that they have received the information.

Article 9: Obligations of applicants

The obligations of applicants are expanded compared to the APD, including, first, that the applicant is obliged to make their application in the country where they are required to be present according to AMMR Article 17(1) and (2). Second, the competent authorities may require that the applicant or their possessions be searched, although this can only be when "duly justified". Third, the duty to cooperate is expanded. If the applicant fails to meet certain of these obligations, one of the most significant consequences will be implicit withdrawal of the asylum application. The APR should be read in conjunction with the recast RCD according to which reduction or withdrawal of reception conditions are variously required or allowed when the applicant does not meet procedural obligations.

Article 10: Right to remain during the administrative procedure

The position of the applicant is strengthened with the reference to the applicant's "right" to remain on the territory rather than them being "allowed" to remain as per the APD. Nonetheless, the right to remain is limited to the territory of the Member State where the applicant is "required to be present" in accordance with Article 17(4) of the AMMR, which is a significant restriction. Article 10 in combination with Articles 3, 55 and 56 also extends the exceptions to the right to remain to cover a greater number of subsequent applications, which are now defined as new applications made in any Member State. ECRE argues that revoking the right to remain in the territory pending the examination of a subsequent application undermines the principle of *non-refoulement*.

SECTION II – PERSONAL INTERVIEWS

Article 13: Requirements for personal interviews

Only the determining authority can carry out the interview, although they may be assisted by others. The requirements for the personal interview include confidentiality; the presence of interpreters, mediators, and legal advisors; and a level of competences and training for the responsible personnel.

The determining authority may hold the interview by video conference "where duly justified by the circumstances". In Recital (15) a non-exhaustive but short list of circumstances is provided, suggesting that this should not be common practice. The Member State is required to respect the procedural guarantees, "taking into account guidance from the EUAA."

As in the APD, the interview may be omitted when a positive decision on the merits or admissibility can be taken on the basis of evidence or when the applicant is unfit. The Article expands the circumstances in which the interview may be omitted to two cases. First, subsequent applications where a preliminary examination is carried out on the basis of a written statement because there are no new elements (Article 13(12)(d)). Second, cases where the determining authority considers the application inadmissible pursuant to Article 38(1)(c) (another Member State has granted international protection) (Article 13(12)(e)).

The safeguards for personal interviews throughout Articles 11, 12 and 13 are undermined by Article 13(15), which states that “provided that sufficient efforts have been made to ensure that the applicant has been afforded the opportunity of a personal interview, the absence of a personal interview shall not prevent the determining authority from taking a decision on the application for international protection”. The clause exists in the APD but it allows for fewer situations in which the interview may be omitted.

Article 14: Reporting and recording of interviews

There are three options for the reporting of the personal interview: “a thorough and factual report containing all the main elements”; a transcript of the interview; or a transcript of the recording of the interview. ECRE recommends that responsibility for the reporting and recording of the interview should be conferred on the determining authority.

SECTION III – PROVISION OF LEGAL COUNSELLING, LEGAL ASSISTANCE AND REPRESENTATION

Article 16: Free legal counselling in the administrative procedure

The APR introduces the right to free legal counselling for asylum applicants in the administrative procedure. Legal counselling is a new term in EU law and the text provides no definition for it, but rather sets out the elements and requirements for states to meet.

On the basis of the requirements listed in the APR, ECRE proposes the following definition: legal counselling is the provision of legal advice and guidance by a lawyer on procedural and substantive issues related to an asylum application during the administrative procedure, including assistance with the lodging of the application, support during the preparation for the first-instance interview and guidance on any legal issues arising throughout the procedure. The APR requires that legal counselling is provided throughout the administrative procedure, from the making of the application to the decision, and on any legal issue that arises. More information on the standards required for free legal counselling in the administrative procedure and free legal assistance and representation at the appeal stage, can be found in ECRE’s Legal Note 16, 2024.

At Article 76, the APR provides that EU funding will be used to support legal counselling. ECRE argues that the European Commission and the EUMS should interpret “putting in place” legal counselling under Article 76 as meaning all elements of the provision of legal counselling, including support for legal fees.

ECRE continues to advocate for free legal assistance and representation in the administrative procedure in line with the frontloading approach.

Articles 17: Free legal assistance and representation in the appeal procedure

The APR maintains the right to free legal assistance and representation at the appeal stage, but also unfortunately maintains the merits test.

SECTION IV – SPECIAL GUARANTEES

Article 20: Assessment of the need for special procedural guarantees

Provisions on the assessment of special needs are more detailed than in the APD and include a clarification of existing rules and stricter timelines. An obligation is placed on the authorities to identify whether an applicant “presents first indications” that they might require special procedural guarantees. After that, the assessment should start as soon as possible. Visible signs, statements, behaviours, and documents should all be taken into account and medical practitioners may be involved. The assessment should be concluded as soon as possible and at least within 30 days.

Article 21: Applicants in need of special procedural guarantees

When the applicant is identified as in need of special procedural guarantees than the authorities must provide them with “the necessary support” in order that they can benefit from the rights and comply with their obligations under the APR. Recital (20) provides indications as to what necessary support consists in, stating that it is provided “in order to create the conditions necessary for the genuine and effective access to procedures.”

Where the necessary support cannot be provided in the accelerated procedure or border procedure, the authorities must not apply the procedure. ECRE argues that the text and relevant jurisprudence create a strong presumption that special procedures are not suitable for applicants in need of special procedural guarantees. ECRE further recommends that Member States exempt these applicants from special procedures as a general practice in order to reduce the administrative burden.

Article 23: Special guarantees for unaccompanied minors

While Article 22 on guarantees for minors is short and largely reiterates the provisions of the APD and of case law on the application of the best interest principle, Article 23 is extensive and includes useful new detail on the guarantees for unaccompanied children. In particular, it includes provisions aimed at ensuring consistency with the recast RCD on the appointment and responsibilities of the representative of the child. Representing and assisting the child, the representative is there to enable the child to benefit from the rights and comply with the obligations under the APR.

Chapter III: Administrative Procedure

SECTION I – ACCESS TO THE PROCEDURE

Articles 26 to 28: the three stages to access the procedure

The APR consolidates the approach to accessing the procedure based on three stages: the making, registering and lodging of the application for international protection. In so doing, it removes some of the ambiguity from the legal framework and incorporates jurisprudence, however, the procedure is rendered more complicated from the perspective of the applicant. In addition, the APR changes or adds timelines for each stage of the administrative (first instance) procedure.

A major implementation gap in the CEAS concerns unlawful denial of access to the procedure. Article 26 seeks to rectify this by stipulating when an application is made and from when and to when the person is considered an applicant. Their status as an applicant entails certain obligations for the state, such as provision of reception conditions. There remains a risk that denial of access to a procedure will continue in cases where the person expresses their desire to receive protection to an authority which is not competent for reception or registration. An additional risk to the applicant is the lack of an obligation to provide evidence of the making of the application, see section on documents below.

ECRE recommends that all authorities likely to have contact with applicants are designated as competent authorities for the purpose of receiving applications and that the responsibility for registration is expanded beyond the determining authority to support quicker access to a procedure.

SECTION II – EXAMINATION PROCEDURE

Article 34: Examination of applications

The role of the determining authority is reinforced and Article 34 sets out the rules it should follow for the regular procedure. It allows for but does not require prioritisation of certain caseloads, with prioritisation here meaning examination before other previously made applications. ECRE recommends that manifestly founded cases and cases of vulnerable applicants should always be prioritised.

Article 35: Duration of the examination procedure

The APR introduces or adjusts deadlines for the issuing of decisions by the authorities. Extensions are possible due to disproportionate numbers, complex issues of fact or law, or where the delay is due to a failure of the applicant to comply with obligations. Extensions are a measure of last resort and before applying them, Member States should avail themselves of the support of the EUAA.

For the regular procedure, the deadline is reduced to 6 months from the lodging, with the possibility to extend by another six months. ECRE considers this a reasonable time period, however notes that Member States often fail to meet the longer deadlines provided for by the APD, meaning that more resources will be required to respect the rules.

For special procedures – inadmissibility assessments, accelerated procedures, and border procedures – the time limits are short. For inadmissibility assessments, for decisions made on all but one of the inadmissibility grounds, the deadline is two months with the possibility to extend by another two months in the standard three cases of disproportionate arrivals, complex issues of fact or law, or due to a failure of the applicant to comply with their obligations. For inadmissibility decisions taken on the basis of Article 38(1)(e) (reapplying after a return decision with failure to meet the seven-day deadline), then the deadline is 10 working days.

The deadline for the accelerated procedure is three months with no extension. For the border procedure, the deadline for providing a decision is 12 weeks, which can be extended to 18 weeks in certain circumstances when the Crisis Regulation is in use. If the border procedure follows a transfer from another Member State, the deadline is 16 weeks.

ECRE raised concerns about the quality of examination likely to be provided given such short time limits, and argues that failure to meet the deadline should lead automatically to transfer to the regular procedure to avoid a situation where applicants are left in limbo.

SECTION III – DECISIONS ON APPLICATIONS

Article 36: Decisions on applications and Article 37: Rejection of an application and issuance of a return decision

The APR provides that the return decision shall be issued as part of the decision rejecting the application for international protection or in a separate act but one that is issued at the same time and “together with” the decision rejecting the application for international protection, or “without undue delay thereafter”. ECRE raised its concerns about this provision because the return decision requires a wider examination than a decision on an application for international protection. States’ obligations under EU primary law, international human rights law and relevant national constitutional provisions remain in place, meaning that people cannot be deported to situations where their human rights will be violated. In addition, the granting of national protection statuses is possible where they exist in national law. Recital (9) underlines that the APR can also be used in relation to other forms of protection in national law.

Article 38: Decision on the admissibility of the application

The determining authority may assess the admissibility of an application and it “may be authorised under national law” to reject the application as inadmissible on five grounds: applying the first country of asylum concept; applying the safe third country concept; where protection has been granted by another Member State; where safe relocation has or will be provided by an international criminal court; and when a return decision has been issued and the applicant has failed to comply with the seven-day deadline to re-apply (so long as the applicant was informed of the deadline and no new elements have arisen).

ECRE is opposed to the use of admissibility assessments because all applicants should have access to an in-merits examination of the asylum claim, otherwise a strong risk of *refoulement* pertains.

In admissibility assessments, the first country of asylum and safe third country concepts can be applied as grounds for inadmissibility only “unless it is clear that the applicant will not be admitted or readmitted to that country”. This is an important safeguard, reiterated in Recital (53), which reduces the risk that (over)use of the concepts as part of an admissibility assessment leaves applicants in limbo. An important recent judgment of the CJEU underlines that when an applicant will not be (re)admitted an inadmissibility decision must not be issued.

Article 38(2): inadmissibility – subsequent applications

The APR provides that the Member State must reject an application as inadmissible when it is a subsequent application and there are no new elements relevant to the application for international protection or to previously applied inadmissibility grounds. This Article constitutes part of a significant harshening of the approach to subsequent applications, see below.

Article 39: Decisions on the merits of an application

Under Article 39(2) the sequencing for examining the applicant's eligibility for the two protection statuses defined under EU law (refugee and subsidiary protection statuses) is rendered mandatory, which should protect against policies of misuse of subsidiary protection for certain caseloads when refugee status is applicable.

Article 40: Explicit withdrawal of applications

The provisions on explicit withdrawal of applications have varying consequences for the applicant. Safeguards are improved by setting out the requirements for explicit withdrawal and adding detail on the decision that the authorities have to provide. In contrast, Article 40(3) states that the decision declaring explicit withdrawal is final and cannot be appealed, points on which the APD is silent.

Article 41: Implicit withdrawal of applications

The concept of implicit withdrawal existed in the APD, however, the APR expands the circumstances which will be considered implicit withdrawal, including to cover cases where it is not necessarily the applicant's intention to withdraw their application. In addition, according to Article 41(1) Member States have no other option than to reject an application as abandoned in the six cases listed, whereas under the APD Member States may simply opt for the discontinuation of the examination without a rejection. Thus, whereas under the APD cases can be re-opened or new applications made which are not treated as subsequent applications after an implicit withdrawal decision, this will no longer be the case.

SECTION IV – SPECIAL PROCEDURES

Article 42: Accelerated examination procedure

The APR renders it mandatory to accelerate certain applications, whereas acceleration was always optional under the APD. A wide-ranging but exhaustive list of ten circumstances in which

acceleration is mandatory are set out in Article 42(1). The accelerated procedure is a short procedure which has to take place within three months.

New elements include that all subsequent applications which follow an inadmissibility decision are subject to acceleration. Applicants who do not present themselves as soon as possible will have their applications accelerated, regardless of manner of entry.

An adapted category for which acceleration is mandatory concerns applicants who have "intentionally misled the authorities by presenting false information or documents or by withholding relevant information or documents, that could have had a negative impact on the decision or if there are clear grounds to consider that the applicant has, in bad faith, destroyed or disposed of an identity or travel document in order to prevent the establishment of his or her identity or nationality." For this category, the applicant must be provided with a "full opportunity" to show "good cause." If they can do so, then neither a lack of documents nor the use of forged documents can per se lead to the use of an accelerated procedure (or a border procedure, as the same definition is used).

Article 42(1)(j) covers the new category at the centre of the 2020 APR amendments: applications made by people from countries where the protection rate is 20% or lower will be subject to mandatory acceleration (and use of the border procedure). Applicants from countries in this category should be exempted from the accelerated procedure under circumstances summarised in Recital (56), namely where a significant change has occurred in the country or they are from a category of persons for whom the 20% protection rate is not considered as representative.

Finally, where a case is too complex for reasons of fact or law to be examined in an accelerated examination procedure, Article 42(2) provides for the *possibility* to continue in the regular procedure.

Article 42(3): Unaccompanied children in accelerated examination procedures

The accelerated examination procedure can also be used for unaccompanied children but only in five of the ten cases for adults and children with family. These are safe country of origin, national security and public order, subsequent applications, misleading the authorities and bad faith destruction of documents, and the 20% protection rate criterion, which will collectively cover many of the cases of asylum-seeking unaccompanied children.

Article 43: Conditions for applying the asylum border procedure

Optional use of the asylum border procedure

Article 43 includes a set of three conditions that need to be fulfilled before the asylum border procedure may be used and, second, four situations (a) to (d) in which the asylum procedure may be used. The three conditions are that 1) the screening process has taken place if applicable; 2) the applicant has not been authorised to enter the territory; and 3) the applicant does not fulfil the conditions for entry under the Schengen Regulation. The four situations are: 1) at the external border or in a transit zone; 2) following "apprehension in connection with an unauthorised crossing of the external border"; 3) following disembarkation in the territory of a Member State; or 4) after relocation.

It is mandatory for border procedures to take place in a "fiction of non-entry", as is also the case for the screening process, meaning a situation where authorisation for entry has not been provided. Article 43(4) provides for the creation of "a monitoring of fundamental rights mechanism in relation to the border procedure."

Member States should prioritise applications from minors and their families when they are subject to the border procedure, in the sense of examining their cases before others. In contrast, however,

Member States also have to prioritise applications from people where there are better prospects of deportation.

Article 45: Mandatory application of the asylum border procedure

The main innovation of the APR is the rule that the Member State shall examine certain applications in an asylum border procedure so long as circumstances in Article 43 apply (the conditions and situations above). First, the three conditions for the use of the border procedure and one of the four situations must be in place (see above). If this is the case, the categories for which the asylum border procedure is mandatory are those listed in Article 42(1)(c) (d) (j), specifically, c) Intentionally misleading the authorities with false documents or withholding information or in bad faith destroying documents, f) national security or public order considerations, and j) the 20% protection rate criterion.

There is no appeal against the decision that an application is to be processed in a border procedure, which reduces the enforceability of provisions stipulating the conditions that must be in place for its use. Certain limited safeguards are in place. First, the absence of documents per se should not be a reason to apply the border procedure (Recital (75)). Second, if the applicant's case is not representative of the situation in the country of origin, then the provision on the 20% protection rate should not apply.

Article 46 to 50: Adequate capacity

The adequate capacity sets a minimum number for the use of border procedures for the EU as a whole during the year. When the APR comes into application the figure will be 30,000, meaning that at least 30,000 people should have their applications processed in an asylum border or a return border procedure, at every point in time during the year, with the 30,000 to be divided among the Member States. A maximum number of applications to be processed in border procedures ("annual cap") is set at several times this number, starting at 60,000 in the first year and increasing to 120,000 over two years.

The adequate capacity for each Member State – their proportion of the overall adequate capacity – is calculated according to a complex formula. The "inflow-outflow" concept means that the adequate capacity applies at any given point, i.e. the Member State must have the specified number of applicants in a border procedure at all times, so long as there are applicants that meet the conditions for the use of the border procedure, and the annual minimum of 30,000 applies at any given time. The adequate capacity can be made up of people in the asylum border procedure or the return border procedure.

Article 51: Deadlines

In the border procedure the deadline for the lodging of the application is five days from the registration, "provided that the applicants are given an effective opportunity to do so." The maximum duration of the border procedure is 12 weeks (which can be extended to 18 weeks under the Crisis Regulation). If the deadline is not met "the applicant shall be authorised to enter the territory" (and - implicitly - transferred to the regular procedure), unless Article 4 of the Return Border Procedure Regulation applies.

Article 52: Determination of the Member State Responsible

Under Article 52(1) the Member State is obliged to carry out the procedure for determination of responsibility at the location of the border procedure. Given the limited implementation of the responsibility rules under the Dublin Regulation, ECRE advocated for the inclusion of this provision, and urges monitoring of its implementation.

Article 53: Exceptions to the asylum border procedure

At Article 53(1) unaccompanied children should be exempted from the asylum border procedure unless there are security considerations (Article 42(3)(b)). Other exemptions are set out, including where the conditions for its application no longer apply; where the necessary support cannot be provided to applicants with special reception or procedural needs; where there are medical reasons not to apply it; and where the guarantees and conditions for the use of detention are not met and the border procedure cannot be applied without the use of detention.

Article 54: Locations for carrying out the border procedure

The border procedure should take place "at or in proximity to the external border or transit zones", but following amendment to the proposal, it may also take place "in other designated locations" within the territory of the Member State. This is "pursuant" to Article 9 of the recast RCD and "without prejudice to" Article 10 of that Directive. While ECRE opposed this provision due to the risk that applicants are housed in isolated locations with limited access to services, with its inclusion, there is an opportunity for states to find more appropriate locations than the border context.

Article 55: Subsequent applications and Article 56: Exception from the right to remain in subsequent applications

A theme running throughout the APR is the very harsh treatment of subsequent applications. Combined with the widened scope of the definition and the continued lack of harmonisation across the EU, significant risks arise. As well as the change in definition of subsequent application, the changes to the concept of implicit withdrawal will also increase the number of cases treated as subsequent applications. A new application in any Member State will now be considered a subsequent application. Procedural guarantees are weaker for subsequent applications than other applications, including the possibilities to omit the interview, to deny free legal counselling at the administrative stage, and to make the applicant responsible for translation. Notably, there is no right to remain for subsequent applications at appeal stage, and in some cases, neither is there a right to remain at the administrative stage. All subsequent applications are subject to mandatory acceleration and must be rejected as inadmissible if no new elements have arisen. The threshold for showing new elements is higher than under the APD and may be challenging to reach as applicants must show that the new elements "significantly" increase the chances of being granted protection or of refuting a previous inadmissibility decisions.

SECTION V – SAFE COUNTRY CONCEPTS

Article 57: The notion of effective protection

For the APR, countries are to be considered safe if they offer "effective protection" which is defined in Article 57, and applies for both first country of asylum and safe third country concepts. Effective protection is available if either the country respects the Refugee Convention of 1951 or if a set of other conditions apply. Specifically, in the latter case, the four conditions are that: applicants are allowed to remain on the territory; have access to means of subsistence sufficient to maintain an adequate standard of living; have access to healthcare and essential treatment for illnesses; have access to education (for each of these two conditions, this should be "under the conditions generally provided for in that third country"); and effective protection remains available until a durable solution can be found.

Recital (50) includes the additional information that "an adequate standard of living should be understood as including access to food, clothing, housing or shelter and the right to engage in gainful employment, for example through access to the labour market, under conditions not less favourable than those for non-nationals of the third country generally in the same circumstances."

Both the operational articles and the Recitals offer certain safeguards for applicants in the use of the first country of asylum and safe third country concepts. First, Member States retain the right to examine the application on the merits as per Recital (48). Second, an individual assessment has to be carried out (Articles 58 and 59, Recital (52)). Third, for both first country of asylum and safe third country concepts, Articles 58 and 59 provide the following: Where the third country in question does not readmit the applicant to its territory or does not reply within a time limit set by the competent authority, the applicant shall have access to the procedure...”.

Article 59: The concept of safe third country

Compared to the APD, the APR, introduces four main changes. First, effective protection is a lower threshold for a country to be classed as safe (Article 57, above); second, a country can be classed as safe with exceptions for certain parts of its territory or for certain categories of applicants (Article 59(2)); third, a possibility to bypass safety requirements is in place when there is a formal international agreement with the country (Article 59(7)); and, fourth, an EU list of designed safe countries is to operate in addition to Member States' national lists (Article 60).

As was extensively debated, the connection criterion whereby there must be a meaningful link between the applicant and the third country, remains but it will be reviewed in a year's time (Article 59(5)(b)). The provision on the review was the compromise reached by the Member State in June 2023 during negotiations on the Council's General Approach. Certain Member States, led by Italy, wanted to remove the connection criterion, whereas others, based around Germany, wanted to maintain the criterion.

Article 61: The concept of safe country of origin

Chapter V: Appeal procedure

Article 67: The right to an effective remedy

The Article maintains the right to an effective remedy before a court or tribunal against inadmissibility, in-merits and withdrawal decisions as per the APD. It adds, first, an explicit right to appeal a decision rejecting an application as implicitly withdrawn in response to the adapted and expanded use of implicit withdrawal (Article 67(1)(c)), and, second, a reference to the right to appeal a return decision issued in accordance with Article 37 (Article 67(1)(e)), which brings together the rejection and return decisions. When the asylum decision and the return decision are issued jointly, the appeal must also take place jointly, meaning within the same judicial proceedings, before the same court, and within the same time limit. When the return decision is in a separate act "it may be appealed in separate judicial proceedings," although the time limit remains the same.

Article 67(7): Deadlines for appealing a decision

The APR sets strict time limits for the applicant to lodge an appeal, constituting a significant shift compared to the APD, according to which Member States need to provide "for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy." In the final text, short deadlines are set, with two sets of rules. First, deadlines should be set at between minimum five days and maximum ten days to lodge an appeal against all inadmissibility decisions; all implicit withdrawals; and rejections on the merits in accelerated procedures. In all these cases, there is no right to remain pending the outcome of the appeal; it can be requested with a five-day deadline to do so. Second, for all other cases, deadlines should be set at a minimum of two weeks and maximum one month. For these cases, the right to remain applies only for cases of rejection on the merits in the regular procedure and explicit withdrawal (except when that is due to exclusion or national security considerations). In all other cases, it is possible to request the right to remain with the same five-day deadline.

ECRE argues that Member States should allow applicants to remain even where they do not have the right to do so in order to minimise the risk of refoulement, to limit litigation, and to reduce their own administrative burden, notably in terms of burden on courts.

Article 68: Suspensive effect of appeal

The new Article 68(1) clarifies that the legal effects of a return decision shall be automatically suspended for as long as the applicant has the right to remain or is allowed to remain in accordance with the Regulation. At Article 68(3)(a) to (e), the text expands the categories of people who do not have the right to remain compared to the APD; "without prejudice to the principle of non-refoulement" the people in the categories listed "shall not have the right to remain".

Specifically, the right to remain, and therefore the automatic suspensive effect of the appeal, is removed for the people in the following categories and decisions: all decisions taken in accelerated procedures (including for unaccompanied children); all decisions taken in the border procedures (with some exceptions for those concerning unaccompanied children); inadmissibility decisions on the following grounds: application of the first country of asylum concept, ICC extraditions, where there is a return decision and the seven-day deadline to re-apply has been missed; subsequent applications with no new elements; all decisions on implicit withdrawal; decisions to reject subsequent applications as unfounded or manifestly unfounded; and some explicit withdrawal decisions (where crime and public order considerations arise). The right to remain only applies for in-merits rejections in the regular procedure and explicit withdrawals (unless the latter relate to exclusion or national security).

As per Article 68(4), a court or tribunal shall have the power to decide whether the person has the right to remain and may do so *ex officio*. At Article 68(5)(a) the person has five days to make the request to remain in order to suspend the effect of the return decision pending the outcome of the appeal. A set of procedural guarantees applies: the rights to information, interpretation and free legal assistance and representation; and the right to remain during the five days and then pending the decision of the court or tribunal. No right to remain for the five days or pending the decision is provided for cases of subsequent applications lodged merely to delay or frustrate the realisation of a return decision and in cases of further appeals.

ECRE considers that the right to remain pending the examination of the asylum application and until a final decision on such application is taken, is necessary for ensuring that the principle of *non-refoulement* is respected. The right to an effective remedy under Article 13 ECHR and Article 47 of the Charter requires the right to remain extends to the appeals stage in the asylum procedure, as does the jurisprudence of the CJEU and ECtHR.

Article 70: Duration of the first level of appeal

The Member States should lay down in national law "reasonable time limits" for the examination of the appeal. For the border procedure the time limit is de facto short given that the full procedure including the appeal should take no longer than 12 weeks.

Introduction

After years of negotiations, the reform of EU asylum law, the Common European Asylum System (CEAS), has been approved. The first proposals for a comprehensive reform of EU asylum law were launched in 2016, when the recast Reception Conditions Directive (rRCD or recast RCD), Asylum Procedures Regulation (APR), Union Resettlement Framework (URF), Qualification Regulation (QR), and Eurodac Regulation were presented. In 2018, a recast of the Return Directive was proposed. Additional proposals were launched in 2020 as part of the New Pact on Migration and Asylum, including amendments to the APR proposal, the Regulation on Asylum and Migration Management (RAMM), the Screening Regulation, and the Regulation for Crisis and Force Majeure (the Crisis Regulation).

Finally, more proposals were launched in 2021, including a reform of the Schengen Border Code (SBC reform) and the Instrumentalisation Regulation. In the latest stage of negotiations, provisions from the Instrumentalisation Regulation were included in the Crisis file, and two additional files – the Return Border Procedures Regulation and Regulation on consistency amendments related to screening – were derived from provisions originally included in the APR and Screening Regulation respectively. The 2016 regulation transforming EASO into the EU Asylum Agency (EUAA) is already in force.

In April 2024, the European Parliament voted in favour of a package of reforms including 10 files: rRCD, URF, QR, the Eurodac Regulation, Screening Regulation, Regulation on consistency amendments related to screening, APR, Return Border Procedures Regulation (RBPR), RAMM, and the Crisis and Force Majeure Regulation (Crisis Regulation).

Based on the overall outcome of the reforms, ECRE maintains its positions that they will likely result in a reduction of protection standards in Europe. As well as the impact on fundamental rights, ECRE questions the workability of the new common asylum system and the continued uneven division of responsibility among the Member States.

These comments will focus on the Regulation establishing a common procedure for international protection in the Union, the Asylum Procedures Regulation (henceforth, the APR) and will assess the content of APR and changes compared to the current Asylum Procedures Directive (Directive 2013/32/EU, hereafter “the APD” or “recast APD”). It will analysis the content of the APR, changes compared to the APD, areas of legal uncertainty, potential legal challenges and recommendations for the implementation of the new rules. It should be noted that most files that form part of the reform, including the APR, will enter into adoption only after a transition period of two years – by summer 2026. In the meantime, the European Commission and Member States are developing implementation plans for the new system.

The comments will follow the structure of the APR and will assess most but not all its articles. They will not focus on the details of the negotiations between co-legislators that led to the approval of the present text, nor on the differences from the original proposal from the European Commission, apart from cases in which it is deemed useful for better clarity. These should be read together with the

ECRE comments on other Pact instruments,¹ ECRE's comments on the original Pact proposals,² as well as the policy papers on the state of play of the reform throughout the negotiations.³ The text includes considerations for implementation and recommendations. Where it refers to EU Member States, this may occasionally also include associated countries.

The APR seeks to harmonise procedural requirements across the Member States with the objective "to streamline, simplify and harmonise the procedural arrangements of the Member States". At the same time, it adds considerable complexity by proposing the expanded use of special procedures, including their mandatory use in some circumstances, and by granting wide-ranging discretion to the Member States despite the transition from a directive to a regulation.

The APR proposal was presented in 2016 by the European Commission which then presented amendments to the proposal in 2020. During the negotiations, the co-legislators, the Council and the European Parliament, added to the complexity by amending the categories of applicants for whom different procedures may or *must* apply, and by amending the exemptions to the use of special procedures.

The original 2016 proposal both enhanced some procedural guarantees (provision of legal assistance) and restricted others (the right to a remedy, the use of detention, safeguards for vulnerable applicants). Again, the co-legislators put forward extensive amendments, many of which are integrated into the final text. Very often, the proposed amendments pulled in opposite directions, with the Council's amendments further undermining protection standards and Parliament's amendments improving protection standards (often slightly and only in comparison to the proposals), although there are also examples of the opposite. While many safeguards – including those proposed by ECRE and other civil society commentators – were included in the final text, with very few exceptions the changes brought about by the APR represent a deterioration in protection standards compared to the status quo.

Cumulatively, compared to the current APD, the changes brought in by the APR will mean that more people will be detained in centres, usually at the border, and have their applications heard in border procedures. It is likely that fewer people will receive protection in Europe given the erosion of procedural guarantees and particularly the restrictions on the right to an appeal in a context where consistently around one-third of cases that go to appeal or review culminate in the granting of a protection status to the applicant. ECRE is also concerned that there may be more denials of entry due to the increased responsibilities of countries at the external borders. For these and other reasons, ECRE campaigned against the APR, while also proposing amendments to limit its negative impact. The main substantive elements of the final text are analysed below.

¹ *ECRE Comments on the Regulation on Asylum and Migration Management*, May 2024, available at: <https://bit.ly/4beiR1Q>, and *ECRE Comments on the Regulation Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum*, May 2024, available at: <https://bit.ly/3VMC06x>.

² *ECRE Comments on the Commission Proposal for a Regulation of the European Parliament and of the Council for a Regulation on Asylum and Migration Management COM(2020) 610 2020/0279 (COD)*, January 2021, available at: <https://bit.ly/4cLyIMl>.

³ ECRE, *Quo vadis EU asylum reform? Stuck between gradual approach, (mini)-package deals and "instrumentalisation"*, September 2022, available at: <https://bit.ly/3x10DT8>; ECRE, *Reforming EU asylum law: the final stage*, August 2023, available at: <https://bit.ly/4ciMvVx>.

Analysis of Key Provisions

Chapter I: General Provisions

Article 3: Scope

The scope of the Asylum Procedures Regulation (APR) is defined as “all applications for international protection made in the territory of the Member States, including at the external border, on the territorial sea or in the transit zones of the Member States, and to the withdrawal of international protection.” The Preamble contains the same language but also notes that people seeking international protection who are on the territorial sea of a Member State “should be disembarked on land and have their applications examined in accordance with this Regulation.” (Recital (8))

Implementation considerations

The question of geographic scope has attained significance with renewed discussion of the external processing of the asylum applications by the Member States, and plans such as the agreement between Italy and Albania.⁴ While it is clear that EU law applies “in the territory” of the Member State, legal debate⁵ centres on whether it applies when states are managing asylum matters outside their territory. If EU law applies, the obligations and protections in the APR must be respected, primary law including the Charter of Fundamental Rights (CFREU) applies, and the actions fall within the jurisdiction of the Court of Justice (CJEU).

When acting outside their territory, asylum and migration actions will often involve states “exerting control”, such that the people affected are under the state’s jurisdiction and the obligations under international law, including the European Convention on Human Rights (ECHR) must be respected. This is a lower standard than application of EU law – while no less binding on the states, the enforceability of obligations under international law is lesser. Thus, states have an interest in arguing that they are not applying EU law.

For the Italy-Albania Agreement, while Italy has not made the argument explicitly, the European Commission in its delicate positioning on the Agreement, appears to maintain that Italy’s operations on Albanian territory will involve the application of Italian national law but not EU law – although it has not published the advice of its legal service. The claim on both sides appears to be that the people will be under Italian jurisdiction but not on Italian territory.

Based on the scope of the APR, the Agreement could not apply to people rescued in the territorial sea, however, it should be noted that many people rescued by European vessels – state and NGO vessels – are not in the territorial sea of an EU Member State, a narrow band along a state’s coast, although they may be in its Search and Rescue (SAR) zone. Often people are rescued on the High Seas or in the territorial sea of a non-EU state. That will bring them under the jurisdiction of the flag state of the SAR ship but not onto territory.

⁴ Protocol between Italy and Albania for the strengthening of cooperation in migration matters, November 2023, available in Italian at: <https://bit.ly/45zV2k6>.

⁵ For commentary on the Italy-Albania deal, see: ECRE, ‘Preliminary Comments on the Italy-Albania Deal’, 9 November 2023, available at: <https://bit.ly/3VO5Qrq>; CEPS, *The 2023 Italy-Albania Protocol on Extraterritorial Migration Management: a worst practice in migration and asylum policies*, 7 December 2023, available at: <https://bit.ly/45uuG2K>; Council of Europe, ‘Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures’, 13 November 2023, available at: <https://bit.ly/4csxQGE>; Lorenzo Piccoli, ‘Offshoring Asylum the Italian Way’, 14 November 2023, *Verfassungsblog*, available at: <https://bit.ly/4coHN7W>.

Vulnerability and the APR

The APR contains complex provisions on vulnerable applicants. ECRE argues that one of themes running throughout the instrument is a lowering in standards of treatment of these applicants because, on balance there is an erosion of procedural guarantees for these applicants specifically or the related removal of exemptions, for instance from special procedures. The general reduction in procedural guarantees means the impact on vulnerable applicants is likely to be more marked

In many cases, the changes compared to the existing *acquis* allow but do not oblige Member States to apply lower standards to applicants than is generally the case. Combined with the extensive body of jurisprudence on the rights and treatment of vulnerable applicants, harm may be limited to some extent.⁶ Overall, it would be preferable that Member States' decisions on interpretation and application of the APR reflect the required level of protection of vulnerable applicants from the start, rather than redress being sought in often arduous legal processes.

At Article 3(14) and in the Recitals, definitions are included. First, as with the recast RCD, the terminology has shifted away from explicit references to vulnerability, which are minimal. Instead, the overall category is "applicant in need of special procedural guarantees", which means:

... an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Regulation is limited due to individual circumstances, such as specific vulnerabilities.

The rRCD similarly refers to applicants "with special reception needs".

Recital (17) provides a non-exhaustive list of characteristics which may mean that an applicant is in need of special procedural guarantees:

age, gender, sexual orientation, gender identity, disability, serious physical or mental illness or disorders, including when these are a consequence of torture, rape or other serious forms of psychological, physical, sexual or gender-based violence.

