



# SURVEY ON LEGAL AID FOR ASYLUM SEEKERS IN EUROPE

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## CHAPTER I. INTRODUCTION

This survey provides a comparative overview of the provision of legal aid for asylum seekers in 19 countries across Europe. It gathers information not only on the role and tasks of those advising, assisting and representing asylum seekers but also on related aspects of the asylum procedure. For the individuals and families seeking protection, the asylum procedure may be the most important process they experience in their lifetime. Indeed, for those fleeing persecution or serious harm it may mean the difference between finding safety and security and being sent back to human rights violations or worse. Due to the potentially irreversible consequences of erroneous decisions, safeguards are needed to ensure that those in need of international protection are recognised as such. One essential safeguard is the provision of quality legal aid for asylum seekers. Asylum seekers face numerous obstacles due to the very nature of their vulnerable situation. Factors such as the severe traumatising, isolation due to language barriers and the lack of support all hinder their effective access to justice.<sup>1</sup> Therefore it is imperative that they receive quality legal advice at the earliest stage possible in the asylum procedure.

As asylum claims in Europe are increasingly being processed through sophisticated and complex legal procedures, the importance of legal representation and assistance in guiding asylum seekers through these processes cannot be underestimated. At present there is increasing debate in Europe on the role of legal aid. This is most prominently reflected at the EU level in the current discussions on the EU Commission recast proposals amending the asylum *acquis*, in particular the amendments to the Asylum Procedures Directive.<sup>2</sup> Also at the national level, legal aid for asylum seekers is the subject of increasing public debate such as in the UK where the closing of one of the most important legal aid providers for asylum seekers, Refugee and Migrant Justice, an ECRE member, has left thousands of asylum seekers without proper legal assistance and representation.<sup>3</sup>

A motivation for undertaking this survey was the fact that there is limited up-to-date comparative research on legal aid systems for asylum seekers in Europe. The most comprehensive comparative research in Europe was produced by ECRE in 2001.<sup>4</sup> More recently, some information on the availability of legal aid in asylum procedures was compiled by the European Migration Network in October 2009.<sup>5</sup> Additionally a 2009 report on asylum procedures published by the Intergovernmental Consultations on Migration, Asylum and Refugees includes summary information on legal

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<sup>1</sup> "It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. [S/]He finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his [her] case to the authorities of a foreign country, often in a language not his [her] own". See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para. 190.

<sup>2</sup> COM(2009) 554 final, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection*, Brussels, 21 October 2009 (hereinafter Asylum Procedures recast proposal).

<sup>3</sup> For further information see The Times, "Asylum seekers face legal aid axe", 17 August 2010 and The Guardian, "Asylum seeker takes his own life after losing legal aid", 1 August 2010 and "Legal aid is in tatters and only long-term thinking can mend it", 19 August 2010.

<sup>4</sup> ECRE, *Study on the availability of free and low-cost legal assistance for asylum seekers in European States*, November 2001.

<sup>5</sup> European Migration Network, *Ad-Hoc Query on the Legal Aid in International Protection Procedures*, Compilation produced on 22<sup>nd</sup> October 2009 (covering 18 EU Member States).

assistance of asylum seekers in the countries concerned.<sup>6</sup> The Fundamental Rights Agency report on access to effective remedies also complements this survey by providing an account of the asylum seeker's own experiences relating to free legal assistance.<sup>7</sup> Furthermore, this survey itself, intends to complement the recent Commission report on the implementation of the Asylum Procedures Directive.<sup>8</sup> Research has also been carried out at the national level for example in the UK on the quality and cost of legal advice in asylum cases<sup>9</sup> and in Belgium on the provision of legal assistance in detention centres.<sup>10</sup> All of these reports complement the information gathered in this survey and other sources are also referenced where appropriate.<sup>11</sup>

This survey provides an overview of the practice and procedures concerning legal aid for asylum seekers in 17 EU Member States: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Romania, Slovenia, Spain, the Netherlands, the United Kingdom and also Norway and Switzerland. Throughout the survey it also refers to the implementation of relevant provisions in the Asylum Procedures Directive. However, the objective of the study was not in the first place to monitor its implementation, rather the survey aims to stimulate dialogue on the necessity for a high quality legal aid regime. Nevertheless, it is envisaged that the information gathered in this survey may also inform the ongoing debate on the Asylum Procedures recast proposal, which includes amendments strengthening the provision of free legal aid to asylum seekers. In this respect, the information included in this survey adds to the picture of the growing complexity of asylum procedures in European countries which makes access to quality legal assistance and representation for asylum seekers indispensable in order to ensure that they are able to comply with procedural requirements and that their case is effectively heard and properly presented.

Among the key findings are the crucial role of NGO's in the provision of legal aid to asylum seekers, the obstacles faced by asylum seekers in accessing legal aid in detention as well as in Dublin and border procedures, the limited application of merits

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<sup>6</sup> Intergovernmental Consultations on Migration, Asylum and Refugees, *Asylum Procedures. Report on Policies and Practices in ICC Participating States (hereinafter IGC, Asylum Procedures Report)*, May 2009.

<sup>7</sup> European Union Agency for Fundamental Rights, *Access to effective remedies: The asylum-seeker perspective*, Thematic Report, September 2010.

<sup>8</sup> European Commission, *Report from the Commission to the European Parliament and Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, Brussels, 8.9.2010. COM(2010) 465 final.

<sup>9</sup> ICAR, *Review of quality issues in legal advice: measuring and costing quality in asylum work*, March 2010; Council on Social Action, *Time well-spent: The importance of the one-to-one relationship between advice workers and their clients*, 2009); Devon Law Centre, *Asylum Appellate Project – Final Report*, March 2010.

<sup>10</sup> Aide aux Personnes Déplacées, Caritas International – Belgique, Centre Social Protestant, Coordination et Initiatives pour Réfugiés et Etrangers (CIRE), Jesuit Refugee Service – Belgium, Mouvement contre le Racisme, l'Antisémitisme et la Xénophobie (MRAX), Piont d'Appui, Service Social de Solidarité Socialiste (SESO), Vluchtelingenwerk Vlaanderen, *Faire valoir ses droits en centre fermé. Un état des lieux de l'accès à l'aide juridique dans les centres fermés pour étrangers en Belgique*, November 2008.

<sup>11</sup> For further related information on asylum procedures see UNHCR *Improving asylum procedures: Comparative analysis and recommendations for law and practice*, UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States, March 2010 (hereinafter UNHCR, *Asylum Procedures Study*).

and means testing in granting legal aid as well as the practice of restricting free legal aid to the appeals procedure in a majority of countries surveyed.

It is clear that in many European countries today the involvement of NGOs in the provision of legal aid to asylum seekers is indispensable. This is particularly evident at the first instance administrative stage of the procedure whereby NGO's in some countries may be the only source of legal assistance for asylum seekers or conversely be the important link to accessing legal aid by lawyers. Despite their important role this survey has found that in a number of countries NGOs have limited resources due to funding delays or cuts which detrimentally impacts upon access to legal assistance for a most vulnerable client group, asylum seekers.

The research also illustrates the many practical difficulties asylum seekers experience when trying to access legal aid at the border or in detention or when their claim is being examined in an accelerated asylum procedure or pursuant to the Dublin II Regulation. As an example this research shows that in the context of accelerated and Dublin procedures asylum seekers in certain countries simply may not have sufficient time to contact a legal aid provider while provision of quality legal aid may be rendered almost impossible for the lawyer or legal advisor due to the speed of the process.

A third important finding concerns the role of means and merits testing in the provision of legal aid in the countries surveyed. While means testing is in most countries a condition in the law, good practice was identified in a number of countries where the means testing is reduced to merely a procedural formality. This is also and even more so the case with merits testing as this survey shows that such a condition is not strictly applied in practice with regard to legal representation in the vast majority of countries surveyed. At the same time in none of the countries surveyed is a merits test being applied with regard to the provision of legal assistance.

Finally, the survey presents a mixed picture with regard to the availability of legal aid at all stages of the asylum procedure, including at the first instance. It is indeed worrying that in a majority of the countries surveyed legal aid is only ensured at the appeals stage. Nevertheless, a number of countries included in this survey do provide legal aid to asylum seekers at all stages of the asylum procedure, which is in line with an approach based on frontloading, a concept promoted by ECRE. These are just some of the conclusions drawn from this research, a full and comprehensive overview of all main findings is provided in Chapter III of this report.

### **1.1. Methodology & Structure**

The information in this study has been provided by the European Legal Network on Asylum (ELENA)<sup>12</sup> and lawyers and legal advisors participating in ELENA or active within ECRE member organisations. The experts involved provided detailed information on their respective country on the basis of a questionnaire and phone interviews. The outcome covers the national practice concerning legal aid from October 2009 through to August 2010. Due to the entry into force of a new asylum procedure in the Netherlands towards the end of the research (1 July 2010) a summary description of the new procedure and its main effects on the provision of legal aid has been included in a separate annex to this survey. The information

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<sup>12</sup> ELENA, the European Legal Network on Asylum, is a forum for legal practitioners who aim to promote the highest human rights standards for the treatment of refugees, asylum seekers and other persons in need of international protection in their daily counselling and advocacy work. For more information see [http://www.ecre.org/about\\_us/elena](http://www.ecre.org/about_us/elena).

included in this survey regarding the legal aid system in the Netherlands is still valid but must be read in light of the main characteristics of the new asylum procedure.

This survey is structured around three main chapters. Chapter II provides a general overview of international and regional standards on legal aid including soft law instruments, legislation and relevant jurisprudence. Chapter III provides a comprehensive overview of the main findings of the survey structured around 6 topics as follows: 1) the position of legal aid for asylum seekers within the general legal aid regime; 2) legal aid providers and in particular the respective roles of lawyers and legal advisors; 3) access to legal aid; 4) both the availability and the role of legal aid during the asylum procedure; 5) the challenges concerning the provision of legal aid in specific procedures and legal aid specifically for unaccompanied children; 6) complaint procedures and other methods to monitor the quality of legal aid provided.<sup>13</sup> These sub-sections are followed by recommendations on improving both access and the content of legal aid. Chapter IV of the survey provides more in-depth information on the national practice in the countries surveyed. The information in this part of the survey should be read in light of the national context of the respective countries.<sup>14</sup> This section not only provides information on legal aid but also certain procedures in the national asylum systems of the countries included in this study. Legal aid systems for asylum seekers in the countries researched differ considerably and certain aspects therefore require detailed description of the national context within which legal aid operates in order to fully understand its functioning or the challenges it creates for legal aid providers and asylum seekers. Further background information on the legal framework in the countries included in the survey is provided in Annex II (national legal framework on legal aid and asylum procedures) and Annex III (Grounds for acceleration of the Asylum Procedure).

Finally, Annex I presents a list of recommendations on the accessibility and availability of legal aid for asylum seekers based on the findings of this research. These recommendations provide a number of fundamental principles necessary for ensuring access to quality legal aid for asylum seekers in Europe.

It should be noted that this survey at times provides information which is broader than legal aid but deals with related aspects of asylum systems for instance the way asylum interviews are conducted or the competences of appeal authorities. This information is necessary as it may either directly impact upon the quality of legal aid and provides a background for a better understanding of the general system in which legal aid providers function.

## **1.2 The Definition of Legal Aid**

This research has revealed that the terminology used to define legal aid for asylum seekers varies considerably in the countries surveyed. Legal aid for asylum seekers is provided in various ways in the countries of research and may encompass legal information and advice, legal assistance and representation. This survey has also found that a variety of service providers may be involved in the provision of legal including private lawyers, caseworkers and legal advisors. It is important to note that for the purposes of this survey legal aid is used a generic term encompassing both

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<sup>13</sup> It should be noted that on certain points limited or no information was available on the practice in some of the countries surveyed therefore in the findings section no reference is made to these countries.

<sup>14</sup> Further information on national procedures for a number of these countries can also be found in the UNHCR, *Asylum Procedures Study* and IGC, *Asylum Procedures Report*.

the provision of legal assistance and legal representation. However, in many European countries legal assistance is to be distinguished from legal representation. Whereas legal representation implies the capacity of the legal aid provider to act on behalf of and represent his/her client i.e. the asylum seeker, legal assistance is mainly restricted to a purely advisory relationship between the provider of legal aid and the asylum seeker. The latter usually does not allow the service provider to act on behalf of the asylum seeker in the asylum procedure. In this survey sometimes the term legal advice is used as well. This must be understood as having the same meaning as legal assistance for the purpose of this survey. For the sake of clarity legal aid as stated in this survey refers to the meaning of legal assistance and legal representation as defined above, unless otherwise indicated in Chapter III and IV.<sup>15</sup>

It must be noted that in the context of Austria, the term legal aid has a definition which is narrower than the one described above. Indeed, in Austria, the term legal aid is exclusively used to indicate the legal representation of an asylum seeker by a lawyer at the Constitutional Court. At all other stages of the asylum procedure in Austria asylum seekers are assisted by two types of legal advisors: 'Rechtsberater' (legal advisors) who are employed by the Ministry of the Interior and provide legal assistance to asylum seekers during the admission procedure and 'Flüchtelingsberater' (refugee advisors) who are normally seconded staff from NGOs, who can assist and represent asylum seekers throughout the asylum procedure.<sup>16</sup> Nevertheless, for the purpose of this survey the term legal aid will also be used to describe the provision of legal assistance and representation to asylum seekers by Rechtsberater and Flüchtlingsberater in Austria. Where the term legal aid only covers legal representation by a lawyer before the Constitutional Court in Austria, this will be explicitly mentioned throughout the survey.

Furthermore, varying terminology is being used in the countries of research with regard to the providers of legal aid. In some of the countries surveyed the term 'lawyer' exclusively refers to a private lawyer, who has professional qualifications, is registered by a Bar Association and has the capacity to represent asylum seekers. In contrast to this in other countries surveyed the term 'lawyer' may also refer to a law graduate who is not qualified as a 'barrister' or 'solicitor' (common law terminology) and is only entitled to provide legal advice or assistance. In other countries a distinction is made in the context of legal aid between legal advisors who usually provide assistance at the initial administrative stage of the procedure and legal aid lawyers who represent asylum seekers before appellate authorities.

For the purposes of this survey the term 'lawyer' refers to an independent legal professional who is member of a Bar Association and entitled to represent an asylum seeker. Also, the term 'legal advisor' in this survey reflects a person who provides legal assistance without being able to act on behalf of the asylum seeker or represent him or her in the asylum procedure.<sup>17</sup> Throughout the survey exceptions to these definitions will be clearly indicated in the respective countries surveyed.

Finally, when the term legal aid is used in this survey it refers to legal aid that is free of charge and is provided through public governmental funds, unless otherwise

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<sup>15</sup> For example in Chapter III section 3 legal assistance is distinguished from legal representation under legal aid when considering the 'merits-of-the-claim' test.

<sup>16</sup> For further information see Articles 64-66 Federal Act concerning the Granting of Asylum (2005 Asylum Act – Asylgesetz 2005), Federal Law Gazette (FLG) I No. 100/2005 (unofficial consolidated version) available at <http://www.unhcr.org/refworld/pdfid/46adc62c2.pdf>.

<sup>17</sup> This is with the exception of the legal advisor Flüchtlingsberater in Austria.

indicated. As a clear exception, legal aid in Ireland requires a small fee from asylum seekers, therefore throughout the survey reference will be made to the availability of low cost legal aid in Ireland.

## CHAPTER II. INTERNATIONAL AND REGIONAL STANDARDS

The principle of *non-refoulement* and the right of effective access to justice essentially demand procedural safeguards for refugee status determination procedures, central to which is the right to legal aid for asylum seekers. International refugee law remains largely silent on the right of asylum seekers to be granted legal assistance and representation during a refugee status determination procedure. Article 16 of the 1951 Refugee Convention<sup>18</sup> guarantees refugees, in addition to general free access to the courts of law of all Contracting States, equal treatment with nationals in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*. However, this provision has predominantly been interpreted as being reserved for refugees who had established a “habitual residence” in some state meaning that formal recognition as a refugee is required before legal assistance under this provision can be invoked.<sup>19</sup>

It is only with the adoption of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status<sup>20</sup> (hereafter Asylum Procedures Directive) that a right to legal assistance and representation for asylum seekers during the status determination procedure is explicitly established in a supranational legal norm. In addition, guidance on the right to legal aid can also be found in the standards set down in UNHCR EXCOM Conclusions, Council of Europe recommendations and jurisprudence of the European Court of Human Rights and in the provisions of the EU Charter of Fundamental Rights.

### UNHCR

According to EXCOM Conclusion No. 8<sup>21</sup> and the UNHCR Handbook on procedures,<sup>22</sup> an asylum applicant should receive the necessary guidance as to the procedure to be followed and should be given the necessary facilities for submitting his/her case to the authorities concerned, including the opportunity to contact a representative of UNHCR. EXCOM Conclusion No. 8 which identifies a number of basic requirements for asylum procedures has also been interpreted by the Council of Europe as requiring a fair hearing which includes “a full interview and examination of the asylum claim by a specialized authority, and appropriate legal assistance.”

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<sup>18</sup> 1951 Convention and 1967 Protocol relating to the Status of Refugees (Hereinafter 1951 Refugee Convention) Article 16 1) A refugee shall have free access to the courts of law on the territory of all Contracting States. 2) A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*. 3) A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

<sup>19</sup> See James C. Hathaway, *The rights of refugees under international law*, Cambridge University Press, 2005, at p. 909.

<sup>20</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005 L 326/13 (hereinafter Asylum Procedures Directive). Member States had until 1 December 2008 to bring into force the laws, regulations and administrative provisions necessary to comply with Article 15 on the right to legal assistance and representation.

<sup>21</sup> UNHCR, Executive Committee Conclusion No. 8 (XXVIII) Determination of Refugee Status, 1977.

<sup>22</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees 1979 (re-edited 1992).

Furthermore the Council of Europe has held that “certain minimum standards should govern such hearings: asylum-seekers should be given a reasonable time to prepare their case, to communicate with and seek advice from their lawyer or appropriate non-governmental organizations, and to obtain whatever background information is necessary in support of their claim; asylum-seekers should be provided with legal assistance throughout the procedure”.<sup>23</sup>

UNHCR’s global consultations on international protection in 2001 have also addressed the role of legal aid. One of the aims of the consultations is the establishment of clearer and simpler determination procedures, which concentrate on well-resourced, quality initial decision-making with appropriate safeguards. In setting out the basic guiding principles for asylum procedures that are both efficient and fair and in keeping with international refugee law standards, access to legal counsel is considered crucial: “[A]t all stages of the procedure, including at the admissibility stage, asylum-seekers should receive guidance and advice on the procedure and have access to legal counsel. Where free legal aid is available, asylum-seekers should have access to it in case of need”.<sup>24</sup> It is also clearly acknowledged that legal advice and counseling play an important role in establishing a relationship between the asylum seeker and the asylum authorities that is based on trust and therefore significantly contribute to the efficiency of the procedure. “[A]ppropriate counseling of the asylum-seeker on the meaning and nature of the asylum procedure, on his/her rights and responsibilities, and on the consequences of not co-operating have proved helpful in promoting cooperation. Access to non-governmental organisations, and legal advice can also play an important role in giving the asylum-seeker greater confidence in and understanding of the procedure”.<sup>25</sup>

As previously stated, Article 16 of the 1951 Refugee Convention provides a right of access to courts and guarantees “free access to the courts of law on the territory of all Contracting States” and the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi* in the Contracting State in which they have their habitual residence.

### **Council of Europe**

The parliamentary assembly of the Council of Europe has acknowledged the necessity of providing quality legal assistance and representation for asylum seekers in Europe. The Council of Europe has not only addressed the need for legal assistance in accelerated asylum procedures and detention but also in relation to those who claim asylum at Europe’s sea borders. As an example recommendation 1645<sup>26</sup> regarding the situation of asylum seekers at European seaports and coastal areas clearly outlines the necessity of legal aid. The recommendation calls for “a system to ensure the permanent availability of independent and professional legal advice and representation in the field of asylum and migration at seaports and coastal areas, and monitor its quality”.<sup>27</sup> Also within the context of detention of asylum-seekers the Council of Europe has encouraged Member States to ensure

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<sup>23</sup> Council of Europe, Parliamentary Assembly, Report on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe, Doc. 7783, 26 March 1997.

<sup>24</sup> UNHCR, Global Consultations on International Protection, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, para. 50 (g).

<sup>25</sup> Ibid. para. 37.

<sup>26</sup> Council of Europe, Parliamentary Assembly, Recommendation 1645, *Access to assistance and protection for asylum-seekers at European seaports and coastal areas* 2004.

<sup>27</sup> Ibid.

access to legal assistance and representation for detained asylum seekers. Most recently, in its January 2010 Resolution on detention of asylum seekers and irregular migrants in Europe, the Parliamentary Assembly called on Member States to ensure that “detainees shall be guaranteed effective access to legal advice, assistance and representation of a sufficient quality, and legal aid shall be provided free of charge”.<sup>28</sup> The PACE report explicitly refers to the situation in Germany where the number of successful challenges to detention increased in those regions where legal aid was made available to detainees, such as in Berlin, Brandenburg and Bavaria<sup>29</sup>. Finally, the Parliamentary Assembly has also recommended that Member States ensure the right to free legal aid in particular in the context of accelerated procedures. It is paramount in the context of such procedures to “ensure the right of all asylum seekers to a personal interview in a language they understand, together with the possibility of free legal aid at the first instance hearing and throughout the appeal process”.<sup>30</sup>

### European Union

There are now binding legal provisions on EU Member States concerning legal assistance and representation for asylum seekers due to the entry into force of the Asylum Procedures Directive. The directive guarantees asylum seekers the opportunity to consult in an effective manner a legal advisor or other counsellor “at their own cost” on matters relating to their asylum applications.<sup>31</sup> Furthermore it only imposes upon Member States to ensure that free legal assistance and/or representation be granted upon request “in the event of a negative decision by a determining authority”.<sup>32</sup> Member States have the discretion to introduce considerable limitations to the provision of free legal assistance and/or representation. They may *inter alia* provide that this is granted only for a first instance appeal and not for onward appeals or reviews provided for under national law, or only if the appeal or review is likely to succeed while ensuring that legal assistance and/or representation granted in the latter case is not arbitrarily restricted.<sup>33</sup> Member States may also impose monetary and/or time-limits on the provision of free legal assistance and/or representation or provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals.<sup>34</sup>

As to the scope of the legal assistance and representation guaranteed to asylum seekers, the Asylum Procedures Directive provides a limited standard. A legal advisor or other counsellor admitted as such under national law and assisting or representing an asylum seeker must have access to “such information in the applicant’s file as is liable to be examined by the authorities referred to in Chapter V [appeals procedures], insofar as the information is relevant to the examination of the

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<sup>28</sup> Council of Europe, Parliamentary Assembly, Resolution 1707 (2010), Detention of asylum seekers and irregular migrants in Europe, para. 9.2.9.

<sup>29</sup> Council of Europe, Parliamentary Assembly, Report Committee on Migration, Refugees and Population, The detention of asylum seekers and irregular migrants, Doc. 12105, 11 January 2010.

<sup>30</sup> Council of Europe, Parliamentary Assembly, Report Committee on Migration, Refugees and Population, Accelerated Asylum Procedures In Council of Europe Member States, Doc. 10655, 2 August 2010. See also Council of Europe, Parliamentary Assembly, Resolution 1471(2005), Accelerated Asylum Procedures In Council of Europe Member States, para. 8.10.2.

<sup>31</sup> Article 15(1) Asylum Procedures Directive.

<sup>32</sup> Article 15(2) Asylum Procedures Directive.

<sup>33</sup> Article 15(3) (a) and (d) Asylum Procedures Directive.

<sup>34</sup> Article 15(5) (a) and (b) Asylum Procedures Directive.

application”.<sup>35</sup> However, this is subject to broadly formulated exceptions such as where disclosure of information or sources would jeopardise national security. Restrictions on a legal advisors’ or other counsellor’s right to access to closed areas, including detention centres and transit zones, for the purpose of consulting that applicant are possible on similar national security considerations.<sup>36</sup> The presence of legal advisors or other counsellors at interviews during the asylum procedure is considered a matter of national legislation.<sup>37</sup> In other words, under the directive asylum seekers are only entitled to free legal assistance or representation at the appeal stage, i.e. after a negative decision on the application has been taken.

