



# EASO

## Practical Guide on Subsequent Applications

*EASO Practical Guide Series*

December 2021







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Manuscript completed in November 2021

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Luxembourg: Publications Office of the European Union, 2021

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PDF	ISBN 978-92-9485-195-6	doi:10.2847/21167	BZ-04-20-081-EN-N
Print	ISBN 978-92-9485-194-9	doi:10.2847/054405	BZ-04-20-081-EN-C

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# About the guide

**Why was this guide created?** The mission of the European Asylum Support Office (EASO) is to support Member States of the European Union and the associated countries (EU+ countries <sup>(1)</sup>) through common training, common quality standards and common country of origin information, among others. In accordance with its overall aim of supporting Member States in achieving common standards and high-quality processes within the Common European Asylum System, EASO develops common practical tools and guidance.

**How was this guide developed?** This guide was created by experts from across the European Union (EU), with valuable input from the European Commission, the United Nations High Commissioner for Refugees and the European Council on Refugees and Exiles <sup>(2)</sup>. The development was facilitated and coordinated by EASO. Before its finalisation, a consultation on the guide was carried out with all EU+ countries through the EASO Asylum Processes Network.

**Who should use this guide?** This guide is primarily intended for asylum case officers, interviewers and decision-makers, as well as policymakers in the national determining authorities. Additionally, this tool is useful for quality officers and legal advisers, along with any other person working or involved in the field of international protection in the EU context.

**How to use this guide.** This guide on subsequent applications is structured in three parts.

1. Procedural rules, related to the making, registering and lodging of a subsequent application, the admissibility procedure of a subsequent application and the right to remain and its exceptions.
2. Preliminary examination, including aspects such as the situation in which new elements and findings are presented and what ‘significantly adds to the likelihood’ means.
3. Subsequent applications in particular situations, such as:
  - after a decision to reject the previous application as unfounded, manifestly unfounded or inadmissible;
  - after the withdrawal of an application;
  - when a dependent adult/unmarried child lodges a new application after an application has been submitted on their behalf;
  - following an exclusion decision, cessation, revocation, ending or refusal to renew the international protection status;
  - while an appeal against the decision concerning the previous application is still pending;
  - repeat subsequent applications;
  - after the rejected applicant has left the territory or territories of the Member State(s);
  - after a Dublin procedure.

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<sup>(1)</sup> The 27 Member States of the European Union, along with Iceland, Liechtenstein, Norway and Switzerland.

<sup>(2)</sup> The finalised guide does not necessarily reflect the positions of the United Nations High Commissioner for Refugees.

This guidance should be used in conjunction with the *EASO Practical Guide: Evidence assessment*, the *EASO Practical Guide: Qualification for international protection*, the *EASO Guidance on Asylum Procedure: Operational standards and indicators* and the *EASO Practical Guide on the Implementation of the Dublin III Regulation: Personal interview and evidence assessment*.

**How does this guide relate to national legislation and practice?** This is a soft convergence tool. It is not legally binding and reflects commonly agreed standards.

**Disclaimer**

This guide was prepared without prejudice to the principle that only the Court of Justice of the European Union can give an authoritative interpretation of EU law.

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## List of abbreviations

<b>APD</b>	Asylum procedures directive. 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)
<b>CJEU</b>	Court of Justice of the European Union
<b>COI</b>	country of origin information
<b>EASO</b>	European Asylum Support Office
<b>EU</b>	European Union
<b>EU+ countries</b>	Member States of the European Union and associated countries
<b>Member State(s)</b>	Member State(s) of the European Union
<b>QD</b>	Qualification directive. 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)

# Introduction

EU+ countries have been facing increased challenges posed by subsequent applications, in terms of both numbers and content. The percentage of repeat applications <sup>(3)</sup> has grown since 2016: according to Eurostat, in 2016 only 4.45 % of all applicants had lodged an application in the same country before. This figure rose to reach 9.8 % in 2018, 9.6 % in 2019 and 11.6 % in 2020. This means that, by 2020, one applicant out of 10 had already applied for international protection in the same EU+ country before. Next to the rising numbers, the assessment of subsequent applications does give rise to difficulties, and this despite its apparent simplicity. The exact assessment differs depending on the circumstances of the previous application and the way it was concluded. As a result, assessing a subsequent application can be a complex process.

This practical guide is mainly based on the legal provisions of the asylum procedures directive (APD). It aims at providing case officers with guidance on the examination process and the special procedural rules for assessing subsequent applications.

The introductory chapter explains what a subsequent application is. It highlights where special attention has to be paid at the time of the making, registering and lodging of a subsequent application, and lays out the distinct procedural aspects of the admissibility examination. This chapter concludes with the topic of the right to remain and its exceptions. The second chapter explores further the preliminary examination of 'new elements': scenarios in which new elements can be presented; the definition of 'new'; and whether the new element adds significantly to the likelihood of the applicant qualifying as a beneficiary of international protection. The final chapter examines the particularities of the assessment depending on the specific situations in which a subsequent application was submitted and/or how the previous one was concluded.

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<sup>(3)</sup> According to Eurostat, the concept of repeat applications includes subsequent applications (Article 2(q) APD), as well as new asylum applications after discontinuation of the previous application and reopened applications (Article 28(2) APD). For further information, see Eurostat, [Statistics Explained – Glossary: Repeated applicant](#), 22 March 2019.

# 1. Procedural rules

## 1.1. Defining subsequent applications

### 1.1.1. What are subsequent applications?

The APD defines a ‘subsequent application’ as:

‘... 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) [APD]’ <sup>(4)</sup>.

The APD envisages that a subsequent application may be submitted following a final negative decision. There are no other restrictions as to when a subsequent application may be submitted to the competent authorities. A subsequent application may be needed in situations where a significant change arises in the applicant’s personal circumstances or in the situation in their country of origin, regardless of how much time has passed since the issuance of the final decision.

The APD sets out the examination framework within which a subsequent application should be assessed. In particular, it stipulates the minimum conditions for the preliminary examination of a subsequent application in order to take a decision on its admissibility <sup>(5)</sup>. The directive also provides the procedural rules that apply during the preliminary examination of the admissibility procedure (see [Section 1.2 ‘Making, registering and lodging a subsequent application’](#) and [Section 1.3 ‘Admissibility procedure of a subsequent application’](#)) and the specific exceptions from the right to remain on the territory of the host Member State <sup>(6)</sup> in the case of a subsequent application, always taking into account the core principle of *non-refoulement* <sup>(7)</sup> in accordance with the obligations placed on Member States by international and European Union (EU) law (see [Section 1.4 ‘The right to remain in case of subsequent applications’](#)).

### 1.1.2. Why subsequent applications?

The notion of subsequent applications included in the APD derives from the recognition that there might be reasons why an applicant may wish/need to raise a new claim for international protection following a negative decision. The possibility to make a subsequent application is crucial to upholding the principle of *non-refoulement*. EU+ countries are obliged under international law to ensure that applicants are not sent to a country in breach of the principle of *non-refoulement* or in breach of their legal obligations under international human rights treaties.

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<sup>(4)</sup> Article 2(q) APD.

<sup>(5)</sup> Article 40 APD.

<sup>(6)</sup> Article 9 (2) APD.

<sup>(7)</sup> The obligation on states to refrain from expelling or returning a person in any manner whatsoever to a situation in which they may face persecution or torture, inhuman or degrading treatment or punishment.

In this context it is also recognised that subsequent applications are not always submitted based on new evidence or facts. The APD acknowledges that it would be disproportionate to oblige Member States to carry out a new full examination procedure when an applicant makes a subsequent application without presenting new evidence or arguments. In such cases, Member States should be able to dismiss the application as inadmissible <sup>(8)</sup>. The APD <sup>(9)</sup> provides Member States with the option of considering an application as inadmissible in an exhaustive set of cases, including the instance of subsequent applications. However, it should be noted that this is an optional clause, and Member States may also decide to examine such cases on the merits.

### 1.1.3. Making further representations

The APD provides that:

‘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 ...’ <sup>(10)</sup>.

A subsequent application comes after a final negative decision and is subject to a preliminary examination as to whether new elements have arisen or have been presented <sup>(11)</sup>. There are no similar requirements stipulated for situations where an applicant makes ‘further representations’. Therefore, it can be deduced that ‘further representations’ concern the submission of arguments or elements before a final decision on the (previous) application has been taken. Therefore, these elements should be considered as additional – or ‘further’ – representations and examined within the framework of the examination of the (previous) application, either in the first instance or, if a first instance decision refusing international protection has already been delivered, during an appeal process <sup>(12)</sup>. Therefore, if it is established that the previous application is still pending or that an appeal can be submitted whereby any outstanding issues can be brought forward, the new circumstances should be examined as further representations in the context of the pending application or appeal.

With Article 40(1) APD, a connection is established between the examination of the further representations or subsequent application and the application previously submitted. Through this connection, the competent authority can ascertain whether the previous proceedings are pending and whether examination of the new elements can be included therein. If not, the competent authority can proceed to examine the requirements of the preliminary examination as set forth in the APD <sup>(13)</sup>, to determine if new elements or findings have arisen or have been presented. See [Section 3.8 ‘While an appeal against the decision in the previous application is still pending’](#).

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<sup>(8)</sup> Recital 36 APD.

<sup>(9)</sup> Article 33(2) APD.

<sup>(10)</sup> Article 40(1) APD.

<sup>(11)</sup> Article 40(2) APD.

<sup>(12)</sup> The CJEU has clarified the methods for the examination of arguments and evidence as ‘further representations’ in the application of Articles 40(1) and 46(3) APD. See CJEU, judgment of 4 October 2018, *Ahmedbekova*, C-652/16, ECLI:EU:C:2018:801. Summary available in the [EASO Case Law Database](#).

<sup>(13)</sup> Article 40(2) APD.

As in the case of a first application, the examination procedure may involve not only the determining authority but also other authorities required to play a role at the stage of the admissibility procedure <sup>(14)</sup>. This is important in subsequent applications because, in some Member States, other competent authorities such as the police or personnel at border points may conduct admissibility interviews, even though examination of the application remains the competence of the determining authority.

### **Dependant or unmarried minor lodging a new application after a previous application has been submitted on their behalf**

A dependant or an unmarried child may lodge an application after an application has previously been lodged on their behalf <sup>(15)</sup>. For further information see [Section 3.5 'Dependent adult / unmarried child lodging a new application after an application has been submitted on their behalf'](#).

## **1.2. Making, registering and lodging a subsequent application**

### **1.2.1. General principles**

Chapter III APD on procedures at first instance also includes procedural rules for the examination of subsequent applications. Since many of the provisions laid out in the APD in relation to subsequent applications are optional, Member States may establish further national rules regulating the preliminary examination of a subsequent application within the framework of the directive. In any case, the basic principles and guarantees laid out in the APD must be respected at all times <sup>(16)</sup>. In particular:

- the principle of *non-refoulement*;
- the right to remain on the territory pending examination of the application, notwithstanding the well-defined exceptions under Article 41 APD;
- the right to information;
- the right to confidentiality;
- the principle of non-discrimination and gender equality;
- primary consideration of the best interests of the child;
- the right to a fair and efficient asylum procedure;
- the right to an individual, objective and impartial examination;
- the right to an effective remedy.

Respect of the above principles ensures that applicants have effective access to a new asylum procedure. Particularly in relation to subsequent applications, the effective access of applicants to the procedure is further stressed in the APD when providing that national rules regarding the procedural framework for the preliminary examination 'shall not render impossible the access of applicants to a new procedure or

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<sup>(14)</sup> Article 34(2) APD.

<sup>(15)</sup> Article 40(6) APD.

<sup>(16)</sup> For further information, refer to the following tools: EASO, *Guidance on Asylum Procedure: Operational standards and indicators*, September 2019; EASO, *Asylum Procedures and the Principle of Non-refoulement – Judicial analysis*, 2018; EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*, 2018.

result in an effective annulment or severe curtailment of such access' <sup>(17)</sup>. The rationale is not to exclude applicants from a new asylum procedure. This also secures the possibility for the applicant to reapply and submit new facts, if their personal circumstances or the situation in the country of origin have significantly changed, in order to determine whether they qualify for international protection.

In light of the above, an applicant's effective access to the asylum procedure should be safeguarded by Member States in accordance with the provisions of the APD. This applies irrespective of the type of examination procedure to be applied.

### 1.2.2. Guarantees for the applicants

The APD <sup>(18)</sup> reaffirms the Member States' obligation to ensure that the relevant guarantees <sup>(19)</sup> are applied equally in cases of subsequent applications, following the principle that every applicant is entitled to an appropriate examination of their application. The basic guarantees set forth in the APD include the following.

- **Access to information.** The applicant's understanding of the asylum procedure is essential in achieving a fair examination procedure under the APD. Member States are required to provide information on the different asylum procedures <sup>(20)</sup> in time for the applicant to exercise their rights and comply with their obligations and in a language that they understand.

The APD does not define the tools or means through which the information is provided. Thus, general information on the different asylum procedures, including subsequent applications, should be made available by Member States. This information could be disseminated orally or in writing (through brochures, leaflets, designated web pages or mobile applications).

The information must be transmitted in a comprehensive way so that the applicant is able to understand where or how to lodge an asylum application, their rights and obligations, and any other necessary requirement of the procedures.

When making/registering/lodging a subsequent application, the information provided to the applicant must include the aspects of the admissibility procedure. First of all, it should be explained to the applicant what a subsequent application is. This ensures that the applicant is aware of the conditions to be granted access to a new asylum procedure and their rights and obligations during the procedure, including the consequences for not complying with those obligations. The information should include:

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<sup>(17)</sup> Article 42(2), second subparagraph, APD.

<sup>(18)</sup> Article 42(1).

<sup>(19)</sup> Provided for in Article 12(1)(a) APD.

<sup>(20)</sup> Article 12(1)(a) APD.

- o the procedural steps of the application;
- o the type of examination procedure;
- o what ‘submission of new elements’ means and what it requires;
- o the possibility or not of a personal interview;
- o specific time limits;
- o the result of the decision that is taken concerning their application and the remedies against it, where the subsequent application is rejected;
- o the exceptions to the right to remain.