⁶ Since *M.S.S. v. Belgium and Greece* (ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011, available at: <https://bit.ly/3Ry5NO3>), the ECtHR has emphasised applicants' vulnerability in several judgments, affecting not only asylum seekers but also those who have not sought asylum or whose applications have been rejected, as seen in *Khlaifia and Others v. Italy* (ECtHR, *Khlaifia and Others v. Italy*, Application no. 16483/12, Judgment of 15 December 2016, available at: <https://bit.ly/4c7Msv5>) and *Aden Ahmed v. Malta* (ECtHR, *Aden Ahmed v. Malta*, Application No 55352/12, 23 July 2013, available at: <https://bit.ly/3xuPZER>). The CJEU, while rarely using the term "vulnerability," has addressed the issue in various contexts of asylum cases. In the case of *M*, the CJEU linked vulnerability to the right to be heard and the obligation to conduct an interview with an applicant for subsidiary protection. An interview must be arranged if the applicant's specific vulnerability, such as age, health, or experience of serious violence, makes it necessary for a coherent presentation of their application (CJEU, *M v Minister for Justice and Equality*, Case C-560/14, Judgment of 9 February 2017, available at: <https://bit.ly/3z959Qz>, ECLI:EU:C:2017:101, paras 51–52). In *MP*, the CJEU's Grand Chamber connected 'vulnerability' with Article 4 of the EU Charter, emphasising the importance of considering the specific vulnerabilities of individuals whose psychological suffering, due to past torture or inhuman treatment, could worsen if they are returned to the country of origin (CJEU Grand Chamber, *MP v Secretary of State for the Home Department*, C-353/16, Judgment of 24 April 2018, available at: <https://bit.ly/4cvpttR>, EU:C:2018:276, para. 42). In the case of *Jawo*, vulnerability is considered when determining if transferring an applicant under the Dublin III regulation should be precluded. The CJEU acknowledged that transfer might be stopped if the applicant faces a substantial risk of inhuman or degrading treatment due to living conditions in the responsible Member State. The court noted that an applicant might show exceptional circumstances unique to their vulnerability, potentially leading to extreme material poverty if transferred (CJEU, *Abubacarr Jawo v Bundesrepublik Deutschland*, C-163/17, judgment of 19 March 2019, available at: <https://bit.ly/3VU4Gun>, EU:C:2019:218, para. 95, 98.). Additionally, in *C.K. and Others*, the Court addressed standards and precautions for an asylum seeker with a particularly serious health condition. (CJEU, *C.K. and Others v Republika Slovenija*, C-578/16 PPU, Judgment of 16 February 2017, available at: <https://bit.ly/3VWajyw>, EU:C:2017:127, paras 73, 77, 81–90).

Examples of vulnerable groups are included at various points in the text, including Recital (15) which mentions victims of torture and applicants suffering from trauma, and Recital (61), which mentions minors, persons with disabilities and elderly people.

Implementation considerations

The language of the APR makes it clear that “applicants in need of special procedural guarantees” and vulnerable applicants are overlapping but not identical categories. There may be applicants in need of special procedural guarantees who are not vulnerable and vice versa. Similarly, there may be applicants with special reception needs who do not have special procedural needs and vice versa. There are both potential benefits and risks attached to this approach. Thus, there is potential for the category of applicants in need of special procedural guarantees to cover a higher number of applicants than the category of vulnerability. On the other hand, the approach has become more fragmented and complex for the authorities, given that they must consider vulnerabilities, needs for special procedural guarantees and special reception needs, which adds to the longstanding issues related to the concept of vulnerability, such as whether it is inherent or situational, whether asylum seekers are vulnerable per se, and so on.⁷ The complexity is compounded by the refusal to legislate on clear-cut exemptions for vulnerable applicants. Instead, a series of tests must be applied and hurdles overcome (see below.)

Article 4: Competent authorities

Status determination

Article 4 includes a largely useful simplification and clarification of the related Article 4 of the APD. It requires the Member States to designate a single determining authority to be responsible for status determination and sets out the obligations and resource requirements for that authority. The determining authority is “the only authority with the power to decide on the admissibility and the merits of an application for international protection”.

Other responsibilities

The Article defines and separates out other responsibilities in the asylum procedure, including the responsibilities to receive and to register applications.

At Article 5(2), the APR expands the obligation to receive applications to other authorities of the state beyond the determining authority. At a minimum, this must include the four authorities listed: the police, immigration authorities, border guards and authorities managing detention or reception facilities. Member States may decide on a wider group of authorities to have the power to receive applications.

⁷ In the case of *J.K. and Others v. Sweden*, the ECtHR Grand Chamber did not explicitly use the term “vulnerability.” Instead, it emphasised that due to the “special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof.”: ECtHR (GC), *J.K. and Others v Sweden*, Application no 59166/12, Judgment of 23 August 2016, available at: <https://bit.ly/3KW63m5>, para. 93. At the same time, in the Grand Chamber judgment of *Ilias and Ahmed v. Hungary*, the Court compared general vulnerability with individual vulnerability, stating: “The Grand Chamber endorses the Chamber’s view that while it is true that asylum seekers may be considered vulnerable because of everything they might have been through during their migration and the traumatic experiences they were likely to have endured previously [...], there is no indication that the applicants in the present case were more vulnerable than any other adult asylum-seeker confined to the Röszke transit zone in September 2015.” (ECtHR, *Ilias and Ahmed v Hungary*, Application no 47287/15, judgment of 21 November 2019, available at: <https://bit.ly/4eEC4wP>, para. 192). This implies that mental health alone does not necessarily require higher standards for Convention-compliant conditions or treatment of asylum seekers, See: B. Hudson, *Asylum Marginalisation Renewed: ‘Vulnerability Backsliding’ at the European Court of Human Rights*, International Journal of Law in Context, no. 20, 2024, available at: <https://bit.ly/4eDnrcO>, p. 23.

The responsibility for registering the application is separated from the responsibility for receiving the application, with Article 5(3) requiring the Member State to “designate a competent authority to register applications for international protection”. The language is somewhat ambiguous: as per Article 5(3), the Member States shall designate “a competent authority” to register applications, suggesting that only one authority should have this power. The following sentence specifies that the determining authority or “other relevant authorities” should be entrusted with this task, suggesting instead that more than one authority could have this role.

Implementation considerations

During the implementation phase, Member States need to decide on the determining authority, the authority responsible for determination of the Member State responsible (if not the determining authority), the authorities with the power to receive applications, and the authority or authorities responsible for registration. They should notify the Commission of these authorities by the date of application of the APR.

Access to a procedure

Evidence shows that in many Member States, applicants struggle to get access to a procedure, with their applications not registered, particular in border contexts. With the designation of authorities responsible for receiving applications, and the separation of the receiving and registering roles, there is a risk that states may seek to deny access to the procedure when an authority other than those listed receives the application, given that it will be more difficult to monitor whether they refer (all) applications onwards for registration by the authority responsible for registration.

The separation and designation of tasks reflects the large number of authorities with a role in asylum and migration policy and largely supports access to a procedure. There is a risk, however, of creating confusion and a lack of accountability when roles are too fragmented. Notably, the value of separating the decisions on international protection and the determination of which EUMS is responsible for an application can be questioned and should be monitored, see below.

Overall, ECRE welcomes the expansion of the obligation to receive applications to a wider set of authorities, given that – in practice – these other authorities might be the first point of contact with the applicant. It is unfortunate, however, that Member States are allowed to limit in national law the authorities entrusted with receiving the application. The armed forces are not mentioned among the authorities which must be charged with receiving applications. This is a regrettable omission given that in an increasingly militarised border context, it may be the army that has the first contact with an applicant.

The text includes safeguards that aim to ensure access to protection, often introduced by amendments from the European Parliament. First, in Article 4(2), the task of receiving the application is combined with the task of informing the applicant as to “where and how to lodge an application for international protection...” Second, according to Article 4(4), where the authority receiving the application does not have the power to register it, two duties are imposed on that authority: to “promptly inform” the authority responsible for registration and to inform the applicant as to which authority is responsible for registration.

Registration

In ECRE’s view, expanding the responsibility for registration could have a positive impact as asylum seekers currently face delays in having their asylum applications registered and subsequently lodged. This also means a delay in access to basic services and may further put the applicant at risk of human rights violations. Examples are to be found in in Belgium, Cyprus, Greece, Italy, the

Netherlands, and Spain, where delays in registration have had a serious negative impact on applicants in recent years.⁸ Combined with the obligation under Article 29(1) to issue a document certifying the applicant's right to remain on the territory upon registration, the obligation for a range of authorities to register applications enhances both the protection of applicants from *refoulement* and legal certainty.⁹

Responsibility allocation (Dublin/ AMMR)

Article 4(6) leaves ambiguity as to the authority with the competence for determining the Member State responsible under the AMMR, by allowing that the Member State may provide that an authority other than the determining authority plays this role, but with no further clarification.

As such, the APR has missed an opportunity to integrate jurisprudence into the legal framework. The jurisprudence of both the European Court of Human Rights (ECtHR) and the CJEU relating to Dublin cases has clarified that decisions on the responsible Member State require an assessment of the applicant's risk of being subjected to *refoulement* or other human rights violations in the Member State(s) that may be responsible for the application.¹⁰

In its assessment of the proposal, ECRE argued that the application of responsibility criteria is inextricably linked to a person's protection needs and, therefore, this task would better be assumed by the determining authority. As well as ensuring that protection considerations are taken into account in AMMR procedures, it would also increase efficiency as it avoids additional administrative delays resulting from transferring files between different authorities.

Means and training of responsible authorities

Given the extension of responsibilities to other authorities beyond the determining authority, the obligation on the Member State to ensure that they have the necessary means and receive the necessary training is also extended to all competent authorities by Article 5(7) and (8). This includes the training provided by the EUAA as per Article 8 of the Regulation setting out its mandate (Regulation(EU) 202/2303 – hereafter “the EUAA Regulation”). Training is important for many reasons, including that denial of access to the procedure may result from a poor understanding of an authority's responsibilities and related obligations and also that inaccuracies, particularly in the registration of personal details, may have negative consequences for the applicant at a later stage in the procedure, and notably in relation to the credibility assessment.

Recommendations

- EUMS should ensure that all authorities in contact with applicants are designated as responsible for receiving applications.
- EUMS where delays in and lack of registration of asylum applications has been commonplace, should designate additional authorities as responsible for registration (while ensuring appropriate training and support).
- Independent monitoring bodies should review which applications received are passed on the registration by the authorities in question.

⁸ See e.g. ECRE, *Asylum in Europe: the situation of applicants for international protection in 2022*, available at: <https://bit.ly/3VKU3ds>; p. 4; European Parliament, *Reception Conditions Across the EU*, November 2023, available at: <https://bit.ly/3Xsfls4>, p. 38.

⁹ For further recommendations as regards documentation of applicants, see section on Documents.

¹⁰ See, ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09 op. cit. and CJEU, *Joined Cases C-411/10 and C-493/10, N.S. v. Secretary of State for the Home Department and M.E and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011, ECLI:EU:C:2011:865, available at: <https://bit.ly/3xz4K9z>.

- Independent monitoring bodies and the monitoring mechanism established by the APR should assess whether states' authorities are meeting their obligations to receive and to register applications when people express their wish to apply for asylum as per Article 26.
- The EUMS should concentrate the responsibility for determining the Member State responsible with the determining authority.
- The EUAA should review the pros and cons of separating the functions of deciding on admissibility and on international protection, on one hand, and of determining the Member State responsible on the other.

Article 5: Assistance

Article 5 is a new article which covers assistance provided to the Member State for the tasks of receiving, registering and examining applications (but not for status determination), referring to assistance from experts deployed by the EUAA (as per the EUAA Regulation), and support from the authorities of other Member States arranged on a bilateral basis.

The Article is positive in that it acknowledges the importance of external support, which may be necessary to ensure the proper functioning of the asylum procedure, particularly in situation of pressure. Nonetheless, the decision to retain the possibility for support to also include a role in examination of applications raises questions.

ECRE recommended deleting the possibility of entrusting to the authorities of another Member State the task of assisting with “examining applications for international protection” and rather to limit such assistance to the reception and registration of applications. ECRE’s concerns derived from its analysis of the limitations and risk attached to the role of experts from other Member States, notably in the context of EUAA operations,¹¹ which often includes a lack of knowledge of the legal context and the language of the country.

In the final text, a role in examination is maintained, however, a safeguard has been included which specifies that the authorities of other Member States may only assist in tasks that their own Member State has entrusted to them at national level. This implies but does not guarantee that they have received the necessary training.

The text was amended to soften the role of external experts in examination, now stating that “the examination of applications may be facilitated, including with the regard to the personal interview” by external experts, although the reference to bilateral support from other Member States still states that they may be charged with the task of “examining” directly.

A certain lack of clarity remains, as there is no definition of “assistance” nor of “facilitation” of the examination, or examining directly. It could imply a range of activities, such as deploying interpreters, technical support on country of origin information, conducting interviews, and making recommendations for a decision to be taken by the determining authority.¹²

¹¹ ECRE, *The role of EASO operations in national asylum systems*, November 2019, available at: <https://bit.ly/4c4DG1b>.

¹² As has been the case in the admissibility procedure in Greece since April 2016 as part of the implementation of the EU-Turkey statement. This was integrated in the domestic legal framework in June 2016: AIDA, *Country Report: Greece – Update on the year 2016*, March 2017, available at: <https://bit.ly/4bbw6k7>, p. 62. ECRE examined some of the implications arising in the following study: ECRE, *The role of EASO operations in national asylum systems*, November 2019, available at: <https://bit.ly/4c4DG1b>.

For experts deployed by the EUAA, notwithstanding concerns raised in some contexts, including Greece,¹³ it is guaranteed that they will at least have received the necessary training.¹⁴ In addition, the EUAA's revised mandate has expanded its role in coordinating and supporting activities including "joint processing" activities and the development of tools for such purposes.¹⁵ It now has operations in 15 EU Member States and activities outside the EU. For these reasons, and given the level of scrutiny of the EUAA, ECRE believes that the deployment of experts under its auspices is preferable to bilateral deployment because it offers a stronger guarantee that the assistance meets EU standards, along with other advantages, such as contributing to a convergence of decision-making.

Recommendations

- The EUAA should provide external assistance to Member State authorities whenever possible rather than bilateral support provided by other Member States.
- EUMS should specify the support to provide and the specific role of those providing external assistance, be that from the EUAA or other Member States.
- The EUAA and requesting EUMS should define the role of external assistance in examination of applications and facilitation thereof.

Article 6: The role of the United Nations High Commissioner for Refugees (UNHCR)

Article 6 is a standalone section on the role of UNHCR which replicates almost exactly the equivalent article from the APD (Article 29). The Article obliges Member States to allow UNHCR to have access to applicants and to information on individual applications (with the applicant's consent) and allows UNHCR to present its views on individual applications. Again replicating the APD, Article 7 also extends the same rights to any organisation working "on behalf of UNHCR pursuant to an agreement with that Member State."

Implementation considerations

Given the expanded use of detention, especially in the border setting, which is ushered in by the APR read in conjunction with the recast RCD,¹⁶ Article 6 will be more important than was previously the case. It will be essential for UNHCR to seek access to centres where border procedures are being implemented, given the risk of increases in unlawful detention and provisions which purport to allow detention of vulnerable applicants. In addition, access to applicants for independent monitoring organisations and service providers may also rely on this article, as these organisations may be working as implementing partners for UNHCR, which should fall within the scope of working "on behalf" of UNHCR (conditional on an agreement with the Member State). In a context where states seek to limit access to applicants, this may be one route available for independent organisations to access applicants.

Recommendations

¹³ AIDA, *Country Report: Greece – Update on the year 2022*, June 2023, available at: <https://bit.ly/3xmos8C>, p. 98.

¹⁴ For experts deployed by the EU Asylum Agency this is already ensured under Article 7(7) of the EU Asylum Agency proposal.

¹⁵ See European Commission, *Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010*, COM(2016) 271, 4 May 2016. For ECRE's analysis and comments, see ECRE, *Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010*, July 2016, available at: <http://goo.gl/DPuZQQ>.

¹⁶ Article 10(d) of the recast RCD establishes a new ground for the use of the use of detention whereby its use is permitted for the purpose of assessing whether the person has the right to enter the country, provided that all the conditions for its use are in place.

- UNHCR should take full advantage of the role that it is afforded by the Regulation, and prioritise its work on supporting applicants through access, within its programmes in Europe, and particularly at the borders, given the lack of access for other organisations.
- UNHCR, the European Commission and EU agencies should use the means available to them (good offices, funding) to ensure that the extension of access to organisations working on behalf of UNHCR is implemented in practice.

Chapter II: Basic Principles and Guarantees

SECTION I – RIGHTS AND OBLIGATIONS OF APPLICANTS

Article 8: General guarantees for applicants

Similarly to the related article of the APD, Article 8 provides that applicants shall be informed “in a language which they understand or are reasonably supposed to understand” of their rights and obligations throughout the procedure. There are new references to information on the consequences of not complying with obligations “particularly as regards explicit or implicit withdrawal” and on the rights to free legal counselling and to legal assistance and representation.

The Article also specifies that the information must be provided as soon as possible and at the latest during registration. As an additional safeguard for the applicant, they “shall be given the opportunity to confirm” that they have received the information, and the confirmation has to be documented in the applicant’s file.

ECRE highlighted the need to be more specific about the guarantees relating to information provision because the means and format in which authorities communicate information to applicants has a direct impact on their understanding of their rights and obligations in the procedure. There is clear evidence of the difficulties applicants encounter when given information in unduly technical or otherwise complex language. These examples have been documented throughout most countries in the EU.¹⁷

ECRE recommended similar provisions to those set out in Article 30 of the Eurodac proposal, which required authorities to provide information “in a concise, transparent, intelligible and easily accessible form, using clear and plain language,”¹⁸ however this level of detail is not included. Nonetheless, the requirement that the information is provided in a leaflet which is prepared by the EUAA (Article 8(7)) will also help ensure consistency and quality of information.

Article 9: Obligations of applicants

The obligations of applicants in the asylum procedure are laid down in Article 9. Significant additions compared to the related Article 13 APD are, first, that the applicant is obliged to make their application in the country where they are required to be present according to AMMR Article 17(1) and (2). Second, the competent authorities may require that the applicant or their possessions be searched, although this can only be when “duly justified” for the examination of the application and reasons must be given and included in the file. Third, the duty to cooperate is expanded to cover the following requirements:

- “(a)...providing the data referred to in points (a),(b) and (d) of Article 27(1);
- (b) providing an explanation where he or she is not in possession of an identity or travel document;
- (c) providing information on any changes as regards his or her place of residence, address, telephone number or email;
- (d) providing biometric data as referred to in Regulation (EU) No .../... [(Eurodac Regulation)];
- (e) lodging his or her application in accordance with Article 28 and remaining available throughout the procedure;

¹⁷ See e.g. ECRE and AIRE Centre, *With Greece: Recommendations for refugee protection*, July 2016, available at: <https://bit.ly/4etFrq8>, p. 23-25.

¹⁸ See ECRE, *Comments on the Commission proposal to recast the Eurodac Regulation*, July 2016, available at: <https://bit.ly/3zaOmg8>, p. 14.

- (f) hand over as soon as possible documents in his or her possession relevant to the examination of the application;

Where the competent authorities decide to retain any document, they shall ensure the applicants immediately receives copies of the originals. In case of a transfer pursuant to [Article X of Regulation (EU) No .../... (AMMR Regulation)], competent authorities shall hand back such documents to the applicant at the time of the transfer;

- (g) attending the personal interview, without prejudice to Article 14;
- (h) remaining on the territory of the Member State where he or she is required to be present, [in accordance with Article 9(4) of Regulation (EU) No .../... (AMMR Regulation)]...

If the applicant fails to meet certain of these obligations, the consequence will be implicit withdrawal of the asylum application as per Article 41, specifically applying to (a), (d), (e), (g) and (h).

The APR should be read in conjunction with the recast RCD according to which reduction or withdrawal of reception conditions is allowed when the applicant does not meet procedural obligations.¹⁹

Implementation considerations

Implicit withdrawal

The implicit withdrawal of an application is a technique allowed under the APD and expanded by the APR. In the APD, implicit withdrawal enables the authorities to respond to a situation where an asylum applicant can be presumed either to no longer be present on the territory or to no longer wish to continue with the procedure. It is a situation where the applicant does not respond to requests from the authorities, leaving them without information about the person's whereabouts.

The APR, in contrast, allows a lack of cooperation in accordance with elements of Article 9 to be classified as implicit withdrawal – despite the applicant still being available to the authorities. It also obliges the authorities to take the decision on implicit withdrawal in certain circumstances, rather than allowing them to suspend the process. In practice, there are many situations where an applicant does not meet their obligations but through no fault of their own. This may be perceived as a lack of cooperation when in fact it is not (see section below on implicit withdrawal). Overall, therefore, a significant change in the definition and use of the concept of implicit withdrawal is part of the APR, about which ECRE raised concerns in its original Comments.²⁰

Despite greater detail being added to the final text compared to the Commission proposal, certain risks are still present in Article 9's obligations. Notably, the ambiguous wording may undermine legal certainty for the applicant. In particular, the "documents relevant to the examination of the application" which must be handed over is a broad category and can be interpreted in ways to the disadvantage of the applicant, leading to the applicant being classed as not cooperating – and thus facing negative consequences – for not handing over documents which the authorities deem relevant but the applicant does not.

Recommendations

- EUMS should limit the use of implicit withdrawal as a consequence of non-cooperation since it creates the risk that applications are declared withdrawn when that is not case, with negative consequences for the applicant and for the authorities.

¹⁹ RCD Article 23, Recital (47).

²⁰ On implicit withdrawal, see ECRE, *Comments on the amended proposal for an Asylum Procedures Regulation COM(2020) 611*, December 2020, available at: <https://bit.ly/3XuaMmH>.

- EUMS and the EUAA should prepare guidance for use by officials responsible for decisions on implicit withdrawal to address the lack of clarity in the text.

Article 10: Right to remain during the administrative procedure

Article 10 strengthens the position of the applicant by referring to the applicant's "right" to remain on the territory rather than them being "allowed" to remain as per the APD.²¹ This wording more clearly reflects the applicant's status as a person legally authorised to enter and reside on the territory of the Member State as already implied in EU law.²² It strengthens the protection against deprivation of liberty in line with the case law of the ECtHR on Article 5 ECHR,²³ as well as the corresponding right to liberty and security of person laid down in Article 6 of the EU Charter of Fundamental Rights (CFREU).

Nonetheless, in the final text of the APR, the right to remain is limited to the territory of the Member State where the applicant is "required to be present" in accordance with Article 17(4) of the AMMR, which is a significant restriction.

Article 10 in combination with Articles 3, 55 and 56 also extends the exceptions to the right to remain for subsequent applications. Under Article 41 APD, the exception was only possible in the following narrowly described circumstances involving subsequent applications:

- (a) where a person has lodged a subsequent application, which is considered inadmissible, merely in order to frustrate his or her imminent removal; and
- (b) in case of a subsequent application following a final decision considering a first subsequent application inadmissible or unfounded.

In the APR, first, the category of applications considered as subsequent applications has been expanded to include further applications made in *any* Member State, in contrast to the APD which defines subsequent applications as those made in the same Member State. Second, despite amendments from the European Parliament that restricted the scope compared to the proposal and compared to the Council's position, it is still the case that the circumstances in which the right to remain may be denied have been expanded compared to the APD. The new formulation from Article 56 APR foresees the right to remain may be removed for the following:

- (a) a first subsequent application has been lodged, merely in order to delay or frustrate the enforcement of a decision which would result in the applicant's imminent removal from that Member State and is not further examined pursuant to Article 56(7);
- (b) a second or further subsequent application is made in any Member State following a final decision rejecting a previous subsequent application as inadmissible or unfounded or manifestly unfounded.

Implementation considerations

Removal of the right to remain

ECRE has long argued – in line with the jurisprudence of the courts – that the right to remain on the territory of the Member States pending the examination of the asylum application and until a final

²¹ Article 9(1) recast Asylum Procedures Directive.

²² Article 9 recast Asylum Procedures Directive and Recital 9 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter "Return Directive") [2008] OJ L348/98.

²³ ECtHR, *Suso Musa v. Malta*, Application No. 42337/12, Judgment of 23 July 2013, para. 97, available at: <https://bit.ly/4eviltW>.

decision on such application is taken is crucial to ensuring that the principle of *non-refoulement* is fully respected. The right to an effective remedy under Article 13 ECHR and Article 47 CFREU requires the right to remain to extend to the appeals stage in the asylum procedure, as discussed below. Revoking the right to remain in the territory pending the examination of a subsequent application during the administrative procedure risks undermining the principle of *non-refoulement*. Applicants for international protection may be forced to submit a subsequent application for a variety of reasons, including due to shortcomings in the asylum procedure that are beyond their control. Therefore, the submission of a subsequent asylum application should not be presumed to be fraudulent or abusive *per se* and thus subject to weaker standards.²⁴

As removing the right to remain also means that an eventual appeal will not have automatic suspensive effect,²⁵ ECRE believes that Article 10(4)(a) and Article 55 result in the APR not meeting the requirements under international human rights law and the CFREU to ensure compliance with *non-refoulement* obligations.

Geographic restrictions on the right to remain

The right to remain under Article 10 is restricted to the territory of the *responsible* Member State, which corresponds with the expanded definition of “subsequent application” to include further applications made in any Member State. Both expanding the geographical impact of a decision rejecting a subsequent application to any Member State and denying the right to remain pending the examination of such an application, create additional protection gaps in the CEAS.

Considering such an application as subsequent to a first decision taken in *another* Member State should only be permissible in a fully harmonised system as it presumes that a full examination has taken place. In practice, that may not be the case, differing interpretations of obligations and a lack of compliance with procedural obligations remain, and may do so even after the reforms, given that Member States retain the final responsibility for individual decisions.

In addition, the expanded use of inadmissibility on the basis of safe country concepts and the onerous procedural requirements imposed on applicants, increases the risk of applicants being denied a full examination of the merits of their claim in any Member State. Allowing a Member State to exempt an applicant from the right to remain on the basis of a subsequent application to an application rejected in *another* Member State, and thus before an in-merits examination, may result in such applicants being subject to *refoulement* or inhuman and degrading treatment as a result of the lack of access to reception conditions in violation of ECtHR jurisprudence and their human dignity guaranteed by the CFREU.

Recommendations

- EUMS should use possibilities under national law to extend the right to remain to subsequent applications in all cases, or to allow applicants to remain, in order to ensure that people are not deported before having access to a fair hearing.
- EU agencies and independent organisations should monitor the treatment of subsequent applications, including the impact of removal of the right to remain and the arising risk of

²⁴ The Commission’s approach on the right to remain for subsequent applicants is also in contrast to existing legislation and practice in some Member States. In the **Netherlands**, for instance, subsequent applicants have a right to remain on the territory, regardless of whether it is a first or further subsequent application, until the intention of the Immigration and Naturalisation Service (IND) to reject the application is notified to the applicant: Article 8(f) Dutch Aliens Act.

²⁵ See Article 54(2)(b) and the discussion below on the right to an effective remedy.

refoulement. This should be done within the context of assessing the right to a fair hearing in all EUMS.

SECTION II – PERSONAL INTERVIEWS

Articles 11 to 14: The right to a personal interview

The applicant's right to an interview on the admissibility and substance of their application is guaranteed in Articles 11 and 12 of the APR. The central role and key importance of the interview in the individual assessment of an applicant's need for international protection and risk of *refoulement*, has long been acknowledged in UNHCR EXCOM Conclusions²⁶ and the UNHCR Handbook,²⁷ as well as jurisprudence of the European Courts²⁸ and of international human rights treaty bodies.²⁹ It is already reflected in the APD.

The importance of the interview is due to the specific nature of requests for international protection, which often rely predominantly on the applicant's oral statements. Thus, the consolidation of the guarantee in the APR is welcome.

Article 13: Requirements for personal interviews

Article 13 sets out the requirements for the personal interview, including confidentiality; the presence of interpreters, mediators, and legal advisors; and the competences and required level of training of the personnel of the determining authority responsible for conducting the interview. While largely maintaining the existing guarantees in the APD, there are changes regarding the authorities responsible for interviews, the use of video interviews, and with regard to the exceptional situations in which the personal interview may be omitted.

Responsibility for the interview

At Article 13(6), the APR specifies that only the determining authority can conduct personal interviews, be they admissibility or substantive interviews. ECRE welcomes this restriction: given the

²⁶ See UNHCR, *EXCOM Conclusions Nos. 8 and 30*, 1977 and 1983, available at: <https://bit.ly/3VCXddi>.

²⁷ According to which basic information given by completing a standard questionnaire will normally not be sufficient to enable the examiner to reach a decision and that one or more personal interviews will be required. See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, Reissued, December 2011, para. 200, available at: <https://bit.ly/4csWSVW>.

²⁸ In the case of *I.M. v. France*, for instance, when assessing the compatibility of the accelerated asylum procedure in France with that State's obligations under the ECHR, the ECtHR attached importance to the fact that the personal interview only last 30 minutes, in particular as it concerned a first application for international protection: ECtHR, *I.M. v. France*, Application No. 9152/09, Judgment of 2 February 2012, available at: <https://bit.ly/4eviltW>, para. 155. In *Khlaifia and Others* the ECtHR underlined that the right to be heard is a fundamental principle of EU law and applies in spite of the lack of express provision in the Return Directive. ECtHR, *Khlaifia and Others v. Italy*, Application no. 16483/12, Judgment of 15 December 2016, available at: <https://bit.ly/4c7Msv5>, para. 43. In *M.K. and others*, the ECtHR concluded that very brief interviews, where foreigners' justifications for seeking international protection were disregarded, led to refusal-of-entry decisions that failed to consider each applicant's individual situation, constituting a collective expulsion of aliens under Article 4 of Protocol No. 4. ECtHR, *M.K. and others v. Poland*, Application nos. 40503/17 42902/17 43643/17, 23 July 2020, available at: <https://bit.ly/4cpy01t>, paras. 208-210.

In the case *M. M. v. Minister for Justice* (Case C-277/11), the CJEU pointed out the importance of the right to be heard in all stages of the procedure to guarantee fair decision-making and respect for good administration. CJEU, *M. M. v. Minister for Justice*, Case C-277/11, Judgment of 22 November 2012, available at: <https://bit.ly/4cpD4mh>, ECLI:EU:C:2012:744, paras. 81-99.

²⁹ In the case of *Ke Chun Rong v. Australia*, the UN Committee of the Convention against Torture found a violation of Article 3 of the Convention against Torture inter alia on the basis of the finding that the complainant had not been interviewed either by the Immigration Department or by the Refugee Review Tribunal. See Committee against Torture, *Ke Chun Rong v. Australia*, Communication No. 416/2010, 29 November 2012, available at: <https://bit.ly/4cpD4mh>, para. 7.4.

critical role of admissibility concepts in the reformed CEAS, it is even more important that personal interviews are conducted by specialised determining authority.

Nonetheless, according to the following paragraph the determining authority “may be assisted” by the personnel of other authorities of the Member State or by the EUAA where there is a “disproportionate number of applications” which makes it “unfeasible to conduct timely personal interviews of each applicant”. If the former, the personnel should be trained on how to conduct interviews, including elements set out in the EUAA Regulation Article 8.

The possibility for the personnel of authorities of other Member States to assist with personal interviews that appeared in Article 14 in the Commission proposal has been deleted, however, a strict reading of Article 6, would still allow for this to take place, as that article specifies that experts deployed by the EUAA *and* personnel from other Member States’ authorities can assist in the facilitation of the examination of the application “including with regard to the personal interview.” (see above).

For the reasons explained above, in ECRE’s view the involvement of personnel from other Member States should be limited to reception and registration of applications for international protection. In order to ensure that such assistance does not result in lower quality of personal interviews, the deployment of experts through the EUAA offers better guarantees that such assistance is provided by sufficiently qualified and trained staff.

Omission of the interview

Article 13(10) allows the determining authorities to hold the interview by video conference “where duly justified by the circumstances”. In Recital (15) a non-exhaustive but short list of circumstances is provided, suggesting that this should not be common practice. The Member State is required to respect the procedural guarantees, “taking into account guidance from the EUAA.”

Article 13(12) includes an exhaustive list of circumstances in which an interview can be omitted. In favour of the applicant. This maintains the APD provision that omission is possible when a positive decision can be taken on the basis of available evidence (Article 13(12)(a)), to which is added when the determining authority “considers that the application is not inadmissible on the basis of evidence available” (Article 13(12)(b)). A standard clause – also present in the APD – allows omission of the interview when the applicant is “unfit or unable” to be interviewed due to circumstances beyond their control (Article 13(12)(c)). The authorities should then reschedule the interview.

The Article then expands the circumstances in which the interview can be omitted against the interests of the applicant. In the following new circumstances, the interview may be omitted:

- Article 13(12)(d) “...in case of a subsequent application, the preliminary examination referred to in Article 56(4) is carried out on the basis of a written statement.”
- Article 13(12)(e) “...the determining authority considers the application inadmissible pursuant to Article 38(1)(c).”

In the former clause, the interview can be omitted when there are no new elements presented in the subsequent application (based on the restricted interpretation of “new” elements). The latter clause means that inadmissibility decisions can be taken without a personal interview where another Member State has granted the applicant international protection.

The safeguards throughout Articles 11, 12 and 13 are weakened by Article 13(15), which states that “provided that sufficient efforts have been made to ensure that the applicant has been afforded the opportunity of a personal interview, the absence of a personal interview shall not prevent the

determining authority from taking a decision on the application for international protection". The clause existed in the APD but in that instrument there are fewer circumstances when the interview can be omitted.

Implementation considerations

Omission of the interview

The APR allows EUMS to declare an application as inadmissible without a personal interview, which creates a strong risk to the applicant. Allowing for the provision of information in writing is not sufficient to ensure the right to a hearing.

The role of the EUAA is increased and in some circumstances it may be preferable that it conduct personal interviews rather than personnel from other authorities of the EUMS. Given the importance of the interview, Member States should refrain as far as possible from omitting it. Where they do so without good cause legal challenges may result.

The CJEU has repeatedly emphasised the importance of detailed and appropriately conducted interviews, as they provide crucial opportunities for applicants to present personal information and correct errors, ultimately influencing the outcome of their cases and safeguarding their rights.

In *M.M. v. Minister for Justice* (Case C-277/11), the Court underlined the importance of the right to be heard as a fundamental principle of EU law with a very broad scope in the EU's legal order. Applying the principle will ensure that asylum applicants are fully heard in all stages of the procedure, including separate procedures for subsidiary protection. It also guarantees the principles of fair decision-making and respect for good administration.³⁰ Similarly, in *Sacko* (Case C-348/16), the Court considered it necessary "to conduct a hearing to ensure that there is a full and ex nunc examination of both facts and points of law," finding that the information gathered during the personal interview conducted in the procedure at first instance was insufficient.³¹

In *Addis* (Case C-517/17), the Court agreed with the Opinion of the Advocate General, emphasising that "detailed rules relating to how that interview is to be conducted demonstrates the fundamental importance which it attaches not only to an interview being held, but also to the conditions under which that interview is to take place."³² Furthermore, in *M. v. Minister for Justice and Equality* (C-560/14), the CJEU highlighted that an interview must be arranged to ensure the applicant for subsidiary protection's right to be heard, particularly when specific circumstances, such as the applicant's age, health, or experiences of serious violence, require it for the applicant to fully and coherently comment on elements substantiating their application.³³

Omission of the personal interview is permissible only in limited circumstances, as confirmed by the CJEU in *Ministero dell'Interno*, which emphasised that the interview serves to ensure the applicant

³⁰ CJEU, *M. M. v Minister for Justice*, Case C-277/11, Judgment of 22 November 2012, available at: <https://bit.ly/4cpD4mh>, ECLI:EU:C:2012:744, para. 81-99.

³¹ CJEU, *Moussa Sacko*, Case C-348/16, Judgment of 26 July 2017, available at: <https://bit.ly/3XvuWN1>, ECLI:EU:C:2017:591, para. 48.

³² CJEU, *Milkias Addis v Bundesrepublik Deutschland*, Case C-517/17, Judgment of 16 July 2020, available at: <https://bit.ly/3xA1xqe>, ECLI:EU:C:2020:579, para. 66.

³³ CJEU, *M v Minister for Justice and Equality*, Case C-560/14, Judgment of 9 February 2017, available at: <https://bit.ly/3z959Qz>, ECLI:EU:C:2017:101, para. 41, 51.

understands the information provided and offers a vital opportunity to disclose information that could affect the decision or prevent transfer to another Member State.³⁴

In *Mukarubega* (Case C-166/13), the Court reaffirmed that the rule requiring the addressee of an adverse decision to be allowed to submit observations before its adoption ensures that the competent authority can effectively consider all relevant information and allowing the individual to provide personal details that could influence the decision's outcome or correct errors.³⁵

In addition, the interview plays a crucial role in assessing the credibility of the applicant's claims. In *Abdolkhani and Karimnia v Turkey*, the ECtHR underlined that, before making its own assessment of the risk faced by the applicants if returned to Iran, the court must also consider UNHCR's conclusions regarding their claims. Unlike the Turkish authorities, UNHCR interviewed the applicants, providing an opportunity to assess the credibility of their fears and the accuracy of their account of circumstances in their country of origin, ultimately finding that they risked arbitrary deprivation of life, detention and ill-treatment there.³⁶

Therefore, the role of personal interviews is crucial in the asylum procedure, highlighting the right to be heard as a fundamental principle in EU law, necessary to ensure fair decision-making and to uphold the principle of good administration.