Legal assistance is also dealt with in Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers (hereinafter Reception Conditions Directive).<sup>38</sup> Article 5 of the Reception Conditions Directive on information for asylum seekers imposes on Member States to ensure that “applicants are provided with information on organisations or groups of persons that provide specific legal assistance” requiring such information to be in writing and “as far as possible, in a language that the applicants may reasonably be supposed to understand”. Article 21 of the Reception Conditions Directive which provides for an appeal against negative decisions relating to the granting of benefits only ensures that “procedures for access to legal assistance in such cases shall be laid down in national law”.

The European Commission presented proposals recasting the four main EU asylum legislative instruments, including the Asylum Procedures Directive and the Reception Conditions Directive which were still under negotiation in the Council and the European Parliament at the time of finalising this research.<sup>39</sup> The proposal recasting the Asylum Procedures Directive enhances the provision of free legal assistance at the first instance of the asylum procedure as well as free legal assistance and representation at the appeal stage.<sup>40</sup>

Finally, Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals guarantees those subject to a decision relating to return an effective remedy, including the “possibility to obtain

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<sup>35</sup> Article 16(1) Asylum procedures Directive.

<sup>36</sup> Article 16(2) Asylum Procedures Directive.

<sup>37</sup> Article 16(3) and (4) Asylum Procedures Directive.

<sup>38</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ 2003 L 31/18.

<sup>39</sup> See COM(2009) 554 final, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)*, Brussels, 21 October 2009; COM(2009) 551 final, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (recast)*, Brussels, 21 October 2009; COM(2008) 820 final, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, Brussels, 3 December 2008 and COM(2008) 815 final, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast)*, Brussels, 3 December 2008. For further information on ECRE’s comments on these Commission recast proposals see [www.ecre.org](http://www.ecre.org).

<sup>40</sup> For detailed analysis and comments see ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Asylum Procedures Directive*, May 2010.

legal advice [and] representation”.<sup>41</sup> Necessary legal assistance and/or representation must be granted free of charge in accordance with “relevant national legislation or rules regarding legal aid” while Member States “may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of the Asylum Procedures Directive.

The European Parliament has also emphasized the need for effective and free legal assistance and representation within asylum procedures. In its 2006 Resolution on the 1995 Council Recommendation on asylum procedures it called for “asylum seekers to be offered free legal aid”<sup>42</sup>. This recommendation was later qualified by stating that States must “provide the applicant at all stages of the procedure with access to legal counsel and, where necessary, interpreters as well as an opportunity to contact the UNHCR and NGOs”.<sup>43</sup> In the 2004 legislative resolution on the amended proposal for a Council directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status the European Parliament suggested several amendments aiming at ensuring free legal assistance for asylum seekers where they have insufficient resources.<sup>44</sup> It also proposed to delete current limitations and restrictions to free legal assistance in Article 15(3) Asylum Procedures Directive such as the possibility not to provide free legal assistance to onward appeals, to limit free legal assistance only to legal advisors or counselors specifically designated by national law or if the appeal or review is likely to succeed.

### **Jurisprudence**

The right to free legal aid has been mainly been addressed by the European Court of Human Rights in its jurisprudence with regard to Article 6 § 3 ECHR<sup>45</sup> in the context of criminal proceedings but also with regard to the right to effective access to a court in Article 6 § 1 ECHR.<sup>46</sup> So far the Court has not interpreted Article 6(1) ECHR as establishing a right to free legal aid as such. However, it has found on several occasions that the absence of free legal aid may lead to a violation of the right to effective access to a Court as guaranteed under Article 6(1) depending on the circumstances of the case.

In *Airey v Ireland*, the Court found a violation of Article 6(1) because the applicant was unable, in the absence of legal aid and not being in a financial position to meet herself the costs involved, to find a solicitor to assist and represent her in judicial separation procedure. While Article 6(1) ECHR does not imply that the State must

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<sup>41</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008, *common standards and procedures in Member States for returning illegally staying third-country nationals*, OJ 2008 L 348/98, Article 13 on remedies.

<sup>42</sup> European Parliament, Resolution on the Council Resolution on minimum guarantees for b asylum procedures (5585/95 – C4-0356/95).

<sup>43</sup> European Parliament, Resolution on the Commission working document: ‘Towards common standards on asylum procedures’ (SEC(1999) 271 – C5-0157/1999 – 1999/2148(COS)).

<sup>44</sup> P6\_TA(2005)0349 - European Parliament legislative resolution on the amended proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (14203/2004 – C6-0200/2004 – 2000/0238 (CNS)).

<sup>45</sup> According to which everyone charged with a criminal offence has a right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

<sup>46</sup> “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

provide free legal aid for every dispute relating to a civil right it “may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to Court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case”.<sup>47</sup> The Court attached particular importance to the personal circumstances of the applicant<sup>48</sup> and found it most improbable that a person in the applicant’s position could effectively present his or her own case.

On the basis of the same criteria the Court came to the opposite conclusion in *McVicar v the United Kingdom* where the applicant, a well-educated journalist who was unable to afford legal representation and was not entitled to free legal aid in a defamation action brought against him by a comparatively wealthy and famous individual and held that there was no violation of Article 6(1). The Court considered the law of defamation not to be sufficiently complex to require a person in the applicant’s position to have legal assistance under Article 6 § 1 ECHR. However, it must be noted that the Court adheres particular value to the fact that the applicant was represented by a specialist defamation solicitor for a certain period prior to the start of the trial which “illustrates that he was not prevented from presenting an effective defence to the libel action by his ineligibility for legal aid”.<sup>49</sup> In another defamation case the Court held that the denial of legal aid to the applicants in a case that lasted for almost 10 years, involved highly complex legal as well as factual issues and where there was a huge disparity between the respective levels of legal assistance enjoyed by the applicants and their opponents (in this case McDonald’s) resulted in a violation of Article 6 § 1 ECHR.<sup>50</sup>

In *P. C. and S. v United Kingdom* the exceptional technical complexity of the proceedings and of the case as well as the highly emotive nature of the subject matter<sup>51</sup> were reasons for the Court to conclude that, in absence of legal representation of the applicants, there had not been effective access to a Court as required by Article 6 § 1 ECHR. While the right of access to a court is not absolute and may be subject to legitimate restrictions, fairness is a key principle governing the application of Article 6. In this respect the Court held that the “seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures”.<sup>52</sup>

In a case concerning the detention of a Belgian national in the psychiatric wing of an ordinary prison, rather than in a designated social protection the Court held that the Legal Aid Board’s refusal to grant legal aid violated the applicant’s right to access to a Tribunal under Article 6 § 1 ECHR. The refusal of the Legal Aid Board concerned an appeal on points of law before the Court de Cassation and was *inter alia* based on the appeals prospects of success which the Board considered to be low. However, according to the Court “[I]t was not for the Legal Aid Board to assess the proposed appeal’s prospects of success; it was for the Court of Cassation to determine the

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<sup>47</sup> ECtHR, *Airey v Ireland*, Application no. 6289/73, 9 October 1979, p. 12.

<sup>48</sup> The applicant was from a humble background, had gone to work as a shop assistant at a young age before marrying and having four children and had been unemployed for much of her life.

<sup>49</sup> ECtHR, *McVicar v United Kingdom*, Application no. 46311/99, 7 May 2002, para. 60.

<sup>50</sup> ECtHR, *Steel and Morris v. The United Kingdom*, Application no. 68416/01, 15 May 2005, para. 72.

<sup>51</sup> The case involved parental custody of the applicants over their daughter.

<sup>52</sup> ECtHR, *P., C. and S. v United Kingdom*, Application no. 56547/00, 16 July 2002, para.90.

issue. By refusing the application on the ground that the appeal did not at that time appear to be well-founded, the Legal Aid Board impaired the very essence of Mr. Aerts's right to a Tribunal. There has accordingly been a breach of Article 6 § 1 ECHR".<sup>53</sup>

So far judgments of the European Court of Human Rights relating directly to legal assistance and representation concern civil rights cases or criminal charges. While the Court has not yet directly pronounced itself on the right to legal assistance and representation in the context of asylum related cases, recent judgments make reference to the availability of legal assistance in the general assessment of national remedies. This is mostly in the context of the Courts' jurisprudence requiring a remedy to be effective in law as well as in practice. One example is the case of *Abdolkhani v Turkey* where the Court takes into account *inter alia* Turkey's failure in practice to provide the applicant with an opportunity to have access to legal assistance to conclude that Article 13 ECHR was violated.<sup>54</sup> In a recent case concerning the detention of a Palestinian asylum seeker in Greece the applicant in practice had no access to legal assistance, though there was a basis in the law for a right to legal assistance when challenging a detention decision. The European Court of Human Rights held that a remedy against the detention measure was purely theoretical and accordingly there was a violation of Article 5 § 4 ECHR.<sup>55</sup>

Another recent judgment of the Court concerned a domestic procedure to establish a man's paternity of a child. The fact that an irregularly staying third country national in Belgium could not benefit from a waiver of costs related to the procedure was found to be violating the right to effective access to a Court and non discrimination under Article 6 § 1 in combination with Article 14 ECHR. No imperative reasons were presented which could justify the different treatment between persons with and without a residence permit. In coming to its decision the Court referred to the complexity of the case and the decisive impact the outcome of the procedure would have on the life not only of the applicant but also of various other persons involved.<sup>56</sup>

Whereas the European Court of Human Rights has held that the guarantees included in Article 6 ECHR do not apply in asylum cases,<sup>57</sup> this restriction does not apply in the EU asylum law context. The Court's jurisprudence on Article 6 ECHR becomes applicable also in asylum cases where these involve the enforcement of rights guaranteed under EU law. This is because EU law incorporates standards inherent in Article 6 ECHR whenever rights under EU law are being invoked. This is clearly reflected in Article 47 EU Charter of Fundamental Rights of the European Union (hereinafter EU Charter) which states that "everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a Tribunal in compliance with the conditions laid down in this Article".<sup>58</sup> As the

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<sup>53</sup> ECtHR, *Aerts v. Belgium*, Application no. 61/1997/845/1051), 30 July 1998, para. 60.

<sup>54</sup> ECtHR, *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, 22 September 2009.

<sup>55</sup> « Enfin, la Cour relève qu'en l'espèce, le requérant devait bénéficier de l'assistance d'un avocat, qui muni d'un pouvoir dûment certifié par les autorités de police de Samos, devait se rendre à l'île de Syros pour déposer les objections du requérant. Or, dans les circonstances de la cause, et compte tenu des constats de la Cour concernant les conditions de vie et l'organisation du centre de détention de Samos, l'efficacité de ce recours était purement théorique ». ECtHR, *Affaire A.A. c. Grèce*, Requête n° 12186/08, 22 juillet 2010, para. 78.

<sup>56</sup> ECtHR, *Affaire Anakomba Yula v. Belgium*, Requête n° 45413/07, 10 mars 2009, para. 37.

<sup>57</sup> As asylum claims do not concern a civil right or criminal charge.

<sup>58</sup> Charter of Fundamental Rights of the European Union, OJ 2010 C 83/389.

right to asylum is now guaranteed under Article 18 EU Charter and Member States are under an obligation to grant refugee status or subsidiary protection status to a third country national or a stateless person who qualifies for that status according to the EU Qualification Directive, a wrongful refusal of refugee status or subsidiary protection status involves the violation of “a right guaranteed by the law of the Union”. The EU Charter consolidates *inter alia* the jurisprudence of the European Court of Human Rights, therefore the principles established by the Court with respect to legal assistance and legal aid need to be complied with as being part of what constitutes an effective remedy in the context of the Charter. This is enshrined in Article 47 of the EU Charter which explicitly states that “legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice”. As a result, there is an unequivocal right under EU law to legal aid for asylum seekers who lack sufficient resources.

The Court of Justice of the European Union's (hereinafter CJEU) jurisprudence is also of relevance in the context of legal aid provision. The CJEU has developed the concept of effective judicial protection, which includes the principle of equivalence and effectiveness. This implies that “detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by (EU) law (principle of effectiveness)”.<sup>59</sup> In addition, national courts have to apply national procedural rules in such a way as to ensure effective judicial protection of an individual's right under EU law. This implies the need for compliance with fundamental rights, in particular the right to a fair hearing before a Tribunal as laid down in Article 6 § 1 ECHR.<sup>60</sup> The Court has also considered that access to legal assistance is an important aspect of the general principle of effective judicial protection in EU law and may indeed be necessary to ensure effective judicial protection. In *Evans* it emphasized that it is incumbent on national courts to “assess whether, in view of the less advantageous position in which victims find themselves vis-à-vis the MIB and the conditions under which such victims are able to submit their comments on matters that may be used against them, it appears reasonable, or indeed necessary, for them to be given legal assistance”.<sup>61</sup>

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<sup>59</sup> CJEU, *Unibet* (C-432/05), judgment of 13 March 2007, ECR I-2271, para. 43.

<sup>60</sup> CJEU, *Steffensen* (276/01), judgment of 10 April 2003, ECR I-3735, para. 72 and the final answer to the second question.

<sup>61</sup> CJEU, Case C-63/01, *Evans and the Secretary of State for the Environment, Transport and the Regions, and The Motor Insurers' Bureau*, judgment of 4 December 2003, para. 77.

## CHAPTER III. FINDINGS OF THE SURVEY

### 3.1 Structure of the Legal Aid System

This section addresses the position of legal aid provision for asylum seekers within the general legal aid system structure. Such background information is provided in order to better understand the various legal aid systems for asylum seekers in the national context.

The provision of legal aid for asylum seekers is part of the general national legal aid system in **Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Romania, Spain, the Netherlands, United Kingdom (hereinafter UK),<sup>62</sup> Norway** and **Switzerland**. However in **Slovenia** and **Lithuania** there is a separate legal aid system specifically for asylum seekers. As part of the general legal aid system in **Ireland** and the **UK** legal aid services are administered by specialised bodies i.e. the Legal Aid Board and Legal Services Commission respectively.

Legal aid may be differentiated according to the stage of the administrative procedure. An example of this practice is illustrated in **Belgium** and **Lithuania** whereby a distinction is made between primary legal aid, which is restricted to legal advice services, and secondary legal aid, which includes legal representation. In **Finland** a distinction is also made between legal aid for the purpose of legal advice and representation for court proceedings and legal aid for matters outside court proceedings.

Some countries make eligibility for legal aid in principle conditional on citizenship or residence requirements. This is the situation in **Finland, France, Hungary, Italy, Lithuania,** and **Slovenia**. However, in none of these countries was it reported that residence requirements constitute an effective barrier for asylum seekers to access free legal aid within the limits of the respective legislation.

### 3.2 Legal Aid Providers

#### 3.2.1 Legal Advisors and Non-Governmental Organisations

Whereas in most sectors legal assistance and representation before administrative authorities or judicial or quasi-judicial bodies remain the exclusive domain of the independent and private lawyer, within asylum systems non-governmental organisations (hereinafter NGO's) and legal advisors<sup>63</sup> also play a complementary but necessary role in the provision of legal aid. This part of the survey therefore examines in more detail their function in assisting asylum seekers within the asylum procedure.<sup>64</sup>

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<sup>62</sup> It should be noted that for the purposes of this survey only the legal aid system in England and Wales has been examined therefore any references to the United Kingdom in this survey only covers those regions. The legal aid system in Scotland is different and administered by the Scottish Legal Aid Board ([www.slab.org.uk](http://www.slab.org.uk)) whilst the Legal Aid system in Northern Ireland is managed by the Northern Ireland Legal Services Commission.

<sup>63</sup> As defined in the introduction, the term 'legal advisor' is generally used to refer to a person who provides legal assistance as distinct from legal representation.

<sup>64</sup> The information collected is limited to activities of NGO's and legal advisors that are directly relevant for the asylum procedure. They may also assist asylum seekers with many other related issues that are beyond the scope of this survey, such as housing and renewal of residence documents.

There is wide divergence across the countries surveyed both in the profiles of legal advisors and the task that they are entitled to perform. Legal advisors are only entitled to provide legal assistance in **Belgium, Germany, Denmark, Hungary, France, Lithuania, Italy, the Netherlands, Romania, Slovenia, and Norway**. Therefore these advisors are not able to act on behalf of asylum seekers or represent them before the administrative authorities or appellate bodies. As an example in **Germany** legal advisors who are primarily staff of welfare organisations provide advice to asylum seekers but cannot represent them before the Courts.

However, in some countries legal advisors perform tasks, similar in content to what traditionally is viewed as work within the strict ambit of lawyers. An example is the **UK** whereby accredited and OISC<sup>65</sup> regulated legal advisors may undertake all aspects of legal advice and representation in the asylum procedure including appeals to the Tribunals (Immigration and Asylum Chamber).<sup>66</sup> A similar practice is evident in **Spain and Switzerland**.

A special system of legal advisors is employed in **Austria**. There are two types of legal advisors 'Rechtsberater' and 'Flüchtlingsberater' who each have distinct roles in the asylum procedure. 'Rechtsberater' are employed by the Ministry of the Interior and provide legal advice to asylum seekers at the preliminary stage of the procedure.<sup>67</sup> Flüchtlingsberater who are normally seconded staff from NGO's, are advisors throughout the asylum procedure and have the ability to represent asylum seekers before the Court of Asylum.

In **Switzerland** there is also a separate role for a neutral observer known as a 'Hilfswerksvertreter' who may be present at the main asylum interview. 'Hilfswerksvertreter' are staff members of a certified aid organisation who may attend the asylum interview provided the asylum seeker has granted consent.<sup>68</sup> It should be noted that the "Hilfswerksvertreter" attends the interview as an observer only.<sup>69</sup> As the Swiss authorities provide for the role of 'Hilfswerksvertreter' there is no state funding available for the services of legal advisors.

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<sup>65</sup> The Office of the Immigration Services Commissioner (hereinafter OISC) is an independent, non-departmental public body involved in regulating immigration advisors by ensuring they are fit and competent and act in the best interests of their client.

<sup>66</sup> In the UK legal advisors can also represent asylum seekers in the High Court, Court of Appeal and Supreme Court but only under the strict supervision of a solicitor or barrister and they cannot appear as advocates in those Courts.

<sup>67</sup> Rechtsberater also have the ability to act as a legal representative for unaccompanied children. For more information see Chapter IV section 14 below.

<sup>68</sup> This practice is in accordance with Article 30 of the Asylum Act 1998.

<sup>69</sup> He/she does not represent the asylum seeker as such. His/her function is to check the correctness of the procedure. He/she may not intervene in order to help the asylum seeker, but he/she may request that certain questions be asked in order to clarify the facts or may suggest that further investigations be conducted. The "Hilfswerksvertreter" may also raise objections. Any such objections must be noted in the records. Although "Hilfswerksvertreter" are only observers and not entitled to represent the asylum seeker, their presence has a positive influence on the quality of the interview. In a decision of 10 July 2001, the Swiss Asylum Appeals Commission ruled that although asylum seekers might need legal representation during the first stage of the asylum procedure, any subjective disadvantage the applicant might have (age, social situation, language, legal knowledge, mental health) can be alleviated by the fact that, *inter alia*, the observer status of certified NGO representatives is statutorily recognized in the asylum procedure. NGOs however, have noted that the observer status is not equivalent to representing the interests of a client and speaking on his/her behalf as a representative in the procedure.

Legal advisors are predominantly involved in the initial administrative procedure in **Belgium, Czech Republic, Denmark, Finland, France, Hungary, Italy, Lithuania, Romania, Spain, the Netherlands and Norway**. They may perform a variety of tasks such as providing information on the asylum procedure, assisting asylum seekers with questionnaires, conducting country of origin research and attending the main asylum interview with asylum seekers.

In contrast to this, in **Germany** there is no direct involvement of legal advisors in the asylum procedure. However, staff from refugee organisations and Amnesty International can assist lawyers and provide relevant country of origin information. Some NGO's in **Germany** also financially support important test cases in the Courts. Most legal advisors across the countries surveyed are volunteers or staff members of NGO's. However, NGO's are not only involved in providing legal advice but in some countries they may also be an important link in facilitating contact with a lawyer for legal representation in the asylum procedure. NGO's in **Finland**,<sup>70</sup> **France, Germany, Italy, Romania, Slovenia, the Netherlands, UK and Switzerland** inform asylum seekers of their rights to legal aid and assist them with finding a lawyer.

The delivery of legal aid and assistance by these organisations is dependent on their financial resources, funding and capacity. However a reduction in funding has impacted upon the scope of their services in a number of countries as shown in Chapter IV, section 2 below.

As NGO's in a number of countries play a crucial role not only in informing asylum seekers of their right to legal aid and facilitating contact between asylum seekers and lawyers but also in the provision of legal advice and representation, they should be securely and properly funded in order to allow them to effectively deliver these services.

### 3.2.2 Legal Advisor Requirements

In most countries the qualification and training requirements for legal advisors are less strictly defined than for private lawyers and vary according to the tasks they are entitled to perform.<sup>71</sup> In **Denmark, France, Germany, Hungary, Italy, Spain, the Netherlands** and **Switzerland** there are no specific qualification requirements for legal advisors in the national legislation. However, in practice, training in refugee law is provided for legal advisors in NGO's in **Spain, the Netherlands** and **Switzerland**.

In the other countries surveyed qualification requirements vary from a number of year's relevant experience to obtaining a law degree. Legal advice in the **Czech Republic, Romania, Slovenia and Norway** can only be provided by a law degree graduate. However, notwithstanding the law degree qualification, in **Slovenia** there is no requirement to be knowledgeable in refugee law in order to provide legal aid.

In **Austria** qualification requirements vary depending on the category of legal advisors. There are no formal requirements for 'Flüchtlingsberater' but 'Rechtsberater' require a master's degree in law or five years relevant experience. In the **UK** legal advisors must be registered with the OISC, complete continuing professional development and, if providing legal aid funded advice or representation, must be accredited under the Immigration and Asylum Accreditation Scheme.<sup>72</sup>

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<sup>70</sup> In Finland in addition to informing asylum seekers of their rights to legal aid, NGO's may also directly provide legal aid to asylum seekers.

<sup>71</sup> See below Chapter IV, section 3 for an overview of qualification and training requirements of lawyers.

<sup>72</sup> See [www.legalservices.gov.uk/civil/immigration/accreditation.asp](http://www.legalservices.gov.uk/civil/immigration/accreditation.asp).

The provision of legal aid services by NGO's may also be subject to conditions. In the **UK** NGO's involved in legal advice need to be registered with the relevant authorities.

### 3.2.3 Legal Representation and Lawyers' Requirements

In the majority of countries surveyed lawyers represent asylum seekers at appeal procedures in judicial or quasi-judicial proceedings.<sup>73</sup> Some countries have set up special arrangements for example the private practitioner schemes in **Ireland** for legal representation at the Refugee Appeals Tribunal.<sup>74</sup>

Lawyers may require professional qualifications in order to provide legal aid for asylum seekers.<sup>75</sup> Good practice is revealed in **the Netherlands** whereby lawyers are initially supervised by more experienced lawyers for at least 12 cases and undergo an audit every three years by the Bar Association. Additionally in the **UK** persons providing legal advice and representation in respect of immigration or asylum law must be either endorsed by a designated professional body<sup>76</sup> to practice, or be registered with the OISC.

Lawyers receive specialized refugee law training in **Belgium, Ireland, Romania, Spain, the Netherlands** and **Norway**. Lawyers and barristers in **Ireland** who wish to represent asylum seekers at the Refugee Appeals Tribunal as part of the private practitioners' scheme are required to undertake training provided by the Refugee Legal Service and UNHCR. In **Spain**, in addition to completing specific training in asylum law, lawyers must also have five years experience as a lawyer to be appointed by the Bar Association under the free legal aid scheme. Lawyers in **Greece, Italy, Lithuania** and **Norway** are also required to have a relevant number of years experience to represent asylum seekers under legal aid. This can vary from approximately two years up to eight years experience as required for lawyers representing before the Council of State in **Greece**. In **the Netherlands** and the **UK** lawyers must undertake continuous professional development, which can encompass training on asylum law on an annual basis.<sup>77</sup>

However in a number of the countries researched no formal specific training requirements exist for lawyers<sup>78</sup> representing asylum seekers under legal aid as shown in **Denmark, France, Germany, Greece and Switzerland**. Furthermore in

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<sup>73</sup> Exceptions to this include Austria whereby Flüchtlingsberater may represent asylum seekers at the Asylum Court and the UK whereby accredited caseworkers may represent asylum seekers at the Tribunal level.