This information should be given in sufficient time to enable the applicant to exercise the rights guaranteed by the APD and to fully comply with all the relevant obligations, especially taking into consideration that shorter time limits are applicable when examining a subsequent application.

- **Access to and communication with the United Nations High Commissioner for Refugees or other organisations providing legal advice or counselling.**
- **Access to legal assistance and representation in the appeals procedure (upon request) <sup>(21)</sup>.**
- **Provision of special procedural guarantees and adequate support when an applicant is assessed as having special procedural needs <sup>(22)</sup>.**
- **Additional guarantees for unaccompanied children <sup>(23)</sup>.**
- **Specific practical safeguards must also be guaranteed to ensure effective implementation of the right to remain,** in accordance with national law, in order to allow the applicant to remain on the state’s territory pending the outcome of the appeal, including, in particular, protection against *refoulement*.
- **Language guarantees <sup>(24)</sup>.** Interpretation must be provided when making/registering/lodging the application. Should the personal interview be omitted, as it is not mandatory when examining subsequent applications <sup>(25)</sup>, and the application be based on written submissions, translation of the submission form, if applicable, or of the application for international protection must be guaranteed.

### 1.2.3. Obligations of the applicant

The APD establishes not only the guarantees applying to applicants <sup>(26)</sup> but also their obligations <sup>(27)</sup>.

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<sup>(21)</sup> For more information regarding the right to legal assistance and representation, see Section 11 of EASO, *Guidance on Asylum Procedure: Operational standards and indicators*, September 2019.

<sup>(22)</sup> For more information regarding the procedural guarantees for special needs, see Section 9 of EASO, *Guidance on Asylum Procedure: Operational standards and indicators*, September 2019.

<sup>(23)</sup> Article 25 APD.

<sup>(24)</sup> For more information regarding language guarantees, see Section 10 of EASO, *Guidance on Asylum Procedure: Operational standards and indicators*, September 2019.

<sup>(25)</sup> Article 34 and Article 42(2)(b) APD.

<sup>(26)</sup> Article 12(1) APD.

<sup>(27)</sup> Article 13 APD.

## Obligation to cooperate

As in an initial application, applicants are obliged to cooperate with the competent authorities in order to establish their identity and other elements referred to in the qualification directive (QD) <sup>(28)</sup>, such as facts and circumstances regarding their need for international protection. Member States can impose other obligations on the applicant to cooperate, insofar as they are necessary to assess the application.

## Obligation to substantiate

In the specific case of subsequent applications, the obligation above is further supplemented by Article 40 APD, in conjunction with Article 42(2)(a) APD. When the applicant makes a subsequent application, they are required to present ‘new elements or findings’ <sup>(29)</sup>. For further details, see [Section 2.1 ‘What are “new elements and findings”?’](#)

The new elements must also relate to the examination of whether the applicant qualifies as a beneficiary of international protection.

The criteria above must be considered as a whole in order to justify a new procedure. Therefore, it becomes apparent that the applicant has to submit new elements. A new full examination of an application after a previous rejection needs to be properly substantiated. Otherwise, the lack of such ‘new elements or findings’ would result in a justifiable rejection of the subsequent application by the Member State, **in accordance with the *res judicata* <sup>(30)</sup> principle <sup>(31)</sup>**. This means that the Member State is not required to re-examine the same grounds for international protection and can consider the subsequent application inadmissible. Therefore, the obligation of the applicant to raise/present new facts or circumstances, including by submitting any available material, documentary or other evidence in relation to their need for international protection, becomes an imperative component of the admissibility procedure. Information about the obligation to substantiate must be given in time to allow the applicant to submit the reasons for reapplying for international protection. When lodging the new application, applicants can be required to submit all elements that are at their disposal. They should also have the possibility to submit further elements until a decision has been taken regarding their application. Similarly, in the event of simultaneous registration and lodging of a subsequent application, officers must ensure that the shortened procedure will not prejudice the applicant’s ability to explain the reasons for their application.

Moreover, the determining authority should consider the applicant’s obligation to cooperate and substantiate their case together with their personal circumstances, particularly where vulnerability issues arise. Thus, the individual assessment of the preliminary grounds should be seen in conjunction with the Member State’s duty to provide all relevant information, eventually tailored to the personal situation of the applicant, should the latter be identified as in need of special procedural guarantees <sup>(32)</sup>. However, any rules requiring applicants to properly substantiate their subsequent application should not be applied

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<sup>(28)</sup> Article 4(2) QD.

<sup>(29)</sup> The term ‘elements’ mentioned in this practical guide always refers to the full expression of ‘elements or findings’ as mentioned in Article 40(2) APD.

<sup>(30)</sup> *Res judicata* means that the decision by the court is final and the parties to the case are bound by it.

<sup>(31)</sup> Recital 36 APD.

<sup>(32)</sup> Article 24(3) APD.



in a manner that either precludes the possibility of a new procedure or severely limits their access to such a procedure in accordance with the APD <sup>(33)</sup>.

#### 1.2.4. Making a subsequent application

In most cases, applicants will make the subsequent application directly to the authorities responsible for the registration and/or lodging of applications for international protection. This is because the applicants are already present on the territory of the Member State and are familiar with the competent authorities. Subsequent applications not made directly to the competent authorities are most often made in the context of an arrest or detention, or in the context of a removal process. In these cases, the subsequent application will most likely be made to the police, the immigration authorities, the detention personnel or the reception authorities. If they do not have the competence to register the application, these authorities should at least:

- (a) have the relevant information and instructions in order to guide the applicants on where and how to proceed with their application for international protection; and
- (b) receive the necessary training to perform their tasks in relation to the asylum procedure.

The applicant is protected from *refoulement* as soon as the application is made, without prejudice to the exceptions from the right to remain described under [Section 1.4 'The right to remain and its exceptions'](#). As part of the basic guarantees of applicants in detention facilities, free interpretation services, when necessary, and access to organisations providing counselling must also be provided.

Under the reception conditions directive <sup>(34)</sup> there are also other consequences linked to making a subsequent application. Chapter III of that directive allows Member States to reduce or withdraw material reception conditions (housing, food and clothing) if the application is subsequent as defined in the APD. This means that the applicant may not have the right to accommodation or any other material help during the examination of the subsequent application. However, it must be noted that any decision on the reduction or withdrawal of material reception conditions must be taken individually, objectively and impartially, indicating the reasons for it. Such a decision must comply with the principle of proportionality and must respect human dignity. The assessment must be based on the particular situation of the person concerned. Member States cannot withdraw the material reception conditions if this would have the effect of depriving the applicants of the possibility to meet their most basic needs related to housing, food or clothing <sup>(35)</sup>.

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<sup>(33)</sup> Article 42(2) APD.

<sup>(34)</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).

<sup>(35)</sup> See also the *Haqbin* ruling, in which the CJEU clarified the obligation of Member States to ensure a dignified standard of living, which must be guaranteed continuously and without interruption, including by supervising whether the provision of reception conditions actually provides an adequate standard of living. CJEU, judgment of 12 November 2019, *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers*, C-233/18, ECLI:EU:C:2019:956. Summary available in the [EASO Case Law Database](#).

### 1.2.5. Registering a subsequent application

Member States are free to decide which authorities are competent to register applications, including subsequent applications. If the application is made to an authority that is not competent to register it, Member States must ensure that the registration is completed within 6 working days. On the other hand, when the application is made to an authority that is competent to register it, the registration can take place on the spot, or in any case within 3 working days <sup>(36)</sup>.

In this phase of the procedure, the information collected concerns the identification of the applicant **and includes elements similar to those gathered during the initial procedure** <sup>(37)</sup>. Member States can establish a link with the information they collected before and can update this information regarding specific issues that might have changed since the previous registration (e.g. marital status, birth of children, address).

Depending on national practice, the registration may include other information such as: fingerprinting (the obligation for Member States to take the fingerprints of every applicant aged at least 14 is also applicable to subsequent applications <sup>(38)</sup>); identification of possible vulnerabilities and special needs as early as possible in the process in order to provide special procedural guarantees to the applicant in need (it is likely that a record of vulnerabilities will be available from the initial procedure); medical examination; allocation to reception facilities; security screening; provision of procedural and legal advice; counselling on return options; or any other information regarding the rights and duties of applicants.

At this stage, applicants may also be required to present new elements in writing and/or to provide relevant documentation or other pieces of evidence in their possession that may be necessary for the assessment of their case <sup>(39)</sup>.

The registration phase aims at improving the efficacy of the rights and obligations triggered when making an application for international protection. In the case of subsequent applications, however, specific rights may be derogated from, depending on national law (e.g. the right to be accommodated in a reception facility or the right to a personal interview). At this stage, Member States can derogate from the right to remain in the territory only in the case of a second, third, etc. subsequent application, following consultation with the determining authority. The matter is explored in further detail below.

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<sup>(36)</sup> Article 6(1) APD.

<sup>(37)</sup> For further details, see EASO, *Practical Guide on Registration*, December 2021.

<sup>(38)</sup> This obligation is described in Article 9(1) of 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, p. 1).

<sup>(39)</sup> On the duty of the applicant to substantiate their application, see Section 1.1.2 'Obligations of the applicant'.

### 1.2.6. Lodging a subsequent application

The APD does not prohibit the integration of the registration and lodging phases: the two steps can be combined, as long as the relevant procedural safeguards are met.

Member States can set out rules as to whether the lodging of a subsequent application should take place in person before the relevant authorities or at a designated place <sup>(40)</sup>. The application may be lodged through a form filled in by the applicant. The APD does not provide specific requirements, except that a form has to be submitted. In any case, the form should include at least the new elements and evidence in support of the application, unless they had already been submitted at the previous step of the registration.

If the personal interview is omitted in accordance with national law, it is very important that the applicant can submit and substantiate the new elements in writing.

### 1.2.7. Reopening a previous application

‘Subsequent application’ means an application for international protection submitted after a ‘final decision’ has been made on a previous application (and thus cannot be further challenged), including cases of explicit and implicit withdrawal of the previous application <sup>(41)</sup>. Therefore, a subsequent application can only be made after the final rejection of a previous application. If the applicant invokes new elements, the stage of their previous application should first be determined. If a final decision has been issued, the occurrence of new circumstances would lead to a subsequent application.

Where a previous application for international protection has been withdrawn, the distinction between **explicit** and **implicit** withdrawal should first be highlighted.

If the applicant has **explicitly** withdrawn their application <sup>(42)</sup>, any application lodged afterwards is considered a subsequent application and is subject to an admissibility examination. This is the case irrespective of whether the determining authority has taken a decision to discontinue the examination or to reject the application, or rather has decided to discontinue the examination without taking a decision.

On the other hand, regarding applications made after an **implicit** withdrawal <sup>(43)</sup>, the situation differs significantly depending on whether the determining authority rejected the application or discontinued the examination. The new application can only be treated as a subsequent application after the determining authority has considered the previous application ‘to be unfounded on the basis of an adequate examination of its substance’ <sup>(44)</sup> and thus has rejected the application, and this decision is final. However, if the determining authority has, following an implicit withdrawal, made a decision to discontinue the examination, the applicant is entitled to report to the authorities and request the reopening of their case, or to make a new application that will not be treated as a subsequent

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<sup>(40)</sup> Article 6(3) and (4) APD.

<sup>(41)</sup> Article 2(e) and (q) APD.

<sup>(42)</sup> Article 27 APD.

<sup>(43)</sup> Pursuant to Article 28 APD.

<sup>(44)</sup> In accordance with Article 28(1) APD.

application <sup>(45)</sup>. Member States may introduce in national law a time limit of at least 9 months <sup>(46)</sup> after which the case cannot be reopened. If this time frame elapses and the applicant wishes to submit another application, it should be treated as a subsequent application.

## 1.3. Admissibility procedure of a subsequent application

### 1.3.1. Who conducts the admissibility procedure?

It is particularly important that the examination of subsequent applications be done by the determining authority that has access to all necessary information relating to the previous application(s). In order to ensure that the subsequent application is examined taking into account the assessment of the previous application(s), the case officer needs to have access to all elements of the file of the previous examination(s), including those examined in the appeal phase.

The personnel of a different authority may conduct the interview on admissibility, if applicable. Where the personnel of authorities other than the determining authority conduct the personal interview on the admissibility of the application for international protection, the authorities must ensure that such personnel receive the necessary basic training in advance, in particular with respect to international human rights law, the EU asylum *acquis* and interview techniques.

After the interview, the determining authority conducts the examination of the application and issues the decision. In any case, the determining authority needs to have access to all relevant information and should consider all the elements underlying the further representations or subsequent applications, as provided for by the APD <sup>(47)</sup>.

### 1.3.2. Time frames

The preliminary examination should be concluded as soon as possible. A decision on admissibility may be issued quickly, thanks to the specificities of the procedure. In particular, the following should be taken into account.

- The procedure is limited to the examination of whether there are new elements and/or facts.
- An interview is not required under the APD. If envisaged by the national legislation, the interview can be conducted by a competent authority different from the determining authority.

In addition, the national law may provide for limitations to the rights and benefits that the applicant enjoys during the preliminary examination of their application. In this case, there is a direct link between the duration of the preliminary examination and these limitations. Therefore, the competent authority should take a decision on the admissibility of the application as soon as possible and within a reasonable amount of time.

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<sup>(45)</sup> Article 28(2) APD.

<sup>(46)</sup> Article 28(2) APD.

<sup>(47)</sup> Article 40(1) APD.

When the application has been found admissible, the determining authority should take a decision on the substance within 6 months of the lodging of the application, as is the case for any other application <sup>(48)</sup>. The fact that the examination on the substance was preceded by an admissibility procedure does not extend the overall time limit of 6 months from the lodging of the application to the conclusion of the examination.

### 1.3.3. Submission of facts and evidence

In order to support the preliminary examination of a subsequent application <sup>(49)</sup>, Member States may impose on the applicant the obligation to indicate facts and to substantiate evidence that would significantly add to their likelihood of qualifying as a beneficiary of international protection under the QD.