Remote interviews

Allowing the use of video conferencing for interviews when “duly justified” may increase the use of remote interviewing. Challenges relating to ensuring interpretation may arise during remote interviews. In addition, ECRE's analysis of digital tools in the asylum procedure during the COVID period, demonstrated risks as well as benefits, reaching the following conclusion:

Online interviews, while in some cases useful to avoid unnecessary movements for applicants and to ensure a swift completion of the procedure, generate several concerns both in terms of respect for privacy, possible risks for vulnerable applicants and lack of adequate equipment and spaces. These challenges should be tackled before establishing a system for online personal interviews, and the use of this method should remain residual.³⁷

Recommendations

- EUMS should interpret Article 12(5) in line with the jurisprudence of the courts to ensure that the right to a fair hearing is respected.
- Authorities should seek legal opinion on interpretation of “duly justified” in Article 12(4) and of “sufficient efforts” in Article 12(6).
- The EUAA should be provided with adequate resources and be prepared to step in to conduct interviews as per Article 12(3), given the frequency with which EUMS consider that numbers of applicants are disproportionate.

³⁴ “the personal interview serves to verify that that person understands the information provided to him or her in that leaflet and it represents a privileged opportunity, or even a guarantee, for that person to disclose to the competent authority information which could lead the Member State concerned to refrain from submitting a take-back request to another Member State or even, as the case may be, to prevent that person's transfer”. CJEU, *Ministero dell'Interno v TO*, Case C-422/21, Judgment of 1 August 2022, available at: <https://bit.ly/3xzbTqp>, ECLI:EU:C:2022:616, paras 105 and 122.

³⁵ CJEU, *Sophie Mukarubega v Préfet de police*, C-166/13, Judgment of 5 November 2014, available at: <https://bit.ly/4cKgm8X>, ECLI:EU:C:2014:2336, para. 47.

³⁶ ECtHR, *Abdolkhani and Karimnia v Turkey*, Application No 30471/08, Judgment of 22 September 2009, available at: <https://bit.ly/3xkTL3F>, para. 82.

³⁷ ECRE/AIDA, *Digitalisation of asylum procedures: risks and benefits*, January 2022, available at: <https://bit.ly/3PNlpfA>, p. 28.

- EUMS should be prepared to request assistance from the EUAA where necessary.
- The EUAA should maintain updated guidance on the use of remote interviewing, including directly referring to when it would be “duly justified by the circumstances”.

Article 14: Reporting and recording of interviews

Accurate reporting of the applicant’s statements during the personal interview is crucial for the conduct of a fair and efficient asylum procedure. It often is the main source of information for assessing the applicant’s need for international protection and therefore it is in the interest of both the applicant and the determining authority and appeal authorities to have a detailed and correct transcript of the personal interview.

Article 14 includes three options for the personal interview report: either “a thorough and factual report containing all the main elements”, a transcript of the interview or a transcript of the recording of the interview. In light of the possible involvement of other experts in conducting the personal interview, such obligation is extended to “any other authority or experts” assisting or conducting the determining authority.

Article 14(2) requires an audio recording of every interview. This has been revised from “audio-visual” in the proposal, which is preferable given the risks that may be attached to filming an applicant.³⁸ The applicant is informed of the audio recording but does not have to consent. The applicant is given the opportunity to comment on the report or the transcript and to confirm that the final version is correct. An audio recording combined with a written document should serve to limit discussion or debate about what has been said during the interview, which is beneficial for both the applicant and the determining authority, and allows the latter to make a first instance decision based on a correct and full understanding of the applicant’s statement.

Article 14(6) requires that access to the report or transcript is provided as soon as possible after the interview and “in any case in due time before the determining authority takes a decision”. This specification is in line with the jurisprudence of the CJEU relating to the EU general principle of the right to be heard requires that the person concerned is given a reasonable time to effectively present his or her views.³⁹ Access to one’s file is an inherent part of the right to good administration which reflects a general principle of EU law.⁴⁰

It should be noted that this guarantee is restricted in the case of the accelerated procedure (see below).

Article 14(2) specifies that Member States must pay particular attention to the requirements of applicants with special procedural needs.

Implementation considerations

³⁸ Video recording potentially places an undue emphasis on the way an asylum seeker presents visually. This risks, at minimum, cultural misunderstandings, particularly in assessing credibility. See on this issue UK Home Office, *Considering Asylum Claims and Assessing Credibility*, 2012, available at: <https://bit.ly/3XvUjyq>, 14.

³⁹ See for instance CJEU, *Mediocruso v Commission*, Case C-462/98, Judgment of 21 September 2000, available at: <https://bit.ly/4b8Cj03>, ECLI:EU:C:2000:480, para. 38: “However, no reasonable period was granted to it between the time at which it was able to examine the reports and the time at which it had to express its view. Indeed, it was on the very day that the reports were disclosed to it, during a meeting, that the appellant was called on to comment on the reports if it wished to do so. It must be held that, in such circumstances, the appellant did not on that occasion have an opportunity effectively to put forward its views on those documents.”

⁴⁰ See e.g. CJEU, *H.N. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, Case C-604/12, Judgment of 8 May 2014, available at: <https://bit.ly/45v6KMB>, ECLI:EU:C:2014:302, para. 49.

Member States will decide on the process and responsibility for the reporting and recording of the interviews.

This raises important questions from a practical and legal perspective. First, the applicable national legal framework may preclude the involvement of foreign experts in conducting interviews or it may require that any official report on the interview be drafted in one of the official languages in the Member State concerned.⁴¹ The APR does not specify the language of the factual report or transcript but it may not be compatible with national constitutional law in some Member States to use non-official languages.

Second, even if it were allowed under national law, drafting such reports in a language other than the official national languages may have important repercussions for the applicant's ability to fully exercise their rights and access all elements of the file. For example, in joint processing carried out in Greece, experts deployed from other EU Member States operated in English as the working language as they lacked a sufficient knowledge of Greek. This resulted in applicants and their lawyers receiving strangely drafted decisions in both Greek and English.

Recommendations

- EUMS should confer responsibility for the report or transcript and recording on the determining authority in order to ensure legal clarity and given the crucial role of the personal interview in the refugee status determination process.
- EUMS and the EUAA should limit the involvement of other Member States' authorities in the interview.

SECTION III – PROVISION OF LEGAL COUNSELLING, LEGAL ASSISTANCE AND REPRESENTATION

Article 15: Right to legal counselling, legal assistance and representation

Article 15(1) reiterates the right to consult a legal advisor or other counsellor at any point and Article 15(2) states the compromise that was reached on free legal advice: the applicant may request “free legal counselling” for the administrative stage and “free legal assistance and representation in the appeals procedure”. ECRE strongly supported the provision of free legal assistance throughout the procedure because, given the immense complexity of the APR, accessing quality legal assistance at the earliest possible stage is essential.⁴²

The state has to inform the applicant as soon as possible and at latest during registration of the right to request free legal counselling or free legal assistance and representation. This is an improvement on the Commission proposal which did not indicate the exact moment in the procedure when such assistance should be available to the applicant. As counselling will be available from the registering, it at least means that the applicant will have support in the onerous part of the process which is the lodging of the application following the registering.

Although it is not an obligation, it is important that the Member States may still provide for free legal assistance and representation rather than just free legal counselling in the administrative procedure

⁴¹ This is the case for instance in **Belgium**.

⁴² In particular as the lodging of an application may imply filling in extensive application forms. In **Estonia**, for instance, applicants arriving at the border are required to fill in a 16-page application form. See Bridget Anderson and Sue Conlan, *Providing Protection. Access to early legal advice for asylum seekers*, 2014, available at: <https://bit.ly/3VrJomF>, 26.

(Article 16(3)). Overall, they may organise the provision of all legal services “in accordance with their national systems”.

Article 16: Free legal counselling in the administrative procedure

The extension of the obligation to provide free legal assistance to the administrative procedure was one of the most important improvements on the APD in the 2016 APR proposal. Following amendments from both co-legislators, the topic was debated right up until the final agreement and the text has been watered down. In the administrative procedure, rather than free legal assistance and representation, the applicant will instead have the right to free legal *counselling*. According to Article 16, this is to include:

- (a) guidance and explanations of the administrative procedure including information on rights and obligations during the procedure;
- (b) assistance on the lodging of the application as well as guidance on the different procedures under which the application may be examined and the reasons for the application of those procedures, the rules related to admissibility, legal issues arising in the course of the procedure, including information on how to challenge a decision rejecting an application in accordance with Articles 53 to 55;

At Article 16(1), access to legal counselling may be assured by “entrusting a person with the provision of legal counselling... to several applicants at the same time”.

The free legal counselling can be excluded in certain cases of subsequent applications and where the applicant already has legal assistance or representation (Article 17(3)), however the controversial provision on merits testing are not in the final text (according to which legal assistance could be excluded following a preliminary assessment of the merits of the case), although it remains as a reason for exclusion of legal assistance in the appeals procedure, (see below).

Article 16(4) includes the useful provisions that Member States may request assistance from the EUAA for the purpose of implementing the article and that financial support may be provided from the EU to support the provision of legal counselling. In regard to EU funding, Article 76 reads as follows:

Article 76 Financial support

Actions undertaken by Member States for putting in place free legal counselling and adequate capacity for carrying out the border procedure in accordance with this Regulation shall be eligible for financial support from the funds made available under the 2021-2027 multiannual financial framework.

Implementation considerations

Legal aid in the administrative procedure

While free legal counselling is an improvement compared to the APD, the absence of free legal assistance and representation in the administrative procedure constitutes a risk to the applicant because the right to a fair hearing and the quality of the procedure may be adversely affected.

Given the complexity of EU asylum law – and notably the provisions of the APR itself – the process is weighted against the applicant in the absence of legal assistance. Asylum applicants find themselves by definition in a disadvantaged position in the asylum process as they are unfamiliar with the legal framework and in most cases do not speak the language in which the procedure is conducted. Evidence shows that free legal assistance can also support certain outcomes that are prioritised by the EUMS, such as increasing the return rate because more applicants opt for voluntary

return when provided with solid legal advice during the first instance process. Thus, it would be in Member States' interests to use their discretion to provide access to legal assistance and representation in the administrative procedure, as allowed by Article 15(3).

ECRE has long advocated for the provision of free legal assistance and representation to asylum applicants from the start of the procedure as a core aspect of "frontloading" of asylum systems.⁴³ The important role of free legal assistance and representation in safeguarding the rights of applicants for international protection throughout the procedure was acknowledged in the Commission's proposal.⁴⁴ Its importance in protecting individual's rights under the ECHR and the CFREU is also increasingly highlighted in the jurisprudence of the ECtHR and the CJEU.⁴⁵

In a number of cases, the ECtHR has held that the lack of legal assistance and representation can undermine the effectiveness of the remedy under Article 13 ECHR to the point that it becomes inaccessible.⁴⁶ In the case of *DEB*, the CJEU held that the principle of effectiveness meant that procedural rules should not inhibit the exercise of a person's rights derived from EU law. The CJEU accepted that this could be rendered impossible in practice where a person did not qualify for legal aid but was also unable to afford the costs of taking a case to the court.⁴⁷ Furthermore, the legality of any interference with the right to legal aid will be scrutinised in relation to the circumstances of the case and the legal regulations governing the issue.⁴⁸ In *Abdolkhani and Karimnia v. Turkey*, the ECtHR concluded that the authorities' failure to consider the applicants' asylum requests and their denial of access to legal assistance prevented them from effectively asserting their asylum-related claims under Article 3.⁴⁹

Legal counselling: definitions

In a separate Legal Note, ECRE has examined the concept of the legal counselling and analysed the guarantees required for legal counselling in the administrative procedure and for legal assistance and representation in the appeal procedure.⁵⁰ Based on the language of the APR, ECRE extracts the following definition of legal counselling:

⁴³ See ECRE, *The Way Forward, Europe's role in the global refugee protection system: Towards Fair and Efficient Asylum Systems in Europe*, September 2005, available at: <https://bit.ly/3zaWMEg>; ECRE, *Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, December 2014, available at: <https://bit.ly/3z4SsX8>.

⁴⁴ See Article 15(1) of the Commission proposal from 2016. This is mirrored in Article 14 on the right to legal assistance and representation which is now defined as the right of applicants to consult in an effective manner a legal adviser or other counsellor on matters relating to their application at all stages of the procedure. Unlike the corresponding Article 22(1) of the recast APD, it no longer mentions that this is at the applicants own cost.

⁴⁵ See also: ECRE, *Legal Note: the guarantees of the EU Charter of Fundamental Rights in respect of legal counselling, assistance and representation in asylum procedures*, June 2024, to be published; B. Mikołajczyk, 'The maze of legal support in the New Pact on Migration and Asylum', *Odysseus*, June 2024, accessible at: <https://bit.ly/3VsZ1Kx>.

⁴⁶ In the case of *M.S.S. v. Belgium and Greece*, for instance, the Court found a violation of Article 13 in conjunction with Article 3 ECHR inter alia because the applicant has no practical means of paying a lawyer and received no information on organisations offering legal assistance, which was considered essential in securing access to the asylum procedure in Greece, See, ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011, available at: <https://bit.ly/3Ry5NO3>, para. 319.

⁴⁷ See CJEU, *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, 22 December 2010, C-279/09, available at: <https://bit.ly/3VyKUYO>, ECLI:EU:C:2010:811. For a discussion, see Nuala Mole, 'The right to legal assistance, legal representation and legal aid' in ECRE and Dutch Council for Refugees, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, available at: <https://bit.ly/3XyhZC3>, 61-62.

⁴⁸ CJEU, *Mukarubega*, op. cit., para. 54.

⁴⁹ ECtHR, *Abdolkhani and Karimnia v. Turkey*, Application No 30471/08, Judgment of 22 September 2009, available at: <https://bit.ly/3KwKEOI>, para. 115.

⁵⁰ See ECRE, *The Guarantees of the EU Charter of Fundamental Rights in Respect of Legal Counselling, Assistance and Representation in Asylum Procedures*, <https://bit.ly/3BNOhAa>

Legal counselling is the provision of legal advice and guidance by a lawyer on procedural and substantive issues related to an asylum application during the administrative procedure, including assistance with the lodging of the application, support during the preparation for the first-instance interview and guidance on any legal issues arising throughout the procedure.

In addition, it is clear from the text that legal counselling must be provided throughout the administrative procedure, from the making of the application to the decision, and on any legal issue that arises. It must be of a high quality and readily available in order to meet the requirements of the APR for the administrative procedure if Member States decide not to extend access to legal assistance. To serve as a genuine guarantee for applicants, legal counselling also needs to be independent, in the sense of provided by independent, qualified legal practitioners and not through state agencies.

Finally, legal counselling needs to be provided in a confidential setting and directly to the applicants alone, one by one. Thus, although the text refers to provision of legal counselling to “several applicants at the same time”, this should be construed as meaning that a legal counsellor is responsible for more than one applicant at any point in time rather than that the legal counselling is to be delivered to more than one applicant present in a room at any one time. The latter interpretation would render the counselling ineffective as it would become little more than oral information provision to a number of applicants, who may not be able to share information on and/or receiving counselling on their application when other applicants are present. Thus, a legal counsellor could have a caseload of several applicants, for whom they have been entrusted with providing legal counselling, however individual counselling appointments should be foreseen. It should also be noted that “several”, while inexact, means a small number.

Overall, Recital (16) underlines that the purpose of the counselling is to “ensure a correct recognition of international protection needs” at the administrative stage, to support “more efficient and better quality decision-making”. It also refers to “legal support”. For this reason, quality, independent and confidentiality will be essential.

Recommendations:

- EUMS should expand free legal assistance and representation to the administrative procedure as they are able to do (Article 14(1)) in order to ensure more efficient as well as fairer processes.
- In line with the text, legal counselling should be interpreted as “the provision of legal advice and guidance by a lawyer on procedural and substantive issues related to an asylum application during the administrative procedure, including assistance with the lodging of the application, support during the preparation for the first-instance interview and guidance on any legal issues arising throughout the procedure.”
- The EUAA should prioritise assistance to EUMS in the implementation of this article, given evidence of the lack of respect for procedural guarantees.
- The EUAA should provide guidance on the provision of adequate quality legal counselling.
- EUMS should interpret legal counselling as requiring high quality, independent and confidential legal support to applicants on one-to-one basis, even when a legal counsellor is entrusted with supporting several (a small number) of applicants as part of their caseload.

- The European Commission should programme sufficient financial support under AMIF and BMVI for implementation of Articles 14 and 76.
- The European Commission and the EUMS should interpret “putting in place” legal counselling under Article 76 as meaning all elements of the provision of legal counselling, including support for legal fees.

Articles 17: Free legal assistance and representation in the appeal procedure

The articles on free legal assistance and representation largely replicate the APD, albeit with an expansion of the right of the state to exclude access to such assistance. The APD allows for the exclusion of free legal assistance and representation where the appeal is considered to have “no tangible prospect of success”, which is sometimes termed “merits testing”. Article 17(2)(b) of the APR maintains merits testing and expands it to include abusive appeals. Free assistance can also be excluded if the appeal is at a second or higher level under national law or if the applicant is already assisted by a legal adviser.

Implementation considerations

ECRE is concerned about maintaining the merits test at it leaves extensive scope for Member States to deprive applicants of the right to free legal assistance. While the application of a merits test at the appeal stage of the procedure is in theory justified by the objective of avoiding so-called “abuse” of the procedure by discouraging appeals that have little or no substance, in practice, it may deprive asylum applicants of an essential procedural guarantee and increase the risk of *refoulement*.

Merits testing involves predicting the outcome of an appeal based on a preliminary and incomplete pre-assessment of the merits of the case. Such an approach is at odds with the requirements of a full and extensive review of possible violations of Article 3 ECHR under the ECtHR jurisprudence relating to Article 13 ECHR.⁵¹ Currently, practice in EU Member States on merits-testing differs widely: while it is unknown in some Member States, it is applied in others albeit to varying degrees.⁵² In countries such as France, the standard is set to discourage “manifestly unfounded” appeals from benefitting from legal aid, rather than examining the prospect of success of the appeal.⁵³

Article 18: Scope of legal counselling, legal assistance and representation and Article 19: Conditions for the provision of free legal counselling, assistance and representation

Articles 18 and 19 explain the scope and conditions of the provision of legal support. The legal advisor must be provided with access to the applicant’s file and to the applicant. Member States are obliged to lay down rules for the arrangements for the provision of legal support.

⁵¹ See ECtHR, *Singh and Others v. Belgium*, Application No 33210/11, Judgment of 2 October 2012, available in French at: <https://bit.ly/3VD61om>; ECtHR; *S.J. v. Belgium*, Application No 77055/10, Judgment of 27 February 2014, available at: <https://bit.ly/3Xu1vuQ>, and *M.S.S. v. Belgium and Greece*, op. cit.

⁵² **Switzerland** abolished merits testing for legal assistance in the asylum procedure with the adoption of the Asylum Act in February 2014. See AIDA, *Country Report: Switzerland – First Update*, October 2015, available at: <https://bit.ly/3z9o4e2>, p. 24. In the **UK**, the system of merits testing, combined with other measures cutting legal aid, impacts significantly on access to free legal assistance. From 2014, legal aid was abolished for civil court cases where the merits are assessed as ‘borderline’, i.e. over 50% but not more than 60%, while legal aid would not be granted for judicial review applications unless the court granted permission for the judicial review to go ahead. The regulations introducing these cuts to legal aid were declared unlawful by the High Court in 2015: AIDA, *Country Report: United Kingdom – Fourth Update*, November 2015, available at: <https://bit.ly/3z9o8dM>, p. 26.

⁵³ AIDA, *Country Report: France – Fourth Update*, December 2015, available at: <https://bit.ly/3z5lo0V>, p. 33.

SECTION IV – SPECIAL GUARANTEES

The treatment of vulnerable applicants / applicants in need of special procedural guarantees is addressed in Articles 20 to 25 (see also definitions above at Article 3).

Article 20: Assessment of the need for special procedural guarantees

Provisions on the assessment of needs are more detailed compared to the APD and include a clarification of existing rules and stricter timelines. An obligation is placed on the authorities to identify whether an applicant “presents first indications” that they might require special procedural guarantees. After that, the assessment should start as soon as possible (Article 20(2)). Visible signs, statements, behaviours, and documents should all be taken into account and medical practitioners may be involved with the consent of the applicant. The assessment should then be concluded as soon as possible and at least within 30 days – no time limit was specified in the APD. Based on the text and the previous versions, the intention is that the 30-day time limit starts running from when the assessment begins, whenever that is.

In ECRE’s view, the changes constitute an improvement by more clearly describing the process of as a continuum, and more clearly distinguishing the respective roles of the various authorities that may be involved at different stages in the process. While authorities responsible for receiving and registering applications are entrusted with the task of detecting and indicating first indications of vulnerability which may require special guarantees, the determining authority is tasked with continuing and completing the assessment of the need for special guarantees. This is logical from a procedural perspective and rightly limits the role of police and other law enforcement authorities to indicating physical signs of vulnerability, as they are neither equipped nor qualified for any additional tasks in this process.

Article 21: Applicants in need of special procedural guarantees

When the applicant is identified as in need of special procedural guarantees than the authorities must provide them with “the necessary support” in order that they can benefit from the rights and comply with their obligations under the APR.

Article 21(2) includes the crucial – albeit complexly drafted – guarantee as follows:

Where the determining authority, including on the basis of the assessment of another relevant national authority, considers that the necessary support referred to in paragraph 1 of this Article cannot be provided within the framework of the accelerated examination procedure referred to in Article 42 or the border procedure referred to in Article 43, paying particular attention to victims of torture, rape or other serious forms of psychological, physical, sexual violence or gender-based violence, the determining authority shall not apply or shall cease to apply those procedures to the applicant.

Implementation considerations

Exemption of vulnerable applicants

ECRE argues that special procedures are not suitable for vulnerable applicants and that they should automatically be exempted from accelerated and border procedures. Unfortunately, neither the Commission nor the co-legislators seized the opportunity of the reform to introduce the clear-cut exemptions for vulnerable applicants. Instead, a far more complicated formula is used: after the assessment finds that applicants are in need of special procedural guarantees, the determining authority will have to assess whether the necessary support can be provided in the accelerated or

border procedure as relevant. Thus, vulnerable applicants can be subject to these procedures, provided that the “necessary support” is available.

Nonetheless, the Article establishes a strong presumption against the examination in the accelerated or border procedure of applications from applicants in need of special procedural needs, particularly if that is as a result of torture, rape or other serious forms of psychological, physical, sexual or gender-based violence, which are mentioned explicitly. Although wider exemptions on health grounds were removed in the negotiations, Recital (62) still includes the provision for exemption of applicants with special procedural needs “where justified on health grounds, including reasons pertaining to a person’s mental health”, as an additional factor. In practice, a practice of generally exempted vulnerable applicants from special procedures is likely to better align with national and international standards and reduce administrative burdens.

Necessary support

Recital (20) provides indications as to what necessary support consists in, stating that it is provided “in order to create the conditions necessary for the genuine and effective access to procedures.”

ECRE argues that changes in the APR militate against the use of accelerated and border procedures for these applicants because, even with support, the conditions will often not be in place for them to benefit from effective access to the procedure. First, the extremely short time limits that apply in these procedures for submitting documentation, taking first instance decisions and lodging appeals against negative decisions will render it difficult for vulnerable applicants to have access, or, put differently, for the Member States to provide the support necessary for that to be the case.

In addition, border procedures will often be conducted from detention, meaning a setting where certain vulnerable applicants will struggle to have genuine access to a procedure because of the likely impact on them, including people subject to violence or torture. The guarantee at Article 21(2) is reinforced by Article 53(2)(c) which provides for an exemption from the border procedure for these applicants when the necessary support cannot be provided in the locations in which the border procedure is taking place as per Article 54.

Finally, as a consequence of the examination of the application in the accelerated examination or border procedures, applicants may not benefit from an appeal with automatic suspensive effect under the APR. Vulnerable applicants are unlikely to be able to access an effective remedy if they do not have the right to remain during the process.

Recommendations

- EUMS should ensure adequate training for all authorities receiving and registering applications on the identification of indications of vulnerability and of the need for special procedural guarantees.
- EUMS must ensure the determining authorities are adequately resourced and prepared to carry out assessments of vulnerability and the need for special procedural guarantees, given their central role.
- EUMS should operate from the assumption that the necessary support cannot be provided to applicants in need of special procedural guarantees in either the accelerated or border procedure, which reflects both case law and evidence from practice.
- The EUAA should provide guidance on the necessary support for the different categories of vulnerable applicants.

Article 23: Special guarantees for unaccompanied minors

While Article 22 on guarantees for minors is short and largely reiterates the provisions of the APD and of case law on the application of the best interest principle, Article 23 is extensive and includes useful new detail on the guarantees for unaccompanied children. It integrates evidence on best practice, including that derived from EU programmes, where projects on child applicants, including on the use of guardians, have been supported.

In particular, it includes provisions aimed at ensuring consistency with the recast RCD on the appointment and responsibilities of the representative of the child. Representing and assisting the child, the representative is there to enable the child to benefit from the rights and comply with the obligations under the APR. A person with the necessary skills and experience should be designated to “provisionally assist” the child immediately, and a formal representative should be appointed no later than 15 days from the making of the application, with the person designated to assist acting as representative in the interim.

Despite these positive changes, in ECRE’s view, the provisions under Article 23 will not be sufficient to ensure access to asylum for unaccompanied children when they are subject to accelerated or border procedures (see below); a similar assessment applies for all children in relation to Article 22.

Chapter III: Administrative Procedure

SECTION I – ACCESS TO THE PROCEDURE

Articles 26 to 28: the three stages to access the procedure

The APR consolidates the approach to accessing the procedure based on three stages: the making, registering and lodging of the application for international protection. In so doing, it removes some of the ambiguity from the legal framework and incorporates jurisprudence, however, the procedure is rendered more complicated from the perspective of the applicant.⁵⁴ In addition, the APR changes or adds timelines for each stage of the administrative (first instance) procedure.

The timelines for each stage of the administrative procedure are summarised here:

Stage	Responsible actor	Deadline APR	Deadline APD
Regular procedure			
Making the application	By the applicant	As soon as possible (implicit – there are consequences for not making as soon as possible)	Silent
Registering the application	By the state’s authorities		
	<ul style="list-style-type: none"> If it goes to the authority responsible for registering 	5 days from the making	3 working days
	<ul style="list-style-type: none"> If it goes to another authority 	8 days – 3 to transfer to registering authority + 5 days	6 working days
Lodging the application	By the applicant	21 days from the registration	As soon as possible
	In case of disproportionate arrivals (meaning that the authority is not providing the applicant with an appointment)	2 months maximum	
Decision	Authorities	6 months (+ 6 months for complex cases. Maximum 12 months.	6 months + 9 months + 3 months. Maximum 18 months.

⁵⁴ Article 6 recast Asylum Procedures Directive equally distinguishes the same three steps in accessing the asylum procedure with the same maximum time limit of 3 working days for registration with a possible extension up to 10 working days in case of a large number of applications being made simultaneously.

Asylum border procedure			
Lodging	By the applicant	5 days	Silent
Decision	Authorities	12 weeks (extended to 18 weeks under the Crisis Regulation)	

Article 26: Making an application for international protection

Article 26(1) stipulates when an application shall be “considered as made”, which is when the applicant “expresses in person to a competent authority as referred to in Article 5(1) and (2) a wish to receive international protection from a Member State”.

As per Article 26(1) paragraph 2, if officials from the competent authority have a doubt they should ask the person “expressly” whether they wish to receive international protection, which is partly because the APR does not prescribe any particular formula to be used in expressing the wish for international protection.

Article 26(3) provides that the person must be “considered as an applicant for international protection” until a final decision is made on the application. Being an applicant, extends the rights and protections available to the person. Notably, the recast RCD provides that applicants are eligible for reception conditions “from the moment the express the wish to apply for international protection”.⁵⁵

These provisions have important consequences in terms of the applicant’s legal position and the rights derived from their status as an applicant, as this entails *inter alia*:

- (i) a right to remain in the Member State responsible;⁵⁶ and
- (ii) access to material reception conditions.⁵⁷

The obligation to confirm in case of doubt is an important safeguard to ensure full respect for the right to asylum guaranteed under Article 18 of the CFREU, in particular at Member States’ external borders, and consolidates their obligations resulting from the jurisprudence of the ECtHR. In the case of *Hirsi Jamaa and Others v. Italy*, concerning the interception at sea and immediate expulsion by the Italian authorities of a group of Somali and Eritrean nationals to Libya, the ECtHR held that obligations under Article 3 ECHR apply regardless of whether the person intercepted has explicitly applied for asylum. According to the Court, it was for the Italian authorities, faced with persons who had left Libya to “find out about the treatment to which the applicants would be exposed after their return” and to ascertain “how the Libyan authorities fulfilled their obligations in relation to the protection of refugees”.⁵⁸

An important restriction should be noted, however, which is that, following amendments, the references in Article 26 are to the *competent* authorities, rather than to any authorities of the Member State in question. Read with Article 5, the competent authorities refers to the determining authority and the authorities with responsibility for receiving applications but not other authorities. This is a significant change compared to the APD and one which may limit access to international protection. The APD at Article 6(1) paragraph 2 imposes a general obligation on the Member State to ensure

⁵⁵ Recital (7) Reception Conditions Directive.

⁵⁶ See Article 10 above.

⁵⁷ Article 16(1) recast Reception Conditions Directive.

⁵⁸ ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No 27765/09, Judgment of 23 February 2012, available at: <https://bit.ly/3RzPMH4>, para. 133 and 157.

registration takes place in 6 days when the application is received by *any* authority even without the competence to register.

Implementation considerations

A major implementation gap in the CEAS concerns unlawful denial of access to the procedure. Article 26 seeks to rectify this by stipulating when an application is made and from when and to when the person is considered an applicant. Their status as an applicant entails certain obligations for the state, such as provision of reception conditions. There remains a risk that denial of access to a procedure will continue in cases where the person expresses their desire to receive protection to an authority which is not competent. An additional risk to the applicant is the lack of an obligation to provide evidence of the making of the application, see section on documents below.

Jurisprudence in recent years has underlined the importance of ensuring genuine access to protection, in line with the requirement that EU law provisions must be interpreted to provide *effet utile*⁵⁹, ensuring effective implementation. In *Shahzad v Hungary*,⁶⁰ the ECtHR reiterated its stance from *N.D. and N.T.*⁶¹, noting that while the ECHR allows states to require that international protection applications are made at border crossing points, these points must genuinely and effectively secure the right to request protection under the ECHR, especially Article 3.

In *EU Commission v Hungary*, the CJEU underlined that the right to apply for international protection requires applications to be registered, lodged, and examined within the time frames set by Directive 2013/32 to ensure the effectiveness of the right to asylum under Article 18 of the CFREU. In the judgment, the Court underlined that the APD aims to provide effective, easy, and rapid access to protection procedures and mandates that Member States ensure individuals can effectively exercise their right to apply for international protection, including at borders, as soon as they express their intention.⁶² Moreover, it was clarified by the Court that an application for international protection is “deemed to have been made as soon as the person concerned has declared, to one of the authorities referred to in Article 6(1) of Directive 2013/32, his or her wish to receive international protection, without the declaration of that wish being subject to any administrative formality whatsoever”.⁶³

In *VL v. Ministerio Fiscal*, the CJEU underlined that Article 6(1) of the APD includes a broad definition of competent authorities. It requires all authorities “likely” to receive applications for international protection to accept such applications when made. The CJEU emphasised that the non-exhaustive list of competent authorities, introduced by “for example”, cannot be limited to police, border guards, immigration authorities, and detention facility personnel; it can also include judicial authorities handling detention requests. Member States must ensure these authorities receive relevant information and proper training to perform their tasks effectively.⁶⁴ When evaluating the accessibility of procedures, consideration must be given to independent reports indicating a state policy of

⁵⁹ CJEU, *Factortame and Others* [1990] ECR I-2433, Case C-213/89, Judgment of 19 June 1990, available at: <https://bit.ly/4crh9ev>, para. 20.

⁶⁰ ECtHR, *Shahzad v Hungary*, Application no. 12625/17, Judgment of 8 July 2021, available at: <https://bit.ly/3xo0M3D>, para. 62.

⁶¹ ECtHR, *N.D. and N.T. v. Spain* [GC], Application nos. 8675/15 and 8697/15, Judgment of 13 February 2020, available at: <https://bit.ly/4cnoQIY>, para. 209.

⁶² CJEU, *European Commission v. Hungary*, Case C-808/18, Judgment of 17 December 2020, available at: <https://bit.ly/3VxXcfe>, ECLI:EU:C:2020:1029, paras 102-106.

⁶³ *Ibid.*, para. 97.

⁶⁴ CJEU, *VL v. Ministerio Fiscal*, C-36/20 PPU, Judgment of 25 June 2020, available at: <https://bit.ly/45t5ee1>, ECLI:EU:C:2020:495, paras 58 – 60.

refusing entry to non-nationals seeking international protection, as confirmed by the ECtHR in *M.K. v Poland*.⁶⁵

Recommendations

- As per Recommendations on Article 4, EUMS should ensure that all authorities likely to have contact with applicants are designated as competent authorities for the purpose of receiving applications. This entails that the applicant can make the application to any authority, reflecting the jurisprudence of the European courts.
- EUMS should provide evidence that the application has been made, even though this is not an explicit obligation, since this has significant legal consequences for the applicant and may be of use to their own authorities.

Article 27: Registering applications for international protection

The second of the three stages, the registering of the application, is set out in Article 28, similarly to Article 27 including useful clarifications on the obligations of the authorities and certain (new) safeguards for the applicant.

Article 28(1) explains the information that must be gathered at registration, including the information relevant to the allocation of responsibility under the RAMM.

It also sets a deadline of 5 days from the making of the application for the registering of the application. Article 28(5) allows that, when there is a “disproportionate” number of people who make applications, making it “unfeasible” to meet the deadline, then the deadline is extended to 15 days from the making of the application.

When the application is made to an authority which is responsible for receiving but not registering the application (see Article 4), then that authority has 3 days to inform the authority responsible for registering application, which in turn has 5 days register the application after receiving the information.

Implementation considerations

In order to ensure that access to an asylum procedure is guaranteed and to improve the efficiency of the asylum system, it will be important to ensure that the deadlines are respected.

The interaction with the Screening Regulation is foreseen: the information for registration may already be available on the screening form.

Recommendations

- EUMS should take full advantage of training available from the EUAA or other actors in order to ensure that all relevant authorities are aware of their obligations including deadlines pertaining.
- EUMS should ensure necessary investment in the capacity of the authorities to ensure that timely registration takes place.

⁶⁵ ECtHR, *M.K. and others v. Poland*, Application nos. 40503/17 42902/17 43643/17, Judgment of 23 July 2020, available at: <https://bit.ly/4cpy01t>, paras. 208-209.

Article 28: Lodging of an application for international protection

The final of the three stages to access the procedure is the lodging of the application by the applicant, which is set out in Article 28. Again, the Article contains useful clarifications in the interest of the applicant as well as the Member State.

Article 28(1) requires that the application is lodged “as soon as possible” with a deadline of 21 days for the lodging of the application by the applicant (21 days from the registration). The deadline for the applicant is a new element compared to the APD. While still a short period of time, it is a significant improvement on the 10 working days that was foreseen in the proposal. As per Article 28(2), the same deadline applies to the applicant following a transfer under AMMR. Article 28(4) allows an extension of the deadline to two months in the case of disproportionate numbers meaning that the authorities cannot provide an appointment.