<sup>74</sup> The Refugee Legal Service maintains a panel of solicitors and barristers who are willing to provide legal aid and advice pursuant to Section 30 of the Civil Legal Aid Act 1995. Their services are engaged to submit appeals on behalf of legally aided asylum seekers and represent them before the Refugee Appeals Tribunal.

<sup>75</sup> Information on formal qualifications to be recognised as a lawyer/counsel/barrister was beyond the scope of this survey. As sample information, lawyers must be members of a professional bar association in order to provide legal aid in Austria, Belgium, Denmark, France, Greece, Italy, Romania, Spain and the Netherlands.

<sup>76</sup> Examples of relevant designated professional bodies include the General Council of the Bar, the Solicitors Regulation Authority or the Institute of Legal Executives.

<sup>77</sup> It should be noted though that the asylum law element of this continuing professional development is not mandatory in the UK.

<sup>78</sup> However lawyers still require professional qualifications to provide legal representation in general in these countries.

**Switzerland** in practice any person may represent an asylum seeker.<sup>79</sup> Given the complexities in the area of asylum there is a need for regulation to ensure the provision of quality legal assistance and representation. Therefore any person wishing to commence work in this field should be subject to qualifications and training requirements.

In order to qualify or register as a legal aid provider, lawyers and legal advisors should receive initial and continuing training in refugee and human rights law. Such training is essential to maintain a high quality service to asylum seekers. ELENA believes that Bar Associations or other related regulatory authorities should provide specialised training to lawyers and legal advisors. Where financial resources are limited training programmes in the field of asylum being developed at the European level could also be utilized. In this regard it should be noted that certain training modules developed within the European Asylum Curriculum (EAC) provide excellent tools to improve the skills not only of decision-makers in asylum bodies but also of lawyers and legal advisors who assist or represent asylum seekers throughout the asylum procedure. Allowing legal aid lawyers and legal advisors access to relevant training modules of the EAC is only one way of creating additional training opportunities. Such training should not only encompass refugee and human rights law but also practical skills such as interviewing techniques, cross cultural awareness and the expertise required to work not only with vulnerable and traumatized asylum seekers but also with interpreters.

ELENA recommends the practice in **the Netherlands** whereby a more experienced lawyer supervises new lawyers before they are permitted to deal with asylum cases independently. An initial supervisory period acts as a monitoring mechanism and should be a necessary precondition to ensure that the lawyer or legal advisor is fully equipped to provide a quality legal aid service to asylum seekers. The competency of new lawyers should be examined prior to them providing independent legal advice and representation.

#### **Recommendation 1**

**All legal aid providers should receive both initial and ongoing training in refugee and human rights law.**

#### **Recommendation 2**

**An initial supervisory period by a more experienced legal aid provider including a competency examination or other mechanism to ensure the aptitude of the provider should be a requirement for all persons wishing to provide legal aid.**

### **3.2.4 The Quantity and Capacity of Legal Aid Providers**

As part of this research ELENA received information on whether the number of legal aid lawyers and advisors available in the countries of research was sufficient to meet the needs of asylum seekers.<sup>80</sup> The finest legal aid system for asylum seekers will be of little use if there is insufficient capacity amongst legal aid providers to meet the

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<sup>79</sup> However only legal representatives who are fully qualified lawyers registered in the cantonal law's register will be appointed and reimbursed by the Court under the legal aid scheme in Switzerland.

<sup>80</sup> This survey is unable to provide a comprehensive and detailed analysis of the numbers of lawyers and/or legal advisors available in the countries of research. The survey only reflects an -inevitably subjective- estimation of the contributors on whether or not there is sufficient capacity in their respective countries. As this is based on the experience of professionals who provide legal aid, it nevertheless provides at least an indication of available capacity in the countries concerned.

demand. This section therefore addresses lawyers or legal advisors' capacities in this sector.

The number of lawyers available is considered insufficient to meet the needs of asylum seekers requiring legal aid in the **Czech Republic, Greece, Hungary, France and Slovenia**. In **Austria**, the governmental authorities are under a legal obligation to provide "Flüchtlingsberater" 'in a sufficient quantity', however the reality is that there is an insufficient number of these advisors and NGO's must fill the gap in practice.

In **Belgium** there is a shortage of qualified lawyers reported with regard to legal assistance and representation of asylum seekers in detention at the border.<sup>81</sup> In **Finland**, an ever increasing problem is the shortage of lawyers specialised in asylum law.<sup>82</sup> The magnitude of the problem is highlighted in the **Czech Republic** where there are approximately only thirty lawyers available in NGO's offering legal aid while on average about 1500 asylum seekers apply for asylum per year.

In **Hungary** only a few law firms and the Hungarian Helsinki Committee have qualified lawyers to provide legal aid for asylum seekers. In the **UK** the matter of capacity is disputed. The Legal Services Commission (hereinafter LSC)<sup>83</sup> is of the opinion that there is sufficient provision of lawyers for legal aid. However, there have been reports that in some areas of the **UK** asylum seekers are not able to access legal aid.<sup>84</sup> The number of lawyers varies according to the province in **Spain**.

The reported limited number of lawyers or legal advisors providing legal aid in a number of countries may be for one of several reasons related to a lack of or delays to public funding. The low remuneration for lawyers working in legal aid is cited as additional reason for the shortage of providers in this field. A concerning practice is noted in the **UK** whereby good quality providers of legal aid are increasingly disengaging from this field because of the limitations in public funding for these cases.

A reduction in funding has also impacted upon the scope of services NGO's can provide for asylum seekers in **Austria, Czech Republic,<sup>85</sup> Greece, Slovenia and Norway**. In **Greece** and **Slovenia** legal assistance at the first instance is exclusively provided by NGO's but this is entirely dependant on European Refugee Fund (ERF) project grants.<sup>86</sup> As there may be long periods between consecutive ERF project

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<sup>81</sup> For further information on the provision of legal aid at the border and in detention see Chapter IV, sections 11 and 12 below.

<sup>82</sup> According to UNHCR "access to specialised lawyers is also problematic in the remote areas of Finland where reception centres for asylum applicants are increasingly being built". For further information see UNHCR *Asylum Procedures Study*, Section 16: The right to an effective remedy p. 33.

<sup>83</sup> This a non-departmental public body sponsored by the Ministry of Justice that runs the legal aid scheme in England and Wales.

<sup>84</sup> See Independent Asylum Commission, "Saving Sanctuary", 2008, available at [www.citizensforsanctuary.org.uk/pages/reports/SavingSanctuary.pdf](http://www.citizensforsanctuary.org.uk/pages/reports/SavingSanctuary.pdf).

<sup>85</sup> In the Czech Republic NGOs providing legal services (OPU and SOZE) depend on European Refugee Fund resources. However, in 2009 funds were not allocated until April 2009 so both NGOs had to cut their legal assistance services prior to that time. See UNHCR, *Asylum Procedures Study*, Section 16: The right to an effective remedy, at p. 35.

<sup>86</sup> In Greece the government authorities only convened meetings in July 2010 to address the ERF projects for this year meaning that in practice before the implementation of the ERF funding legal assistance by NGO's was provided on a 'voluntary' basis and to a lesser extent due to lack of staff and funding.

grants, in practice no legal assistance is available for asylum seekers in these countries in the interim periods.

Due to funding shortages in **Austria** a number of independent legal aid providers have had to close down or seriously reduce their services in Salzburg, Oberosterreich, Tirol, Wien, Eisenstadt and Traiskirchen over the past few years. Similarly in the **UK**, Refugee Migrant Justice, an ECRE member, was closed in June 2010 due to changes to the government payment system for asylum and immigration legal work.<sup>87</sup> These are not isolated cases, as governments reduce the funding in this area, more and more organisations face likely closure or a serious reduction in the delivery of vital services to asylum seekers.

Limited anecdotal information collected during the research of this survey shows that remuneration for legal aid work in the asylum sector is significantly lower than legal aid available for other areas of law (for e.g. criminal legal aid work) as reported in **Belgium, Germany, France** and the **UK**. Other additional factors also need to be considered such as delays in payment which is problematic for lawyers in **Germany**,<sup>88</sup> **Greece** and **Romania** and, as mentioned above lead to the closure of one of the main legal aid providers in the **UK**, Refugee Migrant Justice.

Remuneration of legal aid providers is provided under a fixed fee scheme in **Belgium, Denmark, Germany, Greece, Hungary, France, Ireland, Romania, Spain, the Netherlands** and the **UK**. The fees for legal aid are not limited in **Finland**. It is possible to exceptionally extend the costs of legal aid and receive further reimbursement in **Belgium, Denmark, Ireland, Romania, Spain, the Netherlands** and **Switzerland and the United Kingdom**. However legal aid funding cannot be increased for exceptionally complex cases in **Greece** and **Hungary**. Also in **Switzerland** no funding is available for legal assistance.

Article 15(5)(b) of the Asylum Procedures Directive gives Member States discretion to “provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance”. This is the practice in **Denmark, Finland, France**,<sup>89</sup> **Greece, Germany, Hungary, Italy, Slovenia** and **Romania**. In **Norway** the national law also limits the treatment of asylum seekers to the level generally accorded to nationals regarding fees and costs of legal aid.

Financial payments for legal advice and representation should reflect the complexity of the asylum claim and the actual amount of work undertaken including the time and disbursements required to deliver a quality service. Also the cost of legal aid should be promptly made payable to legal aid providers as and when they provide legal aid during the asylum procedure.

### **Recommendation 3**

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<sup>87</sup> Due to changes in the Legal Services Commission payment scheme the organisation only received payment for their work after each asylum case was closed which was dependent on the timing of Home Office and Tribunal decisions. The charity organisation closed in June 2010, which left more than 10,000 asylum seekers including vulnerable groups without legal assistance in the UK.

<sup>88</sup> In some cases it can take up to a year for a decision on legal aid to be taken in Germany. Sometimes in practice asylum seekers are asked to pay additional low monthly contributions to the lawyer as long as no decision has been taken on whether or not legal aid will be granted for the Court procedure.

<sup>89</sup> There is no specific provision in French legislation reflecting Article 15(5)(b) of the Asylum Procedures Directive however in practice the same treatment applies as for French nationals.

**Sufficient public funding should be available to ensure that all legal aid providers can effectively provide free legal assistance and representation to asylum seekers.**

#### **Recommendation 4**

**Where the number of legal aid providers is insufficient to cover the demand States must take positive action to increase their capacity while ensuring at the same time the quality of the legal aid service. States should guarantee continuous funding for the provision of legal aid by NGOs, in particular where this is necessary to ensure the demand for legal aid is met in practice.**

### **3.3 Access to Legal Aid**

The practice regarding access to legal aid varies across the countries surveyed. Sometimes it is conditional upon certain requirements such as a lack of financial resources or on the ground that the asylum claim is likely to succeed. In addition to this asylum seekers may need to follow certain rules in order to request a lawyer for legal representation.

#### **3.3.1 Means Testing**

Article 15(3) of the Asylum Procedures Directive gives Member State's discretion to provide in their national legislation that free legal assistance and/or representation is granted '*only to those who lack sufficient resources*'. There is no further guidance as to what constitutes '*sufficient resources*' and therefore this has been defined and interpreted in different ways in national state practice. This requirement has become known as 'sufficient means' test in the provision of legal aid. Means testing in the context of this survey refers to an examination of an applicant's disposal income or financial situation when considering their eligibility for free legal aid.

Eligibility for legal aid is based on a 'sufficient means' test in **Austria, Finland, France, Germany, Hungary,<sup>90</sup> Ireland, Italy, Lithuania, Slovenia, Spain, the Netherlands**, the **UK** and **Switzerland**. However the practice in the Member States surveyed varies widely as to when the means test is applied and the level of income of asylum seekers that is taken into account. An example is shown in **Finland** whereby a means test is only applicable for the provision of legal aid at the appeal stage of the asylum procedure. Also in **Hungary** a means test is only applied for those asylum seekers who are not in State provided reception facilities.

There is an automatic presumption that asylum seekers do not have sufficient resources and cannot afford paid legal assistance or representation in **Belgium**, the **Czech Republic, Romania** and **the Netherlands** so that the means test is reduced to merely a procedural formality. ELENA welcomes this example of good practice which reflects the reality that the majority of asylum seekers are impecunious and do not have sufficient resources upon arrival in the country of refuge. There is no means test applied in practice in **Denmark, Greece** and **Norway**.

As part of this research, information was also gathered on whether there are national mechanisms in place for the reimbursement of legal aid as defined in Article 15(6) of the Asylum Procedures Directive.<sup>91</sup> The possibility for national authorities to be

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<sup>90</sup> However, asylum seekers are automatically entitled to legal aid if they benefit from State-provided reception facilities due to their lack of financial means. See also Chapter IV, section 4.

<sup>91</sup> Article 15(6) states that "Member States may demand to be reimbursed wholly or partially for any expenses granted if and when the applicant's financial situation has improved considerably or if the

reimbursed partially or wholly for the financial cost of legal aid is a related concept to means testing. Article 15(6) is a discretionary provision and Member States may demand reimbursement for the cost of legal aid if the applicant's financial resources improve or if the legal aid was fraudulently obtained through the use of false information.

Asylum seekers may be required to reimburse costs related to legal aid in **Austria, Czech Republic, Germany, Hungary, Finland, France, Lithuania, Ireland, Italy, Spain, the United Kingdom, and Switzerland**. However, the practice varies according to the timeframes for demanding reimbursement for legal aid and on the grounds for reimbursement.

Regarding timeframes for example, in **Austria** reimbursement can be requested up to three years from the date of the final decision whilst in **Finland** it can be up to fifteen years after the grant of legal aid. In **Germany** reimbursement can be demanded up to four years after the final decision and in the **United Kingdom** within six years.

Asylum seekers who have concealed financial resources in order to obtain free legal aid are also liable to penalties under criminal and/or civil law in the respective countries surveyed. This is the situation in **Austria**,<sup>92</sup> **Italy**,<sup>93</sup> the **UK**<sup>94</sup> and **Switzerland**.<sup>95</sup> In **Belgium, Denmark, Greece, Romania** and **the Netherlands** national authorities do not implement Article 15(6) of the Asylum Procedures Directive and therefore applicants are not liable to reimburse legal aid expenses.

The practice across the countries surveyed varies widely regarding both 'sufficient means' testing and the reimbursement of legal aid. In reality, it is likely that most asylum seekers will meet the requirements under the means test and be unable to afford private legal assistance and representation. Asylum seekers often do not have sufficient financial means at their disposal due to the nature of their flight from persecution and the fact that they may have restricted access, if any, to the labour market in the country of refuge.<sup>96</sup> The financial amount constituting 'sufficient resources' in means testing should not lead to the arbitrary restriction of legal aid.

As to the possibility of reimbursing the State for the costs of legal aid, this should only be enacted upon in a transparent objective manner taking into account the current financial situation of the asylum seeker. The repayment of any costs should be over a very lenient timescale, which takes into account other costs the asylum seeker may have. Depending on the circumstances of the individual concerned this may mean

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decision to grant such benefits was taken on the basis of false information supplied by the applicant". Information was also gathered on similar practice to Article 15(6) of the Asylum Procedures Directive present in Denmark, Norway and Switzerland.

<sup>92</sup> In Austria both civil and criminal law sanctions apply.

<sup>93</sup> In Italy criminal law sanctions apply in case the applicant submitted false documents or provided false information during the asylum procedure.

<sup>94</sup> In the UK criminal charges apply.

<sup>95</sup> In Switzerland criminal charges apply when dealing with the reimbursement of legal aid.

<sup>96</sup> Article 11 Reception Conditions Directive allows EU Member States to restrict access to the labour market for asylum seekers up until 1 year after applying for asylum. If no decision at first instance has been taken within one year from the date on which the asylum application was lodged, Member States shall decide the conditions for granting access to the labour market for asylum seekers. More information on the situation in the States surveyed as regards access to the labour market is included in Chapter IV, section 4 below.

that costs are only partially reimbursed rather than wholly reimbursed by the applicant.

#### **Recommendation 5**

**Where States apply a means test this should be based on the presumption that asylum seekers do not have sufficient resources to afford paid legal aid, unless there is clear evidence to the contrary.**

#### **Recommendation 6**

**Rules on the reimbursement of legal aid where asylum seekers have knowingly concealed their own financial resources should only include sanctions which are proportionate to the offence.**

### **3.3.2 Merits Testing**

Article 15(3) of the Asylum Procedures Directive permits Member States to include in their national legislation that free legal assistance and/or representation is granted on a number of conditions including subsection (d) “only if the appeal or review is likely to succeed”.<sup>97</sup> This is commonly referred to as the ‘merits-of-the –claim’ test and often it involves an examination of whether there are reasonable grounds for the success of the asylum claim. It involves an assessment of the substance of the asylum claim and an examination of the prospects of success. This section provides information on whether eligibility for free legal aid is conditional on a merits test in the countries of research.

A “merits-of–the-claim” test is not applicable in **Belgium, Czech Republic,<sup>98</sup> Denmark, Finland, Hungary, Lithuania, Romania, Slovenia** and **Spain.<sup>99</sup>** However in **Austria, France, Germany, Greece, Ireland, Italy, the Netherlands,** the **United Kingdom, Switzerland and Norway,** a merits-of-the-claim test is applicable in the national legislation. In general, a ‘merits-of-the-claim’ claim either results in a grant or refusal on legal aid however an exception to this is the practice in **Norway.** The merits test in **Norway** is used only to ascertain the amount of legal aid hours granted to the applicant, for instance less hours are granted for manifestly unfounded cases, however all asylum applicants receive a certain amount of legal aid at appeal.

There is also a variety of practice as to what constitutes a reason for refusal on legal aid on the merits of the claim for example in **Germany** and **France** the timing of the appeal is relevant when considering the ‘merits-of-the-claim’ test for legal aid. Legal aid is refused for manifestly unfounded claims in **France, Greece** and **Italy.** Also in **France** and **Greece** legal aid can be refused for appeals on admissibility. Merits’ testing is not strictly applied in **Spain** and **the Netherlands** in practice. Additionally, in **Ireland** and **Italy** the test is only strictly applied for onward higher appeals. Though both countries in theory conduct a merits test at the initial appeal stage, in practice this is not strictly applied.

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<sup>97</sup> Another provision under Article 15(3) is also of relevance in this context as it states “Member States shall ensure that legal assistance and/or representation granted under point (d) is not arbitrarily restricted.”

<sup>98</sup> In general no merits test is applied when accessing legal aid for asylum seekers in the Czech Republic. However, in a recent case the County Court in Prague refused free legal aid as the Court considered that the case had no prospects of success.

<sup>99</sup> There is no merits test in practice in Spain.

The examination of the merits of a claim may even vary from town to town in *Italy*. As regards the actual content of the merits test it is noted in *France, Germany, Italy, Norway* and *Switzerland* that no hearing before the relevant authorities is arranged to examine whether an asylum seeker's claim passes the merits test.

Article 15(6) of the Asylum Procedures Directive may be applicable to both legal assistance and/or legal representation. However in practice amongst the countries surveyed the 'merits-of-the-claim' test is only applicable to legal representation primarily at the appeal stage.

According to this survey there is no practice reported of eligibility for *legal assistance* being conditional on whether the '*appeal or review is likely to succeed*'. ELENA agrees with this approach as continuous free legal assistance is both in the interest of States and applicants in identifying those in need of protection. Even if applicants are denied legal representation on the basis of the merits of the claim, it is vital that they receive free legal assistance throughout the asylum procedure. Furthermore asylum seekers may also require legal assistance to effectively challenge the refusal of legal aid on the basis of the merits of the claim if such an appeal is available in the national system.

This survey does not reveal whether sufficient information is provided on the nature of the applicant's claim for protection as to effectively determine the merits of the claim. This would require further analysis of individual decisions on access to legal aid, which is beyond this scope of this study. However, the Devon Law Centre in the *UK* conducted research on the 'merits-of-the-claim' test there as part of an Asylum Appellate project<sup>100</sup> which further informs the debate on the impact of merits tests on asylum seekers' access to legal assistance and representation and therefore also to a fair and efficient asylum procedure. Although the project was geographically confined to Devon and Cornwall, it found that if a similar pattern was evident all across the *UK* it would "suggest that legal representatives are wrongly refusing Controlled Legal Representation in almost four out of every five cases". This is an issue of concern and one which requires further examination not only in the *UK* but across Europe. The responsible decision makers on legal aid must have all the relevant information before them in order to make an informed decision on the merits of the claim. There must also be sufficient time in order for the merits of the claim to be adequately reviewed given the consequences for asylum seekers of a refusal of legal aid.

While a 'merits-of-the-claim' test can be viewed as a mechanism to discourage asylum applications that have little or no substance with the aim of reducing costs and enhancing the efficiency of the procedure, it may equally result in depriving asylum seekers from an essential procedural guarantee, access to justice. This is even more important if there is no effective review or appeal structure of the decision to refuse legal aid on the merits of the claim. The merits test itself is an exercise in trying to predict the outcome of the examination of the need for international protection. Given the fundamental human rights at stake, it is vital that a thorough examination of the claim is undertaken with the aid of legal assistance prior to applying a merits test.

Therefore in those countries where merits tests are applied ELENA recommends that such tests should only apply in relation to judicial higher appeals, i.e. following a

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<sup>100</sup> The aim of this three-year project was to examine the extent to which asylum seekers are being wrongly denied a publicly funded legal representative at the appeal stage. For further information see Devon Law Centre, *Asylum Appellate Project – Final Report*, March 2010.

substantive examination of the claim by the first instance authority and initial appellate body. This relates to higher appellate bodies where an assessment of the facts is no longer possible and the onward appeal is limited to points of law.

#### **Recommendation 7**

**Where States apply a ‘merits-of-the-claim’ test for legal representation it should only take place after a full examination of the asylum application has been carried out as required under international human rights law. The ‘merits-of-the-claim’ test should not be so stringent as to *de facto* prevent access to an effective remedy.**

#### **Recommendation 8**

**The right to *legal assistance* should not be subject to a ‘merits-of-the-claim’ test.**

### **3.3.3 Appointment of a Legal Representative**

In most of the countries researched lawyers providing legal representation and assistance are appointed from a list which is drafted either by the Bar Association as is the practice in **Belgium, France, Italy, Romania, Spain** or by a specialized body responsible for the organization of legal aid as in **Finland, Ireland, Lithuania, Slovenia, the Netherlands**, and the **UK**.<sup>101</sup> Alternatively the legal representative is appointed by the Court examining the asylum appeal as seen in **Austria**, the **Czech Republic, Germany** and **Denmark**. In **Finland, France** and **the Netherlands** asylum seekers also have the option of selecting a preferred lawyer to represent them under the legal aid scheme, however in contrast to this in **Belgium, Czech Republic, Ireland** and **Romania** there is no such option available. In **Greece** there is no system in place to help asylum seekers find a lawyer to represent them.

In some countries asylum seekers must complete application forms to request legal aid as is the practice in the **Czech Republic, Germany, Hungary, Ireland** and **Italy**. Practical problems may arise as shown in **Germany** whereby asylum seekers are not always informed in a language they understand on the procedures in place to access legal aid and no assistance may be available for illiterate asylum seekers. ELENA recommends that in such systems of appointment assistance must be available for asylum seekers to complete application forms which may be complex and require detailed information. As an example in **Italy** lawyers specifically chosen by the applicant may assist the asylum seeker with the actual application form necessary to request legal aid.

