



## Judicial analysis

# Asylum procedures and the principle of *non-refoulement*



*EASO Professional Development Series  
for members of courts and tribunals*

Produced by IARLJ-Europe under contract to EASO

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**EASO professional development materials have been created in cooperation with members of courts and tribunals on the following topics:**

- introduction to the Common European Asylum System for courts and tribunals;
- qualification for international protection (Directive 2011/95/EU);
- asylum procedures and the principle of non-refoulement;
- evidence and credibility assessment in the context of the Common European Asylum System;
- Article 15(c) qualification directive (2011/95/EU);
- exclusion: Articles 12 and 17 qualification directive (2011/95/EU);
- ending international protection: Articles 11, 14, 16 and 19 qualification directive (2011/95/EU);
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# European Asylum Support Office

The European Asylum Support Office (EASO) is an agency of the European Union that plays a key role in the implementation of the Common European Asylum System (CEAS). It was established with the aim of enhancing practical cooperation on asylum matters and helping Member States fulfil their European and international obligations to give protection to people in need.

Article 6 of the EASO founding regulation <sup>(1)</sup> specifies that the agency shall establish and develop training available to members of courts and tribunals in the Member States. For this purpose, EASO shall take advantage of the expertise of academic institutions and other relevant organisations, and take into account the Union's existing cooperation in the field with full compliance with the independence of national courts and tribunals.

## The International Association of Refugee Law Judges

The International Association of Refugee Law Judges (IARLJ) is a transnational, non-profit association that seeks to foster recognition that protection from persecution on account of race, religion, nationality, political opinion, or membership of a particular social group is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law. From its foundation in 1997, the association has been heavily involved in the training of judges around the world dealing with asylum cases. The European chapter of the IARLJ (IARLJ-Europe) is the regional representative body for judges within Europe. One of IARLJ-Europe's specific objectives under its constitution is 'to enhance knowledge and skills and to exchange views and experiences of judges on all matters concerning the application and functioning of the Common European Asylum System (CEAS)'.

## Contributors

This analysis has been developed by a process having two components: an editorial team (ET) of judges and tribunal members with overall responsibility for the final product and a drafting team of experts.

In order to ensure the integrity of the principle of judicial independence and that the EASO professional development series for members of courts and tribunals is developed and delivered under judicial guidance, an ET composed of serving judges and tribunal members, with

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<sup>(1)</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office OJ L 132, 29.5.2010, pp. 11-28.

extensive experience and expertise in the field of asylum law was selected under the auspices of a joint monitoring group. The group is composed of representatives of the contracting parties, EASO and IARLJ-Europe. The ET reviewed drafts, gave detailed guidance to the drafting team, drafted amendments, and was the final decision-making body as to the scope, structure, content and design of the work. The work of the ET was undertaken through a combination of face-to-face meetings in London in May 2017 and Brussels in October 2017 as well as regular electronic/telephonic communication.

### Editorial team of judges

The members of the ET were judges/tribunal members **Hugo Storey** (United Kingdom, chair), **Hilkka Becker** (Ireland), **Jakub Camrda** (Czech Republic), **Katelijne Declerck** (Belgium), **Michael Hoppe** (Germany), **Florence Malvasio** (France), **Liesbeth Steendijk** (Netherlands) and **Boštjan Zalar** (Slovenia). The ET was supported and assisted in its task by project coordination manager **Clara Odofin**.

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Comments on the draft were received from Judges **Lars Bay Larsen** and **Yann Laurans** of the Court of Justice of the European Union (CJEU) and Judge **Ledi Bianku** of the European Court of Human Rights (ECtHR) in their personal capacities.

Comments were also received from the following participants in the EASO network of court and tribunal members and in the EASO consultative forum: Ana Celeste Carvalho, appellate judge at the Central South Administrative Court and judicial trainer at the Centre for Judicial Studies, Lisbon, Portugal; Lars I. Magnusson, judge at the Administrative Court of Gothenburg, Sweden, and migration law representative at the Judicial Training Academy, Jönköping, Sweden; Catherine Koutsopoulou, judge at the Court of First Instance of Athens and member of the third Independent Appeal Committee, Athens, Greece; European Council on Refugees and Exiles, Brussels, Belgium; Koulocheris Spyros, head of legal research, Greek Council for Refugees, Athens, Greece; and Oikonomou Sypros-Vlad, legal and programmes intern, Greek Council for Refugees, Athens, Greece.

All these comments were taken into consideration by the ET in finalising the text for publication. The members of the ET and EASO are grateful to all those who have made comments, which have been very helpful in finalising this judicial analysis.

The methodology adopted for the production of this analysis is set out in Appendix B, p. 242.

This judicial analysis will be updated as necessary by EASO, in accordance with the methodology for the EASO professional development series for members of courts and tribunals.

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# List of abbreviations

APD	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
APD (recast)	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)
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
Dublin Convention	Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (1990)
Dublin II regulation	Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national
Dublin III regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
Dublin implementing regulation	Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, as amended by the Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 [...]
EASO	European Asylum Support Office
EASO regulation	Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing the European Asylum Support Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR	European Court of Human Rights
EDAL	European database of asylum law
EU charter	Charter of Fundamental Rights of the European Union of 18 December 2000
Eurodac regulation	Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention
Eurodac regulation (recast)	Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints [...]
Geneva Convention	See Refugee Convention
IARLJ	International Association of Refugee Law Judges
PDS	EASO Professional Development Series for members of courts and tribunals
QD	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
QD (recast)	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)
RCD	Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers
RCD (recast)	Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)
Refugee Convention	Convention relating to the status of refugees (1951), as amended by its Protocol (1967) [referred to in EU asylum legislation as 'the Geneva Convention']
returns directive	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
TFEU	Treaty on the Functioning of the European Union
UNHCR	Office of the United Nations High Commissioner for Refugees

# Preface

In close cooperation with courts and tribunals of the Member States as well as other key actors, the European Asylum Support Office (EASO) is creating a professional development series aimed at providing courts and tribunals with a full overview of the Common European Asylum System (CEAS) on a step-by-step basis. Following consultations with the EASO network of court and tribunal members, including IARLJ-Europe, it became apparent that there was a pressing need to make available to courts and tribunals judicial training materials on certain core subjects dealt with in their day-to-day decision-making. It was recognised that the process for developing such core materials was one that had to facilitate the involvement of judicial and other experts in a manner fully respecting the principle of independence of the judiciary as well as accelerating the development of the overall professional development series.

This judicial analysis is the product of a project between IARLJ-Europe and EASO and it forms part of the EASO professional development series for members of courts and tribunals.

The analysis is primarily intended for use by members of courts and tribunals of EU Member States concerned with hearing appeals or conducting reviews of decisions on applications for international protection. It aims to provide a judicial analysis on asylum procedures and *non-refoulement* as primarily dealt with under the Asylum Procedures Directive 2013/32/EU (APD (recast)). It is intended to be of use both to those with little or no prior experience of adjudication in the field of international protection within the framework of the CEAS as well as to those who are experienced or specialist judges in the field. As such, it aims to be a useful point of reference for all members of courts and tribunals concerned with issues related to asylum procedures and *non-refoulement*. The structure, format and content have, therefore, been developed with this broad audience in mind. Moreover, it is hoped that it will contribute to 'horizontal judicial dialogue'. This judicial analysis provides the following.

- A general introduction setting out the legal framework of this judicial analysis (the APD (recast), an overview of the rules of interpretation of the APD (recast), the objective and structure of the analysis and a presentation of the concepts of procedures and *non-refoulement*).
- An examination of the general provisions relating to definitions within the APD (recast), its scope and the rules governing how the asylum procedure is initiated.
- A detailed analysis of the rules governing asylum procedures and appeal against transfer decisions in the framework of the determination of the Member State responsible for examining an application for international protection under the Dublin III regulation No 604/2013.
- A detailed analysis of the basic principles, safeguards and procedural guarantees for applicants for international protection laid down in the APD (recast), including the right to remain (*non-refoulement*).
- A detailed analysis of the rules of the APD (recast) governing the examination of applications for international protection at first instance and the right to an effective remedy.
- An examination of the scope of the returns directive 2008/115/EC of relevance to asylum procedures.

The analysis is supported by a compilation of jurisprudence and appendices listing not only relevant EU primary and secondary legislation and relevant international treaties of universal and regional scope, but also essential case-law of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and the courts and tribunals of EU Member States. To ensure that the relevant legislation and case-law is easily and quickly accessible to readers, hyperlinks have been utilised. Other judicial analyses, which have been or are being developed as part of the professional development series, explore other specific areas of the CEAS, in addition to one general introduction to the CEAS <sup>(2)</sup>.

The aim is to set out clearly and in a user-friendly format the current state of the law. This publication analyses the law as it stood at 20 October 2017. However, the reader will be aware that, at the time of writing, the asylum systems of a number of EU Member States came under exceptional pressure due to the arrivals of unprecedented numbers of persons seeking international protection. It is worth emphasising in this context that, together with other judicial analyses in the professional development series, this judicial analysis will be updated periodically as necessary. However, it will be for readers to check whether there have been any changes in the law. The analysis contains a number of references to sources that will help the reader to do that.

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<sup>(2)</sup> See: EASO, *Article 15(c) qualification directive (2011/95/EU) — A judicial analysis*, December 2014; EASO, *Exclusion: Articles 12 and 17 qualification directive (2011/95/EU) — A judicial analysis*, January 2016; EASO, *End of protection — A judicial analysis*, forthcoming; EASO, *An Introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, August 2016, produced by the IARLJ-Europe under contract to EASO; EASO, *Qualification for international protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, produced by the IARLJ-Europe under contract to EASO; EASO, *Ending international protection: Articles 11, 14, 16 and 19 qualification directive (2011/95/EU) — A judicial analysis*, December 2016, and EASO, *Evidence and credibility assessment in the context of the Common European Asylum System (CEAS) — A judicial analysis*, forthcoming, produced by the IARLJ-Europe under contract to EASO.

# Key questions

The present judicial analysis aims to provide an analysis to courts and tribunals of the EU Member States of the standards on asylum procedures under the APD (recast) and Dublin III regulation, and of the principle of *non-refoulement*. It strives to answer the following main questions.

1. **What are asylum procedures and what are the main procedural stages?** (Section 1.4)
2. **What is the principle of *non-refoulement* and how does it apply** in the context of asylum procedures? (Section 1.5)
3. How can a person apply for international protection? This includes the **territorial and substantive scope** of the APD (recast); Member States' responsibility to establish **competent national authorities** to register and process the lodging of applications for international protection; the difference between '**making**', '**registering**' and '**lodging**' an application; the circumstances under which an applicant may make an application on behalf of his or her dependants; the means by which a minor can apply for international protection; and information and counselling in detention facilities and at border-crossing points. (Sections 2.2 and 2.3)
4. **What is the purpose and scope of the Dublin system** for determining the Member State responsible for examining an asylum application made in one of the Member States and what other EU standards and wider legal obligations apply? (Sections 3.1 and 3.2)
5. What are the **rights and obligations of applicants for international protection** under the Dublin III regulation, including the procedural guarantees applying to minors? (Sections 3.3-3.5)
6. What **hierarchy of criteria** applies for determining the Member State responsible for examining an application for international protection under the Dublin III regulation, and how do the **discretionary clauses** apply? (Subsections 3.6.2 and 3.6.3)
7. What safeguards need to be in place to ensure the **legality of transfer decisions** and **effective legal remedies** under the Dublin III regulation? (Sections 3.6 and 3.8)
8. What **basic principles, safeguards and procedural guarantees** apply under the APD (recast), including as regards the scope of applicants' right to remain in the territory of the Member State during the examination procedure and other basic principles and procedural guarantees applying to the procedure at administrative level, such as applicants' rights to information, interpretation, access to legal information, assistance and representation, and the conduct and report of the interview, as well as the obligations of applicants? (Sections 4.1 and 4.2)
9. What are the (regular, accelerated and border) examination **procedures at administrative level for the processing of applications for international protection** and what standards apply? (Section 5.1)
10. On what grounds may Member States consider an application **inadmissible, unfounded or manifestly unfounded** and what are the concepts, for example, of first country of asylum, safe third country and safe country of origin? (Sections 5.2-5.4)
11. What elements need to be in place to ensure Member States provide an **effective remedy** at appeal, including as regards access to appeals, the right to remain during appeals procedures and the requirement to ensure a full and *ex nunc* examination of the appeal? (Sections 6.1-6.4)
12. What is the **scope of the returns directive**, what principles apply in its implementation and in what situations may it apply to persons seeking international protection? (Sections 7.1-7.3)



# Part 1: Introduction

This judicial analysis concerns asylum procedures and the principle of *non-refoulement* in the CEAS as primarily regulated under the [Asylum Procedures Directive 2013/32/EU](#) (APD (recast)) <sup>(3)</sup>. It also provides in Part 3 an overview of procedures for determining the Member State responsible for examining an application for international protection as primarily regulated under the [Dublin III regulation 604/2013](#) <sup>(4)</sup>. However, the focus of this introduction in Part 1 is on the APD (recast).

This introduction is structured as set out in Table 1.

**Table 1: Structure of Part 1**

<b>Section 1.1.</b>	Legal framework: the APD (recast)	pp. 15-17
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<b>Section 1.3.</b>	Scope and structure of the judicial analysis	pp. 19-22
<b>Section 1.4.</b>	What are ‘procedures’?	pp. 22-25
<b>Section 1.5.</b>	The principle of <i>non-refoulement</i>	pp. 26-31

## 1.1. Legal framework: the APD (recast)

The APD (recast) is an essential part of the European Union (EU) asylum *acquis* and derives its legal basis from EU primary law in Article 78(2)(d), in particular, the [Treaty on the Functioning of the European Union](#) (TFEU) <sup>(5)</sup>, which provides for the adoption of measures for a CEAS including common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status. The significance of the fact that the APD (recast) is in the form of a directive is analysed further in [An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis](#) <sup>(6)</sup>, but in view of the fact that interpretation of each directive requires regard to its specific objects and purposes, certain preliminary observations about it are necessary.

Since 1999, the EU has been working towards the creation of a CEAS <sup>(7)</sup>, which must be in accordance with the [Convention relating to the status of refugees \(1951\)](#), as amended by its [Protocol \(1967\)](#) (Refugee Convention) <sup>(8)</sup> and other relevant treaties (Article 78(1) TFEU). As a first-phase legal instrument of the CEAS, the [Asylum Procedures Directive 2005/85/EC](#) (APD),

<sup>(3)</sup> 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 OJ L 180, 29.6.2013, pp. 60-95 (APD (recast)).

<sup>(4)</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) OJ L 180, 29.6.2013, pp. 31-59 (Dublin III regulation).

<sup>(5)</sup> Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2010, pp. 47-390.

<sup>(6)</sup> [An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis](#), see fn 2, pp. 66 and 67.

<sup>(7)</sup> European Council, [Presidency Conclusions](#), Tampere European Council, 15 and 16 October 1999, SN 200/99, Brussels, para. 13 (Tampere Conclusions). The legal basis of the CEAS is discussed more extensively in [An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis](#), see fn 2, Part 1, pp. 13-23. The principles of interpretation of the legislative provisions of the CEAS are also dealt with in Section 1.2 of this judicial analysis.

<sup>(8)</sup> [Convention Relating to the Status of Refugees](#), 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954); and [Protocol Relating to the Status of Refugees](#), 606 UNTS 267 (entry into force: 4 October 1967).

which entered into force on 2 January 2006, established minimum standards on procedures for granting and withdrawing refugee status <sup>(9)</sup>. However, such minimum standards afforded Member States a degree of flexibility for the implementation of additional measures <sup>(10)</sup>.

It was therefore agreed in 1999 that, in the second phase of the creation of the CEAS <sup>(11)</sup>, EU legislation should lead to a ‘common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union’ <sup>(12)</sup>.

As a result, the APD (recast), as a second-phase legal instrument of the CEAS, which entered into force on 19 July 2013 <sup>(13)</sup>, provides that the European Union framework on procedures for granting and withdrawing international protection should be based on the concept of a single procedure ‘[i]n order to ensure a comprehensive and efficient assessment of the international protection needs of applicants within the meaning of [the Qualification] Directive 2011/95/EU [QD (recast)]’ <sup>(14)</sup> (recital (11) APD (recast)). This aim is manifested by the legislator’s choice to avoid the expression ‘minimum standards’, as is apparent from the wording of Article 1 APD (recast), which affirms: ‘The purpose of this directive is to establish **common procedures** for granting and withdrawing international protection pursuant to Directive 2011/95/EU’ <sup>(15)</sup>.

Recital (7) APD (recast) explains that ‘considerable disparities remained between one Member State and another concerning the grant of protection’, which called for ‘a single asylum procedure comprising common guarantees’. Therefore, the objective of the APD (recast) is ‘to further develop the standards for procedures in Member States for granting and withdrawing international protection with a view to establishing a common asylum procedure in the Union’ (recital (12) APD (recast)). According to recital (13), ‘[t]he approximation of rules on the procedures [...] should help to limit the secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks, and to create equivalent conditions for the application of [the QD (recast)] in Member States’.

Whilst the APD (recast) has the purpose of establishing common procedures for granting and withdrawing international protection, under Article 5 Member States are still permitted to ‘introduce or retain more favourable standards’. However, this is subject to the reservation that those standards are compatible with the APD (recast).

All EU Member States are bound by the APD (recast), except for Denmark, Ireland and the United Kingdom (UK) as illustrated in Table 2 below. Denmark does not take part in the adoption of measures based on Article 78 TFEU and is therefore not bound by the APD or the

<sup>(9)</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326, 13.12.2005, pp. 13-34.

<sup>(10)</sup> United Nations High Commissioner for Refugees (UNHCR), *Comments on the European Commission’s Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)*, COM(2011) 319 final, January 2012.

<sup>(11)</sup> See *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, Section 1.4, pp. 15 and 16.

<sup>(12)</sup> European Council, *Tampere Conclusions*, see fn 6, para. 15.

<sup>(13)</sup> The APD (recast) provides two different deadlines for the transposition of its provisions into domestic law of Member States. First, according to Art. 51(1), Member States were to transpose ‘Articles 1 to 30, Article 31(1), (2) and (6)-(9), Articles 32 to 46, Articles 49 and 50 and Annex I by 20 July 2015 at the latest’. As laid down in Art. 52, these provisions are to be applied to ‘applications for international protection lodged and to procedures for the withdrawal of international protection started after 20 July 2015 or an earlier date’; those lodged or started previously being still governed by the APD. Second, by virtue of Art. 51(2), Member States are to transpose ‘Article 31(3), (4) and (5) by 20 July 2018’. As provided by Art. 52, these provisions are then applicable to ‘applications for international protection lodged after 20 July 2018 or an earlier date’, as those lodged beforehand remain governed by the APD.

<sup>(14)</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L 337, 20.12.2011, pp. 9-26.

<sup>(15)</sup> Emphasis added.

APD (recast) <sup>(16)</sup>. Ireland and the UK did not take part in the adoption of the APD (recast) <sup>(17)</sup>, but since they opted into the APD, these Member States remain bound by the APD (recitals (32) and (33) APD) <sup>(18)</sup>.

**Table 2: Adoption of the APD and its recast by Denmark, Ireland and the UK**

	APD	APD (recast)
Denmark	✘	✘
Ireland	✔	✘
UK	✔	✘

It must be remembered that the CEAS is an evolving system. With regard to possible future developments, it should be noted that, on 13 July 2016, the Commission published a proposal to replace the APD (recast) with a regulation <sup>(19)</sup>. As noted by the Commission in its proposal:

‘The degree of harmonisation of national procedures for granting and withdrawing international protection that was achieved through [the APD (recast)] has not proven to be sufficient to address the differences in the types of procedure used, the time limits for the procedures, the rights and procedural guarantees for the applicant, the recognition rates and the type of protection granted. It is only a regulation establishing a common asylum procedure in the Union, and whose provisions shall be directly applicable, that can provide the necessary degree of uniformity and effectiveness needed in the application of procedural rules in Union law on asylum.’ <sup>(20)</sup>

The proposal to replace the APD (recast) with a regulation and the proposed amendments contained therein will now be the subject of scrutiny and negotiation within the Council and European Parliament. The participation of Ireland in the arrangements set out in the Commission’s proposal repealing the APD (recast) will be determined in the course of negotiations in accordance with the protocols mentioned above <sup>(21)</sup>.

At the time of writing, it cannot be known whether the Commission’s proposal will result in a new regulation or what its precise terms will be. The reader should, therefore, simply be aware that, at some point in the future, there is the possibility that the APD (recast), which is the subject of this judicial analysis, may be repealed and replaced by a regulation with some amended provisions.

<sup>(16)</sup> Protocol No 22 on the position of Denmark, annexed to the TFEU in OJ C 326, 26.10.2012, p. 299.

<sup>(17)</sup> Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TFEU in OJ C 326, 26.10.2012, p. 295.

<sup>(18)</sup> It should be noted that, on 29 March 2017, the United Kingdom notified the European Council in accordance with Art. 50(2) of the Treaty on European Union of its intention to withdraw from the European Union.

<sup>(19)</sup> European Commission, 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, 13 July 2016, COM(2016) 467 final.

<sup>(20)</sup> *Ibid.*, p. 7.

<sup>(21)</sup> See Protocol No 21 on the position of the United Kingdom and Ireland, see fn 16 and 17.

## 1.2. Interpretation of the APD (recast) in relation to the EU charter and other relevant treaties

Being an instrument established under EU primary law (Article 78(2)(d) TFEU), the matter of the correct interpretation of the APD (recast) is, as the last resort, for the CJEU to determine and the judgments of the CJEU have a binding effect on all Member States. That said, when interpreting the APD (recast), a member of a national court or tribunal <sup>(22)</sup> at any level must have regard to EU primary law, including the [Charter of Fundamental Rights of the European Union](#) (EU charter) <sup>(23)</sup>, as well as to the Refugee Convention and ‘other relevant treaties’ referred to in Article 78(1) TFEU. This matter is dealt with in more detail in *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis* <sup>(24)</sup>. According to the CJEU, the interpretation of the APD must be consistent with the rights recognised by the EU charter <sup>(25)</sup>. Recital (60) APD (recast) emphasises that the ‘directive respects the fundamental rights and observes the principles recognised by the [EU] charter. In particular, this directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 18, 19, 21, 23, 24, and 47 of the charter and has to be implemented accordingly’.

The right to good administration, enshrined in Article 41 of the EU charter, is not addressed to Member States but solely to the institutions, bodies, offices and agencies of the European Union. However, the CJEU has held that the right to good administration reflects a general principle of EU law and as such is also relevant to asylum procedures insofar as Member States are implementing EU law when they examine applications for international protection <sup>(26)</sup>. According to its preamble, the EU charter ‘reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the [ECHR], the social charters adopted by the Union and by the Council of Europe and the case-law of the [CJEU] and of the European Court of Human Rights [ECtHR]’.

Although not addressing asylum procedures, the Refugee Convention remains relevant in the context of the APD (recast). On the one hand, recital (25) APD (recast) underlines that effective access to procedures is central to ensure ‘a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the [Refugee] Convention’. On the other hand, the directive refers explicitly to the Refugee Convention for applying the concepts of safe third country (Article 38(1)(c) and (e)) European safe third country (Article 39(2)(a)) and safe countries of origin (Annex I).

Besides the Refugee Convention, Article 78(1) TFEU does not define ‘other relevant treaties’ and the CJEU has yet to clarify its components. The APD (recast) nevertheless explicitly refers to the 1989 United Nations (UN) [Convention on the Rights of the Child](#) <sup>(27)</sup>, noting that its principle of ‘[t]he best interests of the child should be a primary consideration of Member States when applying this directive’ (recital (33)). The 1950 [European Convention for the Protection](#)

<sup>(22)</sup> When national courts or tribunals are required to apply and interpret the provisions of EU law, the national judge is required to act as an ‘EU judge’, as explained in *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, p. 61.

<sup>(23)</sup> Charter of Fundamental Rights of the European Union of 18 December 2000, as adopted in 2007, OJ C 326, 26.10.2012, pp. 391-407 (entry into force: 1 December 2009).

<sup>(24)</sup> See *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, Subsection 2.1.3, pp. 28-32.

<sup>(25)</sup> See most notably CJEU, judgment of 17 December 2015, Case C-239/14, *Abdoulaye Amadou Tall v Centre public d'action sociale de Huy*, EU:C:2015:824, para. 50. See also, CJEU, judgment of 2 December 2014, Grand Chamber, Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, EU:C:2014:2406, para. 53; CJEU, judgment of 31 January 2013, Case C-175/11, *HID and BA v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2013:45, para. 58; and CJEU, judgment of 28 July 2011, Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, EU:C:2011:524, para. 34.

<sup>(26)</sup> See CJEU, judgment of 8 May 2014, Case C-604/12, *HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2014:302, paras 49-50; CJEU, judgment of 17 July 2014, Joined Cases C-141/12 and C-372/12, *YS v Minister voor Immigratie, Integratie en Asie and Minister voor Immigratie, Integratie en Asie v M, S*, EU:C:2014:2081, paras 67-68.

<sup>(27)</sup> 1557 UNTS 3, 20 November 1989 (entry into force: 2 September 1990).

of Human Rights and Fundamental Freedoms (ECHR) <sup>(28)</sup> is also referred to in Article 39(2)(c) with respect to the concept of European safe third country and in Annex I concerning the designation of safe countries of origin, together with the 1966 International Covenant on Civil and Political Rights <sup>(29)</sup> and the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment <sup>(30)</sup>.

The interrelationship between EU and ECHR law and the methods of interpretation are dealt with in more detail in *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis* <sup>(31)</sup>, but two particular points require emphasis here. First, Article 52(3) of the EU charter provides that charter rights corresponding to rights guaranteed by the ECHR shall have the same meaning and scope as those laid down by the ECHR. At the same time, it is specified that this provision ‘shall not prevent Union law providing more extensive protection’. Second, according to Article 53, nothing in the charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised by EU law, Member States’ constitutions and international law, including the ECHR.

The ECHR can be said to have a certain interpretive relevance in the context of asylum procedures in light of the guarantees developed by the ECtHR on the basis, most notably, of Article 3 ECHR on the prohibition of torture and inhuman or degrading treatment and Article 13 ECHR on the right to an effective remedy <sup>(32)</sup>. From that perspective, the significance of ECHR standards is likely to derive from their relevance to the interpretation of the fundamental rights set out in the EU charter, as well as to certain provisions of the APD (recast) itself <sup>(33)</sup>.

### 1.3. Scope and structure of the judicial analysis

The APD (recast) establishes common procedures both for granting and withdrawing international protection pursuant to the QD (recast) (Article 1). This judicial analysis exclusively considers the procedures for granting international protection and the importance thereto of the principle of *non-refoulement* (see Sections 1.4 and 1.5 below) <sup>(34)</sup>. From that perspective, Table 3 below summarises the structure of the APD (recast) and highlights in bold the elements that will be addressed in this judicial analysis.

<sup>(28)</sup> 213 UNTS 222, ETS No 005, 4 November 1950 (entry into force: 3 September 1953).

<sup>(29)</sup> 999 UNTS 171, 16 December 1966 (entry into force: 23 March 1976).

<sup>(30)</sup> 1465 UNTS 85, 10 December 1984 (entry into force: 26 June 1987).

<sup>(31)</sup> *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, Subsection 3.4.1., pp. 71-75.

<sup>(32)</sup> See also Appendix A 3.2 case-law of the European Court of Human Rights.

<sup>(33)</sup> See CJEU, Grand Chamber, judgment of 21 December 2011, Joined Cases C-411/10 and 493/10, *NS v Secretary of State for the Home Department and ME and others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865, paras 87-91 (*NS and others*); CJEU, judgment of 16 February 2017, Case C-578/16 PPU, *CK and others v Republika Slovenija*, EU:C:2017:127 (*CK and others*), paras 67-68.

<sup>(34)</sup> It does not therefore cover the ending of international protection, which is addressed in EASO, *Ending international protection — A judicial analysis*, see fn 2. It also does not cover withdrawal of protection. However, withdrawal of protection and the assessment of evidence is addressed in *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Section 5.6.

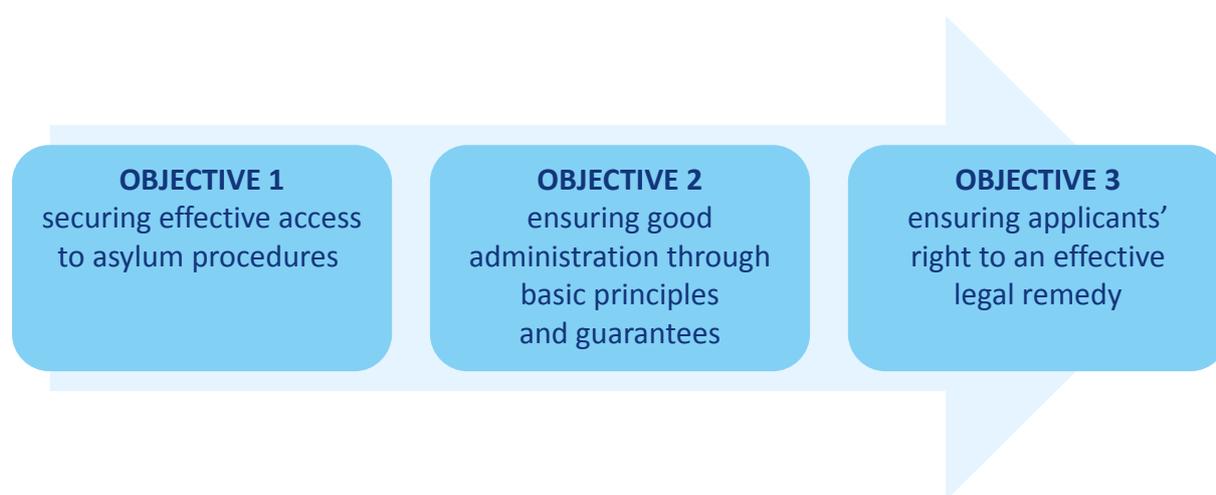
**Table 3: Structure of the APD (recast) and scope of this judicial analysis**

Chapter I: General provisions	<b>Article 1: Purpose</b> <b>Article 2: Definitions</b> <b>Article 3: Scope</b> <b>Article 4: Responsible authorities</b> Article 5: More favourable provisions
Chapter II: Basic principles and guarantees	<b>Article 6: Access to the procedure</b> <b>Article 7: Applications made on behalf of dependants or minors</b> <b>Article 8: Information and counselling in detention facilities and at border-crossing points</b> <b>Article 9: Right to remain in the Member State pending the examination of the application</b> <b>Article 10: Requirements for the examination of applications</b> <b>Article 11: Requirements for a decision by the determining authority</b> <b>Article 12: Guarantees for applicants</b> <b>Article 13: Obligations of the applicants</b> <b>Article 14: Personal interview</b> <b>Article 15: Requirements for a personal interview</b> <b>Article 16: Content of a personal interview</b> <b>Article 17: Report and recording of personal interviews</b> <b>Article 18: Medical examination</b> <b>Article 19: Provision of legal and procedural information free of charge in procedures at first instance</b> <b>Article 20: Free legal assistance and representation in appeals procedures</b> <b>Article 21: Conditions for the provision of legal and procedural information free of charge and free legal assistance and representation</b> <b>Article 22: Right to legal assistance and representation at all stages of the procedure</b> <b>Article 23: Scope of legal assistance and representation</b> <b>Article 24: Applicants in need of special procedural guarantees</b> <b>Article 25: Guarantees for unaccompanied minors</b> Article 26: Detention <b>Article 27: Procedure in the event of withdrawal of the application</b> <b>Article 28: Procedure in the event of implicit withdrawal or abandonment of the application</b> Article 29: The role of the UNHCR Article 30: Collection of information on individual cases
Chapter III: Procedures at first instance	<b>Article 31: Examination procedure</b> <b>Article 32: Unfounded applications</b> <b>Article 33: Inadmissible applications</b> <b>Article 34: Special rules on an admissibility interview</b> <b>Article 35: The concept of first country of asylum</b> <b>Article 36: The concept of safe country of origin</b> <b>Article 37: National designation of third countries as safe countries of origin</b> <b>Article 38: The concept of safe third country</b> <b>Article 39: The concept of European safe third country</b> <b>Article 40: Subsequent application</b> <b>Article 41: Exceptions from the right to remain in case of subsequent applications</b> <b>Article 42: Procedural rules</b> <b>Article 43: Border procedures</b>
Chapter IV: Procedures for the withdrawal of international protection	Article 44: Withdrawal of international protection Article 45: Procedural rules
Chapter V: Appeals procedures	<b>Article 46: The right to an effective remedy</b>

<b>Chapter VI: General and final provisions</b>	Article 47: Challenge by public authorities Article 48: Confidentiality Article 49: Cooperation Article 50: Report Article 51: Transposition Article 52: Transitional provisions Article 53: Repeal Article 54: Entry into force and application Article 55: Addressees
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As transpires from the APD (recast), procedures for granting international protection seek to ensure three main objectives which are illustrated in Figure 1.

**Figure 1: The three main objectives of asylum procedures**



Firstly, securing applicants' effective access to asylum procedures is vital to ensure that individuals seeking international protection have the possibility to apply for international protection and have their application effectively examined in order to determine whether they qualify for international protection in accordance with the QD (recast). From that perspective, access to procedures involves both rights and obligations for applicants (see Section 2.2 on territorial scope and Subsection 2.3.2 on access to the procedure), including those relating to fingerprinting as laid down in Regulation 603/2013 (Eurodac regulation (recast))<sup>(35)</sup>. It may also entail the determination of the Member State responsible for examining an application for international protection under the Dublin III regulation<sup>(36)</sup>.

Secondly, once an application has been lodged and is being processed, good administration requires that basic principles and guarantees be in place to ensure an individual and thorough examination of the application. These principles and guarantees are to be followed by Member States so as to safeguard applicants' rights throughout the process, as well as to ensure the correct identification of those applicants who qualify for international protection in accordance with the QD (recast).

<sup>(35)</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180, 29.6.2013, pp. 1-30 (Eurodac regulation (recast)).

<sup>(36)</sup> Dublin III regulation, see fn 4.

Thirdly and finally, Member States have the obligation to ensure applicants' right to an effective remedy before a court or tribunal against decisions taken on their application (Article 46 APD (recast)). It is thus important for members of courts and tribunals of Member States to be fully apprised of the APD (recast) provisions as they may be required to review the procedural lawfulness of the decision taken. A right to an effective legal remedy is also to be provided with respect to transfer decisions in application of the Dublin III regulation.

Building on these three objectives, the judicial analysis has seven parts as presented in Table 4 below. Part 7 also takes into account access to asylum procedures and protection against *refoulement* in the context of the [returns directive](#) <sup>(37)</sup> which, albeit not part of the CEAS, lays down relevant conditions and safeguards for the return of illegally staying third-country nationals.

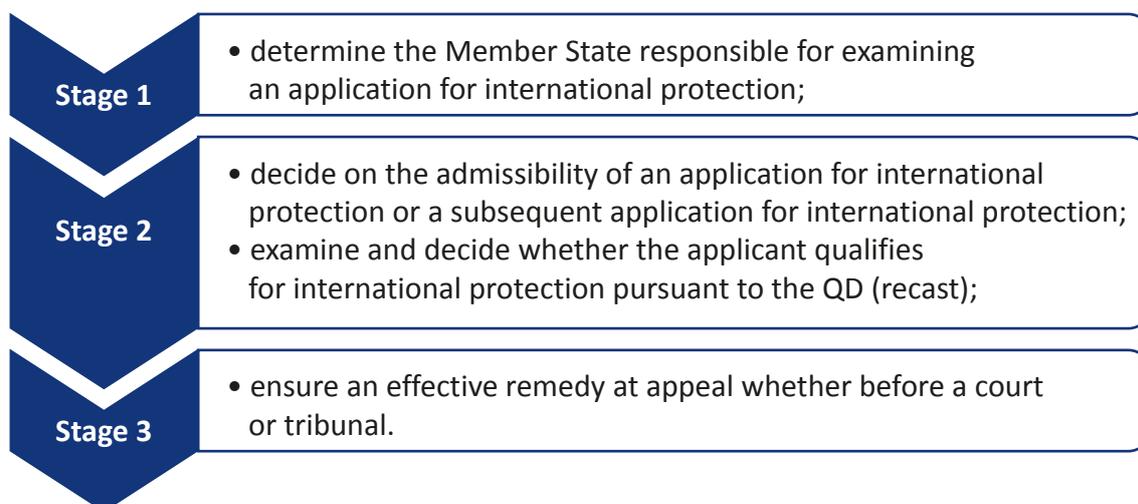
**Table 4: Structure of this judicial analysis**

<b>Part 1</b>	Introduction	pp. 15-31
<b>Part 2</b>	Applying for international protection	pp. 32-42
<b>Part 3</b>	Member State responsible for examining the application according to the Dublin III regulation	pp. 43-79
<b>Part 4</b>	APD (recast): basic principles, safeguards and procedural guarantees	pp. 80-107
<b>Part 5</b>	Procedures at the administrative level	pp. 108-129
<b>Part 6</b>	Right to an effective remedy	pp. 130-163
<b>Part 7</b>	Relevance of procedures under the returns directive	pp. 164-170

## 1.4. What are 'procedures'?

Procedures refer to the processes whereby Member States:

**Figure 2: What do 'procedures' do?**



<sup>(37)</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, pp. 98-107.

In the main, the procedures can be divided into three different stages.

The **first stage** relates to the Dublin procedure for determining the Member State responsible for examining an application which may, if applicable, be a precondition for access to asylum procedures at the administrative level (see Part 3 below).

The **second stage** refers to the actual examination procedure, which can be preceded by an initial admissibility procedure, at the administrative level. The APD (recast) permits Member States to operate two types of examination procedure. The examination procedure may take the form of a regular procedure (Article 31 APD (recast)) or an accelerated procedure (Article 31(8) APD (recast)). Both of these procedures may comprise an initial admissibility procedure, based on Articles 33 and 34 APD (recast), to determine the admissibility of the application; that is, whether the Member State is required to examine qualification for international protection. The accelerated procedure may be conducted in-territory or at the border. The APD (recast) permits Member States to provide for a border procedure, at the border or in transit zones, to decide on the admissibility of applications and/or the substance of an application in an accelerated procedure (Article 43 together with Article 31(8) APD (recast)). It should be noted that an application may be transferred between procedures. For instance, an application may be initially examined in a border procedure to determine its admissibility and, if found to be admissible, then transferred to the regular examination procedure in-territory for an examination of whether the applicant qualifies for international protection. Or an application might initially be examined in an accelerated procedure at the border or in-territory, but subsequently transferred to the regular procedure. For further information on examination procedures at the administrative level see Parts 4 and 5 below.

Finally, the **third stage** concerns appeal procedures before a court or tribunal (see Part 6 below).

Ordinarily, these stages are sequential. A Member State may nevertheless decide to consider the admissibility of an application under Article 33(2)(c) APD (recast) before determining the Member State responsible in the Dublin procedure (Article 3(3) Dublin III regulation). For further information, see Subsection 3.1.2 below. These different stages and types of procedure are further detailed throughout this judicial analysis.

### 1.4.1. Different types of procedures

Table 5 below outlines the purpose of these different types of procedure and the different parts and subsections of this publication in which they are analysed.

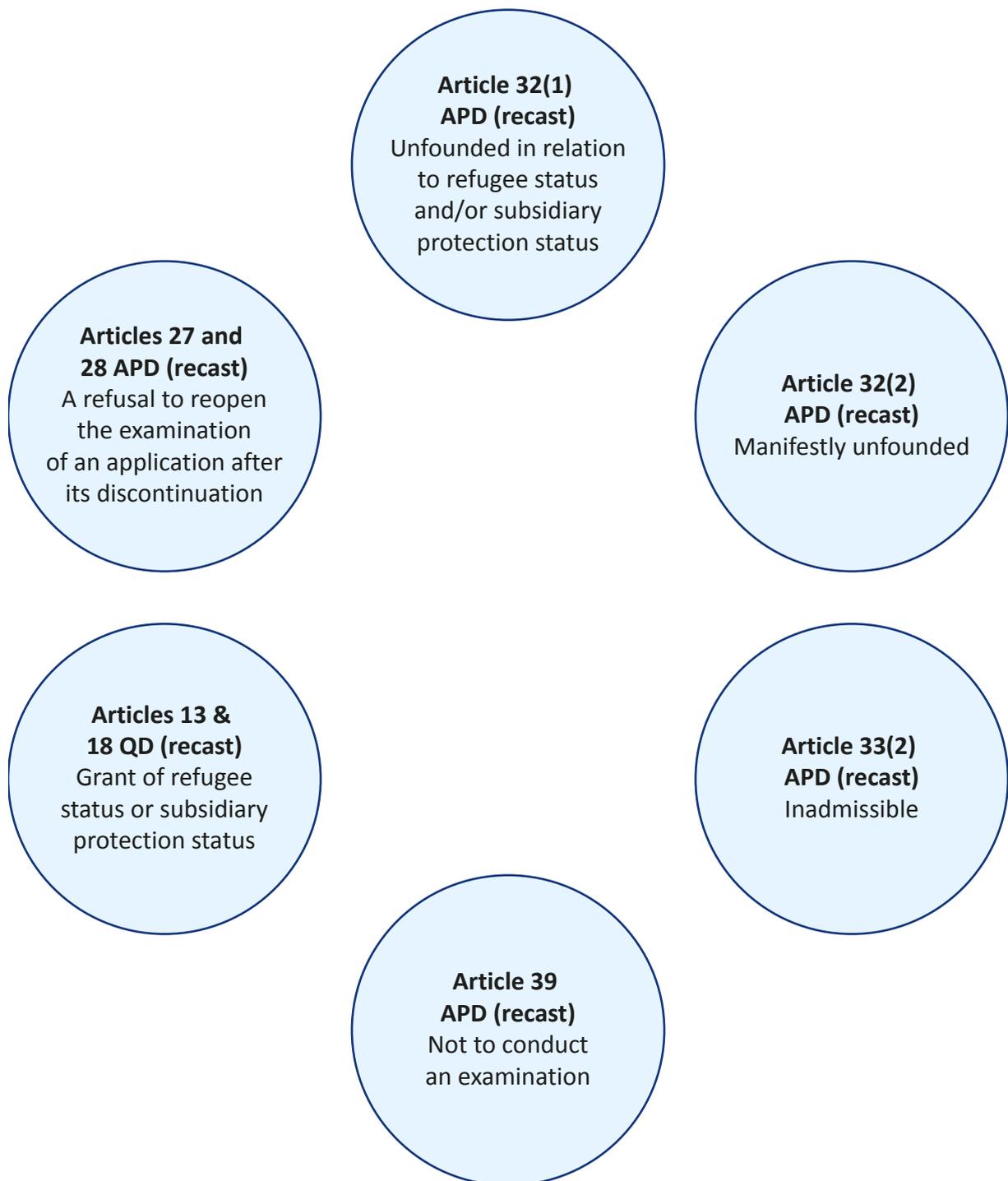
**Table 5: Different types of procedures**

Procedure	Purpose	Analysis contained within:
<b>Dublin procedure</b>	Procedure to determine the Member State responsible for examining an application for international protection.	Part 3
<b>Regular procedure</b>	An examination procedure, in accordance with the basic principles and guarantees of Chapter II APD (recast), to examine and decide upon whether an applicant qualifies for international protection.	Part 4 & Subsection 5.1.1
<b>Accelerated procedure</b>	An accelerated examination procedure, in accordance with the basic principles and guarantees of Chapter II APD (recast), in which applications may be examined if at least one of the grounds set out in Article 31(8) APD (recast) is fulfilled.	Part 4 & Subsection 5.1.2
<b>Border procedure</b>	A procedure, in accordance with the basic principles and guarantees of Chapter II APD (recast), in order to decide at the border or in a transit zone of a Member State on the admissibility and/or the substance of an application in a procedure pursuant to Article 31(8) APD (recast).	Part 4 & Subsection 5.1.3
<b>Admissibility procedure</b>	A procedure to determine whether an application may be considered inadmissible pursuant to Article 33 APD (recast).	Parts 4 & 5
<b>Appeal procedure</b>	A procedure before a court or tribunal which provides an effective remedy against a transfer decision under the Dublin III regulation and against a decision taken on an application for international protection.	Section 3.8 & Part 6

### 1.4.2. Types of decisions

Figure 3 below sets out the different types of decision referred to in the APD (recast), as well as the granting of refugee status or subsidiary protection status pursuant to the QD (recast). (There are other types of decision that are not covered by this judicial analysis, e.g. a decision to withdraw international protection in accordance with Article 14 or 19 of the QD (recast).)

**Figure 3: Types of decisions**



## 1.5. The principle of *non-refoulement*

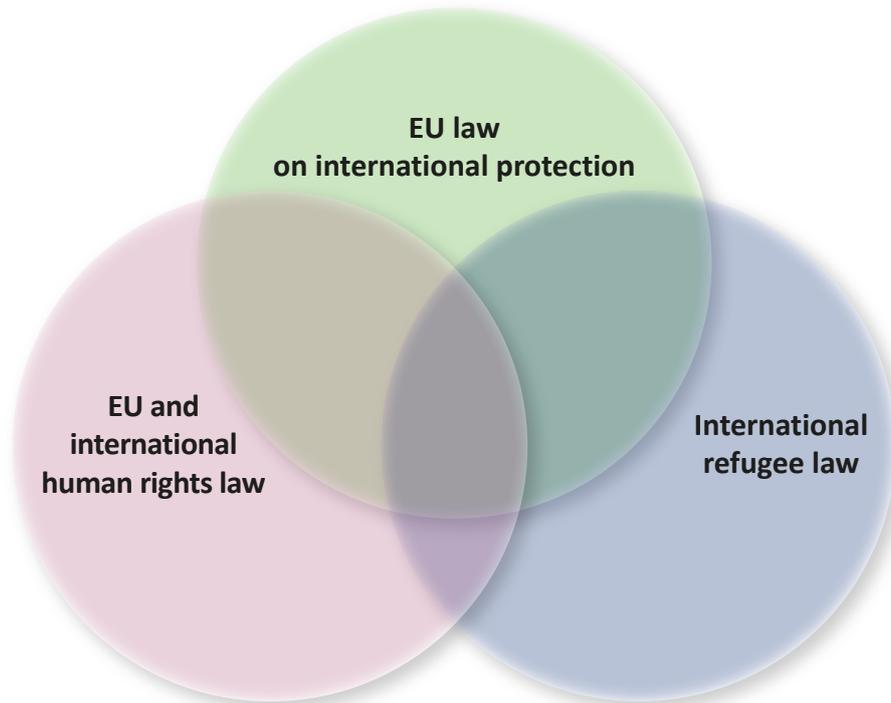
The term ‘principle of *non-refoulement*’, as used in this subsection, describes both the concept as derived from international refugee law and the concept as derived from international human rights law, and examines their relevance for **applicants** for international protection and those who are not yet applicants within the definition of Article 2(c) APD (recast) but who wish to make an application for international protection (see Section 2.3). That is, it is confined to an analysis of the principle as it applies to persons who have not yet had a final decision on whether or not they qualify as a refugee or a beneficiary of subsidiary protection.

The principle of *non-refoulement* constitutes an essential and crucial safeguard throughout the asylum process and is thus addressed throughout this judicial analysis. It ensures that applicants are not sent to countries where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion or where they would be at real risk of suffering serious harm as discussed below.

The principle of *non-refoulement* also secures the right of applicants to remain in the host country when applying for international protection (see Part 2), including during Dublin procedures (see Part 3), and then pending a decision by the determining authority in accordance with the procedures at the administrative level (see Part 4 and Part 5). It is also the basis for the general rule that Member States must allow applicants to remain in the territory to exercise the remedy of a right to appeal and, when such a right has been exercised, pending the outcome of the appeal; and must be observed by courts or tribunals when ruling whether or not an applicant may remain in the territory of the Member State (see Part 6). It also limits returns of illegally staying third-country nationals to their country of origin, including potential applicants and certain failed applicants for international protection (see Part 7).

The principle of *non-refoulement* in the context of EU asylum law governing asylum procedures, as described below, is to be seen against the background of the corpus of international law obligations that are incumbent on all Member States and to which reference is made in Article 78(1) TFEU.

**Figure 4: The scope of the principle of *non-refoulement* in EU law on international protection, international refugee law and human rights law**



In international law, the prohibition of *refoulement* flows from both international refugee law and international human rights law. It was first laid down in Article 33 of the Refugee Convention as follows.

#### Article 33 Refugee Convention

1. No contracting state shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Within the Refugee Convention, the scope of this *non-refoulement* principle is limited to ‘refugees’ as defined in Article 1. Nevertheless, since recognition as a refugee by the host state is declaratory, not constitutive of refugee status under international law <sup>(38)</sup>, Article 33 is also applicable to refugees not formally recognised, who could be, for example, applicants for refugee status awaiting a final decision on their application.

However, in contrast to Article 33 of the Refugee Convention, the prohibition of *refoulement* in international human rights law is absolute. As recalled by the CJEU itself in relation to the

<sup>(38)</sup> See UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 1979, reissued 2011 (UNHCR Handbook), para. 28; recital (21) QD (recast).

EU charter <sup>(39)</sup>, the prohibition of *refoulement* in international human rights law is absolute, protecting any individual from being returned to ill treatment, irrespective of their criminal record or the danger they may pose to the security of the host state. It prohibits states from sending any individual, including those seeking to apply for international protection and those who have made an application for international protection, to another state where there would be a real risk to his/her right to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person <sup>(40)</sup>. *Refoulement* is also prohibited when the returning state ought to have known that the destination state might further send the individual to another state where there is a risk of ill-treatment. This is known as indirect or chain *refoulement* <sup>(41)</sup>.

This wider human rights principle of *non-refoulement* has developed in parallel to Article 33 of the Refugee Convention. It is explicitly enshrined in international human rights instruments, such as the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is also implicit in other human rights instruments, including the 1966 International Covenant on Civil and Political Rights and, more particularly for the purposes of this judicial analysis, the ECHR. Both the Human Rights Committee and the ECtHR have interpreted the prohibition of torture and inhuman or degrading treatment or punishment, as well as severe violations of other provisions, as precluding contracting states from returning individuals to risks thereof <sup>(42)</sup>.

In addition to torture or inhuman or degrading treatment <sup>(43)</sup>, the ECHR more specifically prohibits *refoulement* when substantial grounds have been shown for believing that the individual would face a real risk of the death penalty (Article 2 ECHR in conjunction with Protocols 6 and 13) <sup>(44)</sup>, slavery (Article 4 ECHR) <sup>(45)</sup>, serious violations of the right to liberty and security (Article 5 ECHR) <sup>(46)</sup>, and flagrant denial of justice (Article 6 ECHR) <sup>(47)</sup>.

Moreover, ill treatment as prohibited in international human rights law is not confined to treatment on account of race, religion, nationality, membership of a particular social group or political opinion. Hence, the principle of *non-refoulement* under human rights law is broader than its refugee law counterpart (see Figure 4 above). At the same time, it is an open question whether persecution under the Refugee Convention has a broader scope than the prohibition of torture, inhuman or degrading treatment or punishment under international human rights

<sup>(39)</sup> CJEU, judgment of 5 April 2016, Grand Chamber, Joined Cases C-404/15 and C-695/15 PPU, *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198, paras 85-87 concerning the execution of arrest warrants pursuant to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190, 18.7.2002, 1-18; CJEU, *CK and others*, see fn 32, para. 59.

<sup>(40)</sup> See e.g., UN Committee against Torture, views of 28 April 1997, *Gorki Ernesto Tipia Paez v Sweden*, UN Doc CAT/C/18/D/39/1996, para. 14.5; UN Committee against Torture, views of 21 June 1999, *MBB v Sweden*, UN Doc CAT/C/22/D/104/1998, para. 6.4; ECtHR, judgment of 15 November 1996, Grand Chamber, *Chahal v United Kingdom*, application no 22414/94, paras 79 and 80; ECtHR, judgment of 28 February 2008, Grand Chamber, *Saadi v Italy*, application no 37201/06, para. 127; and ECtHR, judgment of 17 January 2012, *Omar Othman (Abu Qatada) v United Kingdom*, application no 8139/09.

<sup>(41)</sup> UN Committee against Torture, *General Comment No 1 on the Implementation of Article 3 of the Convention in the Context of Article 22*, see fn 47, para. 2. See also England and Wales High Court (UK), Queen's Bench Division, judgment of 5 August 2016, *Ibrahimi & Abasi v Secretary of State for the Home Department*, EWHC 2049 (Admin), Cases nos CO/5201/2015 & CO/5067/2015, and Supreme Administrative Court (Nejvyšší správní soud) (Czech Republic), judgment of 12 September 2016, No 5 Azs 195/2016-22, *MO v Ministry of Interior*, available in Czech at [www.nssoud.cz](http://www.nssoud.cz).

<sup>(42)</sup> Concerning the International Covenant on Civil and Political Rights, see most notably: UN Human Rights Committee, views of 11 November 1993, *Kindler v Canada*, UN Doc CCPR/C/48/D/470/1991, para. 13.2; Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, in UN Doc HRI/GEN/1/Rev.1, para. 9; and Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13, para. 12.

<sup>(43)</sup> Among the number of ECtHR judgments, see e.g., judgment of 7 July 1989, *Soering v United Kingdom*, application no 14038/88 (on the death row phenomenon as an inhuman or degrading treatment or punishment); judgment of 28 June 2011, *Sufi and Elmi v United Kingdom*, applications nos 8319/07 and 11449/07 (in case of generalised violence); and ECtHR, judgment of 4 September 2014, *Trabelsi v Belgium*, application no 140/10 (on life imprisonment being de jure and de facto incompressible as an inhuman or degrading treatment or punishment).

<sup>(44)</sup> Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, ETS No 114, 28 April 1983 (entry into force: 1 March 1985); and Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances, ETS No 187, 3 May 2002 (entry into force: 1 July 20013). See most notably ECtHR, judgment of 2 March 2010, *Al-Saadoon and Mufdhi v United Kingdom*, application no 61498/08.

<sup>(45)</sup> See ECtHR, admissibility decision of 19 January 1999, *Ould Barar v Sweden*, application no 42367/98.

<sup>(46)</sup> See e.g., ECtHR, judgment of 10 April 2012, *Babar Ahmad and others v United Kingdom*, applications nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09; ECtHR, *Qatada v UK*, see fn 39, para. 232.

<sup>(47)</sup> See ECtHR, *Qatada v UK*, see fn 39, paras 258-26; ECtHR, judgment of 24 July 2014, *Al Nashri v Poland*, application no 28761/11.

law. Importantly, under both refugee law and human rights law, protection from *refoulement* applies to any type of expulsion or return, including in cases of deportation and extradition <sup>(48)</sup>.

In primary EU law, the principle of *non-refoulement* is enshrined in Article 19(2) of the EU charter which provides that:

#### Article 19(2) EU Charter of Fundamental Rights

No one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Moreover, the CJEU has also interpreted Article 4 of the EU charter concerning the prohibition of torture and inhuman or degrading treatment or punishment as prohibiting *refoulement* to a real risk of such treatment <sup>(49)</sup>. This article states:

#### Article 4 EU Charter of Fundamental Rights

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

These provisions are absolute and apply to all persons covered by the scope of EU law, including those seeking to apply for international protection and those who have made an application for international protection.

The principle of *non-refoulement* is likewise reflected in secondary EU law. QD (recast) provides as follows.

#### Article 21 (1) and 21(2) Qualification Directive (recast)

1. Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.
2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may *refoule* a refugee, whether formally recognised or not, when:
  - (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or
  - (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

Article 21 is situated in Chapter VII QD (recast) on the ‘content of international protection’ and this chapter, pursuant to Article 20(2), applies to refugees and persons eligible for subsidiary protection unless otherwise indicated. However, bearing in mind Article 19(2) of the EU charter, as well as the declaratory nature of refugee status <sup>(50)</sup> and the fact that Article 78(1) TFEU requires the CEAS to be in accordance with the Refugee Convention and other relevant treaties,

<sup>(48)</sup> See e.g., UN Committee against Torture, *General Comment No 1 on the Implementation of Article 3 of the Convention in the Context of Article 22*, 16 September 1998, annexed to UN Doc A/53/44, para. 2; ECtHR, *Soering*, see fn 42, para. 88; ECtHR, Grand Chamber, judgment of 23 August 2016, *JK and others v Sweden*, application no 59166/12, paras 77-79.

<sup>(49)</sup> CJEU, *Aranyosi*, see fn 38, paras 83-94 concerning the execution of arrest warrants pursuant to the Council Framework Decision on the European arrest warrant, see fn 38. See also CJEU judgment of 16 February 2017, Case C-578/16 PPU, *CK and others v Republika Slovenija*, EU:C:2017:127, paras 59-60.

<sup>(50)</sup> This principle has been recognised in EU law, see recital (21) QD (recast).

the principle of *non-refoulement* is applicable to applicants for international protection pending a final decision on their application <sup>(51)</sup>.

Recital (3) of the APD (recast) also recalls that the European Council agreed to work towards establishing a CEAS based on the full and inclusive application of the Refugee Convention, ‘thus affirming the principle of *non-refoulement* and ensuring that nobody is sent back to persecution’.

The principle that Member States shall ensure that a person is not removed from their territory contrary to the principle of *non-refoulement* is affirmed in a number of articles of the APD (recast) and the Dublin III regulation as follows.

**Table 6: Provisions affirming the obligation to comply with the principle of *non-refoulement* in the APD (recast) and the Dublin III regulation**

APD (recast)		
Recital (3)		‘The European Council, at its special meeting in Tampere on 15 and 16 October 1999, agreed to work towards establishing a common European asylum system, based on the full and inclusive application of the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967 (‘the Geneva Convention’), thus affirming the principle of <i>non-refoulement</i> and ensuring that nobody is sent back to persecution.’
Article 9(3)	Right to remain in the Member State pending the examination of the application	‘A Member State may extradite an applicant to a third country pursuant to paragraph 2 only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect <i>refoulement</i> in violation of the international and Union obligations of that Member State’.
Article 28(2)	Procedure in the event of implicit withdrawal or abandonment of the application	‘[...] Member States shall ensure that such a person is not removed contrary to the principle of <i>non-refoulement</i> . [...]’
Article 35	The concept of first country of asylum	‘A country can be considered to be a first country of asylum for a particular applicant if: [...] (b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of <i>non-refoulement</i> [...]’.
Article 38(1)(c)	The concept of safe third country	‘Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned: [...] (c) the principle of <i>non-refoulement</i> in accordance with the Geneva Convention is respected [...]’.
Article 39 (4)	The concept of European safe third country	‘The Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph 1 and the consequences of decisions pursuant to those provisions in accordance with the principle of <i>non-refoulement</i> [...]’.

<sup>(51)</sup> The fact that the lack of a suspensive effect of an appeal against a decision on a subsequent application is compatible with Article 19(2) and 47 of the charter under circumstances such as those in the case of Tall does not affect the applicability of *non-refoulement* in proceedings for subsequent applications: CJEU, *Tall*, see fn 25, para. 56.

Article 41(1)	Exceptions from the right to remain in case of subsequent applications	'[...] Member States may make such an exception only where the determining authority considers that a return decision will not lead to direct or indirect <i>refoulement</i> in violation of that Member State's international and Union obligations.'
Annex 1	Designation of safe countries of origin for the purposes of Article 37(1)	'[...] In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by: [...] (c) respect for the <i>non-refoulement</i> principle in accordance with the Geneva Convention [...].'
<b>Dublin III regulation</b>		
Recital (3)		'The European Council, at its special meeting in Tampere [...] in 1999, agreed to work towards establishing the CEAS, based on the full and inclusive application of the [Refugee] [...] Convention [...], thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of <i>non-refoulement</i> . In this respect, and without the responsibility criteria laid down in this regulation being affected, Member States, all respecting the principle of <i>non-refoulement</i> , are considered as safe countries for third-country nationals.'
Chapter II Article 3(2)	General principles and safeguards Access to the procedure for examining an application for international protection	'Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the [EU], the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.'

## Part 2: Applying for international protection

This part deals with the general provisions relating to definitions and the scope of the APD (recast), and addresses the rules applicable insofar as the directive governs the initiation of the asylum procedure. It is organised into three sections as illustrated in Table 7 below.

**Table 7: Structure of Part 2**

<b>Section 2.1.</b>	Definitions	pp. 32-33
<b>Section 2.2.</b>	Scope of the APD (recast) and access to procedures	pp. 33-35
<b>Section 2.3.</b>	Making, registering and lodging an application	pp. 35-42

### 2.1. Definitions

The key terms of the APD (recast) are defined in Article 2. These definitions are aligned with the definitions in the other second-phase legal instruments of the CEAS, including the QD (recast), Directive 2013/33/EU (RCD (recast)) <sup>(52)</sup> and the Dublin III regulation.

The key definitions of the APD (recast) for the purpose of this judicial analysis are reproduced in Table 8 below, with ‘international protection’, ‘refugee status’ and ‘subsidiary protection status’ being defined on the basis of the QD (recast).

**Table 8: Key definitions in the APD (recast)**

<b>‘application for international protection’ or ‘application’</b>	‘[...] means a request made by a third-country national or a stateless person for protection from a Member State who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection outside the scope of [the recast QD], that can be applied for separately’	Article 2(b)
<b>‘applicant’</b>	‘[...] means a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken’	Article 2(c)
<b>‘refugee’</b>	‘[...] means a third-country national or a stateless person who fulfils the requirements of Article 2(d) of [the QD (recast)]’	Article 2(g)
<b>‘person eligible for subsidiary protection’</b>	‘[...] means a third-country national or a stateless person who fulfils the requirements of Article 2(f) of [the QD (recast)]’	Article 2(h)
<b>‘international protection’</b>	‘[...] means refugee status and subsidiary protection as defined in points (j) and (k)’	Article 2(i)
<b>‘refugee status’</b>	‘[...] means the recognition by a Member State of a third-country national or stateless person as a refugee’	Article 2(j)
<b>‘subsidiary protection status’</b>	‘[...] means the recognition by a Member State of a third-country national or stateless person as a person eligible for subsidiary protection’	Article 2(k)

<sup>(52)</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180, 29.6.2013, pp. 96-116.

Within EU law all these terms have an autonomous meaning. This entails, for instance, that if a request for protection filed at national level is an ‘application for international protection’ within the meaning of Article 2(b), the APD (recast) applies irrespective of whether the application is formally considered as such under national law.

## 2.2. Scope of the APD (recast) and access to procedures

In line with the objective of ensuring a single procedure for granting and withdrawing international protection pursuant to the QD (recast), the APD (recast) applies to the examination of applications for both refugee and subsidiary protection status. Accordingly, the **substantive scope** of the recast version includes ‘all applications for international protection’ (Article 3(1) APD (recast) and recitals (11) and (12)).

The APD (recast) therefore strengthens the procedural rights of applicants for subsidiary protection status compared to the APD, which only governed this group where Member States ‘employ or introduce’ a single procedure in which asylum applications are examined both as applications for refugee status and applications for subsidiary protection status (Article 3(3) APD). The APD still applies in Ireland and the United Kingdom (see Section 1.1 above), which both operate a single procedure for the determination of applications for international protection.

Under Article 3(3) APD (recast) Member States are given the discretionary power to apply the directive to ‘any kind of protection falling outside of the scope of [the QD (recast)]’. If a Member State, based on this provision, decides to apply the directive to procedures for examining applications for a form of national protection which falls outside the scope of EU law, it can do so on a selective basis (subject to its human rights commitments) <sup>(53)</sup>.

**Figure 5: The substantive scope of the APD (recast) (Article 3(1))**



The **territorial scope** of the APD (recast) also enhances access to asylum procedures compared to the APD. Article 3(1) underlines that it applies to applications for international protection made ‘in the territory, including at the border, in the territorial waters or in the transit zones of the Member States’. Accordingly, the APD (recast) applies not only when applications are made to border personnel but also when applications are made in, for instance, airport transit zones, detention centres or during interceptions at sea in the territorial waters of a Member State.