The requirement in the APD for the applicant to have “an effective opportunity” to comply with the obligation is maintained at Article 28(1), which provides protection for the applicant, given that their lodging of the application is dependent on the Member States providing an appointment for them to do so. In an important change, it is now obligatory for the lodging to take place in person unless the applicant is in prison or detention.

As per Article 28(3), the application has to be lodged in person, with very limited exceptions allowed. Following amendments to the proposal, it is not explicit in the final text that the applicant must be given an appointment to lodge an application at the time of registration. This would have constituted an important guarantee ensuring that the applicant has an effective opportunity to lodge the application with the determining authority. It remains implicit, however, given that without an appointment the lodging cannot take place.

Article 28(5) defines the act of “lodging an application”⁶⁶ by reference to the applicant’s obligations under Article 4(2) of the Qualification Regulation to submit all elements available to him or her which substantiate the application. The following elements are required:

- (i) the applicant’s statements;
- (ii) all documentation at the applicant’s disposal regarding the applicant’s age, background and personal data of “relevant relatives”, including their places of previous residence;
- (iii) previous applications;
- (iv) travel routes and travel documents; and
- (v) reasons for applying for international protection.

The lodging of the application triggers a range of consequences for the applicant including:

- the start of the actual examination of the application, whether in the examination or the special procedures (border procedure, accelerated examination, or subsequent application procedure);
- the applicant’s access to the labour market; and
- the applicant’s entitlement to a document certifying his or her status as an applicant.

Article 28(6) includes a new provision which relates to all three stages and allows Member States to organise their systems “in such a way that making registering or lodging take place at the same

⁶⁶ Lodging an application is also mentioned in Article 6 recast Asylum Procedures Directive as a procedural step the applicant should have an effective opportunity to complete but without specific time limit for its completion nor mentioning of the elements to be submitted by the applicant.

time”, so long as all the procedural guarantees are respected. For some Member States, this will allow them to maintain the status quo.

Implementation considerations

Effective access to the procedure

Imposing a deadline for lodging the application, creates a risk of denial of access to the procedure, given that there are currently and have often been many Member States where there are significant delays in the provision of appointments for applicants to lodge their applications. While this results in part from the unclear legal distinctions between the notions of making and lodging applications in national legislation – which is addressed by the APR – it also results from a simple lack of capacity in national administrations for the timely registration of applications.

Some notable examples in the past years have been Spain and Italy, where appointments to lodge asylum applications can take several months and up to more than a year in certain cases, depending on the province.⁶⁷ Also in other Member States, including Belgium, Cyprus, France and the Netherlands, asylum applicants have repeatedly experienced delays of several weeks or even months before the registration or lodging of their application has been completed, in some cases leaving them destitute during this time.⁶⁸

Given the range of information that the applicant must submit at the lodging stage in order to substantiate the application, it becomes one of the most important moments in the procedure for the applicant. Incomplete submission of elements at that stage can have serious consequences for the applicant, including the rejection of the application. Although the later submission of additional elements is explicitly allowed under Article 28(5) and (6), this may nevertheless be interpreted as casting serious doubts over the applicant’s credibility.⁶⁹

In many cases, respecting Article 28 will require Member States to increase resources in the asylum system in order to ensure that appointments for the lodging of the application can be provided in a timely manner and that therefore the applicants have an effective opportunity to lodge the application in line with the 21-day deadline.

Applicant from the “making” of the application

It should be underlined that the applicant must be considered as such from the point that the application is made, not the point of lodging. Recital (29) refers to the lodging of the application as “the act that formalises the application for international protection”, which triggers the time limits for the various administrative procedures and the obligation to issue the applicant with a document certifying the person’s status as an applicant. However, as the application has already formally been made, it should be underlined that the lodging is an administrative step which marks the submission of elements by the applicant to substantiate the claim. It is the act of substantiating the application that has already been made.

Combining the stages

⁶⁷ AIDA, *Country Report: Italy – Update on the year 2023*, to be published in June 2024; AIDA, *Country Report: Spain – Update on the year 2023*, May 2024, available at: <https://bit.ly/4esCq9E>.

⁶⁸ AIDA, *Country Report: Belgium – Update on the year 2023*, May 2024, available at: <https://bit.ly/3zahc09>; AIDA, *Country Report: Cyprus – Update on the year 2023*, May 2024, available at: <https://bit.ly/3KR8Tsu>; AIDA, *Country Report: France – Update on the year 2023*, May 2024, available at: <https://bit.ly/4c9Bvt6>; AIDA, *Country Report: Netherlands – Update on the year 2023*, April 2024, available at: <https://bit.ly/3KOsFhV>.

⁶⁹ For an analysis of the impact of late submission of information on credibility assessment in the **Netherlands** and **Belgium**, see UNHCR, *Beyond Proof – Credibility Assessments in EU asylum systems*, May 2013, available at: <https://bit.ly/45AzBz9>, 97-102.

Overall, the APR clears up the ambiguities with respect to making and registering and lodging of applications that exist in Article 6 of the APD and in Member States' practice. However, it also complicates the process of accessing the asylum procedure by formalising the three stages before an application is considered lodged.

Some Member States (e.g. Portugal, Romania and Sweden) do not currently distinguish between the making, registration and lodging of an application and instead apply a straightforward system whereby an asylum application is registered the day it is made without requiring applicants to formally lodge their application. While the separation of the stages will become a requirement, Article 28(6) allows two or more of the stages to take place at the same time. So long as the procedural guarantees are respected, this approach may be advantageous for Member States and possibly for applicants.

Deadlines

While preferable to the original proposal of 10 days, the new deadline of 21 days for the applicant to lodge the application is short, especially given the large number of elements that should be provided, and the potentially serious consequences of omitting elements. Respect for the relevant jurisprudence can be questioned.

In a judgment concerning the requirement in Irish law for applicants who have been refused refugee status to submit an application for subsidiary protection within a period of 15 days, the CJEU held that such rule was incompatible with the principle of effectiveness.⁷⁰ With specific reference to the difficulties applicants may face because of the difficult human and material situation in which they may find themselves and the protection of the rights of defence and the principle of legal certainty, the Court found the time limit particularly short. It also held that it cannot reasonably be justified for the purposes of ensuring the proper conduct of the procedure and is therefore "capable of compromising the ability of applicants for subsidiary protection actually to avail themselves of the rights conferred to them by Directive 2004/83."⁷¹

By analogy, a period of three weeks for lodging the application may be considered liable of rendering impossible in practice or excessively difficult the exercise of the rights conferred by the EU legal order.

Furthermore, as explained above, compliance with the time limits for lodging the application depends as much on the capacity of the determining authority to fix a timely appointment, given that, with limited exceptions, the application must be lodged in person. In such instances, in line with the EU law principle of the right to good administration, non-compliance with the time limits mentioned cannot be held against the applicant as they will not have had the required "effective opportunity".

In *N.H. and Others v. France*, the ECtHR assessed the situation of international protection applicants who faced prolonged waiting times to register and lodge their applications. One of the applicants received a certificate confirming his asylum claim was lodged 28 days after his first appointment at the prefecture. Even though the Court noted the extended waiting time, it clarified that its role was not to adjudicate on the time frames set by the EU law. Instead, it examined the impact on the applicants to determine if the severity required for Article 3 of the ECHR was met. The Court found the French authorities responsible for the applicants' living conditions, which included sleeping

⁷⁰ See CJEU, *Evelyn Danqua v. Minister for Justice and Equality, Ireland, Attorney General*, Case C-429/15, Judgment of 20 October 2016, available at: <https://bit.ly/3VtiN4R>, ECLI:EU:C:2016:789.

⁷¹ See CJEU, *Danqua*, op. cit., para. 46.

rough, lack of access to sanitary facilities, no means of subsistence, and living in constant fear of attack or robbery. This amounted to degrading treatment and a lack of respect for their dignity.⁷²

Legal assistance for the lodging

As the moment of lodging the application is so important, legal support is necessary. ECRE argues that free legal assistance and representation is essential. Unfortunately, it is not obligatory in the final text. The free legal counselling which is mandatory must be of a scope and quality as to ensure the applicant the required assistance in lodging the application in time and with all relevant elements included, see above. Member States should in any case reflect on the value of providing free legal assistance and representation even though it is not an obligation.

ECRE remains concerned that applicants will be penalised by implicit withdrawal of the application if they do not meet the deadline for lodging the application. This is discussed in more detail in section on implicit withdrawal, Article 41.

Preparation for the lodging

A final consideration is the use of the period between the registration and the lodging of the application. ECRE has long advocated for a preparation period to be provided to the applicant at the start of the asylum procedure.⁷³ The concept of a preparation period has been applied for instance by the Netherlands with aim of providing the applicant with some time to rest in order to cope with their new situation.⁷⁴ During this period, the applicant receives counselling by the Dutch Council for Refugees, while a number of other procedural steps are taken such as a medical examination, the EURODAC check etc.⁷⁵

Although making full use of this time to allow for efficient preparation would have required longer than 21 days, even in with shorter time, some of the necessary support to the applicant could be provided.⁷⁶ When Member States are not able to provide interviews within the 21 days and the extension to two months is in place, this may allow for use of the time in this way.

Article 29: Documents provided to the applicant

Reflecting the three-stage process of access to the procedure, covering the making, registering and lodging of the application, two types of documents should be issued to applicants.

First, at Article 29(1), at the point of registration, a document is issued which indicates that an application has been made and registered. In line with the registration deadlines, this shall be issued 5 days after the making of the application. Second, at Article 30(4), “as soon as possible” after the

⁷² ECtHR, *N.H. and others v. France*, Application Nos. 28820/13, 75547/13 and 13114/15, 2 July 2020, available at: <https://bit.ly/3xzkFol>, paras 169-171.

⁷³ See ECRE, *The Way Forward, Europe's role in the global refugee protection system: Towards Fair and Efficient Asylum Systems in Europe*, September 2005, available at: <https://bit.ly/3zaWMEg>, p. 49-50.

⁷⁴ AIDA, *Country Report: Netherlands – Update on the year 2023*, April 2024, available at: <https://bit.ly/3KOsfhV>, p. 38.

⁷⁵ In the **Netherlands**, which has a system of a short regular procedure aiming at concluding the first instance procedure in 8 working days with a possibility to refer cases to an extended procedure, the duration of the preparation period is at least six days. See AIDA, *Country Report: Netherlands – Fourth Update*, November 2015, available at: <https://bit.ly/3VrRtYx>, p. 14-15.

⁷⁶ As is required by Article 16(1) Commission Proposal recasting the Reception Conditions Directive and Article 17(1) recast Reception Conditions Directive. As mentioned above, in a number of Member States asylum seekers may be barred from accessing material reception conditions or accommodation for several weeks due to delays in the registration of their application or even after such registration. The effectiveness of a rest and preparation period would be conditional on rigorous screening and enforcement of Member States' obligations to provide effective access to material reception conditions, accommodation and legal assistance as soon as an application is made. The monitoring and assessment mechanism envisaged in the EU Asylum Agency Proposal could constitute an important tool in this regard.

lodging of the application, the authorities issue a document containing a list of specified information. The document is valid for up to twelve months.

Article 29(5) exempts the Member States from the obligation to provide either document “when and for as long as the applicant is in detention or imprisonment.” Given the expanded use of detention foreseen by the reforms, this Article may have a negative impact on a significant number of people.

Implementation considerations

The strengthened obligations of Member States to provide applicants with a document which confirms their status is welcome, as are the deadlines set for doing so. It should be noted, however, that certain gaps will be created. First, Member States certify that an application has been made upon registration, rather than at the making of the application itself. This leaves the applicant undocumented in the period between arrival and registration, notwithstanding the applicant’s entitlement to remain on the territory as soon as an application is made. This is inconsistent with the definition of applicant for international protection whereby a person is defined as such from the moment an application is made: they must be considered an applicant but have no proof of the fact.

Second, the document issued at the point of registration has limited information compared to that issued at the point of lodging and does not state that the individual is an applicant (although this is implicit). The document issued at lodging does not have to include information on labour market access which would facilitate access to the labour market.

ECRE is concerned about the exemption from the obligation to provide the documents at registration or lodging when the applicant is in detention or imprisonment at Article 29(5). The rationale for this exemption is not spelled out but can be assumed to be based on the idea that the person detained or imprisoned will not need a document because they will not need to prove their status, given that they will not be in contact with state or private actors beyond those managing detention facilities.

The presumption is itself incorrect, given that a person in detention will still have contact with lawyers, providers of assistance, and potentially other state and private actors, such as potential employers – indeed, in the case of detention rather than imprisonment, with any one they may wish to correspond with. They may need to prove their status with the use of formal documents. That could be in an emergency situation, such as a health emergency, where they need to have a document, for instance to facilitate medical treatment.

Second, while imprisonment presumes that the person is subject to criminal sanction and there may be a justification for differential treatment, detention is – regrettably – allowed for a wide variety of asylum applicants even when they have not committed a mistake or error, let alone a crime. Notably, the grounds for the use of detention are extended by the recast RCD, and read with the APR, detention may become a standard regime for certain categories of applicants, especially those subject to the fiction of non-entry. Reducing the rights of detained applicants, even though they are detained through no fault of their own and not as a punishment for an act they have carried out, appears to be discriminatory and a potential subject for a legal challenge on the basis of the breach of the principle of non-discrimination under the CFREU.⁷⁷

⁷⁷ In the Case C 550/07 P *Akzo*, the CJEU confirmed that the principle of equal treatment under Article 20 “requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified”. CJEU, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, Case C-550/07 P, Judgment of 14 September 2010, ECLI:EU:C:2010:512, available at: <https://bit.ly/45yu1gV>, para. 55. The ECtHR underlined that once the applicant demonstrates a difference in treatment, the burden of proof lies with the government to justify it. ECtHR, *D.H. and others v. Czechia*, Application No. 57325/00, 13 November 2007, available at: <https://bit.ly/3KVRReQE>, para. 177.

In addition, the use of de facto detention – a situation which amounts to detention but which is not formally classified as such – is widespread across the Member States.⁷⁸ While the exemption from the obligation to provide documents should only cover formal use of detention, Member States seek to expand it to the grey area of de facto detention, where safeguards are rarely present.

Recommendations

- EUMS should provide the documents specified in Article 29 to applicants in detention and prison despite the absence of an obligation to do so. Provision of documents will also support the authorities to manage and track applicants.
- The EUAA should include in its training and guidance the information that should be included in documents and the information that it would be useful to include, for example, issues that relate to the labour market, based on the use in practice of documents by asylum applicants.

Article 30: Access to the procedure in detention facilities and at border crossing points

Article 30 concerns access to the procedure for people held in detention facilities or at a border crossing. It expands on the equivalent article (Article 8) of the APD.

The Article repeats the obligation in the APD for the authorities to provide information on accessing the procedure when there are indications that the person wishes to apply for asylum. There is a subtle change however which is that in the APR the obligation to provide information is confined to the “competent authorities” whereas the APD refers simply to the Member State. This is also the case for the obligation to make arrangements for interpretation services to the extent necessary, now separated out as Article 30(2).

Article 30(3) ensures access to applicants in detention or at border crossing. It states that “Organisations and persons permitted under national law to provide advice and counselling shall have effective access to applicants held in detention or present at border crossing points, including transit zones, at external borders”. An important change is that access is extended to detention facilities which was not mentioned in the APD. In other respects, the Article reorders the phrases in Article 8(2) APD but does not substantively change the right to access. The Member States retain the right to set rules and condition access on an agreement with the national authorities, and limiting access is possible for objective reasons so long as it is not “severely restricted or rendered impossible”.

Implementation considerations

Making an application

The provision of accurate and timely information is crucial to ensure “effective access to the examination procedure”, as required by the APR.⁷⁹ However, ECRE remains concerned that the wording in Article 30(1), copied from Article 8(1) of the APD, is unclear and therefore fails to set a useful standard for Member States. It is hard to see how in practice border guards at border crossing points or personnel in detention facilities should interpret “indications that third country nationals or stateless persons... may wish to make an application for international protection”. The provision

⁷⁸ European Parliament, *Reception Conditions Across the EU*, November 2023, available at: <https://bit.ly/3Xsfls4>.

⁷⁹ See Recital (26) recast APD emphasising the crucial role of officials who come first into contact with persons seeking international protection, in particular border guards in ensuring access to the asylum procedure and the importance of training in providing persons who make an application for international protection with the relevant information as where and how to lodge such an application.

leaves too much to the official's subjective assessment of the "indications" that may be presented, itself being such a vague concept that it seems liable to create arbitrariness.

As argued elsewhere by ECRE,⁸⁰ a mere "indication" is not suitable as a benchmark to establish a Member State's obligation to provide third country nationals in such locations with information on the possibility to do so. Applying this standard on an individual basis may result in discriminatory treatment of third country nationals, as an unqualified and subjective indication as to whether a person may or may not wish to apply for asylum cannot qualify as an objective justification for withholding such information from that person. Guidance on the indications that should be considered a wish to apply for asylum, including a list of examples, would assist in ensuring access to asylum.

Recital (27) expands upon the Article by underlining that it is possible to express the wish to receive international protection "in any form" and that specific wording does not have to be used, the "defining element" is expression of fear of persecution or serious harm if returned. The Recital also requires that where there is doubt about the intention the person must be "expressly asked" whether they wish to apply for international protection.

In ECRE's view, the principle of non-discrimination laid down in Article 21 of the CFREU requires information detailing the possibility of making an application for international protection to be available to all third country nationals present in such locations. In order to be effective, such information must be provided pro-actively to all those apprehended at the border or held in detention facilities on an equal footing. Informing individuals of the possibility to make an asylum application is not an overly complicated task and does not require the use of disproportionate resources, as it can be provided by way of information leaflets and through oral communication, including audio-visual material that is freely accessible in detention facilities or border crossing points.⁸¹

Access to applicants

Given the expanded use of detention, the expanded use of the border procedure, and the combination of the two, ensuring access to applicants will become more of a challenge under the APR. Nonetheless, a range of actors must have access in order for the provisions of the APR to be respected, and not just the various representatives of the authorities. Notably, providers of legal counselling during the administrative procedure and providers of language teaching and vocational training under rRCD Article 18, will need to be able to reach applicants. Other service providers, such as those providing medical assistance, including psychological assistance, and providing return counselling, as relevant, may also seek access to applicants. There are a number of Member States in which access to applicants in detention has not been allowed, including Malta and Poland⁸² thus, access should not be taken as a given but needs to be monitored.

Recommendations

- EUMS should extend the obligation to provide information on the right to apply for asylum to all authorities likely to have contact with the applicant.
- The EUAA should provide guidance on "indications" of the wish to apply for asylum in training and advice on asylum procedures.

⁸⁰ ECRE, *Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, December 2014, available at: <https://bit.ly/3z4SsX8>, p. 13-14.

⁸¹ See also EUAA and Frontex, *Practical Guide: Access to the Asylum Procedure*, 2023, available at: <https://bit.ly/4cuyQtB>.

⁸² See AIDA Country Report on Malta – 2022 Update, available at: <https://bit.ly/4cqwnkg> and AIDA Country Report on Poland – 2023 Update, available at: <https://bit.ly/4bjajHc>.

- EUMS should provide access to applicants for all providers of assistance to applicants and certainly when the assistance is an obligation, including access for legal counsellors and education providers.
- The European Commission and independent bodies should closely monitor whether access to applicants is ensured, particularly where applicants are in detention.

SECTION II – EXAMINATION PROCEDURE

In the APR, the administrative stage includes four types of procedure: an “examination procedure” (the regular procedure) and three special procedures, the accelerated examination procedure, the border procedure, and subsequent applications. The procedural rules for examination and decision-making are significantly expanded upon in the APR compared to the APD, with the equivalent sections of the APD separated into additional sections with information elaborated and re-ordered.

Articles 34 and 35 set out certain of the procedural rules for the regular asylum procedure, although they should be read alongside the subsequent section on decisions which explains in more detail the procedural rules for the decisions being taken.

Article 34: Examination of applications

An important change introduced by Article 35 compared to the APD is to firmly reinforce the responsibility of the determining authority for the examination of the application. The determining authority is referred to throughout and its specific obligations set out.

Article 34(2) sets out the elements that the determining authority has to take into account in the examination. As such it cross-references the Qualification Regulation, incorporating the changes to status determination brought about by that instrument. Notably, the new obligation to apply the internal protection alternative – unless the state is the actor of persecution – appears at Article 34(2)(g).

The new mandate of the EUAA is highlighted, with reference to its role in providing common analysis of the country of origin and guidance notes at Article 34(2)(b), derived from EUAA Regulation Article 11; and in providing information and analysis on safe third countries (Article 34(2)(c), from EUAA Regulation Article 12.

Article 34(3) requires that the personnel examining the application should have the necessary knowledge and training, including the training provided by the EUAA as per EUAA Regulation Article 8.

Article 34(5) allows but does not oblige the Member State to prioritise the application under certain circumstances, with the non-exhaustive list covering (a) well-founded applications, (b) vulnerable applicants, (c) national security/public order, (d) subsequent applications, and (e) applicants subject to a decision under recast RCD Article 23(2)(e) (public nuisance/criminality).

It should be read in conjunction with Recital (44) on prioritisation, which explains that Member State retain the flexibility to decide on prioritisation of applications, so long as they continue to respect the procedural rules, on time limits and so on. On the other hand, the mandatory use of accelerated and border procedures is “without prejudice to” Member States’ right to decide whether to prioritise these applications.

Prioritisation is defined here, and as elsewhere in the *acquis*, it should be understood simply as examining an application “before other, previously made applications.”

Implementation considerations

Prioritisation

Member states retain the right to prioritise applications as they wish, so long as they continue to respect the rules. Prioritisation is a form of fast-tracking separate from acceleration. It involves examining the certain applications before other applications, even if the latter were made before the former. There are both risks and advantages attached to this form of fast-tracking.

First, it allows for rapid examination of manifestly founded cases. It is widely acknowledged that rapid access to protection status for manifestly founded cases is an advantage to applicants and states alike. Second, prioritisation of vulnerable applicants may minimise the time they spend in the procedure, which creates additional risks for them compared to other applicants, particularly in a context where Member States struggle to respect special guarantees.⁸³ On the other hand, prioritisation may increase the risks of unfairness for categories of applicants already subject to harsher procedures, such as those for whom procedural guarantees have been stripped out, such as subsequent applicants. The time limits remain the same but where they are short and prioritisation is applied, applicants may struggle to make the necessary legal challenges to access their rights. For instance, if subsequent applicants are prioritised, preparing an appeal may be even more of a challenge.

Article 35: Duration of the examination procedure

Specific time limits are imposed on the relevant authorities for the conclusion of both the administrative first instance and the appeal procedure, as well as on applicants for lodging appeals against the various types of decisions in the APR.

Introducing a deadline for the first instance decision, compared to the flexibility left to Member States under the APD, entails both benefits and risks for the applicant. There is an advantage in rapid provision of a decision, which allows the applicant to move on with their lives. On the other hand, there may be a negative impact on the quality of decision-making, especially given the prevalence of complex cases.⁸⁴ The APR sets different timelines for decisions on the admissibility and the merits

⁸³ European Parliament, *Reception Conditions Across the EU*, November 2023, available at: <https://bit.ly/3Xsfls4>.

⁸⁴ In the Order of the vice-president of the CJEU, it is specified that “where one of the pleas relied on reveals the existence of complex issues of law the solution to which is not immediately obvious and therefore calls for a detailed examination that cannot be carried out by the court hearing the application for interim relief but must be the subject of the main proceedings, or where the discussion of issues by the parties reveals that there is a major legal disagreement whose resolution is not immediately obvious”: CJEU, *European Commission v Amazon Services Europe Sarl*, Order of the vice-president of the Court, 27 March 2024, Case C-639/23 P(R), available at: <https://bit.ly/4cskzxw>, ECLI:EU:C:2024:277, para. 77. See also: CJEU, *Carles Puigdemont i Casamajó and others v. European Parliament and Spain*, Order of the vice-president of the Court, Case C-629/21 P(R), 24 May 2022, available at: <https://bit.ly/45tbqml>, ECLI:EU:C:2022:413, para.188.

In the Opinion of AG Wathelet in Joined Cases C-47/17 and C-48/17, concerning the time limits established in the Dublin III Regulation, it is emphasised that “there may actually be situations where the authorities of the requested Member State have to examine complex cases, connected with unaccompanied minors and possible family members for example; in such situations, a short mandatory time limit would run counter to the objective of the Member State responsible being correctly designated”. CJEU, *X, X v Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-47/17 and C-48/17, Opinion of Advocate General Wathelet of 22 March 2018, available at: <https://bit.ly/3KNKBjh>, ECLI:EU:C:2018:212, footnote 38.

AG Sharpston refers to an individual’s sexual orientation as “a highly complex issue”, “a complex matter, entwined inseparably with his identity, that falls within the private sphere of his life.” Moreover, it is underlined that “The referring court considered that verifying an averred sexual orientation is more complex than verifying other grounds of persecution listed in Article 10(1) of the Qualification Directive”. CJEU, *A, B, C*, Joined Cases C-148/13, C-149/13 and C-150/13, Opinion of the Advocate General Sharpston, 17 July 2014, available at: <https://bit.ly/4bcr6f1>, ECLI:EU:C:2014:2111, paras. 28, 36, 38, 68.

of the application, and for decisions on explicit and implicit withdrawal by the determining authority. Time limits for lodging appeals are discussed in the section below.

The following time limits for decisions are set out in Article 35:

Procedure	Deadline for a decision		
	Standard time limit	With extension	APD
Inadmissibility procedure (all articles except A39(1)(e)).	2 months from lodging	4 months (Article 36(3))	
Inadmissibility procedure under Article 39(1)(e).	10 working days	No extension	
Accelerated examination procedure.	3 months from lodging	No extension	In “reasonable” time
Regular examination procedure.	6 months from lodging	12 months (+ 6 months – Article 36(5))	18 months (+ 9 months + 3 months)
Regular examination procedure – uncertain situation in country of origin.		21 months (postponement Article 36(7)) Review every 4 months	21 months Review every 6 months.

Procedure	Deadline for a decision		
	APR	Crisis Regulation	APD
Border Procedure	<ul style="list-style-type: none"> Standard: 12 weeks After relocation: 16 weeks 	If a MS has requested derogation from the APR: 18 weeks	None (variety of examples from practice)

The APR thus maintains the maximum time limit of six months for concluding the examination in the regular procedure as per the APD. Article 36(1) envisages a shorter time limit for the examination of the inadmissibility of the application at two months (amended from the one month envisaged in the proposal), or 10 days in one set of circumstances (Article 39(1)(e) – the applicant has been issued

In *H.A. v. The United Kingdom*, the ECtHR deemed the application admissible, stating that the complaint raises sufficiently complex issues of fact and law, and thus cannot be rejected as manifestly ill-founded under Article 35 § 3 (a) of the Convention. The case concerned a young stateless Palestinian refugee male from the Ein El-Hilweh Refugee Camp in Lebanon, who asserted a fear and real risk of serious harm under Article 3 of the ECHR due to forced recruitment by terrorist extremist organisations in the camp, the Court highlighted the issue of forced recruitment. It found that the UK Upper Tribunal had failed to examine the real risk of serious harm on return, and this failure was not addressed by the Court of Appeal when permission to appeal was requested: ECtHR, *H.A. v. The United Kingdom*, Application no. 30919/20, 5 December 2023, available at: <https://bit.ly/45yY48g>, para. 46. Similarly, in *V.C.L. and A.N. v. The United Kingdom*, the Court confirmed admissibility of the case due to sufficiently complex issues of fact and law. The case concerned prosecution of the (then) minor applicants, both of whom were recognised as victims of trafficking by the designated Competent Authority, for criminal offences connected to their work as gardeners in cannabis factories. ECtHR, *V.C.L. and A.N. v. The United Kingdom*, Applications nos. 77587/12 and 74603/12, 16 February 2021, available at: <https://bit.ly/3xs6ly3>, para. 123.

with a return decision and does not meet the 7-day deadline for making a new application despite having been informed of the deadline, and no new elements have arisen).

Extensions are possible for all inadmissibility decision, except those taken on the ground Article 39(1)(e), and for decisions taken in the regular procedure, but should be used sparingly. There are three grounds for requesting an extension. They are replicated in full here and then used in a summary form throughout the Comments, given that the same formula is used at different points: disproportionate numbers, complexity, and delay attributed to applicant.

- (a) a disproportionate number of third-country nationals or stateless persons make an application for international protection within the same period of time, making it unfeasible to conclude the admissibility procedure within the set time limits;
- (b) complex issues of fact or law are involved;
- (c) the delay can be attributed clearly and solely to the failure of the applicant to comply with his or her obligations under Article 9.

According to Recital (26), “extending ... time limits should be a measure of last resort”. Instead, Member States should be maintaining an efficient asylum system, based on regular reviews and contingency planning, and requesting supporting from the EUAA. Indeed, an obligation is created whereby Member States should request assistance from the EUAA when they foresee that they will not meet the time limits. A mechanism is then created for provision of support:

Where no such request is made, and because of the disproportionate pressure the asylum system in a Member State becomes ineffective for the functioning of the CEAS, the Asylum Agency should be able, on the basis of a Council implementing act following a proposal by the Commission, to take measures in support of that Member State.

Postponement of decision-making

In Article 35(7), the APR maintains the possibility for postponing by up to 21 months the conclusion of the examination where the determining authority cannot reasonably be expected to decide within the proscribed time limits “due to an uncertain situation in the country of origin which is expected to be temporary”. There are two important changes in the application of this provision, however – the review of the situation in the country of origin needs to take place every four months rather than every six months, and reviews of the situation in the country of origin by the EUAA should be taken into account. This Article is of particular relevance given that following the Taliban takeover, asylum applicants from Afghanistan faced Member State suspension of decision making on these grounds, although that has now largely ended.⁸⁵

Countries which decided to “freeze” applications for Afghan nationals after August 2021 used varying lengths for the suspension, including Belgium until May 2022, Germany until December 2021, and Sweden until November 2021. On the other hand, good practice was put in used in Ireland, which instead prioritised applications from Afghan nations from August 2021 “in line with updated advice from UNHCR”, and delivered refugee statuses based on written applications only, foregoing the interview. According to the AIDA country report on Ireland, this practice was still applied to some extent in 2023.⁸⁶

⁸⁵ Regarding the aftermath of the Taliban takeover, according to the EMN, of 23 Member States responding, in 8 countries (BE, DE, GR, HR, HU, LUX, NL, SE) decisions were suspended for Afghan applicants, either partially (only for some types of decisions) or completely: EMN, *Ad-Hoc Query on 2022.22 Protection of Afghans in the EU*, June 2022, available at: <https://bit.ly/3VQcRab>.

⁸⁶ AIDA, *Country Report: Ireland – Update on the year 2023*, May 2024, available at: <https://bit.ly/3xeXa43>.

The APR sets a time limit of three months for decisions taken in accelerated procedures, whereas currently no such limit exists. Practice shows divergence in the national rules laid down on the duration of accelerated procedures at first instance across Member States, from as short as 5 days in Italy to three months in Austria.⁸⁷

Implementation considerations

Accelerated procedures

A three-month time limit for the accelerated procedure is tight and will only be fair when the necessary procedural safeguards are in place and respected. It should be noted, however, that the original proposal included an 8 working days time limit which was far too short and has fortunately been removed. Even with a three-month limit, there is a risk that applicants are deprived of an effective opportunity to substantiate their claim.

Non-compliance with the time limits foreseen has no legal consequences for the determining authority (although there may be practical consequences in terms of implications for solidarity entitlements under the RAMM). For inadmissibility, it is even stated that, “The application shall not be deemed to be admissible solely by reason of the fact that no decision on admissibility is taken within the time-limits set out” (Article 35(1)), thus precluding the Member State from examining the application on the merits solely because the time limit is not met.

The APR removes the obligation in the APD for the determining authority to inform the applicants of the reasons for the delay and provide a time frame within which a decision is to be expected.

The regular procedure

In ECRE’s view, the conclusion at first instance of the examination of the merits of an application within six months from the lodging of the application is a reasonable objective, allowing a fair and full examination of the claim in most cases (provided that the determining authority is sufficiently resourced and its staff well-trained). The time limit should be respected “without prejudice to carrying out an adequate and complete examination of an application for international protection”, according to Recital (44).

The possibility to extend by six months to a year constitutes a reduction compared to the APD which allowed extension by 9 months and then by a further 3 months. The ground for extension remains the same, allowing a certain amount of flexibility for complex cases, when there are large numbers of asylum applications, or when the delay is caused by the applicant (as per the APD). Again, the balance is important: it is in the interest of the applicant to have a faster decision however the quality of decision-making needs to be maintained.

In practice, many authorities are unable to meet the time limits insofar as they are already provided for by the APD.⁸⁸ Thus, in order to meet the additional and tighter time limits in the APR, resources will need to be increased.

Inadmissibility procedure

For admissibility decisions, the deadlines are very short, especially given the serious consequences of receiving an inadmissibility decision. In the case of Article 38(1)(e) – the applicant has been issued with a return decision and does not meet the 7-day deadline for making a new application despite

⁸⁷ AIDA, *Country Report: Italy – Update on the year 2023*, to be published in June 2024; AIDA, *Country Report: Austria – Update on the year 2023*, June 2024, available at: <https://bit.ly/3RGwQGL>.

⁸⁸ On this point, see ECRE, *The length of asylum procedures in Europe*, AIDA Legal Briefing No 7, October 2016, available at: <https://goo.gl/q6hJn>.

having been informed of the deadline, and no new elements have arisen – the time limit is 10 days with no possible extension. In all other cases, the two months can be extended by another two months in three circumstances – disproportionate numbers of arrivals, complexity of the case, applicant's failure to respect obligations.

Quality of decision making

There is a risk that shorter time limits will create pressure on the authorities and lead to poor quality decisions being provided, for instance in cases where further research or additional interviews would be necessary to establish the facts. Thus, implementation should also include evaluation of decision-making to ensure that time limits are not reducing quality. The percentage of decisions overturned on appeal or review remains high, at over 26% across the EU.⁸⁹ Poor quality first instance decisions can increase the administrative burden at the appeal level. Given the restrictions on appeal rights in the APR, there is also a risk of violation of the fundamental rights of the applicant.

Information for applicants

Despite the removal of the obligation to provide information to applicants on delays, ECRE recommends that Member States use their discretion to continue to provide this information, essentially continuing to apply Article 31(6) of the APD, so that applicants are aware of the reasons why a decision is not taken within the prescribed time limit and have information on the time frame for the decision.

The ECtHR has found in instances that Article 6 of the ECHR was violated when the applicant was not informed of the reasons for a delay in their case.⁹⁰ While the delay depends on the circumstances of the case, the applicant, for reasons of legal certainty and reasonable expectation needs to be informed of such a delay. The APR also needs to be read in light of the CFREU, Article 47 of which is informed by Article 6 ECHR and its case law, and as such, it is now applicable to asylum law.

Removing the obligation in the APD to inform the applicants of the reasons for the delay and a time frame within which a decision is to be expected is problematic in two respects. First, the right to good administration as a general principle of EU law entails the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time.⁹¹ In particular, as EU law prescribes specific time limits within which decisions should be taken and includes an obligation on states to inform applicants thereof, this creates a legitimate expectation on behalf of the applicant for the decision to be served within such time limits. Where this is not the case, the applicants should be duly informed of the reasons.⁹²

⁸⁹ Eurostat, 'Final decisions in appeal or review on applications by type of decision, citizenship, age and sex – annual data, last updated 26 April 2024, available at: <https://bit.ly/3KWV0hj>.

⁹⁰ ECtHR, *Eckle v. the Federal Republic of Germany*, Application No 8130/78, Judgment of 15 July 1982, available at: <https://bit.ly/4bbCR5a>, para. 80; ECtHR, *Foti and others v. Italy*, Application No 7604/76, Judgment of 10 December 1982, available at: <https://bit.ly/3XtJ1dI>, para. 76.