In several countries the role of NGO's is crucial to ensure that asylum seekers are effectively represented and receive sufficient information on their rights during the asylum procedure. This is particularly the case in **Finland, Italy, Romania, Slovenia, Spain, the Netherlands**, the **UK** and **Switzerland**. Particular difficulties are faced by detained asylum seekers requesting lawyers as noted in **France, Italy** and particularly asylum seekers detained in prison in the **UK**.<sup>102</sup>

Various systems are utilised for the appointment of lawyers providing free legal assistance and representation. The structural involvement of an independent

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<sup>101</sup> In the UK, asylum seekers, save for when they are in the fast track, have the right to select their own representative. However depending on their locality, there are systems in place in some areas to allocate asylum seekers a legal representative that they can choose to use or not.

<sup>102</sup> For further information on the provision of legal aid for detained asylum seekers see Chapter III section 5.2 below and Chapter IV, section 12.

organisation representing the legal profession such as a Bar Association or a specialised body responsible for the provision of legal aid may constitute an additional guarantee to ensure the quality of the legal aid provided to asylum seekers.<sup>103</sup> At the same time, it is clear that in a considerable number of States NGO's play a crucial role in referring asylum seekers to legal aid lawyers or facilitating contacts as well as in providing information to asylum seekers on the legal aid system in general and their right to free legal representation.<sup>104</sup>

#### **Recommendation 9**

**Asylum seekers must receive timely information in a language they understand on the system in place to appoint and contact a lawyer.**

#### **Recommendation 10**

**Any conditions required for the appointment of a legal representative should not be so restrictive as to effectively limit access to justice.**

### **3.3.4 The Availability of Legal Aid**

This section examines at what particular stage of the asylum procedure is legal aid available in the countries surveyed. Asylum seekers have a right to legal aid at all stages of the asylum procedure in **Belgium, Finland, Hungary, Spain, the Netherlands** and the **UK**. Low cost legal assistance is also available in **Ireland** at all stages of the asylum procedure. In **Ireland** asylum seekers in State provided direct provision accommodation are required to pay a total contribution of €6 for legal advice and representation before the appellate authority, the Refugee Appeals Tribunal. Therefore the model there is one of low cost legal aid.

Similarly in practice sometimes asylum seekers are asked to contribute to the cost of legal aid in **Germany** and **France**. In **Spain** legal aid and assistance is available throughout the asylum procedure. Even if legal aid is refused, NGO's are funded to provide legal assistance both by the Spanish central governments, local government and the EU. They assist regular migrants as well as asylum seekers in practice.

In **Lithuania, Slovenia** and **Norway** there is a system whereby legal aid in general is only available at the appeals stage but exceptions are applied for example for unaccompanied children and vulnerable asylum seekers who then also receive legal aid at the first instance stage.<sup>105</sup> In **Norway** legal aid is also automatically available at both stages of the asylum procedure in all cases where the Immigration Directorate considers using the exclusion clauses. Given the potential implications of the application of exclusion clauses for the individual ELENA considers this a good practice in ensuring that the asylum seeker has effective access to legal assistance and representation.

Legal aid is generally only available at the appeals stage of the asylum procedure in **Austria,**<sup>106</sup> **the Czech Republic, Denmark, France, Germany, Greece, Italy,**

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<sup>103</sup> Further information on the quality assurance mechanisms in place is provided in Chapter III section 6 below and Chapter IV, sections 3 and 15.

<sup>104</sup> NGO's may also be the main legal aid provider themselves as recognised in Chapter III section 2 above and also Chapter IV, section 2.

<sup>105</sup> For further information on the provision of legal aid for unaccompanied children see Chapter III section 4 below as well as Chapter IV, section 14.

<sup>106</sup> In Austria legal assistance by a Flüchtlingsberater is available at the appeal level before the Asylum Court, however legal representation by a lawyer is only available at the level of the Constitutional Court under the legal aid system.

**Lithuania, Romania, Slovenia, Norway and Switzerland.** This does not mean that in these countries asylum seekers are deprived of any form of legal assistance during the first instance administrative procedure. In the majority of countries asylum seekers receive some form of assistance from legal advisors working for NGO's during the first instance procedure. However, legal representation as defined in this survey is only granted to asylum seekers at the appeal stage in these countries.<sup>107</sup>

The specific situation of free legal aid in **Greece** merits further attention as it severely restricts access to an effective remedy for asylum seekers. In **Greece** asylum seekers in theory have a right to free legal aid at the appeal stage.<sup>108</sup> However there are significant restrictions on actually accessing this legal aid in practice. Only senior counsel (i.e. lawyers with at least eight years experience) can be nominated to represent asylum seekers at the Council of State. In addition to this, according to the law,<sup>109</sup> each lawyer can only take one case per year to the Court under the legal aid scheme. This severely limits any access to legal aid for asylum seekers in **Greece**.

ELENA believes that free legal assistance and representation should be available at all stages of the asylum procedure, where asylum seekers lack financial resources to instruct a private lawyer themselves.<sup>110</sup>

#### **Recommendation 11**

**Legal aid should be made available to asylum seekers who lack resources at all stages of the asylum procedure as the right to legal assistance and representation is a fundamental part of a fair and efficient asylum procedure.**

#### **Recommendation 12**

**In those States that currently only provide legal aid at the appeals stage, exceptions should be made for vulnerable applicants including unaccompanied children. Given their specific vulnerabilities such asylum seekers should have access to free legal aid throughout the asylum procedure.**

### **3.3.5 Translation, Interpretation and Expert Consultations**

Effective communication is essential in order to properly identify the protection needs of asylum seekers. A key element of effective communication is the provision of high quality interpretation and translation services. Furthermore, consultation with experts, for example country or medical experts, may be required in order to make a proper assessment of protection needs. An in-depth analysis of the quality of translation and interpretation services and the actual role of medical and other expert advice in asylum procedures was outside the scope of this survey.<sup>111</sup> However a very brief overview is provided on whether costs related to translation and interpretation for the purpose of communication between the legal aid provider and the asylum

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<sup>107</sup> See Chapter I section 2 above.

<sup>108</sup> See Article 11(2) PD 90/2008 which states: "The asylum applicant who files an annulment application against the negative decision is provided with free legal aid in accordance with Law 3226/2004"; See Amnesty International, *The Dublin II Trap. Transfers of asylum seekers to Greece*, Index: EUR 25/001/2010, p. 26.

<sup>109</sup> Article 3(3) Law 3226/2004.

<sup>110</sup> Article 18(2) of the Commission proposal recasting the Asylum Procedures directive proposes an obligation for Member States to provide for free legal assistance in first instance examination procedures and for free legal assistance or representation in appeals procedures. For further analysis of the proposal see ECRE, *Comments on the European Commission Proposal to recast the Asylum Procedures Directive*, May 2010.

<sup>111</sup> See for additional information on the quality of interpretation, UNHCR, *Asylum Procedures Study*, Section 5: *The requirements for a personal interview (Article 13)*, March 2010.

seeker and the consultation of experts are covered by the legal aid systems in the countries of research.

In a number of countries interpretation costs for meetings between lawyers or legal advisors and their clients can be covered either by the legal aid system or through other State provided funding. Such practice exists in **Belgium, the Czech Republic, Denmark, Finland, Ireland, the Netherlands, the UK and Norway**. Consultation of medical experts in the context of the asylum procedure may be covered by the legal aid system in **Finland, Ireland, Denmark, the Netherlands, the UK, Norway and Switzerland**. However, in **Switzerland** legal aid is often not granted in practice. Also in **Ireland, Denmark, the Netherlands and Norway** the costs of medical reports are not automatically covered by the legal aid system and subject to conditions depending on the individual circumstances of the claim. Although costs related to medical examinations and evidence and other expert consultations are normally not covered by the legal aid system in **Spain**, they may be included if the Court considers it necessary for the examination of the asylum claim.

### **Recommendation 13**

**Translation and interpretation services should be freely and automatically available throughout the asylum procedure. ELENA calls upon States to ensure that free interpretation and translation services are available to facilitate meetings between lawyers/legal advisors and their clients where necessary.**

### **Recommendation 14**

**Where relevant for the examination of the asylum application, costs related to expert consultations should be included in the legal aid system unless already covered by the State through other sources.**

## **3.4 The Role of Legal Aid in the Asylum Procedure**

Asylum procedures and the legislative framework surrounding international protection have become increasingly complex in the last decade. Therefore it is vital that legal aid is available to assist the asylum seeker in the determination procedure and correctly identify his or her protection needs. Asylum seekers often have no knowledge of the relevant law in the country where their asylum application is examined, do not speak the language of the country and are in many cases, due to traumatic experiences in their country of origin, distrustful of authorities. Equally they may not be aware of the intricacies of the procedure and issues concerning evidence and the burden of proof. Without legal advice or representation this may result in asylum seekers omitting elements which are pertinent to the assessment of their protection needs. In this context legal aid plays an important role in safeguarding the rights of asylum seekers and is an indispensable guarantee for a fair and efficient asylum procedure. This section provides an overview of the role of legal aid providers in the asylum procedures of the countries. Where possible, background information is provided on the relevant procedures in place both at the initial administrative stage and at appeals. It should be noted that this section also provides information on the role of legal advisors or lawyers if appointed at the asylum seekers own expense where no legal aid is available. Therefore this section should be read in light of section 3.3.4 above on the availability of legal aid in the asylum procedure.

### **3.4.1 Legal Assistance and Advice at the Preliminary Stage**

In many countries the responsible authorities organize a preliminary interview once an asylum application is submitted. These interviews mainly concern nationality and identity issues and information on the travel route and family details of the asylum

seeker.<sup>112</sup> Though preliminary interviews mainly concern the establishment of identity and the collection of data, sometimes the grounds for an asylum application are also explored. As this may have ramifications for the final outcome of the asylum procedure for the individual concerned, the question whether or not a legal advisor or lawyer can assist and advise the asylum seeker at this stage is of importance.

Firstly no preliminary interview prior to the asylum interview exists in the **Czech Republic, France,<sup>113</sup> Greece<sup>114</sup> and Romania**. At the initial stage of the asylum procedure in most of the countries of research asylum seekers are either required to fill in a questionnaire as shown for example in **Belgium, Denmark, Ireland, and Italy** or have the possibility to submit a written statement on the grounds for their application. While the latter is exceptionally the case in **the Netherlands**, in other countries such as the **UK** as a matter of good practice many legal representatives submit a written account of the reasons for requesting asylum.

In the majority of countries surveyed there is only limited legal advice available at the time of submitting an asylum application. This may be for a number of reasons for example in practice asylum seekers often only come into contact with legal advisors or lawyers after they have lodged their application as is evident in **Switzerland**. Limited legal assistance at this preliminary stage may also be due to the fact that such assistance is not covered by legal aid as is the practice in **Denmark, Greece, Germany and Lithuania**. As far as the presence of legal advisors and/or lawyers during the preliminary interview is concerned, it should be noted this is explicitly excluded in in **Belgium** while their presence is allowed in **Hungary, Romania, Slovenia and Switzerland**. In the **Czech Republic** and **Slovenia** legal advisers are explicitly prohibited from helping asylum seekers to prepare their asylum applications.

Also in **Finland** legal advisors are not entitled to assist asylum seekers prepare their asylum applications. This is in contrast with the practice in the **United Kingdom** and **Norway** where lawyers may assist asylum seekers with their preparation of their asylum application.

The right to independent qualitative legal assistance and advice should be available at the point of application. Early access to competent legal assistance and advice is a central component to the 'frontloading' process in ensuring that decision makers have all the relevant information before them to make an informed decision.<sup>115</sup> Where preliminary interviews are not strictly limited to issues related to identity, nationality or travel route it is important that asylum seekers have the possibility to be assisted by a legal representative or legal advisor both in preparing the application

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<sup>112</sup> Preliminary interviews in Member States may also focus on the potential application of the Dublin II Regulation.

<sup>113</sup> There is, however, often an interview at the prefecture for the purpose of the application of the Dublin II Regulation.

<sup>114</sup> However sometimes in practice there is a short interview with the asylum authorities when an asylum claim is submitted.

<sup>115</sup> For further information on the advantages of early legal advice read J. Aspden, *Evaluation of the Solihull Pilot*, October 2008 at [www.asylumaid.org.uk/data/files/publications/137/Solihull\\_Pilot.pdf](http://www.asylumaid.org.uk/data/files/publications/137/Solihull_Pilot.pdf) and ICAR, *Review of quality issues in legal advice: measuring and costing quality in asylum work*, March 2010. See also [www.asylumaid.org.uk/data/files/publications/136/Cost\\_of\\_Quality\\_Legal\\_Advice\\_Review\\_March2010.pdf](http://www.asylumaid.org.uk/data/files/publications/136/Cost_of_Quality_Legal_Advice_Review_March2010.pdf).

and at the preliminary interview. This is for the reason that statements made at this early stage may be decisive as to how the claim is dealt with in the asylum procedure for example if the application will be channelled into an accelerated procedure or not.

Also preliminary information gathered during the interview may be used at a later stage to identify any inconsistencies and contradictions, which may result in a negative decision. The involvement of a lawyer or legal advisor from the start is not only crucial to identifying the important and relevant elements of the applicant's claim but it also can help to build trust between the asylum seeker and the authorities. Their presence at all interviews helps to create transparency about the content of the interviews and prevents costly and protracted proceedings at a later stage as issues can be dealt with as and when they arise with the assistance of a legal advisor or representative. Legal advisors can also play a vital role in assisting asylum seekers to navigate sometimes complex questionnaires which in turns assists decision making authorities in the early identification of the issues to be explored at the substantive interview. Early legal assistance within a system of 'frontloading' benefits not only the individual asylum seeker but also the State in supporting a well-reasoned and sustainable decision-making process at the initial stage and reducing national costs via unmeritorious applications and onward appeals.

#### **Recommendation 15**

**Early legal assistance is vital for a fair and efficient asylum procedure. Asylum seekers should have the right to legal assistance for the preparation of their asylum application.**

#### **Recommendation 16**

**Lawyers or legal advisors should be permitted to accompany asylum seekers to the preliminary interview.**

### **3.4.2 The Asylum Interview**

A key moment in the asylum procedure is the personal interview held by the first instance authority. The centrality of the interview to the asylum determination process is reflected in EXCOM conclusions No 8<sup>116</sup> and 30.<sup>117</sup> Article 12(1) of the Asylum Procedures Directive requires that an interview is held with the asylum seekers on the substance of their claim. Furthermore Article 16(4) of the Asylum Procedures Directive allows Member States to provide for the presence of a 'legal advisor or other counsellor' at the interview.

In **Austria, Belgium, Czech Republic, Finland, Germany, Greece, Hungary, Ireland, Lithuania, Romania, Slovenia, Spain, the Netherlands** and the **UK** it is permissible for lawyers or legal advisors to attend the first instance interview in their national law in accordance with Article 16(4). This is similar to the practice in **Denmark, Norway** and **Switzerland**. Legal aid is available for the presence of a lawyer or legal advisor only in **Belgium, Finland, Hungary, Spain** and **the**

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<sup>116</sup> "The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR". See EXCOM Conclusion No. 8(XXVIII), *Determination of Refugee Status*, 1977.

<sup>117</sup> See EXCOM Conclusion No. 30 (XXXIV), *The Problem of Manifestly Unfounded or Clearly Abusive Applications for Refugee Status or Asylum*, 1983 "...as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status".

**Netherlands.** Low cost legal assistance is also available in **Ireland** for the attendance of legal advisors at the interview however, due to resources reasons in practice Refugee Legal Service caseworkers only attend first instance interviews with minors and other vulnerable applicants. In **Italy** only lawyers, as opposed to legal advisors, are permitted to attend the first instance interview. A notable exception is **France** where lawyers and legal advisors are prohibited from attending the first interview at the OFPRA.<sup>118</sup>

Despite the fact that lawyers or legal advisors are permitted to attend interviews, in practice they rarely attend the first instance interview in a number of countries mainly due to lack of legal aid or if there is insufficient funding or capacity for legal advisors from NGO's to assist at the interview. This is reported to be the case in **Denmark, Germany, the Netherlands, Norway** and the **UK**.<sup>119</sup> In **Germany** another problem arises whereby lawyers may not be informed in due time of the date of the interview and therefore they rarely accompany applicants to the first interview at BAMF.<sup>120</sup>

In situations where the lawyer or legal advisor is unable to attend the asylum interview, the interview is in principle not postponed by the authorities in **Austria, Belgium, Germany, Greece and Hungary**. However in **Germany, Hungary** and **Slovenia** sometimes caseworkers are flexible and will postpone an interview depending on the individual circumstances of the case. Similarly in **Finland**, if the applicant requests for his or her lawyer to be present during the interview than the interview will be postponed until the lawyer arrives.

While it is in the interest of an efficient asylum procedure that interviews can be conducted as scheduled, States should also adopt a balanced approach depending on the needs of the asylum seekers and allow for some flexibility where needed. At least for vulnerable asylum seekers interviews should be postponed until a lawyer or legal advisor is present to assist them. This good practice is followed in **Austria, Romania, and Lithuania**.

When lawyers or legal advisors are present at interviews in **Austria, Belgium,**<sup>121</sup> **Czech Republic, Germany, Hungary, Ireland, Italy, Romania, Slovakia, Spain,** the **UK** and **Switzerland** they are permitted to either intervene during or at the end of the asylum interview. In **Austria, Belgium, Finland, Germany, Hungary, Italy, Romania, Slovakia, Spain** and **Switzerland** lawyers or legal advisors are even permitted to ask or suggest additional questions.

However, in other countries surveyed, interventions may be limited and the lawyer or legal advisor may have a restricted role during the asylum interview. In the **Czech Republic** and the **UK** legal advisors are not permitted to suggest additional questions that may have been overlooked. In **Slovakia** the lawyers' or legal advisors' comments and suggested questions are not always recorded on the interview record by the determining authority. Similarly in **Greece** though lawyers are permitted to

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<sup>118</sup> Office français de Protection des Réfugiés et Apatride (hereinafter OFPRA).

<sup>119</sup> However in the UK often a legal representative will be present during the asylum interviews of separated children.

<sup>120</sup> Bundesamt für Migration und Flüchtlinge, the initial administrative body examining asylum claims in Germany (hereinafter BAMF).

<sup>121</sup> In Belgium legal advisors can only attend the main asylum interview if they work with asylum seekers in a professional capacity, e.g. as a social worker or as a representative from an NGO active in the field of asylum.

intervene according to the Presidential Decree in practice the authorities often obstruct their interventions.

### ***Interviewing Vulnerable Asylum Seekers***

Although it was beyond the scope of this survey to research the provision of legal aid and other guarantees for certain categories of asylum seekers some information was gathered regarding the practice surrounding vulnerable asylum seekers.<sup>122</sup> Regarding the interviewing of vulnerable asylum seekers good practice is found in **Lithuania**, whereby lawyers must attend their substantive asylum interviews. The administrative authorities in **Belgium, Romania, Spain, the UK and Switzerland** use internal guidelines for interviewing vulnerable asylum seekers. With regard to the provision of legal aid itself to assist asylum seekers establish their vulnerability for example by instructing a medical expert to prepare a report as supporting evidence, legal aid is only available for this purpose in **the Netherlands** and the **UK**. Low cost legal aid is also available in **Ireland** for the purpose of instructing experts.

The proper and timely identification of whether an applicant is particularly vulnerable is hindered by the lack of legal aid for the instruction of expert's reports in the majority of countries surveyed. ELENA believes that legal aid should equally be provided to assist asylum seekers with special needs to establish their vulnerability if it is pertinent to the examination of their protection needs.

### ***The Lawyer's access to the Asylum Seeker's File***

In considering the role of legal advisors and lawyers it is also necessary for them to have full access to the asylum seeker's file held by the governmental authorities in order to effectively represent their clients. The question is what information is accessible on the asylum seeker's file held by the first instance authority. Article 16(1) of the Asylum Procedures Directive guarantees access for legal advisors or counsellors to such information in the applicant's file as is liable to be examined by the appeal authorities. In order to uphold the principle of equality of arms, lawyers and legal advisors must be ensured full access to the information on which the initial authorities' decision is based in order to prepare for any potential appeal. Lawyers and legal advisors have access to the files of asylum seekers in **Austria, Belgium, Czech Republic, Finland, Germany, Greece, Hungary, Lithuania, Ireland, Italy, Romania, Slovenia, Spain, the Netherlands** and the **UK**. Similar practice exists in **Denmark, Norway and Switzerland**.<sup>123</sup> A copy of the applicant's file is available upon request by the instructed lawyer in **Germany** and **Denmark** and it's availability depends upon the individual discretion of the governmental official in **Finland**. In **Italy** though the lawyer has access to the file the documentation contained therein is usually limited in practice.

There may be limitations to the disclosure of information on file as provided in the Asylum Procedures Directive. Article 16(1) of the Directive allows for exceptions where disclosure of information or sources would jeopardise national security, the security of those providing the information and where "the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised". Certain information on asylum seeker's files may be withheld in **Austria, Czech Republic, Denmark, Finland, Greece, Lithuania, Ireland, Spain,**

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<sup>122</sup> On legal aid for unaccompanied children seeking asylum see Chapter IV section 14 below.

<sup>123</sup> It should be noted that it is only upon request by the lawyer or asylum seeker that access is granted to the file by the Swiss authorities. The file is sent to the lawyer/asylum seeker automatically together with the notification of the decision only in case of an inadmissibility decision.

**the Netherlands, the UK, Norway and Switzerland.** In **France** and **Italy** lawyers do not have access to the country of origin information relied upon by the administrative authorities. Information is normally withheld on the basis of its classified nature and that fact that it concerns national security information or contains internal classified information only relevant to the first instance authority. It should be borne in mind that in none of the countries of research was specific legislation reported which gives a clear interpretation to the meaning of “relevant information” in Article 16(1) of the Asylum Procedures Directive.

ELENA considers a proactive role of the lawyer or legal advisor during interviews to be good practice as it allows them to assist the interviewer in identifying the main aspects of the claim and ensures that real or perceived inconsistencies or contradictions are clarified in a timely manner. This is consistent with the idea of frontloading as it is likely to contribute to better first instance decision-making by ensuring that all elements of the application are taken into account as much as possible. In order to ensure that any submissions by the lawyer or legal advisor are duly considered by the first instance and appeal bodies there should be an obligation for the interviewing officer to register those interventions accurately.

#### **Recommendation 17**

**Legal aid should cover the presence of lawyers or legal advisors at asylum interviews. Their presence should be mandatory for interviews with vulnerable asylum seekers.**

#### **Recommendation 18**

**If an asylum seeker is represented by a lawyer or legal advisor, it should be possible to postpone or reschedule the asylum interview if the representative is unable to attend due to circumstances beyond his/her control.**

#### **Recommendation 19**

**Lawyers and legal advisors should be permitted to have an active role in the asylum interview and be able to intervene and provide comments and additional questions to assist the determining authority in identifying the protection needs of applicants.**

#### **Recommendation 20**

**During the asylum interview all representations and submissions from lawyers or legal advisors should be accurately recorded by the decision maker and taken into account when considering the asylum application.**

#### **Recommendation 21**

**States should ensure that the asylum seeker’s lawyer or legal advisor has access to all information included in their client’s file to guarantee that the principle of equality of arms is respected. Where full disclosure of the name of the provider of the information upon which the decision is based would jeopardise the security of the person concerned, appropriate measures must be applied protecting the source of the information while at the same time respecting the right of the lawyer or legal advisor to have access to the information in the asylum seeker’s file.**

### **3.4.3. The Asylum Appeal**

The right to an effective remedy before a Court or Tribunal is a fundamental right, which is embodied in general principles of EU law as developed by the CJEU and the jurisprudence of the European Court of Human Rights. In order to be effective, a

remedy against a negative decision in the asylum procedure must be available before a Court or Tribunal which is operationally independent from the authority whose decision it is reviewing, must have automatic suspensive effect<sup>124</sup> and must allow the appeal body to conduct a full *ex nunc* examination of the facts and points of law. Furthermore it must be effective in practice as well as in law, taking the form of a guarantee and not of a mere practical arrangement.<sup>125</sup> Article 39 of the Asylum Procedures Directive also confirms that Member States must ensure that applicants for asylum have the right to an effective remedy before a Court or Tribunal against a range of decisions within the asylum procedure.