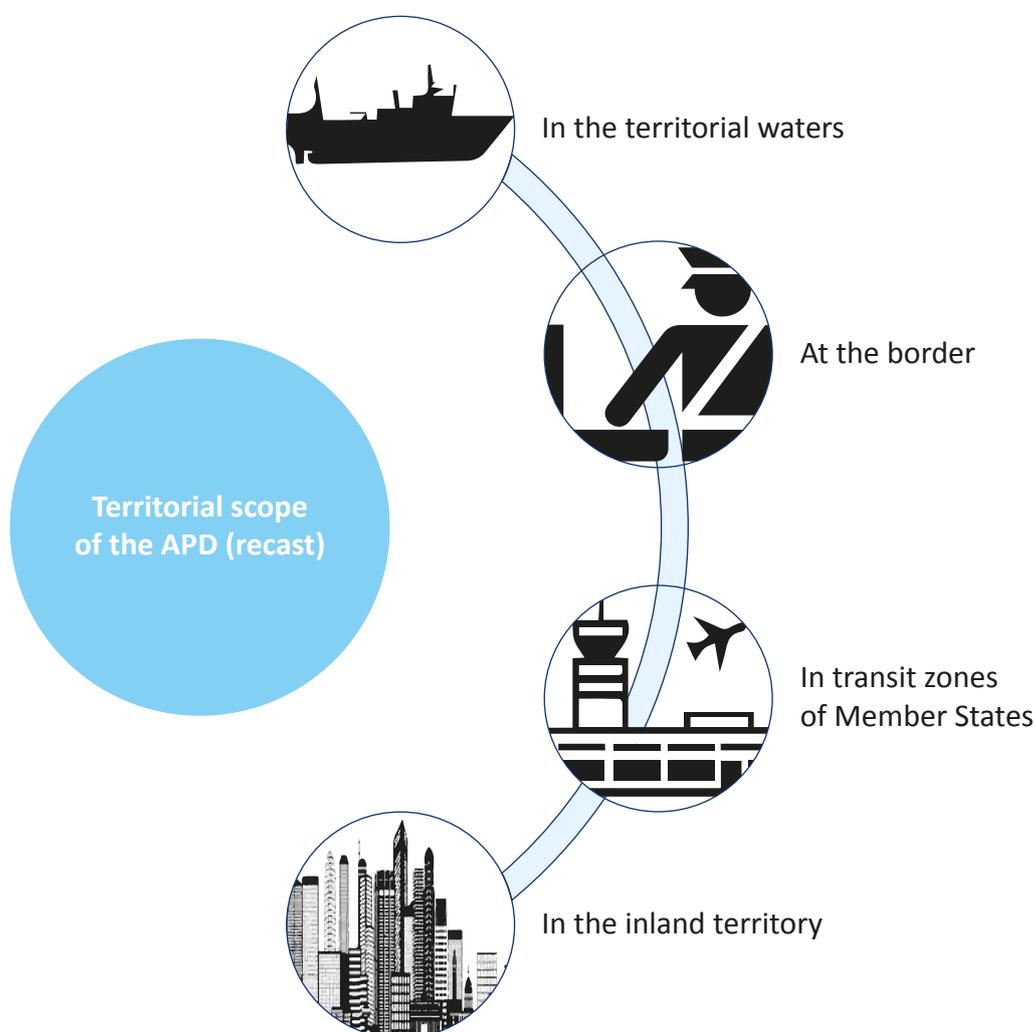
<sup>(53)</sup> For example, in the Czech Republic, a single procedure, reflecting the provisions of the APD (recast) is conducted to examine applications for international protection as well as applications for national forms of protection.

Even though states are normally considered to exercise jurisdiction within the context of their diplomatic representations abroad, the APD (recast) explicitly excludes from its scope ‘requests for diplomatic or territorial asylum submitted to representations of Member States’ (Article 3(2)). This was confirmed in the *X and X* case where the CJEU underlined that the APD (recast) excludes from its scope applications for international protection made to the representations of Member States <sup>(54)</sup>.

As regards the territorial waters of a Member State, recital (26) APD (recast) envisages that whilst applicants can make their applications in the territorial waters of a Member State, what must then happen is that ‘they should be disembarked on land and have their applications examined [there] in accordance with [the APD (recast)]’.

In light of the above, Figure 6 below illustrates the territorial scope of the APD (recast).

**Figure 6: The territorial scope of the APD (recast) (Article 3(1))**



It follows from the definition of the territorial scope in Article 3(1) APD (recast) that the directive is, therefore, inapplicable to the high seas. Nevertheless, actions undertaken by Member State personnel on the high seas may engage Article 4 of the EU charter and Article 3 of the ECHR.

<sup>(54)</sup> CJEU, judgment of 7 March 2017, Case C-638/16 PPU, *X and X v État belge*, EU:C:2017:173, para. 49.

From the standpoint of the principle of *non-refoulement* under Article 3 of the ECHR, contracting states should take into account that the Grand Chamber of the ECtHR in the case of *Hirsi Jamaa and others v Italy* stated that whenever the state through its agents, operating outside its territory, exercises control and authority over an individual, and thus jurisdiction, the state is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the convention that are relevant to the situation of that individual <sup>(55)</sup>.

In *Hirsi*, the Grand Chamber of the ECtHR observed that in the case before it the events complained of by the applicants took place entirely on board ships of the Italian armed forces, and in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, ‘the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities’ <sup>(56)</sup>. The ECtHR held that ‘[a]ccordingly, the events giving rise to the alleged violations fall within Italy’s ‘jurisdiction’ within the meaning of Article 1 of the convention’ <sup>(57)</sup>. The Court found that the applicants had no access to a procedure to identify them and to assess their personal circumstances before they were returned to Libya, there were neither interpreters nor legal advisers among the personnel, and the applicants were given no information by the Italian military personnel <sup>(58)</sup>. The Court stated ‘the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints’ <sup>(59)</sup>.

## 2.3. Making, registering and lodging an application

The APD (recast) introduces a number of guarantees aimed at ensuring and improving effective access to examination procedures for persons applying for international protection. These guarantees reflect the reasoning that access to international protection is a key precondition for ensuring compliance with the principle of *non-refoulement* <sup>(60)</sup>.

### 2.3.1. Authorities responsible

Article 4 APD (recast) spells out the positive obligations of Member States to ensure that competent national authorities are in place to process applications for international protection in accordance with the directive. The main rule in Article 4(1) requires Member States to ‘designate for all procedures a determining authority which will be responsible for an appropriate examination of applications’ in accordance with the APD (recast). According to Article 2(f) APD (recast), ‘a determining authority’ is ‘any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases’.

It follows from the competency requirement set out in Article 4(1) that the Member States must ensure that the determining authority is ‘provided with appropriate means, including

<sup>(55)</sup> ECtHR, Grand Chamber, judgment of 23 February 2012, *Hirsi Jamaa and others v Italy*, application no 27765/09, para. 74. See also paras 133, and 202-205 of this judgment.

<sup>(56)</sup> *Ibid.*, para. 81.

<sup>(57)</sup> *Ibid.*, para. 82.

<sup>(58)</sup> *Ibid.*, paras 202 and 203.

<sup>(59)</sup> *Ibid.*, para. 204.

<sup>(60)</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures for granting and withdrawing international protection status (Recast), 21 October 2009, COM(2009) 554 final, Annex, p. 4 (APD (recast) Proposal) with reference to ECtHR, judgment of 26 April 2007, *Gebremedhin v France*, application no 25389/05.

sufficient competent personnel'. The latter requirement is elaborated upon in Article 4(3) which clarifies that the personnel must be 'properly trained' and that the training shall include the elements listed in Article 6(4)(a)-(e) in the *EASO regulation* <sup>(61)</sup>. This includes, for instance, international human rights law and the EU asylum *acquis*, interview techniques, issues related to the handling of applications from minors and vulnerable persons with specific needs, and issues relating to the production and use of country of origin information. It is also specified that persons interviewing applicants must have general knowledge of problems which could adversely affect the applicant's ability to be interviewed, such as indications of past torture (Article 4(3) APD (recast)).

Article 4(2) contains an exception allowing in two situations for the Member States to **deviate from the principle of a determining authority** and designate a responsible authority which is not the determining authority identified on the basis of Article 4(1). The first concerns the processing of cases under the Dublin III regulation, and the second regards decisions on granting or refusing permission to enter the territory pursuant to the border procedures under Article 43 APD (recast) (see Subsection 5.1.3 below on border procedures). When Article 4(2) is invoked, the relevant Member State must ensure that the personnel of the alternate authority have 'the appropriate knowledge or receive the necessary training to fulfil their obligations' when carrying out the examination procedure (Article 4(4)).

Finally, concerning the specific situation of joint border controls, Article 4(5) specifies that '[a]pplications for international protection made in a Member State to the authorities of another Member State carrying out border or immigration controls there shall be dealt with by the Member State in whose territory the application is made'. The provision is in line with Article 20(4) of the Dublin III regulation which specifies that '[w]here an application for international protection is lodged with the competent authorities of a Member State by an applicant who is on the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present'.

## 2.3.2. Access to the procedure

### 2.3.2.1. The general rule

Article 6 APD (recast) clarifies how the asylum procedure is effectively initiated as it requires Member States to register applications for international protection made in their territory. It spells out the implications of the general principle of effective, easy and timely access to asylum procedures, and is to be considered in conjunction with Articles 7 and 8 APD (recast). Article 7 contains specific rules on applications made on behalf of dependants or minors, or by minors on their own behalf. Article 8 concerns information and counselling in detention facilities and at border-crossing points.

<sup>(61)</sup> Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office OJ L 132, 29.5.2010, pp. 11-28.

Article 6 uses the terms ‘**making** an application’, ‘**registration** of an application’ and ‘**lodging** an application’<sup>62</sup>). Figure 7 summarises the distinctions between these three terms, as used in the APD (recast), which are further explained below.

**Figure 7: Making, registering and lodging an application for international protection**



\*Making an application triggers rights and obligations under both the APD (recast) and the RCD (recast), as indicated further below.

In line with the definition in Article 2(b) APD (recast) (see Figure 7 above), an application is ‘**made**’ as soon as a person, who can be understood to seek refugee status or subsidiary protection status, makes a request for or expresses a wish to apply for protection from a Member State. EASO has suggested the following.

Making an application for international protection means the act of expressing, in any way and to any authority, one’s wish to obtain international protection. Anyone who has expressed his/her intention to apply for international protection is considered to be an applicant with all the rights and obligations attached to this status<sup>63</sup>).

Accordingly, this act, which triggers the initiation of the asylum procedure, does not require the fulfillment of any administrative formalities<sup>64</sup>). Recital (27) APD (recast) provides the following.

#### **Recital (27) APD (recast)**

Given that third-country nationals and stateless persons who have expressed their wish to apply for international protection are applicants for international protection, they should comply with the obligations, and benefit from the rights under [the APD (recast) and RCD (recast)]. To that end, Member States should register the fact that those persons are applicants for international protection as soon as possible.

<sup>62</sup>) Please note that the meaning of the terms ‘making’ and ‘lodging’ and application in the APD (recast) may differ from the meaning of these terms in other CEAS instruments, such as the Dublin III regulation and the RCD (recast). This has been observed by the CJEU in judgment of 26 July 2017, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, EU:C:2017:587, paras 100-102. See also Subsection 3.1.4.3 of this judicial analysis on applicants who have lodged an application for international protection in the context of the Dublin III regulation.

<sup>63</sup>) EASO and Frontex, *Practical Guide: Access to the Asylum Procedure*, 2016, p. 4.

<sup>64</sup>) European Commission, Detailed Explanation of the Amended Proposal, accompanying the document Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), 1 June 2011, COM(2011) 319 final Annex, p. 3.

The '**registration**' of an application is a procedural step which is conducted by the competent authority after — and therefore presupposes — the application has been 'made'. However, the registration of an application does not presuppose that the application has been 'lodged'. An application is only 'lodged' when relevant administrative formalities are accomplished (see below) <sup>(65)</sup>.

As regards time limits for registration, Article 6(1) provides that when a person makes an application for international protection to an authority which under national law holds competence to register it, the registration shall take place 'no later than 3 working days after the application is made'. If an application is made to other national authorities which are likely to receive such applications, but are not recognised as being competent to do so under national law, the registration shall take place 'no later than 6 working days after the application is made'. In that respect it is stressed that the Member States must ensure that the personnel of authorities which are likely to receive applications for international protection — such as the police, border guards, immigration authorities and personnel of detention facilities — have the relevant information and have received the appropriate training and instructions to inform applicants about where and how to lodge an application for international protection <sup>(66)</sup>. Article 6(5) provides that where simultaneous applications 'by a large number of third-country nationals or stateless persons make it very difficult in practice to comply with the time limits' prescribed by Article 6(1), the Member State may extend that time limit to 10 working days.

The importance of distinguishing between when an application is 'made' and when it is 'lodged' for the purpose of the principle of effective access to procedures is clear from Article 6(2). This specifies that Member States shall give a person who has made an application '**an effective opportunity to lodge** it as soon as possible' <sup>(67)</sup>. Where an applicant does not do so, a Member State may apply the procedure of implicit withdrawal or abandonment laid down in Article 28 APD (recast) (see Subsection 4.2.10 below). More specific rules on the lodging of applications are laid down in Article 6(3), which is an optional clause, permitting the Member States to 'require that an application for international protection be lodged in person and/or at a designated place'. When a Member State invokes this rule and requires applications to be lodged in person, a legal advisor, family member or other representative cannot do so on an applicant's behalf, unless the applicant is personally present when the application is lodged.

Regardless of Article 6(3), 'an application shall be deemed to have been lodged when a form submitted by the applicant or, where provided for by national law, an official report, has reached the competent authorities of the Member State concerned' (Article 6(4)).

### 2.3.2.2. Applications made on behalf of dependants or minors and by minors on their own behalf

Article 6 APD (recast) should be applied in conjunction with Article 7 APD (recast). This contains rules on applications made on behalf of dependants or minors (Article 7(1) and (2)), as well as the conditions under which minors can make applications on their own behalf (Article 7(3)-(5)). A 'minor' is for the purpose of the APD (recast) defined as a third-country national

<sup>(65)</sup> J. Vedsted-Hansen, 'Article 6 APD (recast)', in K. Hailbronner and D. Thym (eds.), *EU Immigration and Asylum Law: Commentary* (2nd edn, C.H. Beck, Hart and Nomos, 2016), p. 1306, and European Commission, *Detailed Explanation of the Amended APD (recast) Proposal*, see fn 64, Annex, p. 3.

<sup>(66)</sup> Art. 8 APD (recast) and also Subsection 2.3.2.3 below on information and counselling in detention facilities and at border crossing points.

<sup>(67)</sup> Emphasis added.

or stateless person below the age of 18 years' (Article 2(l)). By contrast, the APD (recast) contains no definition of a 'dependant'.

Article 7 stipulates as the main rule that 'each adult with legal capacity has the right to make an application for international protection on his or her own behalf' (Article 7(1)) and allows the Member State to provide that 'an application may be made by an applicant on behalf of his or her dependants' (Article 7(2)). Member States must ensure that dependent adults consent to the lodging of the application on their behalf at the time the application is lodged or, at the latest, when the personal interview with the dependent adult is conducted. Before consent is requested, the dependent adult must be 'informed in private of the relevant procedural consequences of the lodging of the application on his or her behalf and of his or her right to make a separate application' (Article 7(2)). If consent is given by an adult dependant, a subsequent application for international protection lodged by that dependant may be considered inadmissible pursuant to Article 33(2)(e) APD (recast) if 'there are no facts relating to the dependant's situation which justify a separate application' (see Subsection 5.2.2.4 below). If consent cannot be obtained, adult dependants 'shall have an opportunity to make an application on their own behalf' (Article 7(2)).

The specific rules on **minors' direct access to the procedure** are laid down in Article 7(3)-(5). These rules complement the specific guarantees for unaccompanied minors in Article 25 APD (recast) (see Subsection 4.2.8 below). It follows from Article 7(3) that the Member States must ensure that a minor has the right to make an application for international protection by various means as follows.

#### Article 7(3) APD (recast)

Member States shall ensure that a minor has the right to make an application for international protection either on his or her own behalf, if he or she has the legal capacity to act in procedures according to the law of the Member State concerned, or through his or her parents or other adult family members, or an adult responsible for him or her, whether by law or by the practice of the Member State concerned, or through a representative.

Additional safeguards are granted by Article 7(4) to unaccompanied minors who are subject to return procedures pursuant to the returns directive<sup>(68)</sup> i.e. unaccompanied minors who are staying illegally in a Member State. The provision obliges the Member States to ensure that an application for international protection can be lodged on behalf of unaccompanied minors by those appropriate (governmental or non-governmental) bodies providing them with assistance pursuant to Article 10 of the returns directive if, 'on the basis of an individual assessment of his or her personal situation, those bodies are of the opinion that the minor may have protection needs pursuant to' the QD (recast)<sup>(69)</sup>.

Article 7(5) permits Member States to set out more detailed provisions in national law regarding certain cases as follows.

<sup>(68)</sup> Returns directive, see fn 37.

<sup>(69)</sup> Art. 10(1) of the returns directive reads: 'Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child'. On this provision, see F. Lutz in Hailbronner and Thym (eds.), see fn 65, pp. 706-707. See also Subsection 7.3.3 below.

### Article 7(5) APD (recast)

Member States may determine in national legislation:

- (a) the cases in which a minor can make an application on his or her own behalf;
- (b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 25(1)(a) [see Subsection 4.2.8 below];
- (c) the cases in which the lodging of an application for international protection is deemed to constitute also the lodging of an application for international protection for any unmarried minor.

It follows from Article 25(6) and recital (33) that the best interest of the child shall be a primary consideration for Member States when implementing this directive (see Subsection 4.2.8 below). In the case of Article 7(4) APD (recast), this implies, for instance, that in order to ensure unaccompanied minors have effective access to procedures, the Member States must make sure that the personnel of the (governmental or non-governmental) body designated to assist such minors, pursuant to Article 10 of the returns directive, are competent to identify their potential protection needs.

#### 2.3.2.3. Information and counselling in detention facilities and at border-crossing points

Article 8 APD (recast) contains specific safeguards for all third-country nationals or stateless persons 'held in detention facilities or present at border-crossing points, including transit zones, at external borders'. As already mentioned, these safeguards must be read together with the general rule on applications for international protection in Article 6 APD (recast) (see Subsection 2.3.2.1 above).

Article 8 safeguards are triggered '[w]here there are indications that third-country nationals or stateless persons held in detention facilities or present at border-crossing points, including transit zones, at external borders, may wish to make an application for international protection' (Article 8(1)).

An expression of the wish to apply for international protection remains a precondition for the applicability of the directive<sup>(70)</sup>, but the wording of Article 8(1) ('indications') entails that there are no formal requirements as to the content or articulation of such a wish<sup>(71)</sup>. This is underlined by the fact that the provision, as explained by the European Commission in its amended proposal for the APD (recast), takes into account that the ability of persons eligible for international protection to articulate their request for such protection may be negatively affected by 'a number of factors, such as trauma, difficult journey, or lack of knowledge of common language'<sup>(72)</sup>. For that reason the provision aims at enabling a '*de facto* asylum seeker' to articulate his/her request for international protection<sup>(73)</sup>.

<sup>(70)</sup> See Art. 2(b) APD (recast) on the definition of 'application for international protection' and Art. 3(1) APD (recast) on the scope of the directive (Sections 2.1 and 2.2 above).

<sup>(71)</sup> See also recital (28) of the APD (recast).

<sup>(72)</sup> European Commission, APD (recast) Proposal, Annex, op cit. fn. 60, p. 5.

<sup>(73)</sup> Ibid.

The specific safeguards which the Member States are required to put in place are:

- provision of information on the possibility of making an application for international protection (Article 8 (1));
- arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure (Article 8 (1)); and
- effective access to applicants present at border-crossing points, including transit zones, at external borders for organisations and persons providing advice and counselling to applicants (Article 8 (2)).

The obligation to **provide information** about the possibility of applying for international protection is to be read together with Article 6(1) APD (recast). This requires that authorities which are likely to receive applications for international protection but are not competent to do so under national law:

such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applications as to where and how applications for international protection may be lodged <sup>(74)</sup>.

Concerning **interpretation arrangements**, it follows from recital (28) of the APD (recast) that '[b]asic communication necessary to enable the competent authorities to understand if persons declare their wish to apply for international protection should be ensured through interpretation arrangements'. The European Commission in its amended proposal for the APD (recast) states that 'such arrangements need to be provided only to the very basic extent that it is necessary to facilitate access to procedure. In essence, the objective is to enable the persons who wish to request international protection to do so' <sup>(75)</sup>. The European Commission also states that 'the term "arrangements" indicates that Member States have a wide discretion to find the appropriate modalities' <sup>(76)</sup>.

Finally, when it comes to access of organisations and persons providing advice and counselling to applicants at border-crossing points, Article 8(2) stipulates as follows.

#### **Article 8(2) APD (recast)**

Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible.

<sup>(74)</sup> See Subsection 2.3.2.1 above.

<sup>(75)</sup> European Commission, Detailed Explanation of the amended APD (recast) Proposal, see fn 64, p. 4.

<sup>(76)</sup> Ibid.

If Member States invoke Article 8(2) to regulate the presence and access of the said organisations and persons, such limitations must comply with the principle of effective access and they may therefore not render access to applicants at border-crossing points severely restricted or impossible.

As explained in Section 2.2 above, whilst not required under the CEAS instruments, from the standpoint of the principle of *non-refoulement* under Article 3 of the ECHR and Article 4 of Protocol 4 to the ECHR, Member States should take into account that the Grand Chamber of the ECtHR in the case of *Hirsi Jamaa and others v Italy* decided that it was for the national authorities, when faced with a situation in which human rights were being systematically violated in the applicants' home country, to find out about the treatment to which applicants would be exposed upon return, even if the applicants had failed expressly to request asylum <sup>(77)</sup>.

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<sup>(77)</sup> ECtHR, *Hirsi v Italy*, see fn 55, paras 132-134. See also ECtHR, judgment of 12 January 2017, *Kebe and others v Ukraine*, application no 12552/12, para. 104, and, *mutatis mutandis*, ECtHR, Grand Chamber, judgment of 23 March 2016, *FG v Sweden*, application no 43611/11, para. 127. See also Subsection 7.3.1 below on illegally staying third-country nationals who are not applicants.

# Part 3: Member State responsible for examining the application according to the Dublin III regulation

This part deals with ‘the system for determining the Member State responsible for examining an asylum application made in one of the Member States (“the Dublin system”)<sup>(78)</sup>. The Dublin system aims to identify and designate the Member State responsible for examining an application for international protection as soon as an application for international protection is first lodged with a ‘Dublin state’<sup>(79)</sup>. The Dublin system consists of the Dublin III regulation<sup>(80)</sup>, the Eurodac regulation (recast)<sup>(81)</sup> and the Dublin implementing regulation<sup>(82)</sup>.

This part is divided into eight sections as illustrated in Table 9 below.

**Table 9: Structure of Part 3**

<b>Section 3.1.</b>	Purpose and scope of the Dublin III regulation	pp. 44-53
<b>Section 3.2.</b>	Other applicable law related to the Dublin III regulation	pp. 54-55
<b>Section 3.3.</b>	Right to information and personal interview	pp. 55-58
<b>Section 3.4.</b>	Procedural guarantees applying to minors	pp. 58-60
<b>Section 3.5.</b>	Obligations of applicants	pp. 61-63
<b>Section 3.6.</b>	Legality of a transfer decision	pp. 63-74
<b>Section 3.7.</b>	Notification of a transfer decision	pp. 74-76
<b>Section 3.8.</b>	Legal remedies	pp. 76-79

<sup>(78)</sup> See this definition in CJEU, Grand Chamber, judgment of 7 June 2016, Case C-63/15, *Mehrdad Ghezalbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409, para. 45.

<sup>(79)</sup> The ‘Dublin states’ are the EU-28 plus Iceland, Liechtenstein, Norway and Switzerland. See also Subsection 3.1.3 on territorial scope.

<sup>(80)</sup> Dublin III regulation, see fn 4.

<sup>(81)</sup> Eurodac regulation (recast), see fn 35.

<sup>(82)</sup> Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 222, 5.9.2003, pp. 3-23 as amended by the Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 39, 8.2.2014, pp. 1-43. On 4 May 2016, the Commission issued a proposal to amend the Dublin III Regulation which is currently being negotiated, see European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 4 May 2016, COM(2016) 270 final (Dublin IV Commission Proposal).

### 3.1. Purpose and scope of the Dublin III regulation

#### 3.1.1. Establishing responsibility

The subject matter of the Dublin III regulation is defined in Article 1 <sup>(83)</sup>.

#### Article 1 Dublin III Regulation

This regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ('the Member State responsible').

This purpose, laid down in Article 1 and in recital (40), has been underlined by the CJEU in several cases <sup>(84)</sup>. The key feature of the regulation is that it provides that an application for international protection shall be examined by a single Member State <sup>(85)</sup>. Article 3(1) clarifies that the application for international protection 'shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible <sup>(86)</sup>.'

However, according to Article 17(1) '[b]y way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it [...] even if such examination is not its responsibility under the criteria laid down in this regulation'. Recital (17) clarifies that '[a]ny Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection [...]' <sup>(87)</sup>.

The Dublin III regulation retains the same underlying principles as the previous Dublin II regulation, namely that responsibility for examining an application for international protection lies primarily with the Member State which played the greatest part in the applicant's entry into or residence on the territories of the Member States, subject to exceptions designed to protect family unity <sup>(88)</sup>. However, it is apparent from recital (9) Dublin III regulation that, while the Dublin III confirms the principles underlying the previous regulation, it differs in essential respects and 'it is intended to make the necessary improvements, in the light of experience, not only to the effectiveness of the Dublin system but also to the protection afforded applicants under that system, to be achieved, inter alia, by the judicial protection enjoyed by asylum seekers' <sup>(89)</sup>.

#### 3.1.2. Access to procedures for granting international protection

The application of criteria and mechanisms for determining the Member State responsible for examining an application for international protection is not an end in itself but should be

<sup>(83)</sup> All articles cited in this part without specification are articles of the Dublin III regulation.

<sup>(84)</sup> CJEU, judgment of 3 May 2012, Case C-620/10, *Migrationsverket v Nurije Kastrati and others*, EU:C:2012:265, para. 41; CJEU, judgment of 14 November 2013, Case C-4/11, *Bundesrepublik Deutschland v Kaveh Puid*, EU:C:2013:740, para. 27; CJEU, judgment of 30 May 2013, Case C-528/11, *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsia pri Ministerskia savet*, EU:C:2013:342, para. 34; CJEU, judgment of 6 June 2013, Case C-648/11, *The Queen on the application of MA and others v Secretary of State for the Home Department*, EU:C:2013:367, para. 43.

<sup>(85)</sup> See also *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, Subsection 2.2.1., p. 34.

<sup>(86)</sup> See Subsection 3.6.2.

<sup>(87)</sup> See CJEU, Grand Chamber, judgment of 6 November 2012, Case C-245/11, *K v Bundesasylamt*, EU:C:2012:685, paras 40, 38, 41; CJEU, *CK and others*, see fn 33, paras 55-97; and Subsection 3.6.3.

<sup>(88)</sup> See recital (9) of the Dublin III regulation and European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM/2008/820 final, 8 December 2008 (Dublin III Commission Proposal).

<sup>(89)</sup> CJEU, *Ghezelbash*, see fn 78, para. 52. See also paras 36, 37, 46 and 51-53.

seen within the larger perspective of the CEAS and its aim to secure the ‘absolute respect of the right to seek asylum’<sup>(90)</sup>. Recital (4) of the Dublin III regulation restates the aim of the European Council at its meeting in Tampere in 1999 that the CEAS should include ‘a clear and workable method’ for determining the Member State responsible for the examination of an asylum application. Recital (5) clarifies that ‘such a method should be based on objective, fair criteria both for the Member States and for the persons concerned’. It further clarifies that:

It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection.

The CJEU has highlighted the importance of the ‘objective of speed’<sup>(91)</sup> in its *CK and others* judgment.

The Dublin system, of which that regulation forms part, seeks, as is apparent from recitals 4 and 5 thereof, to make it possible, in particular, to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of processing applications for international protection expeditiously<sup>(92)</sup>.

The CJEU has furthermore reiterated that the efficiency of the system is dependent on a rapid determination of responsibility<sup>(93)</sup>. The rapidity and efficiency of the determination process are therefore to be seen as the primary focus of the Dublin III regulation. Article 3 on ‘Access to the procedure for examining an application for international protection’ is to be interpreted in line with this overarching objective. Nonetheless, the judicial protection of certain rights of applicants under the Dublin system, including the EU charter, should not ‘be sacrificed to the requirement of expedition in processing asylum applications’<sup>(94)</sup>.

Access to the procedures for granting international protection is to be understood in accordance with the APD (recast). Article 3(3) of the Dublin III regulation provides that ‘[a]ny Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in [the APD (recast)]’. This means that any Member State may declare an application inadmissible under Article 33(2)(c) APD (recast) and may send an applicant to a safe third country as defined in Article 38 (and 39) APD (recast)<sup>(95)</sup>. The CJEU has clarified in the case of *Mirza* that Article 3(3) of the Dublin III regulation may be applied by any Member State regardless of whether it is responsible for examining the application pursuant to the rules of the Dublin III regulation<sup>(96)</sup>. Article 3(3) of the Dublin III regulation may therefore be applied before or after responsibility under the Dublin III regulation has been determined.

<sup>(90)</sup> European Council, *Tampere Conclusions*, see fn 7, para. 13.

<sup>(91)</sup> This is the wording used by the CJEU in *K*, see fn 87, to described the necessity of a rapid responsibility determination procedure. See CJEU, *op. cit.*, fn. 87, para. 49.

<sup>(92)</sup> See regarding the Dublin III regulation: CJEU, *CK and others*, see fn 33, para. 57, and CJEU, *Ghezelbash*, see fn 78, para. 42. See also regarding the Dublin II regulation: CJEU, Grand Chamber, judgment of 10 December 2013, Case C-394/12, *Shamsa Abdullahi v Bundesasylamt*, EU:C:2013:813, para. 59.

<sup>(93)</sup> See CJEU, *Ghezelbash*, see fn 78, para. 42. See also regarding the Dublin II regulation: CJEU, *Abdullahi*, see fn 92, para. 59: ‘Lastly, one of the principal objectives of Regulation No 343/2003 is — as can be seen from Recitals (3) and (4) in the preamble thereto — the establishment of a clear and workable method for determining rapidly the Member State responsible for the processing of an asylum application so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications’. See also with a view to Dublin procedures that take ‘an unreasonable length of time’: CJEU, *Puid*, see fn 84, para. 35 and CJEU *NS and others*, see fn 33, para. 108: ‘The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003’.

<sup>(94)</sup> See on the Dublin II regulation: CJEU, judgment of 19 January 2009, Case C-19/08, *Petrosian*, EU:C:2009:41, para. 48. In CJEU, *Ghezelbash*, see fn 78, paras 56 and 57, the Court held that this ‘finding applies, a fortiori, with regard to [the Dublin III regulation], as the EU legislature significantly enhanced, by that regulation, the procedural safeguards granted to asylum seekers under the Dublin system’.

<sup>(95)</sup> See also CJEU, judgment of 17 March 2016, Case C-695/15 PPU, *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal*, EU:C:2016:188, para. 68: The Dublin system ‘seeks to guarantee a first instance decision in line with the APD’.

<sup>(96)</sup> CJEU, *Mirza*, see fn 95, para. 42.

### 3.1.3. Territorial scope

All EU Member States and the four associated states (Iceland, Liechtenstein, Norway and Switzerland) are bound by the Dublin III regulation. The four associated states also participate in the implementation of the Dublin system as illustrated in Table 10 below. Three Member States (Denmark, Ireland and the UK) have a special position regarding measures under Title V of the TFEU conferred on them by protocols<sup>(97)</sup>. Ireland and the UK opted to take part in the adoption and application of the Dublin III regulation under Article 3 of Protocol No 21<sup>(98)</sup> (recital (41)). Although Denmark did not take part in the adoption of the Dublin III regulation (recital (42)), it has in accordance with Article 4(1) of Protocol No 22<sup>(99)</sup> decided to apply the Dublin III regulation<sup>(100)</sup>.

**Table 10: Adoption of the Dublin III regulation by Denmark, Ireland, the UK and the associated states**

	Dublin III	Legal basis
Denmark	✓	National law entered into force on 1 January 2014 — based on Article 4(2) of Protocol No 22
Ireland	✓	Opted in (recital (41))
UK	✓	Opted in (recital (41))
Iceland and Norway	✓	2014 — based on an agreement concluded in 2001 <sup>(101)</sup>
Liechtenstein	✓	National law amended in 2015 (full transposition as of 1 March 2015) — based on a 2008 Protocol <sup>(102)</sup>
Switzerland	✓	National law amended in 2015 (full transposition as of 1 July 2015) — based on a 2004 agreement <sup>(103)</sup>

### 3.1.4. Personal and material scope

The key terms of the Dublin III regulation are defined in Article 2. These terms also define the scope of application of the regulation. These definitions are aligned with the definitions in the other second-phase legal instruments of the CEAS, including the QD (recast), the RCD (recast) and the APD (recast) as well as with the Eurodac regulation (recast).

<sup>(97)</sup> See Section 1.1 above and *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, Section 1.4., pp. 18 and 19.

<sup>(98)</sup> Protocol no 21 on the position of the UK and Ireland, see fn 17.

<sup>(99)</sup> Protocol No 22 on the position of Denmark, see fn 16. The participation of Denmark in the Dublin system as a whole is based on a 2006 agreement: Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention OJ L 66, 8.3.2006, p. 38.

<sup>(100)</sup> Denmark adopted on 26 December 2013 a law amending the Aliens Law in order to implement the Dublin III regulation, LOV nr 1619 af 26/12/2013: Lov om ændring af udlændingeloven. The law entered into force on 1 January 2014.

<sup>(101)</sup> Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, OJ L 93, 3.4.2001, pp. 40-46.

<sup>(102)</sup> Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, OJ L 160, 18.6.2011, pp. 39-49.

<sup>(103)</sup> Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, OJ L 53, 27.2.2008, p. 5.

**Table 11: Key definitions regarding the scope of the Dublin III regulation**

'third-country national'	'[...] means any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU and who is not [a] national of a state which participates in this regulation by virtue of an agreement with the European Union'	Article 2(a)
'application for international protection'	'[...] means an application for international protection as defined in Article 2(h) of [the QD (recast)]' '[...] means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this directive, that can be applied for separately'	Article 2(b) & Article 2(h) QD (recast)
'applicant'	'[...] means a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken'	Article 2(c)
'beneficiary of international protection'	'[...] means a third-country national or a stateless person who has been granted international protection as defined in Article 2(a) of [the QD (recast)]'	Article 2(f)

All of these terms are autonomous EU law concepts.

The Dublin III regulation distinguishes between 'takecharge' and 'takeback' situations (Subsection 3.1.4.1) and is applicable as soon as a third-country national (Subsection 3.1.4.2) has lodged an application for international protection (Subsection 3.1.4.3) which has not led to the granting of international protection (Subsection 3.1.4.4), even if the application is later withdrawn (Subsection 3.1.4.5), as long as the pre-requisites for the application have not ceased (Subsection 3.1.4.6).

#### 3.1.4.1. 'Take charge' and 'take back'

The Dublin III regulation distinguishes between 'takecharge' and 'takeback' procedures depending on the question of whether the applicant had previously lodged an application for international protection in the Member State responsible.

If the applicant had not previously lodged an application for international protection in the Member State responsible, the rules for 'takecharge' requests apply (Articles 21 and 22) and 'the Member State responsible shall examine [...] the application for international protection made by the applicant' (Article 18(2)). If the applicant had previously lodged an application for international protection in the Member State responsible, then the appropriate procedure is a 'take-back' procedure regardless of whether the person has also lodged an application for international protection in the Member State conducting the Dublin procedure (see Articles 23 to 25).

Depending on the stage of the procedure to determine the Member State responsible, the obligations flowing from the responsibility differ. Access to an asylum procedure or an effective remedy against a negative decision by the determining authority pursuant to Article 46 of the APD must also be granted in ‘take-back’ situations (see Article 18 (2)) <sup>(104)</sup>.

#### 3.1.4.2. Third-country nationals

The definition of the term ‘third-country national’ for the purpose of the application of the Dublin III regulation has the effect that nationals of the associated states are not ‘third-country nationals’. This definition differs from the general meaning of the term of ‘third-country national’ in EU law as it excludes specific non-EU citizens, namely nationals of the associated states, from the concept of ‘third-country nationals’.

From the wording of the definition, it is also clear that stateless persons are included in the notion of ‘third-country nationals’ as the definition specifies ‘third-country nationals’ in contradistinction to ‘any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU and who is not [a] national of a state which participates in this regulation by virtue of an agreement with the European Union.’

#### 3.1.4.3. Applicants who have lodged an application for international protection

The scope of the Dublin III regulation encompasses all applicants for international protection (Article 2(b)). This is also reflected in the ‘family criteria’ for the determination of responsibility where family members of beneficiaries of international protection may be reunited with the beneficiaries of international protection <sup>(105)</sup>.

Article 20(1) Dublin III regulation states that the lodging of an application for international protection is the starting point for the Dublin procedure, while Article 20(2) specifies the moment at which the application shall be deemed to have been lodged as follows <sup>(106)</sup>.

#### Article 20(1) and 20(2) Dublin III Regulation

1. The process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State.
2. An application for international protection shall be deemed to have been lodged once a form submitted by the applicant or a report prepared by the authorities has reached the competent authorities of the Member State concerned.

<sup>(104)</sup> If the asylum application has been rejected by the Member State responsible in a final decision on the merits against which the applicant has already had an effective remedy, the Member State responsible is not obliged to grant access to a new asylum procedure or to an effective remedy under Art. 46 of the APD (recast). Access to an examination of the asylum application on the merits may in these cases be subject to the special rules for subsequent applications according to Arts 40 and 41 of the APD (recast) (see Sections 4.1.3 and 5.2.2.4 below). However, if ‘the Member State responsible had discontinued the examination of an application following its withdrawal by the applicant before a decision on the substance has been taken at first instance’ in the sense of Article 18(1)(c) of the Dublin III regulation, it is obliged to ‘ensure that the applicant is entitled to request that the examination of his or her application be completed or to lodge a new application for international protection, which shall not be treated as a subsequent application as provided for in Directive 2013/32/EU. In such cases, Member States shall ensure that the examination of the application is completed.’ (Art. 18(2), Dublin III regulation).

<sup>(105)</sup> See Arts 2(c) and 9. This criterion as well as Article 11 (former Article 14 of the Dublin II regulation) were re-worded in the Dublin III regulation ‘[i]n order to ensure equal treatment for all applicants and beneficiaries of international protection, and consistency with the current Union asylum *acquis*, in particular with Directive 2011/95/EU’ (recital (10)).

<sup>(106)</sup> On the interpretation of Article 20(2), see CJEU, *Mengesteab*, see fn 62, para 75ff.

If no application for international protection has been lodged in any Member State, the Dublin III regulation does not apply as the application of the Dublin rules ‘presuppose the existence of an asylum application which the Member State responsible must examine, is in the process of examining or on which it has already taken a decision’<sup>(107)</sup>. (See also more generally, Section 2.3 above.)

The Dublin procedure starts once an asylum application has been lodged in a Member State. This means that the start of the procedure is not dependent upon an application for international protection being lodged in the Member State conducting the Dublin procedure as long as an application had been lodged previously in another Member State that has triggered the application of the Dublin system<sup>(108)</sup>. In essence this means that the Dublin system could be applicable if the applicant has lodged an asylum application in (at least) one Member State. Moreover, the CJEU has clarified that it is not necessary for the applicant to have lodged a formal application for international protection in a Member State in order to trigger the application of the Dublin system<sup>(109)</sup>. In the *Mengesteab* case<sup>(110)</sup>, the CJEU decided the circumstances in which an application is deemed to have been lodged within the meaning of Article 20(2) Dublin III regulation. The Court held:

Article 20(2) of the Dublin III Regulation must be interpreted as meaning that an application for international protection is deemed to have been lodged if a written document, prepared by a public authority and certifying that a third-country national has requested international protection, has reached the authority responsible for implementing the obligations arising from that regulation, and as the case may be, if only the main information contained in such a document, but not that document or a copy thereof, has reached that authority<sup>(111)</sup>.

If an application is deemed to have been lodged, the date when the document reached the authority provides the starting point for calculating the time limits for lodging a take charge or a take back request to another Member State. This, therefore, also defines the point in time when the request cannot be made (any more)<sup>(112)</sup>.

#### 3.1.4.4. Beneficiaries of international protection

When someone is granted international protection, the Dublin III regulation is no longer applicable to that person, as he/she is no longer an ‘applicant’ within the meaning of the definition provided in Article 2(c) Dublin III regulation. ‘Applicant’ is defined as ‘a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken’<sup>(113)</sup>. The CJEU has ruled that the rules of ‘take-back’ procedures are therefore not applicable to cases where a beneficiary of international protection granted by one Member State applies for international protection in another

<sup>(107)</sup> CJEU, *Kastrati*, see fn 84, para. 45. This is the consequence of the wording and the purpose of the regulation.

<sup>(108)</sup> Art. 24 especially provides for a take back procedure ‘when no new application has been lodged in the requesting Member State.’

<sup>(109)</sup> According to the CJEU, *Mengesteab*, see fn 62, para. 97, a formal asylum application is not necessary to identify the starting point for a Dublin procedure as ‘a written document such as that at issue in the case in the main proceedings, prepared by a public authority and certifying that a third-country national has requested international protection, must be considered to be a ‘report’ within the meaning of Article 20(2)’. See e.g. Dutch Council of State (Raad van State), judgment of 18 January 2017, case 201608443/1/V3, NL:RVS:2017:74. In this case the applicant had claimed that Germany could not be responsible for his asylum application because he had not lodged a formal asylum application there, even though Germany had issued a certificate of registration as an asylum-seeker.

<sup>(110)</sup> CJEU, *Mengesteab*, see fn 62, paras 75ff. See also on this the opinion of Advocate General Sharpston of 20 June 2017, case 670/16, *Mengesteab*, EU:C:2017:480, paras 130-151.

<sup>(111)</sup> CJEU, *Mengesteab*, see fn 62, para. 103.

<sup>(112)</sup> *Ibid.*, para. 67, 74, 76 and 103.

<sup>(113)</sup> See CJEU, order of 5 April 2017, Case C-36/17, *Daher Muse Ahmed*, EU:C:2017:273, para. 36.

Member State <sup>(114)</sup>. The CJEU has derived this ruling mainly from the wording of Articles 23(1) and 18(1)(b)-(d) Dublin III regulation <sup>(115)</sup>. Moreover, the Court stresses that Article 33(2)(a) of the APD (recast) lists the granting of ‘international protection’ by another Member State as an inadmissibility ground that is independent of ‘cases in which an application is not examined in accordance with [the Dublin III regulation]’ (Article 33(1) APD (recast)) <sup>(116)</sup>. The CJEU has clarified that the provisions of the (then) Dublin II Regulation ‘determine, in principle exhaustively’ the situations in which the obligations of the Member State responsible may cease <sup>(117)</sup>. Where an applicant has made another application in another Member State or is on the territory of another Member State without a residence document, a Member State’s obligation to take back the applicant applies in three different scenarios:

- (i) where the applicant’s application is under examination (Article 18(1)(b));
- (ii) where the applicant has withdrawn the application under examination (Article 18(1)(c));
- (iii) where the applicant’s application has been rejected (Article 18(1)(d)).

Consequently, there is no obligation under the Dublin III regulation to take back a (former) applicant who has been granted international protection. This also applies if the application for refugee status was rejected and the person was ‘only’ granted subsidiary protection, as the decision to deny refugee status cannot be interpreted as a rejection in the sense of Article 18(1)(d) Dublin III regulation. A rejection pursuant to Article 18(1)(d) has to be interpreted as a (full) rejection of an application for international protection <sup>(118)</sup>. This also signifies that the time limits of the Dublin III regulation do not apply to procedures aimed at returning a beneficiary of international protection to another Member State <sup>(119)</sup>.

#### 3.1.4.5. Effects of a withdrawal of the application for international protection

Withdrawal is defined in Article 2(e) Dublin III regulation. It means ‘the actions by which the applicant terminates the procedures initiated by the submission of his or her application for international protection, in accordance with [the APD (recast)], either explicitly or tacitly’. In the *Kastrati* case <sup>(120)</sup>, the CJEU had ruled that, under the Dublin II regulation, the withdrawal of an ‘application for asylum’ — if it occurs prior to the acceptance of a take charge request — has the effect that the Dublin rules are no longer applicable. As a reaction to this judgment, the Dublin III regulation contains in Articles 20(5) and 18(1)(c) provisions that secure the application of the Dublin rules even after the person has withdrawn an asylum application.

<sup>(114)</sup> *Ibid.*, para. 41

<sup>(115)</sup> *Ibid.*, paras 27-32.

<sup>(116)</sup> *Ibid.*, paras 38 and 39.

<sup>(117)</sup> CJEU, *Kastrati*, see fn 84, para. 45 and CJEU, *Daher Muse Ahmed*, see fn 113, para. 41.

<sup>(118)</sup> See CJEU, *Daher Muse Ahmed*, see fn 113, paras 30-33. In this context it may be noted that the Commission proposal for the Dublin IV regulation of 4 May 2016 proposes adding an obligation to take back a person that has been granted international protection, see Dublin IV Commission Proposal, see fn 82.

<sup>(119)</sup> See CJEU, *Daher Muse Ahmed*, see fn 113, para. 42.

<sup>(120)</sup> The scope of the Dublin II regulation only covered applications for protection under the Refugee Convention.

### 3.1.4.6. Time limits

The Dublin procedure is essentially conducted in three phases.

**Phase 1: request to take charge or to take back.** The Member State of current stay checks the responsibility of another Member State and then potentially sends a request to the Member State considered responsible.

**Phase 2: reply to take charge or to take back request.** The requested Member State checks its own responsibility and then replies to the request with its decision.

**Phase 3: transfer to Member State responsible.** Where the requested Member State accepts responsibility, the Member State of current stay notifies the applicant of the transfer decision and transfers the applicant.

All three phases have time limits attached to them as set out in Table 12 which follows.

**Table 12: Time limits in Dublin procedures**

	Take charge	Take back
<b>Phase 1: Request to take charge or take back</b>		
<b>Eurodac data</b>	2 months (Article 21(1))	2 months (Articles 23(2) and 24(2))
<b>No Eurodac data</b>	3 months (Article 21(1))	3 months (Articles 23(2) and 24(2))
<b>Phase 2: Reply to takecharge or takeback request</b>		
<b>Eurodac data</b>	2 months (Article 22(1))	2 weeks (Article 25(1))
<b>No Eurodac data</b>	2 months (Article 22(1))	1 month (Article 25(1))
<b>Phase 3: Transfer to the Member State responsible</b>		
<b>Normal time limit for transfer</b>	6 months (Article 29(1))	6 months (Article 29(1))
<b>Time limit if person is imprisoned</b>	Up to 12 months (Article 29(2))	Up to 12 months (Article 29(2))
<b>Time limit if person absconds</b>	Up to 18 months (Article 29 (2))	Up to 18 months (Article 29 (2))

As to the point in time from which time limits begin to apply, the Dublin III regulation foresees different starting points.

In the case of a Eurodac hit <sup>(121)</sup>, a request to take charge or take back must be calculated from the date of receiving the Eurodac hit <sup>(122)</sup>. If the request to take charge or take back is based on evidence other than data obtained from the Eurodac system, the time limit is calculated from the date on which the application for international protection was lodged within the meaning of Article 20(2) Dublin III regulation <sup>(123)</sup>. The CJEU has furthermore clarified that Article 21(1) Dublin III regulation must be interpreted as meaning that a take charge request ‘cannot validly be made more than 3 months after the application for international protection has been lodged, even if that request is made within 2 months of receipt of a Eurodac hit within

<sup>(121)</sup> ‘Hit’ is defined in Art. 2(d) Eurodac regulation (recast), see fn 35. It ‘means the existence of a match or matches established by the Central System by comparison between fingerprint data recorded in the computerised central database and those transmitted by a Member State with regard to a person.’

<sup>(122)</sup> See Art. 21(1) subparagraph 2, 23(2) and 24(2).

<sup>(123)</sup> See Art. 21(1) and Art. 23(2) subparagraph 2.

the meaning of that article' (<sup>124</sup>). Therefore, the time limit of 3 months after an application for international protection has been lodged represents the absolute time limit within which a take charge request must be made (<sup>125</sup>).

If no application for international protection has been lodged in the Member State of stay, Article 24(2) second subparagraph provides that a request must be sent to the requested Member State 'within 3 months of the date on which the requesting Member State becomes aware that another Member State may be responsible for the person concerned.'

The time limits for replying to a request to take charge or take back run from the date the request was received according to DubliNet (<sup>126</sup>).

The starting point for calculating the time limit for a transfer from the requesting Member State to the Member State responsible is the date of acceptance of the request by the Member State responsible or the date of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27 (3) Dublin III regulation (<sup>127</sup>).

The effect of a time limit expiring is clearly stated by the Dublin III regulation. It provides that responsibility for examining the application for international protection shall lie with the Member State that has not acted within the prescribed time limit (<sup>128</sup>). In other words, non-compliance with the applicable time limit triggers the responsibility of the Member State that fails to act within the prescribed time limit (<sup>129</sup>). The binding time limits are one of the key elements furthering the aim of preventing 'asylum seekers in orbit' (<sup>130</sup>) — in other words, asylum seekers for whom no Member State takes responsibility — and the efficiency of the responsibility-determination procedure (<sup>131</sup>).

Even though the most important legal consequences of time limits expiring have been clarified by the CJEU in the *Mengesteab* case, there are still issues pending clarification (<sup>132</sup>). The CJEU has emphasised that a long Dublin procedure may infringe fundamental rights of an applicant (<sup>133</sup>). On the other hand, the automatic transfer of responsibility after a time limit has expired may infringe the right to family unity or undermine the best interests of the child, if another Member State would have been responsible under the family criteria.

If the time limit for the reply has expired, the procedure according to Article 10 Dublin implementing regulation must be followed in order to facilitate the transfer.

<sup>(124)</sup> See CJEU, *Mengesteab*, see fn 62, para. 74.

<sup>(125)</sup> See CJEU, *Mengesteab*, see fn 62, paras 67, 74, 76 and 103.

<sup>(126)</sup> See Arts 22(1) and 25(1) of the Dublin III regulation. DubliNet refers to a secure electronic network of transmission channels between the national authorities dealing with asylum applications, see Article 18 of Regulation (EC) 1560/2003 (Dublin Implementing Regulation) as amended by Commission Regulation (EU) 118/2014, see fn 82.

<sup>(127)</sup> See Art. 29(1) Dublin III regulation.

<sup>(128)</sup> See Arts 21(1) third subparagraph, 22(7), 23(3), 24(3) and 29(2) Dublin III regulation.

<sup>(129)</sup> In CJEU, *Mengesteab*, see fn 62, a case regarding the time limits for lodging a take charge request, the CJEU ruled that the periods foreseen in the regulation are binding and that an applicant may rely on the expiry of such a period in an appeal against a Dublin decision.

<sup>(130)</sup> See European Commission, Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ E 304, 30.10.2001, pp. 192-201, COM/2001/0447 final, (Dublin II Commission Proposal), p. 19.

<sup>(131)</sup> See European Commission, Dublin III Commission Proposal, see fn 88, p. 7.

<sup>(132)</sup> Pending cases addressing the issues of time limits include Case C-201/16, *Shiri v Bundesamt für Fremdenwesen und Asyl*, on which Advocate General Sharpston delivered her Opinion on 20 July 2017; a recent request by the Higher Administrative Court (Verwaltungsgerichtshof) Baden-Württemberg (Germany), decision of 15 March 2017, A 11 S 2151/16; and Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland* lodged by the Higher Administrative Court Baden-Württemberg (Germany) on 3 April 2017.

<sup>(133)</sup> See CJEU, *Puid*, see fn 84, para. 35 and CJEU *NS and others*, see fn 33, para. 108: 'The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.'

Article 28(3) Dublin III regulation provides for shortened time limits in case of detention for the purpose of transfer. It is not yet clarified whether the expiry of the time limits also leads to the transfer of the obligations as Article 28(3)(2) provides for an explicit transfer of responsibility when the requested Member State does not reply within 2 weeks. Article 28(3)(4) states that ‘Articles 21, 23, 24 and 29 shall continue to apply accordingly.’ In the *Khir Amayry* case<sup>(134)</sup>, the CJEU stated that the time limits of Article 28(3) ‘are intended to determine the period during which the transfer must be carried out and that they thus substitute, in certain circumstances, for the normal deadlines established for that purpose by Article 29(1) of that regulation’. It therefore seems clear that in detention cases the applicable time limits are to be found in Article 28(3). However, the question of which time limits apply if the person is released from detention prior to the expiry of the deadlines has not yet been clarified.

### 3.1.4.7. Cessation of responsibilities

A Member State’s responsibilities under the Dublin III regulation cease under three sets of circumstances:

- (i) where the applicant concerned has obtained a residence document from another Member State (see Articles 20(5)(2) and 19(1) Dublin III regulation);
- (ii) where he/she has left the territory of the Member States for a period of at least 3 months (see Article 20(5)(2) and 19(2) Dublin III regulation); or
- (iii) where he/she has left ‘in compliance with a return decision or removal order issued following the withdrawal or rejection of the application’ (Article 19(3) Dublin III regulation).

These circumstances are set out in Figure 8 below.

**Figure 8: Cessation-of-responsibilities provisions in Article 19 Dublin III regulation**

<b>Article 19(1)</b>	Where a Member State issues a residence document to the applicant, the obligations specified in Article 18(1) shall be transferred to that Member State.
<b>Article 19(2)</b>	The obligations specified in Article 18(1) shall cease where the Member State responsible can establish, when requested to take charge or take back an applicant or another person as referred to in Article 18(1)(c) or (d), that the person concerned has left the territory of the Member States for at least 3 months, unless the person concerned is in possession of a valid residence document issued by the Member State responsible. An application lodged after the period of absence referred to in the first subparagraph shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible.
<b>Article 19(3)</b>	The obligations specified in Article 18(1)(c) and (d) shall cease where the Member State responsible can establish, when requested to take back an applicant or another person as referred to in Article 18(1)(c) or (d), that the person concerned has left the territory of the Member States in compliance with a return decision or removal order issued following the withdrawal or rejection of the application. An application lodged after an effective removal has taken place shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible.

<sup>(134)</sup> CJEU, judgment of 13 September 2017, Case C-60/16, *Mohammad Khir Amayry v Migrationsverket*, EU:C:2017:675, para. 54.

### 3.2. Other applicable law related to the Dublin III regulation

The interrelationship between the Dublin III regulation and other applicable sources of law is extensively mentioned in the recitals. For the operation of the Dublin system, the Eurodac regulation (recast) and the Dublin implementing regulation contain provisions that are directly relevant for every Dublin procedure. The Eurodac regulation (recast) is mentioned in recitals (29) and (30) as well as in Articles 4, 13, 17, 21, 23, 24, 34, 46 and 49. The Dublin implementing regulation is mentioned in recitals (24) and (37) as well as in Articles 17, 31, 47, 48 and in the correlation table (Annex II). It has also been amended by [Commission Implementing Regulation 118/2014](#) <sup>(135)</sup> in order to reflect and incorporate the changes made by the Dublin III regulation. Information sharing, data processing and data protection have to be in line with the recently changed European rules on data protection (i.e. with the [General Data Protection Regulation](#) <sup>(136)</sup>). The Dublin III regulation mentions the previous [Data Protection Directive \(Directive 95/46/EC\)](#) <sup>(137)</sup> in this regard in recitals (26) and (27) as well as in Article 34 (on information sharing) and Article 38 (on data protection and data security). There is also a necessity to apply these rules with regard to the application of the Eurodac regulation (recast) and the Dublin implementing regulation.

According to the recitals, the RCD (recast) should apply to the Dublin procedure (recital (11) and Article 49) and the APD (recast) should additionally apply (mentioned in recital (12) and Articles 2(d) and (e), 3, 6, 18 and 49). The application of both directives is subject to limitations. This approach aims at stronger alignment of the application of the Dublin procedure to the CEAS as a whole and is also reflected by the fact that the QD (recast) is mentioned in recital (10) and in Article 2(b), (d) and (f).

With regard to detention for the purpose of transfer, Articles 9 to 11 of the RCD (recast) are incorporated into Article 28(4) Dublin III regulation. Furthermore, the detention decision must be in line with the EU charter, especially with its Articles 4, 6 <sup>(138)</sup> and 7, and the respective jurisprudence of the ECtHR on the corresponding rights contained in Articles 3, 5 <sup>(139)</sup> and 8 <sup>(140)</sup> of the ECHR <sup>(141)</sup>.

Regarding the protection of fundamental rights, the application of the Dublin III regulation must — at least — be fully in accordance with the EU charter. The charter is mentioned in recitals (13), (14), (19), (21) and (39) as well as in Article 3(2) in relation to the protection granted under Article 4 of the charter. The Dublin III regulation also refers to the obligations of the Member States ‘under instruments of international law’ in recital (32) and very explicitly refers to the Refugee Convention and the principle of *non-refoulement* in recital (3), as well as to the ECHR and case-law of the ECtHR in recitals (14) and (32). In relation to the rights of children, the United Nations Convention on the Rights of the Child (UN CRC) is specifically mentioned in recital (13).

<sup>(135)</sup> Commission Implementing Regulation, see fn 82.

<sup>(136)</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, pp. 1-88, was adopted in April 2016 and will fully enter into force in May 2018.

<sup>(137)</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, pp. 31-50. The Data Protection Directive was repealed by Art. 94 of the General Data Protection Regulation.

<sup>(138)</sup> See CJEU, judgment of 15 March 2017, Case C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor and others*, EU:C:2017:213, paras 36 and 37, as well as CJEU, *Khir Amayry*, see fn 134, paras 43-49.

<sup>(139)</sup> See CJEU, *Al Chodor*, see fn 138, paras 37-39.

<sup>(140)</sup> See on a violation of Art. 8 ECHR by a detention order that separated parents from their children; Federal Court (Bundesgericht/Tribunal fédéral) (Switzerland), judgment of 26 April 2017, joined cases *2C\_1052/2016 and 2C\_1053/2016*, consideration 4.

<sup>(141)</sup> See CJEU, *Al Chodor*, see fn 138, para. 38.

It follows from this broad incorporation of fundamental rights protection in the recitals of the Dublin III regulation that a human rights-based approach is necessary in all Dublin procedures. In recital (39) this purpose of the Dublin III regulation is explicitly highlighted in very broad and all-encompassing terms.

### Recital 39 Dublin III Regulation

This Regulation respects the fundamental rights and observes the principles which are acknowledged, in particular, in the Charter of Fundamental Rights of the European Union. In particular, this regulation seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the charter as well as the rights recognised under Articles 1, 4, 7, 24 and 47 thereof. This regulation should therefore be applied accordingly.

The articles of the EU charter mentioned in recital (39) are also the most important reference points for jurisprudence regarding the Dublin procedure. Several CJEU judgments on Dublin issues highlight the importance of the EU charter in general and explain its specific relevance for Dublin procedures <sup>(142)</sup>.

## 3.3. Right to information and a personal interview

Articles 4 and 5 as well as recital (18) Dublin III regulation mention the right to information and a personal interview. These two articles were not contained in the Dublin II regulation and should be interpreted in conjunction with the right to a defence <sup>(143)</sup> and the right to good administration <sup>(144)</sup>, both of which are general principles of European Union law <sup>(145)</sup>. The right to be heard is embedded in both general principles <sup>(146)</sup>. Both Articles 4 and 5 are mentioned by the CJEU as forming an integral part of the ‘enhanced [...] rights and mechanisms guaranteeing the involvement of asylum seekers in the process for determining the Member State responsible’ <sup>(147)</sup>.

### 3.3.1. Right to information

The applicant’s right to information as set out in Article 4 Dublin III regulation is a central prerequisite for the guarantee of procedural fairness. It provides that, as soon as an application for international protection is lodged within the meaning of Article 20(2) Dublin Regulation in a Member State, the competent authorities must inform the applicant of the application of the Dublin III regulation. Article 4(1)(b) requires that the applicant be informed, inter alia, of the following.

<sup>(142)</sup> See e.g. CJEU, *Ghezelbash*, see fn 78, para. 32 and 37; CJEU, *Al Chodor*, see fn 138, paras 36-37; CJEU, *Khira Amayry*, see fn 134, para. 43 to 49 and CJEU, *CK and others*, see fn 33, paras 65-69.

<sup>(143)</sup> The right to defence is rooted in Arts 47 and 48 of the charter, see inter alia CJEU, judgment of 22 November 2012, case 277/11, *MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2012:744, para. 81, CJEU, judgment of 5 November 2014, Case C-166/13, *Sophie Mukarubega v Préfet de police and Préfet de la Seine-Saint-Denis*, EU:C:2014:2336, para. 43 as well as the case-law cited in both cases.

<sup>(144)</sup> See Art. 41(2) of the charter. The right to good administration is by its wording limited to institutions and bodies of the EU (Art. 41(1) of the charter). Nevertheless, the CJEU has also used it as part of an argument as to why the right to be heard also matters for Member States, see CJEU, *MM*, see fn 143, paras 82 and 83. See also CJEU, *Mukarubega*, see fn 143, paras 44 and 45.

<sup>(145)</sup> See also *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, Subsection 3.4.1, pp. 71ff.

<sup>(146)</sup> See, CJEU, *Mukarubega*, see fn 143, paras 42, 43 and 46.

<sup>(147)</sup> See CJEU, *Ghezelbash*, see fn 78, para. 46.

### Article 4(1)(b) Dublin III Regulation

The criteria for determining the Member State responsible, the hierarchy of such criteria in the different steps of the procedure and their duration, including the fact that an application for international protection lodged in one Member State can result in that Member State becoming responsible under this regulation even if such responsibility is not based on those criteria <sup>(148)</sup>.

Article 4(1) Dublin III regulation further requires that the applicant be provided with information on, in particular:

- the objectives of the Dublin III regulation;
- the personal interview;
- the possibility to challenge a transfer decision (and, where applicable, to apply for a suspension of the transfer);
- the fact that data on him/her may be exchanged by the competent authorities of Member States; and
- on the right of access to personal data in specified circumstances, the right to request correction or deletion of personal data, and the procedures for exercising those rights.

The information shall be provided in writing ‘in a language that the applicant understands or is reasonably supposed to understand’ and where necessary for the proper understanding, the information shall also be supplied orally (Article 4(2) Dublin III regulation). The information is supplemented by the common leaflets contained in the annexes of the Commission Implementing Regulation as foreseen in Article 4(3) Dublin III regulation.

Provisions of Article 4 of the Dublin III regulation relevant to the right to information are set out in Table 13 below.

**Table 13: Right to information pursuant to Article 4 Dublin III regulation**

<b>Making a secondary application or moving to another Member State</b>	‘[T]he objectives of this regulation and the consequences of making another application in a different Member State as well as the consequences of moving from one Member State to another during the phases in which the Member State responsible under this regulation is being determined and the application for international protection is being examined’.	Article 4(1)(a)
<b>Determining the Member State responsible</b>	‘[T]he criteria for determining the Member State responsible, the hierarchy of such criteria in the different steps of the procedure and their duration, including the fact that an application for international protection lodged in one Member State can result in that Member State becoming responsible under this regulation even if such responsibility is not based on those criteria’.	Article 4(1)(b)
<b>Personal interview</b>	‘[T]he personal interview pursuant to Article 5 and the possibility of submitting information regarding the presence of family members, relatives or any other family relations in the Member States, including the means by which the applicant can submit such information’.	Article 4(1)(c)

<sup>(148)</sup> Art. 4(1)(b), see also CJEU, *Ghezelbash*, see fn 78, para. 47.

<b>Challenging a decision</b>	'[T]he possibility to challenge a transfer decision and, where applicable, to apply for a suspension of the transfer'.	Article 4(1)(d)
<b>Exchanging personal data</b>	'[T]he fact that the competent authorities of Member States can exchange data on him or her for the sole purpose of implementing their obligations arising under this regulation'.	Article 4(1)(e)
<b>The right of access to personal data</b>	'[T]he right of access to data relating to him or her and the right to request that such data be corrected if inaccurate or be deleted if unlawfully processed, as well as the procedures for exercising those rights, including the contact details of the authorities referred to in Article 35 and of the national data protection authorities responsible for hearing claims concerning the protection of personal data.'	Article 4(1)(f)

### 3.3.2. Personal interview

In addition to the right to information contained in Article 4, Article 5(1) of the Dublin III regulation contains an obligation for the determining Member State to conduct a personal interview with the applicant ('Dublin personal interview'). According to Article 5(1), the objective of the Dublin personal interview is twofold. On the one hand, the interview is meant to 'facilitate the process of determining the Member State responsible', as the information gathered should help to establish the relevant facts for determining responsibility. On the other hand, the interview 'shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 4'. With its focus on information that is relevant for the determination of the Member State responsible, the personal interview provided for under the Dublin III regulation is different in scope and focus from the personal interview on the substance of the application for international protection provided for by Article 14 APD (recast).

The Dublin personal interview may only be omitted if 'the applicant has absconded' or if 'after having received the information referred to in Article 4, the applicant has already provided the information relevant to determine the Member State responsible by other means.' (Article 5(2) Dublin III regulation).

The Dublin personal interview must:

- 'take place in a timely manner and, in any event, before any decision is taken to transfer the applicant to the Member State responsible [...]' (Article 5(3));
- 'be conducted in a language that the applicant understands or is reasonably supposed to understand and in which he or she is able to communicate' <sup>(149)</sup>, where necessary with the assistance of an 'interpreter who is able to ensure appropriate communication between the applicant and the person conducting the personal interview' (Article 5(4));
- 'take place under conditions which ensure appropriate confidentiality' (Article 5(5));
- 'be conducted by a qualified person under national law' (Article 5(5)).

The Member State conducting the Dublin personal interview must make a written summary containing 'at least the main information supplied by the applicant at the interview' and the Member State shall 'ensure that the applicant and/or legal advisor or other counsellor who is representing the applicant have timely access to the summary' (Article 5(6)).

<sup>(149)</sup> This language standard is normally employed concerning the right to information. It is less favourable than the standard contained in Art. 15(3)(c) APD (recast) according to which Member States shall ensure communication takes place 'in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly'.