However, there could be different options set out in national legislation regarding the submission by the applicant of facts, documents or other pieces of evidence to support their subsequent application. The APD does not cover how the applicant can submit such elements. This is left to the discretion of the national legislator.

When making a subsequent application, the applicant should be provided with information on how, when and where to submit new elements, including a clear time frame for these actions.

If the national law envisages a personal interview, it will aim at exploring new elements. Specific questions will be asked of the applicants with regard to the new facts and circumstances of their case. The applicant must benefit from the interview-related guarantees laid out in Articles 15 to 17 APD, such as: confidentiality; allowing applicants to present their grounds in a comprehensive manner (interviewer is competent to take into account the personal and general circumstances surrounding the application – when necessary, the interviewer and/or the interpreter may be a person of the same sex as the applicant, if requested by the applicant); giving applicants an adequate opportunity to present the elements needed to substantiate their application; making a factual report containing all substantive elements / transcript; and providing applicants with the opportunity to make comments, provide clarifications in the report/transcript and access the report/transcript.

Due to the specific procedural nature of subsequent applications, providing correct information to the applicant is essential. If there is no interview, the competent authority should provide guidance to the applicant on how to present new elements of the claim in writing. This could be done, for example, by providing information, guidance and support to the applicant in this regard and, if applicable, by using a standard lodging form.

The form and/or guidance could include, inter alia, information and/or questions making it possible for the applicant to elaborate and to:

- list the new elements submitted to support the new application;
- explain how these elements are new in relation to any previous applications;
- describe the new elements that might be supported by relevant evidence;
- list the reasons why these new elements were not submitted during any previous application(s);

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<sup>(48)</sup> Article 31(3) APD.

<sup>(49)</sup> In accordance with Article 42(2)(a) APD.

- describe how these new elements make it likely that the applicant qualifies as a beneficiary of international protection.

The possibility to omit the personal interview cannot be applied in two situations <sup>(50)</sup>:

- when a dependant lodges an application after they have consented to having their case be part of an application lodged on their behalf; and/or
- when an unmarried child lodges their own application after an application has been lodged on their behalf.

### 1.3.4. Conducting the admissibility procedure

When examining a subsequent application, the competent authority should play an active role by cooperating with the applicant to assess the relevant elements of the application. In this regard, the responsible case officer should:

- have access to all the elements of the previous procedure;
- have knowledge of the relevant legal framework, policy changes and/or new case-law;
- take into account relevant and up-to-date country of origin information (COI) or other relevant information;
- take into account the information provided by the applicant, either during the personal interview, if any, or in the written submission (specifically for this procedure or other written statement);
- take into account any special needs and the individual circumstances of the applicant, depending on the national law.

By doing so, the case officer can assess whether an interview is needed or the written submissions are sufficient.

The aim of a preliminary examination during the admissibility procedure is to decide whether there are new elements and whether the new elements indeed significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of the QD. How this examination can be carried out is described in detail in the next chapter.

If the preliminary examination concludes that there are no such new elements, an inadmissibility decision is taken in accordance with the APD <sup>(51)</sup>.

If the examination concludes that new elements have arisen or have been presented by the applicant that significantly add to the likelihood of them qualifying as a beneficiary of international protection by virtue of the QD, the application is deemed admissible and is further examined on its substance, in accordance with Chapter II APD. When an interview in line with the standards of a personal interview has been held during preliminary examination, and in particular if it was carried out by personnel of the determining authority (Article 14 APD), a decision on the merit can be taken without any additional interview, provided that sufficient information was gathered during the initial interview.

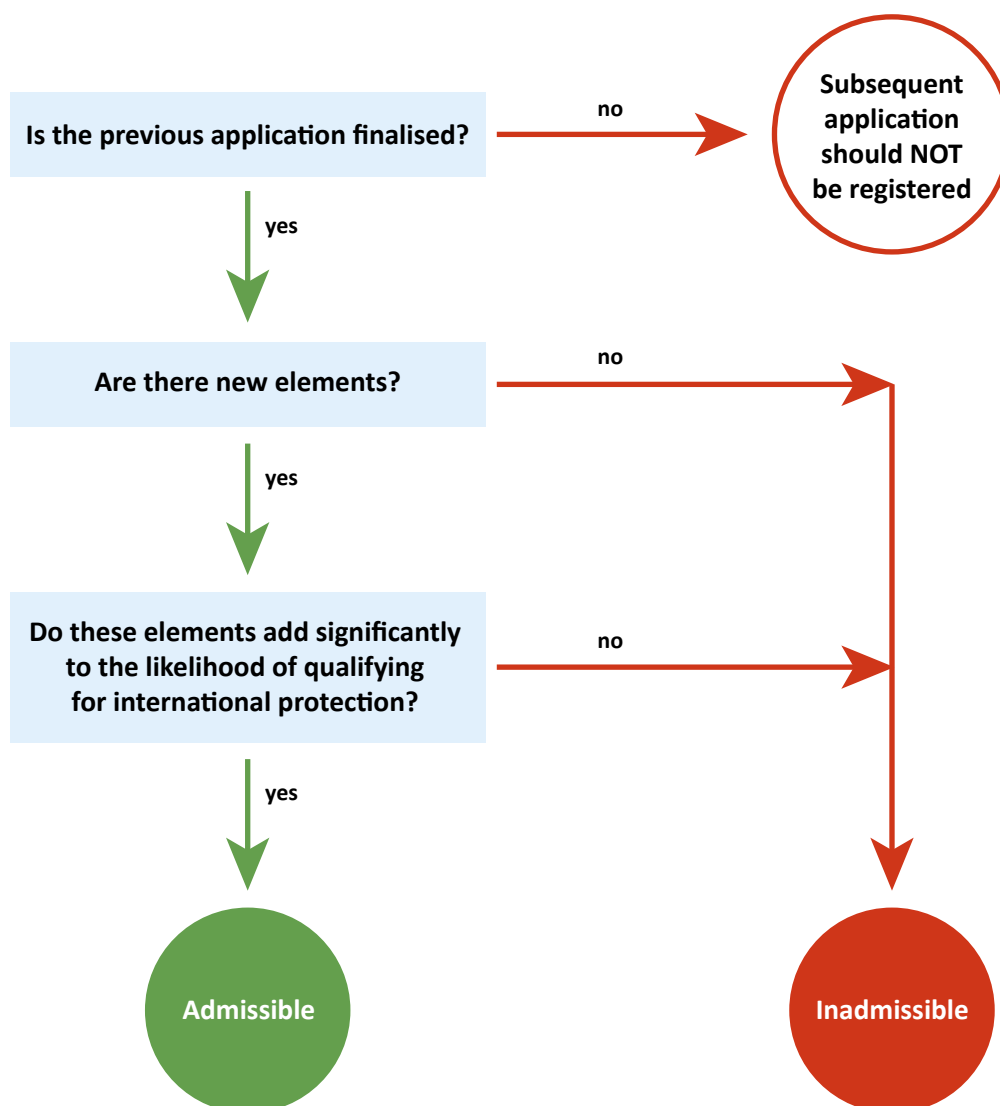
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<sup>(50)</sup> In accordance with Article 42(2)(b) APD.

<sup>(51)</sup> Article 33(2)(d) APD.

Member States may also provide, in their national law, other reasons for a subsequent application to be further examined. In Belgium, for example, if the previous application is implicitly withdrawn and no other previous application was assessed on its substance, the subsequent application is admissible automatically.

If it is decided that a subsequent application is inadmissible and should not be further examined, the applicant must be informed of the reasons for such a decision and of the possibilities for seeking an appeal or review <sup>(52)</sup>, including the name and address of the appeal body and the precise time limit in which an appeal can be made in accordance with the national law. The competent authority may also mention whether the applicant has the right to remain on the territory (taking into account the obligations of the Member State in relation to the principle of *non-refoulement*) after lodging an appeal against an inadmissibility decision.



<sup>(52)</sup> Article 42(3) and Article 46(1)(a)(ii) APD.

## 1.4. The right to remain in case of subsequent applications

The right to remain in the territory during the asylum procedure is a general rule provided for by the APD <sup>(53)</sup>. Therefore, the exceptions mentioned therein <sup>(54)</sup> are exhaustive and should be interpreted in a restrictive manner. Member States may derogate from the right to remain in one specific circumstance during the first instance procedure (see [Section 1.4.1](#) below) and in two specific circumstances after a decision has been made by the determining authority (see [Section 1.4.2](#)). It should be stressed that the APD allows exceptions to the right to remain only where the determining authority is satisfied that a removal decision will not lead to direct or indirect *refoulement* in violation of the international and EU obligations of that Member State <sup>(55)</sup>. This places a clear obligation on national authorities to be certain that the removal of an applicant will not expose them to risks contrary to the *non-refoulement* principle.

The following sections present the possible exceptions to the right to remain.

### 1.4.1. Exception to the right to remain during the first instance procedure

Applicants must be allowed to remain in the Member State until the determining authority has made a decision in accordance with the procedures at first instance <sup>(56)</sup>. The procedure to seek international protection is ‘suspensive’ (i.e. suspensive of any forced removal procedure) by law.

There is only one exception to this basic principle during the first instance procedure: when a first subsequent application has been rejected with a final decision, either as inadmissible or as unfounded. In this case, Member States can derogate from the right to remain for any additional subsequent application made by the applicant from the first instance procedure to any appeals <sup>(57)</sup>. This exception assumes that the repeated subsequent applications may be abusive since the applicants have already benefited from a thorough examination of their first application and their first subsequent application. This exception applies irrespective of whether or not the further subsequent application was made in the context of an imminent removal. However, authorities can only proceed with the return decision when the determining authority considers that there is no risk of direct or indirect *refoulement*. In other words, the determining authority always needs to be consulted before the exception to the right to remain is implemented, so that it can ensure that there is no risk of *refoulement*.

Even though no right to remain applies to these applicants, the processes of information provision, registration, lodging and examination should continue within the set time frames for these purposes, for as long as the applicant is present on the territory.

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<sup>(53)</sup> Article 9 APD.

<sup>(54)</sup> Article 41 APD.

<sup>(55)</sup> See Article 9(3) and Article 41(1), final subparagraph, APD.

<sup>(56)</sup> In accordance with Article 9 APD.

<sup>(57)</sup> Article 41(1)(b) APD.



In this situation, Member States may derogate from the time limits normally applicable to accelerated <sup>(58)</sup> and admissibility <sup>(59)</sup> procedures <sup>(60)</sup>.

If the national law requires that a decision should be issued stating that the applicant has no right to remain, this can already be issued at the time of the registration or lodging of the additional subsequent application, provided that the determining authority has been consulted and considers that the return does not lead to direct or indirect *refoulement*.

## 1.4.2. Exceptions to the right to remain during the appeal procedure

### (a) During an appeal against inadmissibility

In the case of a first subsequent application not further examined because it is considered inadmissible under the APD <sup>(61)</sup>, the applicant has the right to appeal the decision. Depending on the national law, the applicant may have the right to remain in the territory during the appeal procedure, or at least until the court decides on their right to remain <sup>(62)</sup>. In the latter case, the appeal authority has the power to rule on whether the applicant may remain in the territory of the Member State during the appeals procedure, either upon the applicant's request or acting *ex officio* <sup>(63)</sup>. When deciding on the right to remain, it is the obligation of the Member State to comply with the principle of *non-refoulement*.

### (b) Subsequent application lodged merely to frustrate removal and found inadmissible

An applicant might lodge a subsequent application merely to hamper or frustrate a removal process. Member States may make an exemption to the right to remain as soon as such a subsequent application is found inadmissible by the determining authority <sup>(64)</sup>. The condition mentioned under (a) above, that the appeal authority shall have the power to rule on whether the applicant may remain in the territory

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<sup>(58)</sup> Article 41(2)(a) APD.

<sup>(59)</sup> Article 41(2)(b) APD.

<sup>(60)</sup> See CJEU, judgment of 9 September 2020, *JP v Commissaire général aux réfugiés et aux apatrides*, C-651/19, ECLI:EU:C:2020:681, paragraphs 54 to 67. Summary available in the [EASO Case Law Database](#). In that regard, the CJEU underlined the exceptionality of the 'subsequent application' procedure, the short time limits for which can, inter alia, be justified in view of the expedition objective pursued by the APD, of the principle of legal certainty and of the smooth progress of the examination procedure, given that the applicant benefits from specific procedural rights and that the appeal procedure is closely linked to the essential content of the subsequent application. The CJEU has thus considered that the 10-day time limit provided for by the Belgian law to file an appeal against a decision of inadmissibility of a subsequent application does not appear to be insufficient in practical terms to enable an effective remedy. Finally, the CJEU considers that it is for the national jurisdiction to determine whether that time limit also complies with the principle of equivalence.

See also CJEU, order of 11 February 2021, *T.H.C. v Commissaire général aux réfugiés et aux apatrides*, C-755/19, ECLI:EU:C:2021:108. The CJEU has considered that the 5-day time limit, including public holidays, provided for by the French law to file an appeal against a decision of inadmissibility of a subsequent application does not appear to be insufficient in practical terms to enable an effective remedy where the applicant is held in detention. Also here, the CJEU considers that it is for the national jurisdiction to determine whether that time limit also complies with the principle of equivalence and with the procedural safeguards granted by EU law.

<sup>(61)</sup> Articles 33(2) and 40(5) APD.

<sup>(62)</sup> Article 46(8) APD.

<sup>(63)</sup> Article 46(6) APD.

<sup>(64)</sup> Article 41(1)(a) APD.

during the appeals procedure, does not have to be applied in this situation. The APD, however, imposes strict conditions, which are to be met cumulatively.

- (1) The current subsequent application is not further examined and is found **inadmissible**.

This implies that, during the preliminary examination by the determining authority, the applicant has the right to remain.

- (2) It was the **intention** of the applicant to lodge the application **to merely delay or frustrate** the imminent removal.