As part of the research of this survey information was collected on the actual structure of the appellate authority in the countries of research and whether they were specialized bodies or not. This is considered necessary information to understand the environment in which lawyers and/or legal advisors operate in the respective countries. Appellate authorities which are specialized in examining asylum appeals are present in **Austria, Belgium, Denmark, France, Germany, Ireland, the UK and Norway**. Similarly in **Finland, the Netherlands and Switzerland** a specialised chamber exists within the general Court structure whilst in the **Czech Republic** a judge specialized in asylum law presides over the asylum appeals. However, in **Greece, Hungary, Italy, Lithuania, Romania, Slovenia and Spain** there are no specialized appellate authorities and the Courts examining asylum appeals are also competent to deal with other aspects of administrative law or civil law.<sup>126</sup>

#### ***The Power of the Appellate Authority***

The availability of legal assistance and representation at the appeal stage is an integral aspect of the EU principle of effective judicial protection and it is vital to ensure that asylum seekers have effective access to justice in practice. The following States provide for both a review of facts and law at the primary appeal stage: **Austria, Belgium, Czech Republic, Finland, Denmark, France, Germany, Hungary<sup>127</sup> Lithuania, Ireland, Italy, Romania, Slovenia, Spain, the Netherlands, the UK, Norway and Switzerland**. Contrary to this the asylum appeal is just limited to a review of points of law in **Greece**. ELENA believes that appeal authorities should have to power to conduct a full *ex nunc* examination of both facts and law in the asylum procedure. This is required in order for the remedy to be compatible not only with Article 39 Asylum Procedures Directive but also the jurisprudence of the CJEU and the European Court of Human Rights. The practice in **Greece** whereby the appeal is limited to the examination of points of law and the Court does not have the competence to examine the substance of the claim and identify where the applicant is in need of international protection, arguably is not in line with the right to an effective remedy under Article 39 of the Asylum Procedures Directive or compatible with Preamble 27 of the Directive.

The appellate body has the power to amend the decision on the merits of the claim in **Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Lithuania,**

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<sup>124</sup> ECtHR, *Gebremedhin v. France*, Application No. 25389/05, Judgment of 26 April 2007, para. 66 and *Muminov v. Russia*, Application no. 42502/06, Judgment of 11 December 2008, para. 101.

<sup>125</sup> ECtHR, *Conka v. Belgium*, Application No. 51564/99, Judgment of 5 February 2002, para. 83.

<sup>126</sup> In Italy the courts are also competent to deal with civil law.

<sup>127</sup> In theory the Court in principle only deals with points of law under general administrative law rules, but with regard to asylum cases the Court can enter into an assessment of the facts based on the statements of the applicant during the appeal hearing. See for further information Chapter IV, section 10.

**Romania, UK, Norway and Switzerland.** However the Court or Tribunal only has the power to refer the case back to the first instance authority on its' merits in the **Czech Republic, Greece and the Netherlands.**

In **Finland, France, Hungary, Lithuania, Romania and the Netherlands,** though the Tribunal or Court of appeal has the power to review the merits of the claim also, in reality often the factual findings of the first instance authority are given considerable weight by the appellate authority. There is an exceptional practice in **Norway** whereby firstly there is an internal appeal or review within the UDI (Norwegian Directorate of Immigration) and only if the UDI does not amend the original decision the appeal is then forwarded to the appellate authority, the UDE.

New facts and evidence relating to the claim which has not been considered by the initial administrative authority can be examined by the appellate authority in **Austria,**<sup>128</sup> **Denmark, France, Germany, Ireland and the Netherlands.**<sup>129</sup> If new facts arise at the appeal stage in **Finland,** the Court has the power to refer the case back to the Finnish Immigration Service for a review of the asylum application. Similarly in **Belgium** the Court has the power to refer the case back to the first instance authority under certain conditions. In contrast to this only evidence during the first instance procedure can be reviewed and evaluated by the Court in the **Czech Republic.** In **Lithuania** new evidence can be presented to the Court if it was not possible to submit this evidence at an earlier stage in the procedure.

The provision of legal aid in the majority of States surveyed includes the cost of preparing submissions for the Court or Tribunal, the drafting of statements as well as participation of lawyers at hearings before the relevant appellate authorities. However, in **Austria** the Flüchtlingsberater represents asylum seekers at the initial appeal at the Asylum Court and legal aid involving representation by a lawyer is only available for further onward appeals there. In **France** legal aid only covers the participation of the lawyers at the hearing and does not include the costs of preparing for the Court hearing. It should also be noted that there are no appeal hearings in **Slovenia** in practice and the appeal procedure in **Switzerland** is on paper only.

Regarding appeals to inadmissibility decisions where countries follow that practice, it was found that legal aid is available to represent asylum seekers in such appeals in **Belgium, Czech Republic, Italy, Slovenia Spain and Switzerland.** However in **Denmark** no free legal aid is available to challenge inadmissibility decisions and also such appeals have no suspensive effect. In **Italy** the asylum seeker must request the Court to suspend any expulsion decision whilst appealing on inadmissibility grounds.

### **Onward Appeals**

A right to a further appeal to a higher judicial authority is possible in **Austria, Belgium, Czech Republic, Finland, Germany, Italy, Lithuania, Romania, Slovenia, Spain, the Netherlands,** the **UK** and **Norway.** The Court must grant permission for appeal to a higher authority in **Belgium, Finland, Germany** and the **UK.** In **Ireland** there is also the possibility to apply for judicial review to the High Court. However there is no right to a further appeal in **Denmark, Greece, Hungary** and **Switzerland.**

Though the Asylum Procedures Directive expressly allows Member States to provide no free legal assistance and/or representation for onward appeals, it is good to note

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<sup>128</sup> This is subject to certain conditions see Chapter IV, section 10.

<sup>129</sup> This is since the entry into force of the new asylum procedure in the Netherlands on 1 July 2010.

that in the majority of countries researched legal aid is available for these further appeals. It should be noted that in **Austria** it is only at this higher level at the Constitutional Court that legal aid is available for lawyers to represent asylum seekers. In **Italy** in practice it can be difficult to access legal aid at this stage of the asylum procedure. Onward appeals in **Austria, Belgium, the Czech Republic, France, Ireland, Italy, Romania, Spain, the Netherlands** and the **UK** are limited to points of law. Given the complexity of these onward appeals, legal representation may be necessary to safeguard the rights of asylum seekers. Appeal hearings at this stage are technical and complex and frequently limited to points of law therefore the role of lawyers is of increasing importance.

#### ***Appellate Authorities Access to the Asylum Seeker's File***

As noted above in section 3.4.2 exceptions are available to a lawyer's access to their client's file under Article 16(1) of the Asylum Procedures Directive. In those situations appeal authorities must still have access to those sources or the information in question, except where access is precluded on national security grounds. All information available to the first instance administrative authority is also subject to examination by the appellate authority in all of the countries surveyed.

According to the information gathered national security concerns have not been used to deny appellate authorities access to certain information in **Austria, Belgium, Czech Republic, Denmark, Germany, Hungary, Finland, Ireland, Italy, Romania** and the **UK**. However such security concerns have been used to deny the appellate authorities access to information on an asylum seeker's file in **Lithuania** and **Norway**.

#### **Recommendation 22**

**Legal aid should be ensured not only for the initial appeal but also for any onward appeal. This should include both preparation for the appeal as well as the legal representatives' participation in any appeal hearing.**

### **3.5 Legal aid in Specific Asylum Procedures**

This section of the survey focuses on the availability of legal aid during specific situations in asylum procedures, for instance, when an asylum seeker is detained, or their asylum application is examined at the border or subject to an accelerated procedure. Given the nature of such exceptional procedures, where there may be lack of procedural safeguards found in the regular asylum procedure, there is a greater necessitate for legal aid in order to ensure effective access to justice. Such exceptional procedures are often accompanied by restrictive measures such as short timeframes, and limitations on access to detained clients for example, which in turn impacts upon the provision of legal aid for asylum seekers.

In order to establish whether the provision of legal aid is ensured both in legislation and practice it is necessary to also provide background information on the nature of border procedures, any related issues in detention and during Dublin procedures as well as the subject of guardianship concerning unaccompanied children. This information is further detailed in included in Chapter IV. Where applicable, information is also provided on the role of lawyers paid at the asylum seeker's own expense as well as under legal aid schemes.

#### **3.5.1 Access to Legal Aid during Border Procedures**

Article 35 of the Asylum Procedures Directive provides for procedures on asylum applications at the border and in transit zones at the discretion of each Member

State. Such procedures to examine asylum applications made at these locations must be in accordance with the basic principles and guarantees of Chapter II of the Directive.<sup>130</sup> A border procedure in this section refers to both the admissibility of an asylum applicant at the border and the substantive examination of the asylum claim at the border.<sup>131</sup>

There is varied practice across the countries of research with regard to border procedures. **Austria, Belgium, Denmark.**<sup>132</sup> **Czech Republic, France, Greece, Hungary, Lithuania, Romania, Slovenia,**<sup>133</sup> **Spain, Germany, the Netherlands** and **Switzerland** all have some form of border procedures for asylum seekers. However there were no border procedures reported in **Finland, Ireland,**<sup>134</sup> **Italy**, the **UK** and **Norway**. Despite this in practice asylum seekers can claim asylum at the border in **Finland** and the **UK** and can have a preliminary interview or screening interview respectively at the borders. The practice at the border varies from admissibility procedures in some countries to the substantive examination of the asylum application in an accelerated procedure at the border or transit zone.

In **Austria, Denmark, France Hungary, Lithuania** and **Romania** national authorities deal with the admissibility of asylum applications at the border. It is important to note in this context that **Austria** and **Romania** have transposed into national law all of Article 25(2) of the Asylum Procedures Directive, which provides seven substantive grounds in order to consider an application inadmissible.

Irrespective of whether there is no official border procedure in place for examining asylum applications, sometimes asylum seekers are denied entry to apply for protection. Such practice is evident in **Italy** where “collective expulsions” have occurred at the border and therefore potentially *refoulement* before asylum seekers are even given the opportunity to have their protection needs examined.<sup>135</sup> Similar practice is recorded in **Greece** where lawyers and migrants have told of instances of *refoulement* and “pushbacks” to Turkey. Many of the people concerned were given no opportunity to enter the Greek asylum procedure and therefore were potentially directly or indirectly subject to *refoulement*.<sup>136</sup> The issue of such unofficial actions at the border and in transit zones is exacerbated by the lack of presence of lawyers and/or legal advisors at the border.

For asylum seekers to have the opportunity to seek international protection at the border, legal assistance and representation should be available to ensure their rights

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<sup>130</sup> Also Recital 16 of the Directive states that exemptions to the procedural guarantees set in place for asylum seekers in the regular procedure may apply at the border.

<sup>131</sup> Borders in this context refer to both land and sea borders and any airport procedures that are in place.

<sup>132</sup> In theory a border procedure is available in Denmark.

<sup>133</sup> It should be noted that in Slovenia the border procedure is not implemented in practice.

<sup>134</sup> It is possible, under the Refugee Act 1996 (as amended) to apply for asylum at the border. However, asylum claims are not determined at the border.

<sup>135</sup> This is without a formal expulsion decision being taken if third country nationals are being “pushed back” at the border. In those cases there is in practice no effective remedy, even if in theory there may be such a remedy. See further UNHCR written submission in the case of *Sharifi & Others v Italy & Greece* (Application no. 16643/09).

<sup>136</sup> Dutch Council for Refugees, ProAsyl, Refugee Advice Centre and Refugee Migrant Justice Joint NGO Complaint to the Commission of the European Communities concerning failure to comply with community law, failing Member State: Greece, 10 November 2009.

during the procedure. Given that a number of Member States surveyed provide for some decision making authority at border and transit zones impacting upon asylum seeker's applications it is essential that these people have access to legal assistance upon arrival. The fact that asylum seekers may be exhausted and traumatized both by events in their home country and also along their arduous journeys to Europe should be taken into account by national authorities when conducting asylum procedures at borders and transit zones. Therefore asylum seekers should be given assistance and sufficient time to prepare for interviews on their asylum applications at the border. This is also required in order to ensure that applicant's can provide all the evidence at their disposal for the assessment of their claim in accordance with Article 4 of the Qualification Directive.<sup>137</sup>

According to the information gathered in this survey there are no formal restrictions reported on accessing legal aid for asylum seekers during border procedures in **Austria, Belgium, Czech Republic, Denmark, France, Lithuania, Romania, Spain, the Netherlands** and **Switzerland**. Good practice is recorded whereby legal aid is available prior to any decision on the asylum claim at the border in **Belgium** (in theory), **Lithuania, Spain** and **the Netherlands**. However, legal aid is dependent on the presence of NGO funding in the **Czech Republic** and in **Romania**. There is no legal aid available at the border in **Germany** with the exception of the Frankfurt Airport procedure. Similarly no legal aid is available in **Denmark, Greece** and **Romania** at the border in practice.

In practice there can be limitations to accessing legal representation for example sometimes there is insufficient time for an asylum seeker to seek a lawyer's assistance at the border. This is evident at the border in **Czech Republic, Belgium** and **Germany**. In **Greece** there are various obstacles to accessing legal representation at the borders. Firstly the asylum seekers must have the resources to pay a lawyer since there is no free legal aid available at the border.<sup>138</sup> Secondly there is the problem of whether the lawyer is aware of the presence of asylum seekers at the border. This is particularly challenging at the Northern Greek border procedures. Even if the lawyer does have knowledge of asylum seekers at the border they are not always able to attend interviews or hearings on the substantive asylum claim held at transit zones due to Greek national security restrictions.

In **Austria, Belgium, Switzerland**, legal representatives are permitted to attend interviews at the airport and the reception and registration centres at the borders. However in practice most asylum seekers are not actually represented by a lawyer or legal advisor at that stage.<sup>139</sup> NGO's have a presence at the border for legal assistance in the **Czech Republic**,<sup>140</sup> **France and Romania** though this is dependent on funding and capacity.

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<sup>137</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons in need of international protection and the content of protection granted. OJ L 304, 30/09/92004 (hereinafter the Qualification Directive).

<sup>138</sup> UNHCR, *Asylum Procedures Study*. Section 15. Border Procedures, p. 7.

<sup>139</sup> Also in Switzerland this is dependent on the asylum seeker's own financial resources as legal aid is very rarely granted for asylum claims particularly during the first instance procedure.

<sup>140</sup> A specific problem in the Czech Republic is that asylum seekers arriving at the airport are not informed in advance of the fact that an interview will take place, which makes it difficult to contact a lawyer/legal advisor in a timely manner before the interview. However the new Czech law introduces an obligation to inform the asylum seekers two days in advance of the date of the interview.

Sometimes the lack of effective communication can hinder access to legal aid for example in **Lithuania** legal aid will only be granted at the request of the asylum seeker which depends on whether they are properly informed of their rights under the procedure by the Migration Department. In practice this severely curtails access to legal aid in **Lithuania**. In **Ireland** despite the fact that there is no formal border procedure, sometimes asylum seekers claim asylum at the border. There is a lack of information available on what happens there due to the fact that no NGO's or lawyers are present at the airports. In **Slovenia**, practice is similar to **Greece**, in that legal aid is only available at the asylum seeker's own cost.

As noted above, in **Germany** there are provisions for access to legal assistance for asylum seekers at airports but not at other borders where individuals may claim asylum.<sup>141</sup> Despite this, even at the airports there can be problems in contacting a lawyer particularly if the asylum seeker arrives at the weekend. In order to address this lawyers in Frankfurt have established an 'emergency service' that operates both day and night to provide legal assistance at the airport. It should also be noted in **Germany** that if an application is rejected as manifestly unfounded at the border, legal counselling must be provided free of charge.<sup>142</sup>

In **Austria** only 'Rechtsberater' are available at the border. In **Romania** no legal aid is available at the border however there is possibility at appeal to contact a NGO or UNHCR for legal advice. In **Denmark** detained asylum seekers at the border can access legal counselling by the Danish Refugee Council. In **Hungary** access to legal assistance is limited due to the special nature of the return procedure at the airport. The period spent at the airport may be very short, a lawyer may not be able to contact a potential client easily and persons of concern are not informed about the possibility of requesting legal assistance or representation.<sup>143</sup> However there is a system in place whereby the Hungarian Helsinki Committee can provide legal assistance if contacted directly by potential asylum seekers held at the airport via phone.

Good practice is highlighted in **Spain** and **the Netherlands** whereby legal aid lawyers are automatically appointed for asylum border procedures. In **Spain** legal aid is compulsory at the border<sup>144</sup> and legal advisors or lawyers must be present during the first interview in border procedures, which cannot be conducted in their absence. However, concerns remain in **Spain** that sometimes lawyers and/or legal advisors do not have sufficient time with the asylum seeker to prepare for the first interview at the border. In **the Netherlands** legal aid representatives are permitted to attend interviews at the border, however in practice they seldom make use of this right. Also in **Switzerland** a legal assistance NGO has an office in the transit zone of the airport and circulates information leaflets on its advisory services to asylum seekers there.

The administrative procedure at the border is not halted in order for asylum seekers to contact a lawyer or legal advisor in **Austria, Belgium, Czech Republic, France,**

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<sup>141</sup> For further information on the situation regarding Germany's land borders see Chapter IV Section 11 below.

<sup>142</sup> UNHCR, *Asylum Procedures Study*. Section 15 – Border Procedures, p. 7.

<sup>143</sup> Hungarian Helsinki Committee, *Access to Protection at Airports in Europe. Report on the monitoring experience at airports in Amsterdam, Budapest, Madrid, Prague, Vienna and Warsaw*, 2008, p. 23-28.

<sup>144</sup> According to the Spanish Asylum Act legal aid is mandatory when requests are made at the border. See Law 12/2009 of 30 October 2009 regulating the right of asylum and subsidiary protection, BOE no. 263 of 31 October 2009.

**Greece, Lithuania, Romania, the Netherlands and Switzerland.** Asylum seekers are also detained during the border procedures in **Belgium, Czech Republic, France, Germany, Greece, Hungary Lithuania and Spain.** Good practice is noted in **Spain** whereby the asylum proceedings are suspended whilst a lawyer is contacted to act on behalf of the asylum seeker. Whilst noting that asylum seekers may be confined or detained at the border, asylum claims if completely examined at the border should not be dealt with so speedily as to limit effective access to legal aid. Similarly if no legal assistance or aid is available at the border, asylum applicants should be admitted to the territory to have their claim for protection assessed with the help of legal aid.

During border proceedings the asylum applicant is not admitted to the territory in **Austria, Belgium, Czech Republic, France, Greece, the Netherlands and Switzerland.**<sup>145</sup> After a specific duration has lapsed and a decision has not been taken on the claim, asylum seekers may gain access to the territory of **Greece and Switzerland,** after one month<sup>146</sup> and twenty days respectively. ELENA believes that border procedures should be flexible whereby complex asylum claims requiring legal assistance and/or representation are admitted to the territory and dealt with in the regular in-country procedure.

This survey has found that the majority of countries who implement border procedure permit some form of legal aid at the border or transit zone. However in practice there may be obstacles to the provision of legal aid such as lack of information, limited timeframes for preparation or inadequate resources for staff of NGO's to provide legal aid services.

### **Recommendation 23**

**During border proceedings asylum seekers should be automatically granted legal aid and be effectively enabled to substantiate their claim in accordance with Article 4 of the Qualification Directive.**

### **Recommendation 24**

**Legal aid providers should be granted effective access to asylum seekers in border and transit zones. This also involves the relevant border authorities informing legal advisors of the presence of asylum seekers at the border and allowing legal advisors and lawyers to participate in any asylum interviews held at the border.**

## **3.5.2 Access to Legal Aid in Detention**

Asylum seekers are increasingly detained during the examination of their asylum claim and most notably at the border and in accelerated or 'fast track' systems. Access to lawyers is not only essential for assistance with asylum claims but is also necessary to safeguard against arbitrary detention and protect their right to liberty.<sup>147</sup> Hence, legal representatives must not only assist on the applicants' asylum claim but

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<sup>145</sup> It should be noted that the only border procedure in Switzerland is the airport procedure. See Chapter IV section 11 for further information.

<sup>146</sup> This is in accordance with Article 35(4) of the Asylum Procedures Directive, which states that when a decision has not been reached within four weeks then the asylum applicant should be admitted to the territory of the Members State.

<sup>147</sup> In this context Article 18 of the Asylum Procedures Directive refers to the use of detention during the asylum procedure and states that Members States must ensure that there is the possibility of speedy judicial review of the decision on detention.

also as regards the detention itself.<sup>148</sup> This section not only addresses the availability of legal aid in detention but also examines other constraints and obstacles that may hinder effective legal assistance for asylum seekers in detention.

In **Austria, Belgium, France, Germany, Ireland, Italy** and **Spain** the asylum procedure is expedited when the applicant is detained. Also in **Denmark, the Netherlands** and **Norway** asylum claims submitted by detainees are prioritised by the relevant administrative authorities. In **Greece**, according to the Presidential Decree 90/2008, asylum applications by detainees should be examined with priority. In practice, however this does not happen and many applicants are detained for long periods of time, sometimes even more than six months, before their asylum claim is examined. Given the fact that in some countries asylum seeker's claims may be dealt with more speedily in detention ELENA believes that it will be essential that they receive legal aid and support from the moment they are detained.

According to the information gathered lawyers and/or legal advisors have some form of formal access to detained asylum seekers in all the countries of research. Good practice is noted in **Denmark** whereby detained asylum seekers are automatically granted legal aid from the Court, which reviews the legality of the decision to detain them every four weeks. Legal aid is also available in **Lithuania** and **Slovenia**. Similarly the availability of legal aid for challenges to detention is subject to the same general legal aid rules in **Belgium, Czech Republic** and **Italy**. The **UK** has a comprehensive system in place for asylum seekers in the detained fast track procedure. Detainees in this procedure are automatically allocated a Legal Services Commission funded representative. Those representatives benefit from exclusive contracts for the provision of publicly funded advice and representation in those removals centres.<sup>149</sup> Legal aid is available to challenge the decision to detain in **Finland, France, Denmark, Lithuania, Romania, Spain, the Netherlands, UK** and **Norway**. However the quality of legal aid provision must also be measured as for example in **Romania** it is reported that there is limited interaction between the lawyer and client in detention.

### **Administrative Constraints**

In order to ensure the effective management of a detention centre governmental authorities may specify conditions for visitors, which are also applicable for detainee's lawyers and/or legal advisors. The survey has found in practice that most countries have some form of requirements in place for visits. However, such conditions or requirements must not render access impossible as provided by Article 16(2) of the Asylum Procedures Directive.<sup>150</sup>

Difficulties exist for asylum seekers in contacting a lawyer if prior to their detention there are not already represented by one. This is shown in **Austria** and **Belgium**. In a number of countries, only lawyers who are already instructed by their clients have ready access to them if detained. In **Austria, Italy** and **Spain** the lawyer must

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<sup>148</sup> The information gathered for this survey specifically refers to detained asylum seekers whilst their application for international protection is being examined by national authorities.

<sup>149</sup> There is an exception to this in situations where another provider has been representing the client and has already completed 5 hours work on the case.

<sup>150</sup> Article 16(2) of the Asylum Procedures Directive provides that "*Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant for asylum has access to closed areas, such as detention facilities and transit zones for the purpose of consulting that applicant...*" Restrictions on such access are only allowed on the basis of security, public order or administrative management of the area, or "*in order to ensure an efficient examination of the application*" provided that such access is not thereby severely limited or rendered impossible.

already be acting on behalf of the client prior to his/her detention. Also in **Greece** access will only be granted when the lawyer knows the name of the client.