The CJEU describes the proceedings for the personal interview in the following terms.

Article 5(1), (3) and (6) [Dublin III Regulation] provides that the Member State carrying out the determination of the Member State responsible must, in a timely manner and, in any event, before a transfer decision has been taken, conduct a personal interview with the asylum seeker and ensure that the applicant or the counsellor representing him has access to a written summary of the interview. Pursuant to Article 5(2) of the regulation, the interview does not have to take place if the applicant has already provided the information relevant to the determination of the Member State responsible and, in that case, the Member State in question must give the applicant the opportunity to present any further information which may be relevant for the correct determination of the Member State responsible before a decision is taken to transfer the applicant <sup>(150)</sup>.

This obligation to conduct an interview is closely linked to both the right to information (Article 4) and the right to an effective remedy (Article 27) <sup>(151)</sup>. In line with general principles of EU law, Article 5 must be interpreted as giving the applicant the right ‘to make known his views effectively’ during the interview <sup>(152)</sup>.

### 3.4. Procedural guarantees applying to minors

If the applicant is a minor, his or her best interests need to be taken into account as a primary consideration with respect to all procedures provided for in the Dublin III regulation (Article 6(1) Dublin III regulation). The CJEU has stated with regard to transfers of unaccompanied minors under the Dublin II regulation that ‘the effect of Article 24(2) of the [EU] charter, in conjunction with Article 51(1) thereof, is that the child’s best interests must also be a primary consideration in all decisions adopted by the Member States’ <sup>(153)</sup>. The consideration of ‘the best interests of the child’ contained in Article 6 Dublin III regulation also includes the right to information and the right to be heard for minors <sup>(154)</sup>. Article 6(3) sets out the factors that need ‘in particular’ to be taken into account:

#### Article 6(3) Dublin III Regulation

In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:

- (a) family reunification possibilities;
- (b) the minor’s well-being and social development;
- (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
- (d) the views of the minor, in accordance with his or her age and maturity.

<sup>(150)</sup> CJEU, *Ghezelbash*, see fn 78, para. 48.

<sup>(151)</sup> *Ibid.*, para. 53.

<sup>(152)</sup> See CJEU, *Mukarubega*, see fn 143, para. 46: ‘The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely’.

<sup>(153)</sup> See CJEU, *MA and others*, see fn 84, para. 59.

<sup>(154)</sup> Art. 6(1) states that ‘best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.’ Whereas Art. 6(3)(d) provides in accordance with Art. 12 CRC for the necessity to take due account of ‘the views of the minor, in accordance with his or her age and maturity’. The right to information is mainly to be guaranteed by the standard form foreseen in Art. 6(5), see Annex VIII of the Commission Implementing Regulation. See also Subsection 4.2.8 below on guarantees for unaccompanied minors under the APD (recast) and, for minors in general, UN Committee on the Rights of the Child, *General Comment No 12 — the right of the child to be heard*, UN Doc. CRC/C/GC/12, 1 July 2009.

These factors also need to be taken into account by members of courts and tribunals when deciding whether a transfer decision regarding a minor is legal.

These factors were also decisive when the ECtHR decided on the *Tarakhel* case concerning an Afghan family with four minor children. In this case, the ECtHR ruled that there would be a violation of Article 3 ECHR if the applicants were ‘to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together’<sup>(155)</sup>.

Moreover, Article 6 Dublin III regulation provides for several additional guarantees and actions to be taken for unaccompanied minors. These guarantees are contained in Article 6(2) which provides that Member States must ensure that a representative represents and/or assists an unaccompanied minor ‘with respect to all procedures provided for in this regulation’. This representative needs to have the necessary ‘qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this regulation.’ The representative must have ‘access to the content of the relevant documents in the applicant’s file including the specific leaflet for unaccompanied minors.’ According to Article 6(4) Dublin III regulation, the Member State conducting the Dublin procedure is required, as soon as possible, to ‘take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child’ in order to identify the Member State responsible for the examination of the application for international protection.

Article 8 Dublin III regulation provides for the criterion that in principle regulates most of the cases of unaccompanied minors. The principle contained in Article 8(1) is that the Member State responsible is that ‘where a family member or a sibling of the unaccompanied minor is legally present’. Article 8(1) also stipulates how this principle is applied in the case of married minors whose spouse is not legally present on the territory of the Member States. In this case, the Member State responsible is that ‘where the father, mother or other adult responsible for the minor, whether by the law or by the practice of that Member State, or sibling is legally present.’ Article 8(2) provides that ‘where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her’ that Member State shall unite the minor with his or her relative and shall be the Member State responsible’. The application of both provisions is contingent on the best interests of the child, which is also decisive if there is more than one possible Member State responsible (Article 8(3) Dublin III regulation).

Article 8(4) Dublin III regulation prescribes that in the absence of a family member, a sibling or a relative as referred to in Article 8(1) and (2), the Member State responsible is that ‘where the unaccompanied minor has lodged his or her application for international protection, provided that is in the best interests of the minor’. In *MA and others*, the CJEU, with regard to the second paragraph of Article 6 of the Dublin II regulation, stated that ‘where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the

<sup>(155)</sup> See ECtHR, Grand Chamber, judgment of 4 November 2014, *Tarakhel v Switzerland*, application no 29217/12, para. 122.

“Member State responsible”<sup>(156)</sup>. In a statement by the Council, the European Parliament and the Commission contained in the Dublin III regulation<sup>(157)</sup>, the Commission was invited to consider a revision of Article 8(4) Dublin III regulation in light of the *MA and others* judgment<sup>(158)</sup>. This also signifies that it is not clear how to proceed if an unaccompanied minor has already received a decision rejecting his/her asylum application by a Member State other than the Member State of current stay<sup>(159)</sup>.

In this respect, Article 2 Dublin III regulation provides a series of relevant definitions, as set out in Table 14 below. (These definitions are also relevant in the context of implementing the hierarchy of criteria for determining the Member State responsible for examining the application for international protection as discussed in Subsection 3.6.2 below.)

**Table 14: Definitions concerning family members and others**

<b>‘family members’</b>	‘[...] means, insofar as the family already existed in the country of origin, the following members of the applicant’s family who are present on the territory of the Member States: — the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals, — the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law, — when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present, — when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present’.	Article 2(g)
<b>‘relative’</b>	‘[...] means the applicant’s adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law’.	Article 2(h)
<b>‘minor’</b>	‘[...] means a third-country national or a stateless person below the age of 18 years’.	Article 2(i)
<b>‘unaccompanied minor’</b>	‘[...] means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Member States’.	Article 2(j)

<sup>(156)</sup> See CJEU, *MA and others*, see fn 84, para. 66.

<sup>(157)</sup> See OJ L 180, 29.6.2013, p. 59.

<sup>(158)</sup> However, the respective Commission proposal (see European Union, European Commission’s Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State, COM(2014) 382 final of 26 June 2014) has not yet been adopted.

<sup>(159)</sup> In this regard, the judgment is not entirely clear as it does prohibit transfers without clearly stating what status these unaccompanied minors (with a rejected asylum application) should receive, see CJEU, *MA and others*, see fn 84, paras 63 and 64.

## 3.5. Obligations of applicants

### 3.5.1. (No) obligation to apply for international protection in a particular Member State

There is no legal provision obliging those who wish to apply for international protection to make their application in the Member State of first entry or in any other particular Member State. However, if a person chooses to request protection from a Member State, which is considered an application for international protection pursuant to Article 2(h) QD (recast), then in accordance with Articles 20(1) and (2) Dublin III regulation, the Dublin process is to start as soon as the application is lodged or is deemed to be lodged<sup>(160)</sup>. The circumstance may arise in which a person who is illegally present on the territory is apprehended by the authorities of a Member State, but he/she chooses not to request protection from that Member State because he/she intends to apply for international protection in another Member State. In such a situation, Member States may verify whether the person has already lodged an application for international protection in another Member State. If the person has not already lodged an application in another Member State, the mere expression of a wish to lodge an application in another Member State does not constitute the lodging of an application according to Article 20 Dublin III regulation and, therefore, does not trigger the start of the Dublin procedure. However, the Dublin system must not limit access to the asylum procedure, since one of its overarching aims is to prevent ‘asylum seekers in orbit’, in other words, asylum seekers for whom no Member State takes responsibility. Therefore, it may be inferred that the Member State where the person is present is obliged to inform the person about his/her situation including the operation of the Dublin system and should offer the possibility of lodging an application for international protection.

### 3.5.2. Obligation on Member States to take fingerprints under the Eurodac regulation (recast)

The question of fingerprinting has been a seminal one since the beginning of the application of the Eurodac regulation. The obligation to fingerprint under the Eurodac regulation (recast) is provided for in two situations.

- (1) If a person lodges an application for international protection (Article 9 Eurodac regulation (recast)); or
- (2) If a person is apprehended in connection with an irregular entry (Article 14 Eurodac regulation (recast)).

The taking of fingerprints is an obligation that lies with the Member State. The Eurodac database is a tool to facilitate the determination of the Member State responsible (Article 1 Eurodac regulation (recast)). Neither the Eurodac regulation (recast) nor the Dublin III regulation explicitly stipulates that an applicant is obliged to provide fingerprints. However, the APD (recast) has been regarded by some national courts as implying that there is an obligation to provide fingerprints. It provides that if an applicant refuses to comply with an obligation to have his/her fingerprints taken, the examination of the application can be accelerated or conducted at the border (Article 31(8)(i) APD (recast)). Courts in some Member States have regarded this provision read together with the general rules of the APD (recast) as a sufficient basis to construe an

<sup>(160)</sup> See CJEU, *Mengesteab*, see fn 62, paras 75-103.

obligation of the applicant to provide (analysable) fingerprints in the asylum procedure <sup>(161)</sup>. Certain obligations of applicants are also contained in Article 13 APD (recast) and a failure to fulfil those obligations may have the consequence that the examination procedure is ended without a substantive examination (Article 28 APD (recast)) or is accelerated and/or conducted at the border or in a transit zone (Article 31(8)(c) APD (recast)). Whether the obligation for Member States to take fingerprints is also applicable in a situation where the person is not apprehended in connection with an irregular entry (and does not lodge an asylum application) is an open question.

### 3.5.3. Cooperation in establishing the Member State responsible: provision of information in the ‘Dublin personal interview’

Article 5 Dublin III regulation is concerned with the ‘Dublin personal interview’. The scope of this interview is confined to information relevant to the Dublin procedures <sup>(162)</sup>. In the *Ghezelbash* case <sup>(163)</sup>, the CJEU states that the Dublin personal interview, pursuant to Article 5, provides an opportunity for the applicant to also submit relevant information. It holds that the EU legislature ‘decided to involve asylum seekers in that process by obliging Member States to inform them of the criteria for determining responsibility and to provide them with an opportunity to submit information relevant to the correct interpretation of those criteria’. Moreover, the *Ghezelbash* judgment clarifies that the **authorities** are obliged to take into account any information provided by the applicant <sup>(164)</sup>. An obligation to cooperate may be imposed by the Member States on applicants under Article 13 APD (recast), if ‘such obligations are necessary for the processing of the application’ <sup>(165)</sup>.

### 3.5.4. Presence and availability to the authorities

There is no explicit obligation under the Dublin III regulation for the applicant to be present and available to the authorities once the Member State has issued its decision to transfer an applicant. It is nevertheless clear from the rules governing transfers and administrative detention that the Member State has the possibility to use administrative detention pursuant to Article 28(2) Dublin III regulation if there is a ‘significant risk of absconding’ <sup>(166)</sup>. Article 2(n) Dublin III regulation explicitly states that ‘risk of absconding’ means ‘the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure

<sup>(161)</sup> See e.g. Federal Administrative Court (Bundesverwaltungsgericht) (Germany), judgment of 5 September 2013, case 10 C 1.13, DE:BVVerw-G:2013:050913U10C1.13.0. The decision refers mainly to the obligations of the applicants under the APD. Under German national law if a person does not pursue the application, there is a possibility for the authorities to end the asylum procedure without a substantive examination of the request (Arts 32 and 33 of the German Asylum Act). It is seen as a lack of interest in the procedure if the person does not provide analysable fingerprints. Legally the non-provision of fingerprints is seen as an abandonment of the procedure. See also Council of State (the Netherlands), judgment of 7 September 2012, case 201104630/1/V1, NL:RVS:2012:396. This unpublished case concerned an applicant who manipulated his fingertips in such a way that no fingerprints could be taken. The Council of State ruled that by this manipulation (apart from not submitting any documents, etc.) he made it impossible for the secretary of state to assess the need for protection based on objective materials such as fingerprints and written materials. Since this behaviour was attributable to the applicant, the secretary of state was right to reject the claim for protection.

<sup>(162)</sup> Subsection 3.3.2 above on the personal interview.

<sup>(163)</sup> See CJEU, *Ghezelbash*, see fn 78, para. 51.

<sup>(164)</sup> See *ibid.*, para. 53: ‘Thus, the requirements laid down in Article 5 of the regulation to give asylum seekers the opportunity to provide information to facilitate the correct application of the criteria for determining responsibility laid down by the regulation and to ensure that such persons are given access to written summaries of interviews prepared for that purpose would be in danger of being deprived of any practical effect if it were not possible for an incorrect application of those criteria — **failing, for example, to take account of the information provided by the asylum seeker** — to be subject to judicial scrutiny.’ (Emphasis added).

<sup>(165)</sup> Article 13(1) reads: ‘Member States shall impose upon applicants the obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) [‘relevant relatives’, ‘countries and places of previous residence’, ‘previous asylum applications’, ‘travel routes’, ‘travel documents’] Member States may impose upon applicants other obligations to cooperate with the competent authorities insofar as such obligations are necessary for the processing of the application.’

<sup>(166)</sup> Art. 28(2), see on this requirement e.g. Federal Court (Switzerland), judgment of 2 May 2016, case 2C\_207/2016, consideration 4, and Federal Court of Justice (Bundesgerichtshof) (Germany), order of 7 July 2016, case V ZB 21/16, DE:BGH: 2016:070716BVZB21.16.0, para. 5.

may abscond'. Since those criteria have not been established either by that regulation or in another EU legal act, they must be established by national law through a binding provision of general application and applied on a case-by-case basis <sup>(167)</sup>. However, Article 28 Dublin III regulation provides a basis to detain only if the detention decision 'is proportional and other less coercive alternative measures cannot be applied effectively'. This might be a basis for Member States to introduce reporting requirements or restrictions to the freedom of movement. It must be recalled that Article 28(2) read in conjunction with Article 2(n) Dublin III regulation provides for a limitation on the exercise of the fundamental right to liberty enshrined in Article 6 of the EU charter <sup>(168)</sup>. If the applicant has not been ordered to be present and informed of the exact date and time for the scheduled transfer, there is no legal basis obliging him/her to be present and available at the place of residence. A duty to remain available during the transfer phase would constitute a restriction on his/her freedom of movement that would need to be justified in light of the right of freedom of movement as provided for by Article 2 of Protocol 4 ECHR or the right to liberty contained in Article 6 of the EU charter.

### 3.5.5. Obligation to comply with a transfer decision

The basic principle is that a person must comply with an order by the state which has jurisdiction over him/her. The person concerned is therefore obliged to comply with the decision, once the decision is final and properly notified to him/her. As no person should be asked to violate the law in order to comply with the decision, the person concerned must be given the possibility of complying with the decision without violating the immigration laws of other Member States by entering their territory illegally. In this regard Article 7(2) Dublin implementing regulation sets out the provision of a *laissez-passer* <sup>(169)</sup> for applicants in order to facilitate the transfer and Article 8(1) of the same regulation obliges the transferring Member State to allow for the transfer to take place 'as quickly as possible' <sup>(170)</sup>. If the person does not comply with the transfer decision, the transferring Member State has the right to enforce the transfer and to use administrative detention (Article 28 Dublin III regulation). The actions of the Member State in this regard must be proportionate and the Member State is obliged according to Article 29(1) Dublin III regulation to ensure that transfers 'are carried out in a humane manner and with full respect for fundamental rights and human dignity'. According to the wording of Article 30(3) Dublin III regulation, the costs of the transfer 'by his or her own means' are to be borne by the transferring Member State.

### 3.6. Legality of a transfer decision

According to Article 27(1) Dublin III regulation, a person subject to a transfer decision has 'the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision'. (See also Section 3.8 below on legal remedies.)

The subsections below deal with the grounds upon which a transfer decision might be challenged on appeal.

<sup>(167)</sup> CJEU, *Al Chodor*, see fn 138, paras 28, 34 and 45. See also Council for Aliens Law Litigation (Raad Voor Vreemdelingenbetwistingen/Conseil du contentieux des étrangers) (Belgium), judgment of 15 February 2017, *Case 182 277* holding that ascertaining whether a person has absconded requires an individual assessment and may not be inferred from the sole fact that the person was not present in the accommodation or has changed residence.

<sup>(168)</sup> CJEU, *Al Chodor*, see fn 138, para. 36.

<sup>(169)</sup> The specimen *laissez-passer* is to be found in Annex IV of the Commission Implementing Regulation (see fn. 82).

<sup>(170)</sup> Art. 8(1) Dublin implementing regulation states: 'It is the obligation of the Member State responsible to allow the asylum seeker's transfer to take place as quickly as possible and to ensure that no obstacles are put in his way'.

### 3.6.1. Potential violations of Article 4 of the EU charter

In accordance with the settled case-law of the Court, the rules of secondary EU law, including the provisions of the Dublin III regulation, must be interpreted and applied in a manner consistent with the fundamental rights guaranteed by the EU charter<sup>(171)</sup>. The prohibition of torture, inhuman or degrading treatment or punishment, laid down in Article 4 of the charter, is, in that regard, of fundamental importance, to the extent that it is absolute in that it is closely linked to respect for human dignity, which is the subject of Article 1 of the charter<sup>(172)</sup>.

Article 3(2), second subparagraph, Dublin III regulation states the following.

#### Article 3(2), second subparagraph, Dublin III Regulation

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

However, the prohibition on transfers under Article 4 of the EU charter is not confined to risks which derive from the existence of systemic flaws in the asylum procedure and in the reception conditions for applicants in Member States. The CJEU ruled, in *CK and others*, that ‘even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker within the framework of [the Dublin III Regulation] can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of [Article 4 of the EU charter]’<sup>(173)</sup>. The principle of *non-refoulement* deriving from Article 3 ECHR and Article 4 of the EU charter is deemed to constitute an absolute barrier to transfers to another Member State if this would result in a risk of torture, inhuman or degrading treatment or punishment<sup>(174)</sup>. The CJEU recalled that Article 3 ECHR and Article 4 of the EU charter correspond and to that extent have the same meaning and scope, in accordance with Article 52(3) of the charter<sup>(175)</sup>. Therefore, ‘the case-law of the European Court of Human Rights relating to Article 3 of the ECHR [...] must be taken into account when interpreting Article 4 of the charter’<sup>(176)</sup>. All Dublin transfers ‘resulting in a real risk of the person concerned suffering inhuman or degrading treatment within the meaning of Article 4 of the charter’ are therefore prohibited<sup>(177)</sup>.

<sup>(171)</sup> CJEU, *CK and others*, see fn 33, para. 59.

<sup>(172)</sup> CJEU, *CK and others*, see fn 33, para. 59 and CJEU, *Aranyosi*, see fn 39, paras 85-86.

<sup>(173)</sup> CJEU, *CK and others*, see fn 33, paras 65, 92 and 93.

<sup>(174)</sup> See the landmark decisions: ECtHR, Grand Chamber, judgment of 21 January 2011, *MSS v Belgium and Greece*, application no 30696/09, and CJEU, *NS and others*, see fn 33.

<sup>(175)</sup> See CJEU, *CK and others*, see fn 33, para. 67: ‘It must be recalled that the prohibition of inhuman or degrading treatment laid down in Article 4 of the charter corresponds to that laid down in Article 3 of the ECHR and that, to that extent, its meaning and scope are, in accordance with Article 52(3) of the charter, the same as those conferred on it by that convention.’

<sup>(176)</sup> See CJEU, *CK and others*, see fn 33, para. 68.

<sup>(177)</sup> See CJEU, *CK and others*, see fn 33, para. 65.

The risk of a violation of Article 4 of the charter must be fully assessed on an individual basis in line with the jurisprudence of the ECtHR<sup>(178)</sup>. It comprises both the risk of direct and of indirect ('chain') *refoulement*<sup>(179)</sup>, as well as risk arising out of the transfer itself<sup>(180)</sup>. In its *CK and others* judgment, the CJEU has ruled that a special health situation might also be relevant in this assessment. It ruled: if a 'particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in his state of health, that transfer would constitute inhuman and degrading treatment, within the meaning of [Article 4 of the EU charter]<sup>(181)</sup>.

In the past, the respective evidentiary standards and the potential effects of the principle of mutual trust had been discussed at the court level of Member States<sup>(182)</sup>. The 2017 jurisprudence of the CJEU clarifies that mutual trust may not alter the absolute nature of the protection granted by Article 3 ECHR or Article 4 of the charter<sup>(183)</sup>.

There may also be a violation of Article 4 of the charter (or Article 3 ECHR respectively) if there is no access to the asylum procedure in the Member State responsible. In *MSS v Belgium and Greece*, for instance, the ECtHR found that there was a violation by Greece with regard to Article 13 in conjunction with Article 3 ECHR because there was no access to a fair and efficient asylum procedure<sup>(184)</sup>.

The ECtHR, in its *Tarakhel* judgment, ruled that it was incumbent upon the Swiss authorities to obtain specific individual assurances from their Italian counterparts in order to prevent a breach of Article 3 ECHR by the execution of the transfer of eight Afghan nationals from Switzerland to Italy<sup>(185)</sup>. The Court based its judgment on the then state of the reception system in Italy, which resulted in the finding that 'the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded'. In such a situation, the Court emphasised that the Swiss authorities were under an obligation 'to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together'<sup>(186)</sup>. The Swiss Federal Administrative Court has ruled that such assurances are to be seen as a prerequisite for a transfer decision and need therefore to have been obtained when the decision is issued and to be subject to a review by the competent court or tribunal at the national level<sup>(187)</sup>. Therefore, the mere absence of such assurances could render the Dublin transfer decision unlawful and could be invoked by the applicant. These assurances need to be distinguished from transfer modalities and from other human rights violations during the transfer process.

<sup>(178)</sup> See CJEU, *CK and others*, see fn 33, para. 65, where the Court refers extensively to the applicable jurisprudence of the ECtHR.

<sup>(179)</sup> See in particular ECtHR, *MSS v Belgium and Greece*, see fn 174, where both aspects were highlighted.

<sup>(180)</sup> See CJEU, *CK and others*, see fn 33, para. 96, where the CJEU clarifies that a transfer that in itself would violate Art. 4 of the charter is prohibited.

<sup>(181)</sup> See CJEU, *CK and others*, see fn 33, para. 74 and its reference to the ECtHR's Grand Chamber judgment of 13 December 2016, *Paposhvili v Belgium*, application no 41738/10, para. 74.

<sup>(182)</sup> See the diverging interpretation given by the Federal Administrative Court (Germany), decision of 19 March 2014, *10B6/14*, DE:BVerwG:2014:190314B10B6.14.0 (referring to a strict interpretation of the wording of the CJEU in the *Abdullahi*, see fn 92, case) and the Supreme Court (UK), judgment of 19 February 2014, *R (on the application of EM (Eritrea)) v Secretary of State for the Home Department*, [2014] UKSC 12, promoting the general use of the 'Soering test' (see ECtHR, *Soering v UK*, see fn 43) as the relevant test. The Austrian Constitutional Court also promoted a strict adherence to the test as developed by the ECtHR, see Constitutional Court (Verfassungsgerichtshof) (Austria), judgment of 16 June 2014, *U2543/2013*, AT:VFGH:2014:U2543.2013, para. 2 of the considerations ('*Erwägungen*') of the court. Other Dublin States have developed different tests, see e.g. Federal Administrative Court (Bundesverwaltungsgericht/Tribunal administratif fédéral) (Switzerland), judgment of 16 August 2011, *D-2076/2010 (BVGE 2011/35)* asking for 'a concrete risk and serious indices' of a potential violation.

<sup>(183)</sup> See CJEU, *CK and others*, see fn 33, paras 58-65 (on the evidentiary standard).

<sup>(184)</sup> ECtHR, *MSS v Belgium and Greece*, see fn 174, paras 286ss.

<sup>(185)</sup> ECtHR, *Tarakhel v Switzerland*, see fn 155.

<sup>(186)</sup> ECtHR, *Tarakhel v Switzerland*, see fn 155, para. 120.

<sup>(187)</sup> See e.g. Federal Administrative Court (Switzerland), judgment of 12 March 2015, case E-6629/2014, *BVGE 2015/4*, E.4.3.

Where, pursuant to Article 3(2), second subparagraph of the Dublin III regulation, it is impossible to transfer an applicant to the Member State primarily designated as responsible, the ‘determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible’<sup>(188)</sup>. Whilst this is stated explicitly only with regard to cases where it is impossible to transfer the applicant due to systemic flaws in the asylum procedure and reception conditions in the Member State primarily responsible, where the transfer is not possible for other reasons which would mean that transfer would result in a risk of a violation of Article 4 EU charter, it is not excluded that the determining Member State may do likewise. It should be recalled that a Member State may choose to conduct its own examination of the application for international protection by making use of the ‘discretionary clause’ laid down in Article 17(1) of the Dublin III regulation<sup>(189)</sup>. However, in circumstances such as those at issue in *CK and others* which concerned the state of health of the asylum seeker, the CJEU held that Article 17(1), read in the light of Article 4 of the charter, cannot be interpreted as meaning that it implies an **obligation** on that Member State to make use of it in that way<sup>(190)</sup>.

Where a transfer cannot be made to any Member State on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged pursuant to Article 3(2) first subparagraph, the determining Member State shall become the Member State responsible (Article 3(2) third subparagraph, Dublin III regulation)<sup>(191)</sup>.

### 3.6.2. Application of criteria in Chapter III for determining the Member State responsible

Chapter III of the Dublin III regulation contains the applicable criteria for determining the Member State responsible for examining the application for international protection lodged by a third-country national or a stateless person. Accordingly, the Member State responsible ‘shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State’ (Article 7(2)).

There are two sets of criteria: criteria designed to protect family unity (Articles 8 to 11) and criteria relating to the responsibility of ‘the Member State which played the greatest part in the applicant’s entry into or residence on the territories of the Member States’<sup>(192)</sup> (Articles 12 to 15). These criteria are listed in summary in Table 15 below, along with references to related case-law. They are to ‘be applied in the order in which they are set out in this chapter’ (Article 7(1)).

<sup>(188)</sup> See also CJEU *NS and others*, see fn 33, para. 107: ‘the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.’

<sup>(189)</sup> See Subsection 3.6.3 below.

<sup>(190)</sup> See CJEU, *CK and others*, see fn 33, para. 88, and Subsection 3.6.3 below. For other situations when the CJEU indicated that the use of the discretionary clause could become an obligation, see the preliminary rulings in the cases of CJEU, *K*, see fn 87, para. 40, and CJEU, *Puid*, see fn 84, para. 35.

<sup>(191)</sup> See Subsection 3.6.2 which follows.

<sup>(192)</sup> See Dublin III Commission Proposal, see fn 88, pp. 5-6.

**Table 15: Hierarchical list of criteria in summary <sup>(193)</sup>****Criteria designed to protect family unity**

<b>Article 8</b>	<ul style="list-style-type: none"> <li>• Where the applicant is an unaccompanied minor, the Member State responsible is that where a family member, sibling or relative who can take care of him or her is legally present, provided it is in the best interests of the minor. In the absence of a family member, a sibling or a relative, the Member State responsible shall be that where the unaccompanied minor has lodged his/her application, provided this is in the best interests of the minor.</li> <li>• <i>MA and others</i>, 6 June 2013</li> </ul>
<b>Article 9</b>	<ul style="list-style-type: none"> <li>• Where the applicant has a family member who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State is responsible, provided the persons concerned expressed their desire in writing.</li> </ul>
<b>Article 10</b>	<ul style="list-style-type: none"> <li>• If the applicant has a family member in a Member State whose application for international protection in that Member State has not yet been the subject of a first decision regarding the substance, that Member State is responsible, provided the persons concerned expressed their desire in writing.</li> </ul>
<b>Article 11</b>	<ul style="list-style-type: none"> <li>• Where several family members and/or minor unmarried siblings apply for international protection in the same Member State simultaneously or on dates close enough for the procedures to determine Member State responsibility to be conducted together, and where the application of the Dublin criteria would lead to their being separated, the Member State responsible is that which is responsible for the applications of the largest number of family members according to the criteria, or failing this, the Member State responsible for examining the application of the oldest family member.</li> </ul>

<sup>(193)</sup> This table only contains the general rules to provide an overview. The criteria are set out in more detail below.

## Criteria related to responsibility for entry

### Article 12(1)

- Where the applicant is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for international protection. If there is more than one residence document or the document has already expired specific rules apply according to Article 12(3) and (4).
- *Ghezelbash*, 7 June 2016

### Article 12(2)

- Where the applicant is in possession of a valid visa, the Member State which issued the visa shall be responsible for examining the application for international protection. If there is more than one visa or the visa has already expired specific rules apply according to Article 12(3) and (4).

### Article 13(1)

- Where it is established, on the basis of proof or circumstantial evidence, including the data referred to in Regulation (EU) No 603/2013, that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection.
- *Slovakia and Hungary v Council*, 6 September 2017; *Jafari*, 26 July 2017; *AS* 26 July 2017.

### Article 13(2)

- When a Member State cannot or can no longer be held responsible in accordance with paragraph 1 of this article and where it is established that the applicant — who has entered the territories of the Member States irregularly or whose circumstances of entry cannot be established — has been living for a continuous period of at least 5 months in a Member State before lodging the application for international protection, that Member State shall be responsible for examining the application for international protection.

### Article 14

- If a third-country national or a stateless person enters into the territory of a Member State in which the need for him or her to have a visa is waived, that Member State shall be responsible for examining his or her application for international protection.

### Article 15

- Where the application for international protection is made in the international transit area of an airport of a Member State by a third-country national or a stateless person, that Member State shall be responsible for examining the application.

The incorrect application of these criteria in Chapter III of the Dublin III regulation for determining the Member State responsible may be challenged by way of an appeal. In this regard, the CJEU has clarified that ‘an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the regulation’ and that he/she is entitled to also bring forward evidence relevant for determining responsibility<sup>(194)</sup>. The CJEU, in *Ghezelbash*, sets out the obligations of a court or tribunal examining an appeal based on the incorrect application of the criteria as follows: the court or tribunal has ‘to verify whether the criteria for determining responsibility laid down by the EU legislature have been applied correctly’<sup>(195)</sup>.

In terms of the CJEU jurisprudence relating to these articles of the Dublin III regulation, more on the CJEU judgment in *MA and others* can be found above in Section 3.4 on procedural guarantees applying to minors, and on *Ghezelbash* in Sections 3.1.1 on establishing responsibility; 3.1.2 on access to procedures for granting international protection; 3.3 on the right to information and a personal interview; 3.5.3 on cooperation in establishing the Member State responsible: provision of information in the ‘Dublin personal interview’; and 3.8.1 on the (formal) scope of the appeal.

In addition, in the context of the large-scale arrival of asylum seekers into the Dublin area in 2015 and 2016, the CJEU has ruled on the scope of Article 13(1) in three different judgments. In *Slovakia and Hungary v Council*, the CJEU held that a derogation from Article 13(1) by a Council decision under Article 78(3) TFEU is legal if the Council decision is based on objective criteria and is not ‘manifestly inappropriate for contributing to achieving its objective’<sup>(196)</sup>. The Court also emphasised that the contested relocation decision of the Council<sup>(197)</sup> only provided for a temporary derogation of Article 13(1) under its Article 3(1)<sup>(198)</sup>. In the *Jafari* case, the CJEU held in relation to Article 13(1) that a person ‘must be regarded as having “irregularly crossed” the border of that first Member State within the meaning of Article 13(1) of the Dublin III regulation, irrespective of whether that crossing was tolerated or authorised in breach of the applicable rules or whether it was authorised on humanitarian grounds by way of derogation from the entry conditions generally imposed on third-country nationals’<sup>(199)</sup>. The CJEU has emphasised that the criterion of Article 13(1) remains applicable even ‘in a situation characterised by the arrival of an unusually large number of third-country nationals seeking international protection’<sup>(200)</sup>. In this context the CJEU also clarified that the toleration of ‘the entry into its territory of such nationals who do not fulfil the entry conditions generally imposed in the first Member State, is not tantamount to the issuing of a “visa” within the meaning of Article 12 of the Dublin III Regulation’<sup>(201)</sup>. A visa therefore has to be issued in accordance with the EU visa code to meet the definition of ‘visa’ used in Article 12 and Article 2(m). In addition, the CJEU clarified in the *AS* case that the ‘incorrect application of the criterion for determining responsibility relating to the irregular crossing of the border of a Member State’ may be pleaded in an appeal procedure<sup>(202)</sup>.

<sup>(194)</sup> CJEU, *Ghezelbash*, see fn 78, para. 61.

<sup>(195)</sup> CJEU, *Ghezelbash*, see fn 78, para. 54.

<sup>(196)</sup> See CJEU, Grand Chamber, judgment of 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, EU:C:2017:631, paras 206-278.

<sup>(197)</sup> Council of the EU, *Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece*, OJ L 248, 24.9.2015, p. 80.

<sup>(198)</sup> See CJEU, *Slovakia and Hungary v Council*, see fn 196, paras 69-79. The CJEU held that the derogation was clearly circumscribed and temporary and thus meeting the requirements foreseen under Article 78(3) TFEU.

<sup>(199)</sup> See CJEU, Grand Chamber, judgment of 26 July 2017, Case C-646/16, *Khadija Jafari and Zainab Jafari v Bundesamt für Fremdenwesen und Asyl*, para. 92 and (in the same sense) CJEU, Grand Chamber, judgment of 26 July 2017, Case C-490/16, *AS v Republika Slovenija*, EU:C:2017:585, para. 42. For more on the *Jafari* judgment see also Section 3.8.1 below.

<sup>(200)</sup> CJEU, *Jafari*, see fn 199, para. 93 and CJEU, *AS*, *ibid.*, para. 40.

<sup>(201)</sup> See CJEU, *Jafari*, see fn 199, para. 58.

<sup>(202)</sup> CJEU, *AS*, see fn 199, para. 35.

Subsection 3.6.3 which follows addresses the provisions of Articles 16 and 17 of the Dublin III Regulation concerning dependants and the discretionary clauses. As set out in more detail in that subsection, Article 16 identifies the circumstances in which Member States shall ‘normally keep or bring together’ dependent family members, and therefore it constitutes a quasi-criterion for determining responsibility. Article 17 permits Member States to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds.

Article 3(2) Dublin III regulation provides ‘where no Member State responsible can be designated on the basis of the criteria listed in this regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it’. Where the transfer cannot be made to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, ‘the determining Member State shall become the Member State responsible’ (Article 3(2) third subparagraph). The criteria set out in Article 3(2) Dublin Regulation thereby seek to ensure a clear-cut determination of the responsible Member State for every asylum application lodged in a Member State of the Dublin system.

### 3.6.3. Dependent persons and the discretionary clauses

Chapter IV of the Dublin III regulation defines who are considered ‘dependent persons’ and the operation of the ‘discretionary clauses’.

Article 16(1) Dublin III regulation lays down the obligation to ‘normally keep or bring together’ the applicant and dependent family members. This article reads as follows.

#### Article 16(1) Dublin III Regulation

Where, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing.

In line with the *K* jurisprudence of the CJEU (on the corresponding Article 15(2) of the Dublin II regulation), it is clear from the wording of Article 16(1) of the Dublin III regulation that it does not matter whether the dependent person is the applicant or ‘his or her child, sibling or parent’ <sup>(203)</sup>.

Article 16(2) translates the obligation to ‘normally keep or bring together’ into actions required by the Member States involved as follows.

<sup>(203)</sup> See CJEU, *K*, see fn 87, para. 36.

### Article 16(2) Dublin III Regulation

Where the child, sibling or parent referred to in paragraph 1 is legally resident in a Member State other than the one where the applicant is present, the Member State responsible shall be the one where the child, sibling or parent is legally resident unless the applicant's health prevents him or her from travelling to that Member State for a significant period of time. In such a case, the Member State responsible shall be the one where the applicant is present. Such Member State shall not be subject to the obligation to bring the child, sibling or parent of the applicant to its territory.

The CJEU has clarified that 'the obligation "normally" to keep together the asylum seeker and the "other" family member [...] must be understood as meaning that a Member State may derogate from that obligation to keep the persons concerned together only if such a derogation is justified because an exceptional situation has arisen' <sup>(204)</sup>. Therefore, this obligation determines responsibility based on the principle of family unity if no exceptional circumstances have arisen. It should, however, be noted that the definition of the beneficiaries of Article 16 is limited to the applicant and 'his or her child, sibling or parent legally resident in one of the Member States'. In this regard the scope of application of Article 16 is narrower than its predecessor, Article 15(2) of the Dublin II regulation. An issue like that in the *K* case (which fell under Article 15(2) of the Dublin II regulation) would be outside the scope of Article 16, as a mother-in-law and daughter-in-law relationship <sup>(205)</sup> is not included in the potential group of beneficiaries of Article 16. Such a case may now only result in the bringing together or keeping together of the persons concerned, if the discretionary clauses (in this specific case of Article 17(2)) are applied.

The terms of Article 17(1), known as the 'sovereignty clause', and Article 17(2), known as the 'humanitarian clause' are set out as follows.

### Articles 17(1) and 17(2), first subparagraphs, Dublin III Regulation

1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this regulation.
2. The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing.

These two clauses in Article 17, both of which are discretionary, have been part of the Dublin system since its inception <sup>(206)</sup>. Applying the discretionary clauses amounts to implementing

<sup>(204)</sup> CJEU, *K*, see fn 87, para. 46.

<sup>(205)</sup> See for the facts of the case in this regard: CJEU, *K*, see fn 87, para. 17.

<sup>(206)</sup> See Arts 29(4) and 36, Convention implementing the Schengen Agreement of 14 June 1985, 19 June 1990, OJ L 239, pp. 19-62, (Schengen Implementation Agreement); Arts 3(4) and 9 Dublin Convention (n 7); and Arts 3(2) and 15 Dublin II regulation.

EU law for the purposes of Article 51 of the EU charter and is therefore governed by the charter <sup>(207)</sup>. Recital (17) states that any Member State ‘should be able to derogate from the responsibility criteria in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations [...]’.

The humanitarian clause of Article 17(2) differs from the sovereignty clause in purpose and process. The purpose of Article 17(2) is, in accordance with its wording, to bring together the applicant with ‘any family relations’ present in another Member State. The application is subject to three conditions:

- (1) the determining state or the state responsible must send a request before a ‘first decision regarding the substance’ of the application for protection is taken;
- (2) the concerned persons must express their consent in writing; and
- (3) the requested state is asked to reply within 2 months <sup>(208)</sup> and, in a case of refusal, state the reasons therefor.

The CJEU has not yet fully clarified or explicitly stated the particular circumstances under which the use of the discretionary clauses by a Member State can be subject to appeal <sup>(209)</sup>. So far it has only pointed to the possibility that a mandatory use of the sovereignty clause may be required ‘where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time’ <sup>(210)</sup>. In its judgment in *CK and others v Slovenia*, the CJEU states that the provisions of Article 17(1) of Dublin III regulation, read in the light of Article 4 of the charter, cannot be interpreted, in a situation such as that at issue in the main proceedings, as meaning that it implies an obligation on that Member State to make use of it <sup>(211)</sup>. Taking into account the interpretation as a whole, this means that ‘in a situation as that at issue’ precautionary measures or postponement must be considered first by the authorities of Member States <sup>(212)</sup>. Use of the discretionary clause may, however, according to the Court of Justice, be made if the person’s state of health ‘is not expected to improve in the short term’ or a further suspension would ‘risk worsening the condition of the person concerned’. The CJEU did not consider the use of Article 17(1) an obligation in the case of CK and her family <sup>(213)</sup>.

In the national context, some Member State courts have, however, ruled that the use of the discretionary clauses of the Member States may nonetheless be subject to judicial review, *inter alia* where there are compelling humanitarian grounds <sup>(214)</sup>. In the overarching majority of cases where the transfer is not lawful under Article 3(2) or cannot be carried out for any other reason,

<sup>(207)</sup> See CJEU, *NS and others*, see fn 33, para. 69, and CJEU, *CK and others*, see fn 33, para. 54.

<sup>(208)</sup> However, as Art. 17(2) is not a criterion, not replying within the time limit does not entail implicit acceptance.

<sup>(209)</sup> See CJEU, *NS and others*, see fn 33, para. 69, and CJEU, *CK and others*, see fn 33, para. 54.

<sup>(210)</sup> See CJEU, *Puid*, see fn 84, para. 35: ‘The Member State in which the asylum seeker is located must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Art. 3(2) of the Regulation’ and CJEU *NS and others*, see fn 33, para. 108.

<sup>(211)</sup> CJEU, *CK and others*, see fn 33, paras 88 and 97.

<sup>(212)</sup> CJEU, *CK and others*, see fn 33, paras 77-87.

<sup>(213)</sup> CJEU, *CK and others*, see fn 33, para. 88.

<sup>(214)</sup> E.g. the Czech Supreme Administrative Court requires that the administrative authority state its reasons why they have not applied discretionary clauses in cases where there are such particular circumstances established that may imply their application. The appreciation of the administrative authority is in this respect subject to limited review of the administrative courts in order to make sure that the administrative authority has not overstepped its margin of appreciation (whether to apply discretionary clauses or not) or has not abused it: Supreme Administrative Court (Czech Republic), judgment of 5 January 2017, No 2 Azs 222/2016-24, *JDCV v Ministry of Interior*, and Supreme Administrative Court (Czech Republic), judgment of 12 January 2017, No 5 Azs 229/2016-44, *OO v Ministry of Interior*, both available in Czech at [www.nssoud.cz](http://www.nssoud.cz). This does not mean that the outcome in these cases would always be to annul the Dublin decision. See e.g. Council of State (the Netherlands), judgment of 19 February 2016, case 201505706/1/V3, NL:RVS:2016:563. The Secretary of State uses the discretionary clause of Art. 17 restrictively and the Council of State generally approves this practice in most of the cases. In the referenced case, he could reasonably find that the circumstances that the applicant’s spouse had Dutch nationality and was expecting their child did not oblige him to use the discretionary clause. The Swiss Federal Administrative Court also found that the decision not to use the discretionary clause has to be reasoned by the State Secretariat for Migration. If this reasoning is not given or is insufficient, the decision will be annulled and sent back to the State Secretariat, see Federal Administrative Court (Switzerland), judgment of 13 March 2015, case E-641/2014, *BVGE 2015/9*, consideration 8.

the Member State of current stay will become the Member State responsible for the examination of the application for international protection. However, several high-level Member States' courts and tribunals have identified the existence of an obligation to use the sovereignty clause under certain circumstances and a respective right to appeal <sup>(215)</sup>. By contrast, the Irish High Court rejected the argument that such an obligation exists and held that Article 17 'confers a wide discretionary sovereign power unfettered by conditions or policies' <sup>(216)</sup>.

In this context, it needs re-emphasising that the sovereignty clause and the humanitarian clause were designed, notably, as potential remedies to ensure compliance with 'primary considerations' such as respect for family life or the best interest of the child deriving from the Dublin III regulation (recitals (13)-(16)) <sup>(217)</sup>. Once it is established that the intended measure would adversely impact family life, Article 8 ECHR and Article 7 of the EU charter are engaged <sup>(218)</sup>. The authorities are placed under two general obligations to:

- (1) duly ascertain and take into account the impact of the intended measure on family life; and
- (2) strike a fair balance between the interest of the applicant in family unity and the public interest underpinning the measure <sup>(219)</sup>.

Recital (14) states that the 'respect for family life should be a primary consideration of Member States when applying this regulation'. This confirms and strengthens the necessity of meeting both obligations in Dublin procedures.

In the context of the protection of family life, and independently from the obligations flowing from Article 8 ECHR and Article 7 of the charter, the CJEU confirmed in the *K* judgment that Article 15(2) of Regulation No 343/2003 entailed an 'obligation [to] "normally" [...] keep together the asylum seeker and the "other" family member' <sup>(220)</sup>. This may also be relevant for dependency situations outside the scope of Article 16 as the purpose of the humanitarian clause is 'to permit Member States to derogate from the criteria regarding sharing of competencies between the Member States in order to facilitate the bringing together of family members where that is necessary on humanitarian grounds' <sup>(221)</sup>. For dependency situations, the CJEU has clarified that '[t]his must be understood as meaning that a Member State may derogate from that obligation to keep the persons concerned together only if such a derogation is justified because an exceptional situation has arisen' <sup>(222)</sup>.

As regards other situations in which humanitarian reasons apply, the CJEU has not yet given a judgment. However, it is clear from the *K* judgment that if such humanitarian reasons exist, Member States are under an obligation to actively seek a rapid bringing together of the family

<sup>(215)</sup> See e.g. Constitutional Court (Austria), *U2543/2013*, see fn 182, which also refers to its general jurisprudence that it is possible to challenge the lack of use of the sovereignty clause in court. Going in the same direction, the Federal Administrative Court (Switzerland), E-641/2014 (*BVGE 2015/9*), see fn 214, held that the non-application of the national provision related to the sovereignty clause may be challenged in court and that there is an obligation of the lower instance to assess whether the use of the sovereignty clause is necessary in every Dublin decision. German courts have also held in a significant number of cases that the use of the sovereignty clause is mandatory and its non-application may be challenged in court (for an overview on these cases see the database on the Dublin case-law provided by [asyl.net](http://asyl.net)).

<sup>(216)</sup> See High Court (Ireland), judgment of 26 July 2017, *U v Refugee Appeals Tribunal & ors* [2017] IEHC 490.

<sup>(217)</sup> See Dublin II Commission Proposal, see fn 130, p. 192 on draft Art. 16: 'Article 16(1) reproduces Article 9 of the Dublin Convention unchanged. This provision, called the "humanitarian clause", has been used first and foremost to prevent or remedy the dispersal of family members which could sometimes result from the strict application of the responsibility criteria' and on draft Article 3: 'However, a Member State may sovereignly decide, for political, humanitarian or practical considerations, to agree to examine an asylum application lodged with it by a third-country national, even if it is not responsible under the criteria in the regulation.'

<sup>(218)</sup> See e.g. ECtHR, judgment of 29 July 2010, *Mengesha Kimfe v Switzerland*, application no 24404/05, paras 61-63.

<sup>(219)</sup> See e.g. ECtHR, decision of 7 May 2013, *LH and VS v Belgium*, application no 67429/10, paras 72-74 (duty to examine); ECtHR, *Kimfe*, application no 24404/05, para. 7 (duty to strike a fair balance).

<sup>(220)</sup> See CJEU, *K*, see fn 87, para. 46.

<sup>(221)</sup> See CJEU, *K*, see fn 87, para. 40.

<sup>(222)</sup> See CJEU, *K*, see fn 87, para. 46.

members<sup>(223)</sup>. In this regard it might also be necessary to go beyond the formal requirements of a request to ‘take charge’ if humanitarian reasons prevail. The CJEU in *K* stated that such ‘a requirement would be purely formal in nature’<sup>(224)</sup>. In this context, the Swiss Federal Administrative Court has stated in a case where the husband of an asylum seeker in Switzerland was staying in Greece that sending a request under Article 17(2) was mandatory in order to facilitate the arrival of the husband in Switzerland<sup>(225)</sup>.

### 3.6.4. Cessation of responsibility pursuant to Article 19

An appeal may not only challenge the correct application of the criteria, but also the question of whether the responsibility of one specific Member State has ceased according to Article 19.

In the *Karim* case, the CJEU clarified that the applicant has a right to bring forward evidence in this regard<sup>(226)</sup> and that a court dealing with this issue has to assess the evidence brought forward by the applicant<sup>(227)</sup>.

### 3.6.5. Procedural rights

If procedural rights of applicants are violated by the Member State carrying out the Dublin procedure, the person concerned may base an appeal on this violation of the procedural guarantees or procedural rules provided by the Dublin III regulation<sup>(228)</sup>.

In the context of the returns directive, the CJEU has ruled that whether the decision taken after a violation of procedural rights has to be considered unlawful may depend on the question of whether the outcome of the procedure would have been different without the violation<sup>(229)</sup>. If the decision is considered unlawful, depending on the setup of the national asylum system regarding appeals, this may lead to an annulment of the decision and a referral back to the relevant authority at the administrative level for a proper decision-making process or to a court decision on the responsibility question where such a referral back to that authority is not provided for<sup>(230)</sup>.

## 3.7. Notification of a transfer decision

As with the right to information (Article 4) and the right to a personal interview (Article 5), the creation of Section IV in the Dublin III regulation on procedural safeguards containing provisions on the notification for a transfer decision (Article 26) and on legal remedies (Article 27) is a new addition introduced by the Dublin III regulation. The Dublin III Commission Proposal specified that Section IV aims to guarantee a right to appeal a Dublin decision in line with

<sup>(223)</sup> See CJEU, *K*, see fn 87, paras 48-53.

<sup>(224)</sup> See CJEU, *K*, see fn 87, para. 51.

<sup>(225)</sup> See Federal Administrative Court (Switzerland), judgment of 9 October 2013, *D-3349/2013*.

<sup>(226)</sup> See CJEU, Grand Chamber, judgment of 7 June 2016, Case C-155/15, *George Karim v Migrationsverket*, EU:C:2016:410, para. 21.

<sup>(227)</sup> See CJEU, Grand Chamber, judgment of 7 June 2016, Case C-155/15, *George Karim v Migrationsverket*, EU:C:2016:410, para. 26: ‘Consequently, in order to satisfy itself that the contested transfer decision was adopted following a proper application of the process for determining the Member State responsible laid down in that regulation, the court dealing with an action challenging a transfer decision must be able to examine the claims made by an asylum applicant who invokes an infringement of the rule set out in the second sub-paragraph of Article 19(2) of that regulation.’

<sup>(228)</sup> See CJEU, *Shiri*, see fn 132; CJEU, *Mengesteab*, see fn 62, paras 45 and 49.

<sup>(229)</sup> See CJEU, judgment of 10 September 2013, Case C-383/13 PPU, *MG and NR v Staatssecretaris van Veiligheid en Justitie*, EU:C:2013:533, para. 38.

<sup>(230)</sup> See on the specificities of the national court systems and its effect on the interpretation of law, *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, Section 3.6, pp. 84-89.

international and European legal standards to ensure access to an effective legal remedy <sup>(231)</sup>. The notification of the decision to the individual concerned is an essential element of the right to appeal and is rooted in the fundamental principles of the right to defence and of good administration.

In accordance with Article 26(1) Dublin III regulation, the notification comprises both the decision to transfer and, where applicable, the decision not to examine the application for international protection <sup>(232)</sup>. If the person is represented by a legal advisor or legal counsellor, 'Member States may choose to notify the decision to such legal advisor or counsellor instead of to the person concerned and, where applicable, communicate the decision to the person concerned' <sup>(233)</sup>.

Pursuant to Article 26(2) Dublin III regulation, the decision must contain information on the available legal remedies, including on the right to apply for suspensive effect, where applicable, and on the applicable time limits for the appeal and for the transfer. If necessary, the decision must contain 'information on the place where, and the date on which, the person concerned should appear, if that person is travelling to the Member State responsible by his or her own means'. Member States must ensure that information on persons or entities that may provide legal assistance is communicated to the person concerned together with the decision if it has not already been communicated (Article 26(2), second subparagraph, Dublin III regulation). In this regard, Section IV strongly emphasises the important role of legal representation and legal counselling.

#### Article 26(3)

##### **Article 26(3) Dublin III Regulation**

When the person concerned is not assisted or represented by a legal advisor or other counsellor, Member States shall inform him or her of the main elements of the decision, which shall always include information on the legal remedies available and the time limits applicable for seeking such remedies, in a language that the person concerned understands or is reasonably supposed to understand.

In addition to the explicitly mentioned 'legal remedies available and the time limits', the main parts of the reasoning will also always need to be available for the applicant in a language the applicant 'understands or is reasonably supposed to understand'. The reference to 'a language that the person concerned understands or is reasonably supposed to understand' is used in several other provisions of CEAS legislation in the context of the right to information of applicants <sup>(234)</sup>.

According to Article 7 Dublin implementing regulation, a transfer may be 'carried out in one of the following ways': (1) 'at the request of the asylum seeker, by a certain specified date'; (2) by supervised departure; or (3) by escort. Article 8 Dublin implementing regulation leaves it to a discussion between the Member States in order to decide on the mode of transfer and other details.

<sup>(231)</sup> Dublin III Commission Proposal, see fn 88, p. 12.

<sup>(232)</sup> In cases where the applicant has withdrawn the application for international protection or this application has been rejected there is no obligation for the Member State responsible to examine the application, see Art. 18(1)(c) and (d) and (2).

<sup>(233)</sup> In some national procedures such as the Dutch '8 day procedure' the decision is notified to the assigned lawyer, who will communicate and discuss it with his/her client.

<sup>(234)</sup> See e.g. recital (25) and Arts 12 and 25 APD (recast); Arts 5, 9 and 10 RCD (recast); Art. 22 QD (recast), as well as Art. 29 Eurodac regulation (recast), see fn 35.

In practice, the departure of the person concerned by his/her own means is rarely applied<sup>(235)</sup>. This has raised the question of whether this practice is compatible with human rights standards. The German Federal Administrative Court has found that the modalities of transfers are to a large extent a matter for the discretion of the Member State implementing the transfer decision<sup>(236)</sup>. In decisions on detention, the German Federal Court of Justice has held that any coercive measure needs to be in line with the general principles of law, especially with the principle of proportionality, and that, therefore, detention is not lawful if the person is willing to depart voluntarily<sup>(237)</sup>. According to the principle of proportionality, coercive measures always need to be proportional and justified<sup>(238)</sup>. Additionally, recital (24) also requires Member States ‘to promote voluntary transfer by providing adequate information to the applicant’. It is an open question whether Member States may directly resort to supervised or escorted transfer to carry out a Dublin transfer without giving the person concerned the option of requesting a transfer by his or her own means.

## 3.8. Legal remedies

### 3.8.1. (Formal) scope of the appeal

The right to an effective legal remedy is guaranteed by Article 47 of the EU charter<sup>(239)</sup>. In the context of the Dublin III regulation, Article 27(1) reaffirms the right to an effective remedy as follows.

#### Article 27(1) Dublin III Regulation

The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

The scope of the legal remedy against a transfer decision is made clear in recital (19) of the Dublin III regulation which specifies that the appeal serves the purpose of establishing an effective remedy ‘in accordance, in particular, with Article 47 of the charter’ and that ‘[i]n order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this regulation and of the legal and factual situation in the Member State to which the applicant is transferred’. The CJEU highlighted this purpose in three decisions in 2016 and 2017<sup>(240)</sup>. Article 27 of the Dublin III regulation firstly provides for an effective possibility to lodge an appeal or review against the transfer decision before a court or a tribunal that is not limited in scope<sup>(241)</sup>.

<sup>(235)</sup> See, European Commission, *Commission staff working document accompanying document to the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system — Annex to the communication on the evaluation of the Dublin system*, COM(2007) 299 final, SEC(2007) 742, 6 June 2007, p. 31.

<sup>(236)</sup> See Federal Administrative Court (Germany), judgment of 17 September 2015, case 1 C 26.14, DE:BVVerwG:2015:170915U1C26.14.0, paras 12ff.

<sup>(237)</sup> See e.g. Federal Court of Justice (Germany), judgment of 17 June 2010, V ZB/13/10, para. 17.

<sup>(238)</sup> See on the principle of proportionality, inter alia, CJEU, judgment of 19 March 2002, Case C-476/99, *Lommers v Minister van Landbouw, Natuurbeheer en Visserij*, EU:C:2002:183, para. 39.

<sup>(239)</sup> See Part 6 below on the right to an effective remedy, including notably Subsection 6.1.1 on Article 47 of the EU charter.

<sup>(240)</sup> See, CJEU, *Ghezelbash*, see fn 78; CJEU, *Karim*, see fn 226, paras 19-27; and CJEU, *CK and others*, see fn 33, para. 75.

<sup>(241)</sup> The question of the availability of the appeal is to be distinguished from the question whether the appeal has a chance to be successful (this question was dealt with above under 3.5). As the ECtHR has confirmed in the Grand Chamber judgment in *Khlaifia* that it is possible that the unavailability of an appeal may violate Art. 13 in conjunction with Art. 3 ECHR even if there is no violation of Art. 3 ECHR in substance. See ECtHR, Grand Chamber, judgment of 15 December 2016, *Khlaifia and others v Italy*, application no 16483/12, para. 268: The ‘effectiveness’ of a ‘remedy’ within the meaning of Art. 13 ECHR does not depend on the certainty of a favourable outcome for the applicant.

Article 27(2) Dublin III regulation states that Member States shall ‘provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy’ pursuant to Article 27(1). These provisions guaranteeing an effective remedy in fact and in law are directly applicable as they are part of a regulation. The provisions reflect the standards established by the jurisprudence of the ECtHR<sup>(242)</sup>, expanded by the content of Article 47 of the EU charter (as the appeal according to Article 13 ECHR does not necessarily need to be in front of a court or tribunal). Recital 19 and Article 27 entail that the court or tribunal must have scope to examine facts as well as law. However, Article 27 from its wording does not explicitly provide for an *ex nunc* examination. In the *Jafari* case, the CJEU referred to the assessment of a genuine risk of a violation of Article 4 of the charter in a situation ‘following the arrival of an unusually large number of third-country nationals seeking international protection, such a risk existed in the Member State responsible’; however, the CJEU did not state which point in time is decisive for the decision<sup>(243)</sup>. In court practice the issue of the scope of the examination of an appeal is seldom dealt with directly. In a case concerning ‘systemic flaws’, the Czech Supreme Administrative Court has derived from Article 4 and 19 of the charter a duty to provide for a full and *ex nunc* examination in appeals concerning Article 3(2), second subparagraph, Dublin III regulation<sup>(244)</sup>.

### 3.8.2. Suspensive effect

For the purposes of appeals against, or reviews of, transfer decisions, Article 27(3)(a)-(c) sets out three options regarding provision in national law for the suspension of the implementation of the transfer decision. Article 27(3)(c) may be seen as the common minimum standard. It provides the person concerned the opportunity to request, within a reasonable period of time, a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his/her appeal or review and the opportunity to remain on the territory until the court or tribunal has decided whether to suspend the implementation of the transfer. The other two options provide for an automatic suspension of the transfer pending the outcome of the appeal or review (Article 27(3)(a)) or for a certain reasonable period of time, during which the decision on whether to grant suspensive effect to the appeal or review shall have been taken (Article 27(3)(b)). All three options are in accordance with the legal requirements concerning the ‘automatic suspensive effect’ of appeals derived from Article 47(1) of the EU charter and Article 3 ECHR.

These three options are set out in Article 27(3) below.

#### Article 23(3) Dublin III Regulation

3. For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:
  - (a) the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review; or
  - (b) the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close

<sup>(242)</sup> See in particular the jurisprudence developed requiring a remedy that is ‘effective in law and practice’ since ECtHR, judgment of 5 February 2002, *Čonka v Belgium*, application no 51564/99; ECtHR, *Gebremedhin v France*, see fn 60, para. 53; as well as the procedural standards contained in ECtHR, judgment of 2 February 2012, *IM v France*, application no 9152/09; and earlier in ECtHR, Judgment of 11 July 2000, *Jabari v Turkey*, application no 40035/98.

<sup>(243)</sup> See CJEU, *Jafari*, see fn 199, para. 101. This question may be very relevant if there is a lengthy court procedure involved.

<sup>(244)</sup> See Supreme Administrative Court (Czech Republic), *MO v Ministry of Interior*, see fn 41.

- and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; or
- (c) the person concerned has the opportunity to request, within a reasonable period of time, a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based.

Pursuant to Article 27(4) Dublin III regulation, ‘Member States may provide that the competent authorities may decide, acting *ex officio*, to suspend the implementation of the transfer decision pending the outcome of the appeal or review’.

### 3.8.3. Access to legal and linguistic assistance

Article 27(5) Dublin III regulation requires Member States to ‘ensure that the person concerned has access to legal assistance and, where necessary, to linguistic assistance’. Access to legal and linguistic assistance of sufficient quality and expertise is a key element to ensuring the effectiveness of a legal remedy and is part of Member States’ obligation to comply with everyone’s right to be heard and make known their views effectively<sup>(245)</sup>. Furthermore, Article 27(5) seeks to ensure access to legal assistance by making the provision and facilitation of access to this assistance mandatory for Member States.

Additionally, in accordance with Article 27(6) Dublin III regulation, Member States must ensure that legal assistance is granted ‘on request free of charge where the person concerned cannot afford the costs involved’. Member States may provide that, ‘as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance’ (Article 27(6) first subparagraph)<sup>(246)</sup>. ‘Procedures for access to legal assistance shall be laid down in national law’ (Article 27(6) sixth subparagraph). The minimum assistance to be granted comprises ‘at least the preparation of the required procedural documents and representation before a court or tribunal and may be restricted to legal advisors or counsellors specifically designated by national law to provide assistance and representation’ (Article 27(6) fifth subparagraph). Member States are under an obligation to ensure ‘that legal assistance and representation is not arbitrarily restricted and that the applicant’s effective access to justice is not hindered’ (Article 27(6) fourth subparagraph).

In accordance with the rules applicable for nationals of the Member State, free legal assistance may, however, ‘[w]ithout arbitrarily restricting access to legal assistance’ only be provided in cases where there are ‘tangible prospects of success’ (Article 27(6) second subparagraph)<sup>(247)</sup>.

<sup>(245)</sup> See CJEU, *MM*, see fn 143, para. 87: ‘The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely’; CJEU, *M.*, see fn 273, para. 31: ‘The right to be heard guarantees the applicant [...] the opportunity to put forward effectively, in the course of the administrative procedure, his views regarding his application [...] and grounds that may give the competent authority reason to refrain from adopting an unfavourable decision’.

<sup>(246)</sup> See in this regard also CJEU, judgment of 22 December 2010, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, EU:C:2010:811.

<sup>(247)</sup> If free legal assistance was denied by an administrative authority, Member States shall provide for an effective remedy against the denial to challenge that decision, see Art. 27(6)(3).

With this being the only possible restriction, the entitlement to free legal assistance under Article 27(6) is to some extent more favourable than the rules provide for by Articles 20 and 21 of the APD (recast) <sup>(248)</sup>. Where a decision not to grant free legal assistance and representation pursuant to the second subparagraph is taken by an authority other than a court or tribunal, 'Member States shall provide the right to an effective remedy before a court or tribunal to challenge that decision' (Article 27(6) third subparagraph).

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<sup>(248)</sup> See Subsection 6.3.3 below and J. Vedsted-Hansen, 'Arts. 21 and 20 APD (recast)', in Hailbronner and Thym (eds.), see fn 65. For example, the possibilities to limit free legal assistance to appeals before a first instance court, or absolute monetary or time limits, are not foreseen in Art. 27(6).

# Part 4: APD(recast): Basic principles, safeguards and procedural guarantees

This part of the judicial analysis is concerned with the basic principles, safeguards and procedural guarantees laid down in the APD (recast). These standards govern the examination of applications for international protection by the Member State that has been determined to be responsible, or has assumed responsibility, according to the Dublin III regulation <sup>(249)</sup> (see Part 3 above).

First, Section 4.1 analyses the right of applicants to remain in the territory of the Member State during the examination procedure, as well as the exceptions to this right. Subsequently, Section 4.2 analyses the other basic principles and procedural guarantees for the examination that are of particular, yet not exclusive, relevance to the procedures at administrative level under Chapter III of the APD (recast). This structure is reproduced in Table 16 below.

**Table 16: Structure of Part 4**

<b>Section 4.1.</b>	Right to remain/ <i>non-refoulement</i>	pp. 80-84
<b>Section 4.2.</b>	Basic principles and guarantees	pp. 84-107

## 4.1. Right to remain/*non-refoulement*

As previously noted in Section 1.5 above, the right of applicants to remain in the host country during the examination of their application for international protection flows from the principle of *non-refoulement*. This section more specifically analyses such a right to remain when applying for international protection (Subsection 4.1.1), during examination of the application at the administrative level (Subsection 4.1.2), in the case of subsequent applications (Subsection 4.1.3), and during appeals procedures (Subsection 4.1.4). The right to remain during appeals procedures is further dealt with in more detail in Section 6.4 below.

### 4.1.1. Submission of an application for international protection

Although (as is set out in Subsection 2.3.2.1 above) Article 6 APD (recast) implies a distinction between different formal stages of submitting an application for international protection, an application must be considered to be ‘made’ for the purposes of the APD (recast) regardless of compliance with any formal requirements. In this regard, Article 2(b) APD (recast) provides that an application for international protection means ‘a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection outside the scope of [QD (recast)], that can be applied for separately’. Similarly, the preamble of the APD (recast) states that ‘third-country nationals and stateless persons who have expressed their wish to apply for international protection are applicants for international

<sup>(249)</sup> By way of exception, see Subsections 3.1.2 and 5.2.2.4 with regards to Article 3(3) Dublin III regulation.

protection’ (recital (27)). As the ‘expression of a wish to apply’ is thus equated with the ‘making’ of an application, it follows that the Member State is under the obligation to examine an application for international protection in accordance with the directive as well as the relevant standards of international law, in particular the prohibition of *refoulement*, as soon as an application for protection has been made according to Article 6 APD (recast), regardless of any administrative formalities. The principle of *non-refoulement* must be complied with even in cases where Article 9(2) APD (recast) allows an exception from the applicant’s right to remain (see Subsection 4.1.2 on the right to remain during examination at the administrative level below).