⁹¹ In the case of *Ys*, the CJEU confirmed that Article 41 EU Charter of Fundamental Rights, although it is not addressed to Member States, reflects a general principle of EU law. See CJEU, *Ys v. Minister voor Immigratie, Integratie en Asiel en Minister voor Immigratie, Integratie en Asiel v. M, S*, Case C-141/12, Judgment of 17 July 2014, available at: <https://bit.ly/3RyxPc0>, para. 68.

⁹² This has been sanctioned recently by German courts. See Administrative Court of Munich, Judgment M 12 K 16.31503 of 29 July 2016, in which the applicant complained that he had not received a first instance decision after 12 months from the lodging of his claim and had not been informed of the reasons for the delay. Citing the recast Asylum Procedures Directive, the court found that the 12 months had gone over the scale of deadlines in the Directive and that the permanent overloading of the authorities was no excuse. The court obliged the administrative authority to give a first decision within 3 months. See also Administrative Court of Würzburg, Judgment W 3 K 15.30604 of 4 March 2016; Order 3 K 15.30267 of 23 February 2016; Administrative Court of Munich, Judgment M 15 K 16.30647 of 5 April 2016.

Extension of time limits

The provisions on extension of time limits reinforce the obligation on Member States to respect the time limits through proper management of their asylum systems. The references to regular reviews and contingency planning are useful ways to ensure better compliance with procedural rules, and can be linked to the requirements on having a “well-prepared system” which are set out in the Crisis Regulation.⁹³ The APR foresees the involvement of the EUAA when Member States are unable to meet time limits, another provision which could contribute to better functioning systems.

Consequences of not meeting time limits

ECRE argued that Member States should face legal consequences for missing deadlines and that there should be greater legal certainty for applicants when time limits are not met. As well as prevention through better planning and resourcing of systems, the use of extensions and provision of information to applicants when delays occur, ECRE urges Member States to transfer applicants out of special procedures and into the regular procedure when time limits are not met.

If time limits are not met in an inadmissibility procedure there is a risk that the applicant remains in limbo. Rather, transfer to an in-merits procedure should be standard practice. Unfortunately, Article 35(1) paragraph 3 rules out transfer solely on the basis of time limits expiring, however, there may often be other reasons to justify a transfer. For example, where there is a failure of the determining authority to identify a safe third country or first country of asylum for the applicant within the set timeframe, this should be equated with a finding that the criteria for applying the safe third country or first country of asylum concepts are not met. For instance, current Austrian law states that, if the determining authority does not, within 20 days, either issue an inadmissibility decision or formally notify the applicant of its intention to issue an inadmissibility decision on the ground that another state is considered responsible for the examination of the asylum claim, the application is admitted to the in merit procedure.⁹⁴

Recital (48) is instructive, underlining the right that Member States retain to transfer an applicant in all circumstances, even when the conditions for inadmissibility are met:

Nonetheless, the determining authorities of the Member States should retain the right to assess the merits of an application even if the conditions for regarding it as inadmissible are met, in particular when they are compelled to do so pursuant to their national obligations.

As no legal challenge is available to the applicant to challenge the decision for them to be placed in an inadmissibility procedure, using this provision will require instructions in policy and development of practice.

The use of extensions for inadmissibility procedures also has mixed implications for the applicants. While a continuation of the procedure may be preferable to a situation of limbo, the objectives of procedural fairness and administrative efficiency that partly underlie the APR⁹⁵ require that admissibility criteria should be applied at the initial stage of the procedure or not at all. Allowing the rejection of the application on admissibility grounds several months after an application is lodged

⁹³ *ECRE Comments on the Regulation Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum*, May 2024, available at: <https://bit.ly/3VMC06x>.

⁹⁴ Austrian Asylum Law (Asylgesetz 2005), §28, available in German at: <https://bit.ly/3VtHuly>.

⁹⁵ See Recital (33) according to which maximum time-limits for the duration of the administrative procedure as well as for the first level of appeal should be established to streamline the procedure for international protection with the purpose of enabling applicants to “receive a decision on their application within the least amount of time possible in all Member States thereby ensuring a speedy and efficient procedure”.

also contradicts the proposal's own logic of filtering out such applications as soon as possible in the process.

Freezing applications

The continuation of the possibility for the determining authority to postpone taking a decision on the merits, whether in a regular or accelerated examination procedure, due to “an uncertain situation in the country of origin which is expected to be temporary” creates risks for applicants because many situations would qualify as such.⁹⁶ Previously, in Spain, where postponement was systematically used for certain nationalities, including at the time Côte d'Ivoire, Mali, the Democratic Republic of Congo (DRC), Iraq and Ukraine,⁹⁷ the Spanish Ombudsman sharply criticised the practice.⁹⁸ Cyprus has also used freezes quite extensively, including for applications from Iraqi and Syrian nationals for up to 2 years. It then applied good practice, by prioritising these cases when the suspension was removed. It should be noted that forms of unofficially freezing of processing of applications by Syrians also took place for most of the last 2 years, before an official freezing again in April 2024, justifying through reference to “increased arrivals” rather than the situation in Syria itself.

In a related development, the experience of freezing Afghan applications following the Taliban takeover also led to other negative changes, such as a more restrictive approach to the granting of subsidiary protection in Belgium.⁹⁹

Whereas the evolving situation in a country of origin obviously is an important factor in the assessment of an asylum application and may indeed be a valid reason to delay a decision, Member States should grant protection to those in need when they require it and as soon as they qualify as such. Postponing a decision has significant consequences for the applicant who may be confronted with poor reception or detention conditions, continued lack of access to the labour market and will have to wait even longer to be reunited with family members. Furthermore, it also undermines the EU law principle of legal certainty. Swift decision making is also in the state's interests as it contributes to the efficiency of the procedure and reduces the period of provision of reception conditions to asylum seekers (and is one of the main objectives of the APR). Member States should instead use the possibility for shorter extensions and the cessation clauses.

Recommendations

- EUMS must increase the resources available to the asylum system in order to meet the additional and tighter time limits in the APR.
- The European Commission with the support of the EUAA should monitor the resources allocated to asylum systems by the EUMS and seek to establish the relationship between resources and meeting time limits, for instance, by establishing whether there is a correlation between resource provision and respect for time limits.
- The EMN should also collate information on time limits and serve as forum for discussion of the implications of respect for time limits.

⁹⁶ See also Cathryn Costello and Emily Hancox, ‘The recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee’, in Vincent Chetail *et al.*, *Reforming the Common European Asylum System: The New European Refugee Law* (Brill Nijhoff 2016), 411.

⁹⁷ AIDA, *Country Report: Spain – First report*, April 2016, available at: <https://bit.ly/4cuF7Wb>, p. 35; Spanish Ombudsman, *El asilo en España: La protección internacional y los recursos del sistema de acogida*, June 2016, available in Spanish at: <https://bit.ly/3VuzfW4>, p. 64.

⁹⁸ Spanish Ombudsman, *El asilo en España: La protección internacional y los recursos del sistema de acogida*, June 2016, available in Spanish at: <https://bit.ly/3VuzfW4>, p. 64.

⁹⁹ See Ciaran King, *Assessing Legal Grounds for Protecting Afghan Asylum Seekers in Europe*, ECRE Working Paper 18, March 2023, available at: <https://bit.ly/3xqx5z2>, p.6.

- The EUAA should support standardised evaluation of quality of asylum procedures, including exploring the link between resources and quality.
- EUMS should use their discretion to continue to provide information on delays and time frames despite the removal of the obligation to do so.
- Legal practitioners should be ready to mount legal challenges where pressure to meet time limits leads to neglect of procedural guarantees.
- EUMS should transfer applicants out of special procedures and into the regular procedure when time limits are not met as a standard practice.
- EUMS should respect the requirement to request support from the EUAA in order to meet time limits and should do so as an alternative to invoking extensions to the time limits.
- The European Commission should take full advantage of the provision under Recital 26 which allows for it to propose an implementing decision be taken by the Council to authorise support from the EUAA where an EUMS not meeting time limits is having an impact on the CEAS as a whole.
- EUMS should avail themselves of the right that they retain per Recital (48) to examine applications on the merits even when inadmissibility assessments may be applied.
- The European Commission and other relevant actors should consider the implications for the CEAS as a whole of EUMS invoking Article 35 to suspend processing of applications.

SECTION III – DECISIONS ON APPLICATIONS

The APR sets out four types of decisions that can be made, resulting in either granting or refusing international protection:

- decisions on admissibility;
- decisions on the merits of an application;
- decisions on explicit withdrawal of applications; and
- declaration of implicit withdrawal of applications.

While one of the objectives of the APR is to simplify and streamline procedures and address the complex legal framework created by the APD, this does not translate into a substantial reduction of the grounds for admissibility or accelerated procedures. Indeed, many layers of complexity remain and additional complexity resulted from the negotiations.

Article 36: Decisions on applications and Article 37: Rejection of an application and issuance of a return decision

Article 37 provides that the return decision shall be issued as part of the decision rejecting the application for international protection or in a separate act but one that is issued at the same time and “together with” the decision rejecting the application for international protection, or “without undue delay thereafter”. The final phrase added in the negotiations offers scant protection, allowing only that the return decision could be issued after the rejection decision so long as there is not “undue delay”.

ECRE raised its concerns about this provision bringing together the rejection of the application and the return decision because the return decision requires a wider examination than a decision on an application for international protection.¹⁰⁰ For this reason, ECRE recommended that the examination

¹⁰⁰ ECRE, *Comments on the amended proposal for an Asylum Procedures Regulation COM(2020) 611*, December 2020, available at: <https://bit.ly/3XuaMmH>; ECRE, *A seamless link: ECRE’s analysis of human rights risks and broader implications linking asylum and return procedures*, November 2021, available at: <https://bit.ly/4evkBXj>.

also include an assessment of human rights implications and of whether other statuses apply, however these recommendations were not included in this Article of the final text, despite an amendment from the Parliament to this effect. The only safeguards are that the Return Directive applies and the return decision must be “in accordance with the principle of non-refoulement”.

Implementation considerations

Despite the lack of inclusion of an amendment explicitly referring to the potential relevance of other statuses or to the need to review risks of human rights violations if the person is deported, Member States’ obligations under international human rights law and EU primary law remain in place. Accordingly, legal challenges, including on human rights grounds, will remain possible when people are issued with return decisions, even if that occurs at the same time as the rejection decision. In addition, Recital (9) underlines the retention of this right and the option to use the APR to assess the eligibility of other forms of protection:

In addition to the international protection, the Member States may also grant other national humanitarian statuses under their national law to those who do not qualify for the refugee status or subsidiary protection status. In order to streamline the procedures in Member States, the Member States should have the possibility to apply this Regulation also to applications for any kind of such other protection.

Nonetheless, the practical possibility of ensuring access to a review is significantly reduced by the condensed timeline. It also requires the simultaneous lodging of two appeals – against the rejection and against the return decision.

Article 38: Decision on the admissibility of the application

The 2016 APR proposal introduced an obligation on Member States to assess admissibility and reject applications as inadmissible in a wide range of circumstances. The proposals have gone through various iterations, with amendments by the Commission as part of the Pact and then by the co-legislators. As a consequence, the mandatory use of inadmissibility assessments has been restricted, one of the few positive changes in terms of protection that took place during the course of the negotiations.

In the 2016 proposal, of most concern was the mandatory use of first country of asylum and safe third country concepts as grounds for rejection on the basis of inadmissibility, meaning that the applicant would not have had access to an in-merits examination when these concepts were found to apply. In particular, the inadmissibility assessment combined with the erosion of the safe third country concept, would have left large numbers of applicants without access to an in-merits examination of their application. The 2020 amendments to the APR proposal removed the requirement to apply the inadmissibility assessment with safe country concepts in the border procedure, although it remained in the regular procedure. Finally, both co-legislators amended what is now Article 38(1) to remove the mandatory use of these concepts combined with inadmissibility.

As it stands, Article 38(1) contains may clauses rather than shall clauses: the determining authority *may* assess the admissibility of an application and it “may be authorised under national law” to reject the application as inadmissible when the grounds listed apply. Nonetheless, it must be underlined that, given the revived prominence of these concepts in Member State discussions and proposals in 2023 and 2024,¹⁰¹ it is very likely that at least some Member States choose to use the option of issuing inadmissibility decisions on the basis of the first country of asylum and safe third country

¹⁰¹ See for example the letter of 15 Member States, *Joint Letter for the undersigned Ministers on new solutions to address irregular migration to Europe*, 15 May 2024, available at: <https://bit.ly/45Alrye>.

concepts. Thus, significant risks to the right to asylum in Europe remain. In ECRE's view, all applicants should have access to an in-merits examination of the asylum claim, otherwise a strong risk of *refoulement* pertains.

Grounds for inadmissibility

The grounds for possible (but not mandatory) rejection of an application as inadmissible are summarised here and will then be examined in turn:

- (a) First country of asylum
- (b) Safe third country
- (c) Protection has been granted by another Member State
- (d) Safe relocation has or will be provided by an international criminal court
- (e) Return decision, plus failure to comply with the seven-day deadline so long as the applicant was informed of the deadline and no new elements have arisen.

For the first four grounds, (a) to (d), the deadline of two months, with possible extension by another two months, applies (see section on Article 36 above). For Article 38(1)(e), the 10-day deadline with no extension applies.

For grounds (a), (b) and (c), similar provisions exist in the APD however it should be noted that the concepts of first country of asylum and safe third country have been eroded (see below), meaning that they may be applied to wider group of applicants.

Safeguard: possibility of (re)admission

For the first two grounds, using the first country of asylum and safe third country concepts, application of these grounds can be applied "unless it is clear that the applicant will not be admitted or readmitted to that country".

The latter phrase serves as an important safeguard and limits the risk that (over)use of the concepts as part of an admissibility assessment leaves applicants in limbo, a situation of questionable legality which is already creating significant distress for people seeking protection and increased and open-ended responsibilities for states. Article 38 should be read in conjunction with Recital (53), which is replicated here in full:

An application should not be rejected as inadmissible on the basis of the concepts of first country of asylum or safe third country where it is already clear at the stage of the admissibility examination that the third country concerned will not admit or readmit the applicant. Furthermore, if the applicant is eventually not admitted or readmitted to the third country after the application has been rejected as inadmissible, the applicant should again have access to the procedure for international protection in accordance with this Regulation.

Implementation considerations

Decisions to use inadmissibility assessments

Significant risks remain if Member States choose to carry out admissibility assessments for many applicants by applying some or all of the grounds for rejecting decisions as inadmissible.

The example of Greece is instructive. The EU-Turkey deal of 2016 imposed the use of a similar inadmissibility assessment specifically for applicants from Syria who had crossed from Türkiye into Greece via the Greek islands. The approach initially met with resistance from the Greek government and in court judgments. In practice, nobody was transferred back to Türkiye under these provisions.

Nonetheless, the Greek government has since legislated to massively expand the use of inadmissibility assessments combined with the safe third country concept.

In 2021, following the Joint Ministerial Decision issued on 7 June 2021, Greece designated Türkiye as a safe third country for asylum applicants coming from Syria, Afghanistan, Somalia, Pakistan and Bangladesh. Apart from the numerous concerns that have been repeatedly raised as to whether Türkiye should be considered a safe third country,¹⁰² an additional element indicating the unfeasibility of this new decision is the fact that Türkiye has not been accepting readmissions from Greece since March 2020.¹⁰³ As a consequence, refugees whose applications have been/are rejected as inadmissible based on the safe third country concept end up in a state of legal limbo in Greece, exposed to a direct risk of destitution and detention, without access to an in-merit examination of their application.

The legislation was subject to a preliminary reference to the CJEU regarding the interpretation of Article 38 APD, the outcome of which is likely to have a significant impact on the future of this Article and the definition of the safe third country concept under Article 59, below. In June 2024, Advocate General Pikamäe presented his Opinion in the case. The conclusions are as follows:

Article 38 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

must be interpreted as meaning that it does not preclude national legislation designating a third country as generally safe for certain categories of applicants for international protection where, notwithstanding its legal obligation, that country has generally suspended the admission or readmission of those applicants and there is no foreseeable prospect of a change in that position;

it precludes national legislation providing for the adoption of a decision that an application for international protection is inadmissible pursuant to the concept of 'safe third country' where, from the time when the application is examined, the Member State is certain that the third country concerned will not permit the applicant to enter its territory.¹⁰⁴

In reaching the second branch of the conclusions, the AG drew on the APR text, and the safeguard described above at Article 38. As it is the case that an application shall not be rejected as inadmissible when it is clear that the person will not be (re)admitted, so it is precluded that national legislation provides for such decisions.

In October 2024, the CJEU issued its judgment¹⁰⁵, largely following the AG's reasoning to find that, first, the impossibility of (re)admission does not preclude a Member State from designating a third country as safe; the (re)admission question is not a component of the definition of safety. Second, where the country is generally designated as safe but does not (re)admit the applicants undergoing the procedure, the Member State "cannot reject their applications for international protection as inadmissible".¹⁰⁶ Furthermore, the Court states at three separate points in the judgment that in these circumstances, the Member State must ensure that the applicants have access to an asylum

¹⁰² Indicatively see: GCR, 'Greece deems Turkey 'safe', but refugees are not: The substantive examination of asylum applications is the only safe solution for refugees', 14 June 2021, available at: <https://bit.ly/3E3qgCe>.

¹⁰³ For instance see: MoMA, 'New request from Greece for the return of 1.908 illegal economic migrants to Türkiye', 28 July 2021, available at: <https://bit.ly/3r15bhy>; European Commission, *Commission Staff Working Document: Türkiye 2020 Report*, 6 October 2020, <https://bit.ly/3xgt4aK>, p. 48.

¹⁰⁴ For the Opinion, see: <https://bit.ly/3xCVsJQ>

¹⁰⁵ See XXX

¹⁰⁶ *Ibid* para 54

procedure and must not postpone examination. While the judgment interprets the APD, it is equally relevant to the APR, given that the provisions on non-(re)admission remain or are reinforced.

The use of safe third country concepts has continued to be a subject of debate for Member States including emerging as a contentious point in the final agreement on the General Approach of 2023. ECRE's concerns about the use of the safe third country concept were set out in a policy note prepared during the previous round of negotiations.¹⁰⁷ As well as the questionable legality of the concept, there are practical and political obstacles which have never been overcome. How many countries will want to serve as a "safe third country" for and accept asylum applicants from the EU? The challenges faced by countries seeking to work with Rwanda are illustrative.

Transfer to an in-merits procedure

The APR states in Article 39 and in Recital (53) that rejection as inadmissible using the first country of asylum or safe third country concept is not possible when it is clear that the applicant will not be (re)admitted to the country. In order to ensure respect for this condition on the use of the concept, the following would be useful. First, the situation as regards (re)admission should be included in EU and national level country information. Second, according to Article 34(2), the determining authority should take into account "relevant, precise and up-to-date information" on the situation in the country when applying either safe country concept; this information should include the question of (re)admission which is clearly "relevant". Third, the individual assessment provided for by Recital (52) and Article 58(2) should be carried out and should include the prospects for (re)admission of the applicant. Finally, as per Recital (52) and Article 58(2), the applicant has the right to submit elements explaining why those concepts would not be applicable to him or her. The applicant and their legal representative or counsellor should ensure reference to the situation.

According to the text, where the country does not (re)admit the applicant following a rejection as inadmissible on these grounds, the person should be admitted to an in-merits procedure as per Article 58(5). There is no time limit set, however, in ECRE's view, the Member State should take this action as soon as it is clear that the country will not (re)admit the person or indeed when significant challenges arise, again to avoid a situation of limbo. Where there is a longstanding policy or practice of non- (re)admission on the part of the third country for particular categories of applicants, the inadmissibility assessment should not be applied.

Recommendations

- EUMS should minimise the use of inadmissibility assessments allowed but not required by Article 38(1).
- EUMS and the EUAA when implementing Article 12 of its mandate should assess the prospects of (re)admission to countries deemed safe.
- EUMS should include (re)admission as an element to be taken into account in individual assessments.
- Applicants and their legal representatives or counsellors should include reference to (re)admission in the elements they submit to show the non-applicability of safe country concepts.
- EUMS should transfer applicants to a regular procedure as soon as challenges arising concerning the (re)admission to a safe country.

¹⁰⁷ ECRE, *Debunking the safe third country myth*, Policy Note No. 8, 2017, available at: <https://bit.ly/3VNjLhh>.

- EUMS should not apply inadmissibility assessments where third countries have longstanding policies or practices of not (re)admitting particular categories of applicant.
- The European Commission should indicate time limits for the transfer of applicants to an in-merits procedure when third countries are not cooperating.
- Third countries should familiarise themselves with these sections of the articles.
- Applicants and their representatives should assess opportunities for legal challenges when violations of applicants' rights arise from a situation of limbo following application of safe country grounds for rejection of applications as inadmissible combined with the refusal of countries to (re)admit people.

Article 38(2): inadmissibility subsequent applications

Article 39(2) sets out the remaining case when the Member States must reject an application as inadmissible. This applies to subsequent applications where there are no new elements relevant to the application for international protection or to previously applied inadmissibility grounds. This clause was strongly supported by the Member States and initially rejected in the European Parliament's position. Unfortunately, the Parliament then conceded in the negotiations.

Implementation considerations

Subsequent applications

This Article constitutes a significant harshening of the approach to subsequent applications, a theme which runs throughout the APR (see Article 55 below). First, the obligation to reject subsequent applications as inadmissible applies to all Member States, not just the Member State which examined the first application, aligning with the revised definition of subsequent applications as per Article 3. The widening of this obligation presupposes that all Member States are delivering a fair examination of the application, which is not the case.¹⁰⁸ Second, there is a more restrictive approach to new elements meaning that it will be harder for applicants to show that the elements they are presenting are new. The former aspect is related to reform of return policy, and in particular to the mutual recognition of return decisions.

Article 39: Decisions on the merits of an application

Under Article 39(2) the sequencing for examining the applicant's eligibility for the two protection statuses defined under EU law is rendered mandatory.¹⁰⁹ While this is implicit in the APD, in practice, Member States' decision making did not always apply this sequencing, for example, with regard to asylum applications from people fleeing the conflict in Syria.¹¹⁰ ECRE welcomes this change to

¹⁰⁸ Protection rates diverge significantly between Member States. See inter alia ECRE, *Asylum statistics and the need for protection in Europe*, December 2022, available at: <https://bit.ly/3XNUnYm> and ECRE, *Asylum statistics in Europe: Factsheet*, June 2020, available at: <https://bit.ly/3XQUAKj>.

¹⁰⁹ This is already implied in the definition of beneficiary of subsidiary protection in the recast Qualification Directive as a third country national or stateless person "who does not qualify as a refugee" but in respect of whom the eligibility grounds of Article 15 apply. See Article 2(f) Directive 2011/95/EU Qualification.

¹¹⁰ See for instance, ECRE/ELENA, *Information Note on Syrian Asylum Seekers and Refugees in Europe*, November 2013, available at: <https://bit.ly/45zGJfl>; AIDA, *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015, available at: <https://bit.ly/3VUksWb>, p. 19.

render the sequencing explicit, especially given that the differences between refugee status and subsidiary protection status are maintained in the Qualification Regulation.¹¹¹

The final text was also improved compared to the proposal with the removal of the obligation on the determining authority to declare an unfounded application to be *manifestly* unfounded in five circumstances. It remains optional as under the APD¹¹² but a wider range of circumstances when it can be used is included. Whenever the accelerated procedure is used as per Article 42(1) and (3), the option is in place for the declaration of the application as manifestly unfounded, regardless of any other circumstances related to the examination. In addition, the text does not require the determining authority to state the reasons why it considers an application to be “manifestly unfounded” rather than unfounded.

Implementation considerations

Given that there are practical if not legal implications for the applicant of the application being found to be “manifestly unfounded” rather than simply “unfounded”, ECRE recommends that Member States do not use this provision.

Finding that the application is manifestly unfounded allows Member States to deprive rejected applicants of a period for voluntary departure under the Return Directive and triggers the mandatory issuance of an entry ban accompanying the return decision, which may be valid up to 5 years.¹¹³

The possibility to present a decision as manifestly unfounded without explanation may result in arbitrariness and may encourage decisions on asylum applications being dictated by return policy objectives rather than protection considerations. It also implies an additional but unsubstantiated negative qualification of the substance of the claim which may *de facto* result in an increased burden of proof for the applicant in challenging a negative first instance decision before a court or tribunal.

Recommendation

- Member States should not use the provisions allowing rejection as manifestly unfounded rather than simply founded, unless there are substantive reasons for so doing.

Article 40: Explicit withdrawal of applications

The provisions on explicit withdrawal of applications have varying consequences for the applicant. Safeguards are improved by setting out the requirements for explicit withdrawal and adding detail on the decision that the authorities have to provide. In contrast, Article 40(3) states that the decision declaring explicit withdrawal is final and cannot be appealed, points on which the APD is silent.

Article 41: Implicit withdrawal of applications

The concept of implicit withdrawal existed in the APD however, the APR expands the circumstances which will be considered implicit withdrawal, including to cover cases where it is not necessarily the applicant’s intention to withdraw their application, see above. In addition, according to Article 41(1) Member States have no other option than to reject an application as abandoned in the six cases

¹¹¹ In particular with respect to the duration of the residence permit and access to social assistance. See European Commission, *Proposal for a Regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, COM(2016) 466 final, 13 July 2016, Articles 26 and 34.

¹¹² See Article 32(2) recast Asylum Procedures Directive.

¹¹³ See Articles 7(4) and 11(1) Return Directive.

listed, whereas under the APD Member States may simply opt for the discontinuation of the examination without rejecting the application.

Amendments proposed by the European Parliament introduced changes that largely improved the Article from a protection perspective but these were mainly rejected, with the exception of some limited safeguards. The original proposal included strict time limits within which the state was obliged to reject the application as implicitly withdrawn when no contact had been made by the applicant, following amendments from the Council the time limits were deleted, a positive change.

Importantly, Article 41(4) allows for a suspension of the withdrawal procedure by the competent authority to allow the applicant to “justify or rectify omissions or actions” in relation to the six factors before the decision is made, however. This is weaker than the protection provided by the APD at Article 28(2) which requires Member States to reopen the case or to allow a new application which is not to be treated as a subsequent application when the person reports again to the authorities. Under the same paragraph Member States were allowed but not obliged to set a time limit of minimum 9 months after which the case could not be reopened.

At Article 41(1)(d), there is a reference to justified cause, added by an amendment from the Council which implies that the state has to show that there is no justified cause for the applicant missing an interview or for the refusal to answer the questions during the interview before declaring implicit withdrawal. In cases (a), (b) and (c) similar safeguards are not included.

An authority other than the competent authority can be charged with assessing whether the conditions for implicit withdrawal are met, however, the decision on implicit withdrawal can only be taken by the determining authority (Article 41(2)). The applicant should be informed of the withdrawal and the procedural consequences in a language they understand or are reasonably supposed to understand, and there is a right to appeal.

Grounds for implicit withdrawal

The six circumstances which must be considered as implicit withdrawal are summarised here.

The applicant:

- (a) Has not lodged the application in accordance with Article 28.
- (b) Refuses to cooperate by not providing information or data.
- (c) Refuses to provide an address.
- (d) Has not attended a personal interview or has refused to respond to questions.
- (e) Has not complied with reporting duties or does not remain available.
- (f) Has lodged the application in a Member State other than the one responsible and has not remained present.

Implementation considerations

Broader and punitive concept of implicit withdrawal

These provisions constitute a significant change to the concept of implicit withdrawal compared to the APD according to which implicit withdrawal occurs when there is “reasonable cause” to consider that the applicant has withdrawn or abandoned the application (Article 28(1)). This is particularly when the person fails to respond to requests or to appear at an interview (Article 28(1)(a)) or when they have absconded or failed to comply with reporting duties (Article 28(1)(b) APD). Whereas under these circumstances in the APD it could be reasonably construed that the applicant has withdrawn the application, the re-defined concept under the APR includes circumstances which do not indicate

an intention to withdraw the application. Rather, the concept now encompasses cases where administrative errors, communication, and personal circumstances may have led to absence but without the intention to withdraw, and it is used as a form of sanction when the applicant fails to abide by obligations, for example, failing to meet deadlines for lodging the application, or, as per Article 29(1)(f), failing to stay in the country of first entry (see above).

The consequences of a declaration of implicit withdrawal by the authorities are significant as it means that the asylum application is ended without the consent of the applicant. Thus, ECRE recommended significant revision of the proposal, including a removal of the requirement to declare an application as implicitly withdrawn, which unfortunately were not included in the text.

It should be noted that non-compliance with certain procedural obligations incumbent on the applicant may be the result of factors over which they have no control. In any administrative process, miscommunication between the individual and the authorities may result from a variety of factors, including administrative errors, sudden illness etc. Such risks are even greater in the asylum procedure, as applicants are in most cases unfamiliar with the language and legal framework of the country and may have difficulties coping with their personal situation and recent experiences, in particular at the start of the process.

Less flexibility for Member States

In ECRE's view, imposing on Member States an obligation to reject applications as withdrawn is disproportionate and deprives them of any flexibility to adopt a more cautious approach where they consider this necessary. In addition, the Article does not necessarily serve the purpose of administrative efficiency and expediency, which may be better served by a flexible process of reopening and examining an applicant's file without having to resort to the more complicated procedural step of lodging a new application, which under the APR will have to be treated as a subsequent application.¹¹⁴

Thus, given concerns about the concept and its use, and the risk of burden on the Member State when applications are considered withdrawn when the applicant did not intend to withdraw the application, it will often be appropriate for Member States to use the provisions at Article 42(2) and suspend the withdrawal while seeking a justification or rectification from the applicant.

Interaction with subsequent application rules

Whereas under the APD cases can be re-opened or new applications made which are not treated as subsequent applications after an implicit withdrawal decision, this will no longer be the case. So, first, more cases will be classed as implicitly withdrawn even when that is not the intention of the applicant. Second, if the people affected wish to access the procedure again, their claims will be treated as subsequent applications, and the new rules on subsequent applications will apply, see below. This will include, first off, that they will have to meet the higher threshold justifying the presence of "new elements" in order to access an in-merits procedure rather than being issued immediately with an inadmissibility decision.

Recommendations

¹¹⁴ Any further application made by the same applicant in any Member State, after a previous application had been rejected by means of a *final decision*, must be considered to be a subsequent application. A rejection of an application as abandoned which can no longer be subject to an appeal procedure in the Member State concerned, is included in the definition of "final decision".

- EUMS' determining authorities should reflect on the implications of declaring that an application is implicitly withdrawn before making decisions on cases.
- EUMS' authorities charged with assessing and deciding implicit withdrawal should invoke Article 41(4) and suspend the procedure in order to allow the applicant to justify or rectify information whenever there are doubts about the applicant's intentions.
- Applicants and legal advisors should be prepared for extensive appeals against implicit withdrawal decisions. There is a right to an appeal and given the expanded definition and mandatory use of the concept, many more applicants are likely to be issued with implicit withdrawal decisions, the implications of which are significant.

SECTION IV – SPECIAL PROCEDURES

At the heart of the APR is the expanded use of special procedures, with the objective that more people have their asylum applications heard in a special procedure or in a combination of special procedures, rather than in the regular procedure. The procedures in question are inadmissibility assessments, the accelerated examination procedure and border procedures (for asylum and return), each of which is mandatory for one or more category of applicants. All applications heard in the border procedure are accelerated, whereas the scope of the accelerated procedure is broader, including categories where acceleration will take place in the regular rather than border procedure.

ECRE generally opposes the use of special procedures because of the risks they pose to fundamental rights and the significant administrative burden generated by managing multiple procedures. One of ECRE's concerns about special procedures is that protection rates tend to be lower than when cases are examined in the regular procedure.¹¹⁵ The reasons for this are likely to lie in the reduced procedural guarantees and the difficulty therefore of getting a fair procedure. Indeed, a fair and rigorous examination of the need for international protection is near impossible in the conditions under which special procedures – and in particular border procedures – take place. The impact is exacerbated for vulnerable applicants.

The expanded use of special procedures is justified through reference to the claim which is frequently made by the Commission and other EU institutions and agencies¹¹⁶ that recognition rates are low. This is not currently the case however it could become a self-fulfilling prophecy with the expanded use of special procedures. In terms of protection rates, a large majority of those seeking protection in the EU are in need of international protection: in 2023, the protection rate was 53% at first instance according to Eurostat, with consistently a third of appeal cases resulting in the granting of a protection decision. This is unsurprising, given the record levels of global displacement and the situations of violence, persecution and repression in countries around Europe. In this context, making it harder

¹¹⁵ See EASO, *Annual Report on the Situation of Asylum in the European Union 2015*, July 2016, available at: <https://bit.ly/3VTcEnw>, p. 96. Data reveal that the use of special procedures such as border and accelerated procedures generally result in a much higher proportion of applications being rejected than is the case in regular procedures. To illustrate, 90 % of applications examined under accelerated procedures and 88% of applications examined in border procedures in the EU in 2015 resulted in negative decisions. As special procedures in the EU Member States are typically characterised by often extremely short time frames for the authorities for processing claims, reduced time-limits for applicants to lodge appeals and the lack of appeals with automatic suspensive effect, the use of such procedures continues to raise serious fundamental rights concerns, despite the increased procedural guarantees with respect to such procedures included in the recast Asylum Procedures Directive. Practice shows that the conditions in which such procedures are carried out, make a fair and qualitative examination of applicants' need for international protection close to impossible, in particular as applicants have insufficient time to prepare their application properly or to appeal a negative decision effectively. There has been a worrying trend in many Member States, *inter alia* encouraged by the EU asylum *acquis*, of such special procedures becoming the norm rather than the exception.

¹¹⁶ For example, EASO, *Border Procedures for Asylum Applications in EU+ Countries*, 2020, available at: <https://bit.ly/4bc4qLH>, p. 8

for people receive a protection status through the over-use of special procedures will not deter people from coming to Europe but will likely mean that more people are in situations of limbo or irregularity – and that states increase the number of people with return decisions at a time when the return rate is particularly low.¹¹⁷

The exceptional cases where special procedures can play a role is the use of accelerated procedures for manifestly founded cases. Here, ECRE has consistently argued in favour of ensuring rapid access to protection status, the value of which has been demonstrated by the EU's response to displacement from Ukraine. ECRE thus welcomes the decision to maintain the Temporary Protection Directive and the introduction of the expedited procedure under the Crisis Regulation. Use of prima facie approaches in national law would also be useful.

Article 42: Accelerated examination procedure

The APR renders it mandatory to accelerate certain applications, whereas acceleration was always optional under the APD. A wide-ranging but exhaustive list of ten circumstances in which acceleration is mandatory is set out in Article 42(1)(a) to (j). The accelerated procedure is a short procedure which has to take place within 3 months (see Article 36), meaning that from the time of lodging the Member State's determining authority has 3 months to issue a decision.

While the expanded use of accelerated procedures has been a constant theme in the reform, different options were debated in terms of scope, mandatory use and time limits to be applied. The original 2016 APR proposal reduced the number of possible grounds for acceleration to eight from the ten in the APD. In 2020, the amendment to the APR proposal added a new ground to the list for obligatory use of acceleration – cases where the protection rate for the country of origin or residence of the applicant is 20% or below. This was justified “by the significant increase in the number of applications made by applicants coming from countries with a low recognition rate, lower than 20%, and hence the need to put in place efficient procedures to deal with those applications, which are likely to be unfounded.”¹¹⁸ The 2020 amendments also introduced a maximum duration of 2 months (reduced to 8 working days in one case) for concluding of the examination. In the final text, the time limit is set at 3 months for all categories.

The Council's General Approach expanded the cases where the use of the accelerated procedure is mandatory, whereas the European Parliament's position maintained the requirement to use the accelerated procedure but qualified and limited the circumstances giving rise to its mandatory use. Notably, Parliament attempted to remove the mandatory use of the accelerated procedure for subsequent applications. Unfortunately, this amendment is not reflected in the final text. A requirement to accelerate in case of non-compliance with obligations under the Dublin Regulation / RAMM was however removed.