This condition implies that the applicant's intention can be identified and that the intention is aimed solely at delaying or frustrating an imminent removal.

This condition calls for interpretation by the national authorities. Member States may provide for additional guidance in their national legislation or practice.

- (3) The determining authority has considered that a removal decision would not infringe the **principle of non-refoulement**.

This condition implies that the authority that decides on the right of the applicant to remain in the territory has received information from the determining authority indicating that there is no risk of violation of the principle of *non-refoulement* if a forced removal is carried out.

Here, as under [Section 1.4.1](#), Member States may derogate from the time limits normally applicable to accelerated and admissibility procedures. Shorter time limits for the preliminary examination and the issuance of the decision at first instance can be applied in order to expedite the process <sup>(65)</sup>.

The APD also allows Member States to immediately return an applicant pending the outcome of the appeal or court procedure to rule on whether or not the applicant may remain on the territory <sup>(66)</sup>. This exception to the right to remain also covers the period until the time limit for appeal elapses.

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<sup>(65)</sup> Article 41(2) APD.

<sup>(66)</sup> Article 41(2)(c) APD.

## 2. Preliminary examination

During preliminary examination, the case officer needs to assess whether the elements submitted by the applicant under the subsequent application are new and whether they significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection <sup>(67)</sup>.

This chapter focuses specifically on the analysis of the following two main aspects:

- what ‘new elements’ are and in which situations they can be found;
- what ‘significantly add to the likelihood’ means.

An introductory section with clarifications on the notions of ‘element’ and ‘finding’ opens the chapter.

### 2.1. What are ‘new elements and findings’?

#### 2.1.1. Elements and findings

As described in Article 4 QD, the **elements** relating to the examination of whether the applicant qualifies as a beneficiary of international protection stem from multiple sources of information. These include the applicant’s statements, all the relevant documentation at the applicant’s disposal and other available evidence regarding the applicant’s age, background (including that of relevant relatives), identity, nationality(ies), country(ies) and place(s) of previous residence, previous applications for international protection, travel routes, travel documents and reasons for applying for international protection.

**Findings** are pieces of information that are identified/brought to light by multiple sources of information – in a similar way to elements – for example by the case officer, or by the case officer in cooperation with the applicant during the examination of a particular situation, be it the personal situation of the applicant or the situation in the country of origin.

**Elements** and **findings** represent **facts** and **circumstances** that may be presented by the applicant or identified by the case officer while examining the subsequent application. Depending on the specific case at hand, it may be difficult to make a clear distinction between the elements and the findings. However, trying to make that distinction is not of the utmost importance. What matters most is that the case officer takes into consideration all the new elements and findings relating to whether the applicant qualifies as a beneficiary of international protection <sup>(68)</sup>. As previously mentioned, for the purposes of this guide, the term ‘elements’ refers to the full expression ‘elements or findings’, as mentioned in Article 40(2) APD. Article 40(3) APD then specifies that such ‘elements’ need to add significantly to the likelihood of the applicant qualifying for international protection, which means that they must be related to material facts.

#### Related EASO tool

For further details on the connection between evidence and material facts, see EASO, *Practical Guide: Evidence Assessment*, March 2015 (update expected in 2022).

<sup>(67)</sup> Article 40(3) APD.

<sup>(68)</sup> For further details, see Article 4 QD.

## 2.1.2. When can the elements be considered new?

In what circumstances can we say that the elements and findings can be considered ‘new’?

New elements can be related to:

- **new facts after the final decision;**
- elements **that existed** before but **were neither presented** by the applicant in the previous procedure **nor considered** by the asylum authority.

### New facts after the final decision

This case is considered *sur place* situations. New facts can occur in the country of origin or the applicant may have engaged in new activities after a final decision has been taken on the previous application. These changes can happen in the country of origin and/or in the personal situation of the applicant at any time, regardless of the length of time the applicant has resided (regularly or irregularly) abroad. Due to the length of stay outside the country of origin of some applicants who were denied international protection in a previous application, *sur place* situations may present regularly in subsequent applications. The developments or events in their life or country of origin can give rise to a well-founded fear of persecution or a real risk of serious harm on return <sup>(69)</sup>.

### Elements that existed before but were neither presented by the applicant in the previous procedure nor considered by the asylum authority

This case considers all elements that existed before, during the previous procedure, but were not brought to the attention of the determining authority. These elements are new because they were not examined during the previous procedure and the final decision concerning the previous application was not based on them <sup>(70)</sup>.

However, Article 40(4) APD gives Member States the option to provide that the application will only be further examined if the applicant concerned was, through no fault of their own, incapable of asserting the situations set forth in Article 40(2) and (3) in the previous procedure, in particular by exercising their right to an effective remedy pursuant to Article 46. At the same time, this specific provision recognises that there may be objective or subjective situations where the applicant is prevented from presenting some elements of their case. Such situations may derive from the situations below.

- Personal circumstances that make it difficult to gather and put forward documentary proof. Such circumstances may be related, for example, to the incapability of the applicant or the state of flight that asylum applicants are found in, or to mental health issues, age or feelings of despair

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<sup>(69)</sup> ‘Without prejudice to the Geneva Convention, Member States may, nevertheless, determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin’ (Article 5(3) QD). The possibility to introduce such an exception aims at avoiding abuses of the international protection regime. However, it should be noted that the assessment of whether the fear of the applicant is well founded always remains forward-looking, and the principle of *non-refoulement* should in all cases be respected. The issue of protection needs arising *sur place* is defined in EASO, *Practical Guide: Qualification for international protection*, April 2018, p. 34.

<sup>(70)</sup> See CJEU, judgment of 9 September 2021, *XY v Bundesamt für Fremdenwesen und Asyl*, C-18/20, EU:C:2021:7101, paragraphs 31 to 44.

and helplessness. Similarly, the potential inability to identify and explain persecution practices, a lack of awareness regarding one's own vulnerability and the normalisation of past traumatic experiences can all create situations where important elements are omitted. Incapability has to be demonstrated by the applicant, and is assessed by the determining authority on a case-by-case basis, before any negative outcome of the preliminary examination.

- Practical difficulties can also impede applicants' access to documentation: the lack of a social network in the country of reception or in the country of origin, the lack of registration practices and filing systems in some countries and risks stemming from contacts with official services can all make it difficult to gather documentary proof.
- A relevant event took place while the previous procedure was ongoing, but the applicant became aware of it after the end of the procedure. For example, the applicant's claim is persecution by the state due to their political activity. The authorities visited their family in the country, searching the house and asking questions about the applicant. Although the incident took place before the applicant's interview during the first application, the applicant learnt about it a few days before the subsequent application. The same could happen with documentary or other material evidence, when the existence of it became known after the end of the previous procedure.
- Sexual and gender-related issues: (credible) inability to mention very intimate subjects during the previous application (rape, homosexuality) or (credible) lack of knowledge about the possibility to receive international protection (domestic violence, risks related to female genital mutilation, etc.). Persons whose applications are related to sexual orientations and gender identities that are not accepted in their country of origin often have to conceal their true identity, feelings and opinions in order to avoid shame, exclusion, stigmatisation and very often also the risk of violence. Stigmas and feelings of shame may further inhibit the applicant from disclosing information within the asylum context. There are numerous cases where the applicant discloses that they are lesbian, gay, bisexual, trans or intersex only in a subsequent application. These issues are also relevant for applicants who disclose gender-based persecution at a later stage in their application. Since shame and trauma may make it difficult to disclose such harms, late disclosure should not lead to the inadmissibility of the application, if the requirements of Article 40(4) APD are met <sup>(71)</sup>.

## 2.2. Three scenarios in which new elements can be presented

The new elements may either originate from facts that already existed during the first examination (but of which the applicant was not aware) or refer to facts that have arisen since. It is possible to present new elements in the following three scenarios:

- as part of a previously presented and assessed material fact;
- as part of a new material fact;
- as a totally new claim.

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<sup>(71)</sup> The Court of Justice of the EU has clarified that '... having regard to the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset', CJEU, judgment of 2 December 2014, *A and Others v Staatssecretaris van Veiligheid en Justitie*, C-148/13, ECLI:EU:C:2014:2406, paragraph 69. Summary available in the [EASO Case Law Database](#).

For each of these scenarios it is important to examine the risk of persecution or serious harm invoked under it. However, they differ greatly from one another.

In the first scenario, an assessment of the risk of persecution or serious harm to the applicant was conducted when the authority previously examined the material fact(s). So it is important to see, at this stage, whether the **new element** can have an impact on that assessment.

In the second scenario, an assessment of the risk of persecution or serious harm to the applicant was conducted when the authority previously examined the material fact(s) at the time under the same claim. So it is important to see, at this stage, whether the **new material fact** can have an impact on that assessment.

In the third scenario, the assessment of the material fact(s) under the new claim will start from the beginning.

### 2.2.1. New element substantiating a previous material fact

During the preliminary examination of a subsequent application, applicants may submit new elements that are related to material facts that were examined under the previous application. During the previous application these material facts may have been rejected or accepted (but, in the latter case, they did not support the risk assessment or legal assessment). In this case, the subsequent application is an extension of the previous one. This also means that there is already a clear point of reference in the previous examination when the time comes to assess that new element. For example, the material fact is the religious conversion of the applicant. This material fact was presented, assessed and rejected during the first examination. Now the applicant provides a new element, i.e. a certificate from the church where they were baptised. This is a new element related to the already identified and assessed material fact.

Often, if the previous assessment led to the rejection of the material fact, the new element would aim at changing the credibility assessment of that material fact. However, substantiating a previously existing material fact is not limited to changing the credibility assessment, but can also support or alter the risk assessment related to the material facts and the legal assessment.

### 2.2.2. New material fact

The second scenario addresses the situation in which the new elements are related to a new material fact within the same claim. So, by presenting the element(s), the applicant presents at the same time a new material fact that had not been presented and assessed during the first examination of the claim.

This is an example of a new material fact related to the applicant's political involvement. The applicant states during his subsequent application that, since leaving his country, he has been involved with the diaspora in the host country and has participated in several demonstrations in front of their embassy. The applicant also says that the authorities know about it. These activities are in line with his earlier political involvement in his country of origin, which had been raised during the first application. The subsequent application is an extension or continuation of the previous claim of the aforementioned political involvement. But there are new material facts: the applicant's involvement with the diaspora their participation in demonstrations in the host country and their visibility by the national authorities of the country of origin.

### 2.2.3. New claim

Under this scenario, the applicant presents a totally new claim, for example regarding their sexual orientation. In this example, let us assume that the applicant had previously applied for international protection on the basis of political activity in their country of origin; they now claim that they will face problems because of their sexual orientation. This claim comprises several new material facts relevant to the case: the applicant's sexual orientation; any relevant events such as the situation of homosexuals in the applicant's country of origin; the applicant's social and economic situation; the family context in which they were raised; any persecution they may have suffered in the past; or other events linked to the new fear that is claimed.

As a distinctive feature of this scenario, the new claim is not a continuation or an extension of the previous one. The elements invoked are completely different, meaning the determining authority will start from a blank page.

In this scenario there is no point of reference from the previous assessment to which the new claim / material facts can be linked. Therefore, the assessment has to be done on the basis of this new claim. It is up to the case officer to decide whether this is a new element.

During the presentation of new elements by the applicant and the processing of the subsequent application, the authority responsible for examining the admissibility of the application can come across new elements, for example a new COI report.

The scenarios described above put the elements in a context that reflects whether and/or how they are connected with the previous claims of the applicant. This shows whether the elements are new or not. At this stage, it is up to the determining authority to decide whether the elements that have been presented or have arisen are new.

## 2.3. What does 'significantly adds to the likelihood' mean?

Once the case officer has concluded that the elements presented by the applicant during the subsequent application are new, they have to decide whether the elements that have arisen or have been presented by the applicant significantly add to the likelihood of them qualifying as a beneficiary of international protection.

### 2.3.1. Standard of the increase of likelihood

'Significantly' means 'in a way that is easy to see or by a large amount' <sup>(72)</sup> or 'in a way that is large or important enough to have an effect on something or to be noticed' <sup>(73)</sup>. The common meaning of 'significantly' calls for a meaningful increase in the likelihood.

If we translate this into the degree of likelihood of qualifying for international protection, a significant increase in the likelihood would fall between a negligible increase in the likelihood and a situation in which the new element that has been presented or has arisen would most likely lead to the granting of international protection.


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<sup>(72)</sup> <https://dictionary.cambridge.org>

<sup>(73)</sup> <https://www.oxfordlearnersdictionaries.com>



**Figure 1. Degree of likelihood of qualifying for international protection**

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- Will certainly be granted international protection
  - Will most likely be granted international protection
  - **Significant increase in the likelihood**
  - Negligible increase in the likelihood
  - No increase in the likelihood

### The preliminary nature of the examination

The distinction between the standard of ‘significant increase in the likelihood’ and the standards of ‘will most likely be’ or ‘will certainly be’ granted international protection derives from the preliminary nature of the examination itself.

Preliminary examination is, as the wording itself suggests, an examination that is done ‘before’ the examination on the merits, to see whether the latter is needed. Therefore, a preliminary examination is not in itself an examination on the merits. Case officers do not need to establish whether the new element will indeed lead to the granting of the refugee status or subsidiary protection. They only need to assess whether there is a significant increase in the likelihood of this happening. The requirements are therefore less demanding than in a fully fledged examination. It is enough that the element is new and potentially able to alter the conclusion of the previous examination. However, once the preliminary examination has been concluded, it may not always be necessary to conduct an additional interview to reach a decision on the merits.

### 2.3.2. Criteria to determine a significant increase in the likelihood of qualifying for international protection

The new element can only ‘significantly add to the likelihood’ if it addresses a central element of the assessment of the need for international protection.

In order to determine whether the element adds significantly to the likelihood of qualifying for international protection, the following questions should get an affirmative answer.