In light of the mandatory single procedure established by the APD (recast) (see recital (11)), any application for international protection is to be understood as an application for either refugee status or subsidiary protection status, unless it explicitly concerns protection outside the scope of the QD (recast) that can be applied for separately under national law. Such applications for international protection falling within the scope of the QD (recast) will therefore have to be determined in accordance with the sequence laid down in Article 10(2) APD (recast). (See Subsection 4.2.1 on requirements for the examination of and decision-making on applications for international protection below.)

Article 6(1) APD (recast) requires the Member State to register the application within 3 working days of the application being made <sup>(250)</sup>. In addition, it is stipulated in Article 6(2) that Member States shall ensure that a person who has ‘made’ an application for international protection has an effective opportunity to ‘lodge’ the application as soon as possible. (See Section 2.3 on making, registering and lodging an application above.)

#### 4.1.2. The right to remain during examination at the administrative level

According to Article 9(1) APD (recast), ‘[a]pplicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III’ of the directive. As the general rule, the right to remain is absolute and may only be restricted in two specific situations, as described below. Unlike the meaning of ‘right to remain’ in some legal systems, however, this right does not constitute an entitlement to a residence permit (Article 9(1) *in fine*). Thus, the right to remain can be said to entail only the right not to be forcibly removed from the territory of the Member State pending the examination of the application for international protection <sup>(251)</sup>.

The reference in Article 9(1) to the ‘determining authority’ and to the procedures set out in Chapter III of the directive makes clear that the right to remain extends until the substantive decision on the application for international protection has been made by the determining authority that has been designated as responsible in accordance with Article 4 APD (recast). (See Subsection 2.3.1 above).

<sup>(250)</sup> See Art. 6(1), second subparagraph, extending the time limit to 6 working days, and Art. 6(5) extending the time limit to 10 working days in case of large numbers of simultaneous applications. For further details see Subsection 2.3.2.1 below.

<sup>(251)</sup> See also Art. 2(p) APD (recast), defining the term ‘remain in the Member State’. The right to remain under Art. 9 is not affected by the detention of the applicant pursuant to Art. 8(3) RCD (recast), cf. CJEU, judgment of 15 February 2016, Case C-601/15 PPU, *JN v Staatssecretaris voor Veiligheid en Justitie*, EU:C:2016:84, para. 74.

Exception from the right to remain in the territory of the Member State is permitted only in the situations referred to in the optional provision of Article 9(2) APD (recast).

- (1) Where a person makes a **subsequent application** that falls within the exceptions from the right to remain as specified in Article 41 APD (recast) (see Subsection 4.1.3 below); or
- (2) where a Member State will **surrender or extradite** a person either:
  - to another Member State according to obligations based on a European arrest warrant <sup>(252)</sup> or otherwise; or
  - to a third country; or
  - to an international criminal court or tribunal.

As regards **extradition to a third country**, this cannot take place to the country of origin of an applicant for international protection without prior substantive examination of his/her application. This interpretation follows from the drafting history of Article 9 APD (recast) <sup>(253)</sup>. It is confirmed by Article 9(3) which expressly provides that a Member State may extradite an applicant for international protection to a third country only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect *refoulement* in violation of the international and EU obligations of that Member State. In this context it should be noted that the right not to be extradited without substantive examination of an alleged risk of persecution or serious harm in the requesting state is generally secured by Article 19 of the EU charter, as well as by Article 13 in conjunction with Article 3 ECHR and by Article 33 of the Refugee Convention (see Section 1.5 above) <sup>(254)</sup>.

#### 4.1.3. The right to remain in the case of subsequent applications

Article 40 APD (recast) provides for two steps in examining subsequent applications. (See the definition in Article 2(q) and further details in Subsection 5.2.2.4 on subsequent applications and admissibility below.)

First, there must be a **preliminary examination** as to whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether he/she qualifies as a beneficiary of international protection under the QD (recast) <sup>(255)</sup>. Second, if the preliminary examination concludes that such new elements or findings have arisen or have been presented which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection, the application shall be **further examined** in conformity with the basic principles and guarantees laid down in Chapter II of the directive <sup>(256)</sup>.

If, on the contrary, the preliminary examination does not find that such new elements or findings have arisen or have been presented, or in cases where such new elements or findings have arisen or have been presented but they do not add significantly to the likelihood of the

<sup>(252)</sup> See Council Framework Decision on the European arrest warrant, see fn 39.

<sup>(253)</sup> See J. Vedsted-Hansen, 'Article 9 APD (recast)', in Hailbronner and Thym (eds.), see fn 65, pp. 1310-1311.

<sup>(254)</sup> See E. Guild, 'Article 19 — Protection in the Event of Removal, Expulsion or Extradition', in S. Peers et al. (eds.), *The EU charter of Fundamental Rights. A commentary* (Hart, 2014), pp. 548-553. On Arts 13 and 3 ECHR, see ECtHR, *MSS v Belgium and Greece*, see fn 174, paras 286-293 and 321; ECtHR, judgment of 6 June 2013, *Mohammed v Austria*, application no 2283/12, para. 81. See also M. Reneman, *EU asylum procedures and the right to an effective remedy* (Hart Publishing, 2014), pp. 118-122; B. Rainey, E. Wicks and C. Ovey, *Jacobs, White & Ovey, The European Convention on Human Rights* (6th edn, OUP, 2014), pp. 176-180; W. Schabas, *The European Convention on Human Rights. A commentary* (OUP, 2015), pp. 194-196. See also J.C. Hathaway, *The rights of refugees under international law* (CUP, 2005), pp. 319-322.

<sup>(255)</sup> Art. 40(2) APD (recast).

<sup>(256)</sup> Art. 40(3) APD (recast). See also Art. 40(4) on the optional limitation of the new elements or findings that can establish the basis for the need for international protection.

applicant qualifying as a beneficiary of international protection, the Member State may decide not to further examine the subsequent application. In such cases, the application may be considered **inadmissible** in accordance with Article 33(2)(d) APD (recast) <sup>(257)</sup>. If the subsequent application is not considered inadmissible under this provision, it may alternatively be examined in an accelerated procedure pursuant to Article 31(8)(f) APD (recast).

The two-step approach to subsequent applications reflects the view that on the one hand, even after an application for international protection has been rejected, the applicant must be able to reapply, if his/her circumstances have significantly changed in order to take into account the possibility of *sur place* claims in line with the QD (recast) (Article 5). On the other hand, realising the need to prevent the potential abuse of rules on subsequent applications, it was decided to make such applications subject to a rapid and efficient preliminary examination procedure with a view to deciding on the existence of new relevant elements and considering the application inadmissible if no such elements exist (see recital (36) APD (recast)) <sup>(258)</sup>.

In line with this examination structure for subsequent applications laid down in Article 40, Article 41 APD (recast) specifies the situations where a Member State may make an **exception from the right to remain** in the territory in connection with subsequent applications. According to Article 41(1), such exception may be made where the applicant:

#### Article 41(1) APD (recast)

- a) has lodged a **first subsequent application**, which is not further examined pursuant to Article 40(5), merely in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State; or
- b) makes **another subsequent application** in the same Member State, following a final decision considering a first subsequent application inadmissible pursuant to Article 40(5) or after a final decision to reject [the previous subsequent] application as unfounded <sup>(259)</sup>.

Since the right to remain in the territory is the general rule as recognised in Article 9 APD (recast), the exceptions mentioned in Article 41 are exhaustive and should be interpreted restrictively and applied with caution. This is further emphasised by Article 41(1), second subparagraph, APD (recast), according to which Member States may make an exception from the right to remain in the case of subsequent applications ‘only where the determining authority considers that a return decision will not lead to direct or indirect *refoulement* in violation of that Member State’s international and Union obligations’.

Therefore, Article 41(1)(a) can only serve as the legal basis for exempting the applicant from the right to remain once the decision not to further examine the subsequent application and to consider it inadmissible has been made pursuant to Articles 40(5) and 33(2)(d), and it has been established that this application was made ‘merely in order to delay or frustrate the enforcement’ of a removal decision <sup>(260)</sup>.

<sup>(257)</sup> Art. 40(5) APD (recast).

<sup>(258)</sup> See also J. Vedsted-Hansen, ‘Article 40 APD (recast)’, in Hailbronner and Thym (eds.), see fn 65, p. 1368.

<sup>(259)</sup> Art. 41(1) APD (recast), emphasis added.

<sup>(260)</sup> See CJEU, *Tall*, see fn 25, para. 48, interpreting Arts 7 and 32 APD so as to permit the exception from the right to remain ‘if [...] the subsequent application is not examined after that preliminary examination’.

Article 41(2) provides for the option to derogate from the time limits normally applicable in accelerated procedures under Article 31 <sup>(261)</sup> and admissibility procedures under Articles 33 and 34, as well as to derogate from Article 46(8) concerning the right to remain in the territory pending the outcome of the procedure on interim measures laid down in Article 46(6) and (7) (see Subsection 4.1.4 below). Further procedural rules concerning the preliminary examination of subsequent applications are laid down in Article 42, including the option for Member States to introduce national rules obliging the applicant concerned to indicate the facts and substantiate evidence which justify the new procedure examining the subsequent application. Notably, such national rules shall not render the access of applicants to a new procedure impossible or result in the effective annulment or severe curtailment of such access, cf. Article 42(2) APD (recast) *in fine*.

The latter provisions should be seen in the light of the general principle that the examination of subsequent applications, and in particular decisions amounting to exceptions to the right to remain in the territory during the examination procedure, must be conducted with due compliance with the principle of *non-refoulement* as protected by Article 19(2) of the EU charter, cf. Article 41(1), second subparagraph APD (recast) as quoted above. This is further supported by Member States' obligations under Article 13 in conjunction with Article 3 ECHR and Article 33 of the Refugee Convention <sup>(262)</sup>.

#### 4.1.4. The right to remain during appeals procedures

The right of applicants for international protection to remain in the Member State during the examination of their appeal is governed by the general rule concerning **suspensive effect of appeals** as laid down in Article 46(5) APD (recast). This provision stipulates that Member States shall allow applicants to remain in the territory until the time limit for submission of an appeal has expired and, when the right to an effective remedy has been exercised within the time limit, pending the outcome of the appeal. See Section 6.4 below on the right to remain during appeals procedures for further details on the general rule as well as the exceptions permitted.

## 4.2. Basic principles and guarantees

### 4.2.1. Requirements for the examination of and decision-making on applications for international protection

Article 10(1) APD (recast) first recognises the basic principle that 'Member States shall ensure that applications for international protection are neither rejected nor excluded from examination on the sole ground that they have not been made as soon as possible'. In this regard the provision in Article 10(1) should be read in the light of Article 6 concerning the modalities for submitting an application (see Sections 2.3 on making, registering and lodging an application and 4.1.1 on submission of an application for international protection above).

As a result of the fact that the APD (recast) establishes a mandatory single procedure encompassing the assessment of the need for international protection of all applicants (see

<sup>(261)</sup> Art. 41(2)(a) APD (recast). This provision, however, refers only to Art. 31(8)(g) concerning applications made merely in order to delay or frustrate the enforcement of an earlier or imminent decision on removal of the applicant, in line with the exception from the right to remain laid down in Art. 41(1)(a).

<sup>(262)</sup> See references in fn. 63.

recital (11)), Article 10(2) provides for the sequence of examination and decision-making in accordance with the definitions of refugee status and subsidiary protection status laid down in the QD (recast) (see recital (33) and Article 2(f) QD (recast)). It is therefore mandatory for the Member State to first determine (examine and decide) whether the applicant qualifies for refugee status. Only if and when the determining authority decides negatively as regards refugee status shall the determining authority then determine (examine and decide) whether the applicant is eligible for subsidiary protection <sup>(263)</sup>.

The standards laid down in Article 10(3) APD (recast) for an appropriate examination of applications for international protection may be seen as inspired by the requirements for independent and rigorous scrutiny that have been developed in the case-law of the ECtHR under Articles 3 and 13 ECHR <sup>(264)</sup>. Member States shall ensure that the determining authority examines and decides on such applications ‘individually, objectively and impartially’, and that the personnel examining applications and taking decisions ‘know the relevant standards applicable in the field of asylum and refugee law’ (Article 10(3)(a) and (c) APD (recast)).

Article 10(3)(d) APD (recast) imposes on Member States the obligation to ensure that the ‘personnel examining applications and taking decisions on international protection have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues’. This provision was included in the APD (recast) with a view to ensuring quality decision-making at the administrative level, reflecting the strategy of ‘frontloading’ in the examination procedure <sup>(265)</sup>.

The availability of precise and up-to-date information on the general situation prevailing in the countries of origin or transit of applicants for international protection is an indispensable precondition for making an appropriate assessment of their need for such protection, and thus for securing the quality of decisions on such applications <sup>(266)</sup>. This is reflected in Article 10(3)(b) APD (recast), according to which Member States shall ensure that ‘such [country of origin] information is made available to the personnel of the determining authorities responsible for examining applications and taking decisions on protection’.

Article 10(3)(b) is supplemented by Article 10(4) APD (recast) requiring that courts or tribunals in charge of appeals procedures under Article 46 APD (recast) shall have access to the general country of origin information that was available to the determining authority at the administrative level. It is optional for Member States whether such access is given to the appeals bodies ‘through the determining authority or the applicant or otherwise’. The applicant’s access to such information is among the guarantees required by Article 12(1)(d) APD (recast) (see Subsection 4.2.3.4 below).

It is stipulated in Article 10(5) APD (recast) that ‘Member States shall provide for rules concerning the translation of documents relevant for the examination of applications’ for international protection. This mandatory provision aims at improving the quality of administrative-level decision-making <sup>(267)</sup> and can generally be considered a prerequisite for compliance with the standards of effective remedy according to Article 47 of the EU charter and Article 13 ECHR (see Section 6.2 on full and *ex nunc* examination below).

<sup>(263)</sup> See CJEU, *HN v Minister for Justice, Equality and Law Reform*, see fn 26, paras 30-36, concerning the sequence of examination under former QD. See also *Qualification for International Protection — A judicial analysis*, op. cit, fn. 1, p. 99.

<sup>(264)</sup> See ECtHR, *Jabari v Turkey*, see fn 242, para. 50; ECtHR, *MSS v Belgium and Greece*, see fn 174, para. 293.

<sup>(265)</sup> See European Commission, *APD (recast) Proposal*, op cit. fn. 60, Annex, p. 6.

<sup>(266)</sup> *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Subsection 4.2.5.

<sup>(267)</sup> See Council doc. 8958/12, 24 April 2012, p. 45.

### 4.2.2. Requirements for a decision

According to Article 11(1) APD (recast), ‘Member States shall ensure that decisions on applications for international protection are given in writing’. This requirement exists whether the decision is positive or negative.

In line with the single procedure mandated by the APD (recast), Article 11(2) provides that ‘Member States shall also ensure that, where an application is rejected with regard to refugee status and/or subsidiary protection status, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing’. The obligation to give **reasons for a negative decision in writing** applies to rejections with regard to ‘refugee status and/or subsidiary protection status’. Accordingly the reasons must also be stated if the applicant is granted subsidiary protection status in the decision simultaneously refusing refugee status. Thus, if an applicant is granted subsidiary protection status, it shall be explained in writing which factual and/or legal considerations motivated the rejection of the application for refugee status that has to be determined (examined and decided) first (cf. Article 10(2) APD (recast); see Subsection 4.2.1 on requirements for the examination of and decision-making on applications for international protection above). The duty to state the reasons for not granting refugee status in this situation will enable the applicant to consider whether to make use of the remedy against such a decision in accordance with Article 46(2) APD (recast) (see Subsection 6.3.1 on access to the reasons for the decision and to information on appeal rights).

National rules may necessarily influence the way in which reasons are presented in the written decisions. Moreover, the precise implications of the EU law requirement of ‘reasons in fact and in law’ have yet to be determined by the CJEU.

The Article 11(2) requirement could be understood as including the assessment of **facts and circumstances** that have been carried out in accordance with Article 4 QD (recast) <sup>(268)</sup>. It should be kept in mind that the reasons given by the administrative-level determining authority will be relevant in the context of the appeals procedures under Article 46 APD (recast). (See Part 6 on the right to an effective remedy below, in particular Section 6.4 on the right to remain during appeals procedures.)

While information on how to challenge a negative decision must, as a point of departure, be given in writing, it follows from Article 11(2), second subparagraph APD (recast), that ‘Member States need not provide [such] information [...] in writing in conjunction with a decision where the applicant has been provided with such information at an earlier stage either in writing or by electronic means accessible to the applicant’. In either case, the obligation under Article 11(2) is to be seen in the light of Article 12(1)(f) which stipulates that applicants shall be informed of the result of the decision, including information on how to challenge a negative decision, in ‘a language that they understand or are reasonably supposed to understand when they are not assisted or represented by a legal adviser or other legal counsellor’ in the administrative-level procedures. (See also Subsection 4.2.3.2 on interpretation below.)

In cases where an application has been made on behalf of the applicant, for instance by his/her spouse or parent, according to Article 7(2) (see Subsection 2.3.2.2 above), and where the

<sup>(268)</sup> See, for further details on the principles for such assessment, *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Sections 4.1-4.4.

application is based on the same grounds as that of the person who made it on behalf of his/her dependant(s), Article 11(3) APD (recast) leaves Member States the option to take a **single decision** covering all dependants<sup>(269)</sup>. In addition to the practical administrative advantage of doing so, this may also reflect the principle of family unity in the context of granting international protection<sup>(270)</sup>. At the same time, however, this possibility does not imply that Member States are permitted to refrain from examining, and taking into consideration, the spouse's or other dependant's account in cases where it is not identical to that of the main applicant, for example if the spouse claims to have been individually persecuted.

As an exemption from the permissible practice of taking a single decision covering all dependants of the applicant, Article 11(3) requires a **separate decision** to be issued to the person(s) concerned if a single decision would 'lead to the disclosure of particular circumstances of an applicant which could jeopardise his or her interests, in particular in cases involving gender, sexual orientation, gender identity and/or age-based persecution'.

### 4.2.3. Guarantees for applicants

Article 12(1) APD (recast) lays down a number of guarantees for applicants which shall apply to the examination procedures **at the administrative level**, as provided for in Chapter III of the directive. At the same time, Article 12(2) requires Member States to ensure that all applicants for international protection enjoy 'equivalent guarantees' with respect to **appeals procedures** under Article 46, with the exception of those laid down in Article 12(1)(a) and (f) which appear to be of less relevance at the appeals stage. As the information here referred to particularly concerns the examination procedures at the administrative level, the purpose of Article 12(1)(a) and (f) will normally be fulfilled if these provisions have already been complied with at that stage.

The guarantees for applicants laid down in Article 12(1) APD (recast) can be seen as reflecting, and to some extent elaborating on, the procedural standards for the examination of asylum applications previously recommended by the UNHCR Executive Committee and by the Committee of Ministers of the Council of Europe<sup>(271)</sup>. The general provisions of Article 12 are supplemented by other more specific standards in the APD (recast), in particular those laid down in Articles 14-17 concerning personal interviews of applicants for international protection, Article 18 on medical examination, Article 19 on provision of legal and procedural information free of charge in procedures at first instance (administrative level), Articles 20-23 on provision of legal and procedural information, legal assistance and representation and Article 29 on the role of UNHCR (see Sections 4.2.4 below on the personal interview to 4.2.7 on applicants in need of special procedural guarantees).

#### 4.2.3.1. Information

First, as regards the **language** of communication between Member States' authorities and applicants for international protection, Article 12(1)(a) and (f) APD (recast) require the authorities to inform applicants in a language that they 'understand or are reasonably supposed to

<sup>(269)</sup> While the term 'dependant' in Art. 11(3) has the same meaning as in Art. 7(2), it should be noted that there is no general definition of a 'dependant' in the APD (recast).

<sup>(270)</sup> See UNHCR Handbook, see fn 38, paras 181-186.

<sup>(271)</sup> See, in particular, UNHCR Executive Committee, *Conclusion No 8 (XXVIII): Determination of refugee status*, 12 October 1977; Council of Europe, Committee of Ministers, *Recommendation No R (81) 16 on the harmonisation of national procedures relating to asylum*, 5 November 1981.

understand’<sup>(272)</sup>. This could be understood as a requirement that the language used should be based on concrete indications that it is actually understood by the applicant.

The obligation under Article 12(1)(a) APD (recast) applies when the authorities provide information about the examination procedure to be followed and the rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. This includes the right to be informed of the time frame and the means at the applicants’ disposal in order to fulfil the obligation under Article 4 QD (recast) to submit elements of facts and evidence, as well as the right to information about the consequences of an explicit or implicit withdrawal of the application (see Articles 27 and 28 APD (recast) and Subsection 4.2.10 below). The scope and content of the information requirement is to be seen in the light of the directive as a whole insofar as the relevant information shall be given in time to enable the applicants to exercise the rights guaranteed in the directive and to comply with the applicant’s obligations under Article 13 (see Subsection 4.2.9 below).

The obligations under Article 12(1)(a) APD (recast) may be relevant to **all authorities** of the Member State which are involved in the examination procedure. In addition, Article 12(1)(f) requires that the applicant shall be informed of the result of the decision taken by the **determining authority**, as well as of how to challenge a negative decision (cf. Article 11(2) and Subsection 4.2.2 above). Similarly, Article 12(1)(e) requires that the applicant be ‘given notice in reasonable time of the decision’ taken by the determining authority on the application for protection. The obligation to give **prior notice** cannot be interpreted as implying a separate duty to notify the applicant of the arguments on which the determining authority intends to base a possible negative decision in order to enable the applicant to comment on these arguments, provided that the general right to be heard under EU law has been duly complied with during the examination procedure<sup>(273)</sup>. However, while there is no obligation to notify the arguments on which the determining authority intends to base a possible negative decision, this has to be distinguished from the obligation under Article 12(1)(d) to notify ‘background information’, as discussed in Subsection 4.2.3.4.

Both the obligation to give prior notice and the obligation to inform of the result of the decision, according to Article 12(1)(e) and (f), are modified in situations where ‘a legal adviser or other counsellor is legally representing the applicant’ or the applicant is ‘assisted or represented by a legal adviser or other counsellor’, respectively.

#### 4.2.3.2. Interpretation

The right of applicants under Article 12(1)(b) APD (recast) to ‘receive the **services of an interpreter** for submitting their case to the competent authorities’ applies ‘whenever necessary’. This shall be considered necessary at least in connection with interviews as referred to in Articles 14-17 and 34 APD (recast). The requirement to offer interpretation is, however, limited to cases where ‘appropriate communication cannot be ensured without such services’, i.e. situations where the applicant does not have sufficient command of the language spoken by the Member State’s authorities.

<sup>(272)</sup> It has been argued that this wording, at least in some language versions, seems to reflect a somewhat higher standard than the previous provision in Art. 10 APD (‘a language which they may reasonably be supposed to understand’), see J. Vedsted-Hansen, ‘Article 12 APD (recast)’, in Hailbronner and Thym (eds.), see fn 65, p. 1315.

<sup>(273)</sup> See CJEU, *MM.*, see fn 143, para. 74, concerning the procedural impact in this regard of Art. 4 QD; see also CJEU, judgment of 9 February 2017, case 560/14, *M v Minister for Justice and Equality, Ireland, Attorney General*, EU:C:2017:101, on the impact of the right to be heard under EU law in similar situations.

It is apparent from the provision that in addition to the **determining authority** that has been designated in accordance with Article 4(1) APD (recast), other **authorities with official duties** in connection with applications for international protection may also communicate with the applicant in circumstances that may necessitate the assistance of an interpreter, for instance those authorities having competence on admissibility issues (see Article 4(2) and Subsection 2.3.1 above on authorities responsible).

#### 4.2.3.3. Contact with UNHCR and/or other organisations

The applicant's opportunity to communicate with UNHCR pursuant to Article 12(1)(c) APD (recast) is supplemented by the similar right to contact any other organisation providing legal advice or other counselling to applicants. The latter aspect of the right is no longer limited to organisations working on behalf of UNHCR (see Article 10 of the original APD).

The right of applicants for international protection to communicate with such organisations, and possibly with UNHCR as well, is subject to the national law of the Member State concerned. Any restrictions in national law must, however, comply with the effective right of communication and may therefore not make the applicant's opportunity practically impossible or excessively difficult. In this connection it is to be noted that Article 12(1)(c), in contrast to Article 21(1) APD (recast) concerning the free legal assistance and representation referred to in Article 20, does not give Member States the express authorisation to 'admit' or 'permit' certain persons to provide legal advice or counselling to applicants.

#### 4.2.3.4. Access to background information

According to Article 12(1)(d) APD (recast), applicants and, if applicable, their legal advisers or other counsellors in accordance with Article 23(1), shall be given access to the country of origin information made available to the personnel responsible for examining and deciding on applications for international protection, as well as to expert information on medical, cultural, religious, child-related, gender or other particular issues, as provided by Article 10(3) (b) and (d), respectively. Such access is limited to the information that has been 'taken [...] into consideration' by the determining authority 'for the purpose of taking a decision on their application'. In order to ensure effective access to information, the latter delimitation cannot be applied restrictively.

In addition to the specific requirements in Article 12(1)(d), it should be noted that, according to the general EU law principle on the right to be heard, the applicant should be given an opportunity to put forward effectively, in the course of the administrative procedure, his/her views regarding his/her application. Depending on the circumstances, this may include grounds that may give the competent authority reason to refrain from adopting an unfavourable decision, documentary evidence he/she wishes to annex to the application, or detailed comments on the elements that must be taken into account by the competent authority and, if appropriate, information or assessments different from those already submitted to the competent authority<sup>(274)</sup>. (See also Subsection 4.2.4.2 below on conduct and content of interviews in relation to the requirements of Articles 15(3) and 16 APD (recast).)

<sup>(274)</sup> See CJEU, *M v Minister for Justice and Equality, Ireland, Attorney General*, *ibid.*, paras 31, 39 and 40.

Notably, the right of access to information is limited to such legal advisers and counsellors as have been admitted or permitted under national law in accordance with Article 23(1) APD (recast). The reference in Article 12(1)(d) to this provision makes clear that advisers' and counsellors' access to information may be subject to the restrictions laid down in Article 23(1). At the same time, however, Article 12(1)(d) does not explicitly allow for any restrictions on the applicant's access to the material mentioned here.

#### 4.2.4. Personal interview

##### 4.2.4.1. Scope of the obligation to conduct interviews

Articles 14-17 APD (recast) lay down rather detailed standards on interviews of applicants for international protection, in this respect requiring Member States to offer a higher level of procedural guarantees than the similar provisions of the previous APD. The APD (recast) provisions concerning interviews first define the scope of the obligation to conduct a personal interview, including the situations where it may be omitted by Member States' authorities and the impact of the absence of such an interview, as well as the authority responsible for conducting personal interviews (Article 14). Second, they set out the requirements for a personal interview in terms of logistics, organisation and professional competences in relation to the conduct of interviews and the content of the interviews (Articles 15 and 16). Finally, Member States' obligations concerning the report and other forms of recording of personal interviews with applicants are specified along with the applicant's right to comment on the report and to have access to it (Article 17).

The general rule in Article 14 APD (recast) provides that an applicant for international protection 'shall be given the **opportunity of a personal interview** on his or her application [...] with a person competent under national law to conduct such an interview' <sup>(275)</sup>. While the wording of this provision indicates no duty for the applicant to appear for the personal interview, Member States may establish such an obligation in national law in accordance with other provisions of the directive <sup>(276)</sup>.

To the extent that the personal interview concerns the substance of the application for international protection, as opposed to certain admissibility issues of a formal nature, it shall be conducted by personnel of the **determining authority** that have been designated in accordance with Article 4(1) APD (recast). However, Article 14(1), second subparagraph, allows exceptions from this rule in situations where it is 'impossible in practice for the determining authority to conduct timely interviews on the substance of each application' due to a large number of simultaneous applications for international protection. In such situations, the interview may be conducted by personnel of another interviewing authority who must have received the relevant training and shall have acquired 'general knowledge of problems which could adversely affect the applicants' ability to be interviewed' (see Article 4(3) APD (recast) laying down requirements for personnel of the determination authority; see also Subsection 2.3.1 on authorities responsible above).

<sup>(275)</sup> Art. 14(1), first subparagraph APD (recast), emphasis added.

<sup>(276)</sup> See Arts 13(2)(a), 14(5), 23(4) and 28 APD (recast) and Art. 4 QD (recast).

In addition, Article 34(2) APD (recast) leaves Member States the option of having personnel of authorities other than the determining authority conduct personal interviews on the admissibility of applications for international protection according to Article 33.

In cases where an applicant has lodged an application for international protection on behalf of his/her dependants in accordance with Article 7(2) APD (recast), ‘**each dependent adult** shall be given the opportunity of a personal interview’ (Article 14(1), third subparagraph) <sup>(277)</sup>. Such interviews with adult dependants must be conducted in circumstances that respect the private life of the dependent applicant in order to ensure confidentiality in compliance with Article 15(2) <sup>(278)</sup>. In contrast, as regards applications made by a minor, Article 14(1), fourth subparagraph allows Member States ‘to determine in national legislation the cases in which the minor shall be given the opportunity of a personal interview’.

Article 14 APD (recast) provides for three optional exceptions from the general rule on the right of applicants to have the opportunity of a personal interview. These exceptions are more narrowly defined than the similar provisions in the previous Article 12 APD.

The first and second exceptions to this general rule are based on the applicant’s individual circumstances. Article 14(2)(a) stipulates that the personal interview on the substance of the application may be omitted where ‘the determining authority is able to take a **positive decision with regard to refugee status** on the basis of evidence available’ <sup>(279)</sup>. The requirement of a ‘positive decision with regard to refugee status’ does not permit Member States to omit an interview in cases where such evidence merely enables the authority to grant subsidiary protection status. In addition, Article 14(2)(b) allows the omission of a personal interview where ‘the determining authority is of the opinion that the applicant is **unfit or unable to be interviewed** owing to enduring circumstances beyond his or her control’ <sup>(280)</sup>. It follows from the wording of Article 14(2) that these decisions must always be taken by the determining authority, in the latter case upon consultation of a medical professional about the temporary or enduring nature of the applicant’s condition, if the determining authority is in doubt.

Third, in the case of a **subsequent application** for international protection, it follows from Article 14(1), first subparagraph *in fine* that the procedural rule in Article 42(2)(b) APD (recast) prevails, giving Member States the option of stipulating in national law that a preliminary examination may be conducted on the sole basis of written submissions without a personal interview, except in cases concerning dependent applicants under Article 40(6).

According to Article 14(3), ‘[t]he **absence of a personal interview** [...] shall not prevent the determining authority from taking a decision on an application for international protection’ <sup>(281)</sup>, provided that such absence is in accordance with the abovementioned rules of Article 14. In cases where the personal interview has been omitted on the basis of Article 14(2)(b) concerning applicants who are unfit or unable to be interviewed, ‘[t]he absence of [such an] interview [...] shall not adversely affect the decision of the determining authority’ (Article 14(4)).

<sup>(277)</sup> Emphasis added.

<sup>(278)</sup> See Subsection 4.2.4.2 below on the conduct and content of interviews.

<sup>(279)</sup> Emphasis added.

<sup>(280)</sup> Emphasis added. In this situation, however, ‘reasonable efforts shall be made to allow the applicant or the dependant to submit further information’, cf. Art. 14(2), second subparagraph.

<sup>(281)</sup> Emphasis added.

Outside these situations ‘Member States, when deciding on an application for international protection, may take into account the fact that the applicant failed to appear for the personal interview, unless he or she had good reasons for the failure to appear’ (Article 14(5)).

#### 4.2.4.2. Conduct and content of interviews

As the main rule, Article 15(1) APD (recast) provides that the ‘personal interview [of an applicant for international protection] shall normally take place **without the presence of family members** [...]’<sup>(282)</sup>. This applies even if the application for international protection has been lodged by another applicant on behalf of his/her dependant, in accordance with Article 7(2). Exception from the main rule can only be made in cases where ‘the determining authority considers it necessary for an appropriate examination to have other family members present’ (Article 15(1)).

When assessing the necessity of the presence of family members during the interview, the determining authority must be informed by Article 15(2) APD (recast) according to which ‘[a] personal interview shall take place under conditions which ensure **appropriate confidentiality**’<sup>(283)</sup>. This requirement for the conduct of personal interviews is based on the more general principle of confidentiality in connection with applications for international protection and serves the purpose of safeguarding the integrity of the applicant’s information as also reflected in Article 11(3) (see Subsection 4.2.2 on requirements for a decision above). It follows that decisions to allow the presence of family members during interviews can only be made to the extent such presence is indeed necessary in the individual case.

The principle of confidentiality will also have to be taken into account by Member States if or when implementing Article 15(4) APD (recast) that allows for provisions of national legislation concerning the **presence of third parties** at a personal interview. This option will normally be relevant where third parties are permitted to be present in order to assist or protect the applicant during the interview according to Article 23(3) and (4) concerning the presence of legal advisers or other counsellors and Article 25(1)(b) concerning representatives or other counsellors of unaccompanied minor applicants (see Subsection 4.2.8 below on guarantees for unaccompanied minors), or such third parties whose presence is warranted for educational or similar purposes in the interest of the determining authority or for security reasons.

Article 15(3) APD (recast) lays down the **conditions of personal interviews**, requiring the following.

#### Article 15(3) APD (recast)

Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:

- (a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant’s cultural origin, gender, sexual orientation, gender identity or vulnerability;

<sup>(282)</sup> Emphasis added.

<sup>(283)</sup> Emphasis added.

- (b) wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests [...];
- (c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests [...];
- (d) ensure that the person who conducts the interview on the substance of an application for international protection does not wear a military or law-enforcement uniform;
- (e) ensure that interviews with minors are conducted in a child-appropriate manner.

The implications of Article 15(3)(a) for the conduct of personal interviews, particularly concerning applications for international protection based on sexual orientation, were clarified by the CJEU in a ruling interpreting the largely similar provision in Article 13(3)(a) APD in connection with Article 4(3) QD <sup>(284)</sup>.

On the central issues of asking questions or **providing evidence concerning specific sexual practices**, the Court held that ‘while the national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum, questions concerning details of the sexual practices of that applicant are contrary to the fundamental rights guaranteed by the EU charter and, in particular, to the right to respect for private and family life as affirmed in Article 7 thereof’ <sup>(285)</sup>.

The requirement under Article 15(3)(b) and (c) that the interviewer and the interpreter have the **same sex as the applicant** reflects various international recommendations <sup>(286)</sup>. It is qualified in three different ways:

- 1) this requirement applies ‘wherever possible’, i.e. only to the extent that it is possible to provide interviewers and interpreters of the relevant sex;
- 2) the obligation to do so arises only at the applicant’s request; and
- 3) a request by the applicant in this regard may be set aside if the determining authority has reasons to believe that it is ‘based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application for international protection in a comprehensive manner’.

The directive’s reference to ‘reasons to believe’ must be understood so as to require concrete reasons to be given for setting aside the applicant’s request as regards the sex of the interviewer or interpreter in accordance with Article 15(3)(b) and (c), respectively.

<sup>(284)</sup> CJEU, *A, B and C*, see fn 25, paras 62-63; discussed also in *Evidence and credibility assessment in the context of the Common European Asylum System (CEAS) — A judicial analysis*, see fn 2, Section 4.2.6.

<sup>(285)</sup> CJEU, *A, B and C*, see fn 25, para. 64; discussed also in *Evidence and credibility assessment in the context of the Common European Asylum System (CEAS) — A judicial analysis*, see fn 2, Section 4.2.6.

<sup>(286)</sup> See UNHCR Executive Committee, *Conclusions No 64: Refugee women and international protection*, 5 October 1990, paras (a) (ii) and (iii); *No 73: Refugee protection and sexual violence*, 8 October 1993; *No 77 (XLVI): General Conclusion on International Protection*, 20 October 1995; *No 79 (XLVII): General Conclusion on International Protection*, 11 October 1996; *No 81 (XLVIII): General Conclusion on International Protection*, 17 October 1997; and *No 105 (LVII): Conclusion on women and girls at risk*, 6 October 2006, para. (n) (iv). See also UN Committee on the Elimination of Discrimination against Women, *General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 14 November 2014, UN Doc CEDAW/C/GC/32, paras 16 and 50.

As regards the **content of personal interviews**, Article 16 APD (recast) reflects the essential function of the personal interview in connection with the examination of an application for international protection and the need for it to be sufficiently comprehensive. It provides the following.

#### Article 16 APD (recast)

When conducting a personal interview on the substance of an application for international protection, the determining authority shall ensure that the applicant is given an adequate opportunity to present elements needed to substantiate the application in accordance with Article 4 [QD (recast)] as completely as possible. [...]

Thus, the questions addressed to the applicant must be relevant to the assessment of the need for international protection in the light of the criteria for qualifying as a refugee or a beneficiary of subsidiary protection. In line with international standards for the assessment of applications for international protection, it is further specified in Article 16 APD (recast) that the required content of the interview ‘shall include the opportunity [for the applicant] to give an explanation regarding elements which may be missing and/or any **inconsistencies** or **contradictions** in the applicant’s statements’ <sup>(287)</sup>.

#### 4.2.4.3. Report and recording of interviews

According to Article 17(1) APD (recast), ‘Member States shall ensure that either a **thorough and factual report** containing all substantive elements or a **transcript** is made of every personal interview’ <sup>(288)</sup>. In addition, Article 17(2) indicates the option to provide for **audio or audiovisual recording** of personal interviews. If such recordings are made, ‘Member States shall ensure that the recording or a transcript thereof is available in connection with the applicant’s file’.

In order to enhance the accuracy of reports on the interviews, Article 17(3) APD (recast) requires Member States to ‘ensure that the applicant has the opportunity to make comments and/or provide clarification orally and/or in writing with regard to any mistranslations or misconceptions appearing in the report or in the transcript [...]’. The opportunity to make such comments shall be given either ‘at the end of the personal interview or within a specified time limit before the determining authority takes a decision’ on the application. This opportunity includes the requirement that Member States ‘ensure that the applicant is **fully informed of the content of the report** or of the **substantive elements of the transcript**, with the assistance of an interpreter if necessary’ <sup>(289)</sup>. In order to be ‘fully informed’ the applicant must have access to all elements of the content of the report or the transcript in an appropriate way.

Having thus been fully informed of the content of the report or transcript of the interview, the applicant for international protection shall be requested ‘to confirm that the content of the report or the transcript correctly reflects the interview’ (Article 17(3), first subparagraph *in fine*).

<sup>(287)</sup> Emphasis added. See UNHCR *Handbook*, see fn 38, paras 195-205. See also *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Section 4.4.

<sup>(288)</sup> Emphasis added.

<sup>(289)</sup> Emphasis added.

Article 17(3), second subparagraph, allows two exceptions from the requirements laid down in the first subparagraph:

- (1) when the personal interview has been recorded in accordance with Article 17(2) and the recording will be admissible as evidence in subsequent appeals procedures, the Member State does not need to request the applicant to confirm the content of the report or transcript; and
- (2) when the Member State provides for both a transcript and a recording of the interview, it is not required that the applicant be allowed to make comments and/or provide clarification of the transcript.

According to Article 17(4), second subparagraph, the applicant's **refusal to confirm the content** of the report or the transcript 'shall not prevent the determining authority from taking a decision on the application' for international protection. The determining authority is, however, under the obligation to enter the applicant's reasons for such refusal into his/her file (Article 17(4), first subparagraph). The observance of this provision as well as Article 17(3) can be of particular practical importance in the case of an appeal against a negative decision on an application for international protection, for instance if the applicant at that stage objects to the accuracy of the translation of his/her statements at the personal interview.

As a rule under Article 17(5), '[a]pplicants and their legal advisers or other counsellors [...] shall have **access to the report** or the **transcript** and, where applicable, the **recording** [of the personal interview], before the determining authority takes a decision' on the application <sup>(290)</sup>. If the Member State provides for both a transcript and recording of the interview, an exception to the right of access to the recording can be made in the examination procedures at the administrative level. Nonetheless, access to the recording must be provided at the appeals stage (Article 17(5), second subparagraph).

According to Article 17(5), third subparagraph, it may be provided that access to reports, transcripts or recordings is granted **at the same time as the decision on the application is made** where the application is examined in accelerated procedures in accordance with Article 31(8) APD (recast). Since this is 'without prejudice' to Article 17(3), the applicant will in such cases still be entitled to have the opportunity to make comments and/or provide clarification of the report or the transcript in accordance with that provision. If this has not taken place at the end of the personal interview, and any issue with regard to mistranslations or misconceptions only becomes clear to the applicant when granted access to the report or the transcript, the applicant must be given the opportunity to comment on such issues in order to provide clarification at this stage, possibly in connection with an appeal lodged with a court or tribunal pursuant to Article 46 APD (recast).

#### 4.2.5. Medical examination

The rules on medical examination laid down in Article 18 APD (recast) are to be read in conjunction with Article 4(4) QD (recast) according to which the fact that an applicant for international protection has already been subject to persecution or serious harm, or to direct threats of such persecution or harm, is a serious indication of the applicant's well-founded fear of persecution or real risk or suffering serious harm unless there are good reasons to consider that

<sup>(290)</sup> Emphasis added.

such persecution or serious harm will not be repeated <sup>(291)</sup>. While the extent of the obligation of Member States to arrange for medical examinations under Article 18 APD (recast) has to be balanced against concerns to avoid longer delays and additional administrative burdens, the provision therefore has to be interpreted and applied with due regard to the substantive rules in the QD (recast).

Where the determining authority ‘deems it relevant for the assessment of an application for international protection in accordance with Article 4 [QD (recast)]’, Member States shall **arrange for a medical examination** of the applicant concerning ‘signs that might indicate past persecution or serious harm’ (Article 18(1) APD (recast)). The **relevancy** criterion implies that the determining authority may omit a medical examination if this is irrelevant or unnecessary because the authority is prepared to accept the applicant’s account as regards past infliction of harm or persecutory measures resulting in the signs that might otherwise call for examination, or because there is no possible relation between the medical signs or evidence and the alleged reasons for applying for international protection.

Although not a binding source of law for the interpretation of the APD (recast), useful guidance as to the relevance of medical examinations may be drawn from ECtHR case-law on Article 3 ECHR. It has here been held that the state has a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant’s injuries may have been caused by torture. Thus, if an applicant for international protection has made a *prima facie* case as to the existence and origin of signs of possible torture, it will be for the examining authorities to obtain an expert opinion on the probable cause of the applicant’s scars or other signs <sup>(292)</sup>.

The scope of the obligation under Article 18 APD (recast) relates exclusively to medical examinations of potential relevance to assessing the application for international protection. This provision, therefore, does not concern the identification of special procedural needs according to Article 24 APD (recast). Nonetheless, when deciding on the relevance of a medical examination, the obligation under Article 24(3) to provide **applicants in need of special procedural guarantees** with adequate support in order to allow them to benefit from the rights and comply with the obligations of the directive will have to be taken into account in relevant cases. (See Subsection 4.2.7 below on applicants in need of special procedural guarantees.)

As an alternative course of action under Article 18(1), ‘Member States may provide that the applicant arranges for such a medical examination’. In such cases, the medical examination will be paid for out of **public funds**, in line with an examination arranged for by the determining authority (Article 18(1), third subparagraph). By contrast, if the determining authority does not deem it relevant to carry out a medical examination in accordance with Article 18(1), it ‘shall inform applicants that they may, on their own initiative and at their own cost, arrange for a medical examination concerning signs that might indicate past persecution or serious harm’ (Article 18(2) APD (recast)).

The determining authority’s decision on medical examination under Article 18(1) is subject to the **applicant’s consent**. As stipulated in Article 18(1), second subparagraph, ‘[a]n applicant’s refusal to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for international protection’. In that case it may, in

<sup>(291)</sup> See the definition of refugees and persons eligible for subsidiary protection in Art. 2(d) and (f) QD (recast), respectively.

<sup>(292)</sup> See ECtHR, judgment of 9 March 2010, *RC v Sweden*, application no 41827/07, para. 53.

certain circumstances, be possible to draw inferences from the applicant's refusal, provided that the applicant does not give good reasons for the refusal to be medically examined.

The medical examinations arranged by the determining authority or, alternatively, by the applicant under Article 18(1) must be carried out by **qualified medical professionals**. According to Article 18(1), second subparagraph, 'Member States may designate the medical professionals who may carry out such medical examinations'. It is set out that national measures dealing with identification and documentation of symptoms and signs of torture or other serious acts of physical or psychological violence in procedures covered by the directive should be in conformity with internationally recognised standards. In this regard, the preamble of the APD (recast) indicates that the *Manual on effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment* (Istanbul Protocol) may be of particular relevance (recital (31) APD (recast)) <sup>(293)</sup>.

#### 4.2.6. Legal information, assistance and representation

The APD (recast) distinguishes between legal and procedural **information** on the one hand (Article 19), and legal **assistance and representation** on the other (Articles 20, 22 and 23). While the authorities are required to provide 'legal and procedural information free of charge in procedures at first instance' under Article 19, Article 20 limits free legal assistance and representation to the appeals stage. In addition to such assistance and representation free of charge, '[a]pplicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their application for international protection, at all stages of the procedure', cf. Article 22(1). The scope and modalities of legal assistance and representation and the rights of legal advisers are specified in Article 23. Importantly, however, the APD (recast) does not include any specific provision concerning the issue of language and translation in order to ensure effective communication between applicants and legal advisers or other counsellors.

Common rules on the conditions for provision of legal and procedural information as well as free legal assistance and representation have been laid down in Article 21 APD (recast). Article 21(1) gives Member States a rather wide discretion as to the manner in which they comply with the obligations to offer applicants information, assistance and representation under Articles 19 and 20. As regards the former provision, free legal and procedural information regarding procedures at the administrative level may be provided by **non-governmental organisations** or by professionals from **government authorities** or by specialised services of the Member State (see recital (22) APD (recast)). By contrast, for the provision of free legal assistance and representation in appeals procedures under Article 20, the appointment of a lawyer is considered the standard solution, although the wording of Article 21(1) has a somewhat broader reference to persons as 'admitted or permitted under national law' <sup>(294)</sup>. This seems to leave the Member State the option of authorising different categories of persons, yet with the inherent limitation that such persons must have **legal qualifications** in order to provide legal assistance and representation as prescribed by Article 20 (see also Subsection 4.2.6.2 below on legal assistance and representation).

<sup>(293)</sup> Recital (31) APD (recast), cf. United Nations Office of the High Commissioner for Human Rights (OHCHR), *Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment ('Istanbul Protocol')*, 2004, HR/P/PT/8/Rev.1. See also *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Subsection 4.7.2.

<sup>(294)</sup> See European Commission, *Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)*, 1 June 2011, COM(2011) 319 final, Annex, p. 8.

According to Article 21(2) APD (recast), Member States may make it a condition for legal and procedural information free of charge under Article 19 as well as for free legal assistance and representation under Article 20 that these services are granted:

#### Article 21(2) APD (recast)

- (a) only to those who lack **sufficient resources**; and/or
- (b) only through the services provided by legal advisers or other counsellors **specifically designated** by national law to assist and represent applicants <sup>(295)</sup>.

Additional rules concerning the provision of legal information, assistance and representation may be laid down in national law by Member States in accordance with Article 21(2)-(5), including modalities for filing and processing requests for legal and procedural information free of charge under Article 19 and for free legal assistance and representation under Article 20. Certain monetary and time limits on the provision of these services under Articles 19 and 20 may also be laid down in national law, yet ‘provided that such limits do not arbitrarily restrict access to the provision of legal and procedural information and legal assistance and representation’ (Article 21(4)(a)). Article 21(5) further allows Member States to ‘demand to be reimbursed wholly or partially for any costs granted if and when the applicant’s financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant’ <sup>(296)</sup>.

#### 4.2.6.1. Legal and procedural information

As mentioned above, Article 19 APD (recast) does not concern the obligation to provide legal assistance in the strict sense in the examination procedures at the administrative level. Article 19 only obliges Member States to ensure that applicants for international protection are, on request, provided with ‘legal and procedural information free of charge during the first-instance procedures’. If, however, a Member State avails itself of the option to provide free legal assistance and/or representation by a lawyer in procedures at this level, that will cover the need for the legal and procedural information required under Article 19 as well (Article 20(2) APD (recast) *in fine*).

As a minimum level of the legal and procedural information to be provided free of charge at this level, Article 19(1) requires Member States to ensure that ‘applicants are provided with [...], at least, information on the procedure in the light of the applicant’s particular circumstances’. The provision of such information is intended to enable applicants to better understand the examination procedure and help them to comply with the relevant obligations during the examination (recital (22) APD (recast)). Thus, the information should include an explanation of the **procedural steps** and the **rights and obligations** of the applicant that are likely to be relevant, depending on the individual case, such as the obligation to cooperate and to submit the elements of facts and evidence referred to in Article 4 QD (recast). In this context, the timing and content of the information required will depend on the extent to which the Member State considers it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection (Article 4(1) QD (recast)).

<sup>(295)</sup> Emphasis added.

<sup>(296)</sup> See, for similar rules on reimbursement of the Member State’s costs for granting material reception conditions and healthcare for applicants for international protection, Art. 17(4) RCD (recast).

If the administrative-level examination of the application results in a **negative decision**, Article 19(1) APD (recast) further requires the Member State's authorities to provide the applicant, on request, with 'information — in addition to that given in accordance with Article 11(2) and Article 12(1)(f) — in order to clarify the reasons for such decision and explain how it can be challenged'. It is clear from the wording of Article 19(1) that the obligation to provide legal and procedural information in such situations goes beyond the requirements under Articles 11(2) and 12(1)(f) to state the reasons of the decision in fact and in law and to inform applicants of the result of the decision in a language that they understand or are reasonably supposed to understand when they are not assisted or represented by a legal adviser or other counsellor.

#### 4.2.6.2. Legal assistance and representation

As is clear from the title of Article 20 APD (recast), Member States' obligation to provide free legal assistance and representation under this provision extends only to **appeals procedures** as provided for in Article 46 APD (recast) <sup>(297)</sup>. It requires Member States to ensure that, on request, applicants for international protection are provided with 'free legal assistance and representation' for the purposes of the appeals procedures. In order to be effective, this implies that the assistance has to be given by a person who is competent and formally entitled to assist and represent clients in legal matters which in several national systems means a qualified lawyer <sup>(298)</sup>. The assistance offered shall therefore 'include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant' (Article 20(1) *in fine*).

The obligation to provide free legal assistance and representation under Article 20 is limited to the appeal procedures before a **court or tribunal of first instance**. If additional instances of appeal procedures are available, there is no requirement under the directive that the Member State provide additional free legal assistance or representation. According to Article 21(2), second subparagraph, Member States have the option to provide in national law that 'free legal assistance and representation referred to in Article 20 is granted only for appeals procedures in accordance with [Article 46 APD (recast)] before a court or tribunal of first instance and not for any further appeals or reviews provided for under national law, including rehearings or reviews of appeals'. Depending on the specific circumstances, this rule may have to be applied with caution, in particular in situations where a rehearing or review of the appeals decision is warranted due to assumed legal errors in the first appeal procedure. In such cases legal assistance and representation may have to be granted in order to ensure access to effective remedy against an administrative decision incorrectly rejecting the application for international protection, in compliance with Article 47 EU charter and the principle of effectiveness in applying substantive EU law within national legal systems <sup>(299)</sup>. This is of special relevance in Member States where legal representation before superior courts is obligatory.

Member States may, according to Article 20(3) APD (recast), 'provide that free legal assistance and representation not be granted where the applicant's appeal is considered [...] to have **no tangible prospect of success**' <sup>(300)</sup>. Decisions on this 'merits test' under national law shall be taken either by a court or tribunal or by another 'competent authority'. If such decisions not to

<sup>(297)</sup> However, Member States have the option to provide free legal assistance and/or representation in the procedures at first instance (Art. 20(2)). See Subsection 4.2.6.1 above on legal and procedural information.

<sup>(298)</sup> See European Commission, *Amended proposal for an asylum procedures directive (Recast)*, 2011, see fn 294, Annex, p. 8.

<sup>(299)</sup> For an account of the general principles of EU law on effectiveness and equality of arms that may have bearing on this situation, see Reneman, *EU Asylum Procedures*, see fn 254, pp. 85-89 and 93-94.

<sup>(300)</sup> Emphasis added.

grant free legal assistance or representation are taken by an authority which is not a court or tribunal, the applicant shall have the right to an **effective remedy** against that decision before a court or tribunal (Article 20(3), second subparagraph). In any event, in the application of this provision ‘Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant’s effective access to justice is not hindered’ (Article 20(3), third subparagraph), which reflects general principles of EU law concerning effective remedy against administrative decisions that affect fundamental rights.

Article 22 APD (recast) confirms that applicants for international protection shall have the **right to legal advice at their own cost** at all stages of the examination procedure, including when they have received a negative decision. More specifically, Article 22(1) imposes the obligation on Member States to give applicants the ‘opportunity to consult [...] in an effective manner’ a legal adviser or other counsellor. The provision furthermore allows Member States to require that legal advisers or other counsellors, even when consulted at the applicant’s own cost, have to be ‘admitted or permitted as such under national law’. This requirement is in line with the condition for persons providing free legal assistance and representation in appeals procedures under Article 20 (see Article 21(1), second subparagraph) and serves the purpose of preventing possible exploitation of applicants for international protection by unqualified legal advisers.

As an important practical modification, Article 22(2) provides that ‘Member States may allow **non-governmental organisations** to provide legal assistance and/or representation to applicants [...] in accordance with national law’<sup>(301)</sup>. This rule applies both in procedures at the administrative level and appeals procedures.

The **scope of legal assistance and representation** and the rights of legal advisers and other counsellors are specified in Article 23 APD (recast). As a main rule, Article 23(1), first subparagraph, stipulates that ‘Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, who assists or represents an applicant under the terms of national law, shall enjoy **access to the information in the applicant’s file** upon the basis of which a decision is or will be made’<sup>(302)</sup>. The proviso that assistance or representation is given ‘under the terms of national law’ apparently refers to the general conditions for the delivery of such legal assistance and representation which must be complied with in order for the legal counsellor to be able to claim such access.

Article 23(1), second subparagraph allows an **exception** to the main rule on access to information in the applicant’s file in a rather wide range of situations.

#### Article 23(1) APD (recast)

Member States may make an exception where disclosure of information or sources would jeopardise **national security**, the **security of the organisations or person(s)** providing the information or the security of the person(s) to whom the information relates or where the **investigative interests** relating to the examination of applications for international protection by the competent authorities of the Member States or the **international relations** of the Member States would be compromised. In such cases, Member States shall:

- (a) make **access to such information or sources** available to the [appeals] authorities referred to in [Article 46]; and

<sup>(301)</sup> Emphasis added.

<sup>(302)</sup> Emphasis added.

(b) establish in national law procedures guaranteeing that the **applicant's rights of defence** are respected.

In respect of point (b), Member States may, in particular, grant access to such information or sources to a legal adviser or other counsellor who has undergone a security check, insofar as the information is relevant for examining the application or for taking a decision to withdraw international protection<sup>(303)</sup>.

While the latter may indeed be a relevant compensating measure in such situations, it should be implemented in a manner and procedural context taking adequate account of the legal problem inherent in the usage of secret information. Thus, as indicated by the CJEU in relation to judicial review of a Member State's decision restricting the right of entry and residence of a Union citizen under Directive 2004/38/EC<sup>(304)</sup> on grounds of public security, the national court reviewing that decision is required by that directive, read in the light of Article 47 of the EU charter, to:

[...] ensure that failure by the competent national authority to disclose to the person concerned, precisely and in full, the grounds on which a decision taken under Article 27 of that directive is based and to disclose the related evidence to him is limited to that which is **strictly necessary**, and that he is informed, in any event, of the **essence of those grounds** in a manner which takes due account of the necessary confidentiality of the evidence<sup>(305)</sup>.

The provisions in Article 23(2)-(4) lay down the modalities for the exercise of the functions of legal advisers and other counsellors. Member States shall ensure that such persons assisting or representing applicants have '**access to closed areas**, including detention facilities and transit zones, for the purpose of consulting the applicant', in accordance with Articles 10(4) and 18(2)(b)-(c) RCD (recast)<sup>(306)</sup>. In addition, according to Article 23(3) APD (recast), applicants shall be allowed to bring a legal adviser or other counsellor admitted or permitted as such under national law to the **personal interview**<sup>(307)</sup>. However, Article 23(3) and (4) lay down optional limitations on the role of such legal advisers or counsellors at interviews concerning such issues as the counsellor's interventions, and allowing Member States to require the presence of the applicant at the personal interview as well as to require the applicant to respond in person to the questions asked.

#### 4.2.7. Applicants in need of special procedural guarantees

The category of 'applicants in need of special procedural guarantees' is defined in Article 2(d) APD (recast) as persons 'whose ability to benefit from the rights and comply with the obligations provided for in this directive is limited due to individual circumstances'. The definition reflects the intention that the special needs have to be taken into account **for the purposes of the examination procedures** under this directive, as opposed to the special needs referred to in Article 2(k) and Articles 21-25 RCD (recast).

<sup>(303)</sup> Emphasis added.

<sup>(304)</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, pp. 77-123.

<sup>(305)</sup> CJEU, Grand Chamber, judgment of 4 June 2013, Case C-300/11, *ZZ v Secretary of State for the Home Department*, EU:C:2013:363, para. 69 (emphasis added).

<sup>(306)</sup> Emphasis added.

<sup>(307)</sup> See Art. 15(4) APD (recast) on the presence of third parties at the personal interview and Subsection 4.2.4.2 above on the conduct and content of interviews.

Based on compromises reached during the drafting of the APD (recast) <sup>(308)</sup>, Article 24(1) stipulates that ‘Member States shall assess within a reasonable period of time after an application for international protection is made whether the applicant is an applicant in need of special procedural guarantees’. That assessment may be integrated into existing national procedures and/or into the assessment referred to in Article 22 RCD (recast). The wording of the two directives is partly similar in this regard, although Article 22 RCD (recast) may seem to be the primary provision concerning the identification of vulnerable persons insofar as assessment of special reception needs will often precede the issue of special procedural guarantees. Common to both directives, the assessment of applicants with special needs does not have to take the form of an administrative procedure (Article 24(2) APD (recast)). There is therefore no requirement under EU secondary law that the procedures for administrative decision-making, including requirements that decisions be given in writing and provide the reasons and information on appeals against such decisions, shall be applied to the assessment of applicants’ need of special procedural guarantees.

It follows from the wording of Article 24, taken together with Article 2(d) APD (recast), that the identification of applicants in need of special procedural guarantees is not based merely on the applicant’s subjective account of his or her individual circumstances and vulnerability. Instead, it is for the determining authority to identify vulnerabilities that are relevant for the examination procedure. This assessment has to be based on objective or generalised criteria in which connection the applicant’s statements may be relevant, although not decisive in and of themselves. In addition, in some instances it may be appropriate or even necessary to provide expert information concerning the applicant’s possible need for special guarantees, for example based on medical examination.

Article 24(1) merely requires the assessment to be carried out **within a reasonable period of time** after the application was made. According to recital (29) APD (recast), however, ‘Member States should endeavour to identify applicants in need of special procedural guarantees **before a first-instance decision is taken**’ <sup>(309)</sup>. In cases where the need for special procedural guarantees becomes apparent at a later stage of the examination procedure, that need shall still be addressed without necessarily restarting the procedure (Article 24(4)).

The scope of application of Article 24 is **not based on specific reasons** for the need of special procedural guarantees. The definition in Article 2(d) merely refers to ‘individual circumstances’, yet recital (29) considers certain personal characteristics and experiences as typically resulting in the need for special procedural guarantees: ‘age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence’. The identification of applicants in need of special procedural guarantees will therefore often be guided by the overall purpose laid down in Article 24(3), according to which Member States shall ensure that such applicants are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of the directive throughout the duration of the examination procedure <sup>(310)</sup>. The adequate support may include ‘sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection’ (recital (29)).

<sup>(308)</sup> See J. Vedsted-Hansen, ‘Article 24 APD (recast)’, in Hailbronner and Thym (eds.), see fn 65, p. 1335.

<sup>(309)</sup> Emphasis added.

<sup>(310)</sup> In order to facilitate the timely identification of persons with special procedural or reception needs, EASO has developed a [Tool for identification of persons with special needs](#) including indicators of special needs and guidance on relevant support.

In particular, where such adequate support cannot be provided within the framework of **accelerated procedures** under Article 31(8) APD (recast) and **border procedures** under Article 43 APD (recast), Article 24(3), second subparagraph, restricts the application of these procedural devices, in particular in cases concerning applicants in need of special procedural guarantees as a result of **torture, rape** or other serious forms of **psychological, physical or sexual violence**. In such cases these procedures shall not be applied or shall cease to apply. Additional procedural guarantees apply as regards situations under Article 46(6) where the appeal does not have automatic suspensive effect, in order to make the remedy effective, cf. Article 46(7) and recital (30) APD (recast). (See Subsection 4.1.4 below on the right to remain during appeals procedures above, and Subsection 6.4.2 on modifications and exceptions.)

#### 4.2.8. Guarantees for unaccompanied minors

Article 25(1) APD (recast) lays down the general obligation of Member States to appoint a **representative** <sup>(311)</sup> to represent and assist the unaccompanied minor applicant <sup>(312)</sup> in order to ‘enable him or her to benefit from the rights and comply with the obligations provided for in this directive’. The only exception is indicated in Article 25(2) on applicants who ‘will in all likelihood reach the age of 18 before a decision at first instance [on their application for international protection] is taken’. The special needs of minors in connection with the **personal interview** and the **decision-making** as well as other aspects of the examination procedure must be taken into account in accordance with Article 25(3) and (4). In general, the **best interests of the child** shall be a primary consideration for Member States when implementing the directive (see Article 25(6), recital (33) APD (recast) and Article 24(2) of the EU charter) <sup>(313)</sup>.

As regards the particular issues pertaining to Member States’ use of **medical examination** in order to determine the age of unaccompanied applicants for international protection, Article 25(5) stipulates that such examinations may be used ‘where, following general statements or other relevant indications, Member States have doubts concerning the applicant’s age’ <sup>(314)</sup>. Thus, examinations of age may be arranged only if this is warranted by such information and the authorities can concretise their doubts by reference to ‘relevant indications’ in this regard. If the doubts persist after the medical examination, the applicant shall be assumed to be a minor, cf. Article 25(5), first subparagraph *in fine*.

Article 25(5) further lays down the modalities for medical examinations, including the requirement that they shall be carried out by qualified medical professionals with full respect for the applicant’s dignity. The unaccompanied applicant and/or his/her representative shall, as a general rule, be requested to **consent** to the medical examination. However, the applicant’s refusal to undergo such an examination shall not prevent the determining authority from taking a decision on the application for international protection (Article 25(5), fourth subparagraph). In the case of refusal, a decision to reject the application shall not be based solely on that refusal (Article 25(5)(c)).

Article 25(6) requires Member States to ensure that the best interests of the child are ‘a primary consideration for Member States when implementing this directive’ and lays down

<sup>(311)</sup> See definition in Art. 2(n) APD (recast). It is clear from this definition that the representative is not identical to a guardian. The APD (recast) does not require a formal guardian to be appointed.

<sup>(312)</sup> See definitions in Art. 2(l) and (m) APD (recast).