Permission is required by the detention centre authorities in **Romania** in advance of any visit to detainees. Equally, in the **Czech Republic**, permission is required from the Ministry of the Interior to access the detention centre. However, depending on which detention centre the asylum seeker is in, there may be additional requirements for visits, for example in the Bela-Jezova centre the OPU<sup>151</sup> can only provide legal advice on certain weekdays and within fixed hours. In light of the high number of asylum seekers detained there this can sometimes reduce the possibility of effective legal assistance considerably. In **Belgium** an appointment has to be made with the client in advance. In **Ireland** the visit times and durations are limited which can be problematic for taking instructions from vulnerable asylum seekers in detention. The issue can be amplified by the fact that the asylum procedure is expedited for detained applicants in **Ireland** although detention in practice occurs only in a minority of cases.

A number of Member States surveyed have national administrative arrangements for consultation interviews. For example consultation meetings are limited to specified visiting hours in the **Czech Republic, Germany, Finland, Ireland, Lithuania, Spain, Norway, the Netherlands and Switzerland**. The meeting must be booked in advance with the authorities in **Slovenia and Switzerland**.

There may also be restrictions on lawyers' and/or legal advisors' access to detention centres for other reasons including national security grounds. For example, in **Belgium**, there may be restrictions due to national security measures or public policy grounds. In **Denmark** there is also a provision for restrictions on the basis of public security grounds. Such measures are implemented on a case-by-case basis in **Belgium, Denmark and Italy**. In **Spain** a new regulation provides for limitations at the border and in detention for reasons of security, public order or purely managerial reasons.<sup>152</sup> In **the Netherlands** an issue is the length of time taken to go through the security procedures for all visitors thereby limiting the actual visiting time with the detained asylum seeker.

There have been isolated instances where access was rendered almost impossible in **Italy** in situations whereby lawyers did not immediately receive permission to enter the detention facility where their client resided because they had not received formal notification of their appointment as the client's lawyer. Also in **Greece** there have been instances whereby lawyers have been refused access to detention facilities even if they had the name of the asylum seeker they planned to visit, which is a requirement for access.

These restrictions may seem necessary for administrative management however in practice they can hinder access to a lawyer for those who need it most, namely, those who had no previous contact with a lawyer. This problem is highlighted in the practice in **Austria** whereby detainees who have no legal advisor are often not informed of their rights whilst in detention including the possibility of accessing legal aid in order to lodge an appeal in the asylum procedure. Access is therefore *de facto* rendered impossible, as usually legal advisors are equally not informed about persons in detention and general legal advice is frequently not available in detention

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<sup>151</sup> Organizace Pro Pomoc Uprchlikum – Organisation for Aid to Refugees.

<sup>152</sup> Please note that as of the time of writing this report these regulations have not been adopted yet.

centres. Despite the fact that social assistants may be present in some detention centres, these are often unable to help asylum seekers to find a lawyer in practice.

Other countries included in the survey reported similar problems for detainees who instructed no lawyer and/or legal advisor prior to their detention. In **Hungary** detained asylum seekers may have more difficulties in finding a lawyer than other asylum seekers as they are not informed about the availability of legal aid and have less means of communication and require more time to contact the Office of Justice. In **Ireland** although detained asylum seekers are provided with the same information as other asylum seekers, there may be increased barriers to contacting a lawyer. Those detained for removal purposes in **Ireland** are detained in prisons, designed for the detention of persons in relation to criminal matters. Professional visiting times can be limited and communication can be a difficulty for an asylum seeker in prison. If a person is not already legally represented when they are detained, it may be difficult for them to access and instruct a lawyer in a non-criminal matter quickly from prison.

A different problem in **Finland** is reported in that sometimes lawyers are not timely informed of the fact that their client has been detained. This can have serious consequences with respect to the use of possible legal remedies including access to the Courts. In the **UK** the issue of effective access to legal aid depends on where the asylum seekers are detained for example in a detention centre, prison or immigration removal centre. Asylum seekers who are detained in prison have particular difficulties because there is no scheme to try to facilitate their access to legal aid in practice. Also those detained in Immigration Removal Centres are supposed to be able to access Legal Services Commission funded advice surgeries or, if their claim is subject to an accelerated procedure, a legal representative is appointed for them. However, in practice, there are reports that the capacity of legal aid providers does not meet the need in such centres.

### ***Practical Barriers***

There may also be practical barriers or obstacles to accessing asylum seekers in detention centres. For example in **Belgium, Czech Republic, Germany, Greece, France, Hungary, the Netherlands** and **Norway** the detention centres are often located in remote isolated areas, sometimes close to the border with limited or no public transport links. In **Italy** access to detention centres is particularly problematic on the island of Lampedusa not only due to its location but also because there are no lawyers permanently residing on the island. The remote location of such detention centres only exacerbates detained asylum seeker's isolation and limits the number of visits by lawyers in practice.

Another practical barrier is whether the asylum seeker is informed of his or her rights to obtain legal aid whilst in detention. This problem is compounded when lawyers are unable to contact detainees in general rather than previously instructing clients. This survey has found that often asylum seekers in detention are not always informed of their rights to legal aid in **Austria, Hungary, Lithuania**<sup>153</sup> and **Switzerland** that has consequences as to whether they can access a lawyer.

It is welcoming to note that in a number of States the issue of access and information is mitigated by the presence of NGO's at detention centres. In **Spain** good practice is noted in that some Bar associations provide SOJ services (legal orientation) in certain detention centres, an example of which is held at Barajas airport. Also in

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<sup>153</sup> It should be noted that in Lithuania the practice of informing detainees of their right to legal aid has improved recently.

**France** the national authorities fund the presence of NGOs in detention centres for removal. The organisations are not entitled to legally represent the detainees but in practice they provide support for lodging appeals. Also regular visits by NGO's for the provision of legal assistance in detention centres is reported in the **Czech Republic, Denmark, Finland, Greece**<sup>154</sup> and **Romania**. Equally in **Ireland** the Refugee Legal Service provides an outreach information service at the main prison on a regular basis whereby clients can be registered for representation. Sometimes NGO's visit detention centres to provide legal advice in **Lithuania** and **Slovenia**.

It is essential that asylum seekers have information on how they can contact a lawyer while detained. In **Denmark, France, Germany, Slovenia** and the **UK** there is some information provided to detainees. For example in **France** detained asylum seekers are generally provided with the contact details of the local bar association, albeit this is due to the fact that the authorities do not systematically inform them of their rights in detention. In **Germany** detained asylum seekers receive a list of the lawyers they may contact. In **Slovenia**, social assistants in detention centres assist asylum seekers with contacting a lawyer. In **Norway** asylum seekers may get assistance from staff working in the detention centre where they reside or receive information from other detainees.<sup>155</sup>

There is varying practice amongst States regarding information on the availability of legal assistance in detention centres. Some States like **Spain** provide legal aid clinics in detention centres whilst in other States asylum seekers have to rely upon staff's discretion to enable them to contact a lawyer.

Access to legal assistance for asylum seekers in detention could be improved through the use of legal aid clinics. This would entail a weekly visit from lawyers and/or legal advisors to detention centres and the provision of a 'drop in' service, in that detainees are free to visit them without appointments at the weekly clinic session if they need legal assistance. In situations where an asylum seeker requires further representation, the lawyer could then be instructed to represent them and an individual consultation visit could be arranged. Legal aid clinics similar to this model are present in **Finland, France, Spain, the Netherlands, the UK** and **Switzerland**. However this is only for the border detention centres in **the Netherlands** and **Switzerland**. A pilot project is underway in **Belgium** and in **Germany** a pro bono service by lawyers is available in some detention centres.

ELENA recommends that there is a legal aid clinic arranged on a regular basis in detention centres to provide effective legal aid and support to all detainees.

### ***Effective Communication in Detention Centres***

Long periods of time in detention can have serious effects on the mental health of asylum seekers.<sup>156</sup> This in turn, affects the quality of communication and relationship of trust between the lawyer and/or advisor and client, the asylum seeker. Traumatized asylum seekers generally need more time to prepare for asylum interviews and consult with lawyers. It is essential that lawyers build rapport and trust over time with vulnerable clients for the full disclosure of their protection claim.

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<sup>154</sup> However in Greece this is dependent on whether funding is available or not for specific projects.

<sup>155</sup> Police and staff in detention centres are not allowed to recommend specific lawyers but refer in practice to the telephone directories. In many cases asylum seekers use their own network to contact a lawyer.

<sup>156</sup> For further information on this see the JRS Europe, *Becoming vulnerable in Detention - Civil society report on the detention of vulnerable asylum seekers and irregular migrants in the European Union (the DEVAS project)*, June 2010.

Therefore, access in itself is not the only concern in providing quality legal assistance and representation for detained asylum seekers. Suitable conditions for effective communication must be present for example confidentiality and privacy must be ensured during meetings and asylum seekers should be able to contact lawyers and legal advisors by phone and other correspondence means. In the countries surveyed it is welcoming to note that sufficient communication between lawyer and client is principally enabled in **Belgium, Denmark, Germany, France, Italy, Lithuania, Romania, Slovenia, Spain, Netherlands, United Kingdom, Norway** and **Switzerland**.<sup>157</sup>

Insufficient communication in detention centres is reported in **Finland** and **Ireland**. This may be due to a number of factors including language barriers and restricted timeframes for gathering all the necessary information on the asylum claim. In **Lithuania** good practice is noted in that there are no restrictions for detainees on accessing the phone and correspondence. In the **Czech Republic** however, there is restricted access to phones. In **Greece** in many detention centres detainees do not have regular access to telephone and the meetings with the lawyer may take place in front of police staff.

Given the confidential nature of the lawyer/client relationship it is essential that privacy be ensured during meetings in detention. Such privacy is reportedly ensured in **Belgium, France**,<sup>158</sup> **Finland, Ireland, Romania, Slovenia, Spain** and the **United Kingdom**. A specified room is used for consultation visits in the **Czech Republic, Denmark, Lithuania, the Netherlands, Norway** and **Switzerland**.

In **Italy** the confidentiality of such a specific consultation room is diminished due to the fact that the door is left open with the presence of officers nearby. In **the Netherlands** the consultation rooms are small and uncomfortable. This is particularly the case for the detention centre at Schiphol (CD Schipol Oost) which has no windows and where it can get very hot during the summer. Rooms have very thin walls, which affects privacy at this centre. In addition detainees are not allowed to make external phone calls there.

Asylum seekers have access to phones to contact their lawyers or legal advisors in detention centres in **Austria, Spain** and **Switzerland**. Restricted access to phones is reported in the **Czech Republic** and **Hungary**. Another element for effective communication is access to interpreters during consultation visits. Interpreters are present for visits between lawyers and their client's in **Belgium, Czech Republic, Denmark and Finland**. Similarly in **Austria** interpreters are present for meetings between the 'Rechtsberater' and the asylum seeker. Interpreters are present for any interviews with government officials in **Finland, France and Italy**. In **Germany, Romania, Slovenia** and **Italy** interpreters are only present for visits with lawyers at the asylum seeker's own expense. According to the information gathered no interpreters are present for consultation visits with lawyers in **Hungary, Lithuania** and **the Netherlands** unless arranged by the lawyers themselves. Interpreters can be arranged by phone as is the practice in **the Netherlands** or may be able to attend the client with the lawyer as can occur in the **UK**. Provision should be in place for

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<sup>157</sup> In Switzerland in practice, whether there are sufficient conditions for effective communication depends on the detention centre visited.

<sup>158</sup> It should be noted that in practice in France confidentiality might be an issue in some of the detention centres.

interpretation services either by phone or in person so that the lawyer and client can effectively communicate with each other.

In principle, in all of the countries researched, detained asylum seekers have some form of access to legal assistance or representation. However in practice, the cumulative effect of restrictive administrative arrangements, remote locations of detention centres and unsatisfactory conditions for efficient communication all limit the quality of legal aid rendered. ELENA calls upon States to implement principle 9.2.9 of the Resolution 1707 (201) by the Council of Europe Parliamentary Assembly on the detention of asylum seekers and irregular migrants in Europe, which states “detainees shall be guaranteed effective access to legal advice, assistance and representation of a sufficient quality, and legal aid shall be provided free of charge.”

#### **Recommendation 25**

**All detained asylum seekers should automatically be granted a legal aid representative both for the purposes of their asylum application and review of their detention.**

#### **Recommendation 26**

**Upon arrival detention centre officials should provide asylum seekers with an information leaflet (translated in relevant languages) on their rights including the right to legal aid. Such a leaflet should also contain a contact list for lawyers and/or legal advisors.**

#### **Recommendation 27**

**States should facilitate ‘legal aid clinics’ on a regular basis within detention centres. The purpose of such clinics would be to provide general legal assistance to all detainees. If further legal representation is required on an individual basis, legal aid providers could then be instructed to represent individual asylum seekers.**

#### **Recommendation 28**

**Consultation rooms for lawyers and detainees should be provided in such a way as to ensure privacy and effective communication. Where necessary, access to interpreters either by phone or in person must be ensured.**

#### **Recommendation 29**

**Detained asylum seekers should not be prevented from contacting their lawyers and/or legal advisors either by phone or other means of correspondence.**

### **3.5.3 Access to Legal Aid in Accelerated Asylum Procedures**

As by their very definition accelerated procedures restrict time within the asylum procedure, it is necessary to have procedural safeguards in place such as access to legal aid. In order to determine on what grounds States are accelerating claims this survey has also gathered information on the implementation of Article 23(4) of the Asylum Procedures Directive, a table of which is found in Annex III of this report.<sup>159</sup>

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<sup>159</sup> Article 23(4) of the Asylum Procedures Directive provides for the potential application of 15 grounds for prioritisation or acceleration within the asylum procedure. This is further to Article 23(2), which provides for acceleration on any ground at the discretion of the Member State concerned. The grounds under Article 23(4) refer to a range of circumstances varying from procedural aspects such as the refusal to provide fingerprints or follow reporting requirements to substantive issues such as the asylum seeker only raised issues of minimal relevance to the assessment of whether he/she is a refugee.

In practice States employ accelerated procedures in a number of different ways for example as detained fast-track procedures, procedures involving shorter timeframes for appeals, applying non-suspensive effect to appeals<sup>160</sup> and the application of different timeframes for procedures depending on whether they take place at the border or in the territory of the State concerned.

Given the nature of accelerated procedures where there is often an implicit presumption that the applicant is not in need of international protection, effective legal aid is essential both for refugees and governmental authorities alike, in correctly identifying those in need of international protection. It is apparent from the table on grounds for acceleration in Annex III<sup>161</sup> that there is a divergence in practice on the grounds for acceleration. Some States like **Slovenia** employ the majority of grounds under Article 23(4) whilst others employ a minimal number of grounds. In **Slovenia** the majority of asylum claims are examined in an accelerated procedure in practice.<sup>162</sup>

The survey found that, in principle, there were no restrictions reported on the availability of legal aid in accelerated procedures in **Austria, Belgium, Czech Republic, Finland, France, Greece, Ireland, Italy, Romania, Slovenia, Spain, the Netherlands, Norway, Switzerland** and **Lithuania**. However in practice in **Lithuania** there are obstacles in accessing legal aid in that the asylum seeker need to be aware that they must request it from the national authorities.

Depending on the country, asylum seekers either receive legal aid throughout the asylum procedure or only at the appeal stage. Legal aid was found to be available prior to the first instance decision in **Belgium, Czech Republic, Finland, Hungary Lithuania, Spain and the United Kingdom**. Low cost legal assistance is available in **Ireland** at this initial stage of the procedure. Legal aid in the **Czech Republic** is not funded by the State but by NGO's, which can have limitations in practice.<sup>163</sup>

However legal aid is only available at the appeal stage in accelerated asylum procedures in **Romania, Slovenia, Germany, Norway** and **Switzerland**. In **Denmark** legal assistance is available to all asylum seekers in the accelerated procedure in theory but resources are limited. Legal representation by a lawyer is generally only provided at the appeal stage, however, this is not the case for those asylum applications that are rejected in the manifestly unfounded procedure (whether it is in the accelerated manifestly unfounded procedure or the "normal" manifestly unfounded procedure)<sup>164</sup>, as in those cases there is no possibility to appeal the

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<sup>160</sup> Though a separate issue within the asylum procedure, the non-suspensive effect of appeals is commonly used as part of the accelerated asylum process in some countries for example Ireland.

<sup>161</sup> Annex III Accelerated Asylum Procedure Grounds.

<sup>162</sup> Particularly complex cases are channelled into the regular procedure where there is a second substantive asylum interview one or more months later. In the regular procedure it can take up to 2/3 years to receive a decision from the first instance authority. As further background information it should be noted that Slovenia receives approximately 260 applications per year (2009) and there are approximately 8 people dealing with the asylum applications in the relevant governmental department.

<sup>163</sup> It should be noted that whereas in the "regular" asylum procedure appeals against the decision of the Ministry of Interior must be lodged within 15 days, this is only 7 days where the asylum application is considered to be manifestly unfounded, where the asylum seeker is in detention or when the procedure was discontinued because the application was found to be inadmissible. See Article 32 Asylum Act. English version available at <http://www.mvcr.cz/mvcren/article/procedure-for-granting-international-protection-in-the-czech-republic.aspx>.

<sup>164</sup> In Denmark an asylum application can be processed in an "expedited" manifestly unfounded procedure in case the asylum seeker comes from a country, which is considered safe. In such case,

negative decision.<sup>165</sup> Only unaccompanied children are granted legal representation by a lawyer during the first instance procedure when the Immigration Service has the intention to reject the asylum application as manifestly unfounded and it refers the case to the Danish Refugee Council for their opinion. In case the asylum application is finally rejected as manifestly unfounded by the Immigration Service, no possibility to appeal that decision exists either in the case of unaccompanied children or for adults.

In **Austria**, if the asylum application is processed at the airport in an accelerated procedure, Caritas provides counselling and assistance to appeal the decision. If the Federal Asylum Agency rejects the application due to safe third country grounds or because another EU Member State is responsible for examining the asylum application, legal counselling is provided by a 'Rechtsberater' who also has to be present at the hearing. Those legal advisers do not help with legal remedies. However, it should be noted that UNHCR has a supervisory role and has the power to object the decision.<sup>166</sup>

Though there are no restrictions in law in **Germany**, in practice it is difficult to access legal aid in accelerated asylum procedures, as it is difficult to pass the merits test for such claims to obtain legal aid, which is then only available at appeal. Hence the reality is that free legal aid is only exceptionally available for asylum seekers in an accelerated procedure.

In the **UK** legal aid in fast track procedures is on the basis of an exclusive arrangement with certain suppliers.<sup>167</sup> Similar to practice in **Germany**, the usual merits and means test applies, leading to the reality that many cases fail on the merits test at the appeals stage, depriving the asylum seeker of legal representation. By the very nature of accelerated procedures time limits are short hindering the quality of legal aid provided. In the **UK** lawyers may only have access to a client up to three hours before the substantive interview on their asylum claim. In such a situation it is very difficult for the lawyers to work effectively.

The issue of insufficient time is also demonstrated in **Norway** and **the Netherlands**. In the Norwegian practice, legal aid is only available at the appeals stage whereby the lawyer only has forty-eight hours to prepare the appeal in the accelerated procedure. This can be extended when more time is needed but it is at the discretion of the Norwegian Directorate of Immigration. In **the Netherlands** the legal aid lawyer only has three hours after the substantive first asylum interview to discuss the claim

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contrary to the "normal" manifestly unfounded procedure, the asylum seeker will not be asked to fill out an asylum application form, the interview with the Immigration Service will be organised very quickly and the Danish Refugee Council will be asked to give its opinion whether it agrees the Immigration Services' assessment of the application as manifestly unfounded within a shorter time period. See IGC, *Asylum Procedures Report*, at p. 105.

<sup>165</sup> In case an asylum application is rejected in the manifestly unfounded procedure by the Danish Immigration service the case is sent to the Danish Refugee Council (DRC). If the DRC agrees with the decision of the Immigration service, the application is rejected with no possibility to appeal the decision. If the DRC disagrees with the Immigration Service's opinion, the case will be rejected but referred to the appeal body (Danish Refugee Appeals Board) where legal representation will be provided. See <http://www.fin.dk/dadk/English/General+information+regarding+the+Danish+Refugee+Appeals+Board/General+Information+regarding+the+Refugee+Appeals+Board.htm>.

<sup>166</sup> Hungarian Helsinki Committee, *Access to Protection at Airports in Europe. Report on the monitoring experience at airports in Amsterdam, Budapest, Madrid, Prague, Vienna and Warsaw*, 2008, p. 15.

<sup>167</sup> However legal aid lawyers who have worked for 5 hours or more on a case can continue to represent their client in an accelerated procedure.

with the applicant and provide a written submission with regard to the preliminary decision of the INS.<sup>168</sup> This timeframe is too short in practice.

Similar problems with the time constraints are noted in **Belgium**. According to UNHCR research, lawyers reported "...that their appointment is often too late to provide legal assistance to applicants in the accelerated border procedure, and that they face practical difficulties finding a suitable interpreter at late notice".<sup>169</sup>

In a number of States the accelerated procedure is not halted whilst the asylum seekers requests legal advice or assistance as demonstrated in **Austria, Belgium, Czech Republic, Finland, France, Germany, Greece, Ireland, Italy, Slovenia, Spain** and **Switzerland**. However, good practice is noted in **the Netherlands** where a lawyer is automatically appointed to represent the asylum seeker in practice. The accelerated procedure is halted in **Lithuania, Romania** and **Norway** albeit in **Norway** under a very short time frame whilst obtaining legal aid.

### **'Manifestly Unfounded' Asylum Claims**

Similarly to accelerated procedures there is the concept of 'manifestly unfounded' applications whereby if an asylum seeker's claim is designated as such it is presumed that he or she is not in need of international protection. According to Article 28(2) of the Asylum Procedures Directive in cases where the accelerated procedure as defined by the circumstances listed in Article 23(4) is applied then these may be considered as manifestly unfounded applications in national legislation.

The designation of asylum claims as manifestly unfounded may result in the asylum claim being examined in a variety of different ways for example the examination of the asylum claim may be accelerated, the appeal may have no suspensive effect or there may be no substantive interview by the national authorities examining the application.

Legal aid is available in manifestly unfounded asylum claims on the same grounds as other asylum claims in **Belgium, Czech Republic, Finland, France, Germany, Italy, Lithuania, Romania, Slovenia, Spain, UK, Norway** and **Switzerland**. Low cost legal assistance is available in manifestly unfounded claims as in the normal procedure in **Ireland**. However due to the nature of manifestly unfounded claims, in practice, legal aid is rarely granted if it is subject to a merits test as shown in the practice in **Germany, Italy** and **Switzerland**. Also in **Italy** manifestly unfounded claims do not have automatic suspensive effect, the Court must decide on the suspensive effect of any appeal on a case-by-case basis.

As previously mentioned in **Denmark** when an asylum application is considered as manifestly unfounded by the Danish Immigration Service, the case is referred to the Danish Refugee Council (DRC) which also examines the case in order to provide the Immigration Service with its opinion. If the DRC agrees with the Immigration Service's assessment, the case is rejected and no appeal is possible. If the DRC does not agree with the Immigration Office's assessment, the case is referred to the Refugee Appeals Board and legal aid is granted as the case is then further processed in the normal procedure at the appeal stage.<sup>170</sup>

<sup>168</sup> The Immigration and Naturalisation Service, Netherlands. However, see Annex IV on the new Dutch asylum procedure below.

<sup>169</sup> UNHCR, *Asylum Procedures Study*. Section 9. Prioritized and accelerated examination of applications, p.36.

<sup>170</sup> In case the asylum application of an unaccompanied minor is considered manifestly unfounded by the Danish Immigration Service, a legal aid lawyer assists him or her during the interview by the DRC.

In **France** an asylum application can only be considered manifestly unfounded in two circumstances: 1) in the framework of a request for entry at the French border and 2) when a claim is considered manifestly unfounded by OFPRA then a personal interview of the asylum seeker can be omitted. In practice, this exception to a substantive asylum interview is rarely used. Also in case the asylum application has been rejected as manifestly unfounded and no interview was organized, the asylum seeker can lodge an appeal against such decision at the CNDA with the assistance of legal aid.