Going beyond first instance decisions

The Parliament's position also included an amendment to specify that the percentage applies to final decisions not first instance decisions. This was a small but important amendment, given the continued high percentage of cases where protection is granted at review or appeal stage or otherwise after the conclusion of the administrative stage of the process. Unfortunately, an adapted version of the amendment was included that changes its meaning.

¹¹⁷ For an overview and critical analysis see, AIDA, *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis*, Annual Report 2014/2015, available at: <https://bit.ly/3VUksWb>, p. 75-81.

¹¹⁸ European Commission, *Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU – Explanatory Memorandum*, September 2020, available at: <https://bit.ly/3zallQm>.

Rather than requiring that the 20% protection rate applies to final decisions not first instance decisions, the new formula only requires that the 20% threshold is used “taking into account, inter alia, the significant differences between first instance and final decisions”. As such, it will not have any impact on the application of the rule, except for possibly allowing an argument to be made that applicants from a particular country should not fall within the scope of the rule when there is a major discrepancy between first and appeal decisions. It is unlikely – although not impossible – that a state would wish to make this argument. Nonetheless, by at least including a reference to the distinction between first and second instance decision-making, the text draws attention to a point frequently made by ECRE, that legal frameworks and political debate on protection rates should generally use protection rates after all remedies are exhausted because referring only to first instance decision-making misrepresents the nature of international protection claims in Europe.

The applicants affected

As it stands, nationalities that would fall under the 20% threshold include Nigeria, Pakistan, Tunisia, Colombia, Egypt, Peru, Morocco, Bangladesh, and Georgia (only considering countries from which there were over 10,000 applicants in 2023). Türkiye, with 94,500 applicants in 2023, had a 20.52% rate of protection at first instance in 2022.

For 2022, 395,985 applicants would have fallen under the scope of the accelerated procedure based on this ground alone, of the 1,130,125 applicants in the EU that year, i.e. over one third of all applicants. They may potentially have also fallen under the scope of the border procedure although it should be noted that the number includes those who entered on visas who have been excluded from the border procedure due to not meeting the conditions for its application under Article 43.

Some nationalities are penalised by the fact that the legislation uses the international protection rate excluding humanitarian protection statuses, instead just taking into account the protection rate for refugee status and subsidiary protection status under EU law. Were the protection rate including humanitarian protection to be used, 15 countries of origin would not be covered by the 20% criterion, which are included when humanitarian protection is ignored, including Senegal (with over 6,500 applicants in 2023), the Gambia (4,400 applicants in 2023), and Nigeria (15,880 applicants in 2023). It should also be noted that “yearly Union wide” statistics on decision making at first instance in 2023, similarly to previous years, only became available on Eurostat in May 2024, meaning that until April / May of each year, the border procedure would, by default, be applied based on decision making from +15 months before.

While most Member States currently have an accelerated procedure in law, some do not use it at all, such as Cyprus,¹¹⁹ and most use it for a very limited number of cases each year.¹²⁰

Mandatory use of the accelerated procedure

The final text in Article 42(1) again settles on ten situations in which acceleration of the procedure is mandatory – or ten grounds for mandatory acceleration – reflecting the Council’s General Approach, with the deadline for the accelerated procedure set at 3 months. There are no procedural consequences for not complying with the time limit, which raises questions as to the added value and the procedural fairness of the time limit.

¹¹⁹ AIDA, *Country Report: Cyprus – Update on the year 2023*, May 2024, available at: <https://bit.ly/3KR8Tsu>.

¹²⁰ See e.g. AIDA country reports on Ireland, Poland, Portugal, Sweden, all available at: <https://bit.ly/4bemUvi>.

Article 42(2) allows the Member State to transfer the application from the accelerated to the regular procedure “when the examination of the application involves issues of fact or law that are too complex to be examined under an accelerated procedure.”

The grounds for mandatory acceleration are summarised here. In most cases, a version appeared in the APD Article 8 (albeit as optional rather than mandatory):

APR Article 42(1) – acceleration	APD Article 8
(a) No relevant issues	(a)
(b) Inconsistent, contradictory, false, or improbable representations	(e) but expanded slightly.
(c) Intentionally misleading the authorities with false document or withholding information or in bad faith destroyed documents	(c) and (d) but expanded.
(d) Application merely to delay, frustrate or prevent removal	(g) but expanded.
(e) Safe country of origin	(b)
(f) National security	(j)
(g) Subsequent application	(f)
(h) Entered or stayed unlawfully and did not present to the authorities as soon as was possible.	(h)
(i) Entered lawfully and did not make an application as soon as was possible.	New
(j) 20% protection rate.	New
Not included	(i) Refusal to have fingerprints taken.

While some of these categories have been replicated from the APD and – while not mandatory – have nonetheless been frequently used as grounds for acceleration in Member State practice, others have been adapted or are new and thus require additional attention.

First, Article 42(1)(c) on intentionally misleading the authorities was subject to considerable debate in the negotiations. The Council General Approach widened the scope of the category: whereas the proposal stated that acceleration must be applied if the applicant presented false information or withheld relevant information, this criterion was expanded to also cover withholding documents and destroying or disposing of an identity or travel document where this was to prevent the establishment of identity or nationality (Article 40(1)(c)) Council General Approach). The clause would have applied even if when “the circumstances clearly give reason to believe that this is the case”.

The final text is narrowed slightly compared to the Council General Approach and includes certain safeguards, reading as follows at Article 42(1)(c):

the applicant, after having been provided with the full opportunity to show good cause, is considered to have intentionally misled the authorities by presenting false information or documents or by withholding relevant information or documents, particularly with respect to his or her identity or nationality, that could have had a negative impact on the decision or

there are clear grounds to consider that the applicant has, in bad faith, destroyed or disposed of an identity or travel document in order to prevent the establishment of his or her identity or nationality;

The category is still quite wide: one of the major risks is that states will claim that any person without documents fits within the scope of Article 42(1)(c) and should therefore be subject to an accelerated border procedure. It should be noted that the same widened scope then applies throughout the Regulation, including as a ground for the use of the border procedure.

An important safeguard in this regard is constituted by the reference to intention, which is re-inserted, having been absent in certain versions of the text and notably in the Council's General Approach. In the operational articles, the applicant must be acting "in bad faith". The point is reaffirmed in Recital (75), which reads as follows:

As long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not per se entail an automatic recourse to an accelerated examination procedure or a border procedure.

The challenge is that the onus is on the applicant to show good cause (based on a contextual reading, to be understood as good faith).

Second, Article 42(1)(g) on subsequent applicants has been expanded compared to the proposal. Again, the Council's General Approach proposed this expansion. The proposal provided for acceleration only for subsequent applications that were manifestly without substance or abusive; the General Approach amendment (previous Article 40(1)(h)) which has been included in the final text, entails that all inadmissible subsequent applications are subject to acceleration.

Third, Article 42(1)(i) extends the requirement on the applicant to present themselves to the authorities as soon as possible to those who entered lawfully. (Article 43(1)(h) covers those who entered or stay unlawfully.)

Fourth, Article 42(1)(j) covers the new category which is at the centre of the 2020 APR amendments, applications from countries where the protection rate is 20% or lower, with some exceptions. Applicants from countries in this category may be exempted from the accelerated procedure under certain circumstances as summarised in Recital (56):

Where a significant change has occurred in the third country concerned since the publication of the relevant Eurostat data and taking into account the guidance note pursuant to Article 11 of Regulation (EU) 2021/2303, or where the applicant belongs to a specific category of persons for whom the low recognition rate cannot be considered to be representative of their protection needs due to a specific persecution ground...

Implementation considerations

Transfer to the regular procedure

Where a case is too complex to be examined under an accelerated examination procedure, i.e. too complex for reasons of fact or law to be examined adequately in 3 months, Article 42(2) only provides for the *possibility* to continue the examination of the "merits of the claim" in the regular procedure. The ambiguity is similar to that pertaining to the failure to meet the deadline for the inadmissibility assessment, where it is also unclear on what happens to the applicant.

In contrast, for the border procedure, non-compliance with the time limit results in an *obligation* for the applicant to be "granted entry to the territory for his or her application to be processed in

accordance with the other provisions of this Regulation.” In practice, in many Member States the failure to meet the time limit of the accelerated procedure entails an obligation on the authorities to examine the application under the regular procedure.¹²¹ ECRE suggests applying this approach to avoid a situation where applicants are left in limbo.

ECRE opposed the mandatory use of accelerated procedure due to the serious human rights consequences that may result. It should be noted that as well as the increased difficulty of accessing a fair procedure, applicants in the accelerated procedure may be denied substantive rights. For example, the recast RCD allows the potentially discriminatory removal of the right to access the labour market in the case of applicants in the accelerated procedure¹²² (although access to language and vocational training is granted as this may serve as a “deterrent against secondary movement”).¹²³

For UNHCR, as per EXCOM Conclusion No. 30, where states want to accelerate the examination procedure this should be limited to cases which are clearly fraudulent or where the applicant has only submitted issues that are not related to the grounds for granting international protection. The APR goes far beyond these categories.

Of the ten grounds for acceleration in the APR, (j) raises particular concerns because it suggests that the determining authority make a pre-emptive judgment on the substance of the claim. Other grounds can also be highly subjective, such as the evaluation of whether an applicant makes an application in order to delay or frustrate the enforcement of an earlier or imminent return decision. In the application of other grounds, the accelerated procedure appears to be used as a punitive measure for the lack of respect for obligations.

Recommendations

- EUMS should apply Article 42(2) by automatically transferring cases to the regular procedure when the time limit is exceeded and as soon as complex questions of fact or law emerge. Despite the lack of a clear-cut obligation to do, this approach would reflect a continuation of current EUMS practice and minimise the risk of applicants being left in limbo.
- EUMS should provide applicants with the opportunity to good cause when they have found without documents.
- EUMS should demonstrate the “bad faith” of the applicant when invoking Article 42(1)(c) as a ground for acceleration.
- The Commission and the EUAA should ensure that A42(1)(c) is implemented in line with Recital (75), such that neither the mere lack of documents on entry nor the use of forged documents per se leads to the use of the accelerated procedure.
- Applicants and their lawyers should invoke Recital (56) as relevant to ensure that when there is a significant change in the country the 20% criterion is not used as reason for application of the accelerated procedure.
- Applications and their lawyers should be prepared to invoke Recital (56) to argue that the applicant’s profile is “typical” for country and that therefor they should not be subject to the accelerated procedure.

¹²¹ On this point, see ECRE, *The length of asylum procedures in Europe*, October 2016, available at: <https://bit.ly/45CvcvA>.

¹²² RCD Article 17(1).

¹²³ RCD Recital (52)

Vulnerable applicants in the accelerated procedure

Article 42(3): Unaccompanied children in accelerated examination procedures

The APR proposal of 2016 and 2020 amended version maintained the possibility of accelerated examination of applications of unaccompanied children, as is the case in the APD. ECRE has always argued that accelerated examination is not suitable for this highly vulnerable category of applicant.

In the 2016 proposal, the only two categories covered were children from safe countries of origin and cases where there are national security or public order considerations. The 2020 proposal increased its use by including children from countries for which the protection rate is 20% or lower. Unfortunately, the Council's General Approach then further expanded the cases in which the accelerated procedure may be applied to unaccompanied children to cover subsequent applications and the widened category of presenting false or misleading information or destroying or disposing of documents (Article 42(1)(c)), discussed above), and these amendments were agreed.

In the final text of Article 42(3) there are thus five categories of unaccompanied children where the accelerated procedure may be applied by the Member States:

- Safe country of origin
- National security
- Subsequent application
- Intentionally misleading the authorities with false document or withholding information or in bad faith destroyed documents
- 20% protection rate.

If Member States decide to use this provision many unaccompanied children will be in accelerated procedures.

Implementation considerations

The particular vulnerability of unaccompanied children in asylum and migration related procedures and their need for special protection and safeguards is acknowledged in international human rights standards,¹²⁴ EU law and jurisprudence.¹²⁵ Because of their age and as they travel unaccompanied by their parents or other adults with the legal capacity to represent them, they are not only frequently

¹²⁴ See UN Committee on the Rights of the Child, *General Comment No 6 (2005), Treatment of unaccompanied and separated children outside their country of origin*, 1 September 2005, available at: <https://bit.ly/3Xwayve>, para. 1.

¹²⁵ In the case of *Mubulanzila Mayeka and Kaniki Mitunga v. Belgium*, concerning the expulsion of a 5 year old child, the Court considered that she was in an "extremely vulnerable situation" and that she "indisputably came within the class of highly vulnerable members of society to whom the Belgian State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 of the Convention": ECtHR, *Mubulanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No 13178/03, Judgment of 12 October 2006, available at: <https://bit.ly/3VEj8FK>, para. 55. In the *Tarakhel* judgment, the ECtHR underscores the critical need for special protection of asylum-seeking minors due to their extreme vulnerability, emphasising that this factor outweighs considerations related to their immigration status. (ECtHR (GC), *Tarakhel v Switzerland*, Application No 29217/12, Judgment of 4 November 2014, available at: <https://bit.ly/3RHjBph>, para. 99, 119). The ECtHR's *N.H.* judgment reaffirms the vulnerability of unaccompanied children. (ECtHR, *N.H. and others v. France*, Application Nos. 28820/13, 75547/13 and 13114/15, 2 July 2020, available at: <https://bit.ly/3xzkFol>, para. 162). In the recent case of *W.S. v. Greece*, the ECtHR emphasises the particular vulnerability of unaccompanied children, noting the authorities were aware of the applicant's unstable housing, lack of basic necessities, and absence of a permanent legal guardian, yet delayed placing him in suitable accommodation, resulting in inadequate living conditions and a violation of Article 3 of the Convention (ECtHR, *W.S. v. Greece*, Application No 65275/19, Judgment of 23 May 2024, available in French at: <https://bit.ly/3xxNPV0>, para. 27-28). In the *A and S* judgment, the CJEU highlighted the particular vulnerability of unaccompanied minors and referenced Article 24(2) of the EU Charter, emphasising that the best interests of the child is in practice a primary consideration for Member States in the application of EU law. CJEU, *A and S v Staatssecretaris van Veiligheid en Justitie*, C-550/16, judgment of 12 April 2018, available at: <https://bit.ly/3RH9gtE>, EU:C:2018:248, para. 11.

subject to human rights violations during their journey, but increasingly also subject to various forms of violence and exploitation, including trafficking, after their arrival in Europe. The percentage of unaccompanied asylum seeking children in EU Member States has increased significantly in recent years. According to the EUAA, the number of unaccompanied minors applying for asylum reached 42 000 in 2022, the highest in several years. In 2023, the number of applications is expected to have increased again, to around 46 000.¹²⁶

Accelerated procedures do not provide the necessary guarantees for compliance with Member States obligations' under international standards, including Articles 3 and 22 of the UN Convention on the Rights of the Child (UNCRC), according to which the best interest of the child shall always be a primary consideration and appropriate measures shall be taken to ensure that a child who is seeking refugee status receives appropriate protection and assistance in the enjoyment of applicable rights.

Rather, in light of their particular vulnerability, the asylum applications of unaccompanied children should be prioritised as allowed under Article 34(5).

Recommendations

- EUMS should choose not examine asylum applications of unaccompanied children in accelerated procedures.
- Representatives of unaccompanied children should advocate for the removal of the children they represent from the accelerated procedure.
- The EUAA should consider include all relevant evidence, case law, and best interest considerations in relations to decisions on procedures to apply in its guidance and training material on the treatment of children.

Article 43: Conditions for applying the asylum border procedure

Central to the 2020 amendments to the APR proposal was the expanded use of border procedures, including rendering it mandatory under certain circumstances. This was proposed as an alternative to the mandatory use of inadmissibility procedures applying first country of asylum and safe third country concepts which was at the heart of the 2016 proposal.

The APD includes a border procedure, at Article 43, but analysis demonstrates that Member States have used it sparingly.¹²⁷ As well as the asylum border procedure, the APR proposal introduced in EU law the return border procedure (now in the Return Border Procedure Regulation and examined in ECRE's comments on that instrument) which was proposed but not (yet) accepted in the reform of the Return Directive. The asylum and return border procedures each last up to 12 weeks per procedure, with extensions to 18 weeks under the Crisis Regulation. The decision to process an asylum application in the border procedure cannot be appealed.

Optional use of the asylum border procedure

Article 43(1) has two sections, first, a set of three conditions that need to be fulfilled before the asylum border procedure may be used and, second, four situations (a) to (d) in which the asylum procedure may be used. As per paragraph 1, the three conditions that must be fulfilled are:

- The screening process has taken place if applicable (under Screening Regulation)

¹²⁶ EUAA, 'EUAA and FRA: Protecting the rights of unaccompanied children in transnational asylum procedures', 17 April 2024, available at: <https://bit.ly/4bb9aS1>.

¹²⁷ European Parliamentary Research Service / ECRE, *Asylum procedures at the border*, November 2020, available at: <https://bit.ly/4bkLk6a>.

- The applicant has not been authorised to enter the territory
- The applicant does not fulfil the conditions for entry under the Schengen Regulation.

If these conditions apply, the asylum border procedure may be used in any of the following situations:

- (a) Following an application made at the external border or in a transit zone;
- (b) Following “apprehension in connection with an unauthorised crossing of the external border”,
- (c) Following disembarkation in the territory of a Member State after SAR
- (d) Following relocation.

If the three conditions do not apply, the asylum border procedure cannot be used. It should be noted that the conditions and situations vary when the special regimes under the Crisis Regulation are in place.

This Article needs to be read in conjunction with Article 44(1) which specifies which decisions can be taken in the border procedure. Given that decisions can only be taken for certain categories of applicants, this limits the scope of the use of the border procedure. Thus, in the asylum border procedure, inadmissibility decisions can be taken and decisions on the merits if the following circumstances apply: Article 42(1)(a) to (g), (j) and Article 42(3)(b).

An overview is as follows:

Conditions: All	Situations: Any one	Decisions for applicants
<p>The screening process has taken place if applicable (under Screening Regulation). The applicant has not been authorised to enter the territory. The applicant does not fulfil the conditions for entry under the Schengen Regulation.</p>	<ul style="list-style-type: none"> • External border or in a transit zone • Following “apprehension in connection with an unauthorised crossing of the external border”, • Disembarkation in the territory of a Member State after SAR • Relocation 	<ul style="list-style-type: none"> • Inadmissibility decisions for any applicants • In-merits: Article 42(1)(a) to (g), (j) and Article 42(3)(b) (see table above on accelerated procedures – most but not all of the same categories).

Article 43(2) makes it mandatory for border procedures to take place in a “fiction of non-entry”, as is also the case for the screening process. Although often interpreted as the pretence that the applicant has not entered the territory of the state carrying out the procedure, in fact, the fiction of non-entry is better understood as the pretence that the applicant has not been authorised to enter the territory, since, in most circumstances, there can be no doubt in law that they have entered the state and are on the territory, and the APR applies to applicants “in the territory”. By claiming instead that the person has not been authorised to enter, the fiction serves its primary purpose of allowing for the use of detention because the applicants who have not been authorised to enter fall within the scope of recast RCD Article 10(d) which allows for the use of detention to assess whether authorisation to enter should be granted. Neither the APR nor the RCD renders it mandatory for the border procedure to take place in detention.

The fiction of non-entry operates without prejudice to Articles 51(2) and 53(2) on the right to remain. It should be “in accordance with” the recast RCD. Article 43(3) then provides for derogations to Article 52(2) in three cases where the fiction of non-entry will be in force. These are all cases where the applicant has no right to remain. In these cases, if the applicant has received a return decision or a refusal of entry under Schengen, then Article 4 of the Return Border Procedure Regulation applies.

Monitoring mechanism

Finally, Article 43(4) provides for the creation of “a monitoring of fundamental rights mechanism in relation to the border procedure.” The monitoring mechanism was proposed by the European Parliament in the negotiations to serve as a safeguard. After extensive discussions and revisions, very little text remains, the Article stating just that the final form of the mechanism should “meet the criteria” of the monitoring mechanism provided for the screening process, as per Article 10 of the Screening Regulation. It is a complementary – additional – monitoring mechanism.

Implementation considerations

Given the risk fundamental rights created by the expanded role of the border procedure, the monitoring mechanism will be a necessary but far from sufficient tool to support access to a fair asylum procedure and decent treatment of asylum applicants. ECRE reiterates the points it made in relation to the monitoring mechanism for the screening process: the mechanism needs to be independent, it needs to be linked into national accountability mechanisms, and there need to appropriate and proportionate consequences for states should violations be identified.¹²⁸ The lessons from recent application of monitoring mechanisms should be applied. It seems clear from the text that this is a second monitoring mechanism, which operates in addition to the screening process monitoring mechanism, which was clearly the intention of the European Parliament when it included this provision. Thus, it should be maintained as an additional mechanism.

Finally, given longstanding concerns, as described above, about the quality of decision making in border procedures, combined with the erosion of appeal rights, see below, it is essential that the monitoring mechanism also evaluates decision-making.

Detention and the border procedure

While a common assumption is that the border procedure will take place in detention, and analysis of the optional use of the border procedure under the APD shows that in practice it is almost always the case, neither the APR nor the RCD renders it mandatory for the border procedure to take place in detention. The RCD introduces a new ground for the use of detention – carrying an assessment to establish whether an applicant should be authorised to enter the territory including in border procedure. The Member States can choose whether or not to invoke this ground and use detention for the border procedure. Given the harm and the cost of detention, ECRE recommends that the border procedure does not take place in detention.

Recommendations

- The monitoring mechanism for the border procedure should be based on the entirety of Article 10 of the Screening Regulation, however it should be a second, complementary monitoring mechanism as indicated in the text.

¹²⁸ ECRE, *Joint Statement: Turning rhetoric into reality: New monitoring mechanism at European borders should ensure fundamental rights and accountability*, 10 November 2020, available at: <https://bit.ly/3VDUSTV>.

- The European Commission should closely monitor the establishment and functioning of the monitoring mechanism for the border procedure.
- FRA should actively engage in designing and supporting development of the mechanism.
- The EUAA should provide guidance on monitoring
- The monitoring mechanism should cooperate with a wider range of independent monitors.
- The monitoring mechanism should assess overall conformity with the obligations of the APR, but could also play a role on particular issues including conditions in locations of the border procedure, access to procedural rights, access to special procedural guarantees for applicants in need of such.
- The monitoring mechanism should evaluate decision-making, including decision-making in appeal processes, since quality may be affected by the border context.

Article 44(2) prioritisation when adequate capacity has been reached

Article 44(2) adds another dimension to the rather complicated provisions on prioritisation already discussed in relation to Article 34(5) and Recital (44), according to which Member States may prioritise some applications in the regular procedure. When the adequate capacity is reached (see below), then the Member State should prioritise certain categories of applications for examination in the border procedure. These are cases where there is a stronger prospect of return, where there are national security considerations and the broad category at Article 44(2)(c):

without prejudice to point (b), applications of certain third-country nationals or, in the case of stateless persons, of former habitual residents in a third country who are not minors and their family members.

Prioritisation here has a different meaning. Rather than the usual meaning that prioritisation is fast-tracking – examining a case first – here it means prioritisation for examining the cases in the border procedure, i.e. that cases in these categories should be put into the border procedure rather than other cases. This applies in situations where the adequate capacity has been reached, meaning that the use of the asylum border procedure is no longer mandatory. Thus, if states decide to continue using it in any case, they must first apply it for these three categories of applicant. As the category at paragraph 2(c) is so broad the whole provision is rendered largely meaningless – it allows the Member State to prioritise any applicant except children and their family members. Thus, they can prioritise any other applicants. Children and families with children are not excluded – they just cannot be prioritised in a situation where a Member State is choosing to use the asylum border procedure although it is not mandatory.

Article 44(3): prioritisation in the border procedure

In contrast to paragraph 2, Article 43(3) refers to the traditional meaning of prioritisation – fast tracking or examining first – and covers the border procedure in general. It introduces the requirement that Member States prioritise applications from minors and their families when they are subject to the border procedure. This is presumably to limit the time that they will be kept in a border procedure as a tacit acceptance of its unsuitability for children.

In contrast, however, Member States also have to prioritise applications from those who will be easy to return, presumably in order to increase the chances of return and the return rate.

Article 45: Mandatory application of the asylum border procedure

The 2020 amendments introduced three situations in which Member States are obliged to apply the asylum border procedure (previous Article 41(3)), which led to significant debate. The Council's

General Approach then expanded the scope of the mandatory use of the border procedure because it amended Article 44(1)(c) to also include cases where applicants have destroyed or disposed of documents or when it is reasonable to believe they have done so (see above). It also expands the use of the border procedure to all family members in the case that national security or public order concerns arise. The European Parliament position deleted Article 41(3) and the mandatory use of the border procedure, however, in the negotiations it conceded to the Council, agreeing to the mandatory use of the border procedure, albeit with some safeguards included.

The final text combines the Commission proposal and Council amendments at Article 45(1), to specify that the Member State shall examine the application in an asylum border procedure for the cases captured by Article 43(1) when any of the circumstances in Article 43(1)(c)(f) and (j) apply. A summary is provided here:

Mandatory use of the border procedure (APR Article 45)		
Article 43(1) conditions (all should apply)	Article 43(1) situations (one of the below)	Article 42(1)(c)(f) and (j) (any of the three)
<ul style="list-style-type: none"> • The screening process has taken place if applicable • The applicant has not been authorised to enter the territory • The applicant does not fulfil the conditions for entry under the Schengen regulation 	<ul style="list-style-type: none"> • Following an application made at the external border or in a transit zone; • Following “apprehension in connection with an unauthorised crossing of the external border”, • Following disembarkation in the territory of a Member State after SAR • Following relocation. 	<p>c) Intentionally misleading the authorities with false document or withholding information or in bad faith destroyed documents</p> <p>f) National security</p> <p>j) 20% protection rate</p>

In relation to 42(1)(c), the same specification in Recital (75) as for the accelerated procedure applies:

As long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not per se entail an automatic recourse to an accelerated examination procedure or a border procedure.

Children and their families in the border procedure

The mandatory use of the border procedure applies for families with children, and Articles 45(2) (3) and (4) contain a list of safeguards which are intended to protect their rights. First, paragraph 2 requires Member States to maintain family unity in the border procedure “as far as possible” and paragraph 3 sets out the family members to be considered.

At Article 45(4), when, on the basis of information provided by EUAA monitoring, the Commission has grounds to consider that the Member State is not providing appropriate facilities, “it shall recommend, without delay, the suspension of the application of the border procedure to families with minors...” The text states that the recommendation should be made public, which is rather redundant since Commission recommendations are in any case public, and that the Member State “shall take utmost account” of it.

Implementation considerations

There is no appeal against the decision for an application to be processed in a border procedure, which reduces the enforceability of provisions stipulating the conditions that must be in place for its use. In practice, if one or more of the conditions is not in place or if the situation is not one where the border procedure may be used, the applicant is not able to bring a legal challenge. Systematic misuse of the procedure may be subject to challenge, however.

The provisions on “families with minors” – children – in the border procedure show the contortions that the Commission and co-legislators have deployed to allow and in some circumstances oblige the Member States to apply the border procedure to children, including allowing them to detain children. The language almost goes as far as suggesting that these provisions are in place in order to support family unity at Article 54(2) – a provision which will allow family members to be put in the border procedure even when they do not fall within the scope of the Articles. There is then an effort at Article 54(4) to limit the Commission’s prerogative to act against inadequate conditions to situations where the information has been received via EUAA monitoring.

Overall, it remains the case that border procedures are unsuitable for all children – unaccompanied or with families – and that the detention of children for the purpose of implementing immigration policy is unlawful and cannot be reconciled with the best interests principle.

In the negotiations, certain Member States sought – unsuccessfully – to establish exemptions from the border procedure for children. At the JHA Council on 8 June 2023, Germany, Luxembourg, Portugal and Ireland issued a note stating that the exemption of children from the border procedure remains a priority for them which they continued to support during the trilogues. A Protocol to the text covers this point.

Recommendations

- EUMS should not subject children to the border procedure.
- EUMS should not invest in appropriate facilities for children with families in the locations where border procedures take place. Instead, the absence of such facilities should require transfer to the regular procedure.
- The European Commission should act whenever it is aware of inadequate conditions in border procedure – as it has the obligation to do – not solely in response to EUAA monitoring.

Article 46 to 50: Adequate capacity

Next to the mandatory nature of the border procedures for certain groups of applicants, a major innovation in the Council’s General Approach included in the final text was the agreement on numerical targets (labelled as “adequate capacity”) for the application of the border procedure. While the adequate capacity concept is presented as a way to ensure that Member States have the “capacity” – i.e. the infrastructure and the resources – in place for management of a certain number of applicants in border procedures – and to some extent it serves this purpose – in fact, it primarily serves to generate a rule setting the minimum number of applicants for whom border procedures must be used at any given time during the year. The adequate capacity is for asylum and return border procedures, thus, if the adequate capacity is 120,000 for the EU, that is composed of people in both the asylum and the return border procedure. It may be that a majority of those making up the numbers are in the latter procedure.

The adequate capacity at Union level and for Member States is set in October of the year before. Article 47(5) stipulates that the Commission adopts an implementing act within two months of the entry into force of the APR, which sets out the adequate capacity per Member State. An equivalent Act is then adopted every year thereafter on 15 October.

Article 46: The adequate capacity at Union level

The adequate capacity sets a minimum number of 30,000 for the use of border procedures for the EU as a whole per year for the first year of application of the APR, meaning that at least 30,000 people per year should have their applications processed in an asylum border or a return border procedure, to be divided among the states.

A maximum number of applications to be processed in border procedures (“annual cap”), set at several times this number, was also introduced. It will start at 60,000 then increase over the first three years from the entry into force of the Regulation to reach 120,000. If the adequate capacity (minimum) increases, so will the annual cap (maximum).

Article 47: The adequate capacity of a Member State

Article 47(1) prescribes that a Member State’s individual adequate capacity (minimum number or target for applicants in the border procedures) is calculated according to Article 47(4), below. Given confusion over the concept, it should be underlined that the adequate capacity for a Member State is the minimum number of people in a border procedure at any point in time in that Member State.

Thus, if the adequate capacity is 5000 for Member State X, there must always be 5000 people in a border procedure (either an asylum border procedure or a return border procedure). This means that when people leave the border procedure – after a decision or deportation for example – then more people must be transferred into the border procedure to maintain the number at the adequate capacity. In this example, Member State X has to keep 5000 people in the border procedure. If 100 people leave following examination or deportation, then another 100 people must be transferred into a border procedure immediately.

The minimum has to be met for as long as there are enough people who meet the criteria for inclusion in the border procedure. Thus, it may be the case that the adequate capacity is not met because there are very few applicants from countries with protection rates below 20%, for example. That could be the case for Greece, for example, where a large number of applicants are from countries with very high protection rates. In these cases, where the adequate capacity is not met due to the nature of arrivals, the Member State is obliged to maintain the facilities to host the number of people specified by its adequate capacity.

Whereas the adequate capacity is a minimum, paragraph 2 of Article 47(1) sets a maximum number for the use of the border procedure in any given year across the EU. For individual Member States, the annual maximum is four times the minimum adequate capacity set by Article 47(4). Thus, if the adequate capacity is 5000 for Member State X, the annual maximum would be 20,000. This means that the Member State has to keep putting people into the border procedure to keep numbers at the adequate capacity until the maximum for the year is reached. The numbers are based on the presumption that there will be applicants who fit the categories for the mandatory use of the border procedure. If not, then the numbers will be lower.

Article 47(4) provides the formula for a Member State’s adequate capacity. It is to be calculated by taking the overall adequate capacity (30,000) multiplying it by the sum of irregular crossings of the external border, arrivals following search and rescue operations, and refusals of entry at the external

border in the Member State in question, and then dividing the result by the number of arrivals and refusals of entry for the EU as a whole.

Example of adequate capacity

The European Commission has published the adequate capacity per Member State for the first year of application of the APR.¹²⁹ In order to illustrate how the formula works, ECRE provides a mock up based on application to the 2021 to 2023 figures (according to the rules, the average annual number for the three previous years will be used), for the case of Italy.

<p>Adequate capacity for Member State</p> $\frac{30,000 \times (\text{irregular crossings of external border} + \text{arrivals after SAR} + \text{refusals of entry by MS AA (over the previous 3 years)})}{(\text{irregular crossings of external border} + \text{arrivals after SAR} + \text{refusals of entry for the EU27 (over the previous 3 years)})}$ <p>Example: Italy (2021-2022-2023 figures)</p> $\frac{30,000 \times (100,222 \text{ (maritime arrivals including following SAR} + \text{estimate for land arrivals)} + 5,950 \text{ (refusals of entries)}) = 106,152}{305,148 \text{ (irregular arrivals including following SAR)} + 135,067 \text{ (refusals of entry)}} = \mathbf{440,215}$ <p style="text-align: center;">= 7,236</p> <p>Minimum number of people in border procedure at any point in time = 7,236</p> <p>Maximum number of people in border procedure for the year = 7,236 x 4 = 28,944</p>
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Member states	Estimated Adequate Capacity			
	2023 (Based on 2020-2021-2022 data)		2024 (Based on 2021-2022-2023 data)	
	minimum	maximum	minimum	maximum
Bulgaria	643	2.572	610	2.440
Greece	1.545	6.180	2.101	8.404
Italy	5.138	20.552	7.236	28.944
Malta	120	479	60	240
Slovenia	1.924	7.697	2.530	10.120
Spain	3.586	14.342	3.341	13.364

¹²⁹

The above figures were calculated using data on 'refusal of entry' published by [Eurostat](#) over the period 2020 to 2023. Data on 'irregular crossings of EU external borders' was extracted from corresponding AIDA reports.

According to Article 47(3), when the maximum is reached, the Member State can cease to apply the border procedure for most applicants. It will however remain mandatory for applicants falling under Article 42(1)(f) and Article 42(3)(b), specifically, when there are national security considerations.

Reaching the adequate capacity

Article 48: Measure applicable in case the adequate capacity of a Member State is reached

When the Member State reaches the adequate capacity, it may notify the Commission. According to Article 48(2), by way of derogation from Article 45(1), it may then cease to apply the border procedure to applicants in the 20% category (Article 42(1)(j)).

Article 48(3) introduces the "inflow-outflow" concept, meaning that the adequate capacity applies at any given point. It states that the Member State should use the border procedure for the 20% threshold group as soon as the number of people subject to the border procedure is "at any given moment" lower than the adequate capacity.

To provide an example, if the adequate capacity is 5000, when it is reached, the Member State can cease to use the border procedure for the 20% category, i.e. if there are 5000 people in a border procedure, there is no obligation to continue to use it (Article 49(2)). If, however, people leave the border procedure so that there are fewer than 5000 in a border procedure, then the Member State has to re-start using it for the applicants in the 20% category.

In an apparent contradiction, Article 48(4) states that the derogation allowing the Member State to cease applying the border procedure to this group applies "for the remainder of the calendar year" following the notification. In fact, what seems to be meant is that when the Member State first hits its adequate capacity, the process of starting and stopping the application of the border procedures should take place for the rest of the year, such that from that day onwards it is always at its adequate capacity.

Thus, who goes into the border procedure will depend on whether other people have left it, as well as on whether arrivals are people who fit into the categories for whom the border procedure(s) is mandatory, and on whether circumstances of cases mean that people with rejections may or must be subject to a return border procedure.

Article 49: Notification by a Member State in case the adequate capacity is reached

When a Member State reaches the adequate capacity and wishes to notify the Commission in order to benefit from derogations to the use of the border procedure, it has to include the information listed in Article 48(1), it should then notify other Member States (Article 49(3)), and continue to report on a monthly basis (Article 49(3)).