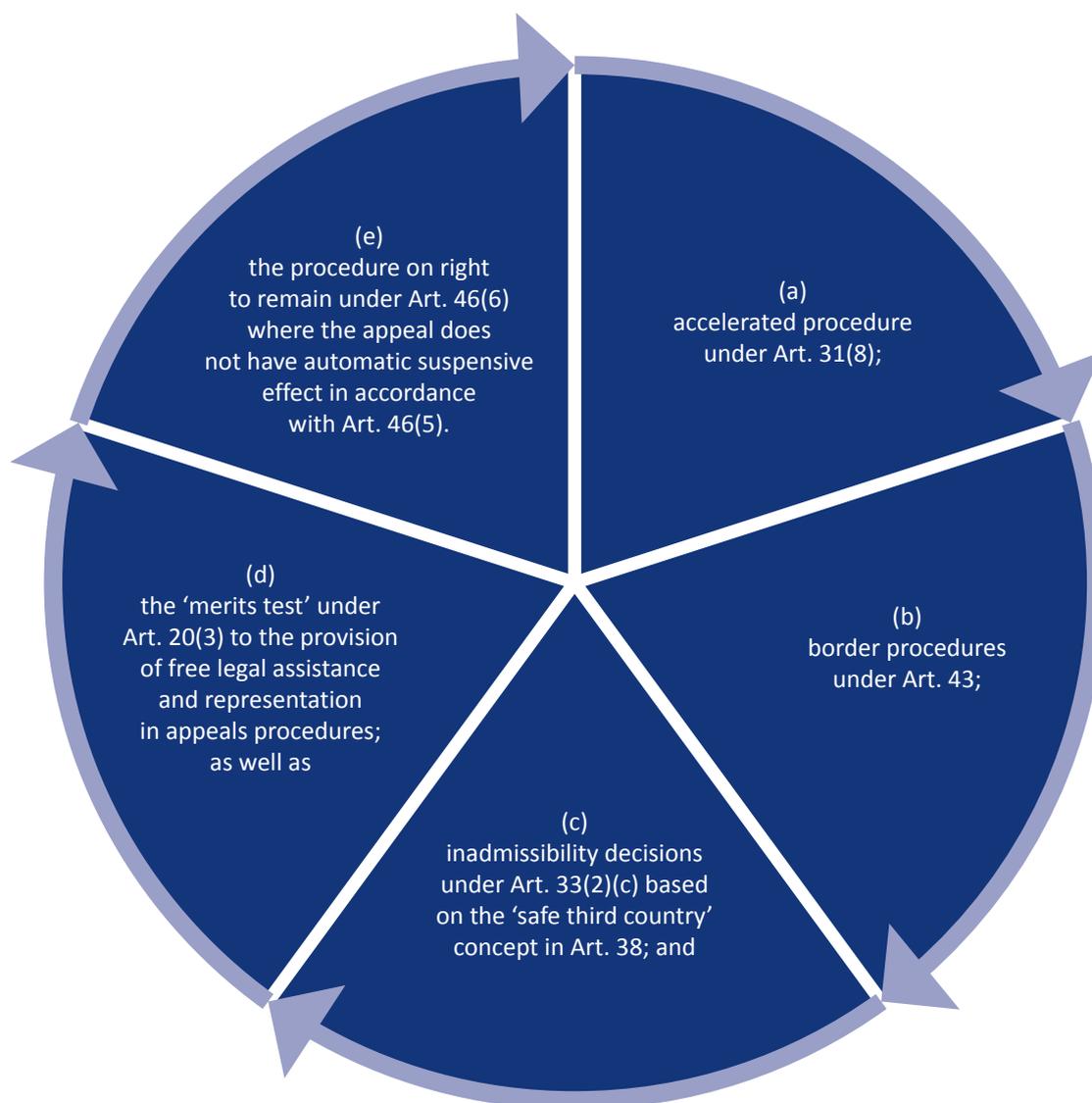
<sup>(313)</sup> See also Art. 24 EU charter and Art. 3 of the Convention on the Rights of the Child.

<sup>(314)</sup> See *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Subsection 4.7.3. See also EASO, *Age assessment practice in Europe*, December 2013 (new edition to be published in 2018).

various **restrictions on the application of special procedures** in cases concerning unaccompanied minor applicants. As also shown in Figure 9 below, Article 25(6)(a)-(d) specifies that, where unaccompanied minor applicants are involved, it is only under certain conditions that it can be permissible for Member States to apply or continue to apply:

- (a) accelerated procedures under Article 31(8);
- (b) border procedures under Article 43;
- (c) inadmissibility decisions under Article 33(2)(c) based on the ‘safe-third-country’ concept in Article 38; and
- (d) the ‘merits test’ under Article 20(3) to the provision of free legal assistance and representation in appeals procedures; as well as
- (e) the procedure under Article 46(6) to rule whether or not the applicant may remain on the territory of the Member State where the appeal does not have automatic suspensive effect in accordance with Article 46(5).

**Figure 9: Restrictions on the application of special procedures in cases concerning unaccompanied minor applicants as set out in Article 25(6) APD (recast)**



Article 25(1)(b) modifies the general rule in Article 15(4) APD (recast) allowing for national rules on the presence of third parties at the personal interview as well as Article 23(3) and (4) dealing with the presence of legal advisers or other counsellors. While these provisions allow Member States some discretion as regards the modalities of such third parties' presence at the personal interview, it follows from Article 25(1)(b) that an unaccompanied minor applicant is entitled to have his/her **representative present at the interview**. In addition, the representative shall 'have an opportunity to ask questions or make comments' during the interview. Such questions and comments must be expressed by the representative 'within the framework set by the person who conducts the interview'. However, this framework is to be considered of a merely practical nature and cannot be allowed to limit the possibility of the representative to assist the unaccompanied minor in connection with the interview.

The requirement in Article 25(3)(a) that the **personal interview** of unaccompanied minor applicants shall be conducted by 'a person who has the necessary knowledge of the special needs of minors' extends both to the personal interviews under Articles 14-17 and to interviews on admissibility under Article 34 APD (recast). Although Article 25(1)(b) does not expressly provide for the presence of the representative at admissibility interviews, the initial wording in Article 25(1) — according to which this provision applies to 'all procedures provided for in this directive' — warrants the conclusion that unaccompanied minor applicants have a similar right to have the representative present at admissibility interviews under Article 34.

The right to be provided with **legal and procedural information** free of charge under Article 19 extends to both the unaccompanied minor applicants and their representatives (Article 25(4)). This provision further states that such information shall be provided also in procedures concerning the withdrawal of international protection under Articles 44 and 45 APD (recast).

#### 4.2.9. Obligations of applicants

According to Article 13(1) APD (recast), 'Member States shall impose upon applicants the **obligation to cooperate** with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) [QD (recast)]' <sup>(315)</sup>. Thus, Article 13 adds a mandatory standard to the latter optional provision, according to which Member States may consider it the duty of applicants to submit as soon as possible all the elements needed to substantiate their application for international protection <sup>(316)</sup>. In order to impose other cooperation obligations on applicants beyond the scope of Article 4(2) QD (recast), such obligations have to be 'necessary for the processing of the application' for international protection (Article 13(1) APD (recast) *in fine*).

By requiring applicants to cooperate with the 'competent authorities' it is clear from Article 13(1) that this obligation exists not only towards the determining authority, designated in accordance with Article 4(1) APD (recast), but also towards **other competent authorities** involved in the examination procedure, for instance in connection with issues of admissibility under Article 33, cf. Article 34(2).

Article 13(2)(a)-(f) permits Member States to require applicants for international protection to contribute actively to the examination of their cases in various ways such as reporting to

<sup>(315)</sup> Emphasis added.

<sup>(316)</sup> See *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Section 4.2.

the competent authorities and handing over documents in their possession if relevant to the examination. When the competent authorities carry out **searches of the applicant's person** in the context of the processing of an application, Article 13(2)(d) prescribes that such searches 'shall be carried out by a person of the same sex [as the applicant] with full compliance with the principles of human dignity and of physical and psychological integrity', thus reflecting Articles 1 and 7 EU charter and Article 8 ECHR. In situations where the search of person is carried out for security reasons, the requirement that it be carried out by a person of the same sex does not apply. The distinction between the various purposes of searches has to take the legal basis of the search as well as the competence and powers of the authorities into account.

The possibility under Article 13(2)(f) to **record the applicant's oral statements**, provided that he/she has previously been informed thereof, supplements the provision in Article 17(2) on audio or audiovisual recording of the personal interview. As the latter provision stipulates that the recording or a transcript thereof must be made available in connection with the applicant's file, this can only be omitted under Article 13 in cases where the applicant's oral statements can clearly be considered as not being part of the personal interview provided for by Articles 14-17 APD (recast).

#### 4.2.10. Procedure for withdrawal and abandonment of application

Article 27 APD (recast) concerns the applicant's **explicit withdrawal** of his/her application for international protection, insofar as that possibility is provided for under the Member State's national law. It serves the aim of ensuring that the outcome of the processing of that application will appear clearly from the files of the determining authority. This may be of particular relevance in situations where the applicant lodges another application for international protection or requests the reopening of the application at a later point in time. To achieve the appropriate clarity, Member States 'shall ensure that the determining authority takes a decision either to **discontinue the examination** or to **reject the application**'<sup>(317)</sup>. Article 27(2) leaves Member States the option to decide to discontinue the examination without taking any formal decision, provided that a notice to that effect is entered into the applicant's file by the determining authority.

The provisions of Article 28 on **implicit withdrawal or abandonment** of an application for international protection were included in the directive and drafted with a view to balancing the aim of reducing root causes of subsequent applications on the one hand, and the prevention of abusive repeat applications on the other<sup>(318)</sup>. Thus, if an application for international protection can reasonably be considered as implicitly withdrawn or abandoned, Article 28(1) provides that 'Member States shall ensure that the determining authority takes a decision either to **discontinue the examination** or [...] to **reject the application**'<sup>(319)</sup>. The latter option presupposes that the application has already been subject to 'an adequate examination in substance in line with Article 4 [QD (recast)]', and that the determining authority on that basis 'considers the application to be unfounded'.

The factual basis for considering an application to be implicitly withdrawn or abandoned is laid down in the second subparagraph of Article 28(1). This requires that it has in particular to be ascertained that:

<sup>(317)</sup> Emphasis added.

<sup>(318)</sup> See J. Vedsted-Hansen, 'Article 28 APD (recast)', in Hailbronner and Thym (eds.), see fn 65, p. 1 343.

<sup>(319)</sup> Emphasis added.

### Article 28(1) APD (recast)

- (a) [the applicant] has **failed to respond** to requests to provide information essential to his or her application [...] or has not appeared for a **personal interview** [...];
- (b) [the applicant] has **absconded** or left without authorisation the place where he or she lived or was held [...] or he or she has not within a reasonable time complied with reporting duties or other obligations to communicate [...] <sup>(320)</sup>.

In either case, it shall be possible for the applicant to demonstrate that the failure was due to circumstances beyond his/her control. Member States may lay down time limits or guidelines to implement these provisions. Notably, the circumstances mentioned in Article 28(1)(a) and (b) are not exhaustive, but only exemplify when ‘in particular’ it may be assumed that an application has been implicitly withdrawn or abandoned.

In situations where an applicant **reports again** to the competent authority after a decision to discontinue has been taken under Article 28(1), it must be ensured in national law that he/she will be entitled either to request that the case be **reopened** or to make a **new application** (Article 28(2)). In the latter case, the new application shall not be subject to the special procedure for subsequent applications under Articles 40 and 41 APD (recast) (see Sections 4.1.3 above on the right to remain in the case of subsequent applications and 5.2.2.4 below on subsequent applications and admissibility).

In this connection, however, Member States may provide for a **time limit** of at least 9 months on requests for reopening the case or making a new application. If such a time limit has passed, ‘the applicant’s case can no longer be reopened or the new application may be treated as a subsequent application’ in accordance with the procedure in Articles 40 and 41. In addition, it may be provided in national legislation that the applicant’s case can be reopened only once (Article 28(2), second subparagraph).

As an important additional safeguard, it is specified in Article 28(2), third subparagraph, that Member States shall ensure that the person will not, under such national rules, be removed contrary to the principle of ***non-refoulement*** regardless of any time limits or procedural devices introduced in national law.

<sup>(320)</sup> Emphasis added.

## Part 5: Procedures at the administrative level

Chapter III of the APD (recast) sets out the procedural frameworks within which an examination of an application for international protection is to be conducted before the determining authority. In this regard, questions of interpretation and application will be considered under four principal headings (see Table 17 below).

**Table 17: Structure of Part 5**

<b>Section 5.1.</b>	Overview on examination procedures	pp. 108-112
<b>Section 5.2.</b>	Inadmissible applications	pp. 112-126
<b>Section 5.3.</b>	The concept of European safe third country	pp. 126-127
<b>Section 5.4.</b>	The concept of safe country of origin	pp. 127-129

### 5.1. Overview of examination procedures

#### 5.1.1. Regular procedures

Chapter III of the APD (recast) provides for a set of minimum standards to be applied in examination procedures at the administrative level. Article 31(1) is the first of the provisions in Chapter III of the directive and opens by stating that ‘Member States shall process applications for international protection in an examination procedure in accordance with the basic principles and guarantees of Chapter II’ of the directive (see Part 4).

Furthermore, Article 31(2)-(6) APD (recast) sets out time limits within which Member States shall conduct an examination at the administrative level. This is to be read in conjunction with recital (18) APD (recast) according to which a prompt examination is to be considered ‘in the interest of both Member States and applicants for international protection’. In this regard, the general rule is set out in Article 31(2) APD (recast) according to which ‘Member States shall ensure that the examination procedure is concluded as soon as possible, without prejudice to an adequate and complete examination’. Article 31(3) specifies that this should be within 6 months of the lodging of the application, although Member States may extend this time limit up to a maximum of 21 months under certain conditions (Article 31(4), (5) and (6)).

Article 31(7) APD (recast) clarifies, that within the time limits thus prescribed:

#### **Article 31(7) APD (recast)**

Member States may prioritise an examination of an application for international protection in accordance with the basic principles and guarantees of Chapter II in particular:

- (a) where the application is likely to be well-founded;

- (b) where the applicant is vulnerable, within the meaning of Article 22 of [RCD (recast)], or is in need of special procedural guarantees, in particular unaccompanied minors.

With regard to the conclusion of examination procedures, Member States may either dismiss an application for international protection as ‘inadmissible’ without examining it on the substance, if at least one of the inadmissibility grounds listed in Article 33 APD (recast) is fulfilled (see Section 5.2 below on inadmissible applications), or reject an application for international protection as ‘unfounded’ according to Article 32(1) APD (recast), if the determining authority has established that the applicant does not qualify for international protection pursuant to the QD (recast). In addition, Article 32(2) APD (recast) permits Member States to consider an application manifestly unfounded, if any of the circumstances listed in Article 31(8) APD (recast) apply (see Subsection 5.1.2 below on accelerated procedures) and such provision is made in national law. It goes without saying that Member States may also conclude examination procedures by granting international protection, even though this is not explicitly mentioned in Chapter III.

### 5.1.2. Accelerated procedures

Particular attention is to be paid to Article 31(8) APD (recast) according to which Member States may accelerate procedures in certain situations, where an application for international protection *prima facie* appears to be either manifestly unfounded or abusive or where there are national security or public order concerns. For the purpose of background information, it is worth noting that, at least at the core, these situations have long been recognised as requiring special attention in international refugee policy, even though the list included in Article 31(8) APD (recast) goes considerably beyond previous considerations at international level <sup>(321)</sup>. As provided by Article 31(8), Member States may provide for accelerated procedures only if:

#### Article 31(8) APD (recast)

- (a) the applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection by virtue of [the QD (recast)]; or
- (b) the applicant is from a safe country of origin within the meaning of this directive [see Section 5.4]; or
- (c) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity and/or nationality that could have had a negative impact on the decision; or
- (d) it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality; or

<sup>(321)</sup> See UNHCR Executive Committee, *Conclusion No 30 (XXXIV): The problem of manifestly unfounded or abusive applications for refugee status or asylum*, 20 October 1983.

- (e) the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection by virtue of [the QD (recast)]; or
- (f) the applicant has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5) [see Subsection 5.2.2.4 below]; or
- (g) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal; or
- (h) the applicant entered the territory of the Member State unlawfully or prolonged his or her stay unlawfully and, without good reason, has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible, given the circumstances of his or her entry; or
- (i) the applicant refuses to comply with an obligation to have his or her fingerprints taken in accordance with [the Eurodac Regulation (recast)]; or
- (j) the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.

According to recital (20) APD (recast), Member States should be able to accelerate the examination procedure in these situations, in particular by introducing shorter time limits than those that apply to regular examination procedures. Furthermore, it follows from Article 31(9) APD (recast) that Member States shall lay down time limits for the adoption of a decision in accelerated procedures at the administrative level in national law and that those time limits shall be 'reasonable'. However, as stipulated in Article 31(8) APD (recast) accelerated procedures should be conducted in accordance with the basic principles and guarantees of Chapter II of the directive, thus limiting, through the use of the term 'reasonable', the wide margin of discretion that is otherwise left to Member States.

As in regular procedures, Member States may either dismiss an application for international protection as 'inadmissible' without examining it on the substance in accordance with Article 33 APD (recast) (see Section 5.2 below on inadmissible applications); reject an application for international protection as 'unfounded' according to Article 32(1) APD (recast), if the determining authority has established that the applicant does not qualify for international protection pursuant to the QD (recast); or grant international protection, if the latter condition can be answered in the affirmative, even though this is not explicitly mentioned in Chapter III. Within the context of Article 31(8) APD (recast) particular attention is to be paid to Article 32(2) APD (recast). Pursuant to Article 32(2) APD (recast), 'in cases of unfounded applications, in which any of the circumstances listed in Article 31(8) apply, Member States may consider an application to be 'manifestly unfounded', where it is defined as such in the national legislation'. While neither Article 32(2) APD (recast) nor any other provision of the APD (recast) set out any exclusive legal criteria for an application being explicitly qualified as 'manifestly unfounded', this can, nevertheless, be the case under national law, for example for reasons of simplification or clarification.

Moreover, it follows from Article 46(6)(a) APD (recast) that in the case of ‘a decision considering an application to be manifestly unfounded in accordance with Article 32(2) or unfounded after examination in accordance with Article 31(8), except for cases where these decisions are based on the circumstances referred to in Article 31(8)(h)’, automatic suspensive effect of legal remedies against this decision is not required. However, where the right to remain in the Member State pending the outcome of the remedy is not provided for in national law, Article 46(6) nevertheless also provides that ‘a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant’s request or acting *ex officio*’ (see Section 6.4 on the right to remain during appeals procedures).

In the case of *Samba Diouf*, the CJEU clarified that Member States are not required to provide for any ‘separate action [that] may be brought against the decision of the competent national authority to deal with an application for asylum under an accelerated procedure, provided that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in the action which may be brought against the final decision rejecting the application’<sup>(322)</sup>. In particular, the CJEU stressed that such a requirement cannot be derived either from Article 39(1) APD that now has its equivalent in Article 46(1) APD (recast) nor by the general principle of effective judicial protection as expressed in Article 47 of the EU charter.

### 5.1.3. Border procedures

As stated in recital (38) APD (recast), ‘[m]any applications for international protection are made at the border or in a transit zone of a Member State prior to a decision on the entry of the applicant’ to the territory (see Section 2.2 on the scope of the APD (recast) and access to procedures). Therefore, Article 43(1) of the APD (recast) allows Member States to ‘provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on:

#### Article 43(1) APD (recast)

- (a) the admissibility of an application, pursuant to Article 33, made at such locations; and/or
- (b) the substance of an application in a procedure pursuant to Article 31(8) [Article 31(8) provides that Member States may provide that an examination procedure be conducted at the border or in transit zones on the same grounds upon which an examination procedure may be accelerated (see Subsection 5.1.2 above)].

According to Article 43(2) APD (recast) Member States shall ensure that a decision is taken within a reasonable time. Moreover, when a decision has not been taken within 4 weeks, ‘the applicant shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of this directive’. As laid down in Article 43(3) APD (recast) it is only under an exceptional circumstance, i.e. in the event of arrivals involving a large number of persons lodging applications for international protection at the border or in a transit zone, which makes it impossible in practice to apply there the provisions of Article 43(1), that Member States may extend these procedures both geographically

<sup>(322)</sup> See CJEU, *Diouf*, op cit., fn. 25, para. 70.

(in locations in proximity to the border or transit zone) and temporally (for as long as these persons are accommodated at such locations).

It is to be noted that, when applying border procedures, detention may be involved in accordance with Article 8(3)(c) RCD (recast)<sup>(323)</sup>. In the case of a decision falling within the grounds of Article 46(6(a) or (b) APD (recast), no automatic suspensive effect of legal remedies against the decision is required (see Subsection 5.1.2 above). However, within border procedures these provisions only apply under the additional conditions laid down in Article 46(7) APD (recast), i.e. provided that:

- (a) the applicant has the necessary interpretation, legal assistance and at least 1 week to prepare the request and submit to the court or tribunal the arguments in favour of granting him/her the right to remain on the territory pending the outcome of the remedy; and
- (b) in the framework of the examination of the request referred to in paragraph 6, the court or tribunal examines the negative decision of the determining authority in terms of fact and law.

With regard to the conclusion of border procedures, Member States may either dismiss an application for international protection as ‘inadmissible’ without examining it on the substance if at least one of the inadmissibility grounds listed in Article 33 APD (recast) is fulfilled (see Section 5.2 below on inadmissible applications) or reject an application for international protection as ‘unfounded’ according to Article 32(1) APD (recast), if the determining authority has established that the applicant does not qualify for international protection pursuant to the QD (recast). In addition, Article 32(2) APD (recast) permits Member States to consider an application manifestly unfounded if any of the circumstances listed in Article 31(8) apply (see Subsection 5.1.2 above on accelerated procedures) and such provision is made in national law. While neither Article 32(2) APD nor any other provision of the APD (recast) set out any exclusive legal criteria for an application being explicitly qualified as ‘manifestly unfounded’, this can, nevertheless, be the case under national law, for example to simplify or clarify what they are. Finally, Member States may also grant international protection within border procedures, even though this is not explicitly mentioned in Chapter III.

## 5.2. Inadmissible applications

### 5.2.1. Introduction and overview

Article 33(1) APD (recast) provides that, in addition to cases in which an application for international protection is not examined in accordance with the Dublin III regulation, ‘Member States are not required to examine whether the applicant qualifies for international protection in accordance with [the QD (recast)] where an application is considered inadmissible’ pursuant to Article 33(2) APD (recast). Read together with recital (43) APD (recast) according to which Member States should in principle examine all applications for international protection on the substance, Article 33(1) APD (recast) is to be understood as a procedural exception. The list of inadmissibility grounds contained in Article 33(2) APD (recast) is exhaustive in nature. Therefore, Member States must not omit examination of cases falling outside the scope of

<sup>(323)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 70. MN 3. Art. 8(3)(c) RCD (recast) states: ‘An applicant may be detained only: (c) in order to decide, in the context of a procedure, on the applicant’s right to enter the territory’.

Article 33(2) APD (recast) or process applicants for international protection for any kind of pre-procedure returns. Furthermore, the grounds set out in Article 33(2) APD (recast) are optional. Thus, Member States may decide to examine such cases on the substance.

#### Article 33(2) APD (recast)

Member States may consider an application for international protection as inadmissible only if:

- (a) another Member State has granted international protection;
- (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;
- (c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;
- (d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of [the QD (recast)] have arisen or have been presented by the applicant; or
- (e) a dependant of the applicant lodges an application, after he or she in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application.

In the cases mentioned in Article 33(2)(a), (b) and (c) APD (recast), it is presumed that either another Member State or a non-member state provides for a sufficient degree of protection. Thus, as the common core of these three conditions one might identify a 'protection elsewhere' approach. In other words, there is a country to which an applicant may legitimately be returned because, there, he/she would neither face persecution or serious harm nor a risk of being sent to the country of persecution or serious harm in violation of the principle of *non-refoulement* (see Section 1.5 above on the principle of *non-refoulement*). The rationale behind the conditions listed in Article 33(2)(d) and (e) APD (recast) is that there is no need for a separate examination on the substance of the application because it is being or has already been examined in another procedure <sup>(324)</sup>.

As a procedural safeguard, Article 34 APD (recast) prescribes that Member States shall allow applicants to present their views with regard to the application of the inadmissibility grounds referred to in Article 33(2) APD (recast) in their particular circumstances before the determining authority decides on the admissibility of an application. To that end, Member States shall — subject to exceptions in cases of a subsequent application in accordance with Article 42 APD (recast) — conduct a personal interview on the admissibility of the application. Furthermore, under Article 46(1)(a)(ii) and (iv) APD (recast) Member States shall — again subject to certain modifications provided by Articles 35(2), 38(2)(c), 46(6)(b) and 46(7) APD (recast) — ensure that applicants have the right to an effective remedy before a court or tribunal against a decision considering an application to be inadmissible pursuant to Article 33(2) APD (recast).

<sup>(324)</sup> See J. Vedsted-Hansen, 'Article 33 APD (recast)', in Hailbronner and Thym (eds.), see fn 65, MN 4.

## 5.2.2. Inadmissibility grounds

### 5.2.2.1. International protection granted by another Member State

Pursuant to Article 33(2)(a) APD (recast), Member States may consider an application for international protection as inadmissible if another Member State has already granted international protection. It follows from the wording of Article 33(2)(a) APD (recast) that this provision only applies to cases where international protection has been granted by **another Member State**. Cases concerning protection granted by a non-member state are dealt with under the concept of ‘first country of asylum’ within the meaning of Article 33(2)(b) APD (recast). Furthermore, according to the definition in Article 2(i) APD (recast), the term ‘international protection’ in this context refers to both refugee status granted as defined by Article 13 QD (recast) and subsidiary protection status as defined by Article 18 QD (recast) (see Section 2.1 above on definitions). From this it follows that Member States may dismiss a further application for international protection as inadmissible, regardless of whether the applicant has previously been granted refugee status or subsidiary protection status<sup>(325)</sup>. Moreover, Article 33(2)(a) can be seen as a direct complement to the Dublin III regulation, since it follows from Article 23(1) of the Dublin III regulation read together with Article 18(1)(d) thereof, that a Member State cannot reasonably request another Member State, under the procedures defined by that regulation, to take back a third-country national, who has lodged an application for international protection in the second Member State after being granted international protection by the first Member State<sup>(326)</sup>. While insofar clear at the outset, Article 33(2)(a) APD (recast) nevertheless appears to raise questions on its interpretation that are yet to be answered, as outlined further below.

First of all, this article does not indicate whether and, if so, how a beneficiary of international protection can be returned to the Member State that has granted international protection. In the first place, it could be suggested that an obligation to take back may be derived from Article 6(1) and (2) of the returns directive according to which Member States shall issue a return decision to any third-country national staying illegally on its territory and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State, if he/she refuses to go to the territory of that other Member State immediately<sup>(327)</sup>. This article is to be read in light of Article 24 QD (recast) which requires Member States to issue a residence permit as soon as possible after international protection has been granted to beneficiaries of refugee status or subsidiary protection status, unless compelling reasons of national security or public order otherwise require. Nonetheless, this interpretation of the returns directive is arguable, as the main effect of Article 6(1) and (2) of this directive is only to provide for the adoption of a return decision against a third-country national authorised to stay legally in another Member State.

In addition or alternatively, various multilateral or bilateral readmission agreements might apply, subject to they having been ratified by Member States. For example, under Article 13 of the Annex to the Refugee Convention, each contracting state undertakes that the holder of a travel document issued by it in accordance with Article 28 of this convention shall be readmitted to its territory at any time during the period of its validity. Similarly, according to

<sup>(325)</sup> See Administrative Court of Aachen (Verwaltungsgericht Aachen) (Germany), judgment of 28 October 2015, 8 K 299/15.A, paras 71 and ff.

<sup>(326)</sup> CJEU, *Daher Muse Ahmed*, see fn 113, paras 24-41 (above Subsection 3.1.4.4). See also Administrative Court of Aachen, 2015, 8 K 299/15.A, *ibid.*, paras 71 and ff.

<sup>(327)</sup> Insofar as the Member State concerned is bound by it, which is not the case for the UK, Ireland and Denmark.

Article 4 of the [European Agreement on Transfer of Responsibility for Refugees](#) <sup>(328)</sup>, a refugee shall be readmitted to the territory of the state that has granted the refugee status at any time, as long as transfer of responsibility has not occurred under the conditions laid down in the agreement. Article 5 of the [European Agreement on the Abolition of Visas for Refugees](#) <sup>(329)</sup> stipulates that refugees who have entered the territory of a contracting party by virtue of the agreement shall be readmitted at any time to the territory of the contracting party by whose authorities the travel document was issued, at the simple request of the first-mentioned party, except where this party has authorised the persons concerned to settle on its territory.

Even less clear is whether or not Article 33(2)(a) APD (recast) applies if the applicant has deliberately relinquished his/her international protection status previously granted by another Member State. Although the CJEU has not yet explicitly dealt with a case concerning this question, it is to be noted that in 2016 the CJEU rejected an interpretation that would risk encouraging third-country nationals to circumvent rules established by the Dublin III regulation, thereby causing secondary movements which the Dublin III regulation seeks to prevent <sup>(330)</sup>. Furthermore, it is a well-established general principle in the case-law of the CJEU that EU law shall not be interpreted in a way that severely undermines its effectiveness <sup>(331)</sup>.

Another problem yet to be addressed is whether or not Article 33(2)(a) APD (recast) needs to be restricted in cases where the situation for a refugee or a beneficiary of subsidiary protection in the Member State which has granted international protection has proven to be in violation of the Article 4 of the EU charter. The French Conseil d'État (Council of State) ruled that when another Member State has granted refugee status, the person can in principle apply for international protection in France. However, there is a presumption that due to the level of protection of liberties in Member States, such an application is unfounded. On the other hand, if the applicant establishes that he/she does not enjoy or no longer enjoys protection in the Member State that granted him/her refugee status, the French authorities will examine the application for asylum considering the risk in the country of origin <sup>(332)</sup>. The French Council of State applied the same rationale in the case of a person who had been granted subsidiary protection in a Member State <sup>(333)</sup>. In Germany, the Higher Administrative Court of Hessen drew a parallel to the CJEU's jurisprudence in cases concerning the Dublin II regulation and applied the 'systemic deficiencies test' as originally developed in the landmark case of *NS* and as now codified in Article 3(2) Dublin III regulation, according to which Article 4 of the EU charter must be interpreted as meaning that the Member States, including the national courts, should not transfer an asylum seeker to the Member State responsible where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions for asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision <sup>(334)</sup>. In the view of the German court, the same principle should apply when considering whether or not a further application for international protection can be

<sup>(328)</sup> ETS No 107, 16 October 1980 (entry into force: 1 December 1980, though the Agreement is not ratified by all Member States: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/107/signatures?p\\_auth=cQ04jNMZ](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/107/signatures?p_auth=cQ04jNMZ)).

<sup>(329)</sup> ETS No 31, 20 April 1959 (entry into force: 4 September 1960, though not ratified by all Member States: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/031/signatures?p\\_auth=cQ04jNMZ](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/031/signatures?p_auth=cQ04jNMZ)).

<sup>(330)</sup> See CJEU, *Mirza*, see fn 95, para. 52.

<sup>(331)</sup> See CJEU, judgment of 9 September 1999, Case C-102/97, *Commission of the European Communities v Federal Republic of Germany*, EU:C:1999:394, para. 43; CJEU, judgment of 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, EU:C:2007:772, para. 69; CJEU, judgment of 14 February 2008, Case C-450/06, *Varec SA v État belge*, EU:C:2008:91, para. 39. See also M. Potacs, 'Effet utile als Auslegungssatz', *Europarecht* (2009), pp. 465 and ff.

<sup>(332)</sup> See Council of State (Conseil d'Etat) (France), judgment of 13 November 2013, *La Cimade et M. XXXXXX*, nos 349735 and 349736, ECLI:FR:CEASS:2013:349735.20131113.

<sup>(333)</sup> See Council of State (France), judgment of 17 June 2015, *OFPRA c M. S.*, No 369021 ECLI:FR:CESSR:2015:369021.20150617.

<sup>(334)</sup> See CJEU, *NS v Secretary of State for the Home Department and others*, see fn 33. For an extensive analysis see also Section 3.6 above.

legitimately dismissed as inadmissible <sup>(335)</sup>. The German Federal Administrative Court recently made a reference to the CJEU asking, inter alia, whether Member States must not dismiss an application for international protection as inadmissible under Article 33(2)(a) APD (recast) if living conditions in the other Member State are contrary to Article 4 of the charter or (without violating the charter) do not meet the standards guaranteed by the QD (recast) <sup>(336)</sup>.

### 5.2.2.2. The concept of first country of asylum

As stipulated in Article 33(2)(b) APD (recast) Member States may also consider an application for international protection as inadmissible if a country which is not a Member State is considered as a ‘first country of asylum’ for the applicant. Article 33(2)(b) APD (recast) is to be read in conjunction with Article 35 APD (recast).

#### Article 35 APD (recast)

A country can be considered to be a first country of asylum for a particular applicant if:

- (a) he or she has been recognised in that country as a refugee and he or she can still avail himself/herself of that protection; or
- (b) he or she otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*,

provided that he or she will be readmitted to that country.

As explained in recital (43) APD (recast) the idea behind the concept of first country of asylum is that ‘Member States should not be obliged to assess the substance of an application for international protection where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to that country’.

The wording of Article 35(a) APD (recast) differs from that of Article 39(2)(a) APD (recast) which, for the purpose of defining the concept of European safe third country, explicitly requires that the third country ‘has ratified and observes the provisions of the Geneva [Refugee] Convention without any geographical limitations’.

The term ‘sufficient protection’ in Article 35(b) APD (recast) appears less strict, but is not conclusively defined. It follows from the wording of Article 35(b) APD (recast) that protection against *refoulement* in that country is necessary. In addition, Member States may, but are not bound to, take into account the criteria set out Article 38(1) APD (recast) for determining a ‘safe third country’ (see Subsection 5.2.2.3). On this basis, it might be argued that ‘sufficient protection’ is, at least, to be assumed if the criteria of Article 38(1) APD (recast) are met, with the possible exception of Article 38(1)(e) APD (recast) which requires that the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention. Under Belgian law, for example, sufficient protection includes multiple components that must be cumulatively fulfilled. The asylum seeker must have an actual residence status in the first country of asylum that must last for as long as the need for protection exists and the possibility to return to the first asylum country must be real.

<sup>(335)</sup> See Higher Administrative Court of Hessen (Germany), judgment of 4 November 2016, 3 A 1292/16.A, paras 28 and 29.

<sup>(336)</sup> See Federal Administrative Court (Germany), decisions of 23 March 2017, 1 C 17.16, ECLI:DE:BVerwG:2017:230317B1C17.16.0; 1 C 18/16.16, ECLI:DE:BVerwG:2017:230317B1C18.16.0 and 1 C 20.16, ECLI:DE:BVerwG:2017:230317B1C20.16.0. Cases are dealt by the CJEU as Joined Cases C-297/17, C-318/17 and C-319/17.

Furthermore, the principle of *non-refoulement* must be complied with in the first country of asylum. Finally, the asylum seeker must not fear persecution nor have a real risk of serious harm within the meaning of Articles 48/3 and 48/4 of the Belgian *aliens act* <sup>(337)</sup>. It is to be also noted that Article 35 APD (recast) explicitly refers to ‘a first country of asylum for a particular applicant’. From this it follows that the conditions laid down in Article 35(a) and (b) do not necessarily relate solely to the general conditions in the non-member state but, also encompass the applicant’s individual circumstances there.

According to Article 35 APD (recast) the application of the concept of first country of asylum requires that the applicant will be readmitted to the country in which he/she has been granted refugee protection or enjoys ‘sufficient protection’ within the meaning of paragraph (b) respectively. If it is clear that the applicant will not be readmitted to the first country of asylum, the application is admissible and must be processed in the regular examination procedure by the Member State. Article 35 APD (recast) does not, however, set any time limits for determining whether or not an applicant will be readmitted to the country in which he/she has been recognised as a refugee or otherwise enjoys sufficient protection. It is, thus, for Member States to further develop rules and procedures under national law for applying the concept of first country of asylum.

As under Article 33(2)(a) APD (recast) (see Subsection 5.2.2.1 above on international protection granted by another Member State), the question arises whether or not Member States may dismiss an application for international protection as inadmissible if the reason why the applicant cannot be readmitted to the first country of asylum is solely because he/she has deliberately abandoned his or her refugee status granted by that state or any other ‘sufficient protection’ within the meaning of Article 35(b) APD (recast). The CJEU has not yet explicitly dealt with a case concerning this question. However, it has already been noted that the CJEU rejected an interpretation that would risk encouraging third-country nationals to circumvent rules established by the Dublin III regulation, thereby causing secondary movements which the Dublin III regulation seeks to prevent and that, generally, it is a well-established general principle in the case-law of the CJEU that EU law shall not be interpreted in a way that would severely undermine its effectiveness <sup>(338)</sup>.

It follows from the last sentence of Article 35 APD (recast) that ‘[t]he applicant shall be allowed ‘to challenge the application of the first country of asylum concept **to his or her particular circumstances**’ <sup>(339)</sup>. This should be read in conjunction with Article 46(1)(a)(ii) APD (recast), according to which Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal against an inadmissibility decision under Article 33(2)(b) APD (recast). Article 35 APD (recast) entails in particular that Member States cannot base a decision on the first country of asylum concept solely on the fact that it has designated certain non-Member States as meeting the conditions laid down in Article 35(a) and (b) APD (recast).

### 5.2.2.3. The concept of safe third country

According to Article 33(2)(c) APD (recast), Member States may consider an application for international protection as inadmissible if a country which is not a Member State is considered

<sup>(337)</sup> Council for Aliens Law Litigation (Belgium), judgment of 13 July 2015, no 149 562.

<sup>(338)</sup> See CJEU, *Mirza*, see fn 95, para. 52. See CJEU, *Commission v Federal Republic of Germany*, see fn 331, para. 43; CJEU, *International Transport Workers’ Federation and others v Viking Line*, see fn 331, para. 69; CJEU, *Varec v État belge*, see fn 331, para. 39. See also M. Potacs, ‘Effet utile als Auslegungsgroundsatz’, *Europarecht* (2009), pp. 465 and ff.

<sup>(339)</sup> Emphasis added.

a safe third country for the applicant pursuant to Article 38 APD (recast). It is to be noted that the concept of safe third country within the meaning of the APD (recast) is limited to non-member states only. The concept of safe third country within the meaning of the APD (recast) may, thus, be described as a procedural device allowing an applicant for international protection to be transferred to a third country outside the EU so that it is responsible for the examination of his/her application and, if the applicant is found to be in need of protection, to grant him/her such protection. In this regard the concept of safe third country is similar to the concept of first country of asylum within the meaning of Articles 33(2)(b) and 35 APD (recast) (see Subsection 5.2.2.2 above). An important difference between both concepts is that a safe third country is a country in which the applicant has not been granted protection, whereas under the concept of first country of asylum the applicant must have already been recognised as a refugee or otherwise enjoy sufficient protection in the third country.

The minimum standards for a non-member state to be considered ‘safe’ for the purpose of finding an application inadmissible pursuant to Article 33(2)(c) are set out in Article 38(1) APD (recast).

#### Article 38(1) of APD (recast)

Member States may apply the safe-third-country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned:

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) there is no risk of serious harm as defined in [the QD (recast)]
- (c) the principle of *non-refoulement* in accordance with the [Refugee] Convention is respected;
- (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the [Refugee] Convention.

It follows from the clear wording of Article 38(1) APD (recast) that the requirements stipulated for a third country to be considered safe do not refer solely to the general conditions in the country concerned, but also to the specific circumstances of persons seeking international protection. While the requirements set out in Article 38(1)(a)-(d) APD (recast) appear to be broadly self-explanatory, it remains an open question with respect to Article 38(1)(e) APD (recast) whether this condition requires that the third country has formally ratified or acceded to the Refugee Convention, or whether it suffices that applicants will be recognised as refugees and treated in accordance with the standards provided for by the Refugee Convention, even if these standards are guaranteed by national law or practice only<sup>(340)</sup>. It should be mentioned in this context that the wording of Article 39(2)(c) APD (recast) on the concept of ‘European safe third country’, by contrast explicitly requires that the third country ‘has ratified and observes the provisions of the [Refugee] Convention without any geographical limitations’.

<sup>(340)</sup> See Council of State (Greece), judgments No 2347/2017 (Plenary) and No 2348/2017 (Plenary), paras 54-56, and the dissenting opinions at para. 60. See also, e.g., High Court, England and Wales (UK), *R (Ibrahimi and Abasi) v SSHD*, EWHC 2049 (Admin) see fn 41, on the problem of ‘chain *refoulement*’.

In addition to these minimum standards on the safety of a third country, Article 38(2) APD (recast) prescribes the following.

#### **Article 38(2) APD (recast)**

The application of the safe-third-country concept shall be subject to rules laid down in national law, including:

- (a) rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;
- (b) rules on the methodology by which the competent authorities satisfy themselves that the safe-third-country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;
- (c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that the third country is not safe in his or her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).

It follows from Article 38(2)(a) APD (recast) that in addition to the safety of the third country as such, the application of the concept of safe third country requires the existence of a certain link between the applicant and the third country concerned that is sufficient to reasonably expect the applicant to go to the third country. Use of the indefinite article ‘a’ and the term ‘connection’ indicate that there is no requirement of ordinary or habitual residence. However, since this provision does not stipulate any further criteria for determining reasonableness, Member States retain a wide margin of appreciation in implementing this condition in national law. It has been observed, that in some national case-law, a previous residence, stay or presence, or even an opportunity to make contact with the authorities in order to seek protection has been deemed sufficient <sup>(341)</sup>. Some Member States also refer to rather personal ties such as the applicant’s origin, his/her native language, family relations or other social bonds to the safe third country <sup>(342)</sup>.

According to Article 38(2)(b) APD (recast) the concept of safe third country cannot be applied unless the Member State has laid down rules in national legislation regarding the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied either generally to the situation of refugees in a particular country or at least to a particular applicant <sup>(343)</sup>. It follows from recital (46) APD (recast) that where Member States designate third countries as safe either by adopting lists to that effect or on a case-by-case basis, they should take into account, *inter alia*, the guidelines and operating manuals and the information on countries of origin and activities. This includes EASO country of

<sup>(341)</sup> See UNHCR, *Improving asylum procedures: comparative analysis and recommendations for law and practice*, March 2010, p. 63. See also Council of State (Greece), judgments No 2347/2017 (Plenary) and No 2348/2017 (Plenary), *ibid.*, para. 61, in which the Court ruled that an applicant’s transit from a third country may, in conjunction with specific circumstances applicable to him or her (such as, *inter alia*, the length of stay in that country or the fact that the country is located close to the country of origin), be considered as a connection between the applicant and the third country, based on which it would be objectively reasonable for him or her to relocate there.

<sup>(342)</sup> See Migration Court of Appeal (Sweden), judgment of 20 August 2015, UM 3266-14 (see EDAL English summary).

<sup>(343)</sup> See Migration Court of Appeal (Sweden), judgment of 11 June 2012, UM 9681-10, MIG 2012:9 (see EDAL English summary).

origin information report methodology, referred to in the EASO regulation, as well as relevant UNHCR guidelines. Furthermore, it is stipulated in recital (48) APD (recast) that, in order to ensure the correct application of the safe-third-country concept based on up-to-date information, Member States should conduct regular reviews of the situation in those countries based on a range of sources of information including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations. When Member States become aware of a significant change in the human rights situation in a country designated as safe, they should ensure that a review of that situation is conducted as soon as possible. National case-law also shows that some national jurisdictions consider that is not sufficient for Member States to rely solely on the fact that a third state has undertaken to comply with the standards guaranteed by Article 38(1) APD (recast). It is required that Member States properly investigate whether or not the third state concerned actually complies with its international obligations <sup>(344)</sup>.

Article 38(2)(c) APD (recast) stipulates that the applicant shall, as a minimum, be allowed to challenge both the application of the safe-third-country concept on the grounds that the third country is not safe in his/her particular circumstances and the existence of a connection between him/her and the third-country concerned. Thus, even though Member States may designate third countries as generally safe for applicants for international protection, an applicant shall have the opportunity to rebut the presumption of safety in his/her individual circumstances <sup>(345)</sup>.

In addition, Article 38(3) APD (recast) provides for further procedural safeguards insofar as Member States when implementing a decision solely based on the concept of safe third country shall inform the applicant accordingly and provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

Like the concept of first country of asylum within the meaning of Article 35 APD (recast), the concept of safe third country is based on the precondition that the applicant will be readmitted to the country concerned. That is why Article 38(4) APD (recast) stipulates that where the country concerned does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II of the APD (recast), i.e. access to an examination of the application on the substance (see [Part 4](#) above).

It is to be noted that the concept of safe third country is also referred to in Article 3(3) of the Dublin III regulation according to which any Member State shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in the APD (recast) <sup>(346)</sup>.

#### **5.2.2.4. Subsequent applications and admissibility**

Article 33(2)(d) APD (recast) addresses the situation where an applicant who has already applied for international protection makes a new application and where no new elements

<sup>(344)</sup> See Court of The Hague (the Netherlands), judgment of 13 June 2016, AWB 16/10406, ECLI:NL:RBDHA: 2016:6624 (see EDAL English summary).

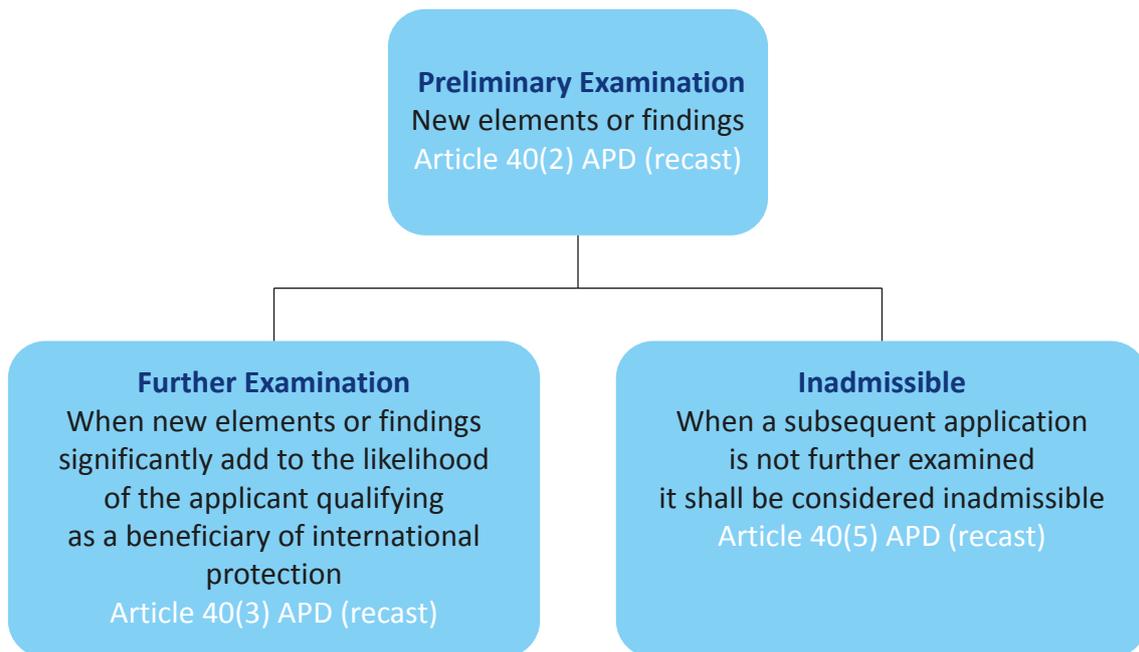
<sup>(345)</sup> See Supreme Court (Slovenia), judgment 16 December 2009, I Up 63/2011 (see EDAL English summary). See also *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Subsection 5.9.2.

<sup>(346)</sup> See Subsection 3.1.2 above.

or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection have arisen or have been presented by the applicant. The rationale for this provision is stated in recital (36) APD (recast) according to which in such a case it would be disproportionate to oblige Member States to carry out a new full examination procedure and that Member States should, therefore, be able to dismiss the subsequent application as inadmissible. Article 33(2)(d) APD (recast) is supplemented by Articles 40-42 APD (recast) which set out the framework within which a subsequent application may be examined. These provisions aim to strike a fair balance between, on the one hand, the fact that even after an application for international protection has been rejected, a person must be able to reapply if new elements or findings have arisen or been obtained and, on the other hand, the necessity to prevent potential abuse of subsequent applications intended to delay removal from the territory. In particular, a subsequent application may be subject to a rapid and efficient preliminary examination to determine whether there are any new elements or findings that justify further examination<sup>(347)</sup>. If there are new elements or findings, the subsequent application has to be examined in conformity with the general rules. If there are not, the application may be declared inadmissible<sup>(348)</sup>. It is to be noted however, that, in the context of Article 3 ECHR, the ECHR has stated that the national authorities should ensure rigorous scrutiny<sup>(349)</sup>.

The two-step examination under Article 40 is summarised in Figure 10 below.

**Figure 10: Two-step examination of subsequent applications under Article 40 APD (recast)**



Further analysis of the examination procedure under Articles 40-42 APD is provided in Subsection 4.1.3 above on the right to remain in the case of subsequent applications.

<sup>(347)</sup> On the issue of new evidence in case of subsequent applications, see *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Section 5.7.

<sup>(348)</sup> See European Commission, Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status of 1 June 2011, COM(2011) 319 final, para. 3.1.5 (p. 6); Council of the European Union, *Statement of the Council's reasons of 6 June 2013*, ST 8260 2013 REV 2 ADD 1, p. 13. For a critical analysis see UNHCR, *Improving Asylum Procedures*, see fn 341, pp. 72ff.

<sup>(349)</sup> See ECHR, judgment of 19 January 2016, *MD et MA v Belgique*, application no 58689/12, para. 66, and ECtHR, *JK and others*, see fn 48, para. 86 with all references therein.

As regards the scope of Article 33(2)(d) APD (recast), it follows from Article 2(q) APD (recast) that:

#### Article 2(q) APD (recast)

‘subsequent application’ means a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1).

The term ‘final decision’ is defined by Article 2(e) APD (recast) as follows:

#### Article 2(e) APD (recast)

‘final decision’ means a decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status by virtue of [the QD (recast)] and which is no longer subject to a remedy within the framework of Chapter V of this directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome.

It is to be noted that Article 2(q) APD (recast) makes a precise distinction with regard to the withdrawal of an application for international protection that can easily be overlooked. On the one hand, the concept of subsequent application can be applied generally in cases, where the applicant has ‘explicitly’ withdrawn his/her application, i.e. regardless of whether, following the explicit withdrawal, the determining authority has taken a decision either to discontinue the examination or to reject the application; or has decided to discontinue the examination without taking a decision as provided for by Article 27 APD (recast). On the other hand, the concept of subsequent application may be applied in cases of an ‘implicit’ withdrawal but only if the determining authority has rejected the application in accordance with Article 28(1) APD (recast), i.e. only after the determining authority had considered the application to be unfounded on the basis of an adequate examination of its substance in line with Article 4 QD (recast). If the determining authority instead takes a decision to discontinue the examination following an ‘implicit’ withdrawal, and an applicant reports again to the competent authority after that decision to discontinue has been taken, the applicant is entitled to request that his or her case be reopened or to make a new application which shall not be treated as a subsequent application (Article 28(2) APD (recast)). However, an exception applies under Article 28(2) APD (recast), according to which Member States may provide for a time limit of at least 9 months after which the applicant’s case can no longer be reopened or the new application may be treated as a subsequent application <sup>(350)</sup>.

A question yet to be answered is whether or not Article 33(2)(d) APD (recast) also applies in cases where a further application is made in a Member State other than the Member State that dealt with the previous application. On the one hand, Article 40(1) APD (recast) concerns ‘a person who has applied for international protection in a Member State’ and ‘makes further representations or a subsequent application **in the same Member State**’ (emphasis added). On the other hand, Article 40(2) APD (recast) on the preliminary examination of an application for the purpose of taking a decision on its admissibility pursuant to Article 33(2)(d) APD (recast) — taken on its own — does not stipulate any explicit limitations.

<sup>(350)</sup> In this regard Art. 32(2)(a) APD has apparently been less strict. See High Court (Ireland), judgment of 28 October 2011, *LH v Minister for Justice, Equality and Law Reform* [2011] IEHC 406, paras 33 and ff.

### Article 40 (1) and (2) APD (recast)

- 1) Where a person who has applied for international protection in a Member State makes further representations or a subsequent application **in the same Member State**, that Member State shall examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.
- 2) For the purpose of taking a decision on the admissibility of an application for international protection pursuant to Article 33(2)(d), a subsequent application for international protection shall be subject first to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of [the QD (recast)].

Nonetheless, Article 40(2) APD (recast) could be seen as a mere extension of Article 40(1) APD (recast). Moreover, Article 18(1)(c) Dublin III regulation provides for specific rules to take back a third-country national whose application has been rejected and who made an application in another Member State. Last but not least, Member States may not always know if a previous application was made in another Member State and might have difficulties ascertaining whether the elements or findings presented by the applicant could be regarded as ‘new elements or findings’.

Section 71a of the German Asylum Act provides that the concept of subsequent applications is extended to cases where the applicant has unsuccessfully applied for international protection in another Member State <sup>(351)</sup>. A recent case dealt with by the German Federal Administrative Court concerned Afghan nationals, whose previous application for international protection made in Hungary was discontinued by Hungarian authorities after the applicants moved to Germany where they had lodged a further application. While the German administrative authorities considered Germany as having become internationally responsible for the examination of the further application due to a deadline expiration under the Dublin III regulation, they dismissed the further application as inadmissible because the applicants did not show new elements or findings that had not been presented in the previous application in Hungary. The Federal Administrative Court ruled in a final judgment that the Hungarian authorities’ decision to discontinue the application with the possibility to reopen the case on the request of the applicants could not be considered as a final rejection of the previous application as required by German law <sup>(352)</sup>. However, the court explicitly mentioned that under these circumstances no decision was required as to the general compatibility of Section 71a of the German Asylum Act with the concept of subsequent applications under Article 33(2)(d) APD (recast) <sup>(353)</sup>.

Article 40(2)-(5) APD (recast) sets down the minimum conditions for a preliminary examination of a subsequent application for international protection for the purpose of taking a decision on its admissibility pursuant to Article 33(2)(d) APD (recast). They can be summarised as follows.

<sup>(351)</sup> German Asylgesetz (Asylum Act), Section 71(a).

<sup>(352)</sup> See Federal Administrative Court (Germany), judgment of 14 December 2016, BVerwG 1 C 4.16, BVerwG:2016: 141216U1C4.16.0, paras 22 and ff.

<sup>(353)</sup> See Federal Administrative Court (Germany), judgment of 14 December 2016, BVerwG 1 C 4.16, BVerwG:2016: 141216U1C4.16.0, paras 22 and ff.

- A subsequent application shall be subject first to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies as a beneficiary of international protection <sup>(354)</sup>.
- If the examination concludes that new elements or findings have arisen or been presented by the applicant, Member States may provide for an additional examination of whether these elements or findings significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection, before the application shall be further examined on the substance in conformity with Chapter II of the APD (recast) <sup>(355)</sup>.
- Moreover, Member States may provide that the application will only be further examined on the substance if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations set forth above in the previous procedure, in particular by exercising his/her right to an effective remedy pursuant to Article 46 APD (recast) <sup>(356)</sup>.

Some national case-law indicates that, in particular, the latter condition does not exempt Member States from considering whether an actual return of the applicant to his/her country of origin will constitute a violation of the principle of *non-refoulement* or of the applicant's human rights guaranteed either by national or European law despite the application being dismissed as inadmissible <sup>(357)</sup>. It is, however, also to be noted that the ECtHR in the case of *Bahaddar* pointed out that despite the prohibition of torture or inhuman or degrading treatment contained in Article 3 of the ECHR being absolute in expulsion cases as in other cases, applicants invoking that article are not for that reason absolved as a matter of course from exhausting domestic remedies that are available and effective. In the ECtHR's view, it followed that, even in cases of expulsion to a country where there is an alleged risk of ill treatment contrary to Article 3, the formal requirements and time limits laid down in domestic law should normally be complied with, such rules being designed to enable the national jurisdictions to discharge their caseload in an orderly manner. For these reasons, the Court held that as domestic remedies were not exhausted in the particular case, it could not consider the merits of the case <sup>(358)</sup>.

These minimum conditions are directly supplemented by Article 42 APD (recast), which stipulates the procedural rules to be applied in a preliminary examination.

#### Article 42 APD (recast)

- 1) Member States shall ensure that applicants whose application is subject to a preliminary examination pursuant to Article 40 enjoy the guarantees provided for in Article 12(1).
- 2) Member States may lay down in national law rules on the preliminary examination pursuant to Article 40. Those rules may, inter alia:

<sup>(354)</sup> For the application of this condition in national law, see e.g. Supreme Administrative Court (Czech Republic), judgment of 6 March 2013, *JJ v Ministry of the Interior*, 3 Azs 6/2011-96 (see EDAL English summary); Regional Administrative Court of Warsaw (Poland), judgment of 13 June 2012, *V SA/Wa 2332/11*; Supreme Court (Slovak Republic), judgment of 17 January 2012, *MS v Ministry of the Interior of the Slovak Republic*, 1SžA/59/2011 (see EDAL English summary); Migration Court of Appeal (Sweden), judgment of 24 October 2011, *UM 2599-11* (see EDAL English summary); Supreme Administrative Court (Poland), judgment of 24 July 2011, *II OSK 557/10* (see EDAL English summary); Council for Aliens Law Litigation (Belgium), judgment of 13 May 2011, no 61.439 (see EDAL English summary); Supreme Administrative Court (Czech Republic), judgment of 17 September 2010, *MY v Ministry of Interior*, 2 Azs 14/2010-92 (see EDAL English summary).

<sup>(355)</sup> For the application of this condition in national law, see e.g.: High Court (Ireland), judgment of 13 December 2011, *JK (Uganda) v Minister for Justice and Equality* [2011] IEHC 473; District Court of Zwolle (the Netherlands), judgment of 24 May 2011, *AWB 11/38687* (see EDAL English summary); Council for Aliens Law Litigation (Belgium), judgment of 15 March 2010, no 40.136 (see EDAL English summary).

<sup>(356)</sup> For the application of this condition in national law, see e.g.: High Court (Ireland), *JK (Uganda) v Minister for Justice and Equality*, see fn 355; Supreme Administrative Court (Czech Republic), *MY v Ministry of Interior*, see fn 354, (see EDAL English summary); Federal Administrative Court (Germany), judgment of 9 December 2010, *BVerwG 10 C 13.09*, *BVerwG:2010:091210U10C13.09.0*, para. 30.

<sup>(357)</sup> See Supreme Administrative Court (Czech Republic), *MY v Ministry of Interior*, see fn 354, (see EDAL English summary).

<sup>(358)</sup> ECtHR, judgment of 19 February 1998, *Bahaddar v The Netherlands*, application no 25894/94, paras 45 and ff.

- (a) oblige the applicant concerned to indicate facts and substantiate evidence which justify a new procedure;
- (b) permit the preliminary examination to be conducted on the sole basis of written submissions without a personal interview, with the exception of the cases referred to in Article 40(6).

Those rules shall not render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailment of such access.

- 3) Member States shall ensure that the applicant is informed in an appropriate manner of the outcome of the preliminary examination and, if the application is not to be further examined, of the reasons why and the possibilities for seeking an appeal or review of the decision.

It has already been highlighted that one of the most pressing reasons for establishing a preliminary examination of subsequent applications was to prevent their potential abuse intended to delay removal from the territory. It is against this background that under Article 41(1) APD (recast) Member States are allowed to make an exception from the normally applicable right to remain in the territory as guaranteed by Article 9 APD (recast) in two cases (see Subsection 4.1.3 above on the right to remain in the case of subsequent applications). First, ‘where a person has lodged a first subsequent application, which is not further examined pursuant to Article 40(5), merely in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State’ (Article 41(1)(a)). And second, ‘where a person makes another subsequent application in the same Member State, following a final decision considering a first subsequent application inadmissible pursuant to Article 40(5) or after a final decision to reject that application as unfounded’ (Article 41(1)(b))<sup>(359)</sup>. However, it is explicitly stated that ‘Member States may make such an exception only where the determining authority considers that a return decision will not lead to direct or indirect *refoulement* in violation of that Member State’s international and Union obligations’. Further procedural exceptions are provided for by Article 41(2) APD (recast).

#### 5.2.2.5. New application by dependant

Article 33(2)(e) APD (recast) provides that Member States may dismiss an application as inadmissible if ‘a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant’s situation which justify a separate application’. In other words, Article 33(2)(e) APD (recast) gives Member States the procedural possibility to not examine the same circumstances twice. It is a precondition for the application of Article 33(2)(e) APD (recast) that the dependant’s consent to have his/her case be part of an application lodged on his/her behalf was requested and obtained in accordance with the rules laid down in Article 7(2) APD (recast).

Article 40(6)(a) APD (recast) provides that Member States may apply the procedural rules established for the preliminary examination of subsequent applications referred to in that article (see Subsection 5.2.2.4 above) in the case of a dependant who lodges an application under the conditions described in Article 33(2)(e) APD (recast). The preliminary examination will then

<sup>(359)</sup> See Council of the European Union, *Statement of the Council’s reasons of 6 June 2013*, see fn 348, p. 14.

consist of examining whether there are facts relating to the dependant's or the unmarried minor's situation which justify a separate application.

### 5.3. The concept of European safe third country

Although not being formally mentioned as part of Article 33 APD (recast) as a ground for inadmissibility, it is to be noted that under Article 39 APD (recast) Member States may provide that no, or no full, examination of the application for international protection and of the safety of the applicant in his/her particular circumstances as described in Chapter II of the directive shall take place in cases where the applicant is seeking to enter or has entered illegally into its territory from a 'European safe third country'. The concept of 'European safe third country' is akin to the grounds for inadmissibility under Article 33(2)(a)-(c) APD (recast) insofar it is also based on the general concept of 'protection elsewhere'. The concept of European safe third country was introduced with the primary aim of enabling Member States to return applicants for international protection to neighbouring European states which, albeit not EU Member States, have a high standard of human rights protection.

Article 39(2) APD (recast) lays down three conditions which must be met cumulatively for a third country to be able to fall within the category of European safe third countries.

#### Article 39(2) APD (recast)

A third country can only be considered as a safe third country for the purposes of paragraph 1 where:

- (a) it has ratified and observes the provisions of the [Refugee] Convention without any geographical limitations;
- (b) it has in place an asylum procedure prescribed by law; and
- (c) it has ratified the [ECHR] and observes its provisions, including the standards relating to effective remedies.

Beside these requirements, Article 39 APD (recast) allows Member States a wide discretion as to the manner in which they deal with applications that are proven to fall within the category of European safe third countries <sup>(360)</sup>. Article 39(4) APD (recast) merely stipulates the following.

#### Article 39(4) APD (recast)

The Member States concerned shall lay down in national law the modalities for implementing the provisions of [Article 39(1) APD (recast)] and the consequences of decisions pursuant to those provisions in accordance with the principle of *non-refoulement*, including providing for exceptions from the application of this article for humanitarian or political reasons or for reasons of public international law.

Further requirements referred to in Article 39(3), (5)-(7) APD (recast) — in particular on procedural safeguards and the possibility for the applicant to be readmitted to the third country concerned — are almost identical to those that apply to the concept of safe third country within the meaning of Article 38 APD (recast). However, the relevance of the applicant's right under Article 39(3) APD (recast) to challenge the application of the concept of European safe third country on the grounds that the third country concerned is not safe in his/her

<sup>(360)</sup> See J. Vedsted-Hansen, 'Article 39 APD (recast)', in Hailbronner and Thym (eds.), see fn 65, MN 3.

particular circumstances, while clear in itself, can be called into doubt when read together with Article 39(1) APD (recast) <sup>(361)</sup>. This provision explicitly stipulates that ‘Member States may provide that no, or no full, examination [...] of the safety of the applicant in his or her particular circumstances [...] shall take place [...]’. Meanwhile, it is to be noted that Article 39(3) APD (recast) had not been included either in the European Commission’s initial proposal for the APD (recast) <sup>(362)</sup>, or in its amended proposal <sup>(363)</sup>, but was adopted only during Council negotiations <sup>(364)</sup>. Against that background it might be assumed that the wording of Article 39(1) APD (recast) has not been adjusted to Article 39(3) APD (recast) by mistake, whereas Article 39(3) APD best reflects the intention of legislature.

## 5.4. The concept of safe country of origin

The concept of safe country of origin as referred to in Articles 36 and 37 APD (recast) does not constitute a ground for inadmissibility. Rather, the concept of safe country of origin has implications for the examination of an application for international protection on the substance. It comprises a presumption of safety to be rebutted by the applicant in order to demonstrate that he/she qualifies for international protection <sup>(365)</sup>. This is stipulated by Article 36(1) APD (recast).

### Article 36(1) APD (recast)

A third country designated as a safe country of origin in accordance with this directive may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant only if:

- (a) he or she has the nationality of that country; or
- (b) he or she is a stateless person and was formerly habitually resident in that country,

and he or she has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection in accordance with [the QD (recast)].

The idea behind the concept of safe country of origin is appropriately elucidated by recitals (40) and (42) APD (recast).

### Recital 40 APD (recast)

A key consideration for the well-foundedness of an application for international protection is the safety of the applicant in his or her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he or she presents counter-indications

<sup>(361)</sup> See J. Vedsted-Hansen, ‘Article 39 APD (recast)’, in Hailbronner and Thym (eds.), see fn 65, MN 3.

<sup>(362)</sup> See European Commission, *APD (recast) Proposal*, see fn 60.

<sup>(363)</sup> See European Commission, *Amended APD (recast) Proposal*, see fn XX.

<sup>(364)</sup> See Council of the European Union, *Note of the Presidency of 22 March 2013*, ST 7695 2013 INIT, p. 104; Council of the European Union, *Statement of the Council’s Reasons of 6 June 2013*, ST 8260 2013 REV 2 ADD 1, see fn 348, p. 17.

<sup>(365)</sup> See *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Subsection 5.9.2. See also J. Vedsted-Hansen, ‘Article 36 APD (recast)’, in Hailbronner and Thym (eds.), see fn 65, MN 4.

However, the designation of a third country as a safe country of origin for the purposes of this directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether there is protection against persecution or serious harm in accordance with Article 7 QD (recast). For this reason, it is important that, where an applicant shows that there are valid reasons to consider the country not to be safe in his or her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her. For example, the Dutch Council of State ruled in several judgments that a particular country was declared safe by the State Secretary except for lesbian, gay, bisexual, transgender and inter-sex (LGBTI) persons <sup>(366)</sup>.