#### (1) Is the new element **relevant**? Does it support a material fact?

Material facts are facts that are directly linked to the definition of a refugee (Article 2(d) QD) or person eligible for subsidiary protection (Article 2(f) QD), and go to the core of the application. It is usually redundant to focus on minor or non-essential facts that do not affect the central elements of the claim <sup>(74)</sup>. In the three scenarios described above, the situations where new elements can be presented are indeed all linked to material facts: they are linked to an existing material fact, constitute a new material fact by themselves or constitute an entirely new claim.

<sup>(74)</sup> For more information regarding the identification of material facts, see Section 1.1 of EASO, *Practical Guide: Evidence assessment*, March 2015.



(2) Is the new element **important**? Could it be of **decisive importance** for the granting of international protection status?

The element should not only be new and relevant, but should also be of such a nature as to have a direct or indirect impact upon the assessment of the risk in case of a return to the country of origin.

(3) After a first examination, is the new element **credible or persuasive**?

An examination should be carried out to assess the evidential strength of the new element. New elements that are clearly fraudulent do not significantly increase the likelihood of the need for international protection. However, given the preliminary nature of the examination, this assessment should not go further than the information immediately available.

### Example

Sabna claimed in her previous application that she had trouble with her family because she converted to Christianity. Her conversion and the subsequent problems were found not to be credible, because none of the conditions set for the benefit of the doubt were fulfilled. She lodges a new application and confines her statement to the assertion that her mother has since threatened her in a letter with death. She does not submit the letter itself.

A new element has been brought forward, however due to the very poor general credibility of Sabna during her previous application, the statement alone would not be sufficient to potentially change the initial assessment. Therefore, her new statement does not significantly add to the likelihood of qualifying for international protection.

In the same example, let us assume that, in addition to her statement, Sabna also submits the threatening letter from her mother. But the letter is not signed and the applicant cannot present the envelope in which it was sent. This situation will not increase significantly the likelihood of the need for international protection. In fact, it is already clear during the preliminary examination that the submitted document cannot potentially change the initial assessment, since a private letter of uncertain origin is not of such a nature that it can shed a different light on the credibility findings of the previous decision.

### 2.3.3. Significant increase in comparison to the previous decision

The new elements of a subsequent application are by definition presented in the background of an earlier application that, in most cases, has already been examined on the merits. Subsequent applications that arise after a first instance decision was taken, but where that decision was not taken on the merits, will be examined in more detail in the next chapter. Here we will focus on subsequent applications submitted after a final decision on the merits. The point of reference to assess the significant increase will be:

- the decision of the determining authority on the merits; or
- the judgment of the court or tribunal of appeal, if there has been an appeal and the court or tribunal has taken a final decision on the substance, which cannot be questioned unless new substantive elements are put forward.

The standard of 'increased likelihood' is a relative term. The case officer should take the previous decision as a starting point for the assessment, and examine whether there are any new elements that

are of such a nature that they can increase significantly the likelihood of being granted international protection. This can be the case when the new elements are related to a material fact that had already been examined during the previous decision, but now puts the assessment in a different light. It also applies when the new element constitutes a new material fact by itself within the context of (one of) the previous claim(s), or constitutes a new claim altogether (see [Section 2.2 'Three scenarios in which new elements can be presented'](#)).

### **New elements that substantiate a material fact that has already been accepted**

Any new information that merely further substantiates the credibility of a material fact that had already been accepted in a previous application would not be considered as adding significantly to the likelihood of qualifying for international protection if all the other general and particular circumstances remain unchanged.

### **New elements that can potentially change the credibility assessment of a previously rejected material fact**

When a material fact that had previously been rejected is reconsidered as being credible, in most cases the likelihood of the need for international protection will significantly increase, unless it is immediately clear that the newly accepted material fact will not impact the risk assessment or, in other words, will not increase the risk for the applicant in case of a return to the country of origin.

For example, if the applicant has submitted compelling medical documentation that is indicative of having suffered torture, inhuman or degrading treatment or punishment, or when very serious injuries/ mental illness are attested by compelling medical documents and there is evidence of torture or inhuman or degrading treatment, a decision on the admissibility of the application may be necessary even if the facts invoked by the applicant lack credibility. Such a decision would in fact help shed light on the causes of the injuries / mental illnesses.

### **New elements that establish a new material fact**

New elements constituting a new material fact and acceptable as such will, in most situations, significantly increase the likelihood of the need for international protection. This would be enough to justify an admissibility decision unless it is immediately clear that the new material fact does not affect the initial risk assessment.

As an example: the applicant referred in their initial application to a general situation (human rights violations, general security situation, general political, ethnic, social situation, etc.) that, in itself, is not sufficient to provide a basis for international protection. They then submit a subsequent application providing new elements that demonstrate that the applicant is or will be personally affected.

### **New elements that establish a new claim**

New elements establishing a new claim that is not clearly unfounded will, in principle, lead to an admissibility decision, as the new elements had not been assessed before.

This can be the case when the previous application related to a situation falling outside the scope of international protection (e.g. family visit, study reasons, socioeconomic situation), and the subsequent application brings forward elements that establish a fear or real risk of persecution or serious harm upon return.

### New elements that affect the risk assessment

New elements can also shed a different light on the initial risk assessment (and legal assessment). This would mostly be the case when: the applicant presents new COI; the asylum administration itself has become aware of new COI; the applicant can demonstrate, based on new elements, that their personal circumstances have become more precarious or vulnerable; or the applicant can prove that they were initially wrongly assessed. The list below presents different situations where the initial application was rejected based on the risk assessment and illustrates how new elements can affect them.

- The probability of something happening to the applicant based on that material fact was too low but new elements demonstrate a considerable change in this probability.
- There was a possibility of an internal flight alternative within the meaning of Article 8 QD, but new elements show that the internal protection alternative location is no longer available or was wrongly assessed.
- There was a possibility of protection within the meaning of Article 7 QD, but new elements show that that protection is no longer available or was wrongly assessed in the first place.
- The problem raised was assessed as no longer being current, but new elements show that it has reappeared or that the initial assessment was incorrect.
- The act was not considered to be a sufficiently severe violation of basic fundamental rights, but new elements show that the act was actually more severe, or that new personal circumstances would lead to a more severe impact on the applicant if the same act were to be repeated in the future.

Below is a set of concrete examples of new elements that can significantly increase the likelihood of the need for international protection.

- A recently published COI report shows evidence of a substantial increase in indiscriminate violence during an ongoing armed conflict in the country of origin of the applicant. The conflict has spread and is currently affecting the whole territory of that country. The report shows that civilians are seriously affected, regardless of their individual circumstances, and that they may be exposed to a real risk of serious harm due to their mere presence on the territory.
- There has been a significant deterioration in the human rights or security situation in the country of origin. It appears that the applicant can rely, individually, on this general situation to make their case in the subsequent application.
- The applicant has submitted new information showing that the COI used to justify the earlier decision was incomplete, inaccurate or outdated.

### Taking into account all relevant elements

As for any application, the assessment of the new elements that have been presented or have arisen within the framework of a subsequent application should be conducted taking into account all relevant personal and individual circumstances <sup>(75)</sup>. The assessment should take into account all the relevant general information available to the authority in charge of the admissibility decision.

<sup>(75)</sup> The CJEU has confirmed that the assessment of evidence cannot vary, whether it is a first or subsequent application, and that the Member State must cooperate with the applicant for the purpose of assessing the relevant elements of the subsequent application. See CJEU, judgment of 10 June 2021, *LH v Staatssecretaris van Justitie en Veiligheid*, C-921/19, ECLI:EU:C:2021:478, paragraphs 58 to 61. Summary available in the [EASO Case Law Database](#).

In the context of the preliminary examination, elements could arise that may negatively affect the likelihood of qualifying for international protection. The authorities need to take all these elements into account.

For example, from the information gathered during the lodging of the subsequent application it appears that the applicant has declared that they have another nationality or identity, different from the one under which they presented themselves to the authorities of the host Member State. Such information could emerge, for instance, from documents submitted under or that have arisen during other procedures, either in the host Member State or in other Member States (e.g. visa information, Dublin examination).

Another example: a female applicant states that she fears being forced into marriage. When explicitly asked if she had been married in the past, she said no. However, it emerges from a visa application submitted 8 months earlier in another Member State that she had declared herself as being married and having two children. She had attached several documents to her visa application in support of this claim, including a marriage certificate and the birth certificates of both her children, which also feature the name of her husband. In such a case, it should be borne in mind that an applicant may be able to give a valid explanation for justifying what appears to be fraudulent. If controversial elements of this kind appear in the file, it would be preferable to conduct an interview with the applicant before making a decision related to the admissibility of the application, so that they have the opportunity to give an explanation about that decisive controversial element <sup>(76)</sup>.

### Case study

The following example is used as a case study on how different elements can have a different impact on the assessment of the ‘significantly add to the likelihood’ standard.

#### The case

In his previous application, the applicant (BJ) invoked problems due to his political involvement with the opposition political party, the Freedom Party. BJ’s statements were found to be credible with respect to his membership of the Freedom Party. Although he did not file any documentary evidence to support his membership, his statements were considered to be sufficiently credible for this material fact to be accepted.

On the basis of the COI information available, however, it appears that membership in the Freedom Party alone is not sufficient to give rise to a well-founded fear of persecution. Only particularly active and visible members of the party are likely to encounter problems with the authorities. BJ’s statements that he is the president of the youth wing of the party in his city were not found to be credible. In addition, he was unable to provide a valid explanation for the lack of documentary evidence to support his position and numerous alleged activities of the Freedom Party, which were not found to be credible either. A decision to refuse international protection was therefore taken on the basis of the lack of visibility of BJ within the Freedom Party, in light of the available COI on this matter.

<sup>(76)</sup> For more information regarding the duty of investigation, refer to Section 1.2.2.3 of EASO, *Practical Guide: Evidence assessment*, March 2015.

**Scenario 1a: new membership card, same COI**

In support of his second application, BJ repeats the statements made in his first application and **submits a membership card**, issued in his name by the Freedom Party. This membership card is linked to one material fact of his previous application. The card is therefore relevant. However, it is not enough to increase significantly the likelihood of qualifying for international protection, because it is not related to a matter of decisive importance. The card confirms a material fact that had already been accepted in the previous application, but does not call into question the previous assessment that his personal involvement and activities within the party are not established. No specific investigation on the probative value of the card is needed, as it would not lead to a different assessment.

The application is therefore found inadmissible.

All the relevant information relating to the general situation in the country of origin, as well as the particular circumstances of the applicant, must be kept in mind. When a fact has been accepted but initially deemed insufficient to establish a need for international protection, and then the general or particular circumstances have changed, it is necessary to bear this development in mind. This will allow an assessment of whether these general or particular changes in the situation are significant enough to add to the likelihood of qualifying for international protection.

**Scenario 1b: new membership card, changed COI**

In support of his second application, BJ repeats the statements made in his first application and submits a membership card issued in his name by the Freedom Party. This membership card is linked to one material fact of his previous application. The card is therefore relevant. It is related to a matter that was not considered of decisive importance during the previous application. It confirms a material fact that had already been accepted in the previous application. However, in the meantime, the general situation in his country of origin has worsened, and the membership alone of an opposition party could lead, depending on personal circumstances, to a well-founded fear of persecution.

The relevant elements at hand are both a material fact that had already been accepted (and for which the applicant submits new evidence) and a new finding that has come to the attention of the competent authority. Such elements support the fact that being a member of an opposition party may imply a well-founded fear of persecution; i.e. there is a change in the general political situation in the country of origin. The application is therefore declared admissible, depending on other personal circumstances.

If the new element is related to a material fact that had previously been rejected, the evaluation will have to focus on the decisiveness of the fact that it supports, as far as the assessment of the need for protection is concerned.

If the new element supports a key material fact that was questioned in the previous assessment because of its lack of credibility, or because the risk assessment had concluded that there is an absence of a need for international protection, one may consider that the element is still sufficiently important to increase, potentially, the likelihood of qualifying for international protection.

**Scenario 2a: new statement from the party allegedly confirming the applicant's role therein**

BJ files a statement from the Freedom Party concerning his involvement in the party and confirming his role as president of the youth wing. BJ repeats the statements he made in his first application. This element is relevant and could be considered to be related to an essential matter of the previous assessment, because it tends to establish his involvement in the party. The element is potentially decisive in the assessment of that involvement.

**Scenario 2b: statement from the party about the applicant's role therein proves to be false**

BJ files a statement from the Freedom Party concerning his involvement in the party, and repeats the statements he made in his first application. Based on the information already available to the authority, it appears that the Freedom Party does not issue this kind of statement, and that the author of the statement has not been in office for more than 10 years. This first examination of the document already shows that it does not significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection.

If the element consists of documentary evidence that, after a first examination of the form and substance, can potentially change the assessment of a material fact that was rejected during the previous application, one may consider that the element adds significantly to the likelihood of qualifying for international protection <sup>(77)</sup>. This may be the case even if the element's probative value needs to be checked through additional investigative measures.

**Scenario 3: testimony from a non-governmental organisation (NGO)**

BJ files a testimony from the NGO Rights for All to support his second application. The NGO states that the testimony is based on a mission to the city where BJ lived, during which the NGO investigated the situation of opposition political parties, including the Freedom Party. The author of the testimony recounts that they had the opportunity to meet BJ in the field, and gives details of the activities in which BJ participated while he was there.

The authority examining the admissibility of the application does not have any information at hand in relation to the NGO or the author. A first examination of the document reveals that the testimony is presented in its original version and is not limited to general assertions. On the contrary, it appears to be detailed. Therefore it may allow a possible different outcome of the assessment of the personal participation of the applicant in the Freedom Party, even though further investigation is needed. This document adds significantly to the likelihood of BJ qualifying for international protection.

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<sup>(77)</sup> The obligation to assess whether a document constitutes a new finding or element and, if so, whether it significantly increases the likelihood of the applicant qualifying for international protection before declaring the application inadmissible has been confirmed by the CJEU. See CJEU, *LH v Staatssecretaris van Justitie en Veiligheid*, op. cit. fn. 73, paragraphs 44 to 45.