Article 50: Notification by a Member State in case the annual maximum number of applications is reached

In the case that the annual maximum is reached, the Member State may then stop using the border procedure except for national security cases. It should be noted that Article 50 requires that the Commission authorises the Member State to stop using the border procedure and it cannot cease to do so until the authorisation is provided. This suggests a level of control over the process by the Commission.

Implementation considerations

Arbitrariness and adequate capacity

ECRE raised its concerns that, first, setting a numerical target is a different logic to the one in the Pact proposals, where the mandatory use of the border procedure was intended for people from places where the average protection rate is 20% or below, with the preamble explaining why this threshold had been chosen; setting a target is a different approach.

Second, setting a numerical target introduces a strong element of arbitrariness, including in the use of detention. Whether or not an application is actually processed in a border procedure – and therefore probably (but not necessarily) in detention – will depend on when and where they arrive. As the adequate capacity only sets a minimum, a country may decide or may be pressured to use this model on a far larger scale. The annual cap – the maximum number of cases to be processed in the border procedure – will be four times the annual capacity by two years after the entry into force of the Regulation, meaning up to 120,000 people, and may be further expanded, especially given the emerging interests of different stakeholders in the construction and management of detention facilities and the incentives and funding that may be provided to Member States.

Third, the description of adequate capacity is highly complex and the actual numbers of people to whom it will apply cannot be predicted. Overall, the rules contribute to a situation where the actual numbers of people who will be subject to a border procedure cannot be calculated; it depends on unknowable factors related to the speed of processing and the timing of arrivals, although the minimum and maximum numbers will be available.

In the example above, the adequate capacity is 7892 for a Member State. When this number is reached, the country will then always have to have 7892 people in centres subject to border procedures (asylum and return) so long as there are people arriving or with rejection decisions who fit within the categories for whom a border procedure is mandatory. Thus, the border procedure centres will be filled up so that 7892 people are always present. As soon as cases are processed and people leave – either because their asylum procedure leads to a positive decision or because they are deported – then there will be fewer than 7892 people present. More people *must* be added if they arrive seeking asylum and fit into the categories in question (20% threshold etc). Every year, tens of thousands of people might therefore be subject to the mandatory border procedure up to the annual cap (four times the minimum 4×7892 in the example).

The formula and denial of access

ECRE has raised its concerns that the formula for calculating adequate capacity will provide incentives for Member States at the external border to informally deny access to their territory because this will lead to a reduction in the number of people that they have to process in the border procedure in future years. While formal, registered refusals of entry will add to the adequate capacity, “pushbacks” and other informal, unlawful, and forcible preventions of entry will not. Thus, in the case of Greece, in 2022, there were 49,060 formal refusals of entry at the border. These cases would be included in the calculation, increasing Greece’s adequate capacity, whereas the 150,000 or more informal denials of entry would not.

Discrimination and the border procedure?

Generally, a question may arise as to whether the use of the border procedure for certain nationalities of applicant is discriminatory. In the Case C-175/11 *H.I.D.*, the referring court asked whether Member States are precluded from examining by way of an accelerated or prioritised procedure certain categories of asylum applications defined on the basis of the criterion of nationality or of the country of origin of the applicant. The Court considered the argument but found no discrimination because

[...], in matters of asylum and, in particular, under the system established by Directive 2005/85, the country of origin and, consequently, the nationality of the applicant play a decisive role, as appears from both recital 17 and Article 8 of the directive.¹³⁰

In *Bah v. The United Kingdom*, the ECtHR, underlined that “the nature of the status upon which differential treatment is based weighs heavily in determining the scope of the margin of appreciation to be accorded to Contracting States. [...] immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice. [...] while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality.”¹³¹

General provisions and case law on non-discrimination may be relevant. In the Case C 550/07 P *Akzo*, the CJEU confirmed that the principle of equal treatment under Article 20 “requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified”.¹³² The ECtHR in turn has underlined that once the applicant demonstrates a difference in treatment, the burden of proof lies with the government to justify it.¹³³

EU funds supporting adequate capacity

Discussion on the Implementation Plan for the Pact suggests that significant amounts of EU funding will be provided to the Member States to ensure that they put in place the necessary adequate capacity in the sense of building the infrastructure to house the number of applicants that they will be obliged to process in the border procedure (see ECRE’s calculations on the numbers). A number of concerns arise. First, will the EU be encouraging or supporting the use of detention for the border procedure, which is not a requirement? Will Member States still be able to draw on EU funding for the creation of the “adequate capacity” infrastructure when they choose not to use detention? Second, will there be adequate monitoring of EU funding used for these purposes? There are significant risks of misuse of public funding in large-scale infrastructure projects, including corruption in procurement processes, cronyism and the involvement of organised criminal groups, all of which have already occurred in the management of reception facilities as part of asylum systems.

Revising the adequate capacity?

Article 77 of the APR on monitoring and evaluation includes an evaluation of adequate capacity. Specifically, three years from the entry into force of the APR (June 2024) the Commission should assess whether the numbers for overall adequate capacity for the EU in Article 46 and the maximum number per Member State “continue to be adequate in view of the overall migratory situation in the Union”. The Commission shall where appropriate propose amendments. The assessment will then take place every three years thereafter. In ECRE’s view, the assessment should be comprehensive, ideally following the evaluation criteria set out in the EU Better Regulation Framework.¹³⁴ This would imply assessing *inter alia* the impact, effectiveness, including the cost effectiveness, efficiency, and

¹³⁰ CJEU, *H.I.D., B.A. v Refugee Applications Commissioner*, Case C-175/11, Judgment of 31 January 2013, available at: <https://bit.ly/4blHidQ>, ECLI:EU:C:2013:45, para. 71.

¹³¹ ECtHR, *Bah v. The United Kingdom*, Application no. 56328/07, judgment of 27 September 2011, available at: <https://bit.ly/3REPSxb>, para. 47.

¹³² CJEU, Judgment of 14 September 2010, CJEU, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, Case C-550/07 P, Judgment of 14 September 2010, ECLI:EU:C:2010:512, available at: <https://bit.ly/3za3j1M>, para. 55.

¹³³ ECtHR, *D.H. and others v. Czechia*, Application No. 57325/00, 13 November 2007, available at: <https://bit.ly/3KVRReQE>, para. 177.

¹³⁴ On the Better Regulation guidelines, see: <https://bit.ly/4eRjL7I>

fundamental rights implications, of the numbers set by the APR. The outcome should not be predetermined, meaning that it should not be presumed that the numbers would have to be either increased or decreased.

Recommendations

- EUMS should use the asylum border procedure as sparingly as possible, given the increased administrative burden placed on them, as well as the fundamental rights risks for the applicants.
- EUMS should carry out the border procedure without the use of detention, by not invoking Article 10(d) recast RCD, given the serious harm to applicants and the extensive costs to the Member State of managing procedures in detention.
- The European Commission should ensure that monitoring mechanisms are independent, and raise objections with the Member States when this is not the case.
- UNHCR and organisations acting on its behalf should request access to applicants subject to the asylum border as a matter of course and priority, especially where the border procedure is taking place in detention.
- Applicants and their legal counsellors/advisors should be ready at every point – in the screening process and in the border procedure to show “good cause” when explaining the absence of documents or the use of forged documents, in order to argue for access to the regular procedure.
- The European Commission should apply the EU’s Better Regulation approach and carry out a thorough and open evaluation in 2027 when assessing the adequate capacity numbers in line with Article 77.

Article 51: Deadlines

By way of derogation from articles of the APR and other regulations, Article 51(1) sets a deadline of 5 days from registration for the lodging of the application in the border procedure, “provided that the applicants are given an effective opportunity to do so.” It also stipulates that failure to meet the deadline “shall not affect the continued application of the border procedure”.

Article 51(2), sets the maximum duration of the border procedure at 12 weeks. If the deadline is not met “the applicant shall be authorised to enter territory” (and – implicitly – transferred to the regular procedure), unless Article 4 of the Return Border Procedure Regulation applies. Recital (68) reinforces the point, after 12 weeks:

if the Member State nevertheless failed to take the relevant decisions, the applicant should be authorised to enter the territory of the Member State, subject to limited exceptions, in order for the appropriate procedure to continue.

The 12 weeks includes all decisions and levels of examination, thus the administrative procedure, the decision, the right to remain request and decision, and the appeal process and decision. Within the 12 weeks, the deadlines for these different steps can be set by the Member State.

The deadline for the border procedure can be extended to 16 weeks following relocation under the RAMM (56(9)). Additional grounds for extension to 16 weeks were discussed in the negotiations but not included in the final text. The deadline can be extended to 18 weeks when the special regimes under the Crisis Regulation are applied, however.

Article 52: Determination of the Member State Responsible

Under Article 52(1) the Member State is obliged to carry out the procedure for determination of responsibility at the location of the border procedure. The Article can be read as requiring the determination procedure to be carried out for applicants for whom the border procedure is applied – a point that was unclear in the proposal.¹³⁵ An alternative reading of the Article is possible however, being that if the determination procedure is carried out for applicants that should be in the border procedure then it should take place at the location of the border procedure.

Article 53: Exceptions to the asylum border procedure

The 2020 proposal listed categories of applicants exempt from the border procedure. In the final text there are restrictions on its use for unaccompanied children and a set of five other exemptions where it should not be used. In all these cases, the authority has to authorise entry to the territory and the “appropriate” asylum procedure should be applied.

It should be noted that the proposal stated that Member States may decide not to apply the border procedure for people from countries which are not cooperating on return and where the Member State has notified the Commission as per the Visa Code (from Article 25a(3) of Regulation (EC) No 810/2009). Following the Council’s General Approach this exemption was removed. This is unfortunate as it increases the risk of people in situations of limbo and/ or extended (de facto) detention.

At Article 53(1) unaccompanied children should be exempt from the asylum border procedure unless there are security considerations (Article 42(3)(b)).

The five exemptions at Article 53(2) are replicated in full:

- (a) the determining authority considers that the grounds for rejecting an application as inadmissible or for applying the accelerated examination procedure are not applicable or no longer applicable;
- (b) the necessary support cannot be provided to applicants with special reception needs, including minors, in accordance with Chapter IV of Directive (EU) .../...+, at the locations referred to in Article 54;
- (c) the necessary support cannot be provided to applicants in need of special procedural guarantees at the locations referred to in Article 54;
- (d) there are relevant medical reasons for not applying the border procedure, including mental health reasons;
- (e) the guarantees and conditions for detention laid down in Articles 10 to 13 of Directive (EU) .../...+ are not met or no longer met and the border procedure cannot be applied to the applicant without the use of detention.

The Preamble includes further information at Recital (61) related to the treatment of vulnerable applicants. It recalls Chapter IV of the recast RCD which obliges Member States to take into account the “special situation” of vulnerable persons when providing the reception facilities that are necessary for the border procedure. It states clearly:

¹³⁵ ECRE, *Comments on the amended proposal for an Asylum Procedures Regulation COM(2020) 611*, December 2020, available at: <https://bit.ly/3XuaMmH>.

Consequently, such persons should only be admitted to a border procedure in the event that the conditions of reception within that procedure comply with the requirements set out in Chapter IV of that Directive.

Recital (62) also provides some limited additional information in regard to the necessary support that should be provided:

There may also be circumstances where, irrespective of the facilities available, the specific situation or special needs of applicants would in any event preclude them from being admitted or from remaining in a border procedure. In this context, a border procedure should not be applied, or should cease to apply, where necessary support cannot be provided to applicants in need of special procedural guarantees or where justified on health grounds, including reasons pertaining to a person's mental health.

Article 54(2) which follows, offers further information in relation to children:

Without prejudice to Article 47, Member States shall ensure that families with minors reside in reception facilities appropriate to their needs after assessing the best interests of the child, and shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development, in full respect of the requirements of Chapter IV of Directive (EU) ...

Implementation considerations

While far from the automatic exemption for vulnerable applicants that ECRE and many others recommended, Article 53 nonetheless offers a certain amount of protection for applicants – should the vulnerability assessment be carried out effectively and if not, should they be able to access a lawyer and a process in order to argue for their exemption or removal from the border procedure. The recast RCD at Chapter IV and in Recitals (26) to (33) recalls all the conditions for the use of detention as established in EU and international law.

The overriding obstacle for applicants is that there is no remedy available in EU law against the decision of the state to examine their application in a border procedure, whether that decision is taken in the screening process or after. Huge weight is thus placed on the vulnerability assessment (assessments of special reception needs and need for special procedural guarantees).

Given that the border procedure will often take place in detention, the risks to children, unaccompanied and accompanied, are even greater. The harmful effects of immigration detention on children, and in particular unaccompanied children, have been widely documented and acknowledged in jurisprudence. In ECRE's view, children, whether accompanied or unaccompanied, should never be detained as this is never in their best interests.¹³⁶ Their double vulnerability stemming from their intrinsic vulnerability as asylum seekers and children and specific is a decisive factor which must take precedence over considerations of immigration control.

Under existing EU asylum law, the exceptional nature of detention of unaccompanied children is acknowledged in Article 11 of the recast RCD. Read in light of the principle of the best interest of the child, which according to the UNCRC must be a primary consideration in any decision concerning children, this already leaves very little scope for states to lawfully detain children and in particular unaccompanied children. Also, the jurisprudence of the European Courts militates against the

¹³⁶ See ECRE, *Comments on the Commission Proposal to recast the Reception Conditions Directive*, October 2016, available at: <https://bit.ly/3znb30q>, 14.

detention of unaccompanied children, holding on various occasions that their detention in premises not suitable to their needs violates states' obligations under Article 3 ECHR.¹³⁷

Today, a number of Member States such as Italy and Belgium do not detain unaccompanied children in practice, while the Netherlands prohibits the detention of unaccompanied children at the border, and only allows their detention in a closed reception centre on the territory in case of indications of human trafficking.¹³⁸

In the complex structure of the APR which does not include clear-cut exemptions, applicants, their legal advisors, international bodies, or the national authorities themselves, will have to make an argument in two parts.

First, it needs to be shown that an applicant has special reception needs or is need of special procedural guarantees.

Second, it will need to be demonstrated that the necessary support that would allow the person to benefit from their rights and access their obligations should a border procedure be applied, is not available.

Finally, as per Recital (62), on health considerations Article 53(1)(d) provides for a standalone exemption based on health, including mental health reasons. Given the documented negative impact on health of detention, where the border procedure takes place in detention it may be possible to invoke this exemption in a range of circumstances.

Reviewing the exceptions

In Article 77 of the APR on monitoring and evaluation, the European Commission is charged with assessing whether “the exceptions to the border procedure continue to be adequate in view of the overall migratory situation in the Union”. It shall then propose amendments where appropriate. The assessment takes place three years after the APR comes into force and then every three years thereafter.

In ECRE's view, the assessment should include a thorough assessment of the operation of the exceptions looking at the situation in practice but also assessing in light of the jurisprudence of the courts and notably the CJEU. The review should assess whether the exceptions should be expanded, given their questionable conformity with international standards.

Recommendations

- EUMS should start from the assumption that the necessary support required by Article 53(1)(b) and (c) is not available in the border procedure, which reflects case law and evidence from practice.
- Applicants and their legal advisors, international bodies and researchers should be ready to marshal the evidence of the serious detrimental impact of detention on people's health in order to secure exemptions from the border procedure.
- The European Commission should use the assessment of the exceptions in 2027 to evaluate with the exceptions need to be expanded, taking into account the relevant case law.

¹³⁷ See for instance, ECtHR, *Rahimi v. Greece*, Application No 8687/08, Judgment of 5 July 2011, available in French at: <https://bit.ly/3RErrQw>; and ECtHR, *Mohamad v. Greece*, Application No 70586/11, Judgment of 11 December 2014, available in French at: <https://bit.ly/3RDEcuN>.

¹³⁸ See AIDA, *Country Report: Netherlands – Fourth Update*, November 2015, available at: <https://bit.ly/3VrRtYx>, p. 67.

Article 54: Locations for carrying out the border procedure

While the proposal specified that the border procedure should take place “at or in proximity to the external border or transit zones”, a significant amendment from the Council’s General Approach was included at Article 54(1) which allows the border procedure to also take place “in other designated locations” within the territory of the Member State. This is “pursuant” to Article 9 of the recast RCD and “without prejudice to” Article 10 of that Directive.

Article 54(3) requires that the Member States inform the Commission of the locations for the border procedure two months prior to the application of the APR. Any changes can be notified post-facto, within two months of them having taken place. Member States must ensure that the capacity is sufficient for the mandatory application of the border procedure as per Article 46.

Recital (58) offers certain additional protection against the use of inappropriate locations on territory specifying that the facilities must be appropriate and that Member States should limit the use of locations away from the border, as follows:

Member States may examine the applications... in other designated locations within its territory where appropriate facilities exist. Member States should retain discretion in deciding at which specific locations such facilities should be set up. However, Member States should seek to limit the need for transferring applicants for this purpose, and therefore aim at setting up such facilities with sufficient capacity at border crossing points, or sections of the external border, where the majority of the number of applications for international protection are made, also taking into account the length of the external border and the number of border crossing points or transit zones. They should notify the Commission of the specific locations at which the border procedures will be carried out.

Article 54(4) and (5) are intended to ensure that fiction of non-entry continues to apply to people in the border procedure: when residing at any of the locations where the border procedure takes place or when being transported to them, or to the determining authority, a court, tribunal or medical facility, the fiction of non-entry will continue to apply. Residing at any of the locations where the border procedure takes place is not considered authorisation to enter, and travel is not entry.

Implementation considerations

ECRE’s position was to strongly oppose provisions in the reform proposals that allowed for the use of border procedures in locations other than at the border and remains concerned about the risk that allowing the border procedure to be used in other designated locations will increase the use of the border procedure by the Member States. It also increases the risks to the applicants of being located in isolated and depopulated areas, for example, where prospects for connection with support services, communities, and family are limited, and where ensuring the procedural guarantees is more of a challenge. On the other hand, it is possible that other designated locations may be more suitable than the border context, for instance if located in cities where access to family and services may be possible.

Recommendations

- EUMS should not use inappropriate locations for the use of the border procedure, including isolated and remote locations on the territory.
- EUMS should identify other designated locations, for instance in cities, where access to services may be facilitated.
- The European Commission should assiduously monitor the Member States designation of other locations to be used for the border procedure and raise objections should it not be

possible for Member States to respect the law – including on procedural guarantees – from those locations.

- The EUAA should include in its materials suggestions as to what locations are inadequate for ensuring conformity with the requirements of the APR and the recast RCD, read in conjunction with primary EU law.

Article 55: Subsequent applications

As mentioned above, a harsher approach to subsequent applications runs through the APR. The table summarises the change by article.

A3(19)	'subsequent application' means a further application for international protection made in any Member State after a final decision has been taken on a previous application, including cases in which the application has been rejected as explicitly or implicitly withdrawn.
A10(4)	Member States may provide for an exception to the applicant's right to remain on their territory during the administrative procedure where that applicant: ... makes a subsequent application in accordance with Article 55 and the conditions laid down in Article 56 have been fulfilled.
A13(11)(d)	The admissibility interview or the substantive interview, as applicable, may be omitted where: ... in the case of a subsequent application, the preliminary examination referred to in Article 55(4) is carried out on the basis of a written statement.
A16(3)(a) and (b)	Without prejudice to paragraph 1, the provision of free legal counselling in the administrative procedure may be excluded where: ... the application is a first subsequent application considered to have been lodged merely in order to delay or frustrate the enforcement of a return decision which would result in the applicant's imminent removal from the Member State; the application is a second or further subsequent application.
A34(4)	For subsequent applications, the applicant may be made responsible for the translation of documents.
A34(5)(d)	Member States may prioritise subsequent applications.
A38(2)	The determining authority shall reject an application as inadmissible where the application is a subsequent application where no new relevant elements as referred to in Article 55(3) and (5) relating to the examination of whether the applicant qualifies as a beneficiary of international protection in accordance with Regulation (EU) .../...+ or relating to the inadmissibility ground previously applied, have arisen or have been presented by the applicant.
A42(3)(c)	Member States shall accelerate subsequent applications
A55(2)	Any further application made in any Member State after a final decision has been taken on a previous application by the same applicant shall be considered

	to be a subsequent application and shall be examined by the Member State responsible.
A55(3)	A subsequent application shall be subject to a preliminary examination in which the determining authority shall establish whether new elements have arisen or have been presented by the applicant and which: ... significantly increase the likelihood of the applicant to qualify as a beneficiary of international protection in accordance with Regulation (EU) .../... +; or relate to an inadmissibility ground previously applied, where the previous application was rejected as inadmissible.
A55(6)	Where no new elements as referred to in paragraph 3 have been presented by the applicant or have arisen, the application shall be rejected as inadmissible pursuant to Article 38(2).
A56	No right to remain when appealing a decision which rejects a subsequent application as unfounded or manifestly unfounded.
A56	No right to remain when requesting the right to remain – could be allowed if non-refoulement is invoked.

In Article 55 new information is provided on subsequent applications. First, Article 55(1) provides that an application before a final decision has been made should be treated as new elements rather than a subsequent application, whereas Article 55(2) repeats the broadened definition whereby new applications in any Member State are classed as subsequent applications. In both cases, the Member State responsible should examine the application. The rest of the Article concerns the definition of new elements and the preliminary assessment required for subsequent applications without new elements.

Article 55(3) stipulates:

Where an applicant makes a subsequent application without presenting new elements which significantly increase his or her likelihood of qualifying as a beneficiary of international protection or which relate to the reasons for which the previous application was rejected as inadmissible, that subsequent application should not be subject to a new full examination procedure.

Without these specified new elements, only a preliminary assessment should be carried out and, according to Recital (77), “applications should be rejected as inadmissible in accordance with the res judicata principle.”

The preliminary assessment can take the form of a personal interview or simply a written submission. Particularly when it is “clear” that there are no new elements, the interview can be omitted. Unless new elements are found, then the application should be rejected as inadmissible. Elements should be considered new only when the applicant “was unable, through no fault on his or her own part, to present..”

Implementation considerations

ECRE strongly argued against the approach to subsequent applications in the APR. First, as explained above, the differential treatment would only be fair if the Member States’ asylum systems were harmonised which is not the case and may well not be for a long time.

Second, applicants have to present new elements which “significantly” increase the likelihood of them qualifying as a beneficiary of international protection, or which relate to the reasons for which the previous application was rejected as inadmissible. This imposes an excessive burden of proof on the applicant and may be extremely difficult to meet in practice. It also adds another layer to the asylum procedure, which can be easily avoided by adopting a less bureaucratic and more protective approach.

Third, given that the rules on subsequent applications concern applications made in any Member State, the mandatory rejection as implicitly withdrawn expands the human rights implications of such decisions for the individual applicant enormously compared to the APD – even more so, given that there is no right to remain and therefore no automatic suspensive effect of the appeal.

As described above, the concept of implicit withdrawal has been widened and its use becomes mandatory. This means that more applicants – potentially very large numbers – will receive decisions that the application is implicitly withdrawn. This is a final decision (as it is under the APD) but one which can at least be appealed. To illustrate the point, in Bulgaria in 2023, there were 16,211 decisions to terminate the asylum procedure due to absconding, almost two-thirds of the total of 24,949 decisions issued. Many of these decisions concerned applicants who had left Bulgaria to go to other Member States. After the changes, these cases will receive implicit withdrawal decisions. If the applicants then wish to access an asylum procedure, their applications which will now be treated as subsequent applications whether they submit the application in another Member State or in Bulgaria.

The risks of human rights violations, including refoulement, are considerable. The need to rely on human rights challenges under international law, especially under the ECHR will be increased given the limited recourse available to applicants, which is not the most reliable or cost-effective situation either for the applicant or the state. There are potentially 100,000s applicants that will not have access to a fair examination of their asylum claim under these provisions – unless they are accompanied by a significant increase in the functioning of asylum decision-making in all countries.

The change is spelled out:

- The applicant has made an application in Member State X and received a final decision (that could be on the merits or it could be a decision on implicit withdrawal).
- They lodge an application in another Member State.
- This will be treated as a subsequent application.
- Unless they can meet the high threshold of showing new elements which significantly increase the likelihood of protection or change the inadmissibility assessment, the case will be dismissed as inadmissible in a preliminary examination which might not even involve a personal interview.
- They then have 5 to 10 days to lodge an appeal (minimum 5 days, maximum 10 days, depending on the EUMS).
- They have no right to remain so the appeal has no suspensive effect. They need to simultaneously lodge a request to remain within 5 days.
- If they are granted the right to remain, they will remain while the appeal is heard, if not they will be deported.

Consequently, ECRE recommends that Member States seek to apply the little flexibility that remains to them with respect to the management of subsequent applications, including assuming

responsibility or at least accepting new elements and carrying out an interview as part of the preliminary assessment.

A precondition for the system to be fair – but not a guarantee that it is – will be well-functioning asylum systems in the Member State that examines the first application.

Recommendations

- EUMS should use their discretion to assume responsibility for the examination of applications in some circumstances to avoid them being treated as subsequent applications.
- EUMS should allow a personal interview in all circumstances for the reasons listed above.
- EUMS should put in law a 10 day deadline for lodging the appeal for subsequent applications because 5 days is too short for an effective opportunity to lodge.
- Applicants, their legal advisors and campaigners, need to be aware of the rules on subsequent applications, particularly in the context of onward movement within the EU.
- The European Commission should use all possible tools available to ensure fair decision-making in asylum systems across the EU to ensure that applicants falling under the scope of the new rules on subsequent applications have at least had access to a fair hearing in the first country.
- The EUAA should provide guidance on what constitutes “new” elements under Article 55(3).
- Legal analysts should provide an assessment of what would be new elements that significantly increase the likelihood of protection needs being recognised in a context of divergent and poor quality decision making.
- National authorities and national courts – as relevant – should seek guidance from higher courts and European courts on aspects of the treatment of subsequent applications.

Article 56: Exception from the right to remain in subsequent applications

See above.

SECTION V – SAFE COUNTRY CONCEPTS

Articles 57 to 64 cover safe country concepts, a central plank of the 2016 reforms and currently of considerable interest to Member States. They should be read in conjunction with Recitals (45) to (53) which provide some additional information.

As discussed above, the APR relies on the mainstreaming of three different safe country concepts as a means to ensure a higher level of harmonisation and efficiency of the asylum procedure. Two of them operate on the basis of a presumption of the availability and accessibility of international protection for the individual applicant (first country of asylum) or the possibility to request and obtain international protection (safe third country) in a country outside of the EU. The safe country of origin concept refers to the absence of any well-founded fear of persecution or risk of being subjected to serious harm for the individual applicant in the country of origin or habitual residence. All three concepts are used to reduce the granting of protection in Europe, either by generating the presumption that the country of origin is safe or that the applicant can receive protection in a third country.

These concepts are part of the APD, an aspect of it which has long been controversial given that they are not part of International Refugee Law.¹³⁹ Member States' practice varies widely, with some Member States not applying any of the three concepts in practice and others using them frequently.¹⁴⁰

Compared to the APD, the APR, introduces the following changes:

- A lower threshold for a country to be classed as safe, which does not require protection as defined in the Refugee Convention (A57);
- The connection criterion remains but will be reviewed in a year (A59(5)(b));
- A country can be classed as safe with exceptions for certain parts of its territory or for certain categories of applicants A59(2);
- A possibility to bypass safety requirements when there is an agreement with the third country A59(7);
- An EU list of designated safe countries to operate in addition to Member States' national lists A60.

Article 57: The notion of effective protection

For the APR, countries are to be considered safe if they offer “effective protection” which is defined in Article 57, and relates to both first country of asylum and safe third country concepts. It is a new concept which replaces protection as defined by the Refugee Convention, setting a lower threshold for a country to be determined to be safe.

First, it should be noted that the concept codified in EU law is more restricted than the standard use of the term “effective protection” by UNHCR, whereby the term means Geneva Convention-level protection which can actually – effectively – be accessed in practice.¹⁴¹

There are two ways for the standard of effective protection to be met. While Article 57(1) explains that countries which have ratified and respect the Geneva Convention shall be considered as ensuring effective protection, Article 57(2) explains that there is an alternative to Convention-level protection. Accordingly, countries also provide effective protection when five criteria are met. These criteria are in place when the people concerned:

- are allowed to remain on the territory of the third country in question;
- have access to means of subsistence sufficient to maintain an adequate standard of living with regard to the overall situation of that hosting third country;
- have access to healthcare and essential treatment for illnesses under the conditions generally provided for in that third country;
- have access to education under the conditions generally provided for in that third country; and
- effective protection remains available until a durable solution can be found.

The Recitals repeat the definition verbatim with the exception of Recital (50) which includes the following addition information:

¹³⁹ ECRE, *Debunking the safe third country myth*, Policy Note No. 8, 2017, available at: <https://bit.ly/3VNjLhh>.

¹⁴⁰ AIDA, *Admissibility, responsibility and safety in European asylum procedures*, September 2016, available at: <http://goo.gl/tuHh2D>.

¹⁴¹ UNHCR, *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers*, 9/10 December 2022, available at: <https://bit.ly/4cxqjCj>.

When assessing whether the criteria for effective protection as set out in this Regulation are met by a third country, access to means of subsistence sufficient to maintain an adequate standard of living should be understood as including access to food, clothing, housing or shelter and the right to engage in gainful employment, for example through access to the labour market, under conditions not less favourable than those for non-nationals of the third country generally in the same circumstances.

According to Article 57(1), second sentence, if the country has ratified and respects the Geneva Convention but with geographic limitations, then Article 57(2) can be used to establish effective protection for the people that fall under the limitation. The most relevant example for the EU where this applies is that of Turkey, which has ratified the Convention but maintains a geographic limitation.

Article 58: The concept of first country of asylum

The concept of effective protection is used in Article 58, which stipulates that a country can only be considered as a first country of asylum if the applicant held effective protection as per Article 57 and if three other criteria also apply:

- the applicant's life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- the applicant faces no real risk of serious harm as defined in Article 15 of the Qualification Regulation;
- the applicant is protected against refoulement in accordance with the Geneva Convention and against removal in violation of the right to protection from torture and cruel, inhuman or degrading treatment or punishment as laid down in international law.

In addition, the concept of first country of asylum can only be applied "provided that the applicant cannot provide elements justifying why the concept of first country of asylum is not applicable to him or her, in the framework of an individual assessment."

Implementation considerations

Definition of effective protection

Article 57 sets a low threshold for a country to be considered as offering effective protection which in turn is necessary but not sufficient for its classification as safe. The threshold is low compared to the APD and compared to the traditional use of the term effective protection in refugee protection. The definition also serves to undermine the Refugee Convention.

First, the reference to Refugee Convention in Article 57(1) is weaker in than in the APD, where Article 38(e) requires that "the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention". Now it is sufficient for state to have ratified and to respect the Convention. The notion of effective protection as deployed by UNCHR developed in part in acknowledgement that there are many states which have ratified the Convention but where refugees do not have effective access to protection because they cannot request and obtain it. In line with UNHCR's position, ECRE considers that Refugee Convention protection must be effective and available in practice.¹⁴²

¹⁴² See UNHCR, *Improving asylum procedures. Comparative Analysis and Recommendations for Law and Practice. Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, available at: <https://bit.ly/4cd0pbo>, p. 282-283.

ECRE strongly argues that the reference to respect for the Refugee Convention in Article 57 should be interpreted as meaning that the people in the same position as the applicant are able to request and obtain refugee status under the Convention in the country concerned.

Second, by introducing a second way in which the standard of effective protection can be met, the APR undermines the centrality of the Refugee Convention. At Article 57(2), five criteria are sufficient to constitute effective protection, and fall far short of the level of protection set out in the Convention. In addition, ECRE has criticised the “pick-and-choose” approach to the Convention, whereby some elements are deemed important and others not.¹⁴³

It can be questioned whether Article 57(2) is compatible with the requirement in Article 78(1) TFEU for the EU’s common policy on asylum to be “in accordance with” the Convention and “other relevant treaties”, with the right to asylum laid down in Article 18 of the CFREU, or with the principle which applies to all instruments of the CEAS, reiterated in Recital (2) of the APR itself, that EU asylum policy is based on “full and inclusive” application of the Convention.

In relation to the first country of asylum concept, while the APD requires that the applicant has been “recognised as a refugee”, the APR states that the applicant should have “held effective protection” in the country. Again, ECRE argues that this should be interpreted as having held refugee status.

In ECRE’s view, if EU law is to allow Member States to deflect their responsibility for examining the merits of individual applications, it should only allow this where it is established that the protection received in the third country is the same as required under EU law. Whereas the notion of international protection in EU law comprises both refugee status and subsidiary protection status, the latter is clearly conceived as complementary to refugee status as it can only be granted after it has been established that the person does not meet the refugee definition. Without such hierarchy between the two statuses formally established in the legislation of the third country concerned, the possibility of receiving any status other than refugee status should not trigger application of the first country of asylum nor safe third country concept.

Fourth, the capacity of the third country to provide effective protection in practice in light of the effort it is already undertaking in hosting large refugee populations must necessarily part of any assessment of whether the first country of asylum concept or the safe third country concept can be applied with respect to the applicant.

Finally, in ECRE’s view, applying the first country of asylum concept is not appropriate for countries where UNHCR undertakes refugee status determination because the state does not have the capacity to do so or cannot provide protection as defined above. As UNHCR recognition in such countries does not constitute recognition of a right of residence for the individual – nor can it guarantee protection from *refoulement* – no effective protection can be assumed to exist. This approach is supported by the case law of the ECtHR. In the case of *Abdolkani and Karimnia v. Turkey* concerning the planned deportation by Turkey of two Iranian nationals, former members of the Peoples Mujahidin Organisation in Iran (PMOI), to Iraq, the ECtHR found that their deportation

¹⁴³ According to Article 42 of the 1951 Geneva Convention, States can only make reservations at the time of signature ratification or accession to articles of the Convention other than Articles 1, 3, 4, 16(1), 33, 36-46.

to Iraq would violate Article 3 ECHR, notwithstanding the fact that they both had been recognised as refugees by UNHCR in Iraq.¹⁴⁴

Article 59: The concept of safe third country

The definition of safe third country has four cumulative criteria, starting with the three listed above that apply for first country of asylum, and concluding with a reference to the Article 57 definition on effective protection, which in this case does not have to have been enjoyed – rather the applicant should have the possibility to request and receive it. As follows:

A third country may only be designated as a safe third country where in that country:

- (a) non-nationals' life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) non-nationals face no real risk of serious harm as defined in Article 15 of Regulation (EU) .../...+;
- (c) non-nationals are protected against refoulement in accordance with the Geneva Convention and against removal in violation of the right to protection from torture and cruel, inhuman or degrading treatment or punishment as laid down in international law;
- (d) the possibility exists to request and, where conditions are fulfilled, receive effective protection as defined in Article 57.

This contrasts with Article 38(1)(e) of the APD, whereby it was simply necessary that the applicant could request and obtain refugee status in accordance with the Geneva Convention.

At Article 59(5)(a), the same provision as in Article 58 on first country of asylum states that the concept can only be applied provided that the applicant cannot provide elements showing that it is not applicable.

The connection criterion

More importantly, at Article 59(5)(b) the “connection criterion” is maintained, stating that there must be a connection between the applicant and the country “on the basis of which it would be reasonable for him or her to go to that country”.

As part of the political agreement required to approve the Council General Approach in June 2023, Member States inserted reference to a review of the concept of the safe third country one year after the Regulation enters into force as part of monitoring and evaluation provisions, to be carried out by the Commission which can propose “targeted amendments” but only “where appropriate”. The text appears in Article 77 on monitoring and evaluation:

By ... [one year from the date of entry into force of this Regulation], the Commission shall review the concept of safe third country and shall, where appropriate, propose any targeted amendments.

¹⁴⁴ “Given that the applicants’ deportation to Iraq would be carried out in the absence of a legal framework providing adequate safeguards against risks of death or ill-treatment in Iraq and against the applicants’ removal to Iran by the Iraqi authorities, the Court considers that there are substantial grounds for believing that the applicants risk a violation of their rights under Article 3 of the Convention if returned to Iraq” See ECtHR, *Abdolkhani and Karimnia v. Turkey*, Application No 30471/08, Judgment of 22 September 2009, available at: [available at: https://bit.ly/3KWkEOI](https://bit.ly/3KWkEOI), para. 89.