That aside, the concept of safe country of origin also has some procedural implications following from Articles 31(8)(b) and 43(1)(b) APD (recast): Member States may examine an application for international protection within an accelerated procedure (see Subsection 5.1.2 for an overview) and/or border procedure (see Subsection 5.1.3 for an overview) if the applicant is either a national of a country which is designated as a safe country of origin or a stateless person that was formerly habitually resident in that country. The rationale behind this is that the application is likely to be unfounded without any prejudice to the applicant's right to present counter-indications during the examination as provided for by Article 36(1) APD (recast).

It is to be noted that, in the case of *HID and BA*, the CJEU has in principle confirmed that the nationality or country of origin of an applicant for international protection is a criterion which may be taken into consideration to justify an accelerated examination procedure as provided by Article 31(8)(b) APD (recast) <sup>(367)</sup>. Nonetheless, the CJEU has emphasised that in order to avoid any discrimination between applicants for international protection from a specific third country whose applications might be the subject of an accelerated procedure and nationals of other third countries whose applications are subject to the regular procedure, that an accelerated procedure must not deprive applicants in the first category of the basic principles and guarantees set out in Chapter II of the directive <sup>(368)</sup>. In particular, applicants for international protection 'must enjoy a sufficient period of time within which to gather and present the necessary material in support of their application, thus allowing the determining authority to carry out a fair and comprehensive examination of those applications and to ensure that the applicants are not exposed to any dangers in their country of origin' <sup>(369)</sup>. The CJEU's judgment places a particular emphasis on Article 31(8) APD (recast) according to which an accelerated examination shall be conducted in accordance with the basic principles and guarantees set out in Chapter II of the directive.

It follows from Article 37(1) APD (recast) that only Member States can take the decision to designate specific countries as safe countries of origin. The APD (recast) does not provide for a minimum common list of safe countries of origin that was originally supposed to be adopted by the Council pursuant to Article 29(1) and (2) of the former APD. In fact, such a list was never adopted, as the CJEU had annulled its legal basis for reasons of regulatory competence relating to the adoption and amending of such a list <sup>(370)</sup>.

<sup>(366)</sup> Council of State (the Netherlands), judgment of 14 September 2016, no 201507017/1/A2, ECLI:NL:RVS:2016:2472 and judgment of 1 February 2017, no 201606592/1/V2, ECLI:NL:RVS:2017:210.

<sup>(367)</sup> CJEU, *HID and BA*, see fn 25.

<sup>(368)</sup> CJEU, *HID and BA*, see fn 25, para. 74.

<sup>(369)</sup> CJEU, *HID and BA*, see fn 25, paras 73 and ff.

<sup>(370)</sup> CJEU, judgment of 6 May 2008, Grand Chamber, Case C-133/06, *Parliament v Council*, EU:C:2008:257.

Article 37(1) APD (recast) is to be read in conjunction with Annex I to the directive that stipulates the conditions under which Member States may designate a certain country as a safe country of origin.

#### Annex I APD (recast)

A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 [of the QD (recast)], no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken, *inter alia*, of the extent to which protection is provided against persecution or mistreatment by:

- (a) the relevant laws and regulations of the country and the manner in which they are applied;
- (b) observance of the rights and freedoms laid down in the [ECHR] and/or the International Covenant for Civil and Political Rights and/or the United Nations Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR];
- (c) respect for the *non-refoulement* principle in accordance with the [Refugee] Convention;
- (d) provision for a system of effective remedies against violations of those rights and freedoms.

Furthermore, Article 37(2)-(4) APD (recast) requires that Member States shall regularly review the situation in third countries designated as safe countries of origin in accordance with this article, that the assessment of whether a country is a safe country of origin shall be based on a range of sources of information, including in particular information from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations and that Member States shall notify to the Commission the countries that are designated as safe countries of origin <sup>(371)</sup>.

<sup>(371)</sup> For examples of national implementation, see Council of State (France), judgment of 30 December 2016, *Association ELENA and others*, applications nos 395058, 395075, 395133, 395383; Council of State (France), judgment of 10 October 2014, *Association ELENA and others, Association FORUM REFUGIES-COSI*, applications nos 375474 and 375920, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale de droit d'asile, Année 2014, 2015*, pp. 13-16; Council of State (France), judgment of 4 March 2013, *ELENA and others*, applications nos 356490, 356491, 356629; Council of State (the Netherlands), judgment of 14 September 2016, 201603036/1/V2, ECLI:NL:RVS:2016:2474 (see unofficial translation by UNHCR); Supreme Administrative Court (Czech Republic), judgment of 24 July 2013, *DB v Ministry of the Interior*, 4 Azs 13/2013-34 (see EDAL English summary); Federal Constitutional Court (Bundesverfassungsgericht) (Germany), judgment of 15 May 1996, 2 BvR 1507/93, BVerfGE 94, 115; Higher Administrative Court of Baden-Württemberg (Germany), judgment of 24 June 2015, A 6 S 1259/14. For a critical analysis of national implementation see UNHCR, *Improving Asylum Procedures*, see fn 341, pp. 65 and ff.

## Part 6: Right to an effective remedy

The right to an effective remedy is necessary to ensure:

- (i) the right of individuals to judicial protection of their rights deriving from EU law, and
- (ii) judicial control of the lawfulness of decisions taken by administrative authorities.

It was recognised in the *Les Verts* judgment that the European Community is a Community based on the rule of law (*'Rechtsgemeinschaft', 'une communauté de droit'*), 'inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty' <sup>(372)</sup>.

Focusing on the right to an effective remedy under the APD (recast), this part is structured as set out in Table 18 below.

**Table 18: Structure of Part 6**

<b>Section 6.1.</b>	Right to an effective remedy in the APD (recast)	pp. 130-142
<b>Section 6.2.</b>	Full and <i>ex nunc</i> examination	pp. 142-149
<b>Section 6.3.</b>	Access to an effective remedy	pp. 149-157
<b>Section 6.4.</b>	Right to remain during appeals procedures	pp. 157-163

### 6.1. Right to an effective remedy in the APD (recast)

Subsection 6.1.1 sets out general principles regarding the right to effective judicial protection and touches upon the ECtHR case-law on effective remedy, under Articles 6 and 13 of the ECHR, in asylum matters which serves as inspiration when interpreting Article 47 of the charter. Subsection 6.1.2 goes on to describe the content of Article 46 APD (recast). Finally, Subsection 6.1.3 explains the notion of an impartial and independent court or tribunal and specifies which types of decisions by the determining authorities must be subject to review under Article 46 APD (recast).

#### 6.1.1. General principles

General principles of the right to an effective remedy and to effective judicial protection are set out in Table 19 below.

<sup>(372)</sup> Judgment of 23 April 1986, Court of Justice, Case C-294/83, *Parti écologiste 'Les Verts' v European Parliament*, EU:C:1986:166, para. 23. The Court stressed that the 'Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions' in order to protect 'natural and legal persons (...) against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the [Treaty]'.

**Table 19: General principles and the right to effective judicial protection**

<b>General principles</b>	Right to good administration Right to effective judicial protection Right of defence Right to be heard
<b>Treaty on European Union</b>	Article 2(1): Fundamental values of the EU Article 19(1): Effective legal protection
<b>Treaty on the Functioning of the European Union</b>	Article 78: Common policy on asylum Article 263: the Court of Justice of the European Union
<b>Charter of Fundamental Rights of the European Union</b>	Article 1: Human dignity Article 4: Prohibition of torture and inhuman or degrading treatment or punishment Article 18: Right to asylum Article 19: Protection in the event of removal, expulsion or extradition Article 20: Equality before the law Article 21: Non-discrimination Article 24: The rights of the child Article 47: Right to an effective remedy and fair trial

The right to effective judicial protection is a general principle of EU law which underlies constitutional traditions common to Member States <sup>(373)</sup>. The principle is explicitly enshrined in Article 47 of the EU charter <sup>(374)</sup> (right to an effective remedy and to a fair trial) and in Article 19(1) of the [Treaty on European Union](#) which requires that Member States ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’ <sup>(375)</sup>. The requirement of effective judicial protection applies to Member States when they are implementing EU law (Article 51(1) of the charter) <sup>(376)</sup>. Any limitation on the exercise of the right to an effective remedy:

must be provided for by law and respect the essence of [that right]. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others [Article 52(1) of the charter] <sup>(377)</sup>.

More recently, primary EU law has accorded certain procedural rights, such as the right to an effective remedy and the right to good administration, the status of fundamental rights in the EU charter <sup>(378)</sup>. In the *Kadi II* judgment, the CJEU explained the content of the right to effective judicial protection which is affirmed in Article 47 of the charter. The CJEU required that the EU courts ensure ‘in principle the full review of the lawfulness of all Union acts in the light of the

<sup>(373)</sup> CJEU, judgment of 15 May 1986, Case C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, paras 18-19. This principle is explained in more detail *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, Section 3.3.7.

<sup>(374)</sup> CJEU, judgment of 8 December 2011, Case C-386/10 P, *Chalkor v Commission*, EU:C:2011:815, para. 52.

<sup>(375)</sup> [Treaty on European Union](#) (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)) OJ C 326, 26.10.2012, pp. 13-45. The CJEU also emphasises that the principle of sincere cooperation, now in Art. 4(3) of the TEU, requires that Member States ensure judicial protection of an individual’s rights under EU law. See e.g. CJEU, judgment of 13 March 2007, Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, EU:C:2007:163, para. 38.

<sup>(376)</sup> See also CJEU, judgment of 25 July 2002, Case C-50/00, *Unión de Pequeños Agricultores v Council of the European Union*, EU:C:2002:462, para. 41.

<sup>(377)</sup> This follows from the case-law on the principle of effective judicial protection, see e.g. CJEU, judgment of 6 October 2015, Case C-61/14, *Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Girogia Iacono v Telecom Italia SpA, Multiservice Srl v Telecom Italia SpA*, EU:C:2010:146, para. 63. The *Alassini* case concerned the question of whether an additional step before a court is accessed (alternative dispute settlement) may be imposed on appellants. The Court examined whether that did not incur additional costs for the claimants, the duration of such out-of-court procedures and whether time-barring of claims is stayed during such procedures. See also CJEU, judgment of 18 July 2013, Grand Chamber, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and others v Yassin Abdullah Kadi*, EU:C:2013:518, para. 101.

<sup>(378)</sup> In its 2013 Grand Chamber judgment in *European Commission and others v Yassin Abdullah Kadi*, *ibid.*, paras 97-98, the CJEU confirmed that both compliance with the rights of the defence and the right to effective judicial protection are fundamental rights. It should be noted however, the logic of the *Kadi* judgment, which has no direct link with asylum matters, may not necessarily be transferred, *mutatis mutandis*, to asylum cases.

fundamental rights forming an integral part of the European Union legal order'. Those fundamental rights include 'respect for the rights of the defence and the right to effective judicial protection' <sup>(379)</sup>.

The effectiveness of the judicial review also required that the courts of the EU:

ensure that that decision, which affects that person individually [...], is taken on a sufficiently solid factual basis [...]. That entails a verification of the factual allegations in the summary of reasons underpinning that decision [...], with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated <sup>(380)</sup>.

The requirements of good administration and legal certainty and the principle of effective legal protection are closely connected <sup>(381)</sup>. The obligation of the authorities to give reasons for their decisions is also part of the right to effective judicial protection <sup>(382)</sup>.

These principles strengthen the rights of applicants for international protection in appeal procedures. For example, even though the APD (recast) only requires the determining authority to give reasons for their decisions, it follows from these principles that the courts and tribunals also have such an obligation. The CJEU has confirmed that 'the characteristics of the remedy provided for in Article 46 of [the APD (recast)] must be determined in a manner that is consistent with Article 47 of the charter, which constitutes a reaffirmation of the principle of effective judicial protection' <sup>(383)</sup>.

Whilst the provisions of the APD (recast) limit national procedural autonomy substantially, they are not exhaustive and hence it cannot be excluded that the principles of equivalence and effectiveness may still have some role <sup>(384)</sup>.

In order to provide effective judicial protection, national courts or tribunals must have power to confirm or set aside the decisions challenged <sup>(385)</sup>. This may contain the power to order the administration to reopen a final decision, if there is an equivalent possibility in national law <sup>(386)</sup>. Under non-asylum-related CJEU case-law <sup>(387)</sup>, the administrative authority may have an obligation to reopen proceedings, if its decision became final after a national judgment which had been based on misinterpretation of EU law, in the light of a decision given by the

<sup>(379)</sup> *Ibid.*, para. 98.

<sup>(380)</sup> *Ibid.*, paras 97 and 98.

<sup>(381)</sup> S. Peers, T. Hervey, J. Kenner and A. Ward, (eds.), *The EU charter of Fundamental Rights (A Commentary)* (C.H. Beck/Hart/Nomos, 2014), p. 1 199. See also Reneman, *EU asylum procedures*, see fn 254, p. 77.

<sup>(382)</sup> CJEU, judgment of 3 September 2008, Grand Chamber, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:461, paras 335-353.

<sup>(383)</sup> CJEU, judgment of 26 July 2017, Case C-348/16, *Moussa Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, EU:C:2017:591, para. 31.

<sup>(384)</sup> CJEU, judgment of 26 July 2017, Case C-348/16, *Moussa Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, EU:C:2017:591, para. 31. The principle of equivalence requires that national procedural rules be no less favourable than those governing similar domestic actions and the principle of effectiveness requires that the rules must not render practically impossible or excessively difficult the exercise of rights conferred by EU law. CJEU, judgment of 16 December 1976, case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188, para. 6. See also CJEU, *Rosalba Alassini and others*, see fn 377, para. 48.

<sup>(385)</sup> CJEU, judgment of 17 September 1997, Case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH and Bundesbaugesellschaft Berlin mbH*, EU:C:1997:413, paras 31, 37.

<sup>(386)</sup> See CJEU, judgment of 4 October 2012, Case C-249/11, *Hristo Byankov v Glaven sekretar na Ministerstvo na vatrešnite raboti*, EU:C:2012:608; and CJEU, judgment of 13 January 2004, Case C-453/00, *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren*, EU:C:2004:17, paras 23-27.

<sup>(387)</sup> CJEU, judgment of 13 January 2004, Case C-453/00, *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren*, EU:C:2004:17, paras 23-27.

CJEU subsequent to it <sup>(388)</sup>. In order to provide effective judicial protection in such cases, it may be necessary for the courts also to have the power to order the administration to reopen their decisions.

*An Introduction to the Common European Asylum System for courts and tribunals — A judicial analysis* has explained further principles that judges and tribunal members should be aware of when applying EU law <sup>(389)</sup>. These include the obligation and/or possibility of courts to request a preliminary ruling by the CJEU <sup>(390)</sup>, the power of courts to award damages arising from non-compliance of Member States with EU law and causing damage to individuals <sup>(391)</sup>, and the requirement that judges take cognisance of and rule upon an issue of EU law of their own motion (Subsection 3.3.6 of the said analysis).

#### Article 47 EU Charter

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

When interpreting Article 47 of the EU charter, the explanations to the charter <sup>(392)</sup> are relevant, as they were ‘drawn up as a way of providing guidance in the interpretation of this charter and shall be given due regard by the courts of the Union and of the Member States’. (Article 52(7) of the charter). For its part, the CJEU has affirmed that Article 47 ‘constitutes a reaffirmation of [...] the principle of effective judicial protection of the rights which individuals derive from EU law’ and that this principle ‘comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented’ <sup>(393)</sup>.

It is outside the scope of this analysis to provide a comprehensive overview of the content of Article 47 of the charter, but some of its aspects are referred to in sections below <sup>(394)</sup>. Subject to conformity with Article 46 APD (recast) (see below), it is for national systems to adopt

<sup>(388)</sup> The effect of the APD (recast) and of the principles of equivalence and effectiveness are yet to be clarified in relation to questions regarding asylum matters. However, in the *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* judgment the CJEU set forth these preconditions for the obligation of an administrative body to review its final decision: ‘— under national law, it has the power to reopen that decision; — the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; — that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under the third paragraph of Article 234 EC; and — the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court’. The principle was also extended to cases where the first decision of administration had not been reviewed by a court in the field of free movement of persons in CJEU, judgment of 4 October 2012, Case C-249/11, *Hristo Byankov v Glaven sekretar na Ministerstvo na vateshnite raboti*, EU:C:2012:608.

<sup>(389)</sup> *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2.

<sup>(390)</sup> Section 3.5 of that analysis.

<sup>(391)</sup> CJEU, judgment of 19 November 1991, Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, EU:C:1991:428, paras 40-43; CJEU, judgment of 30 September 2003, Case C-224/01, *Gerhard Köbler v Republik Österreich*, EU:C:2003:513, paras 53-55. See *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, Subsection 3.3.4 for more detail.

<sup>(392)</sup> See Praesidium of the European Convention which drafted the Charter of Fundamental Rights of the EU, Explanations relating to the Charter of Fundamental Rights OJ C 303, 14.12.2007, p. 17.

<sup>(393)</sup> CJEU, *Moussa Sacko*, see fn 383, paras 31-32.

<sup>(394)</sup> See also *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, Sections 2.1.3 and 2.3.5. For a detailed overview see also Peers et al., *The EU charter of Fundamental Rights. A Commentary*, see fn 254, pp. 1 197-1 273.

procedural rules to ensure the rights flowing from EU law are safeguarded. To find out whether such rules (when applicable) meet the principle of effectiveness, the CJEU has ruled:

each case [...] must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration <sup>(395)</sup>.

Article 47 of the charter has also played a role in the national constitutional review of norms in the field of refugee law before the Austrian Constitutional Court <sup>(396)</sup>, when it examined whether the lack of an oral hearing in certain asylum cases may amount to a violation of Article 47 of the charter.

Under Article 52(3) of the charter, the right to effective judicial protection should be interpreted so as to afford at least the same level of protection as the relevant rights under the ECHR <sup>(397)</sup>. Article 47 of the charter was inspired by Article 13 ECHR in its first paragraph and by Article 6 ECHR in the remaining part <sup>(398)</sup>. The CJEU has held that Article 47 of the charter is autonomous and when both Article 6 ECHR and Article 47 of the charter are invoked, the latter will be referred to <sup>(399)</sup>.

In addition to applying EU law norms, courts and tribunals may be required to ensure compliance with ECHR provisions. Their content differs slightly from that of Article 47 EU charter. Unlike the right to a fair trial under Article 6 ECHR, the right to an effective remedy under the charter is not limited to criminal or civil matters <sup>(400)</sup>. It is thus applicable in the asylum context <sup>(401)</sup>. Article 13 ECHR <sup>(402)</sup> requires an effective remedy for those whose ‘rights and freedoms as set forth in [the ECHR] are violated’. In contrast, Article 47 of the charter does not link the right to an effective remedy to the violation of rights in the charter but to the violation of ‘rights and freedoms guaranteed by the law of the Union’, which is considerably broader in scope. The effective remedy pursuant to Article 47 of the charter must be provided by a ‘tribunal’, whereas Article 13 ECHR ‘merely’ requires an effective remedy to be provided before ‘a national authority’, although the ECtHR seems to be requiring that it must have a court-like character <sup>(403)</sup>.

<sup>(395)</sup> CJEU, judgment of 14 December 1995, Case C-312/93, *Peterbroeck v Belgian State*, EU:C:1995:437, para. 14. An example of how this is applied by the CJEU is provided below in Subsection 6.3.1. in its judgment of 19 June 1990, Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1990:257.

<sup>(396)</sup> Constitutional Court (Austria), judgment of 14 March 2012, no U 466/11 and U 1836/11.

<sup>(397)</sup> On the interplay between EU law and ECHR, see of the *An Introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, Subsection 3.4.1.

<sup>(398)</sup> Under Art. 52(3) of the EU charter ‘[i]n so far as this charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection’.

<sup>(399)</sup> CJEU, *Chalkor v Commission*, see fn 374, para. 51.

<sup>(400)</sup> Art. 6(1) ECHR requires that everyone is entitled to a fair and public hearing ‘in the determination of his civil rights’ (civil limb) ‘and obligations or of any criminal charge against him in the determination of his civil rights and obligations or of any criminal charge against him’ (criminal limb).

<sup>(401)</sup> Contrast the position in respect of Art. 6 ECHR. In *Maaouia v France* the ECtHR held that ‘decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him, within the meaning of Art. 6 § 1 of the convention’. ECtHR, judgment of 5 October 2000, Grand Chamber, *Maaouia v France*, application no 39652/98, para. 40. See also paras 37-39 of the judgment. Asylum, expulsion and immigration matters therefore do not fall under Art. 6 ECHR. For a case concerning asylum matter see e.g. ECtHR, admissibility decision of 9 July 2002, *Venkadajalarasarma v the Netherlands*, application no 58510/00.

<sup>(402)</sup> ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

<sup>(403)</sup> T. Spijkerboer, ‘Subsidiarity’ and ‘arguability’: the European Court of Human Rights’ case law on judicial review in asylum cases’, *IJRL* (2009), p. 50. See e.g. ECtHR, *MSS v Belgium and Greece*, see fn 174, para. 290: ‘Nor does the ‘authority’ referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective’.

According to the ECtHR the protection by the ECHR is subsidiary to national systems safeguarding human rights, since state authorities are in a better position to give an opinion on the content of some of the requirements of the convention<sup>(404)</sup> or to evaluate evidence before them<sup>(405)</sup>. In the field of asylum law, the ECtHR specifically emphasises that ‘[...] it does not itself examine the actual asylum applications or verify how the states honour their obligations under the [Refugee] Convention. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled’<sup>(406)</sup>. When evaluating whether the applicant had access to an effective remedy, the Court weighs whether the assessment by the state authorities was sufficiently thorough.

In order to trigger Article 13 ECHR, it is sufficient for an applicant to have an ‘arguable claim’ that another right guaranteed by the convention was violated. In asylum cases, the other right examined is usually the right to *non-refoulement* to a country in which a person could be facing torture, inhuman or degrading treatment or punishment (Article 3 ECHR)<sup>(407)</sup>. In order to be effective the remedy must be available in practice as well as in law<sup>(408)</sup>, however it need not provide a favourable outcome for the applicant<sup>(409)</sup>. Moreover, ‘even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so’<sup>(410)</sup>. Article 13 ECHR then guarantees ‘the availability at national level of a remedy to enforce the substance of the convention rights and freedoms in whatever form they are secured in the domestic legal order’<sup>(411)</sup>. Reference to the ECtHR case-law in more detail is provided in individual sections below.

In the preliminary rulings concerning interpretations of various elements of effective legal remedy (or judicial protection), the CJEU sometimes even within the very same preliminary ruling uses the term ‘the principle’ of and/or ‘the right’ to an effective legal remedy<sup>(412)</sup>. According to the charter and the APD (recast), the difference between rights and principles is significant. Rights shall be ‘respected’, while principles shall be ‘observed’ (Article 51(1) of the EU charter; recital (60) of the APD (recast)). In addition, and even more importantly, Article 52(5) of the EU charter states the following.

#### Article 52(5) EU Charter

The provisions of this charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

<sup>(404)</sup> ECtHR, judgment of 7 December 1976, *Handyside v United Kingdom*, application no 5493/72, para. 48; ECtHR, *Paposhvili*, see fn 181, para. 184.

<sup>(405)</sup> Art. 35 ECHR requires that domestic remedies have to first be exhausted before the ECtHR can deal with a matter, since states should have the opportunity to redress the alleged wrong on their own.

<sup>(406)</sup> ECtHR, *MSS v Belgium and Greece*, see fn 174, para. 286. See also ECtHR, *IM v France*, see fn 242, para. 127, ECtHR, *FG v Sweden*, see fn 77, paras 117-118.

<sup>(407)</sup> Arguability of a claim is always determined in light of the particular facts and the nature of the legal issue raised. ECtHR, judgment of 27 April 1988, *Boyle and Rice v United Kingdom*, application nos 9659/82 and 9658/82, para. 55. In order for a claim to be ‘arguable’, actual breach of a substantive provision is not a prerequisite for the application of Art. 13 ECHR; however Art. 13 ECHR does not require a remedy in domestic law no matter how unmeritorious a complaint is. ECtHR, *Boyle and Rice v UK*, para. 52: ‘The fact that [...] allegations [by a complainant] are not ultimately substantiated does not prevent [a] claim from being one for the purposes of Article 13 of the Convention’. ECtHR, judgment of 19 February 1998, *Kaya v Turkey*, application no 22729/93, para. 107.

<sup>(408)</sup> ECtHR, *MSS v Belgium and Greece*, see fn 174, para. 290: ‘the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State’.

<sup>(409)</sup> *Ibid.*, para. 289. See also judgment of 6 March 2001, *Hilal v United Kingdom*, application no 45276/99, para. 78.

<sup>(410)</sup> ECtHR, *MSS v Belgium and Greece*, see fn 174, para. 289. See also *Gebremedhin v France*, see fn 60, para. 53.

<sup>(411)</sup> ECtHR, Grand Chamber, judgment of 13 December 2012, *De Souza Ribeiro v France*, application no 22689/07, para. 78.

<sup>(412)</sup> See e.g., CJEU, *Diouf*, op cit., fn. 25, and CJEU, *Moussa Sacko*, see fn 382.

However, while interpreting the right to, or the principle of, an effective legal remedy, the CJEU has not yet referred to Article 52(5) of the charter. The actual practice of the CJEU indicates that if the given issue of an effective legal remedy which is at stake in the question for preliminary ruling is already covered by the case-law of the ECtHR, then the interpretation of the contested provision will be developed primarily based on the interpretation of Article 47 of the charter in conjunction with the case-law of the ECtHR; also taking into account methods of interpretation of the provision on effective legal remedy from secondary EU law <sup>(413)</sup>. However, if the given issue of an effective legal remedy which is at stake in the question for preliminary ruling is not comprehensively covered by the established case-law of the ECtHR, then the interpretation of the contested provision will most likely be developed primarily based on methods of interpretation of secondary EU law, while Article 47 of the charter might be only referenced or even not referenced at all <sup>(414)</sup>.

### 6.1.2. Introduction to the right to an effective remedy in the APD (recast)

Secondary EU law principles that are relevant for an effective remedy are set out in various CEAS instruments as outlined in Table 20 below. With regard specifically to the APD (recast), recital (50) emphasises the following.

#### Recital (50) APD (recast)

It reflects a basic principle of Union law that the decisions taken on an application for international protection, the decisions concerning a refusal to reopen the examination of an application after its discontinuation, and the decisions on the withdrawal of refugee or subsidiary protection status are subject to an effective remedy before a court or tribunal.

**Table 20: EU secondary law relevant for effective remedy**

<b>Qualification Directive (recast)</b>	Article 4: Assessment of facts and circumstances
<b>Asylum Procedures Directive (recast)</b>	Article 10: Requirements for the examination of applications Article 11: Requirements for a decision by the determining authority Article 12: Guarantees for applicants Article 17: Report and recording of personal interviews Article 20: Free legal assistance and representation in appeals procedures Article 21: Conditions for the provision of legal and procedural information free of charge and free legal assistance and representation Article 22: Right to legal assistance and representation at all stages of the procedure Article 23: Scope of legal assistance and representation Article 24: Applicants in need of special procedural guarantees Article 25: Guarantees for unaccompanied children Article 30: Collection of information on individual cases Article 41: Exceptions from the right to remain in case of subsequent applications Article 46: The right to an effective remedy
<b>Dublin III regulation</b>	Article 27: Remedies

<sup>(413)</sup> See e.g., CJEU, *Tall*, see fn 25, paras 48-49 and 50-54.

<sup>(414)</sup> See e.g., CJEU, *Moussa Sacko*, see fn 383, paras 39-40 and 42-49; CJEU, judgment of 11 December 2014, Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, EU:C:2014:2431, para. 64.

The APD (recast) provides for at least one obligatory level of appeal in matters of international protection (Article 46(3) APD (recast)) <sup>(415)</sup>. Since the APD (recast) establishes ‘common procedures for granting and withdrawing international protection pursuant to [QD (recast)]’ (Article 1 APD (recast)), which provide for a uniform status, applicants have the right to an effective remedy ‘against a decision taken on their application for international protection’ <sup>(416)</sup>. Article 46(1)(a) APD (recast) provides a non-exhaustive list of decisions on an application for international protection against which an effective remedy must be available. An effective remedy must also be available in the case of other decisions taken in the context of international protection proceedings enumerated in Article 46(1)(b)-(c) APD (recast) <sup>(417)</sup>.

Article 46 also covers some procedural matters specific to the international protection procedure. It requires a full and *ex nunc* examination of facts and points of law at least in appeals procedures before a court or tribunal of first instance (Article 46(3)) (see Section 6.2 below). It requires that Member States ‘provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy’, requiring that such ‘time limits shall not render such exercise impossible or excessively difficult’ (Article 46(4)) (see Subsection 6.3.2 below). Member States may also lay down in national legislation time limits for the court or tribunal to examine the decisions (Article 46(10)).

The APD (recast) regulates the minimum standard concerning the right to remain in the territory during the appeals phase (Article 46(5)-(9)) <sup>(418)</sup>. In cases where derogations are possible from the automatic suspensive effect of appeal Member States shall as a minimum allow applicants to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory (Article 46(8)) <sup>(419)</sup>. The right to remain during the appeals phase is dealt with in Section 6.4 below.

Member States may also lay down the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his/her remedy and rules to be followed (Article 46(11)) (see Subsection 6.3.5 below).

### 6.1.3. Effective remedy ‘before a court or tribunal’

#### 6.1.3.1. Decisions against which an effective remedy must be available

The decisions against which an effective remedy must be available are listed in Article 46(1)-(2) APD (recast) as follows:

#### Article 46(1)-(2) of APD (recast)

1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

<sup>(415)</sup> This principle is retained from the APD. See European Commission, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 18 June 2002, COM(2002) 326 final (*Amended APD Proposal*).

<sup>(416)</sup> Art. 46(1)(a) APD (recast). This means decisions regarding both eligibility for a refugee status and/or subsidiary protection, see Arts 2(b) and 2(e) APD (recast). This was not the case under the APD in which Art. 39 related only to decisions on refugee status. See *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, see fn 2, Subsection 2.2.3.

<sup>(417)</sup> Subsection 6.1.3.3 below deals in more detail with the decisions that have to be subject to effective remedy.

<sup>(418)</sup> This aspect was not regulated in the APD. The APD (recast) aims at ensuring compliance with the case-law of the CJEU and alignment with the requirements of the ECtHR.

<sup>(419)</sup> The only exception where such a right is not automatically granted is set out in Art. 41(2)(c) APD (recast) in cases of certain subsequent applications.

- (a) a decision taken on their application for international protection, including a decision:
  - (i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;
  - (ii) considering an application to be inadmissible pursuant to Article 33(2);
  - (iii) taken at the border or in the transit zones of a Member State as described in Article 43(1);
  - (iv) not to conduct an examination pursuant to Article 39;
- (b) a refusal to reopen the examination of an application after its discontinuation pursuant to Articles 27 and 28;
- (c) a decision to withdraw international protection pursuant to Article 45.

2. Member States shall ensure that persons recognised by the determining authority as eligible for subsidiary protection have the right to an effective remedy pursuant to paragraph 1 against a decision considering an application unfounded in relation to refugee status.

Without prejudice to paragraph 1(c), where the subsidiary protection status granted by a Member State offers the same rights and benefits as those offered by the refugee status under Union and national law, that Member State may consider an appeal against a decision considering an application unfounded in relation to refugee status inadmissible on the grounds of insufficient interest on the part of the applicant in maintaining the proceedings.

With respect to all these decisions, the rules set forth in Article 46 APD (recast) (including the full and *ex nunc* examination of facts and points of law by the court) apply.

The list of decisions on applications for international protection against which an effective remedy must be provided under Article 46(1)(a) APD (recast) is non-exhaustive<sup>(420)</sup>. The ‘decisions on the application’ were described by the CJEU in the *Diouf* case to be those ‘which entail rejection of the application for asylum for substantive reasons or, as the case may be, for formal or procedural reasons which preclude any decision on the substance’<sup>(421)</sup>. Decisions that are ‘preparatory to the decision on the substance or decisions pertaining to the organisation of the procedure are not covered by that provision’ [Article 39(1) APD]<sup>(422)</sup>. The Court determined that a decision to examine an application for asylum under an accelerated procedure was preparatory to the decision on the substance. It thereby did not require separate judicial remedy, provided that ‘the legality of the final decision adopted in an accelerated procedure — and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded — may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application’<sup>(423)</sup>. The same conclusion should apply for decisions on the application under Article 46(1)(a) APD (recast).

Decisions considering the application to be unfounded are mentioned explicitly in Article 46(1)(a)(i) APD (recast)<sup>(424)</sup>. This includes decisions ‘considering an application unfounded in relation to refugee status’ and cases where an applicant was recognised by the determining authority

<sup>(420)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 41.

<sup>(421)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 42. Although the judgment was taken with respect to Art. 39(1) APD, these conclusions would arguably extend to Art. 46(1) APD (recast).

<sup>(422)</sup> *Ibid.*, para. 43.

<sup>(423)</sup> *Ibid.*, para. 56.

<sup>(424)</sup> In contrast with Art. 39(1) APD, which did not mention such decisions explicitly.

as eligible for subsidiary protection (Article 46(2) APD (recast)). In such a case ‘where the subsidiary protection status granted by a Member State offers the same rights and benefits as those offered by the refugee status under Union and national law, that Member State may consider an appeal against a decision considering an application unfounded in relation to refugee status inadmissible on the grounds of insufficient interest on the part of the applicant in maintaining the proceedings’<sup>(425)</sup>. This is ‘without prejudice to paragraph 1(c)’, i.e. if the subsidiary protection is at a later stage withdrawn from the applicant, he/she should have access to an effective remedy against a decision to withdraw international protection with respect to both forms of international protection.

Under recital (54) APD (recast), the directive applies to applicants subject to the Dublin III regulation ‘in addition and without prejudice to the provisions of that regulation’. The same principle is confirmed by recital (12) of the Dublin III regulation. Article 46(9) APD (recast) provides that ‘[p]aragraphs 5, 6 and 7 [i.e. provisions relating to the right to remain pending appeal] shall be without prejudice to Article 26 of [the Dublin III] Regulation’<sup>(426)</sup>. The CJEU has not yet interpreted this recital. Consequently it is yet to be determined whether the remainder of Article 46 APD (recast) should apply to remedies under the Dublin III regulation, unless specific rules are provided for in that regulation. Access to an effective remedy in these cases is dealt with Section 3.8 of this judicial analysis above.

### 6.1.3.2. ‘Independent and impartial tribunal’ in the case-law of the CJEU and the ECHR

Pursuant to Article 47 of the EU charter everyone is entitled to a fair and public hearing ‘by an independent and impartial tribunal previously established by law’. Article 46 APD (recast) requires that ‘applicants have the right to an effective remedy before a court or tribunal [...]’. Although independence and impartiality are not mentioned explicitly, ‘the elements ‘independent and impartial’ are formal requirements for an effective remedy and can be considered to be included in the notion of court’<sup>(427)</sup> or tribunal<sup>(428)</sup>.

In order to assess whether a body is a court or tribunal, the CJEU examines *inter alia* whether it is ‘established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent’<sup>(429)</sup>. The requirement that the procedure before the hearing body concerned must be *inter partes* is not an absolute criterion<sup>(430)</sup>, whereas it is essential that the body exercises judicial function, i.e. that ‘it can find that a determination made by a review body is unlawful and it can direct the review body to make a fresh determination’<sup>(431)</sup>. With respect to the ‘rule-of-law’ criterion, national law must provide for general procedural requirements, such as the duty to

<sup>(425)</sup> See Art. 46(2) APD second subparagraph (recast).

<sup>(426)</sup> Reference is made to Art. 26 of the Dublin III regulation (notification of a transfer decision), whereas it should probably rather be Art. 27 of the said regulation which concerns remedies in the Dublin cases. This was probably caused by the fact that the first proposal for the Dublin III regulation regulated remedies in Art. 26, and only at a later stage were the remedies moved in Art. 27 of that regulation. See Dublin III Commission Proposal, see fn 88, p. 46. Since the general principle laid in recitals, that the APD (recast) applies without prejudice to the Dublin III regulation is merely emphasized in this provision, such a mistake in reference probably has no practical implication.

<sup>(427)</sup> See also the Commission’s *Amended APD Proposal* (see fn 415, proposal for Art. 38, p. 17).

<sup>(428)</sup> See also CJEU, judgment of 22 December 2010, Case C-517/09, *RTL Belgium SA, formerly TVI SA*, EU:C:2010:821, para. 38.

<sup>(429)</sup> CJEU, Grand Chamber, judgment of 31 May 2005, Case C-53/03, *Synetairismos Farmakopoiou Aitolias and others v GlaxoSmithKline plc*, EU:C:2005:333, para. 29. See also CJEU, *HID and BA*, see fn 25, para. 83. These are requirements imposed on a court empowered to make a reference for a preliminary ruling to the CJEU. Recital (27) APD even made reference to Art. 234 TEC and required that ‘the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty’.

<sup>(430)</sup> CJEU, *HID and BA*, see fn 25, para. 88. In particular, it was not necessary for the decision-making authority to be represented in the appeal.

<sup>(431)</sup> CJEU, judgment of 17 September 1997, Case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH*, EU:C:1997:413, paras 31 and 37.

hear the parties, to make determinations by an absolute majority of votes and to give reasons for them <sup>(432)</sup>.

**The concept of independence implies ‘that the body in question acts as a third party in relation to the authority which adopted the contested decision’** <sup>(433)</sup>. The concept has two aspects:

- **external independence**, which entails protection from ‘external intervention or pressure which is liable to jeopardise the independent judgment of its members as regards proceedings before them’ <sup>(434)</sup>, and
- **internal independence** which ‘is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings’ <sup>(435)</sup>.

Moreover, rules are required as guarantees of independence and impartiality as follows:

[...] particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. [...] the case-law requires, *inter alia*, that dismissals of members of that body should be determined by express legislative provisions <sup>(436)</sup>.

The question of the impartiality of judges is further elaborated on in *Evidence and Credibility Assessment in the Context of the Common European Asylum System — A judicial analysis* <sup>(437)</sup>.

In the *HID and BA* case <sup>(438)</sup>, the CJEU examined whether the Irish Refugee Appeals Tribunal was a court or a tribunal <sup>(439)</sup>. The tribunal met the criteria ‘of establishment by law, permanence and application of rules of law’ <sup>(440)</sup>. With respect to the *inter partes* criterion, although the decision-maker was not required to participate in the appeal proceedings to defend the decision <sup>(441)</sup>, it was required to provide the tribunal with all the documents that were the basis for the decision <sup>(442)</sup>. It was also required to provide a copy of these to the applicant, his solicitor and UNHCR, at the applicant’s request <sup>(443)</sup>. The tribunal could hold a hearing and ‘direct any person whose evidence is required to attend, and hear both the applicant and the Refugee Applications Commissioner present their case’, giving each party the opportunity to make the tribunal aware of any information concerning the case <sup>(444)</sup>. The CJEU found that the Refugee Appeals Tribunal had broad discretion, since it took ‘cognisance of both questions of fact and questions of law and rules on the evidence submitted to it, in relation to which it enjoys a discretion’ <sup>(445)</sup>.

<sup>(432)</sup> *Ibid.*, para. 33.

<sup>(433)</sup> CJEU, *RTL Belgium SA*, see fn 428, para. 38.

<sup>(434)</sup> In order to guarantee external independence, personal and operational independence of a body has to be secured and the system has to constitute an effective safeguard against undue intervention or pressure from the executive on its members. CJEU, *Synetairismos Farmakopoion Aitolias and others* judgment, see fn 429, para. 31.

<sup>(435)</sup> *Ibid.*, paras 39 and 40. See also CJEU, *HID and BA*, see fn 25, para. 96.

<sup>(436)</sup> CJEU, *HID and BA*, see fn 25, para. 97, and CJEU, order of 14 May 2008, Case C-109/07, *Jonathan Pilato v Jean-Claude Bourgault*, EU:C:2008:274, para. 24.

<sup>(437)</sup> *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Subsection 3.4.6.2.

<sup>(438)</sup> CJEU, *HID and BA*, see fn 25. The case concerned Art. 39 of the APD.

<sup>(439)</sup> Parties to the original dispute argued that: a) the jurisdiction of the tribunal was not compulsory; b) the jurisdiction was not exercised on an *inter partes* basis; and c) it was not independent owing to functional links with the administrative authorities and because of certain powers of the minister with respect to its review. *Ibid.*, para. 41.

<sup>(440)</sup> *Ibid.*, para. 84.

<sup>(441)</sup> *Ibid.*, para. 89.

<sup>(442)</sup> *Ibid.*, para. 90.

<sup>(443)</sup> *Ibid.*, para. 90.

<sup>(444)</sup> *Ibid.*, para. 91.

<sup>(445)</sup> CJEU, *HID and BA*, see fn 25, para. 93.

When dealing with independence of the tribunal, the CJEU examined the organisational and administrative links between the administrative level and appeal bodies and found that the law provided that the tribunal was ‘independent in the performance of its functions’ and ‘though the Minister retains residual discretion to grant refugee status despite a negative decision on an asylum application, [...] where the Refugee Appeals Tribunal finds in favour of the applicant for asylum, the Minister is bound by the decision of that tribunal’<sup>(446)</sup>. The rules on appointment of members did not differ substantially from the practice in other Member States; members were appointed for a specific term from among persons with at least 5 years’ experience as a practising barrister or solicitor<sup>(447)</sup>. Dismissal of members of the tribunal was more contentious. The CJEU case-law required that ‘dismissals of members of that body should be determined by express legislative provisions’<sup>(448)</sup>. Ordinary members of the Refugee Appeals Tribunal could be removed from office by a Minister’s decision which had to state the reasons for such a removal<sup>(449)</sup>. However, the reasons for dismissal were not provided by law and it was unclear whether such a decision would be amenable to judicial review<sup>(450)</sup>. For the CJEU the availability of two further means of obtaining redress (i.e. the High Court and the Supreme Court) for unsuccessful applicants for asylum appeared ‘in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members’<sup>(451)</sup>.

At the time of writing, the Commission is running an infringement procedure against Hungary concerning the APD (recast). It argues that procedures in which judicial decisions are taken by court secretaries, i.e. on sub-judicial level, lack judicial independence<sup>(452)</sup>.

While the ECtHR does not interpret EU law, it has established substantial case-law on the independence of a court under Article 6 ECHR. The ECtHR examines the ‘manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence’<sup>(453)</sup>. The impartiality of a court in ECtHR case-law has two aspects: whether the tribunal is ‘subjectively free of personal prejudice or bias’ and whether it offers ‘sufficient guarantees to exclude any legitimate doubt in this respect [...]’<sup>(454)</sup>. Under the objective test, ‘it must be determined [...] whether there are any ascertainable facts which may raise doubts as to their impartiality. [...] What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to proceedings’<sup>(455)</sup>.

In the context of international protection, ECtHR case-law on Article 13 ECHR is of relevance. Article 13 ECHR does not require that the body providing effective remedy necessarily be a judicial authority, however ‘its powers and guarantees which it affords are relevant in determining

<sup>(446)</sup> Ibid., para. 98. Residual discretion was previously contained in s. 17(1)(b) of the Refugee Act 1996 (as amended). The residual discretion of the minister has been removed since the coming into force of the [International Protection Act 2015](#) on 31 December 2016. See s. 47.

<sup>(447)</sup> Ibid., para. 99.

<sup>(448)</sup> Ibid., para. 97.

<sup>(449)</sup> Ibid., para. 100.

<sup>(450)</sup> Ibid., para. 101.

<sup>(451)</sup> Ibid., para. 103. The advocate general considered ‘it quite impossible that the high court or the supreme court might uphold decisions delivered under pressure from the Irish government’.

<sup>(452)</sup> See European Commission, *Infringement decisions: implementation of Common European Asylum System; Hungarian asylum legislation*, 10 December 2015.

<sup>(453)</sup> ECtHR, judgment of 6 May 2003, *Kleyn and others v the Netherlands*, applications nos 39343/98, 39651/98, 43147/98 and 46664/99, para. 190. With respect to appearance of independence, the standpoint of a party is not decisive; what is decisive is whether the fear that the requirement of independence is not met can be held to be objectively justified. Ibid., para. 194.

<sup>(454)</sup> Ibid., para. 191.

<sup>(455)</sup> Ibid., para. 191. This judgment concerned the Council of State in the Netherlands. If a judicial organ exercises both advisory and judicial functions, consecutive exercise of such functions within one body ‘may, in certain circumstances, raise an issue under Art. 6(1) of the convention as regards the impartiality of the body seen from the objective viewpoint’. In this particular case the Council of State did not exercise both the functions, therefore the objection of the appellant regarding lack of impartiality was unfounded. The ECtHR noted that in similar cases impartiality may be at stake in such a system, see paras 196-198.

whether the remedy before it is effective’<sup>(456)</sup>. As the ECtHR has clarified: ‘Although no single remedy may itself satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so’<sup>(457)</sup>.

### 6.1.3.3. Levels of appellate jurisdiction

Article 46(1) APD (recast) makes clear that an effective remedy in international protection proceedings must be provided by a court or a tribunal. Neither the APD nor the APD (recast) requires that there be more than one level of jurisdiction. The CJEU held in *Diouf* that ‘the principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction’<sup>(458)</sup>. As was outlined in the *HID and BA* case, the court or tribunal should fulfil all the requirements of independence and impartiality under the CJEU case-law.

The APD (recast) does not regulate whether a single national court or tribunal or several courts or tribunals in the country should review decisions on international protection<sup>(459)</sup>.

## 6.2. Full and *ex nunc* examination

A further requirement for an effective remedy is set out in Article 46(3) APD (recast) as follows:

### Article 46(3) APD (recast)

[...] Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.

Such a provision was not included in Article 39 of the APD. The CJEU interpreted Article 46(3) APD (recast) for the first time in its *Moussa Sacko* judgment<sup>(460)</sup>. Other requests for a preliminary ruling with respect to this provision are pending<sup>(461)</sup>. The origin of this requirement appears to derive from the case-law of the ECtHR on Article 3 ECHR<sup>(462)</sup>. The provision addresses the scope and intensity of review, the time relevant to conduct the review and provides that this scope of review must be available at least in first-instance appeal procedures.

This section first discusses the importance of the national setting for procedures (whether adversarial or inquisitorial) (Subsection 6.2.1). Then, it goes on to deal with Article 46(3) in more detail, namely whether the APD (recast) sets a specific standard of review by courts (Subsection 6.2.2) and what is meant by the full and ‘*ex nunc*’ examination in Article 46(3)

<sup>(456)</sup> ECtHR, judgment of 25 March 1983, *Silver and others v United Kingdom*, applications nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, para. 113(b). See also ECtHR, *Gebremedhin v France*, see fn 60, para. 53, and ECtHR, *MSS v Belgium and Greece*, see fn 174, para. 289.

<sup>(457)</sup> *Ibid.*, para. 113(c).

<sup>(458)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 69.

<sup>(459)</sup> In the context of agricultural support under the common agricultural policy, the CJEU considered whether conferring jurisdiction to review decisions on a single national court meets the requirement of effectiveness. See CJEU, judgment of 27 June 2013, Case C-93/12, *ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond ‘Zemedelie’ — Razplashtatelna agentsia*, EU:C:2013:432.

<sup>(460)</sup> CJEU, *Moussa Sacko*, see fn 383.

<sup>(461)</sup> See requests by Bulgarian Administrative Court Sofia of 18 November 2016, case registered as C-585/16, and of 19 December 2016, case registered as C-652/16 and request by Supreme Court (Slovak Republic), 6 March 2017, case registered as C-113/17.

<sup>(462)</sup> European Commission, *Commission staff working document accompanying the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in member states for granting and withdrawing international protection — impact assessment*, 21 October 2009, SEC(2009) 1376, p. 39. See also *Evidence and Credibility Assessment in the Context of the CEAS — A judicial analysis*, see fn 2, Subsection 3.2.2.

APD (recast) (Subsection 6.2.3). Finally, it considers whether this provision requires courts to have the power to grant international protection (Subsection 6.2.4).

### 6.2.1. Adversarial and inquisitorial procedures

The different settings of the national system may affect the way in which ‘full and *ex nunc* examination of points of law and fact’ is conducted.

In adversarial procedures, the production of evidence is usually left to the parties and the judge is responsible for weighing the information submitted by the opposing parties. In typical inquisitorial settings, a judge is responsible for the evidentiary base and the duty of investigation rests with him/her. The parties may bring forward evidence, but it is up to the judge to make a decision whether he/she has sufficient information in the procedure and to what extent the aspects of the matter are investigated. The judge has the power to produce and use knowledge from other sources or to guide the parties regarding additional information to be presented.

National judicial rules usually range somewhere in between the two extremes of adversarial versus investigative procedures. For example, judges in an adversarial system may, owing to the requirements placed on them by the APD and the ECtHR case-law, have more options to inquire and gain evidence themselves or to use their expert knowledge. The difference between fact-finding in adversarial and inquisitorial procedures is also dealt with in *Evidence and Credibility Assessment in the Context of the Common European Asylum System — A judicial analysis* <sup>(463)</sup>. Judges and tribunal members should consider whether their national procedural rules fully comply with the requirements of the directive as regards full and *ex nunc* examination of facts and law. In case of potential breach, they should consider whether to apply the direct effect of the directive or to refer the case before them for a preliminary ruling to the CJEU.

### 6.2.2. Scope and intensity of review

Article 46(3) APD (recast) requires that the review include a ‘full and *ex nunc* examination of both facts and points of law’.

In its *Moussa Sacko* judgment, the CJEU held that a court or a tribunal’s obligation in this respect must be interpreted in the context of the procedure for the examination of applications for international protection as a whole, ‘taking into account the close link between appeal proceedings before a court or tribunal and the proceedings at first instance preceding those proceedings’ <sup>(464)</sup>. Only if the information in the administrative file submitted to the court or tribunal, including the report or transcript of a personal interview, is sufficient, may it carry out a full and *ex nunc* examination ‘solely on the basis of the information in the case-file’ <sup>(465)</sup>. However, if the court or tribunal ‘considers that the applicant must be afforded a hearing in order to carry out the full and *ex nunc* examination required, that hearing, as ordered by that

<sup>(463)</sup> *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Sections 3.4.2 and 4.5.5.1.3.

<sup>(464)</sup> CJEU, *Moussa Sacko*, see fn 383, para. 42. The CJEU has dealt with the issue of whether a public hearing of the appellant is required even in cases of manifestly unfounded appeals under Article 46 APD (recast) and Article 47, second paragraph, of the EU charter which affirms that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law’.

<sup>(465)</sup> *Ibid.*, para. 44.

court or tribunal, constitutes an essential procedural requirement, which cannot be dispensed with on grounds of speed' <sup>(466)</sup>.

The judgment determined that, in the case of manifestly unfounded applications:

the obligation for the court or tribunal to carry out the full and *ex nunc* examination referred to in Article 46(3) of the directive is, in principle, fulfilled where that court or tribunal takes into consideration the pleadings submitted to the court or tribunal seised of the application and of the objective information contained in the administrative file in the proceedings at first instance, including, where applicable, the report or recording of the personal interview conducted in those proceedings <sup>(467)</sup>.

Article 46 does not, however, authorise the national legislature to prevent a court or tribunal from ordering a hearing where the court or tribunal has found that the information gathered in the procedure at first instance was insufficient to ensure a full and *ex nunc* examination of both facts and points of law <sup>(468)</sup>.

The right to an effective remedy requires that the 'the national court must be able to review the merits of the reasons which led the competent administrative authority to find that the application for international protection was unfounded or made in bad faith' <sup>(469)</sup>. A court or tribunal must therefore decide an appeal **on its merits**, assess the evidence in order to make **findings of fact**, and ensure that it applies the same legal criteria laid down in CEAS instruments, including Article 4 QD (recast) <sup>(470)</sup>.

The right to a 'full' examination requires at least the court or tribunal to take into account all the evidence put forward by the parties up to that point. The CJEU considered that full examination meant 'an adequate and complete examination' <sup>(471)</sup>. The *ex nunc* nature of the examination requires that the court or tribunal must not confine itself to the state of the evidence as it was at the time the decision was made by the determining authority, but make an up-to-date assessment of evidence (see Subsection 6.2.3 on the relevant time of review below).

In order to make an up-to-date assessment of evidence, the APD (recast) requires that courts or tribunals have access to country information through the determining authority or the applicant or otherwise (Article 10(4)) <sup>(472)</sup>. When acquiring information on the country of origin, the courts are bound by the principle of confidentiality in individual cases and should not disclose information regarding the applicants to the alleged actors of persecution or serious harm <sup>(473)</sup>. The use of country of origin information by the courts is elaborated on in *Evidence and Credibility Assessment in the Context of the Common European Asylum System — A judicial analysis* <sup>(474)</sup>.

<sup>(466)</sup> Ibid., para. 45. The advocate general mentions not only a hearing of the appellant in the form of an interview but also other 'procedural investigative measures' both at the request of a party and of its own motion, which the court may decide on when it considers it necessary for the better administration of justice. Opinion of advocate general Campos Sánchez-Bordona of 6 April 2017, case no C-348/16, *Moussa Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, EU:C:2017:591, paras 53-54.

<sup>(467)</sup> Ibid., para. 46.

<sup>(468)</sup> Ibid., para. 48.

<sup>(469)</sup> Ibid., para. 36, CJEU, *Diouf*, op cit., fn. 25, para. 61. See also *Evidence and credibility assessment in the Context of the CEAS — A judicial analysis*, op. cit. fn. 1, Subsection 3.2.2.

<sup>(470)</sup> See *Evidence and credibility assessment in the Context of the CEAS — A judicial analysis*, see fn 2, for further details.

<sup>(471)</sup> CJEU, *Moussa Sacko*, see fn 383, para. 44.

<sup>(472)</sup> See Section 4.2 above on basic principles and guarantees and EASO, *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, produced by the IARLJ-Europe under contract to EASO, see fn 1, Subsection 4.2.5.

<sup>(473)</sup> EASO, *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, produced by the IARLJ-Europe under contract to EASO, op. cit. fn. 1, Subsection 4.2.8.

<sup>(474)</sup> Ibid., Section 4.5.

Article 39 APD did not contain any provision regarding the scope and intensity of review. In its proposal for the APD (recast), the Commission claimed that access to an effective remedy would be improved if courts and tribunals based their decisions on complete factual circumstances and if they had the possibility to review fully questions of fact and law. The requirements were, however, not intended to go beyond the standards spelt out by the CJEU and the ECtHR <sup>(475)</sup>.

According to the existing CJEU case-law, effective judicial protection is provided if a court or tribunal is able to review both facts and law at least before one court or tribunal instance <sup>(476)</sup>. The CJEU has also referred to that rule in the asylum context <sup>(477)</sup>.

In the CJEU's *HID and BA* judgment, the fact that the Refugee Appeals Tribunal had a broad discretion, since it 'takes cognisance of both questions of fact and questions of law and rules on the evidence submitted to it, in relation to which it enjoys a discretion', was one of the elements considered in the CJEU's conclusion that it could be regarded as a court or a tribunal for the purposes of Article 39 APD <sup>(478)</sup>.

The APD (recast) provides in recital (34) that: 'procedures for examining international protection needs should be such as to enable the competent authorities to conduct a **rigorous** examination of applications for international protection' <sup>(479)</sup>. The requirement of a rigorous examination possibly refers to ECtHR case-law on Article 3 ECHR (see below). As explained in *Evidence and credibility assessment in the context of the Common European Asylum System — A judicial analysis*, similar standards of scrutiny have been used by the CJEU in its case-law. With respect to the assessment of the risk faced by the applicant, in judgments relating to the QD (recast), the CJEU requires that this be carried out with 'vigilance and care' <sup>(480)</sup>. When a national court examines the legality of the final decision on international protection, the CJEU requires 'thorough review' by the court <sup>(481)</sup>.

In its proposed Article 46(3) APD (recast), the Commission referred to ECtHR standards on effective remedy in cases concerning Article 3 and 13 ECHR. Its case-law may therefore provide useful inspiration. When assessing an Article 3 claim, the ECtHR itself conducts a 'full and *ex nunc* assessment' <sup>(482)</sup>. Full assessment means 'the need to examine all the facts of the case' <sup>(483)</sup>. The ECtHR also requires that national courts undertake independent and 'rigorous scrutiny' of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 <sup>(484)</sup>. In order to provide for 'rigorous scrutiny', allegations by applicants

<sup>(475)</sup> European Commission, *Commission staff working document accompanying the proposal for a directive on minimum standards on procedures for granting and withdrawing international protection — impact assessment*, see fn 462, p. 39.

<sup>(476)</sup> See also CJEU, judgment of 2 June 2005, Case C-136/03, *Georg Dörr v Sicherheitsdirektion für das Bundesland Kärnten and Ibrahim Ünal v Sicherheitsdirektion für das Bundesland Vorarlberg*, EU:C:2005:340, para. 55. See also CJEU, judgment of 19 September 2006, Grand Chamber, Case C-506/04, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, EU:C:2006:587, para. 62: '[...] Article 9 of Directive 98/5 must be interpreted as meaning that it precludes an appeal procedure in which the decision refusing registration, referred to in Article 3 of that directive, must be challenged at first instance before a body composed exclusively of lawyers practising under the professional title of the host Member State and on appeal before a body composed for the most part of such lawyers, **where the appeal before the supreme court of that Member State permits judicial review of the law only and not the facts.**' (emphasis added). The case concerned directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, in its Art. 9.

<sup>(477)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 57.

<sup>(478)</sup> CJEU, *HID and BA*, see fn 25, para. 93. Emphasis added.

<sup>(479)</sup> Close and rigorous scrutiny is explained in detail in *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Subsection 4.3.3.

<sup>(480)</sup> CJEU, judgment of 5 September 2012, Joined Cases C-71/11 and 99/11, *Y and Z v Vertreter des Bundesinteresses beim Bundesverwaltungsgericht and Bundesbeauftragter für Asylangelegenheiten beim Bundesamt für Migration und Flüchtlinge*, ECLI:EU:C:2012:518; CJEU, Grand Chamber, judgment of 2 March 2010, *Salahadin Abdulla and others v Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, ECLI:EU:C:2010:105, para. 90.

<sup>(481)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 56.

<sup>(482)</sup> ECtHR, judgment of 11 January 2007, *Salah Sheekh v the Netherlands*, application no 1948/04, para. 136. See also ECtHR, *FG v Sweden*, see fn 77, and ECtHR, *JK v Sweden*, see fn 349, para. 83.

<sup>(483)</sup> ECtHR, judgment of 17 July 2008, *NA v United Kingdom*, application no 25904/07, para. 113.

<sup>(484)</sup> See e.g. ECtHR, *Jabari v Turkey*, see fn 242, para. 50. See also ECtHR, *FG v Sweden*, see fn 77, para. 113 and ECtHR, *JK v Sweden*, see fn 349, para. 86.

regarding the risk of ill treatment should be addressed<sup>(485)</sup>. Rigorous scrutiny may require a court to undertake further investigation of the documents submitted<sup>(486)</sup>. Decisions should not be written in a stereotyped manner without any details of the reasons for the decisions being given<sup>(487)</sup>. The ECtHR assesses the risk both with reference to those facts which were known and to those which ought to have been known at the time of expulsion<sup>(488)</sup>. In order to provide a thorough assessment, the authorities should also take into account ‘possible similarities or potential distinctions of [individual] cases’<sup>(489)</sup>.

For the ECtHR, rigorous scrutiny also requires that the assessment must be ‘adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other contracting or third states, agencies of the United Nations and reputable non-governmental organisations’<sup>(490)</sup>. The Court will assess the risk ‘in the light of all the material placed before it, or, if necessary, material obtained *proprio motu*, in particular where the applicant — or a third party within the meaning of Article 36 of the Convention — provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent government’<sup>(491)</sup>. In light of the subsidiary role of the ECtHR, this requires that the assessment by national authorities is also adequate and sufficiently supported by reliable and objective sources<sup>(492)</sup>.

Article 10(4) APD (recast) requires that courts have access to the general information referred to in Article 10(3)(b) APD (recast), necessary for the fulfilment of their task<sup>(493)</sup>. Article 10(3)(b) requires Member States to ensure that ‘precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions’.

<sup>(485)</sup> ECtHR, *Jabari v Turkey*, see fn 242, para. 49. ECtHR, ECtHR, judgment of 22 September 2009, *Abdolkhani and Karimnia v Turkey*, application no 30471/08, para. 113: ‘The court is struck by the fact that both the administrative and judicial authorities remained totally passive regarding the applicants’ serious allegations of a risk of ill-treatment if returned to Iraq or Iran. It considers that the lack of any response by the national authorities regarding the applicants’ allegations amounted to a lack of the ‘rigorous scrutiny’ that is required by Article 13 of the Convention’. See also ECtHR, judgment of 23 June 2011, *Diallo v Czech Republic*, application no 20493/07, para. 81. See also ECtHR, *Jabari v Turkey*, see fn 242, para. 40, or ECtHR, *MSS v Belgium and Greece*, see fn 174, paras 387-388. The latter states that ‘the requirement flowing from Article 13 that execution of the impugned measure be stayed cannot be considered as a subsidiary measure [...]. The contrary would amount to allowing the States to expel the individual concerned without having examined the complaints under Article 3 as rigorously as possible’.

<sup>(486)</sup> In *Singh v Belgium*, the appellants presented to the Council for Aliens Law Litigation (Belgium) documents to prove their nationality sent to them by UNHCR, accompanied by confirmation that they had been registered as refugees under the UNHCR mandate and supporting their account. The *conseil* did not accord any weight to the documents on the grounds that they could easily be forged. The ECtHR regarded that the approach of the national court in this case did not meet the requirements of Article 13 in conjunction with Article 3 ECHR, since the court did not undergo any investigation whatsoever regarding the potential veracity of the documents submitted by the appellants. ECtHR, judgment of 2 October 2012, *Singh et autres c Belgique*, application no 33210/11, paras 101 and 104-105. See also *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, Section 5.1. on assessment of evidence relating to disputed nationality or statelessness.

<sup>(487)</sup> See ECtHR, *MSS v Belgium and Greece*, see fn 174, para. 302, where this was held with respect to first-instance authorities. However see also ECtHR, Grand Chamber, judgment of 15 December 2016, *Khlaifia and others v Italy*, see fn 241, para. 251, in which the Court accepted refusal-of-entry orders drafted in comparable terms and justified merely by the ‘applicants’ nationality, by the observation that they had unlawfully crossed the Italian border, and by the absence of any of the situations provided for in Article 10 § 4 of Legislative Decree no. 286 of 1998 (political asylum, granting of refugee status or the adoption of temporary protection measures on humanitarian grounds (...)). According to the Court, this could be explained by the fact that the applicants ‘did not have any valid travel documents and had not alleged either that they feared ill-treatment in the event of their return or that there were any other legal impediments to their expulsion’.

<sup>(488)</sup> ECtHR, *FG v Sweden*, see fn 77, para. 115.

<sup>(489)</sup> ECtHR, judgment of 28 March 2013, *IK v Austria*, application no 2964/12, para. 73. In this case the Court found that the domestic authorities had not thoroughly examined the applicant’s grievance. The mother of the applicant was granted refugee status following her appeal to the Asylum Court in Austria. Her son did not pursue his court proceedings with respect to his first application, but lodged a subsequent application stating the same reasons for flight as his mother, which related to the death of his father. His allegations were found not to be credible and the subsequent application was dismissed on the basis of the *res judicata* principle. The authorities however did not provide any arguments ‘as regards the discrepancy between the assessment of the applicant’s subsequent asylum request and his mother’s status as a recognised refugee’. *Ibid.*, para. 74.

<sup>(490)</sup> ECtHR, *NA v United Kingdom*, see fn 483, para. 119; ECtHR, *FG v Sweden*, see fn 77, para. 117, and ECtHR, *JK v Sweden*, see fn 349, para. 89.

<sup>(491)</sup> See also ECtHR, *Salah Sheekh v the Netherlands*, see fn 482, para. 136.

<sup>(492)</sup> *Ibid.*, para. 136: ‘In respect of materials obtained *proprio motu*, the Court considers that, given the absolute nature of the protection afforded by Article 3, it must be satisfied that the assessment made by the authorities of the contracting state is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other contracting or non-contracting states, agencies of the United Nations and reputable non-governmental organisations’.

<sup>(493)</sup> ECtHR, *FG v Sweden*, see fn 77, para. 113.

### 6.2.3. Relevant time of review

Article 46(3) APD (recast) requires that examination of facts and points of law not only be full but also *ex nunc*, at least in appeals procedures before a court or tribunal of first instance. This requirement appears to derive from the well-established case-law of the ECtHR on Article 3 ECHR (see below). The court or tribunal may not confine itself to the state of the evidence as it was at the time of the decision made by the determining authority. Rather, it must ensure that it has before it any relevant evidence relating to how matters stand at the date of the hearing of the appeal. Access to information regarding the country of origin or where necessary of transit by the courts (Article 10(4) APD (recast)) as well as their access to all relevant information concerning the individual position and personal circumstances of the applicant (Article 4(3)(c) QD (recast)) is necessary so that courts can fulfil this task <sup>(494)</sup>.