### 3. Subsequent applications in particular situations

This chapter of the guide addresses the different situations/contexts in which a subsequent application may be submitted. There may be differences in the examination depending on the outcome of the first/previous application, or based on the specific elements of the subsequent application. The personal circumstances or the history of the applicant could have a significant impact on the preliminary examination procedure. It is therefore essential to identify these attributes as soon as the subsequent application is lodged.

#### 3.1. Following a rejection of the previous application as unfounded

The most common situation in which a subsequent application is submitted is after a final decision to reject the previous application as unfounded, following an examination on its substance.

The previous application being rejected as unfounded means that examination of the substance of the case led to the conclusion that there is no need for international protection. In this situation, either the material facts identified were not accepted (they were found not to be credible) or, if they were accepted, the risk of being subjected to persecution or serious harm upon return was too low (only hypothetical or simply possible, for instance) or not established. The latter means that a generic risk was acknowledged, but was not deemed to amount to a risk of persecution or serious harm; or it was estimated that there was a possible internal flight alternative, available protection by the national authorities or other such circumstance.

It is also to be noted that a subsequent application can be submitted when the applicant was granted subsidiary protection in the previous procedure. The decision to grant subsidiary protection is partly negative (partial rejection) insofar as the examination for refugee status resulted in a rejection.

The competent authority for the examination of the subsequent application may thus rely on the substance of the previous examination if the new application is an extension of the facts invoked during the previous application.

Applicants filing a subsequent application may have made clearly inconsistent and contradictory, clearly false or obviously improbable representations in their previous application, which contradicted sufficiently verified COI. In those situations, the grounds for their claim of being eligible for international protection within the meaning of the QD were clearly unconvincing. This has a negative impact on their general credibility in the context of the examination of the admissibility of the subsequent application. The determining authority will have higher expectations with regard to the obligation of the applicant to substantiate their new claim, to verify whether the new elements increase the likelihood of being granted international protection. For previous applications found to be manifestly unfounded, see [Section 3.2 'Following a rejection of the previous application as manifestly unfounded'](#).

#### Related EASO tool

For specific guidance on the credibility assessment, see EASO, *Practical Guide: Evidence Assessment*, March 2015.



### **3.2. Following a rejection of the previous application as manifestly unfounded**

A subsequent application may be lodged after the determining authority has rejected the previous application as manifestly unfounded pursuant to Article 32(2) APD, having considered that one of the circumstances listed in Article 31(8) APD applied to the unfounded application. The relevant specific circumstance should be defined as such in the national legislation in order to be applicable to the particular case.

Depending on the circumstances of the case at hand, the fact that the previous application was rejected as manifestly unfounded within the meaning provided by the APD may show, for example, that the applicant has not raised any material issues relevant to assessing their need for international protection. Or it may show that the applicant comes from a safe country of origin, has provided incorrect information or has submitted false information/documents about their identity and/or nationality. It could also show that the applicant has in various ways tried to mislead the authorities in relation to whether they qualify as a beneficiary of international protection.

Not all the situations envisaged in Article 31(8) APD are immediately related to the applicant's fear of persecution or real risk of suffering serious harm in their country of origin. For instance, it also covers cases when an application is not submitted as soon as possible after unlawfully entering the territory, or is made merely in order to delay or frustrate the enforcement of an earlier or imminent removal decision. Therefore, only those circumstances directly linked to the assessment of the need for international protection that were applied to reject a previous application as manifestly unfounded are relevant to the preliminary examination of the new application.

Therefore, the impact of a previous application rejected as manifestly unfounded on the subsequent application depends, on the one hand, on the circumstances that were applied in the previous application and, on the other hand, on the new elements put forward by the applicant. Examples of relevant new elements include: new elements that are material to the qualification for international protection; personal circumstances making the country of origin unsafe for the applicant; reasons for providing incorrect/false information in the previous application; new evidence that strengthens the credibility of the applicant; and a review of the applicant's situation in relation to national security/public order.

### **3.3. Following a rejection of the previous application as inadmissible**

When the previous application has been rejected as inadmissible, either because another Member State has granted international protection or because a third country could be considered the first country of asylum for the applicant or a safe third country, no examination in relation to the country of origin will have been done in the previous procedure. In these cases, the previous examination did not focus on the situation in the country of origin of the applicant.



### 3.3.1. Another Member State has granted international protection

If the previous application was rejected because another Member State has granted international protection (under Article 33(2)(a) APD), the assessment of the new application will focus on whether the applicant submits new elements that significantly add to the likelihood that the inadmissibility of the previous application is not relevant to the new application. The new elements have to be related to the applicant's situation in the Member State that has already granted international protection. For example, that Member State has revoked, ended or refused to renew the international protection by means of a final decision, or the applicant is facing difficult personal circumstances due to their particular vulnerability and/or to inadequate living conditions available to the beneficiaries of international protection amounting to inhuman or degrading treatment <sup>(78)</sup>. If the new application is found admissible because of significant changes in the protection situation of the Member State that first granted protection, any elements related to the applicant's country of origin will need to be examined on the merits, as the risk of persecution and serious harm in the country of origin has not been assessed before by the determining authority.

### 3.3.2. Concept of first country of asylum

When the 'first country of asylum' concept had been applied in the previous procedure, the assessment of the new application will focus on the elements that could significantly increase the likelihood of not considering that country as the first country of asylum for the applicant (Article 33(2)(b) APD). In some situations, the concept of first country of asylum may no longer apply in a specific case, for example: the refugee status was revoked or ended by that third country; the applicant would no longer enjoy protection against *refoulement* if returned to that third country; the applicant was not readmitted by the third country and evidence in this regard is provided; the protection that the applicant would enjoy would not be sufficient due, among other things, to their vulnerability or to a discriminatory application of the law.

If the concept of safe country of asylum no longer applies, the application should be declared admissible, as there has never been an examination on the substance of the application regarding the country of origin.

### 3.3.3. Concept of safe third country

If the previous procedure concluded that a certain country would be a safe third country for the applicant, the new elements presented should significantly add to the likelihood of not considering that country as being safe with a view to the applicant's situation <sup>(79)</sup>. To substantiate their claim, the applicant could, for example, state that: their life and liberty are threatened because of race, religion, citizenship, membership of a particular social group or political conviction; there is a risk of torture or inhuman or degrading treatment upon return to that country; they would be returned to their country of origin without their case being examined; the law of the third country has changed and they cannot apply for refugee status; the status of protection granted by that third country is not effective.

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<sup>(78)</sup> See also, by analogy, CJEU, judgment of 19 March 2019, *Abubacarr Jawo v Bundesrepublik Deutschland*, C-163/17, ECLI:EU:C:2019:218, paragraphs 79 to 99. Summary available in the [EASO Case Law Database](#).

<sup>(79)</sup> Article 33(2)(c) APD.

If the applicant can convince the determining authority that the concept of safe third country no longer applies to their case, the application should be considered admissible.

### 3.4. Following the withdrawal of an application

Member States have the option to reject the application or to discontinue its examination when the applicant explicitly (Article 27 APD) or implicitly (Article 28 APD) withdraws their application for international protection.

#### 3.4.1. Explicit withdrawal

##### Subsequent application submitted after a discontinuation or a final decision following the explicit withdrawal of the application

If the national law so provides, the applicant may explicitly withdraw their application for international protection. This can happen, for example, when the applicant wants to return to the country of origin or has the possibility to enjoy another right of residence that gives protection against *refoulement*. These reasons should be properly recorded in the file when an application is explicitly withdrawn, as they may be taken into consideration at a later stage, for instance during the assessment of a subsequent application.

The withdrawal of the application for international protection can occur at different stages of the asylum procedure, before or after the personal interview, but before a decision is taken on the merits of the application. Therefore, at the time of the explicit withdrawal, the applicant may have already put forward the reasons for requesting international protection (in the lodging phase) or may have detailed the reasons in the personal interview.

In accordance with the APD <sup>(80)</sup>, the explicit withdrawal of an application may be dealt with in two ways by the determining authority: either by taking a decision to discontinue its examination or by rejecting it.

Discontinuation of the examination can also take place without taking a decision, but by inserting a note in the applicant's file. In case of a discontinuation, the determining authority does not examine the material facts of the application for international protection on their substance.

Regardless of whether the application is discontinued or rejected following an explicit withdrawal, any new application lodged by the same person is considered a subsequent application under the APD <sup>(81)</sup>. The rationale applied takes into account the fact that the applicant decides to withdraw the application while they had the opportunity to continue the asylum procedure and have their need for international protection assessed. Considering any new application as a subsequent application, and thus subjecting it to the admissibility procedure, discourages applicants from repeatedly withdrawing and resubmitting the

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<sup>(80)</sup> Article 27 APD.

<sup>(81)</sup> Article 2(q) APD. This is notably different from the situation after an 'implicit withdrawal' (see [Section 3.4.2](#)). After an implicit withdrawal, a new application can only be considered as a subsequent application if the previous application was rejected after an adequate examination of the substance of the claim, not if the previous application was merely discontinued (except for the situation provided for in Article 28(2), second subparagraph, APD).

application. Nevertheless, the applicant still has the right to put forward a new application that will be examined as a subsequent application in line with the conditions set out in the previous chapter.

The applicant may submit a new application because new elements have occurred since they withdrew their previous application. For example, the situation in the country of origin has seriously deteriorated due to political or legislative changes or to violent confrontations, or the personal circumstances of the applicant may have changed (e.g. new activities have been carried out in the Member State that have drawn the attention of the authorities in the country of origin, their right of stay in the Member State has ended and they risk being returned).

In most situations, no examination on the substance is done following an explicit withdrawal. However, for a subsequent application to be considered admissible, the new elements presented or that have arisen must significantly 'increase' the likelihood of granting international protection. In order to assess this increase, it is first necessary to establish the factual situation at the time of the withdrawal. However, this should not amount to a fully fledged examination of the merits of the previous application.

During the initial review of the facts from the previous procedure, the case officer should identify the material facts and decide whether they are credible or not without going further than the information immediately available. Subsequently, the case officer will assess the risk of persecution or serious harm upon return based on the material facts that could be accepted. This will serve as a reference for the preliminary examination to establish whether the new elements that have been presented or that have arisen significantly add to the likelihood of granting international protection.

If no decision on the merits was taken in the previous procedure, the preliminary examination of the subsequent application is substantially influenced by the information available in the file in connection with the previous application for international protection. In some cases there may be little to no information available in the file, while in other cases a personal interview may already have been conducted, but the examination was discontinued.

For instance, during the personal interview in the previous procedure the applicant stated that he had been a simple member of an opposition political party and risked being persecuted by the authorities in the country of origin due to his political views. He also mentioned that he had expressed his political opinions during the meetings of the local bureau of the party and through posts on social media. He submitted a valid card proving membership of the party, as well as COI regarding the treatment of the leaders of that party.

After the personal interview, **the applicant explicitly withdrew the application** because he had married a citizen of the country of asylum and had been granted a residence permit as a family member. The determining authority decided to discontinue the examination of the application.

After some time, the applicant submits a new application for international protection in which he states that he is divorced, that his residence permit has ended and that he has consequently received a decision to return to the country of origin. He claims that he cannot return there because the members of his political party are systematically arrested and tortured following the violent clashes with the authorities and the ruling party that took place soon after the results of last elections were announced, but after he had withdrawn his application. He also presents a copy of an arrest warrant issued in his name for propaganda and incitement to public violence.

In this situation, the case officer will first identify the material facts of the previous application and assess whether they are credible based on the information immediately available in the file (e.g. the statements of the applicant, the membership card, posts on social media (if available), COI at the time when the application was withdrawn). It may be accepted that the applicant was a simple member of the opposition political party and that he expressed his political views in a public manner, but that could not have drawn the attention of the authorities in the country of origin. Hence there were no particular elements in the file at the moment of the withdrawal to suggest that he was / might have been at risk of being persecuted or exposed to serious harm in case of return.

Next, the case officer will assess whether the elements that were put forward by the applicant through the subsequent application are new, and whether they significantly increase the likelihood of granting international protection. When considering the latter requirement, the first step is to assess the risk at the moment of the explicit withdrawal, based on the material facts in the previous procedure that were found to be credible and accepted after a first review. The case officer may consider that there was a change in the treatment of ordinary members of that political party following the recent violent clashes in the country of origin, and that this is a new element. Also, the case officer may determine that the change is substantial and significantly increases the likelihood of granting international protection (for details in this regard, see [Section 2.3 'What does "significantly adds to the likelihood" mean?'](#)).

When the previous procedure contains little to no information concerning a potential risk of persecution / serious harm, the preliminary examination will in most cases lead to an admissibility decision, unless the applicant only brings forward elements that are clearly not credible or not related to international protection.

However, if the first review of the elements of the previous application indicates that the applicant was likely in need of international protection, the notion of 'significantly adding to the likelihood' of being in need for international protection is met by default. As the likelihood can already be accepted based on the previous application, it would be pointless to require any further, increased likelihood – beyond that already accepted – even in the absence of new formal new elements. The subsequent application will thus have to be examined on its merits.

The reason why the applicant withdrew the previous application may influence the assessment of whether the new application should be considered admissible or not in relation to the new elements that are presented. The reason for withdrawing the application may provide information on the need for international protection at the moment of withdrawal and on the present need for protection, if the new application is an extension of facts already claimed by the applicant.

Lastly, the stage of the procedure at which the examination was discontinued may have an impact on the procedural steps to be followed during preliminary examination. For instance, if the applicant was not interviewed before the discontinuation of the procedure, they could be given the opportunity of an admissibility interview during the preliminary examination, where this is provided for or permitted by the national law and deemed necessary for an adequate examination of the admissibility of the new application. This admissibility interview should not take the form of a full examination, but can help the case officer to establish whether the applicant only brings forward elements that are clearly not credible or not related to international protection.

### 3.4.2. Implicit withdrawal

#### Subsequent application submitted after a discontinuation or a final decision following the implicit withdrawal of the application

The APD <sup>(82)</sup> envisages two options when it can be reasonably considered that the applicant has implicitly withdrawn or abandoned their application. In those cases, the determining authority can either reject the application on the basis of an adequate examination of its substance (wherever possible) or decide to discontinue the procedure.