The government of Denmark, which will take over Presidency of the Council in July 2025, has already signalled that it wishes to use the review to remove the connection criterion. Nonetheless, by that point, first, the APR will not yet be applied, so significant revision of the text appears to be premature, and, second, the Commission will be reviewing the concept as a whole, and should base its positioning on the existing and emerging jurisprudence of the CJEU.

Safe with exceptions

At Article 59(2), another new element renders it possible for a country to be designated as safe “with exceptions for specific parts of its territory or clearly identifiable categories of persons”. This measure is also intended to widen the use of the concept. Whereas previously a country would not have been designated as safe if that were not the case for certain areas or where certain categories of people – for example minority communities – were at risk, the provision opens the door for categorising countries as safe despite the lack of safety in some areas or for some people. This implies, for example, that conflict in one part of the country or repression or even potentially persecution of one particular group should not preclude the country from being designated as safe.

An alternative effort to expand the use of the concept is presented in Article 59(4)(b), whereby a country which is not generally determined to be safe under EU or national law, may be considered safe for a particular applicant if the criteria in Article 59(1) are met for that applicant.

Presumption of safety with agreement

A new paragraph in Article 59(7) allows the states to bypass all of the above requirements in cases where an agreement has been made between the EU and a third country, as follows:

[...] Where the EU and a third country have jointly come to an agreement pursuant to Article 218 TFEU that migrants admitted under this agreement will be protected in accordance with the relevant international standards and in full respect of the principle of non-refoulement, the conditions of this Article regarding safe third country status may be presumed fulfilled without prejudice paragraph 5 and 6.

On a straightforward reading of the Article, the existence of the agreement generates the presumption that the third country is safe, however, the mere existence of an agreement in which a country commits to protect people in line with international standards does not indicate that it is safe in reality. Only rigorous assessment of the evidence of the actual situation in the country by expert, authoritative bodies, can demonstrate the safety or otherwise of the country for a particular person or group.

The Article was introduced by the Council in its General Approach. Parliament was able to secure an important safeguard with the reference to Article 218, meaning that only formal international agreements concluded following the process set out in the TFEU will qualify (the process includes consultation of the Parliament). While recent experience, including the EU’s and individual states’ dealings with Rwanda, Turkey and Tunisia, demonstrates that third countries offered benefits by Europe may be willing to make claims – or indeed efforts – to be safe for asylum applicants, refugees or other people, objective evidence throws doubt on such claims.¹⁴⁵ At the same time, these agreements deliberately take the form of informal agreements rather than formal international agreements, thus they would not fall under Article 58(7). Additional safeguards are offered by the

¹⁴⁵ See e.g. Amnesty International, ‘Tunisia: Repressive crackdown on civil society organizations following months of escalating violence against migrants and refugees’, 16 May 2024, available at: <https://bit.ly/3xC2KgM>.

reference to paragraphs 5 and 6, which must still apply, meaning inter alia that the connection criterion must be in place.

Vulnerable applicants

Article 59(6) concerns the application of the safe third country concept to unaccompanied children. The text includes a reference to the best interests principle – the country can only be considered as safe if it is not contrary to the best interests of the child and the authorities must have provided assurances that they will take charge of the child and they will have immediate access to protection. The text is a compromise between the co-legislators' positions: the Parliament specified that the concept should not be used unless it is clearly demonstrated to be in the best interests of the child and the General Approach suggested that it can be used unless it is not in the best interests of the child.

Implementation considerations

Definition of effective protection (see above)

Concerns described above in relation to the low threshold set by the notion of effective protection are equally relevant for the application of the safe third country concept. In addition, when the safe third country concept is applied, the applicant does not need to have previously held protection but just to be able to request and receive it. Again, the definition of effective protection and the three other criteria combine to represent a standard of protection lower than the Refugee Convention, and one that represents a “pick-and-choose” approach beyond the possibility for Contracting Parties to make reservations as allowed under the strict rules of the Convention.¹⁴⁶

ECRE again questions the compatibility with the requirement in Article 78(1) TFEU for the EU's common policy on asylum, subsidiary protection and temporary protection to be “in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”, with the right to asylum laid down in Article 18 of the CFREU, and the objectives of the APR itself.

Connection criterion

While the connection criterion has been maintained despite concerted efforts by certain Member States to remove it, the assault will resume in 2025, when the review will take place. This will occur when the Presidency of the Council is held by Denmark, which has already underlined its desire to facilitate the removal of the criterion, despite it not being party to the APR due to the long-standing Danish opt-outs.¹⁴⁷

During the negotiations, debate also centred on the nature of the connection. The APD does not contain any indication of what level of connection between the applicant and the third country is required other than it being “sufficient”.¹⁴⁸ According to the original 2016 APR proposal, the reasonableness of the connection required between the applicant and the third country can be

¹⁴⁶ According to Article 42 of the 1951 Geneva Convention, States can only make reservations at the time of signature ratification or accession to articles of the Convention other than Articles 1, 3, 4, 16(1), 33, 36-46.

¹⁴⁷ See the letter of 15 Member States, *Joint Letter for the undersigned Ministers on new solutions to address irregular migration to Europe*, 15 May 2024, available at: <https://bit.ly/45Alrye>.

¹⁴⁸ See Recital (44) recast Asylum Procedures Directive, which refers for the definition of “sufficient” connection to national law.

assumed on the basis that the “applicant has transited through that third country which is geographically close to the country of origin of the applicant”.¹⁴⁹

ECRE maintains its position that a meaningful link with the third country is necessary. In the FMS judgment, the CJEU has already found that transit cannot be considered as sufficient to determine that a connection exists. In practice, what constitutes a meaningful link will depend on many factors and should be assessed on a case-by-case basis, also taking into account the specific vulnerability of the applicant. However, the mere transit of a person through such country cannot be considered as constituting a meaningful link. As emphasised by UNHCR, transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful connection or link with a country.¹⁵⁰¹⁵¹

National courts have also interpreted the connection with a country narrowly. The Swedish Migration Court of Appeal, for instance, has found ethnicity and mother tongue to be insufficient evidence per se of such connection, even where the applicant’s ethnicity would facilitate the acquisition of citizenship in the third country.¹⁵² In Sweden, Austria, Bulgaria, the Netherlands and Greece, the existence of a sufficient connection is interpreted as requiring more than mere transit through the third country concerned, such as for instance the presence of family members.¹⁵³

Critiques from International Refugee Law (IRL)

From an IRL perspective, the concepts of first country of asylum and safe third country are highly controversial as they lack a clear legal basis in the Refugee Convention. Products of administrative practice of asylum authorities developed over the years, they aim at shifting protection responsibilities to neighbouring countries or any country asylum applicants may have transited on their way to the state they request protection from and further undermine solidarity with other regions in the world which host the majority of the world’s refugees. The dealings with Rwanda in recent years go even further, with states attempting to send refugees to a country thousands of kilometres away with which they have no connection at all, not even transit.

The use of these concepts is also premised on a flawed interpretation of the 1951 Refugee Convention as not allowing any choice for the refugee with regard to the state of refuge but requiring the refugee to request protection at the earliest opportunity, a misconception which also underlies the EU’s system for allocating responsibility.

Whereas the Refugee Convention does not provide for an unfettered right to refugees to choose their host state, no obligation to apply in the first country refugees reach after fleeing their country of origin can be derived from IRL either. According to UNHCR, the primary responsibility to provide protection rests with the state where asylum is sought.¹⁵⁴ In this regard, it should be noted that

¹⁴⁹ With respect to the connection requirement in the recast Asylum Procedures Directive, a Commission Communication relating to the implementation of the EU-Turkey Statement mentions, in a politically rather opportunist fashion that “it can also be taken into account whether the applicant has transited through the safe third country in question, or whether the third country is geographically close to the country of origin of the applicant”, without, however, submitting that this is sufficient to comply with Article 38(2) recast Asylum Procedures Directive. See European Commission, *Communication on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration*, COM(2016) 85, 2 February 2016, available at: <https://bit.ly/4bipBfk>, p. 18.

¹⁵⁰ See UNHCR, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept*, 23 March 2016, available at: <https://bit.ly/4ct1NGk>.

¹⁵¹ FMS, *ibid.* para. 157

¹⁵² See Swedish Migration Court of Appeal, MIG 2011:5, 10 March 2015, available in Swedish at: <https://bit.ly/4cvTFFh>.

¹⁵³ This is the case in **Greece** for instance. See ECRE, *Admissibility, responsibility and safety in European asylum procedures*, September 2016, available at: <http://goo.gl/tuHh2D>, p. 21.

¹⁵⁴ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements for asylum-seekers, Division of International Protection*, May 2013, available at: <https://goo.gl/xLPq1l>, para. 1.

UNHCR EXCOM conclusions call upon States to take asylum seekers' intentions as to the country in which they wish to request asylum "as far as possible into account", while "regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State."¹⁵⁵

For the reasons set out above in relation to the first country of asylum concept, ECRE argues that the safe third country concept should only be applied with respect to countries that have ratified the 1951 Geneva Refugee Convention without any geographical limitation. Long-standing jurisprudence from Switzerland is illustrative in this respect, ruling for instance that a person cannot find actual protection in a country that maintains geographical limitations on the Convention.¹⁵⁶

Safeguards to be applied

Both the operational articles and the Recitals offer certain safeguards for applicants in the use of the first country of asylum and safe third country concepts.

First, Member States retain the right to examine the application on the merits as per Recital (48). Second, an individual assessment has to be carried out (Articles 58 and 59, Recital (52)).

Third, for both first country of asylum and safe third country concepts, Articles 58 and 59 provide the following:

Where the third country in question does not readmit the applicant to its territory or does not reply within a time limit set by the competent authority, the applicant shall have access to the procedure in accordance with the basic principles and guarantees provided for in Chapter II and in Section I of Chapter III.

Recital (53) goes further stating:

An application should not be rejected as inadmissible on the basis of the concepts of first country of asylum or safe third country where it is already clear at the stage of the admissibility examination that the third country concerned will not admit or readmit the applicant. Furthermore, if the applicant is eventually not admitted or readmitted to the third country after the application has been rejected as inadmissible, the applicant should again have access to the procedure for international protection in accordance with this Regulation.

As it is the case for the first country of asylum concept, the possibility for the applicant to challenge the application of the concept of safe third country in his or her individual circumstances is limited to the moment of lodging the application and during the admissibility interview. For the same reasons of compatibility with the EU Charter of Fundamental Rights and general principles of EU law raised above, such restriction should be deleted.

Article 61: The concept of safe country of origin

Compared to the APD, Article 61 incorporates similar standards for the concept covering the requirement of an individual assessment, the possibility for the applicant to rebut the presumption of safety in his or her individual circumstances, and the minimum criteria for the third country to be considered safe. It increases transparency by integrating the information into the operational articles, rather than appearing in annex. New criteria describe the type of actions applicants should be

¹⁵⁵ UNHCR, *EXCOM Conclusion No. 15 (XXX), Identifying the Country Responsible for Examining an Asylum Request*, available at: <https://bit.ly/3VEkpww>, p. 443.

¹⁵⁶ Swiss Asylum Appeals Commission, Decisions EMARK 2000/10 and 2001/14.

protected from in their country of origin more clearly.¹⁵⁷ The requirement to take into account the common analysis of country of origin information to be produced by the EUAA is also important.

In the 2016 proposal, the annex of a draft EU common list of safe countries of origin was copied from the Commission's September 2015 proposal for the EU Common list of safe countries of origin.¹⁵⁸ The argumentation developed for each individual country justifying their inclusion in the list was also similar, and adjusted only to the changed wording in respect to the absence of expulsion, removal or extradition of own citizens where they would risk being subjected to serious human rights violations.

Implementation considerations

ECRE has consistently advocated against the use of the safe country of origin concept with international refugee law, as it is at odds with the obligation on states under Article 3 of the 1951 Geneva Refugee Convention to treat refugees without discrimination based on their country of origin. The use of safe country lists, whether nationally designated or at EU level, further contributes to a practice of stereotyping certain applications on the basis of their nationality and increases the risk of such applications not being subject to thorough examination of a person's fear for persecution or risk of serious harm on an individual basis, which is crucial to ensuring full respect for the principle of *non-refoulement*. Furthermore, the application of a presumption of safety, while rebuttable under EU law, in practice often places an almost insurmountable burden of proof on the applicant, which is exacerbated by the lack of access to quality legal assistance in many Member States.

While opposing the adoption of an EU common list of safe countries of origin for the reasons explained above, ECRE reiterates its concern that the preamble sets a number of questionable factors to substantiate a presumption of safety in respect of those countries. In particular the general reference to the number of condemnations before the European Court of Human Rights, without further specification as to how many of those relate to that country's own nationals, or the country's status as an accession country, misleadingly suggesting that they meet the Copenhagen criteria where this is clearly not the case, are of little relevance to the assessment of those countries' presumed safety. Also low EU wide recognition rates as such may not necessarily be considered as a reliable indicator in light of the sometimes significant recognition rates for some of the nationalities concerned in specific Member States.¹⁵⁹ In this regard, the developments in Turkey and the response of the authorities in particular to the failed coup d'état in that country have rendered the proposed designation of Turkey as a safe country of origin even more unsustainable than at the time of the submission of the September 2015 proposal.

¹⁵⁷ Which requires "respect for the non-refoulement principle in accordance with the Geneva Convention". While the *non-refoulement* principle as laid down in Article 33 of the Refugee Convention is the bedrock of international refugee law, it engages a State's obligations vis-à-vis the protection of non-nationals. For the purpose of the application of the safe country of origin concept, the assessment to be made is how the third country concerned treats its own nationals in light of international human rights law. As the Refugee Convention only applies to persons outside of their country of origin or habitual residence, the assessment of how the country concerned complies with its obligations under the Refugee Convention, is strictly speaking not relevant.

¹⁵⁸ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU*, COM(2015) 452, 9 September 2015, available at: <https://bit.ly/3KStehj>.

¹⁵⁹ In the first half of 2016, the EU average recognition rate for Turkey was 23%, and as high as 82.8% in **Italy** and 30.7% in **Austria**: Eurostat, *First instance decisions Quarterly data*, migr_asydcfstq. Moreover, according to EASO, recognition rates for all six Western Balkan countries combined in 2015 were as high as 55% in **Italy**, 24% in **Switzerland** and 18% in the **UK**. See EASO, *Annual Report on the Situation of Asylum in the European Union 2015*, July 2016, available at: <https://bit.ly/3VTcEnw>, p. 54.

Articles 60 to 64: Designation of safe countries

The APR develops mechanism for designation or suspension of countries as safe countries of origin or safe third countries at EU level and their removal from an EU common list of safe countries of origin, included as an annex to the Commission proposal. These sections have undergone some changes, given the Member States efforts to preserve national level designation in parallel.

The Articles foresee a strong role for the EUAA in supporting the Commission, providing it with information and analysis on third countries.

Article 64: Designation of third countries as safe third countries or safe countries of origin at national level

The Commission proposal aimed to harmonise the application of the safe third country and safe country of origin concepts through EU-level designation of countries as such, combined with the phasing out of national safe country lists over a period of five years from entry into force of the Regulation. This was rejected by the Member States which may retain or introduce national legislation designating countries as safe third countries or safe countries of origin.

There is a strong risk that the approach is not harmonised and that Member States seek to designate countries as safe when in reality they are not. Article 64 offers two protections. First, if the designation of a country as safe at Union level has been suspended, then Member States are not permitted to designate them as such. Second, if Member States seek to reclassify the country as safe, the Commission can object. It is not explicit but implied that Member States should withdraw countries from national list, where such designation occurred before the adoption of the Commission delegated act suspending the country concerned.

Implementation considerations

The effects of centralised designation of safe countries of origin and safe third countries

ECRE already opposed, in principle, the adoption of a common list of safe countries of origin as proposed by the Commission in September 2015,¹⁶⁰ which already included the same countries contained in the Commission proposal for the APR.¹⁶¹ The adoption of such a list at EU level through a Regulation, which is directly applicable, seems evident from a harmonisation viewpoint. However, the choice of the instrument is also likely to create an important gap in the judicial scrutiny of the legality of the designation of countries as safe.

This is because the CJEU would have become exclusively competent to assess such legality and annul such designation where necessary. National courts would no longer be able to directly rule on the safety presumption and criteria used with respect to individual countries or annul such designation, as this would entail a review of the legality of an EU legislative act, which is the exclusive competence of the CJEU.

However, in many cases the inclusion of a country in a national safe country list has been successfully challenged through direct court actions initiated by individual applicants or NGOs.¹⁶² As

¹⁶⁰ For a detailed analysis and recommendations, see ECRE, *Comments on the Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin and amending the recast Asylum Procedures Directive (COM(2015) 452)*, October 2015, available at: <https://bit.ly/3xx2gZs>.

¹⁶¹ These are the six Western Balkan Countries (Albania, Montenegro, FYROM, Bosnia and Herzegovina, Kosovo, Serbia) and Türkiye.

¹⁶² A recent example is **Belgium**, where the Conseil d'Etat issued a judgment on 23 June 2016 ordering the annulment of Albania's inclusion in the national list of safe countries of origin. The Conseil d'Etat had already ordered its removal from the list in a judgment of 7 May 2015, but the country was reinserted by the Belgian government shortly after: Belgian Conseil d'Etat, Judgment No 235.211 of 23 June 2016, available in French at: <https://bit.ly/4expBuL>.

the latter would not meet the highly onerous criteria to have locus standi before the CJEU to directly challenge the designation of a country as safe at EU level, applicants and their representative would be deprived from an important tool of fundamental rights protection. Although it should be noted that national courts could of course refer to the CJEU, for instance, in relation to the validity of the inclusion of the country in the light of the need for compatibility with the CFREU.

In the compromise, national lists are maintained which means that APR's harmonisation may be limited, but also that national courts will continue to play a role.

The final text includes considerable room for discretion for Member States in designating countries as safe beyond those designated as such at EU level and constitutes a potentially powerful tool for Member States to steer and influence the EU's policy on safe countries, based on national political considerations rather than protection considerations. Such discretion goes against the key objective of the Commission's proposal to "facilitate convergence in the application of procedures and thereby also deter secondary movements of applicants for international protection."¹⁶³ Overall, the provisions contribute to the risk of nationality-based rather than individual assessments, further undermining a core principle of International Refugee Law.

¹⁶³ See Recital (48) of the Commission proposal.

Chapter V: Appeal procedure

An erosion of the right to an effective remedy is a major theme of the APR, taking the form of short deadlines, merging of appeal processes, and removal of the automatic suspensive effect of an appeal for certain decisions and procedures (i.e. removal of the right to remain pending the outcome of the appeal).

The APR sets strict time limits for the applicant to lodge an appeal, constituting a significant shift compared to the APD, according to which Member States need to provide “for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy.” In the final text, short deadlines are set, and the deadlines vary depending on the procedure the person has followed.

ECRE is critical of these changes, having strongly urged the co-legislators to provide at least 30 days for appeals to be lodged, which is based on estimating the minimum time needed for an applicant to prepare an appeal properly. Varying treatment for different categories of applicants may also violate the rules and principles of good administration and the rule of law.

The proposal required Member States to provide for only one level of appeal for decisions taken in the border procedure, a point of concern for ECRE which recommended removing the article completely as this may deprive applicants of an objective assessment of their claim and also because removing two levels of appeal would have been unconstitutional in some Member States. Both co-legislators removed this requirement which does not appear in the final text, meaning that maintaining additional layers of appeal is possible, as reiterated by Recital (88).

A summary of the rules is provided here:

Decision / procedure	Deadlines for lodging the appeal	Suspensive effect of appeal? Only if there is a right to remain.
<ul style="list-style-type: none"> • Rejection as inadmissible • Decision on implicit withdrawal • Rejection as unfounded or • manifestly unfounded if A42(1) or A42(3) apply (accelerated procedure). 	Minimum 5 days Maximum 10 days	No right to remain as per Article 68(3)(a)(i) therefore no automatic suspensive effect. The right to remain may be requested (5-day deadline)
<ul style="list-style-type: none"> • Rejection on the merits in the border procedure (exemption UAM) • Rejection as inadmissibility on grounds A38(1)a, d, e A38(2) (exemption UAM) • Rejection as unfounded in subsequent application • Decision on withdrawal with application of exclusion or 	Minimum 2 weeks Maximum 1 month	No right to remain The right to remain may be requested (5-day deadline during which the right to remain is in place except for subsequent applications lodged merely to frustrate or delay removal)

national security ground (QR A14 +A19(1)(b))		
Appeal against first or subsequent appeal against withdrawal.	Minimum 2 weeks Maximum 1 month	No right to remain. It may be allowed by a court or tribunal where “the principle of non-refoulement is invoked.”
All other applications, including: <ul style="list-style-type: none"> • Rejection on the merits in regular procedure. • Decisions on explicit withdrawal (except above -exclusion and national security). 	Minimum 2 weeks Maximum 1 month	Yes

Article 67: The right to an effective remedy

Article 67(1): What can be appealed

The Article maintains the right to an effective remedy before a court or tribunal against inadmissibility, in-merits and withdrawal decisions as per the APD. It adds, first, an explicit right to appeal a decision rejecting an application as implicitly withdrawn in response to the adapted and expanded use of implicit withdrawal (Article 67(1)(c)), and, second, a reference to the right to appeal a return decision issued in accordance with Article 37 (Article 67(1)(e)). The proposal by the European Parliament to add a right to appeal against an age assessment decision was not accepted.

While Article 37 concerns the simultaneous issuing of the rejection and the return decision in some circumstances, Article 67(1) reiterates the right to appeal a return decision even in these circumstances. Nonetheless, the requirement is added, that, when the asylum decision and the return decision are taken jointly (where the return decision is taken “as part of” the rejection decision), the appeal must also take place jointly, meaning within the same judicial proceedings, before the same court, and within the same time limit. When the return decision is in a separate act “it may be appealed in separate judicial proceedings,” although the time limit remains the same.

The right to an appeal by subsidiary protection holders against a decision that their application for refugee status is unfounded (“upgrade appeals”) is maintained. The proposed exception that allowed Member States to dismiss an appeal when the two statuses offer the same benefits and rights (which is in any case rare) was not included in the final text.

At Article 67(3), the effective remedy “shall provide for a full and ex nunc examination of both facts and points of law...”

Article 67(7): Deadlines for appealing a decision

The time limit for appeals was a source of significant debate in the negotiations, given the very short deadlines proposed. The final time limits that should be laid down in national law are set out above.

Article 68: Suspensive effect of appeal

A significant change results from Article 68. The new Article 68(1) clarifies that the legal effects of a return decision shall be automatically suspended for as long as the applicant has a right to remain or is allowed to remain in accordance with the Regulation. At Article 68(3)(a) to (e), the text expands

the categories of people who do not have the right to remain compared to the APD, “without prejudice to the principle of non-refoulement”, these people “shall not have the right to remain”. The paragraph includes five categories of decision for which there is no right to remain, as follows:

- (a) a decision which rejects an application as unfounded or manifestly unfounded if at the time of the decision:
 1. the applicant is subject to an accelerated examination pursuant to Article 42(1) or (3);
 2. the applicant is subject to the border procedure, except where the applicant is an unaccompanied minor;
- (b) a decision which rejects an application as inadmissible pursuant to Article 38(1), point (a), (d) or (e), or Article 38(2), except where the applicant is an unaccompanied minor subject to the border procedure;
- (c) a decision which rejects an application as implicitly withdrawn;
- (d) a decision which rejects a subsequent application as unfounded or manifestly unfounded; or
- (e) a decision to withdraw international protection in accordance with Article 14(1), point (b), (d) or (e), or Article 19(1), point (b), of Regulation (EU) .../...+.

Article 68(4) explains that where there is no automatic suspensive effect because the applicant is in a category which does not have the right to remain, a court or tribunal has the power to decide whether the person has the right to remain pending the outcome of the appeal. The person must request to be allowed to remain within 5 days and a court or tribunal will decide. In addition, “The competent court or tribunal shall under national law have the power to decide on this matter *ex officio*.”

To summarise, the right to remain, and therefore the automatic suspensive effect of the appeal, is removed for the following categories of decisions:

- All decisions taken in accelerated procedure and in border procedures (except for those concerning unaccompanied children);
- Some inadmissibility decisions (inadmissibility on the following grounds: application of the first country of asylum concept, ICC extraditions, where there is a return decision and the deadline to apply has been missed, and subsequent applications with no new elements);
- All decisions on implicit withdrawal;
- Decisions to reject subsequent applications as unfounded or manifestly unfounded;
- Some explicit withdrawal decisions (crime and public order considerations).

Requesting the right to remain

As per Article 68(5)(a) the person has 5 days to make the request to remain in order to suspend the effect of the return decision pending the outcome of the appeal. A set of procedural guarantees applies:

- The person has the right to interpretation, and to request and be provided with free legal assistance and representation.
- The person has the right to remain while the request to remain is heard, unless it is a subsequent application and the appeal has been made merely to delay or frustrate the return decision.

- Given the right to request to be allowed to remain, applicants or persons subject to withdrawal should not be removed before the 5-day deadline to request the right to remain.

As throughout the APR, there are stricter rules for subsequent applications. At Article 68(6), the Member State may deny them the right to remain during the process of requesting to be allowed to remain before a court or tribunal where the subsequent application has been lodged merely to frustrate or delay removal.

At Article 68(7), where a person subject to withdrawal appeals against a first or subsequent appeal decision there is no right to remain, although it may be “allowed” by a court or tribunal if the principle of non-refoulement is invoked.

Article 70: Duration of the first level of appeal

The Member States should lay down in national law “reasonable time limits” for the examination of the appeal. This maintains the provisions as per the APD because the time limits for first-level appeals that was part of the proposal were not accepted by the co-legislators. ECRE seriously questioned both the feasibility and added value of setting time limits and raised concerns about undermining access to an effective remedy. Nonetheless, it should be noted that for the border procedure the time limit is de facto short given that the full procedure including the appeal should take no longer than 12 weeks.

Implementation considerations

The applicant or person subject to withdrawal has to meet a number of tight deadlines in order to realise their right to an effective remedy. The obligations of the person including the deadlines they have to meet vary depending on the type of procedure they have undergone and on the decision they have received.

Lodging the appeal

First, applicants have 5 days to 1 month to lodge the appeal. In order to do so, they have the right to request and receive legal assistance and representation. For the categories of decisions where the very short deadlines apply, access to a lawyer will be essential.

Combined appeals

Where the rejection and the return decision have been issued together (“as part of” the same decision, as per Article 37) the person has to lodge two appeals at the same time. Applicants might have to simultaneously:

- Make a request to be allowed to remain
- Lodge an appeal against the rejection decision / withdrawal
- Lodge an appeal against the return decision

While they will have the right to legal assistance and representation, realising that right in practice may be a challenge, particularly for applicants in the border setting.

Removal of automatic suspensive effect

For a wide set of applicants, there is no right to remain. They will then have to make a request to be allowed to remain, and to do that within 5 days. ECRE considers that the right to remain pending the examination of the asylum application and until a final decision on such application is taken, is necessary for ensuring that the principle of *non-refoulement* is respected. The right to an effective

remedy under Article 13 ECHR and Article 47 of the Charter requires the right to remain extends to the appeals stage in the asylum procedure, as does the jurisprudence of the CJEU and ECtHR.¹⁶⁴

The Explanatory Memorandum to the proposal posited that the provision is in line with the judgment of the CJEU in case C-181/16, *Gnandi*, which clarified that the legal effects of a return decision must be suspended when an appeal against a rejection of an application for international protection is ongoing and if the third-country national enjoys a right to remain in accordance with the APD. Rather than directly removing the automatic suspensive effect, the APR operates indirectly by expanding at Article 68(3) the categories of people for which there will be no right to remain (and therefore no automatic suspensive effect). This could be understood as a questionable attempt to claim conformity with the jurisprudence of the Court.

ECRE maintains its position¹⁶⁵ that these provisions nonetheless undermine states' obligations to guarantee access to an effective remedy. The ECtHR in asylum cases requires a remedy to have automatic suspensive effect in order to be effective.¹⁶⁶ In principle, both a system in which the appeal itself or a system in which the request for interim protection pending the outcome of the remedy have automatic suspensive effect, can be compatible with Article 13 ECHR. However, the case law shows that the second option is increasingly questioned by the ECtHR as it may not provide sufficient guarantees to ensure compliance with the principle of *non-refoulement*. In the case of *Conka v. Belgium* the ECtHR held that the extremely urgent procedure before the Conseil d'Etat did not comply with Article 13 ECHR because it was not guaranteed in fact and in law that this application for interim protection, pending the final outcome of the appeal before the Council of State, would suspend the enforcement of the expulsion measure.¹⁶⁷ In *S.J. v Belgium*, the ECtHR concluded that Belgian law failed to enable the applicants to appeal their deportation with "automatic suspensive effect". It found that the Belgian appeal process against a deportation was too complex and difficult to understand, even with the benefit of specialist legal assistance. Given the complexity, coupled with the limited application of the "extreme urgency procedure", the Court concluded that Belgium failed to comply with Article 13 ECHR, which requires the right to an effective remedy to be available and accessible in practice.¹⁶⁸

Finally, both in the case of *Conka* and *M.A. v. Cyprus* the ECtHR stated that the requirements of Article 13 ECHR, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement and it has "pointed out the risks involved in

¹⁶⁴ CJEU, *X v Belastingdienst/Toeslagen*, Case C-175/17, Judgment of 26 September 2018, available at: <https://bit.ly/3XDp8RA>, ECLI:EU:C:2018:776, para. 33 ; CJEU, *Sadikou Gnandi v. Etat belge*, C-181/16, Judgment of 19 June 2018, available at: <https://bit.ly/3znjf0I>, ECLI:EU:C:2018:465; CJEU, *X,Y v Staatssecretaris van Veiligheid en Justitie*, Case C-180/17, Judgment of 26 September 2018, available at: <https://bit.ly/4cbdulz>, ECLI:EU:C:2018:775, para. 29-30. The requirement of automatic suspensive effect has also been confirmed in respect of complaints under Article 4 of Protocol No. 4: ECtHR, *M.K. and others v. Poland*, Application nos. 40503/17 42902/17 43643/17, 23 July 2020, available at: <https://bit.ly/4cpy01t>, para. 220; ECtHR, *Conka v. Belgium*, Application No. 51564/99, 5 February 2002, available at: <https://bit.ly/4cg4Q5k>, para. 81-83; ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No 27765/09, Judgment of 23 February 2012, available at: <https://bit.ly/3RzPMH4>, para. 206. An applicant's complaint alleging that removal to a third state would expose them to treatment prohibited under Article 3 of the Convention "must imperatively be subject to close scrutiny by a 'national authority'". That principle has led the ECtHR to rule that the notion of "effective remedy" within the meaning of Article 13 taken in conjunction with Article 3 requires, per Hirsi, first, "independent and rigorous scrutiny" of any complaint made by a person in such a situation, where "there exist substantial grounds for fearing a real risk of treatment contrary to Article 3" and, second, "the possibility of suspending the implementation of the measure impugned".

¹⁶⁵ ECRE, *Comments on the amended proposal for an Asylum Procedures Regulation COM(2020) 611*, December 2020, available at: <https://bit.ly/3XuaMmH>.

¹⁶⁶ ECtHR, *M.A. and others v. Lithuania*, Application No. 59793/17, Judgment of 11 December 2018, available at: <https://bit.ly/3KXhr10>, para. 83.

¹⁶⁷ ECtHR, *Conka v. Belgium*, Application No. 51564/99, 5 February 2002, available at: <https://bit.ly/4cg4Q5k>, para. 83.

¹⁶⁸ ECtHR, *S.J. v Belgium*, Application No 70055/10, Judgment of 19 March 2015, available at: <https://bit.ly/3XARD2I>.

a system where stays of execution must be applied for and are granted on a case- by-case basis.”¹⁶⁹ The Court held in particular that “it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13”.¹⁷⁰

The CJEU in *Abdoulaye Amadou Tall* found that a remedy under Article 39 (the right to an effective remedy) of the 2005 APD,¹⁷¹ must be determined in a manner consistent with Article 47 of the EU Charter of Fundamental Rights, which is derived from Article 13 of the ECHR.¹⁷² Moreover, in light of Article 19(2) of the Charter, which has its counterpart in Article 3 ECHR, an effective remedy requires that “a remedy enabling suspension of enforcement of the measure authorising removal should, ipso jure, be available to the applicant”.

The Court emphasised that a decision taken on a subsequent application and its enforcement does not lead to the applicant’s removal and so the lack of suspensive effect does not breach Article 19(2) and 47 of the Charter. In contrast, an appeal must have suspensive effect if brought against a return decision which, if enforced, could expose the person concerned to a serious risk of being subjected to inhuman or degrading treatment, in view of the requirements of Articles 19(2) and 47 of the Charter, Article 13 ECHR, and case law from the European courts.

Thus, providing an asylum applicant with an automatic right to remain on the territory pending the outcome of the remedy, constitutes the best guarantee that their right to an effective remedy and the principle of *non-refoulement* are respected in practice. Moreover, the suspensive effect of the appeal and therefore the effectiveness of the remedy in practice, would depend less on factors that may be beyond the asylum seeker’s control, such as access to and availability of adequate information and quality legal assistance. In addition, it would be far more efficient for states themselves to ensure access to an appeal with automatic suspensive effect because asylum applicants are not required to launch a separate request to remain on the territory and Courts are not required to address this issue separately.

ECRE considered that a remedy without automatic suspensive effect would only be acceptable in limited cases, including an appeal against a decision taken on a second or further identical subsequent application made in a Member State following a final decision rejecting a previous subsequent application as inadmissible or unfounded or an appeal against a decision which rejects an application as explicitly withdrawn. In both cases, this would be provided that a full examination of the merits of the first asylum application has taken place in accordance with the necessary procedural safeguards and no new elements have been submitted.

Allowing an applicant to remain?

The APR attempts to remove from Member States all discretion by stating that the categories of people covered “shall not have the right to remain”. Nonetheless, Member States have the possibility

¹⁶⁹ ECtHR, *M.A. v. Cyprus*, Application No 41872/10, Judgment of 23 July 2013, available at: <https://bit.ly/45Bnwda>, para. 137.

¹⁷⁰ ECtHR, *Čonka v. Belgium*, Application No. 51564/99, 5 February 2002, available at: <https://bit.ly/4cg4Q5k>, para. 82.

¹⁷¹ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

¹⁷² CJEU, *Abdoulaye Amadou Tall v CPAS de Huy*, Case C-239/14, Judgment of 17 December 2015, available at: <https://bit.ly/3VXbAy7>, ECLI:EU:C:2015:824.

to offer higher standards as a general principle of EU law. Given both the practical difficulties of deporting applicants and the administrative burden generated by litigation, Member States could consider allowing applicants to remain while the appeal is heard even though this is not a right.

Legal assistance and representation

The applicants again have the right to legal assistance and representation as per the APD. The appointment of legal advisors is crucial. Member States will need to have a pool of qualified, independent and available legal advisors.

The safeguard proposed by the Parliament that, when the applicant has requested legal advice, the time limit will not start running until a legal advisor is appointed was not accepted. This means that the legal advisors need to be on hand at all times.

Recommendations

- EUMS should decide on deadlines for appeal at the maximum allowed by the APR, in order that the remedy is effective, given the overall shortness of the deadlines.
- EUMS should consider the realistic time needed to fairly examine an appeal when laying down “reasonable” time limits for appeal decisions.
- The Commission and the EUAA should provide guidance on the management of the appeal procedure to ensure that the remedy is effective and to thus avoid the risk of litigation.
- EUMS should consider allowing applicants and people subject to a withdrawal decision to remain even though there is no right for them to do so.
- The EUAA, UNHCR or other relevant bodies should monitor the quality of appeal procedures.
- International human rights bodies and legal analysts should assess the impact on other areas of EU law and on national legal systems of the significant erosion of the right to a remedy constituted by the APR.