In cases concerning derogations from the right to free movement of EU citizens, the CJEU has held that the requirement of the existence of a present threat must be satisfied *at the time of the expulsion*. This requires courts to have power to take into account factual matters that took place after the final decision of administrative authorities <sup>(495)</sup>.

Some national courts have dealt with court rules from the perspective of examining matters *ex nunc* <sup>(496)</sup>. In some countries procedural rules may provide for restrictions when new facts are presented by the applicant during the court procedure. While according to French jurisprudence, a court cannot refuse to take into consideration elements that it is aware or informed of and that establish a risk of persecution or ill treatment <sup>(497)</sup>, in Austria if facts were submitted during the asylum court proceedings with the intent to delay proceedings, they could be disregarded <sup>(498)</sup>. The Austrian constitutional court considered that such a narrow limitation was proportionate to the aim sought and not in violation of Article 47 of the EU charter <sup>(499)</sup>. According to the Czech Constitutional Court even if the appellant may not share all relevant facts in front of the determining authority, his individual situation must be examined. Late submission of new facts could be justified, for instance, if the interview questions did not concern the issue; no personal interview took place; the applicant may have misunderstood the importance of the facts for his/her application; trauma, embarrassment of the applicant or other constraints (previous experience of torture, sexual violence or persecution on grounds of sexuality), or gender of the interviewer or interpreter <sup>(500)</sup>.

<sup>(494)</sup> *Evidence and Credibility Assessment in the Context of the CEAS — A judicial analysis*, see fn 2, Subsection 3.1.2.1.

<sup>(495)</sup> CJEU, judgment of 29 April 2004, Joined Cases C-482/01 and C-493/01, *Georgios Orfanopoulos and Raffaele Oliveri*, EU:C:2004:262, paras 78-79: 'Article 3 of Directive 64/221 precludes a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters which occurred after the final decision of the competent authorities which may point to the cessation or the substantial diminution of the present threat which the conduct of the person concerned constitutes to the requirements of public policy. That is so, above all, if a lengthy period has elapsed between the date of the expulsion order and that of the review of that decision by the competent court.' See also CJEU, judgment of 11 November 2004, Case C-467/02, *Cetinkaya v Land Baden-Württemberg*, EU:C:2004:708, para. 48, as regards Turkish nationals. In cases where a prohibition on leaving the territory imposed on a Union citizen '(i) prevents citizens of the Union from asserting the right conferred on them by Article 21 TFEU to move and reside freely against absolute territorial prohibitions that have been adopted for an unlimited period and (ii) prevents administrative bodies from acting upon a body of case-law whereby the Court has confirmed the illegality, under EU law, of such prohibitions, cannot reasonably be justified by the principle of legal certainty and must therefore be considered, in this respect, to be contrary to the principle of effectiveness and to Article 4(3) TEU'.

<sup>(496)</sup> A concise overview of the courts' power to conduct a full and *ex nunc* examination was published by the European Migration Network. European Migration Network, *Ad-hoc query of a full and ex nunc examination by the court in accordance with Article 46(1) of the recast Asylum Procedures Directive*, 2015.

<sup>(497)</sup> See Council of State (France), decisions of 30 November 2016, *M. A.B., no 388766*, ECLI:FR:CECHS:2016:388766.20161130; of 17 October 2016, *Mme B.A., no 393852*, ECLI:FR:CECHS:2016:393852.2016101; and of 5 June 2015, *OPPRA v M. B., no 376783*, ECLI:FR:CESSR:2015:376783.20150605.

<sup>(498)</sup> This rule is embodied in the Austrian Asylum Act.

<sup>(499)</sup> Constitutional Court (Austria), judgment of 25 September 2013, no U1937-1938/2012 (see EDAL English summary). Despite the rule on ban of new facts the asylum court examined in detail the position of the applicants as women in the event of their return to Afghanistan. The constitutional court also had regard to the specific nature of asylum proceedings (possible translation problems, specific physical and mental situations) applicants may sometimes be prevented from presenting relevant facts in due time. Explanation of the rule in Austria can also be found in J. Chlebny, 'Power of the judge vis-a-vis new facts that happened after examination of the claim by the administrative authority', IALRJ 9th World Conference in Bled, 2011, pp. 8-9.

<sup>(500)</sup> Constitutional Court (Ústavní soud České republiky) (Czech Republic), judgment of 12 April 2016, I.ÚS 425/16.

When the ECtHR assesses the risk of an individual being exposed to ill treatment, it makes an *ex nunc* examination of the risk. This approach served as inspiration for Article 46(3) APD (recast). The relevant time for assessing the risk of an individual being exposed to ill treatment is that at the time of expulsion<sup>(501)</sup>. The Court also held that:

[a] full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time. Even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities<sup>(502)</sup>.

It seems from *MSS v Belgium and Greece* that national courts and tribunals should also examine the complaints relating to Article 3 ECHR ‘at the time of the expulsion’<sup>(503)</sup>. In the case *Singh v Belgium*, the ECtHR found the national court had not met the requirement for rigorous scrutiny *ex nunc* in a case where it did not make any assessment of documents submitted only at the judicial phase<sup>(504)</sup>. In assessing credibility, the ECtHR does not consider that belated statements of applicants automatically have an impact on their credibility<sup>(505)</sup>.

Nevertheless, the ECtHR does not rule out the possibility of applicants instead being required to lodge a fresh application for international protection and submit new facts in new proceedings<sup>(506)</sup>. In a case of a subsequent application lodged in 2011 by an applicant whose mother had been granted refugee status a few years before (2009) on the same grounds, the ECtHR found that the domestic authorities had not conducted a thorough assessment, when they dismissed the application as *res judicata* without examining ‘connections between his and his mother’s proceedings and any possible similarities or potential distinctions of these two cases’<sup>(507)</sup>.

#### 6.2.4. Examination of international protection needs

As mentioned at the start of Section 6.2 above, the requirement for an effective remedy under Article 46(3) APD (recast) involves ‘a full and *ex nunc* examination of both facts and points of law, **including, where applicable, an examination of the international protection needs pursuant to [the QD (recast)]**, at least in appeals procedures before a court or tribunal of first instance’<sup>(508)</sup>.

The current case-law of the CJEU has not dealt with the issue of whether courts or tribunals have to have the power to grant international protection, although there are pending

<sup>(501)</sup> ECtHR, judgment of 20 March 1991, *Cruz Varas and others v Sweden*, application no 15576/89, para.76. See also ECtHR, *Salah Sheekh v the Netherlands*, see fn 482, para.136: ‘Since the nature of the contracting states’ responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the contracting state at the time of the expulsion’.

<sup>(502)</sup> ECtHR, *NA v United Kingdom*, see fn 483, para.112.

<sup>(503)</sup> ECtHR, *MSS v Belgium and Greece*, see fn 174, para. 389 ‘(...) The judgments of which the court is aware (...) confirm that the examination of the complaints under Article 3 carried out by certain divisions of the aliens appeals board at the time of the applicant’s expulsion was not thorough. They limited their examination to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3, thereby increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation. Furthermore, even if the individuals concerned did attempt to add more material to their files along these lines after their interviews with the aliens office, the aliens appeals board did not always take that material into account. The persons concerned were thus prevented from establishing the arguable nature of their complaints under Article 3 of the convention.’ See also ECtHR, *FG v Sweden*, see fn 77, paras 156-158.

<sup>(504)</sup> ECtHR, *Singh et autres c Belgique*, see fn 486 paras 101 and 104-105.

<sup>(505)</sup> ECtHR, *Hilal v United Kingdom*, see fn 409, paras 64-65. See also, *Evidence and credibility assessment in the context of the CEAS — A judicial analysis*, see fn 2, notably Sections 4.5.1, 5.7.1 and 6.3.

<sup>(506)</sup> ECtHR, *Bahaddar*, see fn 358, paras 47-48.

<sup>(507)</sup> ECtHR, *IK v Austria*, see fn 489, para. 73.

<sup>(508)</sup> Emphasis added.

preliminary references on this issue as outlined below. The ECtHR case-law does not seem to require that power. Instead, full jurisdiction combined with *ex nunc* examination requires that the courts have the power to quash the administrative decision and to examine as regards both facts and law at the time of the court's decision. It could, however, be argued that to be effective the appeal remedy should redress the violation caused<sup>(509)</sup> and that the power to grant international protection may be necessary in situations where quashing a decision would not result in sufficient safeguards for the appellant. This question arises for instance in circumstances where the court annuls the administrative decision repeatedly and the authority declines to grant international protection to the applicant despite an order from the court to do so.

The Supreme Court of Slovakia has asked the CJEU for a preliminary ruling on whether Article 46(3) APD (recast) is to be interpreted as meaning that the national judge assessing the need for international protection of an applicant is entitled to grant the applicant that protection, where previous negative decisions of an administrative authority have been repeatedly overturned, thus raising doubts as to the effectiveness of subsequent appeals, even when it is not apparent from national legislation that the judge has such competence. The Supreme Court has also asked whether such a power could also extend to a second instance court<sup>(510)</sup>.

The Bulgarian Administrativen Sad Sofia-grad has also asked for a preliminary ruling on whether it follows from Article 46(3) APD (recast) 'that the court is obliged to examine the substance of new grounds for international protection which have been put forward in the course of the judicial proceedings but which were not relied on in the action brought against the decision refusing international protection'<sup>(511)</sup>. It went on in another reference to ask how to interpret the requirement to examine international protection needs in a case where an exclusion clause in Article 12(1) QD might become applicable<sup>(512)</sup>.

Rulings in these cases may clarify whether Article 46(3) APD (recast) requires courts to be empowered to grant international protection.

### 6.3. Access to an effective remedy

This section sets out key elements that need to be in place and practically accessible to ensure applicants for international protection have access to an effective remedy. They include a requirement that applicants whose claim has been rejected be provided with a written decision setting out the reasons for rejection and information on how to appeal against the decision (Subsection 6.3.1). It is also necessary for the time limits within which appeals can be made to be reasonable and for the remedy to be provided reasonably promptly (Subsection 6.3.2). Appellants likewise require free legal assistance and representation, (Subsection 6.3.3). Finally, other protections that need to be in place are outlined (Subsection 6.3.4), including those applying in cases of assumed withdrawal or abandonment of the appeal (Subsection 6.3.5). The question of suspensive effect and the appellant's right to remain on the territory is addressed in Section 6.4. As the ECtHR has ruled: '[T]he accessibility of a remedy in practice is decisive when assessing its effectiveness'<sup>(513)</sup>.

<sup>(509)</sup> See e.g. ECtHR, judgment of 29 March 2006, *Scordino v Italy* (No 1), application no 36813/97, paras 186-188.

<sup>(510)</sup> Supreme Court (Slovakia), Preliminary question to CJEU, case no C-113/17, see fn 461.

<sup>(511)</sup> Administrativen sad Sofia-grad (Bulgaria), Preliminary question to CJEU, case no C-652/16, see fn 461.

<sup>(512)</sup> Administrativen sad Sofia-grad (Bulgaria), Preliminary question to CJEU, case no C-585/16, see fn 461.

<sup>(513)</sup> ECtHR, *MSS v Belgium and Greece*, see fn 174, para. 318; and ECtHR, *JM v France*, see fn 242, para. 131.

Tables 21 and 22 below show which procedural guarantees are not given by the APD (recast) in equivalent fashion at the appeals stage. As the text below indicates, in some of these cases additional guarantees flow from EU primary law.

**Table 21: Guarantees provided in an equivalent fashion in the procedure before the determining authority and in the appeals procedure**

Article	Administrative stage	Appeals stage	Note
8(2)	✓	✓	See Art. 2(c), (e)
10(3)(b)	✓	✓	See Art. 10(4)
12(1) (a)-(e)	✓	✓	See Art. 12(2)
17(5)	✓	✓	[Access to recording of interview relevant for courts]
21-23	✓	✓	
24	✓	✓	
25(1)	✓	✓	
25(6)	✓	✓	[The best interests of the child principle]
25(6)(d)	✓	✓	
26	✓	✓	
29	✓	✓	
30	✓	✓	
41(2)(c)	✓	✓	

**Table 22: Guarantees provided only in the procedure before the determining authority that do not apply in the appeals procedure <sup>(514)</sup>**

Article	Administrative stage	Appeals stage	Note
6	✓	✗	
7	✓	✗	
8(1)	✓	✗	
9	✓	✗	
10(1), (2), (3) (a), (c)- (d)	✓	✗	
10(5)	✓	✗	
11(1), (3)	✓	✗	
11(2)	✓	✗	[reasons in fact and in law for the decision and information on how to challenge a decision is relevant for courts]
14-16	✓	✗	
17(1)-(4)	✓	✗	

<sup>(514)</sup> Some of these guarantees do not apply in appeal procedures because they do not have any relevance in judicial proceedings, e. g. guarantees concerning lodging an application for international protection.

18	✓	✗	
19	✓	✗	
25(2)-(5)	✓	✗	
25(6)(a),(b), (c)	✓	✗	
41(1)	✓	✗	
41(2)(a),(b)	✓	✗	
42(1),(2)	✓	✗	
42(3)	✓	✗	[reasons for the decision and possibilities for seeking an appeal or review of the decision]
43	✓	✗	

### 6.3.1. Access to the reasons for the decision and to information on appeal rights

The APD (recast) requires that when an application for international protection status is rejected, the reasons in facts and in law must be provided in a written decision and that information on how to challenge a negative decision must be given in writing (Article 11(1)-(2) APD (recast)) <sup>(515)</sup>. Outlining the reasons for the decision is crucial for judicial review to be effective and for the court to be able to decide on the legality of the reasons for the decision <sup>(516)</sup> (see also Subsection 4.2.2 on the requirements for a decision above) <sup>(517)</sup>.

In a case where the applicant could not understand the time limit to make an appeal because of a lack of translation, the Italian Court of Cassation has held that the appellant's right to an effective remedy was violated <sup>(518)</sup>.

### 6.3.2. Time limits to appeal

Time plays a crucial role as regards the effectiveness of a remedy. Creating common standards for a 'fair and efficient asylum procedure' is one of the objectives of the Common European Asylum System <sup>(519)</sup>. The APD (recast) tries to achieve efficiency in line with its principle in recital (18), which states: 'It is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out' <sup>(520)</sup>.

Article 46(4) APD (recast) specifies that the time limits must be 'reasonable [...] for the applicant to exercise his or her right to an effective remedy' and that they 'shall not render such exercise

<sup>(515)</sup> See also Art. 12(1)(f) and (2) APD (recast).

<sup>(516)</sup> CJEU, judgment of 15 October 1987, Case C-222/86, *Unectef v Geroge Heylens and others*, para. 15.

<sup>(517)</sup> See also CJEU, 2013, *European Commission and others v Yassin Abdullah Kadi*, see fn 377, para. 100; and CJEU, *ZZ v Secretary of State for the Home Department*, op. cit., 304, para. 53, for explanation why reasons for a decision are important to ensure the right to an effective remedy.

<sup>(518)</sup> Court of Cassation (Italy), judgment of 8 September 2011, no 18493/2011.

<sup>(519)</sup> See Recitals (4) and (11) of the APD (recast). See also European Council, *Tampere Conclusions*, see fn 7, point 14.

<sup>(520)</sup> The CJEU reiterated this principle in *Diouf*, op. cit., fn. 25, para. 44. It emphasised the need for expediency to explain why preparatory (not final) decisions need not be subject to judicial review, since such an approach would unnecessarily prolong the procedures.

impossible or excessively difficult'. This provision was intended to bring the APD (recast) in line with the case-law of the CJEU and ECtHR mentioned below <sup>(521)</sup>.

Since the length of proceedings before a court or tribunal should also not exceed a reasonable time, the APD (recast) provides that 'Member States may lay down time limits for the court or tribunal [...] to examine the decision of the determining authority' (Article 46(10) APD (recast)).

If a decision has to be first appealed to a non-judicial body, then access to a court or tribunal must be available within a reasonable period <sup>(522)</sup>. Time limits for appeal that are too short may render the exercise of judicial review impossible or excessively difficult. Most of the existing CJEU case-law concerns the limitation periods for bringing actions outside the scope of administrative law. The CJEU considered that 'the laying down of reasonable limitation periods for bringing proceedings satisfies, in principle, the requirement for effectiveness inasmuch as it constitutes an application of the fundamental principle of legal certainty' <sup>(523)</sup>. The effectiveness of such time limits depends on their length and starting point <sup>(524)</sup>. Short time limits throughout the procedure may influence the effective use of the right to be heard <sup>(525)</sup>. In the *Pontin* case the CJEU considered that in some circumstances a very short time limit can make it difficult to obtain advice or assistance from a specialist legal adviser <sup>(526)</sup>.

The time limit for lodging an appeal 'must be sufficient in practical terms to enable the applicant to prepare and bring an effective action' <sup>(527)</sup>. The CJEU discussed this aspect in its *Diouf* judgment <sup>(528)</sup>. Mr Diouf's application for asylum in Luxembourg was considered in an accelerated procedure <sup>(529)</sup>. The time limit for lodging an appeal was shortened to 15 days compared to 1 month in an ordinary procedure and there was only one level of jurisdiction <sup>(530)</sup>. The CJEU accepted that court proceedings may have an accelerated nature for the sake of ensuring 'that unfounded or inadmissible applications for asylum are processed more quickly, in order that applications submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently' <sup>(531)</sup>. The time limit of 15 days did not seem generally 'to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved' <sup>(532)</sup>. The Court found however that if, in a given situation, this time limit were to prove insufficient, the national court should consider 'whether that element is such as to justify, on its own, upholding the action brought indirectly against the decision to examine the application for asylum under an accelerated procedure, so that, in upholding the action, the national court would order that the application be examined under the ordinary procedure' <sup>(533)</sup>. It ruled that if the time limit seemed to be insufficient in an individual case, the national court should first look at whether

<sup>(521)</sup> Together with other measures '[t]his should give applicants sufficient opportunities to establish the arguable nature of their claims and therefore ensure compliance with fundamental rights obligations as informed by the case-law of the European courts'. See European Commission, Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council on the adoption of a proposal for a directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, 10 June 2013, COM(2013)411 final, 3.3. Art. 39(2) APD left this matter to the discretion of Member States in line with the principle of procedural autonomy: 'Member states shall provide for time limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to Paragraph 1'.

<sup>(522)</sup> CJEU, *Wilson v Ordre des avocats du barreau de Luxembourg*, see fn 476, para. 60.

<sup>(523)</sup> See e.g. CJEU, judgment of 8 July 2010, Case C-246/09, *Susanne Bulicke v Deutsche Büro Service GmbH*, EU:C:2010:418, para. 36.

<sup>(524)</sup> See e.g. CJEU, judgment of 8 July 2010, Case C-246/09, *Susanne Bulicke v Deutsche Büro Service GmbH*, EU:C:2010:418, para. 37.

<sup>(525)</sup> CJEU, judgment of 18 December 2008, Case C-349/07, *Sopropé — Organizações de Calçado Lda v Fazenda Pública*, EU:C:2008:746.

<sup>(526)</sup> CJEU, judgment of 29 October 2009, Case C-63/08, *Virginie Pontin v T-Comalux SA*, EU:C:2009:666, para. 65. This was, however, in the situation of a young pregnant woman dismissed from work. The law provided for a 15-day time limit from the termination of the contract within which an appeal to a court had to be lodged to declare the termination null and void. Apart from that it also set an 8-day time limit for the employee dismissed to prove her pregnancy, if the contract had been terminated before the employer learnt about her pregnancy.

<sup>(527)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 66.

<sup>(528)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 66.

<sup>(529)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 19.

<sup>(530)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 62.

<sup>(531)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 65.

<sup>(532)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 67.

<sup>(533)</sup> CJEU, *Diouf*, op cit., fn. 25, para. 68.

this **alone** justified allowing the appeal. If it did, it appeared that the national court should have the power to order that the application be examined under the ordinary procedure.

At the national level, the Austrian Constitutional Court and the Czech Constitutional Court have considered whether time limits for lodging an appeal in international protection matters were sufficient. They held, with respect to a 2-day (Austria) and 7-day (Czech Republic) time limit, that the length of the time limit was incompatible with the right to an effective remedy<sup>(534)</sup>. The Slovenian Constitutional Court has taken a similar decision with respect to a 3-day time limit<sup>(535)</sup>.

Other time limits in the course of proceedings may also be relevant. For instance, short time limits for raising new pleas in appeal proceedings may undermine the effective exercise of the right to be heard<sup>(536)</sup>.

Since the ECtHR case-law also inspired the current wording of Article 46(4) APD (recast), its case-law is a relevant source.

The ECtHR has dealt with the question of extremely short time limits for bringing an action against removal. The automatic and mechanical application of a time limit of 5 days to submit an application has been found to be at variance with the protection of the right to *non-refoulement* under Article 3 ECHR<sup>(537)</sup>. It has also been found to be contrary to Article 13 that the domestic court only examined whether the applicant had submitted her application after the passage of that time limit<sup>(538)</sup>.

A remedy should be provided with **reasonable promptness**<sup>(539)</sup>, as the adequate nature of the remedy can be undermined by its excessive duration<sup>(540)</sup>.

In *Bahaddar v The Netherlands*, the ECtHR held that time limits are designed to enable courts to discharge their caseload in an orderly manner. Since it may be difficult for a person to supply evidence within a short time in asylum cases, ‘time limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim’<sup>(541)</sup>. The principle that automatic application of very short time limits may hinder the right to effective remedy has been used in other cases with respect to accelerated procedures<sup>(542)</sup>.

The circumstances of a particular case may also mean that short time limits hinder the right to effective remedy. In *Sultani v France*, the ECtHR did not find the accelerated procedure to be ineffective, since the examination concerned a second asylum application that had received

<sup>(534)</sup> Constitutional Court (Austria), judgment no G31/98, G79/98, G82/98, G108/98 of 24 June 1998; Constitutional Court (Czech Republic), judgment no 9/2010, Coll. which came into effect in January 2010. See also, EU Agency for Fundamental Rights, *Handbook on European Law relating to Asylum, Borders and Immigration*, 2nd edn, 2014, p. 101.

<sup>(535)</sup> Constitutional Court (Slovenia), judgment of 26 May 2005, Up — 338/05-11U-1176/05. For more on this case, see B. Zalar, ‘Constitutionalisation of the Implementing Act of the Procedures Directive’, EJML (2008), p. 198; Constitutional Court (Belgium), judgment of 27 January 2016, 13/2016, Nos 6094 and 6095.

<sup>(536)</sup> CJEU, *Peterbroeck and others* judgment, see fn 395. See also M. Reneman, ‘Speedy asylum procedures in the EU: striking fair balance remedy’, IJLR (2013), Part 4.2 for more case-law.

<sup>(537)</sup> ECtHR, *Jabari v Turkey*, see fn 242, para. 40.

<sup>(538)</sup> Spijkerboer, ‘Subsidiarity and ‘arguability’: the ECtHR case law on judicial review in asylum cases’, see fn 403, p. 55.

<sup>(539)</sup> ECtHR, *De Souza Ribeiro v France*, see fn 411, para. 82. See also ECtHR, *MSS v Belgium and Greece*, see fn 174, paras 293 and 320.

<sup>(540)</sup> ECtHR, *IM v France*, see fn 242, para. 133. See also ECtHR, *MSS v Belgium and Greece*, see fn 174, para. 292: ‘Particular attention should be paid to the speediness of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration’. See also para. 320 where the Court stressed ‘the importance of swift action in cases concerning ill-treatment by state agents [...]. In addition it considers that such swift action is all the more necessary where, as in the present case, the person concerned has lodged a complaint under Article 3 in the event of his deportation, has no procedural guarantee that the merits of his complaint will be given serious consideration at first instance, statistically has virtually no chance of being offered any form of protection and lives in a state of precariousness that the Court has found to be contrary to Article 3. [...]’.

<sup>(541)</sup> ECtHR, *Bahaddar*, see fn 358, para. 45.

<sup>(542)</sup> See e.g. the case of the ECtHR, judgment of 20 September 2007, *Sultani c France*, application no 45223/05 (extracts), referred to below.

full examination in the normal procedure<sup>(543)</sup>. The same type of procedure did not, however, meet the necessary standards in *IM v France*<sup>(544)</sup>. The applicant in this case lodged his first and only asylum claim while in detention and he was supposed to prepare his application in 5 days and in French with very limited linguistic assistance<sup>(545)</sup>. Compared to a 2-month time limit to lodge an appeal in the ordinary procedure, he only had 48 hours to prepare his appeal, during which time he was in detention and without legal or linguistic aid<sup>(546)</sup>. His legal representative appointed by court, whom he met shortly before the hearing only, could only repeat the argumentation already set forth without the possibility of adding any other evidence<sup>(547)</sup>. The ECtHR held that in these circumstances the applicant did not have an effective possibility to substantiate his fear of a violation of Article 3 ECHR before the court<sup>(548)</sup>.

### 6.3.3. Access to legal aid and interpretation

Article 47(3) of the EU charter provides that: ‘Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.’ Access to legal aid is part of the right to effective remedy under the charter and should be provided if the ‘absence of such aid would make it impossible to ensure an effective remedy’<sup>(549)</sup>.

Recital (23) APD (recast) provides as follows.

#### Recital 23 APD (recast)

In appeals procedures, subject to certain conditions, applicants should be granted free legal assistance and representation provided by persons competent to provide them under national law. Furthermore, at all stages of the procedure, applicants should have the right to consult, at their own cost, legal advisers or counsellors admitted or permitted as such under national law.

Subsection 4.2.3 above sets out the basic guarantees relating to legal assistance, access to UNHCR and other organisations, and services of an interpreter which must be provided under Article 12(2) APD (recast) to all applicants in the appeals procedure. See also Subsection 4.2.6.2 below on legal assistance and representation, dealing specifically with legal assistance and representation in appeals procedures under Article 20 APD (recast).

The rules on legal representation should not make the exercise of EU rights excessively difficult<sup>(550)</sup>. The CJEU held that ‘the assessment of the need to grant [legal] aid must be made on the basis of the right of the actual person whose rights and freedoms as guaranteed by EU law have been violated, rather than on the basis of the public interest of society, even if that

<sup>(543)</sup> The Court held that the ‘existence of that first review justifies the brevity of the examination of the second application, in the framework of which OFPRA simply checks, in an accelerated procedure, whether there are any new reasons for changing its previous decision to reject the application’. See ECtHR, *Sultani*, *ibid.*, paras 65 and 66 of that case, translation used from UNHCR, *Manual on the Case Law of the European Regional Courts*, June 2015, p. 237.

<sup>(544)</sup> ECtHR, *IM v France*, see fn 242.

<sup>(545)</sup> *Ibid.*, paras 144-145.

<sup>(546)</sup> *Ibid.*, paras 150.

<sup>(547)</sup> *Ibid.*, paras 151.

<sup>(548)</sup> *Ibid.*, paras 153.

<sup>(549)</sup> Explanations relating to the Charter of Fundamental Rights, see fn 392, relating to Art. 47 with reference to the ECtHR, judgment of 9 October 1979, *Airey v Ireland*, application no 6289/73.

<sup>(550)</sup> CJEU, judgment of 15 April 2008, Case C-268/06, *Impact v Minister for Agriculture and Food, Minister for Arts, Sport and Tourism, Minister for Communications, Marine and Natural Resources, Minister for Foreign Affairs, Minister for Justice, Equality and Law Reform, Minister for Transport*, EU:C:2008:223, para. 51.

interest may be one of the criteria for assessing the need for the aid' <sup>(551)</sup>. In assessing the conditions for granting legal aid, a national court should ascertain the proportionality of any limitation of the right to access the court <sup>(552)</sup>. In order to make that assessment the following factors are to be taken into account:

- the subject matter of the litigation;
- whether the applicant has a reasonable prospect of success;
- the importance of what is at stake for the applicant in the proceedings;
- the complexity of the applicable law and procedure; and
- the applicant's capacity to represent himself/herself effectively <sup>(553)</sup>.

In assessing the proportionality of a limitation, 'the national court may also take account of the amount of the costs of the proceedings' and whether or not 'those costs might represent an insurmountable obstacle to access to the courts' <sup>(554)</sup>. Access to the court should not be prohibitively expensive for the appellant <sup>(555)</sup>.

Some appeals may only be lodged when represented by a lawyer. The CJEU explained the reason for such legal enactment with respect to its own rules on representation in *Peftiev* <sup>(556)</sup>: 'The requirement [...] is based on a view of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs' <sup>(557)</sup>. The judgment suggests that if legal representation before a court is obligatory, access to such representation forms the essence of the right to effective judicial protection <sup>(558)</sup>.

The Austrian Constitutional Court has adjudged that, if a legal representative is appointed by the court, sufficient time should be provided for the representative to assist the appellant in asserting his/her rights effectively in the proceedings <sup>(559)</sup>.

Under the EU charter insofar as it contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. Nonetheless, this rule shall not prevent European Union law providing more extensive protection. The ECtHR case-law on legal and linguistic aid in the context of access to an effective remedy is summarised below.

In *Abdolkhani*, curtailed access to legal assistance along with other circumstances prevented the applicants from raising their assertions under Article 3 ECHR to domestic authorities <sup>(560)</sup>. The situation in which an applicant 'lacks the wherewithal to pay a lawyer, [...] has received no information concerning access to organisations which offer legal advice and guidance'

<sup>(551)</sup> CJEU, *DEB*, op. cit., 245, para. 42. The judgment concerned the question of whether legal persons should have the right to free legal aid to pursue their rights under EU law.

<sup>(552)</sup> That means, 'whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve'. *Ibid.*, para. 60.

<sup>(553)</sup> *Ibid.*, para. 61.

<sup>(554)</sup> *Ibid.*, para.61.

<sup>(555)</sup> CJEU, judgment of 11 April 2013, Case C-260/11, *The Queen, on the application of: David Edwards, Lilian Pallikaropoulos v Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs*, EU:C:2013:221.

<sup>(556)</sup> CJEU, judgment of 12 June 2014, Case C-314/13, *Užsienio reikalų ministerija, Finansinių nusikaltimų tyrimo tarnyba, v Vladimir Peftiev, BelTechExport ZAO, Sport-Pari ZAO, BT Telecommunications PUE*, EU:C:2014:1645. Art. 19 of the Court's Statute provides that an application to the Court can only be made when signed by a lawyer.

<sup>(557)</sup> *Ibid.*, para.28

<sup>(558)</sup> *Ibid.*, para. 34. See also S. Prechal, 'The Court of Justice and effective judicial protection: What has the charter changed?', in C. Paulussen, T. Takács, V. Lazić and B. Van Rompuy (eds.), *Fundamental rights in international and European law* (TMC Asser Press, 2016), p. 152.

<sup>(559)</sup> Constitutional Court (Austria), judgment of 5 December 2011, no U2018/11 (see EDAL English summary). In this case, a non-profit organisation was appointed to represent the appellant. The court took a decision on appeal 1 day after the appointment of the representative. This was deemed too short a time for the lawyer to assist the appellant in his appeal by the constitutional court.

<sup>(560)</sup> ECtHR, *Abdolkhani*, see fn 485, paras 114 and 115.

combined with ‘the shortage of lawyers on the list drawn up for the legal aid system’ was found to be an obstacle hindering access to an effective remedy <sup>(561)</sup>.

In the case *IM v France*, the applicant did not have any access to a lawyer or linguistic aid while in detention. When he arrived at the court, he was only able to talk to his lawyer shortly before the hearing and the lawyer could not add any evidence apart from argumentation already written by the applicant. These factors, including an extremely short time limit imposed for the introduction of an action, constituted obstacles to the applicant being able to effectively submit his arguments concerning breach of Article 3 ECHR to the court <sup>(562)</sup>.

The ECHR does not, however, seem to guarantee free legal aid to everyone under Article 13. In *Goldstein v Sweden*, the ECtHR held in an asylum case that Article 13 does not guarantee a right to a legal counsel paid by the state when availing himself of such a remedy <sup>(563)</sup>. Occasionally, the ECtHR has found that the appellant was able to formulate the reasons for his/her application and appeal on his/her own <sup>(564)</sup>.

The right to the services of an interpreter applies to appellants to the same extent as during the procedure before the determining authority <sup>(565)</sup>. Under Article 12(1)(b) APD (recast) the services of an interpreter must be provided ‘whenever necessary’ for submitting the case to the competent authorities, at least when the applicant ‘is to be interviewed’ and when ‘appropriate communication cannot be ensured without such services’. It seems that at the appeals stage, where the applicants enjoy an equivalent guarantee (Article 12(2) of the APD (recast)), this requires that interpretation be available at least during the hearing before the court, if appropriate communication cannot be ensured without an interpreter. These services are to be paid for out of public funds (Article 12(1)(b) APD (recast)). See also Subsections 4.2.4.1 on the scope of the obligation to conduct interviews and 4.2.3.2 on interpretation above.

#### 6.3.4. Other rules when accessing the court

Article 46(4) APD (recast) states that ‘Member States shall provide for [...] other necessary rules for the applicant to exercise his or her right to an effective remedy [...]’. In line with the principle of effectiveness these rules should not render exercise of the right to effective remedy impossible or excessively difficult (see Subsection 6.1.1 above).

While the following ECtHR cases are not binding for the interpretation of Article 46(4) APD (recast), they illustrate other rules that may affect access to an effective remedy. If it is problematic to deliver mail to persons with an unknown address, as was the case in *MSS v Belgium and Greece*, such a practice may render the remedy ineffective <sup>(566)</sup>. In the case of *Čonka v Belgium*, the authorities were not required to defer execution of the deportation order while an application under the extremely urgent procedure was pending before the Belgian Council of State. In order to find out the date on which the applicant’s removal was planned, the registrar of the Council of State contacted the authorities responsible for expulsion, but this

<sup>(561)</sup> ECtHR, *MSS v Belgium and Greece*, see fn 174, para.319.

<sup>(562)</sup> ECtHR, *IM v France*, see fn 242, paras 151-153.

<sup>(563)</sup> ECtHR, admissibility decision of 12 September 2000, *Goldstein v Sweden*, application no 46636/99.

<sup>(564)</sup> ECtHR, judgment of 10 October 2013, *KK v France*, application no 18913/11, paras 69-70.

<sup>(565)</sup> Art. 12(1)(b) in conjunction with Art. 12(2) of the APD (recast).

<sup>(566)</sup> ECtHR, *MSS v Belgium and Greece*, see fn 174, para. 318: ‘[T]he accessibility of a remedy in practice is decisive when assessing its effectiveness. The court has already noted that the Greek authorities have taken no steps to ensure communication between the competent authorities and the applicant. That fact, combined with the malfunctions in the notification procedure in respect of ‘persons of no known address’ reported by the Council of Europe Commissioner for Human Rights and the UNHCR [...], makes it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit’.

was only on internal directions from a judge. The ECtHR therefore found that there was no guarantee that the Council of State and the authorities would always comply with this practice in order to make it possible for the Council of State to deliver the decision on stay of removal in due time. The ECtHR found that this was one of the factors showing that implementation of the remedy was too uncertain to meet the requirements of Article 13 ECHR<sup>(567)</sup>. A general rule applied by the ECtHR is that ‘Article 13 imposes on the contracting states the duty to organise their judicial systems in such a way that their courts can meet its requirements’<sup>(568)</sup>.

### 6.3.5. Implicit withdrawal

Under Article 46(11) APD (recast), ‘Member States may also lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his or her remedy [...], together with the rules on the procedure to be followed’. Again, these rules should not render exercise of the right to an effective remedy impossible or excessively difficult.

An example from a national court where the rule on implicit withdrawal of appeal resulting in access to an effective remedy being hindered can be found in the Czech Republic<sup>(569)</sup>. The appellant lodged an appeal against a Dublin decision before his transfer to Hungary. The first-instance court applied the rule under which procedures on asylum appeals can be discontinued if the person’s address is unknown. The Supreme Administrative Court held that in these cases the rule had to be set aside, since it would otherwise deprive the appellant of an effective remedy<sup>(570)</sup>.

## 6.4. Right to remain during appeals procedures

### 6.4.1. General rule: automatic suspensive effect

Article 46(5) APD (recast) sets the general rule concerning the right of applicants to remain in the territory until ‘the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy’. A remedy with an **automatic** suspensive effect is one that grants the appellant the right to remain in the territory automatically *ex lege*, without the need to apply for such a right in his/her particular case<sup>(571)</sup>. Exceptions to the general rule in Article 46(5) APD (recast) are described below in Subsection 6.4.2 on modifications and exceptions. The right to remain during the appeals procedure is a corollary of states’ international obligation to comply with the principle of *non-refoulement*, which is reflected in Article 21 QD (recast) (see Section 1.5 above). The effectiveness of the remedy also depends on the power of a tribunal or court to prevent execution of an expulsion order potentially in breach of the principle of *non-refoulement*.

<sup>(567)</sup> ECtHR, *Čonka v Belgium*, see fn 242, paras 83 and 84.

<sup>(568)</sup> ECtHR, *Čonka v Belgium*, see fn 242, para.84.

<sup>(569)</sup> Supreme Administrative Court (Czech Republic), judgment of 24 May 2016, 4 Azs 98/2016 -20.

<sup>(570)</sup> Supreme Administrative Court (Czech Republic), judgment of 24 May 2016, 4 Azs 98/2016 -20.

<sup>(571)</sup> This may also have the effect of suspending the ‘enforcement of the measure authorising removal’, see CJEU, judgment of 18 December 2014, Case C-562/13, *Centre Public d’action sociale d’Ottignies-Louvain-La-Neuve v Moussa Abdida*, EU:C:2014:2453, para. 52.

In the case *Amadou Tall*, a Belgian tribunal requested a preliminary ruling as to whether the fact that an appeal against a decision on a subsequent application had no suspensive effect and was examined before a court without full jurisdiction to determine issues of fact and law was compatible with Article 47 of the EU charter and Article 39 APD<sup>(572)</sup>. The case concerned Article 39 APD, in which the right to remain pending an appeal was not set forth. The CJEU recalled that Article 47(1) of the charter is based on Article 13 ECHR<sup>(573)</sup> and stressed the importance of the ECtHR case-law relating to Article 3 ECHR when interpreting the scope of *non-refoulement* under Article 19 of the charter<sup>(574)</sup>. The right to an effective remedy under Article 13 ECHR requires that ‘a remedy suspending the enforcement of a measure authorising removal should, *ipso iure*, be available to [a] foreign national’<sup>(575)</sup>. The CJEU determined that the provisions of the charter do not require that an appeal against a decision on a subsequent application as such have automatic suspensive effect, since ‘the enforcement of that decision cannot, as such, lead to that national’s removal’. By contrast, if a return decision were adopted in the context of examination of the application, the applicant ‘must be able to exercise his right to an effective remedy against that decision’ under the returns directive. Such a remedy ‘must necessarily have suspensory effect when it is brought against a return decision whose enforcement may expose the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’, in order to ensure that the requirements of Articles 19(2) and 47 of the charter are met<sup>(576)</sup>.

#### 6.4.2. Modifications and exceptions

Article 46(6) APD (recast) sets out the conditions under which Member States may (but are not obliged to) provide for exceptions to automatic suspensive effect in the cases of certain decisions.

##### Article 46(6) APD (recast)

6. In the case of a decision:

- (a) considering an application to be manifestly unfounded in accordance with Article 32(2) or unfounded after examination in accordance with Article 31(8), except for cases where these decisions are based on the circumstances referred to in Article 31(8)(h);
- (b) considering an application to be inadmissible pursuant to Article 33(2)(a), (b) or (d);
- (c) rejecting the reopening of the applicant’s case after it has been discontinued according to Article 28; or
- (d) not to examine or not to examine fully the application pursuant to Article 39,

a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant’s request or acting *ex officio*, if such a decision results in ending the applicant’s right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law.

<sup>(572)</sup> CJEU, *Tall*, see fn 25.

<sup>(573)</sup> *Ibid.*, para. 52.

<sup>(574)</sup> *Ibid.*, para. 53, referring to Art. 52(3) of the EU charter.

<sup>(575)</sup> *Ibid.*, para. 54. See also ECtHR, *IM v France*, see fn 242, para. 134, judgment of 22 April 2014, *AC and others v Spain*, application no 6528/11 and others, para. 94.

<sup>(576)</sup> CJEU, *Tall*, see fn 25. paras 56-58, 60.

As a minimum standard, Member States ‘shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory’ (Article 46(8)).

The APD (recast) provides that if the application is dealt with in a border or accelerated procedure, the applicant is to be ‘provided with additional guarantees in cases where his or her appeal does not have automatic suspensive effect with a view to making the remedy effective in his or her particular circumstances’ (recital (30)). In the text of the APD (recast) additional guarantees are, however, only given to applicants in border procedures, not necessarily to applicants in other forms of accelerated procedures <sup>(577)</sup>.

The additional guarantees are set out in Article 46(7) as follows.

#### Article 46(7) APD (recast)

Paragraph 6 [cited above] shall only apply to procedures referred to in Article 43 [concerning border procedures] provided that:

- (a) the applicant has the necessary interpretation, legal assistance and at least one week to prepare the request and submit to the court or tribunal the arguments in favour of granting him or her the right to remain on the territory pending the outcome of the remedy;
- (b) in the framework of the examination of the request referred to in paragraph 6, the court or tribunal examines the negative decision of the determining authority in terms of fact and law. [...] [see also Section 6.2 on full and *ex nunc* examination].

Without prejudice to Article 41 APD (recast) on exceptions to the right to remain in the case of subsequent applications, the same guarantees, at least, must also be provided to all unaccompanied minors <sup>(578)</sup>. These guarantees should also be provided to applicants in need of special procedural guarantees in cases where adequate support cannot be provided to them to benefit from their rights and comply with their obligations, and where as a result accelerated or border procedures cannot be applied under Article 24(3) APD (recast) <sup>(579)</sup>. (See Sub-section 4.2.7 above for further details.)

In *Factortame*, the CJEU has held that ‘full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law’ <sup>(580)</sup>. In the field of free movement of persons, the CJEU has held that the guarantee of the right to appeal would ‘become illusory if the Member States could, by the immediate enforcement of a decision ordering expulsion, deprive the person concerned of the opportunity to take advantage

<sup>(577)</sup> See Article 46(7) of the APD (recast).

<sup>(578)</sup> Art. 25(6) final sentence APD (recast) provides that: ‘Without prejudice to Article 41 [i.e. subsequent applications], in applying Article 46(6) [i.e. exceptions from automatic suspensive effect] to unaccompanied minors, Member States shall provide at least the guarantees provided for in Article 46(7) [guarantees for border procedures] in all cases’.

<sup>(579)</sup> Art. 24(3) APD (recast) provides that: ‘Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this directive throughout the duration of the asylum procedure. Where such adequate support cannot be provided within the framework of the procedures referred to in Article 31(8) and Article 43, in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, Member States shall not apply, or shall cease to apply, Article 31(8) and Article 43. Where Member States apply Article 46(6) to applicants to whom Article 31(8) and Article 43 cannot be applied pursuant to this sub-paragraph, Member States shall provide at least the guarantees provided for in Article 46(7).’

<sup>(580)</sup> CJEU, *Factortame*, see fn 395, para. 21. This judgment required national courts to set aside a rule under which they could not grant interim relief, if they would have power to do so under national law in similar circumstances. This was confirmed also in *Unibet* judgment, see fn 375, para.77.

of the success of the pleas raised in his appeal’<sup>(581)</sup>. The CJEU has also dealt with the right to an automatic suspensive effect in the context of return procedures, as described below in Part 7<sup>(582)</sup>.

The Belgian Constitutional Court annulled part of the Belgian asylum law which deprived some appeals by asylum seekers who come from a safe country of automatic suspensive effect and treatment of the appeal in full jurisdiction<sup>(583)</sup>.

While the CJEU has not dealt with this issue in its case-law on international protection, the ECtHR case-law on Article 3 and 13 ECHR may serve as an inspiration.

The ECtHR has, for instance, ruled that when measures are imposed, the effects of which are potentially contrary to the ECHR and irreversible, it is ‘inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the convention’<sup>(584)</sup>. The ECtHR requires that in ‘cases in which a state party decides to remove an alien to a country where there are substantial grounds for believing that he or she faces a risk of that nature, Article 13 requires that the person concerned should have access to a remedy with automatic suspensive effect’ whenever the applicant has an arguable claim in relation to Article 3 ECHR<sup>(585)</sup>. Any request for suspensive effect must be subject to rigorous and detailed scrutiny<sup>(586)</sup>. A remedy without suspensive effect may hinder the effectiveness of the remedy, since it may prevent applicants from keeping in touch with their lawyer or with the court so as to be able to substantiate their case<sup>(587)</sup>. It may also be impossible to trace the applicants in their country of origin after their expulsion<sup>(588)</sup>.

The ECtHR requires that requests to remain in the territory be decided by courts and tribunals in a procedure to which appellants have sufficient access, for instance as regards access to legal aid, the possibility to produce evidence on the reasons why they should be granted the right to remain or access to the court<sup>(589)</sup>.

#### 6.4.2.1. Unfounded applications after examination in accelerated or border procedures

Subsection 6.4.2 above sets out a number of decisions as set out in Article 46(6)(a) APD (recast), where the right to automatic suspensive effect need not be provided. Among these are decisions concerning applications considered ‘to be manifestly unfounded in accordance with

<sup>(581)</sup> CJEU, *Georg Dörr v Sicherheitsdirektion für das Bundesland Kärnten*, see fn 476, para. 49. See also CJEU, judgment of 8 April 1976, case 48-75, *Jean Noël Royer*, paras 61-62.

<sup>(582)</sup> See CJEU, *CPAS d’Ottignies-Louvain-La-Neuve v Moussa Abdida*, see fn 571.

<sup>(583)</sup> Constitutional Court (Belgium), judgment of 16 January 2014, *no 1/2014, no de rôle 5488*, (with EDAL English summary).

<sup>(584)</sup> ECtHR, judgment of 4 February 2005, Grand Chamber, *Mamatkulov and Askarov v Turkey*, application nos 46827/99 and 46951/99, para. 149.

<sup>(585)</sup> ECtHR, *Gebremedhin v France*, see fn 60, para.66. See also ECtHR, judgment of 11 December 2008, *Muminov v Russia*, application no 42502/06, para. 100; ECtHR, *Abdolkhani*, see fn 485, para. 108. In *Čonka*, the ECtHR clarified why the possibility to grant suspensive effect on application may prove ineffective in practice: ‘Firstly, 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 such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13. [...] Secondly, even if the risk of error is in practice negligible [...] it should be noted that the requirements of Article 13, 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. [...]’: ECtHR, *Čonka v Belgium*, see fn 242, paras 82-83. A similar conclusion was made in judgment of 23 July 2013, *MA v Cyprus*, application no 41872/10, paras 136-137.

<sup>(586)</sup> ECtHR, *Jabari v Turkey*, see fn 242, paras 39 and 49-50. See also ECtHR, *MSS v Belgium and Greece*, see fn 174, para. 388.

<sup>(587)</sup> ECtHR, judgment of 17 January 2006, *Aoulmi v France*, application no 50278/99, para. 104: ‘In the present case, as the applicant was expelled by France to Algeria, the level of protection that the court was able to afford the rights which he was asserting under Article 3 of the Convention was irreversibly reduced. In addition, as the applicant’s lawyer has lost all contact with him since his expulsion, the gathering of evidence in support of the applicant’s allegations has proved more complex.’

<sup>(588)</sup> ECtHR, *Diallo v Czech Republic*, op. cit. fn. 485, paras 44 and 46, and judgment of 12 April 2005, *Shamayev and others v Georgia and Russia*, application no 36378/02, paras 310 and 312: ‘In addition, the Court itself was deprived of an opportunity to hear the extradited applicants with a view to elucidating this point and the other circumstances of the case’.

<sup>(589)</sup> See ECtHR, *MSS v Belgium and Greece*, see fn 174, paras 385-397.

Article 31(8) [APD (recast)], except for cases where these decisions are based on the circumstances referred to in Article 31(8)(h)'.<sup>(590)</sup>

While Subsections 4.1.2 and 4.1.3 above deal with the above procedures in detail, if a decision was 'based on the circumstances referred to in Article 31(8)(h)', the remedy must provide for automatic suspensive effect and the general rule on the right to remain in Article 46(5) APD (recast) applies. Article 31(8)(h) covers cases when 'the applicant entered the territory of the Member State unlawfully or prolonged his or her stay unlawfully and, without good reason, has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible; given the circumstances of his or her entry'. This provision reflects situations falling under Article 31 of the Refugee Convention<sup>(590)</sup>.

With respect to border procedures, Article 43 APD (recast) sets out the conditions under which procedures can be undertaken at the border or transit zones of Member States (see Subsection 5.1.3 above for further details). These grounds overlap with the grounds for accelerated procedures.

Originally, it was proposed that appeals in such cases have automatic suspensive effect<sup>(591)</sup>. Instead, the final text requires that certain procedural guarantees must be provided if decisions on international protection taken in border procedures are not to have automatic suspensive effect, as set out in Article 46(7) cited in Subsection 6.4.2 on modifications and exceptions above.

Unless these guarantees are in place, the general rule on the right to remain in Article 46(5) APD (recast) applies<sup>(592)</sup>, i.e. 'Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when so exercised, pending the outcome of the remedy'. These guarantees reflect the fact that applicants whose freedom of movement is restricted are in a worse position as regards their access to necessary legal aid and interpretation. They also acknowledge that access to an effective remedy may be more difficult when short time limits apply to the procedure<sup>(593)</sup>.

Member States may also provide for an *ex officio* review of decisions taken pursuant to Article 43 (in border procedures) without the need for the applicant to make an appeal himself or herself (Article 46(4) APD (recast)).

#### **6.4.2.2. First country of asylum or international protection in another Member State**

Under Article 46(6)(b) APD (recast), another situation in which automatic suspensive effect need not be granted by a Member State is in inadmissibility decisions based on the fact that:

- another Member State has granted international protection (Article 33(2)(a) APD (recast)); or that
- a country which is not a Member State is considered a first country of asylum for the applicant (Article 33(2)(b) APD (recast)).

<sup>(590)</sup> Art. 31 Geneva Convention provides: 'The contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.'

<sup>(591)</sup> European Commission, *Communication to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union*, see fn 521.

<sup>(592)</sup> 'If the conditions referred to in points (a) and (b) are not met, paragraph 5 shall apply.' (Art. 46(7) in fine APD (recast)).

<sup>(593)</sup> Decisions in border procedures are to be taken within four weeks, otherwise applicants are to be granted entry to the territory. See Art. 43(2) APD (recast).

Subsections 5.2.2.2 on the concept of first country of asylum and 5.2.2.1 on international protection granted by another Member State provide further detail. In cases where the right to automatic suspensive effect is denied on the ground that applicants come from a first country of asylum, the applicant must be ‘allowed to challenge the application of the first country of asylum concept to his or her particular circumstances’ (Article 35 APD (recast)).

#### 6.4.2.3. Subsequent applications

In the case *Amadou Tall*, relating to Article 39 APD, which did not cover the right to remain pending appeal, the CJEU held that when an applicant makes a subsequent application without presenting new evidence or arguments, ‘it would be disproportionate to oblige Member States to carry out a new full examination procedure and, in these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant’<sup>(594)</sup>.

In the APD (recast), subsequent applications form another category of cases where suspensive effect need not be automatic in cases where Member States consider an application to be inadmissible because ‘no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection [...] have arisen or have been presented by the applicant’ (Articles 33(2)(d) and 46(6)(b) APD (recast)). The procedure on how to deal with subsequent applications is explained above in Subsections 5.2.2.4 on admissibility and 4.1.3 on the right to remain in such cases.

Member States may make an exception to the right to remain in the territory already at the stage of the administrative-level procedure in the case of subsequent applications covered by Article 41 APD (recast)<sup>(595)</sup>. In such cases, the appellant must have the possibility of requesting the court or tribunal to grant him/her a right to remain in the territory, although the APD (recast) allows Member States not to grant such applicants a right to remain pending the ‘outcome of the procedure to rule whether or not the applicant may remain on the territory’ (Article 41(2)(c), derogating from Article 46(6) APD (recast)).

Article 41(1) APD (recast) provides that in such cases ‘Member States may make an exception only where the determining authority considers that a return decision will not lead to direct or indirect *refoulement* in violation of that Member State’s international and Union obligations’. This should thus serve as a final check before any return of that person.

#### 6.4.2.4. Decisions to refuse to reopen an application after its implicit withdrawal or abandonment

Persons whose applications are considered to have been implicitly withdrawn or abandoned on which a decision was taken by the determining authority to discontinue examination under Article 28 APD (recast) can request that their case be reopened. They may also make a new application which will not be considered as a subsequent application. However, this may be subject to certain conditions: a minimum 9-month limit after which the applicant’s case can

<sup>(594)</sup> CJEU, *Tall*, see fn 25. para. 46.

<sup>(595)</sup> See also Subsection 4.1.3 above. More specifically, if ‘the applicant (a) has lodged a first subsequent application, which is not further examined pursuant to Article 40(5), merely in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State; or (b) another subsequent application in the same Member State, following a final decision considering a first subsequent application inadmissible pursuant to Article 40(5) or after a final decision to reject that application as unfounded’.

no longer be reopened or can be treated as a subsequent application or that the applicant's case may only be reopened once, see Article 28(2) second subparagraph APD (recast)). Sub-section 4.2.10 above deals with abandoned applications in more detail.

Where applicants request that their case be reopened and the determining authority rejects the request, an appeal against the decision not to reopen the case need not have automatic suspensive effect pursuant to Article 46(6)(c) APD (recast) 'if such a decision results in ending the applicant's right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law'. In such cases, Member States 'shall ensure that such a person is not removed contrary to the principle of *non-refoulement*' <sup>(596)</sup>.

#### 6.4.2.5. European safe third countries

Article 46(6)(d) APD (recast) refers to cases where the decision not to examine the application or not to examine it fully is based on the fact that the country from which an applicant is seeking to enter or has entered illegally is a European safe third country. In such cases, the applicant must be allowed to challenge the application of the concept on the grounds that the country is not safe in his/her particular circumstances (Article 39(3)) <sup>(597)</sup>. In a case where a safe third country does not readmit the applicant, he/she must be ensured access to a procedure in accordance with the basic principles or guarantees described in Chapter II APD (recast). (See Section 5.3 on the concept of the European safe third country above for further details.)

<sup>(596)</sup> Art. 28(2) subparagraph 3 APD (recast).

<sup>(597)</sup> Section 5.3 of this analysis explains that the scope of that provision can be called into question when read against Art. 39(1) APD (recast) which stipulates that 'Member States may provide that no, or nor full, examination [...] of the safety of the applicant in his or her particular circumstances [...] shall take place [...]':

## Part 7: Relevance of procedures under the returns directive

The returns directive ‘sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations’ (Article 1) <sup>(598)</sup>. It entered into force on 13 January 2009 and has been transposed into national law by all states bound by it (all EU Member States except Ireland and UK; plus the four Schengen associated countries: Iceland, Liechtenstein, Norway and Switzerland).

Although the returns directive does not form part of the CEAS, it is closely related to the CEAS instruments. An effective returns policy is considered key to ensuring public support for legal migration and asylum <sup>(599)</sup>. At the same time, the returns directive recognises that it is only legitimate for Member States to return illegally staying third-country nationals as long as ‘fair and efficient asylum systems are in place which fully comply with the principle of *non-refoulement*’ (recital (8) of the returns directive). The returns directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of EU law as well as international law, including refugee protection and human rights obligations (Article 1). The Commission has published a common *Return handbook* to provide guidance for Member States on the implementation of the returns directive <sup>(600)</sup>.

In this part, the returns directive will be introduced briefly insofar as it is relevant for access to international protection procedure for persons in returns procedure (see Table 23 below) <sup>(601)</sup>. This part does not address the issue of detention under the returns directive.

**Table 23: Structure of Part 7**

<b>Section 7.1.</b>	Personal scope of the returns directive	pp. 165-166
<b>Section 7.2.</b>	Short overview of the scope of the returns directive	pp. 166-168
<b>Section 7.3.</b>	Situations in which the returns directive may apply to persons seeking international protection or to persons facing <i>refoulement</i>	pp. 168-170

<sup>(598)</sup> Returns directive, see fn 37.

<sup>(599)</sup> The Commission stated that ‘the credibility and integrity of the legal immigration and asylum policies are at stake unless there is a Community return policy on illegal residents’: European Commission, *Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents*, 2 June 2003, COM(2003) 323.

<sup>(600)</sup> European Commission, *Recommendation of 1.10.2015 establishing a common ‘Return handbook’ to be used by Member States’ competent authorities when carrying out return related tasks*, C C(2015) 6250 final, p. 62.

<sup>(601)</sup> Detailed information about the CJEU and national case-law and interpretation of the returns directive can be found e.g. on the webpage of Contention project (Judicial CONTROL of immigration deTENTION), see Synthesis report on *The extent of judicial control of pre-removal detention in the EU*, drafted by Migration Policy Centre at the Robert Schuman Centre for Advanced Studies in partnership with the Odysseus Network (ULB), 2014.

## 7.1. Personal scope of the returns directive

Article 2(1) of the returns directive provides that the directive ‘applies to third-country nationals staying illegally on the territory of a Member State’. Illegal stay is defined in Article 3 of the directive as ‘presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State’. The returns directive does not apply to persons with European freedom of movement (Article 2(3)). Member States may decide not to apply it to:

- those subject to a refusal of entry under the Schengen Borders Code (Article 2(2)(a));
- those apprehended or intercepted when crossing external borders irregularly by land, sea or air who have not obtained a right to stay later (Article 2(2)(a)) <sup>(602)</sup>; and
- those with respect to whom return is a criminal law sanction or who are subject to extradition procedures (Article 2(2)(b)) <sup>(603)</sup>.

With regard to applicants for international protection, recital (9) of the returns directive states the following.

### Recital 9 returns directive

[A] third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.

This is closely linked to the fact that applicants for international protection have the right to remain in the territory during the procedure (see Sections 4.1 and 6.4 above). In principle the returns directive should therefore apply to those third-country nationals who have not filed an application for international protection, as well as those whose application for international protection has been finally determined and rejected, and who are no longer entitled to remain in the territory of the Member State concerned.

There are some exceptions to this rule that follow from the fact that certain applicants for international protection need not be granted an automatic right to remain pending the outcome of their procedure. These are listed exhaustively in Article 9(2) APD (recast) and include, *inter alia*, persons who have made a subsequent application referred to in Article 41 and those who are to be surrendered or extradited to a third country or to international criminal courts or tribunals <sup>(604)</sup>. (See Subsection 4.1.2 above on the right to remain during examination at the administrative level.) In both cases Member States should consider whether return may lead to direct or indirect *refoulement* in violation of the international and EU obligations of that Member State (Articles 9(3) and 41(1) last sentence APD (recast)).

<sup>(602)</sup> Commentators claim that this provision will require interpretation by the CJEU to decide whether all cases of irregular entries can be excluded from the directive under this article. They claim that this exception should not be open in cases where a clandestine entrant was detected on the territory far away from the borders. See Peers et al., *The EU charter of Fundamental Rights. A commentary*, see fn 254, p. 491, where opposing views are also presented.

<sup>(603)</sup> See the *Achughbabian* case where the CJEU clarified that criminal law sanctions may only be adopted once the return procedure has been exhausted, if the adoption of coercive measures do not enable the removal of the immigrant to take place, and only so far as there is no justified ground for non-return. See CJEU, judgment of 6 December 2011, Grand Chamber, Case C-329/11, *Alexandre Achughbabian v Préfet du Val-de-Marne*, EU:C:2011:807, paras 41, 46, 48 and 49. See also the judgment of 1 October 2015, Case C-290/14, *Skerdjan Celaj*, EU:C:2015:640, in which the circumstances differed, since this third country national had already been subjected to a return procedure and had entered the territory again irrespective of an entry ban. In this case the CJEU held that a criminal sanction may be imposed.

<sup>(604)</sup> While in cases of extradition or surrender to another Member State the returns directive will not apply, in cases of extradition to a third country, application of the returns directive is optional under Article 2(2)(b). See above Section 7.1 on the personal scope of the returns directive.

The returns directive may be relevant in the case of failed applicants for international protection and illegally staying third-country national who decide to apply for international protection.

## 7.2. Short overview of the scope of the returns directive

Article 5 of the returns directive emphasises the principles to be taken into account throughout the return procedure:

- the best interests of the child;
- respect for family life;
- the state of health of the third-country national; and
- the principle of *non-refoulement*.

The principle of *non-refoulement* is, inter alia, reflected in the fact that it is obligatory to postpone removal in cases where this principle would be violated (Article 9(1) of the returns directive).

Article 6(1) of the returns directive lays down a general rule whereby any third-country national staying illegally on the territory of a Member State will be issued a return decision<sup>(605)</sup>. Derogations from this rule include cases of third-country nationals who hold a residence permit in another Member State (Article 6(2)), who are taken back by another Member State (Article 6(3))<sup>(606)</sup>, or who are the subject of a pending procedure to renew their residence permit (Article 6(5)).

For the whole removal procedure the returns directive provides for subsequent steps to be taken. These were emphasised in the *El Dridi* judgment<sup>(607)</sup>. In the initial phase the third-country national should be given some time to voluntarily comply with the decision imposing the obligation to return (return decision)<sup>(608)</sup>, unless specific circumstances require that he/she not be given such a possibility<sup>(609)</sup>. These specific circumstances may lead to imposing certain other obligations on him/her or setting a shorter time for him/her to leave the country<sup>(610)</sup>.

If the third-country national does not comply with obligation to return (or if there was no period to leave voluntarily), the Member State shall carry out the removal by taking all necessary measures in a proportionate manner and with due respect for fundamental rights<sup>(611)</sup>. In *El Dridi* the CJEU sums up that:

the order in which the stages of the return procedure established by [the returns directive] are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure,

<sup>(605)</sup> Such a decision states and declares the stay to be illegal and imposes or states an obligation to return, and it may be taken by an administrative authority or a court in the form of a decision or act. Art. 3 point 4 of the returns directive.

<sup>(606)</sup> This relates to bilateral agreements or arrangements existing on the date when the directive entered into force.

<sup>(607)</sup> CJEU, judgment of 28 April 2011, Case C-61/11, *Hassen El Dridi, alias Karim Soufi*, EU:C:2011:268, paras 36-38.

<sup>(608)</sup> A return decision will contain an appropriate period for voluntary departure which may range from seven to 30 days (Art. 7(1)). The period may be prolonged on certain compassionate grounds, such as the length of stay, children attending school or due to the existence of other family and social links (Art. 7(2)). Certain obligations may be imposed on the third-country national pending the time for voluntary return in case there is risk of absconding (Art. 7(3)). The CJEU held that in the return procedure 'priority is to be given [...] to voluntary compliance with the obligation resulting from [...] return decision'. *Ibid.*, para. 26.

<sup>(609)</sup> *Ibid.*, para. 36.

<sup>(610)</sup> *Ibid.*, para. 37.

<sup>(611)</sup> *Ibid.*, para. 38. This relates to Art. 8(1) of the returns directive under which Member States 'shall take all necessary measures to enforce the return decision'. Under Art. 8(4) any coercive measures have to be used as a last resort, have to be proportionate and not exceed reasonable force.

to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages <sup>(612)</sup>.

The graduated nature of the return procedures also precludes Member States from having national rules under which a person who did not comply with a removal order would be subjected to a sentence of imprisonment: states must first ‘pursue their efforts to enforce the return decision’ <sup>(613)</sup>.

Some return decisions will be accompanied by an entry ban and will prohibit entry into and stay on the territory of the Member State for a specified period of 5 years maximum (Article 11(1) last sentence) <sup>(614)</sup>. This period can only be exceeded in cases of serious threat to public policy, public security or national security (Article 11(2)). The provisions on entry bans apply ‘without prejudice to the right to international protection, as defined in Article 2(a) of [the QD] in the Member States’ (Article 11(5)) <sup>(615)</sup>. The *Return handbook* comments on the provision by specifying that ‘entry bans should be suspended (pending ongoing asylum procedures) or withdrawn (once international protection has been granted)’ <sup>(616)</sup>.

Member States may decide to issue a decision on removal separately, in a case where a return decision was not complied with within the period for voluntary departure or if no such period was granted (Article 8(3)). However, states may also adopt a system under which a declaration of illegality of stay, a removal order and an entry ban form an integral part of one single decision (Article 6(6)).

There are some circumstances under which a removal (i.e. enforcement of the return decision) must be postponed. One of them is when the removal would violate the principle of *non-refoulement* (Article 9(1)(a)), another relates to a suspensive effect of the remedy against the return decision (Articles 9(1)(b) and 13)). Removal may be postponed for an appropriate period in other cases depending on the circumstances of the individual case, taking into account especially the physical state and mental capacity of the third-country national, technical reasons or lack of identification (Article 9(2)). During the postponement certain additional obligations similar to alternatives to detention can be imposed on the third-country national (Article 9(3)). Third-country nationals must also receive a written confirmation that the decision will temporarily not be enforced (Article 14(2)). During the postponement, third-country nationals have as a minimum the rights set forth in Article 14(1): maintenance of family unity in the territory, provision of emergency healthcare and essential treatment of illness, access of minors to basic education system and accommodation of the special needs of vulnerable persons.