In **Greece** there is no legal aid provided for manifestly unfounded claims according to Article 11(2) Presidential Decree 90/2008. In **Norway** legal aid is available for the manifestly unfounded procedure but the time is very limited.<sup>171</sup>

The concept of manifestly unfounded claims is not applicable in **Austria**, **Hungary**,<sup>172</sup> and **the Netherlands**. However in **Austria** there is a similar procedure whereby there is no suspensive effect at the appeal stage for asylum claims that 'manifestly' do not rely on facts and have no evidence to support them.

As shown in the findings, legal assistance and representation in accelerated procedures is undermined by the extremely short timeframes for consultation with clients. This, combined with the use of a merits test can lead to an effective denial of access to legal aid necessary to identify those in need of international protection. Asylum seekers must be given the opportunity to effectively substantiate their claims with the assistance of a lawyer in the accelerated asylum procedure. As stated by UNHCR, *"it is critical that the speed with which the procedure is conducted does not nullify or adversely hinder the exercise of rights and guarantees."*<sup>173</sup>

### **Recommendation 30**

**The timescales in accelerated procedures must not be fixed and must be applied flexibly to ensure that sufficient time is given for the asylum seeker and their legal representative to effectively consult and obtain relevant evidence before the initial decision.**

### **Recommendation 31**

**Legal aid should be available for manifestly unfounded claims particularly to appeal the decision to process the application as a manifestly unfounded claim.**

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<sup>171</sup> In Norway manifestly unfounded claims receive a three-hour fixed rate of legal aid at appeal, therefore it is one hour more than Dublin cases but less than asylum claims examined in the regular procedure. If the appeal is granted suspensive effect lawyers receive an extra two hours of fixed rate legal aid.

<sup>172</sup> However, the proposed reform of the Asylum Act introduces the 'manifestly unfounded'-concept. The draft law is available at (only in Hungarian) [http://www.otm.gov.hu/web/jog\\_terv.nsf/580a78b1a38daf90c12570f50028c03c/373CC68054EC4BCCC125777B002FEB4C/\\$FILE/2007\\_I\\_tv\\_modositas.pdf?OpenElement](http://www.otm.gov.hu/web/jog_terv.nsf/580a78b1a38daf90c12570f50028c03c/373CC68054EC4BCCC125777B002FEB4C/$FILE/2007_I_tv_modositas.pdf?OpenElement).

<sup>173</sup> UNHCR, *Asylum Procedures Study. Key findings and recommendations*, p.54.

### 3.5.4 Access to Legal Aid in Dublin Procedures

This section explores the availability of legal aid to challenge transfer decisions under the Dublin II Regulation.<sup>174</sup> The Dublin II Regulation itself does not foresee any detailed rules on access to legal remedies. However, Article 19(2) of the regulation states that the “decision may be subject to an appeal or review” with shall be non-suspensive unless a Court or competent body provides for its’ suspension on a case by case basis.<sup>175</sup> All asylum seekers must have access to an effective remedy according to Article 47 of the EU Charter of Fundamental Rights and Article 13 of the European Convention on Human Rights. ELENA believes that a remedy in the context of the cannot be effective in practice unless there is access to legal aid foreseen, including in the context of the Dublin procedure.

According to the information gathered, the general provisions on legal aid are equally applicable to asylum seekers in the Dublin procedure in the majority of countries surveyed. However in **Denmark** and **Lithuania** no free legal aid is available in order to challenge transfers to another Member State under the Dublin II Regulation. Nevertheless in **Denmark** the Danish Refugee Council (DRC) and other NGOs provide legal assistance and act as representatives for asylum seekers in the Dublin procedure including assisting them with lodging appeals. The representation by DRC and other organisations is free of charge but limited to as far as resources and capacity permits, which means that in certain cases asylum seekers must lodge appeals under the Dublin procedure by themselves. In practice legal aid is rarely granted for Dublin II Regulation appeals in the **Czech Republic, Germany** and **Switzerland**.

Another obstacle on accessing legal aid in the Dublin procedure is that either asylum seekers have insufficient time to contact a lawyer to lodge an appeal or the lawyer themselves are given limited time under the free legal aid scheme to consult effectively with their clients. The issue of a lack of time is reported in the **Czech Republic, Finland, France, Germany** and **Norway**. In effect, this means that the asylum seeker is unable to access legal aid under the Dublin procedure in these Member States.

In some situations lawyers are not even informed of their clients’ removal under the Dublin procedure. For example, in **Finland** in one Dublin case the lawyer had specifically asked the police to be kept informed of the time and the date when they would invite her client to the police station to deliver the Finnish Immigration service’s decision. This was due to concerns over the client’s mental health problems. However, the police notified the asylum seeker of the decision to transfer him to **Italy**, detained him for two days and then sent him to **Italy**, all throughout not informing the lawyer of his situation.

Sometimes in the **Czech Republic, France, Germany** and **Ireland** asylum seekers are only notified of a possible transfer under the Dublin Regulation immediately prior to their actual transfer there, which means they also have no time to contact a lawyer to lodge an appeal. In **Norway** lawyers are only given two hours of instruction with

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<sup>174</sup> Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1 (hereinafter Dublin II Regulation).

<sup>175</sup> In this context it is important to note that Recital 29 of the Asylum Procedures Directive clearly states that the provisions within the Directive do not deal with procedures under the Dublin II Regulation. Therefore Article 15 concerning the right to legal assistance and representation is not applicable for asylum seekers in the Dublin Procedure.

their client's prior to lodging an appeal within the forty-eight hour time limit, which is insufficient to effectively challenge the transfer to another State bound by the Dublin Regulation.

In **Belgium** legal aid is available for applicants in the Dublin procedure but with an important restriction. During the interview relating to the application of the Dublin Regulation the asylum seeker cannot be assisted by his/her lawyer or by a legal advisor. This in practice means that asylum seekers do not always indicate the reasons why their case should be examined in **Belgium** and not in the State, which is responsible according to the Dublin II Regulation. Another problem reported in **Belgium** is that asylum seekers are increasingly being detained during the Dublin procedure resulting in quasi-automatic detention of Dublin cases according to the Belgian Ombudsman.<sup>176</sup> As is the case for all asylum seekers in detention in **Belgium**, NGO's have reported that asylum seekers are not fully informed of the possibility to appeal against transfer decisions. A lack of information on the possibility of contacting a lawyer and lodging appeals under the Dublin procedure is noted in **Hungary**.

In **Italy** the national authority that deals with applications for legal aid under the Dublin procedure is separate from the asylum authorities. The Administrative Regional Court (TAR) hears appeals under the Dublin II procedure and only deals with the legality of the decision. The legal aid board in the TAR deals more strictly with applications for legal aid under Dublin than the legal aid board in the Civil Courts, which decides on access to legal aid in the general asylum procedure. The same merits test applies, but whereas this test is not being applied very rigorously in the Civil Courts, it is applied more strictly by the legal aid board of the TAR. However, in practice, there are a low number of appeals against transfers to other Member States under the Dublin II Regulation in **Italy**.

In practice lawyers are often unable to provide effective legal aid for challenges under the Dublin procedure. These obstacles to legal aid are exacerbated by the fact that most appeals under the Dublin Procedure do not have automatic suspensive effect. This is the practice in **Belgium, Czech Republic, Denmark, France, Germany, Italy, Romania** and **Slovenia**. However in some of these States for example **Belgium** and **Hungary** it is possible to request the suspension of a transfer from the Court on an individual basis though this is rarely granted. Given the fact that there are a number of current judicial challenges in EU Member States concerning transfers to **Greece** under the Dublin II Regulation on the basis of protection concerns, it is vital that asylum seekers are given an effective opportunity to lodge an appeal with the assistance of legal aid. Asylum seekers should also be able to consult with a lawyer or legal advisor prior to any interview with the authorities examining the application of the Dublin II Regulation.

It should be noted in this context that the Commission recast proposal on the Dublin II Regulation, increases the legal safeguards for asylum seekers in providing for the right to appeal against a Dublin II transfer decision and ensuring that legal representation and/or representation is available.<sup>177</sup>

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<sup>176</sup> It should be noted that there is no obligation under Belgian legislation to detain asylum seekers for the purpose of applying the Dublin Regulation. See Médiateur Fédéral, *Investigation sur les centres fermés gérés par l'Office des Etrangers*, Juin 2009, §170. According to this report 90% of the asylum seekers detained in 2008 were "Dublin cases".

<sup>177</sup> The Commission recast proposal on the Dublin II Regulation foresees in Article 26 the use of legal assistance and/or representation free of charge for any appeals against transfer decisions under Dublin. See COM(2008) 820 final, *Proposal for a Regulation of the European Parliament and of the Council*

## Recommendation 32

**Legal aid should be available for appeals against transfers under the Dublin II procedure. Asylum seekers must always be informed of the possibility to contact a lawyer to lodge an appeal. Equally lawyers must be given sufficient time to consult with their clients in order to effectively challenge transfers under the Dublin II procedure where there are protection concerns.**

### 3.5.5 Access to Legal Aid for Unaccompanied Asylum Seeking Children

Unaccompanied asylum seeking children<sup>178</sup> are in a particularly vulnerable situation and hence need specific procedural safeguards to protect their rights and grant them effective access to justice. An essential element of access to justice is legal aid within the asylum procedure. ECRE has always maintained that refugee children who seek international protection in their own right should be provided promptly with legal advice and representation throughout the determination procedure.<sup>179</sup> As part of this research ELENA collected information not only on the role of the lawyer/legal representative but also that of the guardian/representative and their interaction in the asylum procedure. This section also explores the availability of assistance within the asylum procedure and specifically during the age determination procedure when disputes concerning a child's age arise.

#### **Age Assessment**

A young asylum seeker's age may be decisive as to the manner in which his/her claim is examined and whether they receive legal aid and other social benefits. In situations where the child's age is disputed the national authorities may conduct an age assessment. The assessment of age is a complex task and there is a considerable margin of error in the procedure. Many age disputed children may not have access to specialist legal representation needed to commission expert evidence or indeed to request a formal age assessment in situations where national authorities dispute their age on arbitrary grounds. It is in the best interests of the child to have a lawyer or legal advisor present for any age assessment and to assist with any potential challenges to the age determination. Therefore this section focuses upon not only access to legal aid during the asylum procedure but also on representation as defined by Article 2(i)<sup>180</sup> of the Asylum Procedures Directive during the age determination process.

According to the information gathered there are a number of different approaches across the countries surveyed in relation to representation during the age determination process. In **Greece** and **Slovenia** there is no specific age

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*establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, Brussels, 3 December 2008.

<sup>178</sup> For the purposes of this survey the definition of unaccompanied minor in the Asylum Procedures Directive is relied upon which states "Unaccompanied minor means a person below the age of 18 who arrives in the territory of the Member States unaccompanied by an adult responsible for him/her whether by law or by custom and for as long as he/she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he/she has entered the territory of the Member States". The terms separated/unaccompanied children and unaccompanied minors will be used interchangeably throughout this survey.

<sup>179</sup> ECRE, *Position on Refugee Children*, November 1996.

<sup>180</sup> According to this Article "representative" means a person acting on behalf of an organisation representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organisation which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests".

determination procedure in place.<sup>181</sup> Also in practice unaccompanied and separated children arriving irregularly in **Greece** are often accorded the same treatment as adults.<sup>182</sup> In **Norway** the timeframe for age assessments is so long to the extent that minors may be considered adults by the time a decision is made on their age.

In **Belgium, Germany, Italy, Lithuania, Norway and Switzerland** no representative is present during the age determination procedure. However in **Romania** a legal guardian appointed from the General Directorate for Social Assistance and Child Protection assists the child during the age assessment if the age dispute arises during the asylum procedure.<sup>183</sup> Also in **Finland** and **Austria** a legal guardian is appointed as soon as an asylum claim is submitted. However, if a subsequent age assessment determines that the asylum seeker is an adult then the role of the legal guardian in the asylum procedure will cease.

In **Italy** both the police and the border guards play a role in the determination of the age of the minor.<sup>184</sup> A lawyer or guardian is not present at the medical examination for formal age assessment proceedings. The Italian Ministry of Interior drafted a circular in 2007 directing officials to apply the benefit of the doubt for unaccompanied children when their age is unclear but the practice varies.<sup>185</sup>

In the **Czech Republic, Denmark, France, Ireland, Spain** and the **UK** a representative is available during the age assessment. States should ensure that a representative is automatically appointed whenever an applicant claims to be under the age of 18. If the age of the child is disputed a legal representative should be present to assist the child during any age determination procedure.

#### **Guardians and Specialised Legal Representation**

In **Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece** (where available), **Hungary, Italy, Lithuania, Romania, Slovenia, Spain, the Netherlands and Switzerland** a personal representative or guardian is appointed for separated children in the asylum procedure within the meaning of Article 17(1) of the Asylum Procedures Directive.<sup>186</sup> This survey shows that there are also different structures in place to support unaccompanied minors in the other countries of research. In **Ireland** and **Norway** for example unaccompanied minors

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<sup>181</sup> In Greece Presidential Decree 90/2008 allows police authorities to use age determination procedures, but there is no legally defined standard procedure defining the type of examination or the margin of error to be applied. See UNHCR, *Observations on Greece as a country of asylum*, December 2009.

<sup>182</sup> Ibid.

<sup>183</sup> Sometimes in Austria if the age dispute is at the very start of the asylum procedure there may not be a representative appointed to assist during the age determination procedure.

<sup>184</sup> In Italy minors can be referred to a hospital to undergo a medical examination (bone testing according to the Greulich-Pyle method which is contested). It should be noted that if the age is contested and the authorities want to conduct a medical examination to assess age, this requires the consent of the child or in case the age is contested after the asylum application has been registered by their representative. Any refusal to consent to the medical examination does not suspend the examination of the asylum application.

<sup>185</sup> ECRE advocates this approach and has previously stated “*In determining age... young asylum seekers should be given the benefit of the doubt.*” See ECRE, *Position on Refugee Children*, November 1996.

<sup>186</sup> Article 17(1)(b) Member States shall as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. This representative can also be the representative referred to in Article 19 Reception Conditions Directive.

receive assistance from the Health Service Executive (social services) or auxiliary guardians respectively. However the auxiliary guardian in **Norway** only has a limited role by being present during the substantive asylum interview. Similarly in **Greece** they do not have the obligation to monitor the asylum claim or to be present at the examination of the asylum claim with the national authorities. In the **UK** key workers from local authorities assist minors during the asylum procedure.

### ***The Role of Representatives in the Asylum Procedure***

Firstly, it is apparent that there is no common understanding of the powers and role of representatives in the asylum procedure.<sup>187</sup> In some countries their role is akin to a legal representative whilst in others they are assigned as legal guardians or they have a limited function. In this context it is important to note that there is no minimum age in the legislation for minors to claim asylum in all the countries of research. However for practical reasons if the child is too young a representative must submit an asylum claim on their behalf. Separated children depending on their maturity or age are able to submit an application on their own behalf in **Belgium, Czech Republic, Denmark, Finland, France, Germany, Italy, Lithuania, Romania, Slovenia, the Netherlands**, the **UK, Norway** and **Switzerland**. In contrast to this guardians or representatives must submit asylum claims on behalf of minors in **Spain**. In **Austria, Germany, Romania, Slovenia** and **the Netherlands** whether or not asylum-seeking children can submit asylum claims by themselves depends on their age, and practice varies from 16 years in **Germany** to 12 years in **the Netherlands** whereby a child can submit an asylum claim on their own behalf.

Sometimes there are practical problems associated with the appointment of representatives. This is shown in **France** where there are issues surrounding the appointment of *ad hoc* administrators at the border which raises protection concerns in situations where unaccompanied children risk expulsion at the border without any contact with a representative. The appointment of a legal guardian by the Court can also take a long time in the **Czech Republic** and so often the Minister of the Interior appoints guardians in practice.

Representatives have the responsibility to determine what action is taken on behalf of the child during the asylum procedure for example whether first instance decisions are appealed or not. This survey has found that the quality of the representation impacts upon what actions are taken in the best interests of the child. As an example in **Austria** and **Germany** sometimes representatives refuse to file asylum appeals on behalf of minors, which is not always in the child's best interests. In **Hungary** sometimes representatives are reluctant to file appeals due to lack of motivation and low remuneration. Additionally representatives do not always have the necessary expertise in asylum law and their quality varies as reported in practice in **Italy, France, Hungary** and **Switzerland**. Good practice is found in **Italy** where judges can intervene and appoint another representative if there are concerns that actions are not being taken in the child's best interests.

According to the UNHCR in **Greece** there are serious legislative and administrative shortcomings as regards representation for unaccompanied and separated asylum seeking children. Access to asylum procedures is seriously hampered for children by the fact that the temporary guardians do not always establish direct contact with the child and often do not provide support and advice.<sup>188</sup>

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<sup>187</sup> 'Representatives' as referred to here is in the context of Article 17(1) of the Asylum Procedures Directive.

<sup>188</sup> UNHCR, *Observations on Greece as a country of asylum*, December 2009.

ELENA believes it is essential that guardians or representatives are familiar with asylum law and are able to identify a child's protection needs. Their impartial role should always be to act in the best interests of the child throughout the asylum procedure. Therefore representatives should receive specialist training on asylum law before acting on behalf of children in the asylum procedure.

Child-specific training is available to representatives as found in **Belgium, the Czech Republic, Denmark, Finland, France,**<sup>189</sup> **Ireland, Romania, Spain Germany, Italy** and the **UK**<sup>190</sup>.<sup>191</sup> However no specialised training is available for lawyers who are representing separated children in **Austria, Greece, Hungary, Lithuania, the Netherlands, Norway, and Switzerland.**

Data was also gathered on the implementation of Article 17(2) of the Asylum Procedures Directive. This provisions allows Member States to refrain from appointing a representative for an unaccompanied minor for the following reasons: a) the minor will in all likelihood reach the age of maturity before a decision at first instance is taken; or b) can avail himself, free of charge, of a legal adviser or other counselor, admitted as such under national law to fulfill the tasks assigned above to the representative; or c) is married or has been married. According to the information gathered only four out of the sixteen countries included in this survey where the Asylum Procedures Directive is applicable implement some of these exceptions to representation in their domestic legislation: **Greece, Romania, Slovenia and the Netherlands.**

**Greece** has transposed all of the provisions under Article 17(2) of the Asylum Procedures Directive. In **Romania** Article 17(2)(b) is applicable but in addition to this under the national legislation there is no requirement to appoint a legal guardian for an unaccompanied asylum seeker who will become an adult within 15 days of lodging his or her application for asylum.<sup>192</sup> **Slovenia** applies Article 17(2)(c) in that minors are not entitled to have a representative for their asylum procedure if they are married or have been previously married. Similarly in **the Netherlands** Article 17(2)(a) and (c) is applied so therefore when a minor is seventeen years old or older they are not guaranteed a representative and also if the minor is married according to national law.

ELENA recommends that unaccompanied asylum-seeking children should not only have access to a guardian but also a legal representative.<sup>193</sup> The exception in Article 17(2) to appoint a representative where the child is married or has been married is unacceptable. Whether a child is married or not has no bearing on his/her maturity

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<sup>189</sup> Although in France it is provided by NGO's as there is no compulsory state-funded training.

<sup>190</sup> Specialist training on child specific issues is provided by, amongst others, the Immigration Law Practitioner's Association, but it is not mandatory for lawyers to undertake these training courses.

<sup>191</sup> It should be noted that there is limited information available on how much of the content of the national training programmes incorporate asylum law and wider protection issues.

<sup>192</sup> This is according to Article 16(3) Law 122/2006.

<sup>193</sup> In this context ECRE welcomes the fact that the Commission's recast proposal for the Asylum Procedures Directive in its Article 21(2) removes the exception to representation where a legal advisor or counsellor is available under Article 17(2). See COM(2009) 554 final, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)*, Brussels, 21 October 2009.

and need for special treatment and assistance.<sup>194</sup> It may even be the basis for their fear of persecution as for example in cases of forced marriage.

### **Legal Aid within the Asylum Procedure**

It is positive to note that there is legal aid available for unaccompanied asylum seeking children both at the first instance authority and also upon appeal within the asylum procedure in the majority of countries surveyed. However limited information was gathered on whether unaccompanied children are exempt from any requirements for accessing legal aid such as merits or means test. In the **UK** the availability of free legal aid for unaccompanied children is subject to the merits test and therefore if there is no merit at appeal then the minor will no longer be legally represented. Similarly in **Switzerland** a person of “trust” only represents unaccompanied children at the first instance stage and a lawyer does not assist them. The availability of legal aid upon appeal depends on the merits and means test. However in **Belgium** and **Ireland**, unaccompanied children are automatically given legal aid and are exempt from means and merits test.<sup>195</sup>

Legal advisors intervene much earlier in the asylum procedure when separated children are involved. For example in **Ireland** legal representatives help minors to fill out their asylum applications for lodging a claim and in **Belgium** a guardian and/or legal representative can assist only separated children at the initial stage of lodging the asylum application at the Office des Etrangers. In **Denmark** if the Danish immigration service considers that an unaccompanied child’s claim is manifestly unfounded they are automatically appointed a lawyer to assist with their claim who must also be present for any review of the decision to consider the claim as manifestly unfounded by the DRC.

Lawyers also play a much greater role in the main asylum interviews for separated children. In a number of countries surveyed legal advisors or lawyers must be present at the asylum interview as evidenced in **Austria, Belgium, Italy, Lithuania and the UK**. In **Ireland** the caseworker, who works with the specialised Separated Children’s Unit of the Refugee Legal Service under the supervision of the minor’s solicitor, prepares submissions prior to the first instance interview and in some cases will attend at interview. ELENA believes that the particular vulnerability of unaccompanied children requires both representatives in the sense of guardians and legal advisors or lawyers to be present during the main asylum interview.

This survey also found that national authorities in a number of Member States implement additional procedural safeguards during the substantive asylum interviews for minors. ELENA welcomes this noting that unaccompanied children have special needs and therefore require further assistance during their asylum interviews.<sup>196</sup> In **Finland** the Finnish Immigration Service have produced interview guidelines for

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<sup>194</sup> In this regard, ECRE has stated that the recast Directive should duly take into account that children are able to marry at a young age in some countries, and that their marriage may be linked to their fear of persecution, for example in the case of a forced marriage. See ECRE, *Comments on the Commission Proposal recasting the Asylum Procedures Directive*, May 2010.

<sup>195</sup> In Belgium there is only a means test for access to legal aid for adults and in practice it is presumed asylum seekers do not have sufficient means.

<sup>196</sup> As UNHCR states “The problem of “proof” is great in every refugee status determination. It is compounded in the case of children. For this reason, the decision on a child’s refugee status calls for a liberal application of the principle of the benefit of the doubt. This means that should there be some hesitation regarding the credibility of the child’s story, the burden is not on the child to provide proof, but the child should be given the benefit of the doubt.” ; UNHCR, *Refugee Children: Guidelines on Protection and Care*, Geneva 1994.

unaccompanied children seeking asylum. In the **UK** specific guidelines exist for interviewing unaccompanied children and children along with other vulnerable applicants. A special unit of the Norwegian Directorate for Immigration (UDI) handles applications made by unaccompanied children seeking asylum in **Norway**. The caseworkers in this unit are specially trained to interview and assess their applications.<sup>197</sup> In **Belgium** specialized training on interviewing techniques as well as on the reception of unaccompanied children and the risks of trafficking is provided to caseworkers.<sup>198</sup> In **Denmark** specially trained staff conduct interviews with minors and if a minor's case is processed according to the manifestly unfounded procedure, the Immigration service appoints a lawyer to represent the minor. In **Germany** the branch offices of the BAMF employ specially trained caseworkers to deal with unaccompanied children seeking asylum in order to ensure that the child's level of maturity and development will be taken into account.<sup>199</sup> In **the Netherlands** separated children are interviewed by specially trained staff and are assigned a guardian, who assists them throughout the procedure.

ELENA welcomes the fact that the majority of countries surveyed provide legal aid for separated children both at the first instance procedure and upon appeal. Such an approach is in line with the best interests of the child principle and takes into account the fact that children may not always be able to elucidate or even identify their own protection needs. As for the role of child's representatives this should be clearly distinguished from the role of legal advisors and lawyers in the asylum procedure. ELENA believes that such representatives must be independent and knowledgeable in asylum matters. Additionally there should be a monitoring mechanism in place to ensure that minors do not waive their rights to appeal on instruction by representatives where they have protection needs. Therefore it is recommended that all representatives acting on behalf of unaccompanied children in the asylum procedure receive specialised training on identifying the protection needs of such children including whether it is in their best interests to submit a claim for protection on their behalf.