In the case of a discontinuation, the elements presented for the previous application were not examined by the determining authority. This is why, in this case, applicants are entitled to request a reopening of their case or to make a new application that will not be subject to the admissibility procedure for subsequent applications. However, Member States may provide in their national law that any new application presented after a certain period of time (at least 9 months) from a decision to discontinue resulting from implicit withdrawal should be subject to the admissibility procedure laid out in Article 40 APD <sup>(83)</sup>.

If the new application is subject to an admissibility examination, the determining authority should proceed as described in [Chapter 2 ‘Preliminary examination’](#). It is worth mentioning that any failure by the applicant to comply with procedural obligations during a previous examination does not necessarily indicate that they do not qualify for refugee or subsidiary protection status. The failure to comply may be due, for example, to a clear failure by the competent authorities to inform the applicant about their duties, or it could be determined by events in the applicant’s life (e.g. serious health problems). Moreover, it should be borne in mind that a person with protection needs may abandon the application for a variety of reasons unrelated to the merits of their application. Whatever the case may be, the preliminary examination will focus on the new elements that occurred or came to light after the previous decision, therefore also after the implicit withdrawal, and not on the reasons for the implicit withdrawal itself.

### 3.5. Dependent adult / unmarried child lodging a new application after an application has been submitted on their behalf

A dependent adult may lodge an application after an application has previously been lodged on their behalf with their consent, if the national legislation envisages such an option <sup>(84)</sup>. Likewise, an unmarried child may lodge an application after another application has previously been lodged on their behalf in situations where the application of the parent automatically constitutes the application of all their unmarried children <sup>(85)</sup>, if the Member States’ national legislation so provides.

This is **not a case of subsequent application**, but is dealt with through a **similar procedure**, namely the preliminary examination. Therefore, the rules are the same as for a subsequent application, except for

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<sup>(82)</sup> Article 28 APD.

<sup>(83)</sup> Article 28(2) APD.

<sup>(84)</sup> Article 7(2) APD.

<sup>(85)</sup> Article 7(5)(c) APD.

two elements: (1) the preliminary examination <sup>(86)</sup> will consist of examining whether there are facts relating to the dependant's or unmarried child's situation that justify a separate application; (2) the national rules cannot provide for the omission of the personal interview <sup>(87)</sup>.

The relevant point in time for applying the procedure under Article 40 in relation to subsequent applications (preliminary examination, inadmissibility, etc.) is after a dependent adult has consented to a previous application lodged on their behalf or after an application has been lodged on behalf of an unmarried child as determined in national legislation, not the final decision on that previous application lodged on their behalf (as it is the case for subsequent applications). Consequently, Article 40(6) APD covers both (a) a situation in which a dependent adult / unmarried child lodges the application after a final decision has been taken on the previous application lodged on their behalf and (b) a situation in which the dependent adult/unmarried child lodges a new application during the examination of the previous application that has been lodged on their behalf (but before a final decision is taken).

In these cases, it is also important to assess the child's individual situation and apply the principle of the best interests of the child.

### 3.5.1. Facts justifying a separate application

Member States may consider an application for international protection to be inadmissible if a dependant lodges a new application after they have consented to having their case be part of an application lodged on their behalf, or if an unmarried child lodges an application after another application has previously been lodged on their behalf in situations where the application of the parent automatically constitutes the application of all their unmarried children. This applies unless there are facts relating to the dependant's or the unmarried child's situation that justify a separate application.

In Article 40(6) APD, the scope of the preliminary examination for these situations is explicitly redefined compared to the preliminary examination of subsequent applications (Article 40(2) APD). The facts justifying a separate application do not necessarily have to be 'new elements' within the meaning of the latter article. They may have already been available during the first application, but were not presented by the 'primary' applicant as a ground for applying for international protection at that time. Or there might be good reasons why the dependent adult or unmarried child did not raise the elements earlier, for instance if the threat were to stem from the 'primary' applicant (e.g. female genital mutilation).

The decisive question is whether the facts relating to the dependent adult or unmarried child merit an examination on their own. This may not be the case, for example, when the problems mentioned by the dependent adult or unmarried child are a further consequence of problems already raised by the 'primary' applicant and found not to be credible during the examination of the previous application. A separate examination would normally not be justified if the problems linked to the specific situation of the child had already been invoked and assessed during the examination of the application of the 'primary' applicant, and considered unfounded (though perhaps they were not questioned as such). However, there may be situations that affect a dependent adult or an unmarried child in a different way because of their vulnerability, or problems that only concern them but that they did not realise could form a ground for an application for international protection (e.g. a situation of domestic violence).

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<sup>(86)</sup> Referred to in Article 40(2) APD.

<sup>(87)</sup> Article 42(2)(b) APD.

Also, it may happen that the dependent adult or unmarried child comes forward with elements that are personal but unrelated to international protection, and therefore do not justify a separate application. For instance, the child may raise the fact that they do not want to be separated from the friends they made in the host country, or that they do not speak the language of their country of origin well.

### 3.5.2. Situations when the child becomes an adult

When the child becomes an adult (18 years old), they have the right to apply for international protection themselves. In accordance with the APD <sup>(88)</sup>, Member States must ensure that everybody with legal capacity has the right to lodge an application on their own behalf.

The new application, submitted after a final decision has been taken concerning a previous application lodged on the child's behalf, could be considered inadmissible in accordance with Article 33(2)(d) APD.

## 3.6. Following an exclusion decision

A subsequent application lodged after an exclusion decision <sup>(89)</sup> must be of such a nature that it can alter the exclusion assessment. During the exclusion assessment, the burden of proof to show that there are serious reasons for the applicant to be excluded lies with the asylum authorities. This is why the new elements have to demonstrate that the grounds on which the reasoning of the determining authority was based were erroneous or are no longer applicable to the applicant's situation. In the application it is not sufficient to challenge the reasoning. There must be new elements showing that the reasoning is not or is no longer valid. This may be the case, for example, when the applicant can prove that the asylum authority mixed up identities or when they were excluded based on information relating to their participation in a serious crime of which they have then been acquitted.

Any elements (further) substantiating the fear of persecution / serious harm will not affect the initial exclusion decision.

For further details on how to assess whether the new elements that have been presented by the applicant or have arisen add significantly to the likelihood of the applicant qualifying for international protection, see [Section 2.3 'What does "significantly adds to the likelihood" mean?'](#).

## 3.7. Following the cessation, revocation or ending of, or refusal to renew international protection status

This section deals with the situation in which an applicant submits a new application after a decision has been taken to cease, revoke, end or refuse to renew their international protection. A distinction can be made depending on the grounds for such a decision.

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<sup>(88)</sup> Article 7(1) APD.

<sup>(89)</sup> Pursuant to Article 12 or Article 17 QD.



### 3.7.1. Cessation

If a new application is lodged by an applicant for whom a decision to cease international protection has been taken <sup>(90)</sup>, the cessation decision will be the starting point for assessing the admissibility of the subsequent application. In this decision, the international protection has been called into question for one of the following two reasons.

- **The applicant's own behaviour.** The applicant has voluntarily re-availed themselves of the protection of the country of nationality; has lost their nationality or has voluntarily reacquired it; has acquired a new nationality and enjoys the protection of the country of the new nationality; or has voluntarily re-established themselves in the country they left or outside which they remained owing to a fear of persecution.
- **Changed circumstances.** The circumstances in connection with which the applicant has been recognised as a refugee may have ceased to exist; the applicant can no longer continue to refuse to avail themselves of the protection of the country of nationality; being a stateless person, the applicant may return to the country of former habitual residence because the circumstances in connection with which they were recognised as a refugee have ceased to exist; or the circumstances that led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

The admissibility examination will thus focus on the ability of the new elements to add significantly to the likelihood that the cessation decision will not apply or no longer applies, or that there are new grounds for the applicant to qualify for international protection. Consequently, these new elements could relate to the material elements that led to the cessation of the international protection initially granted (the applicant may wish to establish that the reasons for which they were considered to have ceased to fulfil the conditions for the granting of international protection may be called into question in light of the new elements they submit in support of their subsequent application); or the new elements could be linked to facts different from those that led to the initial granting of international protection.

For further details on how to assess whether the new elements that have been presented by the applicant or have arisen add significantly to the likelihood of the applicant qualifying for international protection, see [Section 2.3 'What does "significantly adds to the likelihood" mean?'](#)

### 3.7.2. Revocation, ending or refusal to renew

#### Misrepresentation or omission of facts

If a decision to revoke <sup>(91)</sup> the international protection has been taken <sup>(92)</sup> because of misrepresentation or omission of facts, including by using false documents in the previous procedure, the applicant is considered never to have been a refugee or a beneficiary of subsidiary protection, because they obtained international protection but were not entitled to it.

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<sup>(90)</sup> Article 11 or Article 16 QD.

<sup>(91)</sup> Whenever 'decision to revoke' is mentioned in this section, it also refers to decisions to end or to refuse to renew international protection.

<sup>(92)</sup> Pursuant to Article 14(3)(b) or Article 19(3)(b) QD.



In this case, the examination of the admissibility of a new application will focus on the ability of the new elements to add significantly to the likelihood of reviewing the revocation decision, or to prove that there are new grounds for the applicant to qualify for international protection. The new elements could relate to the material elements that led to the revocation of the international protection initially granted. For instance, the applicant may wish to establish that the reasons for revocation were erroneous, and submits new elements to support their point of view. Or the applicant may aim to prove that elements that were previously considered fraudulent are actually not fraudulent, and puts forward other pieces of evidence to this end.

The new elements could also relate to facts different from those that led to the initial grant of international protection.

For further details on how to assess whether the new elements that have been presented by the applicant or have arisen add significantly to the likelihood of the applicant qualifying for international protection, see [Section 2.3 ‘What does “significantly adds to the likelihood” mean?’](#).

### Exclusion cause

If a new application is lodged by an applicant for whom a decision to revoke international protection has been taken because they should have been or are excluded, the admissibility examination will focus on the ability of the new elements to add significantly to the likelihood of reviewing the exclusion decision. Since the applicant has already been excluded from international protection, the new elements will have to relate to the reasons for exclusion and provide grounds for the reconsideration of that decision.

In this case, the applicant is considered not to be a refugee or a beneficiary of subsidiary protection because they obtained international protection but they were not (or are no longer) entitled to it. For further details, see [Section 3.6 ‘Following an exclusion decision’](#).

### Revocation of refugee status – danger to security or final conviction for a particularly serious crime

When a new application is lodged by an applicant for whom a decision to revoke the refugee status has been taken because there are reasonable grounds for regarding them as a danger to the security of the Member State in which they are present, or because having been convicted by a final judgment of a particularly serious crime they constitute a danger to the community of that Member State, it must be kept in mind that the applicant continues to be a refugee for the purposes of, inter alia, Article 1A of the Refugee Convention, in spite of the revocation or ending of their status (for more details see paragraphs 99 and 110 of the Court of Justice of the European Union (CJEU) ruling in joint cases C-391/16, C-77/17 and C-78/17 <sup>(93)</sup>).

The admissibility procedure will thus, in principle, aim at assessing whether the new elements add to the likelihood of not or no longer considering the applicant to be a danger to the security of the Member State or a danger to the community of that Member State, and whether it is therefore possible to grant the applicant refugee status. More precisely, in this case the applicant has not ceased to be a refugee but has lost their refugee status by means of a final revocation or a final ending decision. This status can only

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<sup>(93)</sup> CJEU, judgment of 14 May 2019, *M v Ministerstvo vnitra, and X, X v Commissaire général aux réfugiés et aux apatrides*, C-391/16, C-77/17 and C-78/17, ECLI:EU:C:2019:403; paragraphs 99 and 110. Summary available in the [EASO Case Law Database](#).

be regained if the person is no longer considered a danger to the security or to the community of the Member State.

In some cases, when assessing the admissibility of the new application, it may be found that the elements that existed when the need for international protection was initially considered do not exist anymore. Hence, during the preliminary examination it is necessary to keep an eye on any new elements or new facts that have been submitted by the applicant or are available to the authority in charge of the examination, showing a change in the personal circumstances of the applicant <sup>(94)</sup>. For instance, it may appear that the applicant has ceased to be a refugee as a result of their behaviour or due to a change in circumstances.

**NB:** The guidance above may be applied *mutatis mutandis* to the refusal to grant refugee status in accordance with Article 14(5) APD.

For further details on how to assess whether the new elements that have been presented by the applicant or that have arisen add significantly to the likelihood of the applicant qualifying for international protection, see [Section 2.3 ‘What does “significantly adds to the likelihood” mean?’](#).

### 3.7.3. Absence of the applicant

An interview / written statement is necessary before any decision to end international protection is taken. However, it may happen that the beneficiary of international protection does not appear for the interview or does not submit a written statement. This may be due to a variety of factors, ranging from a problem regarding the address of the beneficiary (e.g. the interview invitation or the invitation to submit a written statement has been sent to an address where the person concerned no longer receives mail), to a stay abroad for a short or longer period, to a return to the country of origin, etc. The determining authority can take the decision to end international protection despite the absence (or the answer) of the beneficiary of international protection only if it has sufficient conclusive evidence to that end. But the validity of such a decision can be challenged by means of an appeal to the appeal body, if the applicant lodges such an appeal in due time.

If the applicant submits a subsequent application, the examination of admissibility will have to cover the elements invoked by the applicant to justify their continued need for international protection. Since there was no interview or written statement prior to the decision to end international protection, subject to the provisions of the national law, it is likely that an interview will have to be conducted in order to assess whether the elements put forward are such as to significantly increase the likelihood that the ending of the international protection status can be overturned. For further details, see [Section 2.3 ‘What does “significantly adds to the likelihood” mean?’](#)

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<sup>(94)</sup> In accordance with Article 11 QD.