The returns directive specifies the circumstances under which illegally staying third-country nationals can be detained, applicable conditions, and sets the maximum length of detention (Article 15) <sup>(617)</sup>. The directive provides for procedural guarantees with respect to the content of the decisions <sup>(618)</sup> and information on available remedies and translation of the main elements

<sup>(612)</sup> *Ibid.*, para. 41.

<sup>(613)</sup> *Ibid.*, para. 58.

<sup>(614)</sup> See Art. 3 point 6 on the term ‘entry ban’. Under Art. 11 of the *returns directive* a return decision must be accompanied by an entry ban, if no period for voluntary departure was granted or if the third-country national did not comply with his obligation to return.

<sup>(615)</sup> In that case the provisions on the content of international protection apply and as soon as international protection has been granted the beneficiaries of refugee or subsidiary protection status must be issued a residence permit, unless compelling reasons of national security or public order otherwise require. The validity of the residence permit depends on the status granted. Art. 24(1) and (2) QD (recast).

<sup>(616)</sup> European Commission, *Return handbook*, see fn 600, p. 62.

<sup>(617)</sup> CJEU, *El Dridi* judgment, see fn 607, para. 40.

<sup>(618)</sup> With respect to the right to be heard in return procedures, see CJEU, *Mukarubega*, see fn 143.

of the decisions (Article 12). However, it also allows a derogation from these standards, for instance with respect to third-country nationals who did not obtain a residence permit after having illegally entered the territory (Article 12(3))<sup>(619)</sup>. An effective remedy must be available with respect to the decisions related to return before a competent judicial or authority which is impartial and independent. This authority shall have the ‘power to review decisions related to return [...] including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation’ (Article 13(1) and (2)). For the appeal phase the third-country national should have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance and free legal assistance and/or representation (Article 13(3) and (4)).

### 7.3. Situations in which the returns directive may apply to persons seeking international protection or to persons facing *refoulement*

#### 7.3.1. Illegally staying third-country nationals who are not applicants

The principle of *non-refoulement* fully applies in the return procedure with respect to all third-country nationals regardless of whether or not they have applied for international protection (see Article 19(2) of the EU charter). Member States are required to ‘postpone removal [...] when it would violate the principle of *non-refoulement*’ (Article 8(6) of the returns directive). A situation in which the risk of *refoulement* could arise in a return decision case was dealt with in *Abdida* judgment which concerned a third-country national with a serious illness. Under the ECtHR case-law this may in exceptional circumstances raise concerns under Article 3 ECHR<sup>(620)</sup>.

For its part, the CJEU has held:

[i]n the very exceptional cases in which the removal of a third-country national suffering a serious illness to a country where appropriate treatment is not available would infringe the principle of *non-refoulement*, Member States cannot therefore, as provided for in Article 5 of Directive 2008/115, taken in conjunction with Article 19(2) of the charter, proceed with such removal<sup>(621)</sup>.

The CJEU also held that in cases where the risk of *refoulement* is at stake, the returns directive precludes ‘national legislation which does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health’<sup>(622)</sup>.

<sup>(619)</sup> In that case, the Member State need not provide a written or oral translation of the main elements of decisions related to return in a language the third-country national understands or may reasonably be presumed to understand. Instead, they may distribute standard forms in at least the five languages most frequently used by illegal migrants.

<sup>(620)</sup> ECtHR, judgment of 27 May 2008, Grand Chamber, *N v United Kingdom*, application no 26565/05, para. 4242. In a more recent case, the Grand Chamber of the ECtHR has revisited the standards set forth before and held that ‘other very exceptional cases’, ‘which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy’. See ECtHR, *Paposhvili*, see fn 181, para. 183.

<sup>(621)</sup> CJEU, *CPAS d’Ottignies-Louvain-La-Neuve v Moussa Abdida*, see fn 571, para. 48.

<sup>(622)</sup> *Ibid.*, para. 53.

In the *Hirsi Jamaa and others v Italy* judgment, the ECtHR emphasised that the fact that third-country nationals had failed expressly to request asylum does not exempt a Member State from fulfilling its obligations under Article 3. It is ‘for the national authorities, when faced with a situation in which human rights were being systematically violated in the applicants’ home country, to find out about the treatment to which the applicants would be exposed upon return notwithstanding the fact that the applicants had failed to expressly request asylum’ <sup>(623)</sup>.

### 7.3.2. Failed asylum seekers

Once the international protection procedure is over, failed asylum seekers may easily fall within the scope of the returns directive. In the *Amadou Tall* case, the CJEU considered that the lack of suspensive effect before the court dealing with international protection cases did not mean that a negative decision on international protection would lead to a third-country national’s removal in that case, since the dispute only concerned ‘the lawfulness of a decision not to further examine a subsequent application’ <sup>(624)</sup>. If a return decision is issued against a third-country national, the national ‘must be able to exercise his right to an effective remedy against that decision in accordance with Article 13 of that directive’ <sup>(625)</sup>. The CJEU concluded in that case that:

in any event, an appeal must necessarily have suspensory effect when it is brought against a return decision whose enforcement may expose the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, thereby ensuring that the requirements of Articles 19(2) and 47 of the charter are met in respect of that third-country national <sup>(626)</sup>.

### 7.3.3. Access to international protection procedure by third-country nationals under the return procedure

The APD (recast) requires that information on the right to apply for international protection also be provided to third-country nationals or stateless persons held in detention facilities, at border-crossing points or in transit zones, who ‘may wish to make an application for international protection’ (Article 8(1) APD (recast)). All authorities likely to receive applications for international protection must ‘have the relevant information and [...] their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged’ (Article 6(1) APD (recast)).

As soon as illegally staying third-country nationals make an application for international protection, they should no longer ‘be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force’ (recital (9) of the returns directive), unless there is no right to remain linked to that application. Application of an entry ban should be suspended at

<sup>(623)</sup> ECtHR, *Hirsi v Italy*, see fn 55, para. 133, see also above in Subsection 2.3.2.3 on information and counselling facilities in detention facilities and at border crossing points.

<sup>(624)</sup> CJEU, *Tall*, see fn 25, para. 56. The case concerned the APD in which the regulation of suspensive effect in the appeals procedure was left to the discretion of Member States.

<sup>(625)</sup> *Ibid.*, para. 57.

<sup>(626)</sup> *Ibid.*, para. 58.

least until the end of the international protection procedure. (See Section 7.2 for a short overview of the scope of the returns directive above.)

The only exception relates to applicants with no right to remain in the territory. In the case of subsequent applications or applicants subject to extradition or surrender to a Member State or a third country under Article 9 APD (recast), Articles 9(3) and 41(1) APD (recast) require separate examination of the risk of *refoulement* <sup>(627)</sup>. In appeals procedures, it will in most cases be necessary to await the decision of the court or tribunal regarding the right to remain in the territory pending appeal (Article 46(8)). (See also Section 6.4 above on the right to remain during appeals procedures <sup>(628)</sup>).

Some illegally staying third-country nationals will be in detention when they lodge an application for international protection <sup>(629)</sup>. With respect to these applicants the application of strict time limits in the procedure and the absence of legal or linguistic assistance may in some cases hamper effective access to the procedure or to the court (see the case-law referred to in Section 6.3 on access to an effective remedy above). Any organisations providing counselling and advice should therefore have effective access to applicants in these places where their freedom of movement is restricted (Article 8(2) APD (recast)). With respect to unaccompanied minors, the guarantees are even more specific, bodies which act as their representatives have the right to lodge the application on behalf of the minor, if they are of the opinion that the minor has protection needs under the QD (recast) (Article 7(4) APD (recast)) <sup>(630)</sup>.

<sup>(627)</sup> Art. 41(1) second subparagraph provides that: 'Member States may make such an exception only where the determining authority considers that a return decision will not lead to direct or indirect *refoulement* in violation of that Member State's international and Union obligations'.

<sup>(628)</sup> The only exception will be that when states decide that a subsequent application does not grant the applicant right to remain in the territory under the conditions set out in Art. 41 APD (recast). In that case, derogation from Art. 46(8) APD (recast) is possible by Art. 41(2)(c) APD (recast).

<sup>(629)</sup> According to the *Arslan* judgment of the CJEU the APD and RCD do not preclude that after application for international protection the third-country national is kept in detention 'on the basis of a provision of national law, where it appears, after an assessment of a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the enforcement of the decision and that it is objectively necessary to maintain in detention to prevent the person concerned from permanently evading his return': CJEU, judgment of 30 May 2013, Case C-534/11, *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, EU:C:2013:343, para. 63.

<sup>(630)</sup> See also Subsection 2.3.2.2 above.

# Appendix A: Primary sources

## 1. European Union law

### 1.1. EU primary law

Treaty on the Functioning of the European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)) OJ C 326, 26.10.2012, pp. 47-390.

Treaty on European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)) OJ C 326, 26.10.2012, pp. 13-45.

Charter of Fundamental Rights of the European Union (as amended on 12 December 2007 (entry into force: 1 December 2009)) OJ C 326, 26.10.2012, pp. 391-407.

Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TFEU in OJ C 326, 26.10.2012, p. 295.

Protocol No 22 on the position of Denmark, annexed to the TFEU in OJ C 326, 26.10.2012, p. 299.

### 1.2. EU secondary legislation

#### 1.2.1. Regulations

Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L 316, 15.12.2000, pp. 1-10.

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 50, 25.2.2003, pp. 1-10.

Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office OJ L 132, 29.5.2010, pp. 11-28.

Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless persons and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) OJ L 180, 29.6.2013, pp. 1-30.

Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 222, 5.9.2003, pp. 3-23.

Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice OJ L 180, 29.6.2013, pp. 1-30.

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) OJ L 180, 29.6.2013, pp. 31-59.

Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 39, 8.2.2014, pp. 1-43.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, pp. 1-88.

### **1.2.2. Directives**

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 283, 23.11.1995, pp. 31-50.

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008, pp. 98-107.

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L 337, 20.12.2011, pp. 9-26.

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) OJ L 180, 29.6.2013, pp. 60-95.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180, 29.6.2013, pp. 96-116.

Council Directive 93/40/EEC of 14 June 1993 amending Directives 81/851/EEC and 81/852/EEC on the approximation of the laws of the Member States relating to veterinary medicinal products OJ L 214, 24.8.1993, pp. 31-39.

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31, 6.2.2003, pp. 18-25.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251, 3.10.2003, pp. 12-18.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304, 30.9.2004, p. 12.

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326, 13.12.2005, pp. 13-34.

### **1.2.3. Agreements**

Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland OJ L 53, 27.2.2008, pp. 5-17.

### **1.2.4. Decisions**

Commission Decision of 13 May 2009 on the selection of operators of pan-European systems providing mobile satellite services (MSS) OJ L 149, 12.6.2009, pp. 65-68.

## **2. International treaties of universal and regional scope**

### **2.1. United Nations**

Convention relating to the status of refugees, 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954).

International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, 7 March 1966 (entry into force: 4 January 1969).

International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entry into force: 23 March 1976).

Protocol Relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entry into force: 4 October 1967).

Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, 18 December 1979 (entry into force: 3 September 1981).

Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entry into force: 2 September 1990).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entry into force: 26 June 1987).

### **2.2. Council of Europe**

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, ETS No 005, 4 November 1950 (entry into force: 3 September 1953).

European Agreement on the Abolition of Visas for Refugees, ETS No 31, 20 April 1959 (entry into force: 4 September 1960).

European Agreement on Transfer of Responsibility for Refugees, ETS No 107, 16 October 1980 (entry into force: 1 December 1980).

Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, ETS No 114, 28 April 1983 (entry into force: 1 March 1985).

Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances, ETS No 187, 3 May 2002 (entry into force: 1 July 2013).

### 3. Case-law

#### 3.1. Court of Justice of the European Union

##### 3.1.1. Judgments

Judgment of 16 December 1976, Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, EU:C:1976:188.

Judgment of 8 April 1976, case 48-75, *Jean Noël Royer*, Rept. 1976, 497.

Judgment of 5 March 1980, case 98/79, *Josette Pecastaing v Belgian State*, EU:C:1980:69.

Judgment of 23 April 1986, Court of Justice, case 294/83, *Parti écologiste 'Les Verts' v European Parliament*, EU:C:1986:166, para. 23.

Judgment of 15 May 1986, Case C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206.

Judgment of 15 October 1987, case 222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*, EU:C:1987:442.

Judgment of 19 June 1990, Case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1990:257.

Judgment of 19 November 1991, Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and Others v Italian Republic*, EU:C:1991:428.

Judgment of 14 December 1995, Joined Cases C-430/93 and S-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, EU:C:1995:441.

Judgment of 14 December 1995, Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State*, EU:C:1995:437.

Judgment of 17 September 1997, Case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH and Bundesbaugesellschaft Berlin mbH*, EU:C:1997:413.

Judgment of 21 January 1999, Case C-120/97, *Upjohn Ltd v The Licensing Authority established by the Medicines Act 1968 and Others*, EU:C:1999:14.

Judgment of 9 September 1999, Case C-102/97, *Commission of the European Communities v Federal Republic of Germany*, EU:C:1999:394.

Judgment of 19 March 2002, Case C-476/99, *Lommers v Minister van Landbouw, Natuurbeheer en Visserij*, EU:C:2002:183.

Judgment of 25 July 2002, Case C-50/00, *Unión de Pequeños Agricultores v Council of the European Union*, EU:C:2002:462.

- Judgment of 11 September 2002, case T-13/99, *Pfizer Animal Health SA v Council of the European Union*, EU:T:2002:209.
- Judgment of 30 September 2003, Case C-224/01, *Gerhard Köbler v Republik Österreich*, EU:C:2003:513.
- Judgment of 13 January 2004, Case C-453/00, *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren*, EU:C:2004:17.
- Judgment of 29 April 2004, Joined Cases C-482/01 and C-493/01, *Georgios Orfanopoulos and Others and Raffaele Oliveri*, EU:C:2004:262.
- Judgment of 11 November 2004, Case C-467/02, *Cetinkaya v Land Baden-Württemberg*, EU:C:2004:708.
- Judgment of 16 November 2004, Grand Chamber, Case C-327/02, *Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie*, EU:C:2004:718.
- Judgment of 15 February 2005, Grand Chamber, Case C-12/03 P, *Commission v Tetra Laval*, EU:C:2005:87.
- Judgment of 31 May 2005, Grand Chamber, Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE*, EU:C:2005:333.
- Judgment of 2 June 2005, Case C-136/03, *Georg Dörr v Sicherheitsdirektion für das Bundesland Kärnten and Ibrahim Ünal v Sicherheitsdirektion für das Bundesland Vorarlberg*, EU:C:2005:340.
- Judgment of 31 January 2006, Grand Chamber, Case C-503/03, *Commission of the European Communities v Kingdom of Spain*, EU:C:2006:74.
- Judgment of 15 June 2006, Case C-28/05, *GJ Dokter, Maatschap Van den Top and W Boekhout v Minister van Landbouw, Natuur en Voedselkwaliteit*, EU:C:2006:408.
- Judgment of 19 September 2006, Grand Chamber, Case C-506/04, *Graham J Wilson v Ordre des avocats du barreau de Luxembourg*, EU:C:2006:587.
- Judgment of 13 March 2007, Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, EU:C:2007:163.
- Judgment of 7 June 2007, Joined Cases C-222-225/05, *J. van der Weerd and others v Minister van Landbouw, Natuur en Voedselkwaliteit*, EU:C:2007:31.
- Judgment of 27 July 2007, Case C-349/07, *Sopropé — Organizações de Calçado Lda v Fazenda Pública*, EU: EU:C:2008:746.
- Judgment of 11 December 2007, Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, EU:C:2007:772.
- Judgment of 14 February 2008, Case C-450/06, *Varec SA v État belge*, EU:C:2008:91.
- Judgment of 15 April 2008, Case C-268/06, *Impact v Minister for Agriculture and Food, Minister for Arts, Sport and Tourism, Minister for Communications, Marine and Natural Resources, Minister for Foreign Affairs, Minister for Justice, Equality and Law Reform, Minister for Transport*, EU:C:2008:223.
- Judgment of 6 May 2008, Grand Chamber, Case C-133/06, *European Parliament v Council of the European Union*, EU:C:2008:257.
- Judgment of 3 September 2008, Grand Chamber, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, EU:C:2008:461.
- Judgment of 29 January 2009, Case C-19/08, *Migrationsverket v Edgar Petrosian, Nelli Petrosian, Svetlana Petrosian, David Petrosian and Maxime Petrosian*, EU:C:2009:41.

- Judgment of 29 October 2009, Case C-63/08, *Virginie Pontin v T-Comalux SA*, EU:C:2009:666.
- Judgment of 30 November 2009, Grand Chamber, Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, EU:C:2009:741.
- Judgment of 18 March 2010, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Girogia Iacono v Telecom Italia SpA, Multiservice Srl v Telecom Italia SpA*, EU:C:2010:146.
- Judgment of 8 July 2010, Case C-246/09, *Susanne Bulicke v Deutsche Büro Service GmbH*, EU:C:2010:418.
- Judgment of 22 December 2010, Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, EU:C:2010:811.
- Judgment of 22 December 2010, Case C-517/09, *RTL Belgium SA, formerly TVi SA*, EU:C:2010:821.
- Judgment of 28 April 2011, Case C-61/11 PPU, *Hassen El Dridi, alias Soufi Karim*, EU:C:2011:268.
- Judgment of 14 June 2011, Case C-196/09, *Paul Miles and Others v Écoles européennes*, EU:C:2011:388.
- Judgment of 28 July 2011, Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, EU:C:2011:524.
- Judgment of 6 December 2011, Grand Chamber, Case C-329/11, *Alexandre Achughbabian v Préfet du Val-de-Marne*, EU:C:2011:807.
- Judgment of 8 December 2011, Case C-386/10 P, *Chalkor v Commission*, EU:C:2011:815.
- Judgment of 21 December 2011, Grand Chamber, Joined Cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department and ME, ASM, MT, KP and EH v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, EU:C:2011:865.
- Judgment of 3 May 2012, Case C-620/10, *Migrationsverket v Nurije Kastrati, Valdrina Kastrati and Valdrin Kastrati*, EU:C:2012:265.
- Judgment of 27 September 2012, Case C-179/11, *Cimade and Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, EU:C:2012:594.
- Judgment of 4 October 2012, Case C-249/11, *Hristo Byankov v Glaven sekretar na Ministerstvo na vatrešnite raboti*, EU:C:2012:608.
- Judgment of 6 November 2012, Grand Chamber, Case C-245/11, *K v Bundesasylamt*, EU:C:2012:685.
- Judgment of 22 November 2012, Case C-277/11, *MM v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2012:744.
- Judgment of 31 January 2013, Case C-175/11, *HID and BA v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2013:45.
- Judgment of 11 April 2013, Case C-260/11, *The Queen, on the application of: David Edwards, Lilian Palikaropoulos v Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs*, EU:C:2013:221.
- Judgment of 13 May 2013, Case C-528/11, *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet*, EU:C:2013:342.
- Judgment of 30 May 2013, Case C-534/11, *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, EU:C:2013:343.

- Judgment of 4 June 2013, Grand Chamber, Case C-300/11, *ZZ v Secretary of State for the Home Department*, EU:C:2013:363.
- Judgment of 6 June 2013, Case C-648/11, *The Queen, on the application of: MA, BT, DA v Secretary of State for the Home Department*, EU:C:2013:367.
- Judgment of 27 June 2013, Case C-93/12, *ET Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie' — Razplasztatelna agentsia*, ECLI:EU:C:2013:432.
- Judgment of 18 July 2013, Grand Chamber, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi*, EU:C:2013:518.
- Judgment of 10 September 2013, Case C-383/13 PPU, *M.G. and N.R.*, EU:C:2013:533.
- Judgment of 3 October 2013, Grand Chamber, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, EU:C:2013:625.
- Judgment of 13 November 2013, Grand Chamber, Case C-4/11, *Bundesrepublik Deutschland v Kaveh Puid*, EU:C:2013:740.
- Judgment of 10 December 2013, Grand Chamber, Case C-394/12, *Shamso Abdullahi v Bundesasylamt*, EU:C:2013:813.
- Judgment of 8 May 2014, Case C-604/12, *HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, EU:C:2014:302.
- Judgment of 12 June 2014, Case C-314/13, *Užsienio reikalų ministerija, Finansinių nusikaltimų tyrimo tarnyba, v Vladimir Peftiev, BelTechExport ZAO, Sport-Pari ZAO, BT Telecommunications PUE*, EU:C:2014:1645.
- Judgment of 17 July 2014, Joined Cases C-141/12 and C-372/12, *YS v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v M and S*, EU:C:2014:2081.
- Judgment of 5 November 2014, Case C-166/13, *Sophie Mukarubega v Préfet de police*, EU:C:2014:2336.
- Judgment of 2 December 2014, Grand Chamber, Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, EU:C:2014:2406.
- Judgment of 11 December 2014, Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, EU:C:2014:2431.
- Judgment of 18 December 2014, Case C-562/13, *Centre Public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida*, EU:C:2014:2453.
- Judgment of 1 October 2015, Case C-290/14, *Skerdjan Celaj*, EU:C:2015:640.
- Judgment of 6 October 2015, Case C-61/14, *Orizzonte Salute — Studio Infermieristico Associato v Azienda Pubblica di Servizi alla persona San Valentino — Città di Levico Terme and Others*, EU:C:2015:655.
- Judgment of 17 December 2015, Case C-239/14, *Abdoulaye Amadou Tall v Centre public d'action sociale de Huy*, EU:C:2015:824.
- Judgment of 15 February 2016, Grand Chamber, Case C-601/15 PPU, *JN v Staatssecretaris voor Veiligheid en Justitie*, EU:C:2016:84.
- Judgment of 17 March 2016, Case C-695/15 PPU, *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal*, EU:C:2016:188.
- Judgment of 5 April 2016, Grand Chamber, Joined Cases C-404/15 and C-695/15 PPU, *Pál Aranyosi and Robert Căldăraru*, EU:C:2016:198.

Judgment of 7 June 2016, Grand Chamber, Case C-63/15, *Mehrdad Ghezlbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409.

Judgment of 7 June 2016, Case C- 47/15, *Sélina Affum v Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, EU:C:2016:408.

Judgment of 7 June 2016, Grand Chamber, Case C-155/15, *George Karim v Migrationsverket*, EU:C:2016:410.

Judgment of 9 February 2017, case 560/14, *M v Minister for Justice and Equality, Ireland, Attorney General*, EU:C:2017:101.

Judgment of 16 February 2017, Case C-578/16 PPU, *CK and others v Republika Slovenija*, EU:C:2017:127.

Judgment of 7 March 2017, Case C-638/16 PPU, *X and X v État belge*, ECLI:EU:C:2017:173.

Judgment of 15 March 2017, Case C-528/15, *Al Chodor*, EU:C:2017:213.

Judgment of 3 April 2017, Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*.

Judgment of 26 July 2017, Case C-670/16, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, EU:C:2017:587.

Judgment of 26 July 2017, Case C-646/16, *Khadija Jafari and Zainab Jafari v Bundesamt für Fremdenwesen und Asyl*, EU:C:2017:586.

Judgment of 26 July 2017, Case C-490/16, *AS v Republika Slovenija*, EU:C:2017:585.

Judgment of 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, EU:C:2017:631

Judgment of 13 September 2017, Case C-60/16, *Mohammad Khir Amayry v Migrationsverket*, EU:C:2017:675.

### **3.1.2. Opinions of advocates general**

Opinion of Advocate General Campos Sánchez-Bordona of 6 April 2017, case no C-348/16, *Moussa Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano*, EU:C:2017:591.

Opinion of Advocate General Sharpston of 20 June 2017, case 670/16, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, EU:C:2017:480.

Opinion of Advocate General Sharpston, of 20 July 2017, case no C-201/16, *Majid (also known as Madzhdi) Shiri v Bundesamt für Fremdenwesen und Asyl*, ECLI:EU:C:2017:579

### **3.1.3. Orders**

Order of 14 May 2008, Case C-109/07, *Jonathan Pilato v Jean-Claude Bourgault*, EU:C:2008:274.

Order of 5 April 2017, Case C-36/17, *Daher Muse Ahmed v. Federal Republic of Germany*, ECLI:EU:C:2017:273.

### **3.1.4. CJEU opinions**

Opinion 2/13 of the Court of 18 December 2014, EU:C:2014:2454.

Opinion 201/16 of the Court of 20 July 2017, EU:C:2017:579.

### 3.1.5. Pending references before the CJEU

Request for a preliminary ruling by the Administrativen sad Sofia-grad (Bulgaria) of 18 November 2016, case registered as C-585/16.

Request for a preliminary ruling by the Administrativen sad Sofia-grad (Bulgaria) lodged on 19 December 2016 — *Nigyar Rauf Kaza Ahmedbekova, Rauf Emin Oglu Ahmedbekov v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, (Case C-652/16) at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CN0652&from=EN>.

Request for a preliminary ruling by the Supreme Court (Slovakia) of 6 March 2017, case registered as C-113/17

Request for a preliminary ruling by the Bundesverwaltungsgericht (Germany) lodged on 23 May 2017 — *Ibrahim Bashar v Federal Republic of Germany* (Joined Cases C-297/17, C-318/17) (2017/C 309/26), (2017/C 309/29) at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CN0297&qid=1506034865355&from=EN>.

## 3.2. European Court of Human Rights

### 3.2.1. Admissibility decisions of the European Court of Human Rights

Decision of 19 January 1999, *Ould Barar v Sweden*, application no 42367/98.

Decision of 12 September 2000, *Goldstein v Sweden*, application no 46636/99.

Decision of 9 July 2002, *Venkadajalarasarma v the Netherlands*, application no 58510/00.

Decision of 20 September 2011, *Haji Hussein v Sweden*, application no 18452/11.

Decision of 7 May 2013, *LH and VS v Belgium*, application no 67429/10.

### 3.2.2. Judgments of the European Court of Human Rights

Judgment of 7 December 1976, *Handyside v United Kingdom*, application no 5493/72.

Judgment of 9 October 1979, *Airey v Ireland*, application no 6289/73.

Judgment of 25 March 1983, *Silver v United Kingdom*, applications nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75.

Judgment of 27 April 1988, *Boyle and Rice v United Kingdom*, application nos 9659/82 and 9658/82.

Judgment of 7 July 1989, *Soering v United Kingdom*, application no 14038/88.

Judgment of 20 March 1991, *Cruz Varas and Others v Sweden*, application no 15576/89.

Judgment of 30 October 1991, *Vilvarajah and Others v United Kingdom*, application nos 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87.

Judgment of 23 October 1995, *Schmautzer v Austria*, application no 15523/89.

Judgment of 15 November 1996, Grand Chamber, *Chahal v United Kingdom*, application no 22414/93.

Judgment of 19 February 1998, *Kaya v Turkey*, application no 22729/93.

Judgment of 19 February 1998, *Bahaddar v Netherlands*, application no 25894/94.

Judgment of 12 May 2000, *Khan v United Kingdom*, application no 35394/97.

- Judgment of 11 July 2000, *Jabari v Turkey*, application no 40035/98.
- Judgment of 5 October 2000, Grand Chamber, *Maaouia v France*, application no 39652/98.
- Judgment of 26 October 2000, Grand Chamber, *Kudła v Poland*, application no 30210/96.
- Judgment of 6 March 2001, *Hilal v United Kingdom*, application no 45276/99.
- Judgment of 4 May 2001, *Hugh Jordan v United Kingdom*, application no 24746/94.
- Judgment of 5 February 2002, *Čonka v Belgium*, application no 51564/99.
- Judgment of 6 May 2003, *Kleyn and others v the Netherlands*, applications nos 39343/98, 39651/98, 43147/98 and 46664/99.
- Judgment of 4 February 2005, Grand Chamber, *Mamatkulov and Askarov v Turkey*, application nos 46827/99 and 46951/99.
- Judgment of 12 April 2005, *Shamayev and others v Georgia and Russia*, application no 36378/02.
- Judgment of 17 January 2006, *Aoulmi v France*, application no 50278/99.
- Judgment of 29 March 2006, *Scordino v Italy* (No 1), application no 36813/97.
- Judgment of 11 January 2007, *Salah Sheekh v the Netherlands*, application no. 1948/04.
- Judgment of 26 April 2007, *Gebremedhin [Gaberamadhien] v France*, application no 25389/05.
- Judgment of 20 September 2007, *Sultani v France*, application no 45223/05.
- Judgment of 28 February 2008, Grand Chamber, *Saadi v Italy*, application no 37201/06.
- Judgment of 27 May 2008, Grand Chamber, *N v United Kingdom*, application no 26565/05.
- Judgment of 17 July 2008, *NA v United Kingdom*, application no 25904/07.
- Judgment of 11 December 2008, *Muminov v Russia*, application no 42502/06.
- Judgment of 22 September 2009, *Abdolkhani and Karimnia v Turkey*, application no 30471/08.
- Judgment of 18 February 2010, *Baysakov and others v Ukraine*, application no 54131/08.
- Judgment of 2 March 2010, *Al-Saadoon and Mufdhi v United Kingdom*, application no 61498/08.
- Judgment of 9 March 2010, *RC v Sweden*, application no 41827/07.
- Judgment of 29 July 2010, *Mengesha Kimfe v Switzerland*, application no 24404/05.
- Judgment of 21 January 2011, Grand Chamber, *MSS v Belgium and Greece*, application no 30696/09.
- Judgment of 23 June 2011, *Diallo v the Czech Republic*, application no 20493/07.
- Judgment of 28 June 2011, *Sufi and Elmi v United Kingdom*, applications nos 8319/07 and 11449/07.
- Judgment of 17 January 2012, *Omar Othman (Abu Qatada) v United Kingdom*, application no 8139/09 2012.
- Judgment of 2 February 2012, *IM v France*, application no 9152/09.
- Judgment of 23 February 2012, Grand Chamber, *Hirsi Jamaa and Others v Italy*, application no 27765/09.
- Judgment of 10 April 2012, *Babar Ahmad and others v United Kingdom*, applications nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09.
- Judgment of 2 October 2012, *Singh and others v Belgium*, application no 33210/11.

Judgment of 13 December 2012, Grand Chamber, *De Souza Ribeiro v France*, application no 22689/07.

Judgment of 28 March 2013, *JK v Austria*, application no 2964/12.

Judgment of 6 June 2013, *Mohammed v Austria*, application no 2283/12.

Judgment of 23 July 2013, *MA v Cyprus*, application no 41872/10.

Judgment of 10 October 2013, *KK v France*, application no 18913/11.

Judgment of 22 April 2014, *AC and others v Spain*, application no 6528/11.

Judgment of 4 September 2014, *Trabelsi v Belgium*, application no 140/10.

Judgment of 4 November 2014, application No 29217/12, *Tarakhel v Switzerland*.

Judgment of 19 January 2016, *MD and MA v Belgium*, application no 58689/12.

Judgment of 23 March 2016, Grand Chamber, *FG v Sweden*, application no 43611/11.

Judgment of 23 August, 2016, Grand Chamber, *JK v Sweden*, application no 59166/12.

Judgment of 13 December 2016, Grand Chamber, *Paposhvili v Belgium*, application no 41738/10.

Judgment of 15 December 2016, Grand Chamber, application No 16483/12, *Khlaifia and others v Italy*.

Judgment of 12 January 2017, *Kebe and others v Ukraine*, application no 12552/12.

### 3.3. Views of UN treaty bodies

Committee against Torture, views of 28 April 1997, *Gorki Ernesto Tipia Paez v Sweden*, UN Doc CAT/C/18/D/39/1996.

Committee against Torture, views of 21 June 1999, *MBB v Sweden*, UN Doc CAT/C/22/D/104/1998.

Human Rights Committee, views of 11 November 1993, *Kindler v Canada*, UN Doc CCPR/C/48/D/470/1991.

#### 3.3.1. The general court (first chamber, extended composition)

EU general court, orders of 28 February 2017, cases of T-192/16, T-193/16 and T-257/16, *NF V European Council*, ECLI:EU:T:2017:128-130.

### 3.4. Courts and tribunals of EU Member States

#### 3.4.1. Austria

Constitutional Court (Verfassungsgerichtshof), judgment no G31/98, G79/98, G82/98, G108/98 of 24 June 1998.

Constitutional Court, judgment of 5 December 2011, no U2018/11 (see EDAL English summary).

Constitutional Court, judgment of 14 March 2012, no U 466/11 and U 1836/11.

Constitutional Court, judgment of 25 September 2013, no U1937-1938/2012 (see EDAL English summary).

Constitutional Court, judgment of 16 June 2014, *U2543/2013*, AT:VFGH:2014:U2543.2013.

### 3.4.2. Belgium

Constitutional Court (Grondwettelijk Hof/Cour Constitutionnelle), judgment of 16 January 2014, no 5488 (see EDAL English summary).

Constitutional Court, judgment of 27 January 2016, 13/2016, Nos 6094 and 6095.

Council for Aliens Law Litigation (Raad Voor Vreemdelingenbetwistingen/Conseil du contentieux des étrangers), judgment of 15 March 2010, no 40.136 (see EDAL English summary).

Council for Aliens Law Litigation, judgment of 13 May 2011, no 61.439 (see EDAL English summary).

Council for Aliens Law litigation, judgment of 13 July 2015, no 149 562.

Council for Aliens Law litigation, judgment of 15 February 2017, no 182 277.

### 3.4.3. Czech Republic

Constitutional Court (Ústavní soud České republiky), judgment no 9/2010 Coll., which came into effect in January 2010.

Constitutional Court, judgment of 12 April 2016, I.ÚS 425/16.

Supreme Administrative Court (Nejvyšší správní soud), judgment of 17 September 2010, *MY v Ministry of Interior*, 2 Azs 14/2010-92 (see EDAL English summary).

Supreme Administrative Court, judgment of 6 March 2013, *JJ v Ministry of the Interior*, 3 Azs 6/2011-96 (see EDAL English summary).

Supreme Administrative Court, judgment of 24 July 2013, *DB v The Ministry of the Interior*, 4 Azs 13/2013-34 (see EDAL English summary).

Supreme Administrative Court, judgment of 24 May 2016, 4 Azs 98/2016 -20.

Supreme Administrative Court, judgment of 12 September 2016, No 5 Azs 195/2016-22, *MO v Ministry of Interior*.

Supreme Administrative Court, judgment of 5 January 2017, No 2 Azs 222/2016-24, *JDCV v Ministry of Interior*.

Supreme Administrative Court, judgment of 12 January 2017, No 5 Azs 229/2016-44, *OO v Ministry of Interior*.

### 3.4.4. France

Council of State (Conseil d'Etat), judgment of 4 March 2013, *ELENA and Others*, applications nos 356490, 356491, 356629.

Council of State, judgment of 13 November 2013, *La Cimade et M. XXXXXXX*, nos 349735 and 349736, ECLI:FR:CEASS:2013:349735.20131113.

Council of State, judgment of 10 October 2014, *Association ELENA and others, Association FORUM REFUGIES-COSI*, application nos 375474 and 375920, in *Contentieux des réfugiés, Jurisprudence du Conseil d'Etat et de la Cour nationale de droit d'asile, Année 2014*, 2015, pp. 13-16.

Council of State, judgment of 5 June 2015, *OFPRA v M. B.*, no 376783, ECLI:FR:CESSR:2015:376783.20150605.

Council of State, judgment of 17 June 2015, *OFPRA c. M. S.*, no 369021 ECLI:FR:CESSR:2015:369021.20150617.

Council of State, judgment of 17 October 2016, *Mme B. A.*, no 393852, ECLI:FR:CECHS:2016:393852.2016101.

Council of State, judgment of 30 November 2016, *M. A. B.*, no 388766, ECLI:FR:CECHS:2016:388766.20161130.

Council of State, judgment of 30 December 2016, *Association ELENA and Others*, applications nos 395058, 395075, 395133, 395383, ECLI:FR:CECHR:2016:395058.20161230.

### 3.4.5. Germany

Administrative Court of Aachen (Verwaltungsgericht Aachen), judgment of 28 October 2015, 8 K 299/15.A.

Higher Administrative Court of Baden-Württemberg, judgment of 24 June 2015, A 6 S 1259/14.

Administrative Court of Berlin, judgment of 11 September 2016, 33 K 152/15.A.

Administrative Court of Trier, judgment of 25 September 2014, 2 K 185/14.TR.

Federal Administrative Court (Bundesverwaltungsgericht), judgment of 15 January 2008, *BVerwG 1 C 17.07*, DE:BVerwG:2008:150108U1C17.07.0,

Federal Administrative Court, judgment of 9 December 2010, *BVerwG 10 C 13.09*, BVerwG:2010:091210U10C13.09.0.

Federal Administrative Court, judgment of 4 September 2012, *BVerwG 10 C 13.11*, BVerwG:2012:040912U10C13.11.0.

Federal Administrative Court, judgment of 5 September 2013, case 10 C 1.13, DE:BVerwG:2013:050913U10C1.13.0.

Federal Administrative Court, decision of 19 March 2014, *10 B 6/14*, DE:BVerwG:2014:190314B10B6.14.0.

Federal Administrative Court, judgment of 17 June 2014, *BVerwGE 10 C 7.13*, BVerwG:2014:170614U10C7.13.0, para. 26, available in English at: [www.bverwg.de](http://www.bverwg.de).

Federal Administrative Court, judgment of 17 September 2015, case 1 C 26.14, DE:BVerwG:2015:170915U1C26.14.0.

Federal Administrative Court, judgment of 14 December 2016, *BVerwG 1 C 4.16*, BVerwG:2016:141216U1C4.16.0.

Federal Administrative Court, decisions of 23 March 2017, 1 C 17.16, ECLI:DE:BVerwG:2017:230317B1C17.16.0; 1 C 18/16..16, ECLI:DE:BVerwG:2017:230317B1C18.16.0 and 1 C 20.16, ECLI:DE:BVerwG:2017:230317B1C20.16.0.

Federal Constitutional Court (Bundesverfassungsgericht), judgment of 14 May 1996, 2 BvR 1938/93, BVerfGE 94.

Federal Constitutional Court, judgment of 15 May 1996, 2 BvR 1507/93, BVerfGE 94, 115.

Federal Court of Justice (Bundesgerichtshof), order of 7 July 2016, case *V ZB 21/16*, DE:BGH:2016:070716BVZB21.16.0.

Federal Court of Justice, judgment of 17 June 2010, *V ZB/13/10*.

Federal Administrative Court (Bundesverwaltungsgericht), judgment of 1 June 2017, 1 C 9.17, ECLI:DE:BVerwG:2017:010617U1C9.17.0.

Higher Administrative Court of Hessen, judgment of 4 November 2016, 3 A 1292/16.

### **3.4.6. Greece**

Council of State, judgments No 2347/2017 (Plenary) (in Greek) and No 2348/2017 (Plenary).

### **3.4.7. Ireland**

High Court, judgment of 28 October 2011, *LH v Minister for Justice* [2011] IEHC 406.

High Court, judgment of 13 December 2011, *JK (Uganda) v Minister for Justice and Equality* [2011] IEHC 473.

High Court, judgment of 26 July 2017, *U v Refugee Appeals Tribunal & ors* [2017] IEHC 490.

### **3.4.8. Italy**

Court of Cassation, judgment of 8 September 2011, no 18493/2011.

### **3.4.9. Netherlands**

Council of State (Raad van State), judgment of 19 February 2016, case *201505706/1/V3*, NL:RVS:2016:563.

Council of State, judgments of 13 April 2016, nos *201506502/1/V2* and *201507952/1/V2* (both with link to English summary of judgment), ECLI:NL:RVS:2016:890 and ECLI:NL:RVS:2016:891.

Council of State, judgment of 14 September 2016, *201603036/1/V2*, ECLI:NL:RVS:2016:2474 (see [unofficial translation by UNHCR](#)).

Council of State, judgment of 1 February 2017, no *201606592/1/V2*, ECLI:NL:RVS:2017:210.

Council of State, judgment of 18 January 2017, case *201608443/1/V3*.

Court of The Hague, judgment of 13 June 2016, *AWB 16/10406*, ECLI:NL:RBDHA: 2016:6624 (see [EDAL English summary](#)).

District Court of Zwolle, judgment of 24 May 2011, *AWB 11/38687* (see [EDAL English summary](#)).

### **3.4.10. Poland**

Regional Administrative Court of Warsaw, judgment of 13 June 2012, V SA/Wa 2332/11.

Supreme Administrative Court, judgment of 24 July 2011, II OSK 557/10 (see [EDAL English summary](#)).

### **3.4.11. Slovakia**

Supreme Court, judgment of 17 January 2012, *MS v Ministry of the Interior of the Slovak Republic*, 1Sža/59/2011 (see [EDAL English summary](#)).

### **3.4.12. Slovenia**

Constitutional Court, judgment of 26 May 2005, Up — 338/05-11U-I176/05.

Supreme Court, judgment 16 December 2009, I Up 63/2011 (see [EDAL English summary](#)).

### 3.4.13. Sweden

Migration Court of Appeal, judgment of 24 October 2011, UM 2599-11 (see EDAL English summary).

Migration Court of Appeal, judgment of 11 June 2012, UM 9681-10, MIG 2012:9 (see EDAL English summary).

Migration Court of Appeal, judgment of 20 August 2015, UM 3266-14 (see EDAL English summary).

### 3.4.14. United Kingdom

Supreme Court, judgment of 19 February 2014, *R (on the application of EM (Eritrea)) v Secretary of the Home Department* [2014] UKSC 12.

High Court of Justice, Queen's Bench Division (administrative court), Judgment of 5 August 2016, *Ibrahimi & Abasi v Secretary of State for the Home Department*, Case No.CO/5201/2015&CO/5067/2015.

## 3.5. Courts and tribunals of non-EU Member States

Switzerland, Federal Administrative Court (Bundesverwaltungsgericht/Tribunal administratif fédéral), judgment of 30 January 2009, Abt. V, E-533/2009.

Switzerland Federal Administrative Court, judgment of 16 August 2011, *D-2076/2010 (BVGE 2011/35)*.

Switzerland Federal Administrative Court, judgment of 9 October 2013, *D-3349/2013*.

Switzerland Federal Administrative Court, judgment of 12 March 2015, case E-6629/2014, *BVGE 2015/4*, E.4.3.

Switzerland Federal Administrative Court, judgment of 13 March 2015, case E-641/2015, *BVGE 2015/9*, consideration 8.

Switzerland Federal Court (Bundesgericht/Tribunal fédéral), judgment of 2 May 2016, case *2C\_207/2016*, consideration 4.

Switzerland Federal Court, judgment of 26 April 2017, joined cases *2C\_1052/2016 and 2C\_1053/2016*.

# Appendix B: Methodology

## Methodology for the development this analysis

Although seeking to work as far as possible within the framework of the EASO methodology for the professional development series as a whole, the development of this analysis, as one of the four subjects being dealt with under the contract between IARLJ-Europe and EASO to produce core judicial training materials, required a modified approach. It has already been observed in the section on [contributors](#) (p. 3) that the drafting process had two main components: drafting undertaken by a drafting team of experts; and review, guidance and overall supervision of that team's drafting work by an editorial team (ET) composed exclusively of judges.

### Preparatory phase

During the preparatory phase, the ET, in consultation with the drafting team, considered and agreed the scope, structure and content of the analysis. On this basis, the drafting team prepared the following.

1. A provisional bibliography of relevant resources and materials available on the subject.
2. An interim compilation of relevant jurisprudence on the subject.
3. A sample of work in progress.
4. A preparatory background report which included a provisional detailed structure for the analysis and a report on progress.

These materials were shared with the ET which provided both general guidance and more specific feedback in the form of instructions to the drafting team regarding the further development of the analysis and compilation of jurisprudence.

### Drafting phase

The drafting team developed a draft of the analysis and compilation of jurisprudence, in accordance with the *EASO style guide*, using desk-based documentary research and analysis of legislation, case-law, training materials and any other relevant literature, such as books, reports, commentaries, guidelines, and articles from reliable sources. Under the coordination of the team leader, sections of the analysis and the compilation of jurisprudence were allocated to team members for initial drafting. These initial drafts were then considered by other members of the team with a full exchange of views followed by redrafting in the light of those discussions.

The first draft, completed by the drafting team, was shared with the ET which was charged with reviewing the draft with a view to assisting the drafting team to enhance its quality. Accordingly, the ET provided further instructions to the drafting team concerning the structure, format and content. Pursuant to these instructions, the drafting team made further amendments and submitted a second draft to the ET which was reviewed and further recommendations made for amendment.

## External consultation

The draft judicial analysis and compilation of jurisprudence was shared by EASO with the EASO network of members of courts and tribunals, UNHCR and members of EASO's consultative forum who were invited to review the material and provide feedback with a view to assisting the ET in further enhancing quality. As part of this process comments were sought and received from a judge of the CJEU and a judge of the ECtHR.

The feedback received was taken into consideration by the ET which reached conclusions on the resultant changes that needed to be made. Revisions were made by the team of experts under the guidance and supervision of the ET and final amendments were then made by the ET.

# Appendix C: Select bibliography

## 1. Official documents

Council of the European Union, *Note of the Presidency of 22 March 2013*, ST 7695 2013 INIT.

Council of the European Union, *Statement of the Council's Reasons of 6 June 2013*, ST 8260 2013 REV 2 ADD 1.

EASO, *Country of origin information report, South and Central Somalia: country overview*, August 2014.

EASO, *Article 15(c) Qualification Directive (2011/95/EU) — A judicial analysis*, December 2014.

EASO, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) — A judicial analysis*, 2016.

EASO, *Ending international protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) — A judicial analysis*, December 2016.

European Commission, *Commission staff working document accompanying document to the Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system — Annex to the communication on the evaluation of the Dublin system {COM(2007) 299 final}*, SEC(2007) 742.

European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 3 December 2008, COM(2008) 820 final.

European Commission, Commission Staff Working Document accompanying the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection — Impact Assessment, 21 October 2009, SEC(2009) 1376.

European Commission, Annexes to the Commission Staff Working Document accompanying the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection Impact Assessment, 21 October 2009, SEC(2009) 1376 (Part II).

European Commission, Recommendation of 1.10.2015 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks, C C(2015) 6250 final.

European Commission, *Infringement Decisions: Implementation of Common European Asylum System; Hungarian Asylum Legislation*, 10 December 2015.

European Council, Presidency Conclusions, Tampere European Council 15 and 16 October 1999, SN 200/99, Brussels.

European Council, *EU-Turkey Statement*, 18 March 2016, Press release No 144/16.

## 2. Publications

### 2.1. Reference materials

- Battjes, H., *European asylum law and international law* (Martinus Nijhoff Publishers, 2006).
- Boeles, P., den Heijer, M., Lodder, G., and Wouters, K., *European Migration Law* (Intersentia, 2014).
- Goodwin-Gill, G.S., and McAdam, J., *The refugee in international law* (3rd edn, OUP, 2007).
- Grahl-Madsen, A., *The Status of Refugees in International Law* (Vols, I & II, A.W. Sitjhoff, 1966 and 1972).
- Hailbronner, K., and Thym, D. (eds.), *EU immigration and asylum law, a commentary* (2nd edn, C.H. Beck, Hart & Nomos, 2016).
- Hathaway, J.C., *The rights of refugees under international law* (CUP, 2005).
- Hathaway, J.C., and Foster, M., *The law of refugee status* (2nd edn, CUP, 2014).
- Peers, S., Moreno-Lax, V., Garlick, M., and Guild, E. (eds.), *EU immigration and asylum law (text and commentary): Second Revised Edition. Vol. 3: EU Asylum Law* (2nd edn, Brill, 2015).
- Reneman, M., *EU asylum procedures and the right to an effective remedy* (Hart Publishing, 2014).
- Zimmermann, A., *The 1951 Convention relating to the status of refugees — a commentary* (OUP, 2011).

### 2.2. UNHCR publications

- UNHCR, *Global consultations on international protection/third track: asylum processes (fair and efficient asylum procedures)*, 31 May 2001.
- UNHCR, *Fair and efficient asylum procedures: a non-exhaustive overview of applicable international standards*, 2005.
- UNHCR, *The European asylum procedures directive in legal context*, 2006.
- UNHCR, *Improving asylum procedures: comparative analysis and recommendations for law and practice*, March 2010.
- UNHCR, *Handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Convention and 1967 Protocol relating to the status of refugees*, 1979, reissued December 2011.
- UNHCR, *Comments on the European Commission's Amended Proposal for a Directive of the European Parliament and the Council on common procedures for the granting and withdrawing international protection status (Recast) COM(2011) 319 final*, January 2012.
- UNHCR, *Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*, 2012.
- UNHCR, *UNHCR recommendations on important aspects of refugee protection in Italy*, 2012.
- UNHCR, *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' compilation report — Universal Periodic Review: Germany*, 2012.
- UNHCR, *Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*, 2012.

UNHCR, *The case law of the European regional courts: The Court of Justice of the European Union and the European Court of Human Rights: refugees, asylum-seekers, and stateless persons*, 2015.

UNHCR Executive Committee, *Note on non-refoulement*, 23 August 1977, UN Doc EC/SCP/2.

UNHCR Executive Committee, *Conclusion No 8 (XXVIII): Determination of refugee status*, 12 October 1977.

UNHCR Executive Committee, *Conclusion No 30 (XXXIV): The problem of manifestly unfounded or abusive applications for refugee status or asylum*, 20 October 1983.

UNHCR Executive Committee, *Conclusion No 41 (XXXVII): General conclusion on international protection*, 13 October 1986.

UNHCR Executive Committee, *Conclusion No 58 (XL): Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection*, 13 October 1989.

UNHCR Executive Committee, *Conclusion No 64: Refugee women and international protection*, 5 October 1990.

UNHCR Executive Committee, *Conclusion No 73: Refugee protection and sexual violence*, 8 October 1993.

UNHCR Executive Committee, *Conclusion No 77 (XLVI): General conclusion on international protection*, 20 October 1995.

UNHCR Executive Committee, *Conclusion No 79 (XLVII): General conclusion on international protection*, 11 October 1996.

UNHCR Executive Committee, *Conclusion No 81 (XLVIII): General conclusion on international protection*, 17 October 1997.

UNHCR Executive Committee, *Conclusion No 105 (LVII): Conclusion on women and girls at risk*, 6 October 2006.

### 2.3. UN human rights bodies

Committee against Torture, *General comment no 1 on the implementation of Article 3 of the Convention in the context of Article 22*, 16 September 1998, annexed to UN Doc A/53/44.

United Nations Office of the High Commissioner for Human Rights (OHCHR), *Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment ('Istanbul Protocol')*, 2004, HR/P/PT/8/Rev.1.

Committee on the Rights of the Child, *General comment no 12 — the right of the child to be heard*, UN Doc. CRC/C/GC/12, 1. July 2009.

Committee on the Elimination of Discrimination against Women, *General recommendation no 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 14 November 2014, UN Doc CEDAW/C/GC/32.

Human Rights Committee, *General comment no 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, in UN Doc HRI/GEN/1/Rev.1.

Human Rights Committee, *General comment no 31: The nature of the general legal obligation imposed on states parties to the covenant*, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13.

## 2.4. European institution publications

EASO, *Age assessment practice in Europe*, December 2013.

EASO, *Country of origin information report, South and Central Somalia: country overview*, August 2014.

EASO, *Article 15(c) Qualification Directive (2011/95/EU) — A judicial analysis*, December 2014.

EASO, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) — A judicial analysis*, 2016.

EASO, *Ending international protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) — A judicial analysis*, December 2016.

EASO, *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, August 2016, produced by the IARLJ-Europe under contract to EASO.

EASO, *Qualification for international protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, produced by the IARLJ-Europe under contract to EASO.

EASO, *Evidence and credibility assessment in the context of the Common European Asylum System — A judicial analysis*, produced by the IARLJ-Europe under contract to EASO.

EASO and Frontex, *Practical guide: access to the asylum procedure*, 2016.

European Commission, Proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, 24 October 2000, COM(2000) 578 final.

European Commission, Proposal for a Council regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2001] OJ E 334/192, COM/2001/0447 final, 30 October 2001 (Dublin II Commission Proposal).

European Commission, Amended proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, 18 June 2002, COM(2002) 326 final.

European Commission, Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, 2 June 2003, COM(2003) 323.

European Commission, Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, 3 December 2008, COM(2008) 820 final.

European Commission, Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), COM/2008/820 final, 8 December 2008 (Dublin III Commission Proposal).

European Commission, Proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), 21 October 2009, COM(2009) 554 final.

European Commission, Amended proposal for a directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), 1 June 2011, COM(2011) 319 final.

European Commission, Detailed explanation of the amended proposal accompanying the document amended proposal for a directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), 1 June 2011 COM(2011) 319 final annex.

European Commission, Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council on the adoption of a proposal for a directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, 10 June 2013, COM(2013) 411 final.

European Commission, proposal (see European Union, European Commission's Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State, COM(2014) 382 final.

European Commission, Communication from the European Commission to the European Parliament and the Council, towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, 6 April 2016, COM(2016) 197 final.

European Commission, 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, 13 July 2016, COM(2016) 467 final.

European Commission, Proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 4 May 2016, COM(2016) 270 final.

European Union Agency for Fundamental Rights, *Access to effective remedies: the asylum-seeker perspective*, September 2010.

European Union Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration*, 2nd edn, 2014.

European Union Agency for Fundamental Rights, *Opinion of the European Union Agency for Fundamental Rights concerning an EU common list of safe countries of origin*, March 2016.

## 2.5. IARLJ publications

IARLJ, *Asylum law*, 1st International Judicial Conference, 1-2 December 1995, London, United Kingdom, 1996.

IARLJ, *Refugee and asylum law: assessing the scope for judicial protection*, 2nd World Conference, 9-11 January 1997, Nijmegen, Netherlands, 1997.

IARLJ, *The realities of refugee determination on the eve of a new millennium: the role of the judiciary/ Les réalités de la détermination du statut de réfugié à l'aube du nouveau millénaire: Rôle du système judiciaire*, 3rd World Conference, October 1998, Ottawa, Canada, 1999.

IARLJ, *The changing nature of persecution/La nature changeante de la persécution*, 4th World Conference, October 2000, Bern, Switzerland, 2001.

IARLJ, *Forced migration and the advancement of international protection/Migración forzada y el avance de la protección internacional*, 7th World Conference, 6-9 November 2006, Mexico City, Mexico, 2006.

- IARLJ, *A Manual for Refugee Law Judges Relating to the European Council Qualification Directive 2004/84/EC and European Council Procedures Directive 2005/85/EC*, 2007.
- IARLJ, *Where to now: charting the future course of international protection*, Proceedings of the 8th World Conference of 28-30 January 2009, Cape Town, South Africa, 2009.
- IARLJ, *Assessment of credibility in refugee and subsidiary protection claims under the EU Qualification Directive: judicial criteria and standards*, prepared by J. Barnes and A. Mackey, 2013.
- EASO, *An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis*, August 2016, produced by the IARLJ-Europe under contract to EASO.
- EASO, *Qualification for international protection (Directive 2011/95/EU) — A judicial analysis*, December 2016, produced by the IARLJ-Europe under contract to EASO.
- EASO, *Evidence and credibility assessment in the context of the Common European Asylum System — A judicial analysis*, produced by the IARLJ-Europe under contract to EASO.
- Chlebny, J., *Power of the judge vis-à-vis new facts that happened after examination of the claim by the administrative authority*, IARLJ 9th World Conference in Bled, 2011.
- Dörig, H. *The test applied by the courts on judicial review*, IARLJ World Conference in Capetown, 2009, 226-236.

## 2.6. NGO publications and others

- European Council on Refugees and Exiles (ECRE), *Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to recast the Asylum Procedures Directive COM(2011) 139 final*, September 2011.
- 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)*, 2014.
- ECRE and Dutch Council for Refugees, *The Application of the EU Charter of Fundamental Rights to asylum procedural law*, 2014.
- European Network of the Council for the Judiciary, *Independence and accountability of the judiciary*, 2013-2014.
- Hungarian Helsinki Committee, *Structural differences and access to country information (COI) at European courts dealing with asylum*, 2011.
- Judicial Group on Strengthening Judicial Integrity, *The Bangalore draft code of judicial conduct 2001*, 2002.
- Red Cross/EU Office, *Opinion of the National Red Cross Societies of the Member States of the European Union and the International Federation of Red Cross and Red Crescent Societies on the proposal for a directive on minimum standards for the qualification and status of third-country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Qualification Directive) and the proposal for a directive on minimum standards on procedures in Member States for granting and withdrawing international protection (Asylum Procedures Directive)*, May 2010.

## 2.7. Academic literature

- Blake, N., and Husain, R., *Immigration, asylum and human rights* (OUP, 2003).
- Bobek, M., 'Why is there no principle of 'procedural autonomy' of the Member States?', in B. De Witte and H.-W. Michlitz (eds.), *The European Court of Justice and the autonomy of the Member States* (Intersentia, 2011), pp. 305-325.
- Cherubini, F., *Asylum law in the European Union* (Routledge, 2014).
- Clayton, G., *Textbook on immigration and asylum law* (2nd edn, OUP, 2006).
- Costello, C., 'The Asylum Procedures Directive and the proliferation of safe country practices: deterrence, deflection and the dismantling of international protection?', *EJML* (2005) 35-69.
- Costello, C., 'The European Asylum Procedures Directive in Legal Context', UNHCR New Issues in Refugee Research, Research Paper No 134, 2006.
- Costello, C., and Hancox, E., 'The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee', in V. Chetail, P. De Bruycker and F. Maiani (eds.), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill/Nijhoff, 2016) 375-445.
- Dörig, H. *Germany: The handling of leading asylum cases by national courts*, *IJRL* (2013) 373-376.
- Duchrow, J., 'Sichere Drittstaaten und Asylverfahren — Das Richtlinienumsetzungsgesetz im Lichte der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte', in R. Hofmann (ed.), *Europäisches Flüchtlings- und Einwanderungsrecht: eine kritische Zwischenbilanz* (Nomos Verlagsgesellschaft, 2008) 99-114.
- Filzwieser, Ch., and Sprung, A., 'Dublin III-Verordnung, Das Europäische Asylzuständigkeitssystem', *Neuer Wissenschaftlicher Verlag*, 2014.
- Gil-Bazo, M., 'The safe-third-country concept in international agreements on refugee protection: assessing state practice', *Netherlands Quarterly of Human Rights* (2015) 42-77.
- Goudappel, F., and Raulus, H., (eds.), *The future of asylum in the European Union: problems, proposals and human rights* (Springer, 2011).
- Hailbronner, K., *Immigration and asylum law and policy in the European Union* (Kluwer Law International, 2000).
- Hofmann, R., and Donath, P., 'Die Asylverfahrensrichtlinie unter besonderer Berücksichtigung völkerrechtlicher Standards', in R. Hofmann and T. Löhr (eds.), *Europäisches Flüchtlings- und Einwanderungsrecht: eine kritische Zwischenbilanz* (Nomos Verlagsgesellschaft, 2008) 19-46.
- Hofmann, R., and Löhr, T., 'Introduction to Chapter V: requirements for refugee determination procedures', in A. Zimmermann (ed.), *The 1951 Convention relating to the status of refugees and its 1967 Protocol: a commentary* (OUP, 2010) 1081-1128.
- Hruschka, K., and Maiani, F., Article 2 APD (recast), in K. Hailbronner and D. Thym (eds.), *EU immigration and asylum law — a commentary* (2nd edn, C.H. Beck/Hart/Nomos, 2016).
- Hyndman, P., *The 1951 Convention and its implications for procedural questions*, *IJRL* (1994) 245-252.
- Kälin, W., Caroni, M., and Heim, L., 'Article 33', in A. Zimmermann (ed.), *The 1951 Convention relating to the status of refugees and its 1967 Protocol — A commentary* (OUP, 2011).
- Kjaergaard, E., *The concept of 'safe third country' in contemporary european refugee law*, *IJRL* (1994) 649-655.

- Kuijjer, M. *Effective remedies as a fundamental right* (European Judicial Training Network, 2014).
- Lambert, H., McAdam, J., and Fullerton, M., *The global reach of european refugee law* (CUP, 2013).
- Lauwaars, R.H., 'The application of Community law by national courts *ex officio*' *Fordham International Law Journal* (2007) 1161-1173.
- Lavenex, S., *Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe* (CEU Press, 2010).
- Mikolajczyk, B., 'Legal aid for applicants for international protection', in V. Chetail, P. De Bruycker and F. Maiani (eds.), *Reforming the Common European Asylum System. The New European Refugee Law* (Brill/Nijhoff, 2016) 446-470.
- Noll, G., 'Seeking asylum at embassies: a right to entry under international law?', *IJRL* (2005) 542-573.
- Peers, S., Hervey, T., Kenner, J. and Ward, A., (eds.), *The EU Charter of Fundamental Rights (A commentary)* (C.H. Beck/Hart/Nomos, 2014).
- Post, D., and Niemann, A., Framing German and European asylum policy: the case of the 'safe-third-country' concept (*Dresdner Arbeitspapiere Internationale Beziehungen* 14, 2005).
- Potacs, M., 'Effet utile als Auslegungsgrundsatz', *Europarecht* (2009) 465 and ff.
- Prechal, S., and Widdershoven, R. J. G. M., 'Redefining the Relationship between 'Rewe effectiveness' and effective judicial protection', *Review of European Administrative Law* (2011).
- Prechal, S., 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?', in C. Paulussen, T. Takács, V. Lazić and B. Van Rompuy (eds.), *Fundamental Rights in International and European Law* (TMC Asser Press, 2016) 143-157.
- Rainey, B., Wicks, E., and Ovey, C., *Jacobs, White & Ovey: The European Convention on Human Rights* (6th edn, OUP, 2014).
- Reneman, M., *Speedy asylum procedures in the EU: striking fair balance between the need to process asylum cases efficiently and the asylum applicant's EU Right to an Effective Remedy*, *IJLR* (2013) 717-748.
- Safjan, M., *A Union of Effective Judicial Protection* (King's College London, 2014).
- Schabas, W., *The European Convention on Human Rights. A Commentary* (OUP, 2015).
- Spijkerboer, T., 'Subsidiarity' and 'arguability': the European Court of Human Rights' case-law on judicial review in asylum cases', *IJRL* (2009) 48-74.
- Spijkerboer, T., and Arbaoui, Y., 'Council Directive 2005/84/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status', in K. Hailbronner (ed.), *EU Immigration and asylum law — commentary* (C.H. Beck/Hart/Nomos, 2010) 1227-1350.
- Staffans, I., *Evidentiary standards of inquisitorial versus adversarial asylum procedures int the light of harmonisation* (European Public Law, 2008).
- Staffans, I., *Judicial protection and the new European asylum regime*, *EJML* (2010) 273-297.
- Strik, T., 'Procedures Directive: An overview', in K. Zwaan (ed.), *The procedures directive: central themes, problem issues, and implementation in selected Member States* (Wolf Legal Publishers, 2008) 7-19.
- Thomas, R. *Administrative justice and asylum appeals: a study of tribunal adjudication* (Hart Publishing, 2011).

- Van Cleynenbreuger, P., 'Case C-69/10, Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration, Judgment of the Court of Justice (Second Chamber) of 28 July 2011', *Common Market Law Review* (2012) 327-348.
- van Dijk, P., van Hoof, F., van Rijn, A., and Zwaak, L., *Theory and practice of the European Convention on Human Rights* (4th edn, Intersentia, 2006).
- Vedsted-Hansen, J., 'Common EU standards on asylum — Optional harmonisation and exclusive procedures?', in E. Guild and P. Minderhoud (eds.), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff Publishers, 2012) 255-271.
- Vedsted-Hansen, J., 'The asylum procedures and the assessment of asylum requests', in V. Chetail and C. Bauloz (eds.), *Research Handbook on International Law and Migration* (Edward Elgar, 2014) 439-458.
- Vedsted-Hansen, J., 'Article 7 (private life, home and communications)', in S. Peers, T. Hervey, J. Kenner and A. Ward (eds.), *The EU Charter of Fundamental Rights. A commentary* (Hart Publishing, 2014) 153-182.
- Vedsted-Hansen, J., 'Asylum Procedures Directive 2013/32/EU', in K. Hailbronner and D. Thym (eds.), *EU immigration and asylum law — A commentary* (2nd edn, C.H. Beck/Hart/Nomos, 2016) 1284-1380.
- Velluti, S., *Reforming the Common European Asylum System: legislative developments and judicial activism of the european courts* (Springer, 2014).
- Weinzierl, R., *Der Asylkompromiss 1993 auf dem Prüfstand: Gutachten zur Vereinbarkeit der deutschen Regelungen über sichere EU-Staaten und sichere Drittstaaten mit der Europäischen Menschenrechtskonvention, dem EU-Recht und dem deutschen Grundgesetz* (Deutsches Institut für Menschenrechte, 2009).
- Zalar, B., *Constitutionalisation of the Implementing Act of the Procedures Directive*, EJML (2008).
- Zalar, B., *Comments on the Court of Justice of the EU's Developing Case-Law on Asylum* IJRL (2013) 377-381.
- Zieck, M., 'Article 35/Article II', in A. Zimmermann (ed.), *The 1951 Convention relating to the status of refugees and its 1967 Protocol: a commentary* (OUP, 2011) 1459-1525.
- Zimmermann, A., and Mahler, C., 'Article 1 A, para. 2', in A. Zimmermann (ed.), *The 1951 Convention relating to the status of refugees and its 1967 Protocol: a commentary* (OUP, 2011) 281-465.
- Zwaan, K., (ed.), *The Procedures Directive: central themes, problem issues, and implementation in selected Member States* (Wolf Legal Publishers, 2008).

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