### 3.8. While an appeal against the decision concerning the previous application is still pending

Until the rejection of a previous application becomes final, any new elements presented under a (potential) subsequent application must be assessed in the ongoing appeal procedure <sup>(95)</sup>. In accordance with the APD, new facts or evidence must be introduced into the pending appeal procedure since the appeal body has the obligation to provide for a full and *ex nunc* examination of both facts and points of law. All further representations need to be submitted at this stage, until the proceedings are closed.

When applications are received by the competent authority <sup>(96)</sup>, this authority should check whether the previous procedure is still pending, either before the determining authority or before the appeal body. If the previous procedure is still pending (which may also include, when the national law so allows, the situation in which the hearing has already been conducted at the appeal stage), the applicant should be informed that the new elements must be submitted to the authority that is currently examining the pending application and no subsequent application should be registered.

### 3.9. Repeated subsequent applications

The APD does not provide any limitation as to the number of applications for international protection that one individual may present in a lifetime. This applies irrespective of the reasons why the applicant requests that a further substantive examination be carried out.

However, the burden that repeated subsequent applications create on Member States has led to some limitations being established in order to avoid the abusive use of the right to apply for international protection numerous times so as to remain on the territory of a Member State. This is the case, for example, when applicants ‘split’ the reasons for their application for international protection and/or partially mention facts or present evidence through multiple separate applications that are submitted gradually over time. More concretely, they may deliberately choose not to present elements/evidence in the ongoing administrative or judicial procedures in order to use such elements/evidence at a later stage, to be able to initiate new proceedings if the initial procedure results in a negative decision. The overall goal could be to break through the validity or *res judicata* nature of the decisions and, at least, to extend their right to remain. This conduct breaches the applicants’ legal obligation to submit as soon as possible all the elements needed to substantiate the application for international protection and to cooperate with the competent authorities with a view to establishing their identity and other elements, as referred to in Article 4(1) and (2) QD, during the examination of their application.

In these cases, as pointed out in [Section 2.1 ‘What are “new elements and findings”?’](#), if it is provided for by the national law, the determining authority may assess whether the elements that were put forward by the applicant could have been submitted during the previous procedure. In other words, it is examined whether the applicant was, through no fault of their own, incapable of asserting them before,

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<sup>(95)</sup> Article 40(1) APD.

<sup>(96)</sup> Article 2(f) APD

while the previous proceedings were pending <sup>(97)</sup>. If the case officer concludes that the applicant was capable in this regard, the application may be rejected as inadmissible.

Also, in cases of repeated subsequent applications, Member States may derogate from the right to remain on the territory. For more information on this matter, see [Section 1.4 'The right to remain and its exceptions'](#).

### 3.10. After the rejected applicant has left the territory(ies) of the Member State(s)

When a person who has left the territory of the Member State where a final decision was taken concerning their previous application for international protection submits a new application in the same Member State, such an application is considered a subsequent application if that Member State is responsible for its examination (see [Section 3.11 'After Dublin procedure'](#)). The fact that the rejected applicant had previously left the territory of that Member State cannot automatically be assessed as a new element for which a decision on admissibility should be issued. It should be considered within the framework of the preliminary examination. If an applicant has temporarily returned to their country of origin after their previous application for international protection was unsuccessful and then submits a new application after re-entering the competent Member State, it is irrelevant in legal terms whether the applicant returned to their home country voluntarily, following an order to leave the territory, or rather was forced to return, for example by means of removal.

In this situation, the determining authority should, inter alia, assess whether the applicant provides information that is deemed sufficient in order to accept the fact that they have returned to their country of origin and the facts/events that have occurred during their return (see [Section 2.3 'What does "significantly adds to the likelihood" mean?'](#)).

For instance, when the applicant claims in the subsequent application that they face state persecution, the circumstances in which they entered and left the home country and their interactions with the authorities in the country of origin (or lack thereof) should be assessed during the preliminary examination. If the applicant presents an individual threat, it is recommended that a personal interview be conducted as part of the admissibility examination, if provided for or permitted by the national law.

Lastly, as already mentioned, the fact that the applicant left the territory of the Member State but did not return to their country of origin is to be assessed in relation to the new elements that have been presented or that have arisen within the framework of the preliminary examination. It does not constitute a new element in itself.

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<sup>(97)</sup> Article 40(4) APD.

## 3.11. After Dublin procedure

### 3.11.1. The Dublin III regulation

Regulation (EU) No 604/2013 (Dublin III regulation <sup>(98)</sup>) lays down the criteria for determining which Member State is responsible for examining an application for international protection.

As soon as a third-country national or stateless person applies for international protection in a Member State, that Member State generally first examines whether, under the Dublin III regulation, another Member State is responsible for examining the application for international protection and whether a transfer to that Member State is possible. Another Member State may be responsible for examining an application for international protection, inter alia, when a family member has already lodged an application in that Member State or when the applicant irregularly entered the territory of the Member States via the external border of that particular Member State. Assessments like these are only made once an application is first lodged in one of the Member States. These cases fall outside the scope of this guide as they concern first – not subsequent – applications.

Another Member State may also be responsible when an application has already been lodged in that Member State. A Eurodac hit, pursuant to Article 9(5) of Regulation (EU) No 603/2013 <sup>(99)</sup>, can serve as proof that an applicant has previously lodged an application in another Member State. In some cases, other evidence can also indicate that the person has applied for asylum in another Member State. For further details on this matter, refer to page 51 of the *EASO practical guide on the implementation of the Dublin III regulation: Personal interview and evidence assessment*, October 2019. In these cases, a Member State can submit a take back request to the Member State in which the application had previously been lodged. After the acceptance of such a request by the requested Member State, the person concerned can eventually be transferred to the responsible Member State by the Member State where the person concerned is located. After a Dublin transfer, a situation could arise in which the applicant lodges a subsequent application in the responsible Member State.

### 3.11.2. Subsequent application in the responsible Member State

The Member State responsible for the examination of the application for international protection has to take back an applicant or a third-country national / stateless person who has made an application in another Member State or who is on the territory of another Member State without a residence document in situations where:

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<sup>(98)</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 (OJ L 180, 29.6.2013, p. 31).

<sup>(99)</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 (recast) (OJ L 180, 29.6.2013, p. 1).

- their application, which had already been lodged, is still under examination in that Member State <sup>(100)</sup>;
- their application was withdrawn <sup>(101)</sup>;
- their application was rejected <sup>(102)</sup>.

### Application still under examination

If the application in the responsible Member State is still under examination, following a successful Dublin transfer, the Member State responsible shall ‘examine or complete the examination of the application for international protection made by the applicant’ <sup>(103)</sup>. In this case, there is no subsequent application being lodged by the applicant.

### Application withdrawn

If the application in the responsible Member State is withdrawn and the Member State had previously discontinued the examination because the applicant withdrew their application, following a successful Dublin transfer to that Member State, it needs to be ensured that the applicant is entitled to either request the completion of the examination of their application or lodge a new application <sup>(104)</sup>. This is only applicable to cases in which no decision on the application has been taken in the first instance. The Dublin III regulation notes that these cases ‘shall not be treated as a subsequent application as provided for in Directive 2013/32/EU’ <sup>(105)</sup>. In such cases the Member State responsible needs to ensure completion of the examination of the application. On this matter, refer also to [Section 3.4 ‘Following the withdrawal of an application’](#).

### Application rejected

If the application has previously been rejected in the responsible Member State and the person concerned is successfully transferred to that Member State, pursuant to the Dublin III regulation the responsible Member State needs to ensure that ‘the person concerned has or has had the opportunity to seek an effective remedy pursuant to Article 46 of Directive 2013/32/EU’ <sup>(106)</sup>.

Should the person concerned wish to apply for international protection again in the responsible Member State, this would be considered a subsequent application. As a result, it would have to be examined whether the requirements set forth in Article 40(2) APD have been met.

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<sup>(100)</sup> Article 18(1)(b) Dublin III regulation.

<sup>(101)</sup> Article 18(1)(c) Dublin III regulation.

<sup>(102)</sup> Article 18(1)(d) Dublin III regulation.

<sup>(103)</sup> Article 18(2) Dublin III regulation.

<sup>(104)</sup> Article 18(2), second subparagraph, Dublin III regulation.

<sup>(105)</sup> Article 18(2) Dublin III regulation.

<sup>(106)</sup> Article 18(2), last subparagraph, Dublin III regulation.

### 3.11.3. Subsequent application in the requesting Member State

Section 3.11.2 above mentioned the phrasing ‘following a successful Dublin transfer’. There are instances in which a Dublin transfer cannot take place, for various reasons, which can ultimately result in the transfer of responsibility to the Member State that requested the person concerned be taken back in the first place (the ‘requesting Member State’). This situation may also occur where an application is first lodged in all the aforementioned Member States.

#### Appeal against a Dublin transfer decision

The person concerned has the right to an appeal against or a review of <sup>(107)</sup> a decision of the requesting Member State to transfer them to the responsible Member State <sup>(108)</sup>. While an appeal is pending before the administrative court or competent appeal body, depending on the national law/practice, it is possible to lodge a new application for international protection, but it will not be processed until a final decision has been taken by the competent appeal body <sup>(109)</sup>.

A final decision of the competent appeal body can lead to a shift in responsibility from the requested Member State to the requesting Member State, for example because it is not possible to transfer the person concerned to the responsible Member State <sup>(110)</sup>. In such a case, depending on the national law/practice of the Member State in question, the person concerned either has their application for international protection examined on its merits or will be granted the opportunity to lodge another application in that Member State.

#### Time limits for Dublin transfers

If the person concerned is to be transferred to the responsible Member State, time limits apply within which the Dublin transfer needs to be carried out. These time limits aim to ensure that the person concerned ultimately has effective access to an asylum procedure in one of the Member States. Starting from the acceptance of a take back request, or from the final decision on an appeal where suspensive effect was granted, the requesting Member State has 6 months to transfer the person concerned <sup>(111)</sup> to the responsible Member State. There are exemptions to this rule <sup>(112)</sup>, for example extending the time limit if the person concerned absconds.

#### End of responsibility

If the applicant has left the territory of the Member States for at least 3 months or in compliance with a return decision or removal order, the requested Member State is no longer responsible <sup>(113)</sup>.

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<sup>(107)</sup> Article 27 Dublin III regulation.

<sup>(108)</sup> Article 26 Dublin III regulation.

<sup>(109)</sup> It should be noted that some Member States explicitly exclude the possibility to lodge a new application for international protection while an appeal or review is ongoing.

<sup>(110)</sup> Article 3(2) Dublin III regulation.

<sup>(111)</sup> Article 29(1) Dublin III regulation.

<sup>(112)</sup> See, for example, Article 29(2) Dublin III regulation.

<sup>(113)</sup> Article 19(2) and (3) Dublin III regulation.



If it is established that the applicant has been granted international protection in the requested Member State, the application is not considered a subsequent application and is inadmissible. In these cases, the Dublin III regulation is not applicable.

### Practical examples

Various scenarios can be envisaged in which the requesting Member State is faced with a subsequent application by the person concerned.

**Case scenario 1:** The transfer has not taken place yet (but is still possible) and a new application for international protection has been lodged <sup>(114)</sup> in the requesting Member State

(a) The Dublin transfer decision is final

If a new application for international protection is lodged in the transferring Member State, this application has to be examined by the responsible Member State in accordance with Article 40(7) APD.

In this situation, if permitted or provided for by the national law/practice of the Member State, the competent case officer at the Dublin Unit may assess whether the Dublin decision, which is already final, should be revoked because new grounds have arisen that are relevant for determining the Member State responsible. Unless the applicant submits such grounds, the Dublin transfer decision is not to be revoked. The statement of reasons for the decision should refer to the transfer decision to the Member State, which remains valid and in force as referred to in Article 40(7) APD. The person concerned will have the right to the appropriate legal remedies.

(b) The Dublin transfer decision is not yet final

If a new application for international protection is lodged, no new asylum procedure is initiated in the transferring Member State.

- If no legal action is pending (within the time limit provided for by the national law of the Member State to lodge an appeal or review), an assessment as to whether the transfer to the Member State is still possible, taking into account in particular the individual circumstances of the case, may be carried out by the Dublin case officer. If permitted or provided for by the national law/practice of the Member State, where new reasons relevant for determining the Member State responsible are presented the Dublin decision already issued may be revoked or amended, depending on the outcome of the assessment. If such an assessment is not possible, the applicant should be advised to lodge an appeal or review.
- If legal action is pending, the new facts or evidence can be introduced into the main pending proceedings. The applicant should be directed to submit such new facts or evidence to the competent appeal body for review in the context of the ongoing proceedings.

<sup>(114)</sup> The Dublin procedure starts when an application for international protection is lodged with a Member State (see Article 20 Dublin III regulation). In accordance with CJEU, judgment of 26 July 2017, [Tsegezab Mengesteab v Bundesrepublik Deutschland](#), C-670/16, ECLI:EU:C:2017:587, paragraph 105, an application 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.' Summary available in the EASO Case Law Database.



**Case scenario 2:** Re-entry into the Member State of application ('requesting Member State') after transfer or voluntary departure and lodging <sup>(115)</sup> of an application for international protection

If a new application for international protection is lodged after the Dublin procedure was successfully completed with a transfer to the responsible Member State, it should first be assessed whether that Member State is still responsible or whether another Member State has become responsible for examining that application for international protection. If this assessment reveals that the same Member State is still responsible or that another Member State has become responsible, a new take back request should be sent. After this request is accepted, a new Dublin transfer decision should be issued as the previous transfer decision has become obsolete as a result of the transfer successfully taking place.

If the assessment reveals that the responsibility ceased based on the grounds mentioned in the section on 'End of responsibility' above after the transfer or voluntary departure to the Member State responsible, and if no other Member State is responsible for the examination of the application for international protection, the application should be examined in the Member State at hand.

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<sup>(115)</sup> The Dublin procedure starts when an application for international protection is lodged with a Member State (see Article 20 Dublin III regulation). In accordance with CJEU, [Tsegezab](#), op. cit. fn. 112, paragraph 105, an application 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.' Summary available in the [EASO Case Law Database](#).



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