This survey has revealed a potential protection gap in a number of countries regarding legal assistance during the age determination procedure. ELENA believes that unaccompanied children should automatically be appointed a representative once the applicant claims to be a child and such a person should be present during any age assessment procedure.

### **Recommendation 33**

**All unaccompanied children seeking asylum should be exempt from merits and means tests used for assessing the eligibility of applicants for legal aid. Legal aid should be provided automatically for such children at all stages of the asylum procedure.**

### **Recommendation 34**

**Legal aid should be ensured throughout the age determination process.**

## **3.6 Monitoring Mechanisms for Legal Aid Providers**

Quality legal advice is of paramount importance to guarantee effective access to justice. Given the crucial human rights at stake, it is essential that there are

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<sup>197</sup> IGC, *Asylum Procedures Report*, at p.284.

<sup>198</sup> *Ibid*, p. 63.

<sup>199</sup> *Ibid*, p.174.

regulatory mechanisms in place to monitor the performance of legal aid providers as the cost of poor quality legal advice is high and may lead to injustice. Monitoring mechanisms and complaints procedures are just two methods of ensuring quality in the provision of free legal aid.

As regards monitoring the delivery of services by lawyers and other legal aid providers, a formal structure for examining work is evidenced in **Ireland, Lithuania, the Netherlands, UK** and **Switzerland**. The form of monitoring authority varies from a legal professional body in **Lithuania** (Council of Advocates) to a monitoring committee affiliated to the Legal Aid Board as shown in **Ireland** and **the Netherlands**. In **the Netherlands** there also is a system of peer review whereby lawyers assess each other's work. Similarly in **Ireland** the Refugee Legal Service has a performance monitoring system for all in-house lawyers.

Lawyers in this sector are only governed by the general rules applicable to the legal profession in **Belgium, Denmark, Ireland, Lithuania, Romania** and **Switzerland**. However, in **Spain** lawyers registered on the "turno de extranjeria" list as legal aid providers in asylum law must comply with specific rules and regulations developed by the Bar Association in each province. Similarly in the **UK** there are a set of rules governing the work of legal aid providers. In the **Czech Republic** NGO staff providing legal aid are subject to ethical codes and quality control mechanisms applicable within the organisation.

Apart from the monitoring of lawyer's performances in delivering legal aid, there is limited information available on monitoring mechanisms in place for legal advisors in NGO's if any. As NGO's may be the main legal aid provider in some countries it is necessary that monitoring mechanisms and quality assurance controls are also in place for their work. In **Slovenia** for example there is no central authority to monitor the effectiveness of refugee counsellor's work.

### **Complaint Procedures**

It is possible for asylum seekers to lodge complaints based on a lawyer's performance with Bar Associations in **Austria, Belgium, Denmark, France, Greece,** and **Romania**. Where clients are dissatisfied with the performance of their lawyers they can request another legal representative under the legal aid scheme in **Belgium, Czech Republic, Finland, Ireland, Italy, Romania** and **Slovenia**. However, in the **Czech Republic** this request will only be granted in circumstances of serious misconduct. Other regulatory bodies, authorities or associations may also receive complaints regarding the performance of a legal aid provider. For example in **Denmark**, the appellate authority, the Refugee Appeals Board is competent to receive complaints. However, this is not viewed as a formal complaints mechanism. In **Ireland** there are two forums for complaints, either internally within the Refugee Legal Service or with an independent monitoring committee. Good practice is found in **Spain** whereby a Tribunal or Court can actually instigate a complaint procedure against a lawyer for their performance. In the **UK** asylum seekers may complain to their present lawyer and to a regulatory body.

This is in contrast to the practice in **Hungary** and **Germany** where there are no complaints mechanisms accessible for asylum seekers in practice. In theory there is a procedure in place for asylum seekers to lodge a complaint with the Court in **Germany** on the grounds that the lawyer is incompetent but this is not applied in practice. In **Hungary** there is not even a way for asylum seekers to request another lawyer. According to Hungarian law only lawyers are permitted to end their representation of a client if there has been a breakdown in the client-lawyer relationship.

It is essential that asylum seekers be informed of the formal complaint mechanisms in place. Such procedures are of limited value if asylum seekers are not aware of the possibility to lodge a complaint when they are dissatisfied with their lawyer's performance. Good practice exists in **Ireland** where an information leaflet on the complaints procedure is available in all Refugee Legal Service offices and in law centres. In the **UK** it is a professional obligation for legal aid providers to inform asylum seekers of the possibility to complain against a decision to refuse legal aid to the LSC's Funding Review Committee. However, there have been reports that lawyers do not always inform asylum seekers of this possibility. Similarly a lack of information on complaints procedures is noted in **Switzerland**.

ELENA believes that asylum seekers should have access to an independent complaints procedure for grievances concerning poor legal advice and representation. Given the detrimental impact poor legal advice can have on an asylum seeker's application such a procedural safeguard is necessary. Such procedures must be accessible in practice and asylum seekers should always be well informed of the possibility to lodge a complaint against a legal aid provider. Quality assessment mechanisms should also be established to monitor and audit legal aid providers. Performance monitoring mechanisms could include *inter alia* file assessment, peer reviews, direct supervision and the implementation of quality control standards.

#### **Recommendation 35**

**Monitoring of the quality of legal aid provided is essential. As this involves an assessment of the professional performance of the legal aid provider, monitoring should preferably be carried out by independent committees operating within Bar Associations or other regulatory bodies.**

#### **Recommendation 36**

**A formal mechanism must be in place for asylum seekers to lodge a complaint against their lawyer and/or legal advisor where there are serious indications that the lawyer has committed professional errors. Such a mechanism must be accessible and asylum seekers must be properly informed of such possibility at the start of the asylum procedure.**

## CHAPTER IV. SELECTED THEMES: COUNTRY OVERVIEWS

This chapter provides a detailed synopsis of the national practice in each of the countries surveyed under a list of selected themes.

### 4.1 National Legal Aid Systems

This section provides information on whether legal aid for asylum seekers is integrated in the general legal aid system as well as the main characteristics of the legal aid system for asylum seekers.

**Austria:** The provision of legal aid for asylum seekers is integrated into the general legal aid system. Legal aid providers are independent lawyers engaged on a case-by-case basis who can both advise and represent asylum applicants only at the Constitutional Court level. All lawyers practicing in Austria must be available to provide legal aid services. However, it should be noted that this system is complemented by a system of advisors responsible for providing legal aid at various different stages of the asylum procedure i.e. 'Rechtsberaters and Fluchtliningsberater'. Those advisors are mainly from NGO's and receive specific funding for this work. In Austria, eligibility for legal aid is not conditional on citizenship or residency requirements.

**Belgium:** Legal aid for asylum seekers is integrated into the general system of legal aid.<sup>200</sup> Eligibility for legal aid is not conditional on citizenship and is granted for any type of proceeding where the applicant is without resources.<sup>201</sup> Sometimes legal aid is granted unconditionally for specific proceedings, including for example, unaccompanied children in the asylum procedure.<sup>202</sup> The legislation distinguishes between "first line" legal aid which includes only legal assistance/advice and "second line" legal aid which includes legal assistance/advice and representation. Only professional lawyers who are members of the bar association can provide "second line" legal aid.

**Czech Republic:** Both the Criminal Law Code and the Administrative Justice Code provide for the possibility of publicly funded legal aid. In asylum cases a distinction must be made between the administrative phase of the procedure before the Ministry of Interior and the appeals procedure. During the first instance administrative procedure free legal assistance is not guaranteed,<sup>203</sup> while at the appeal stage asylum seekers can request free legal aid. Nevertheless, during the first phase of the procedure an asylum seeker may use the services of a paid lawyer while the Ministry of Interior can, in theory, financially support NGO's providing free legal assistance, which rarely happens. In most cases legal assistance is provided by staff members of NGO's, who provide such services without public funding. At the appeal stage legal

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<sup>200</sup> The relevant domestic legislation in Belgium is Art. 508/1 to 508/25 of the Judicial Code of 10 October 1967; Royal Decree of 20 December 1999 on rules for the recognition of organisations providing legal assistance and the composition and functioning of the commission for legal assistance and Royal Decree of 18 December 2003 on the conditions for complete or partial free of charge "second line" legal assistance and legal aid.

<sup>201</sup> Though it should be noted there are exceptions to this depending on the type of legal aid provided for example some legal aid in Belgium is conditional on dependency on social welfare.

<sup>202</sup> For further information see Article 1 Royal Decree 18 December 2003.

<sup>203</sup> Neither the Czech Asylum Act, nor the Czech Administrative Justice Code contain any provision guaranteeing free legal aid during the first instance of the procedure. The Asylum Act only states that the asylum seeker must be given the opportunity to communicate with a lawyer or legal advisor.

assistance and representation is provided by private lawyers after a decision by the Court to grant legal aid. In the Czech Republic eligibility for legal aid is not conditional on citizenship or residency requirements.

**Denmark:** Legal aid is generally available for representation in criminal cases, at the appeal stage of the asylum procedure and in civil law cases. In the Danish system of legal aid for asylum seekers, legal advice can be, and in some cases is, provided throughout the entire asylum procedure by a NGO, the Danish Refugee Council, (hereinafter DRC) although in practice legal advice is mainly provided by the DRC until a first instance decision has been taken and after a final refusal of the asylum application by the appeal body, the Refugee Appeals Board. Independent private lawyers provide legal representation before the Refugee Appeals Board.<sup>204</sup> Lawyers are instructed for the provision of legal aid on a case-by-case basis. In Denmark eligibility for legal aid is not conditional on citizenship or residence requirements.

**Finland:** Legal aid for asylum seekers is integrated in the general system for legal aid. The legal aid system in general distinguishes between legal aid provided for the purposes of court proceedings and other matters. As far as court proceedings are concerned, legal aid may be granted to any individual whose case is being heard in a Finnish Court or who resides in Finland. However, there are three situations where legal aid will not be granted: a) where the issue at stake is of 'little importance to the applicant'; b) where legal aid would 'clearly be pointless in proportion to the benefit that would ensue to the applicant', or c) in case of 'abuse of the procedure'. In principle it is assumed in civil and criminal law cases that parties in court proceedings require professional assistance and representation by a lawyer. Legal aid may also be provided for matters, which are not subject to proceedings in court.<sup>205</sup> In those cases legal aid services are only provided by public legal aid attorneys who are state employees of the Ministry of Justice<sup>206</sup> and not by private lawyers. In principle when an administrative matter is being handled, the counsel assigned to an applicant may also be a person with legal training other than a public legal aid attorney. Eligibility for legal aid is conditional on residence in Finland or on the fact that the case is being heard in a Finnish court. Regarding the asylum procedure, this means that every asylum seeker is entitled to legal aid provided by lawyers of public legal aid offices, any private lawyer, or lawyers of NGO's specialised in asylum cases, such as the Refugee Advice Centre.

**France:** Legal aid for asylum seekers is integrated in the general system for legal aid regulated in the Law of 10 July 1991 on legal aid.<sup>207</sup> Non-nationals are entitled to legal aid in general if they legally reside in France. Undocumented migrants have access to legal aid for specific areas of law, in particular proceedings related to immigration legislation. Asylum seekers are entitled to legal aid in France.<sup>208</sup> It should be noted that for asylum seekers, legal representation by a lawyer is only

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<sup>204</sup> It should be noted that in Denmark only unaccompanied children whose asylum applications are processed in the manifestly unfounded procedure are entitled to legal representation at first instance. However, all unaccompanied minors are assisted by a personal representative during interviews at the first instance of the asylum procedure. See Chapter IV section 14 below.

<sup>205</sup> Such as legal advice, settlement negotiations, assistance in asset and estate distributions.

<sup>206</sup> Public legal aid lawyers may also provide legal aid services to asylum seekers.

<sup>207</sup> Loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique.

<sup>208</sup> According to Article 3 of the Loi no 91-647 du 10 juillet 1991 relative à l'aide juridique "Devant la commission des recours des réfugiés (now the CNDA), elle (l'aide juridictionnelle) est accordée aux étrangers qui résident habituellement en France ».

provided at the appeal stage before the National Court of Asylum (Court nationale du droit d'asile, hereinafter CNDA).

**Germany:** Publicly funded legal aid is generally available to those who cannot afford legal counsel. Legal aid for asylum seekers is integrated into the general system of legal aid for administrative law cases. Under the general administrative law provisions both a sufficient means and a merits test apply in order to be eligible for legal aid in administrative court proceedings. Legal aid will only be granted if the applicant lacks sufficient resources or is dependent on social benefits and there is a chance that the procedure will be successful. With respect to the 'merits-of-the-claim' test the law does not provide for a strict time limit within which the Court must assess this. As a result this is often decided only at the moment of the Court hearing of the case, which means that a decision on legal aid may be delayed for approximately six months. During the time prior to the decision on legal aid the lawyer may request small contributions from asylum seekers to represent them for the appeal (usually around € 20). Legal aid is provided by lawyers (Rechtsanwalt) on a case-by-case basis. There is no list of registered legal aid lawyers and there are also no specific requirements for lawyers to deal with asylum cases. Eligibility for legal aid is not conditional on citizenship or residence requirements in Germany.

**Greece:** Legal aid for asylum seekers is part of the general system of legal aid which provides free legal assistance in criminal, civil and commercial cases for those who can not afford legal counsel.<sup>209</sup> Lawyers interested in this work are listed in each Bar Association and engaged on a case-by-case basis. They provide both legal advice and legal representation. It should be noted that only EU citizens are entitled to work as lawyers in Greece. In practice, mainly lawyers in NGO's like the Greek Council for Refugees, provide legal aid services to asylum seekers.

**Hungary:** Publicly funded legal aid is provided to those unable to afford paid legal counsel in criminal law, civil law and administrative law cases. Legal aid for asylum seekers is integrated in the general system of legal aid. Lawyers providing legal aid services work on a case-by case basis and are included in a register, which is managed by the Central Office of Justice (Igazságügyi Hivatal). Eligibility for legal aid is conditional on citizenship and residency requirements laid down in the Hungarian Legal Aid Act.<sup>210</sup> In order to be eligible for legal aid applicants must have (i) Hungarian citizenship or (ii) have parents who were Hungarian citizens and aim to obtain a visa, a residence permit or Hungarian nationality on that basis or (iii) have a humanitarian residence permit as an asylum seeker or (iv) the right to free movement in Hungary or (v) come within the scope of Act II of 2007 on entry and residence of third-country nationals rightfully residing in Hungary. Asylum seekers come within the scope of Act II.

**Ireland:** Legal aid is available in relation to criminal and many, but not all, civil matters. The Criminal Justice (Legal Aid) Act 1962 provides for the granting of free legal aid to accused persons with insufficient means in criminal proceedings. Criminal legal aid is administered by the Courts and is provided by private practitioners whose names are retained on panels maintained by the Courts. Civil legal aid in Ireland is governed by the Civil Legal Aid Act 1995 and the Civil Legal Aid Regulations. Civil legal aid is means tested, requires a minimal contribution by the applicant and is administered and provided by the Legal Aid Board, an independent body established

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<sup>209</sup> Presidential Decree D 90/2008 makes a particular reference to legal aid in asylum cases in Article 11.

<sup>210</sup> Act LXXX of 2003 on legal aid.

in 1979 and placed on a statutory footing by the Civil Legal Aid Act in 1995. Also a merits test is applied for civil legal aid in court proceedings, with the exception of any proceedings relating to the welfare of a child. Legal aid in asylum cases is provided through the Refugee Legal Service, a specialised law centre established in 1999 by the Legal Aid Board. In-house solicitors are employed by the Refugee Legal Service to provide legal advice and representation to asylum seekers at all stages of the asylum procedure. In addition cases can be referred by the Refugee Legal Service under the Private Practitioner Scheme to private practitioners for preparation of the 'Notice of Appeal' and, if applicable, representation before the Refugee Appeals Tribunal in case an oral appeal has been granted. Under the Private Practitioner Scheme, firms of solicitors and barristers may apply to join panels retained for this purpose and are paid on a case-by-case basis. All solicitors and barristers must undergo a three-day training course in refugee law in advance of being placed on the panel. Eligibility for legal aid is not conditional on citizenship or residency requirements in Ireland.

**Italy:** Publicly funded legal aid is available to those unable to afford counsel in all judicial proceedings. The legal aid system for asylum seekers is integrated within the general system and thus legal aid is only provided for representation in court proceedings. Eligibility for legal aid in civil matters is conditional on the basis of residency in Italy. In the Italian system, the asylum procedure is considered as a civil law matter and therefore the same requirement applies, which used to raise problems in the past with regard to accessing free legal aid. However, after the entry into force on 3 March of Article 16 of Legislative Decree No. 25 of 2008, which expressly provides that asylum seekers are entitled to legal aid at judicial proceedings under the conditions laid down by the legal aid law, legal aid is now generally granted to asylum seekers without requiring residence documents.<sup>211</sup>

**Lithuania:** Legal aid is generally guaranteed in criminal, civil or administrative proceedings. However, within the legal aid system a distinction is made between 'primary' legal aid and 'secondary' legal aid. Primary legal aid covers all services relating to provision of legal information, legal consultations and preparation of legal documents for state and municipality institutions.<sup>212</sup> Secondary legal aid involves the preparation of legal documents and representation in proceedings and can only be provided by lawyers. A specific legal aid system exists for asylum cases, which is separate from the general legal aid system. Legal aid lawyers are paid by the State on a contractual basis. Legal aid is in general available for Lithuanian citizens, EU citizens, third country nationals legally staying in Lithuania or other EU Member States and on the basis of international treaties to which Lithuania is a contracting party. Therefore, eligibility for legal aid in Lithuania is conditional on residency requirements.

**Romania:** Publicly funded legal aid is made available to those unable to afford legal counsel in court proceedings. Legal aid lawyers are private lawyers who work either independently or with a law firm. Legal aid for asylum seekers is integrated into the general system of legal aid. Eligibility for legal aid is not conditional on Romanian citizenship or residence requirements.

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<sup>211</sup> Decreto del Presidente della Repubblica 30 maggio 2002 n. 115 parte III (Presidential decree n. 115 of 30 May 2002, part III (legal aid)).

<sup>212</sup> This information can be provided by a legal advisor or lawyer who has at least two years of experience.

**Slovenia:** Publicly funded legal aid is available to those unable to afford counsel and is applicable to all procedures before the courts in Slovenia, including the Constitutional Court and before all bodies in Slovenia competent to arrange “out-of-court-settlements”. However, in Slovenia the legal aid system for asylum seekers is not integrated within the general system and is provided for in the ‘Act on International Protection’. According to this Act the Minister of Interior is charged with appointing free refugee counsellors for procedures before the Administrative Court and the Supreme Court.<sup>213</sup> The Minister of the Interior selects refugee Counsellors on the basis of a tender. Those selected as refugee counsellors are included in a list which is published on the Ministry’s website. The Minister also determines the criteria for the remuneration of the refugee counsellors and the reimbursement of their expenses. This is different from the general legal aid system where legal aid lawyers are selected from a list provided by the Slovenian Bar Association, which includes all registered lawyers. Those lawyers are engaged on a case-by-case basis for legal aid work. In order to be eligible for the legal aid under the general system one must possess Slovenian citizenship, have residence in Slovenia or must be the national of a country with which Slovenia has a reciprocal agreement on legal aid.

**Spain:** Publicly funded legal aid is available to those unable to afford counsel in all types of proceedings and areas of law. Legal aid for asylum seekers is integrated into the general system of legal aid. The legal aid system in Spain is organised around different “turnos” (duty service or shift) that correspond to the various areas of law such as criminal law and civil law. There is a specific “turno” for administrative law, which includes aliens law (“turno de extranjeria”). Legal aid lawyers are engaged on a contract basis through the services of the Bar Association they belong to. In addition to these legal aid lawyers, asylum seekers may seek the assistance of a lawyer of his or her own choice or a private lawyer. Legal advisors from NGO’s also provide legal assistance while legal advice is also provided in Legal Guidance Services (SOJ) which exist in every province in Spain. Eligibility for legal aid is not conditional on citizenship or residency requirements. Spanish nationals, EU nationals and third country nationals who are on Spanish territory and who are unable afford the costs of court proceedings are entitled to legal aid.<sup>214</sup>

**The Netherlands:** Publicly funded legal aid is made available to those unable to afford counsel in the general legal system in all types of proceedings. Legal aid for asylum seekers is integrated with the general legal aid system. Eligibility for legal aid is not conditional on Dutch citizenship or residence requirements. Legal aid lawyers are engaged on a case-by-case basis and included in a list of lawyers who agree to work within the legal aid system. Private lawyers who operate in the legal aid system need to be registered with the Legal Aid Board and comply with quality standards established by an agreement between the Board, the Dutch Bar Association and the Ministry of Justice.

**United Kingdom:** Publicly funded legal aid is available in the following types of procedures: Criminal defence, Family, Community Care, Employment, Debt, Welfare Benefits, Housing, Immigration and Asylum, Mental Health, Civil Actions against the Police, Clinical Negligence, Consumer (general contract), Education, Personal Injury, Public Law. However there are different parts of a case in these sorts of cases

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<sup>213</sup> In Slovenia, asylum seekers do not have a right to free legal aid at the first instance of the asylum procedure (before the Immigration Authorities). See Chapter III, section 3.4. above.

<sup>214</sup> Article 2 of Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita.(Law 1/1996 of 10 January 1996 on legal aid). BOE (Official Gazette) No. 11, published on January 12<sup>th</sup>. Accessible at [http://www.boe.es/aeboe/consultas/bases\\_datos/doc.php?id=BOE-A-1996-750](http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-1996-750).

where legal aid is not available, and some cases where there are limits on when legal aid is available.<sup>215</sup> Legal aid can only be provided by suppliers who are contracted to the Legal Services Commission to supply a certain amount of legal aid work in respect of one or more of the areas designated above. The suppliers have to report the work that they do in order to receive payment under the contract. Eligibility for legal aid is in principle not conditional on citizenship or residence requirements.<sup>216</sup> Legal aid for asylum seekers is integrated within the general system for legal aid but there are different rates of pay for different areas of law.

**Norway:** Publicly funded legal aid is made available to everyone, regardless of his or her financial resources, who is charged with a criminal offence (except for minor traffic offences), some civil law cases and administrative hearings. Financial criteria for legal aid apply in some civil law cases and administrative hearings while for other cases legal aid is not provided at all. Legal aid for asylum seekers is integrated with the general system. Asylum seekers have a right to legal aid, regardless of their financial resources, in the administrative appeals process. Only a limited number of asylum seekers are entitled to legal aid prior to a first instance decision. Legal aid is automatically granted for unaccompanied children, and in exclusion cases as soon as it is clear that exclusion clauses may be applicable. In all other cases legal aid is only provided after a negative decision is taken. Asylum seekers who were granted subsidiary protection status or a residence permit on humanitarian grounds are not considered to have received a negative decision. As a consequence they do not qualify for legal aid in case they want to lodge an appeal against the refusal of refugee status. This is also applicable in cases where asylum seekers are only granted a temporary residence permit renewal of which is subject to certain conditions or restrictions. In these latter cases legal aid is granted at the discretion of the county governor's office, in particular if forced return is suspended. Asylum seekers may choose any lawyer who is willing to assist an asylum seeker on the basis of the legal aid fee.<sup>217</sup> Eligibility for legal aid is not conditional on Norwegian citizenship or residence requirements.

**Switzerland:** Publicly funded legal aid is made available to those unable to afford counsel. According to Art. 29 (3) of the Swiss Constitution, free legal aid in the sense of a waiver of procedural and court costs is granted if a person does not have the necessary means, provided his or her case has a chance of success. Applicants are also entitled to free legal representation if such is necessary for the safeguarding of their rights. These conditions apply to all types of proceedings. For administrative proceedings, Art. 65 (1) of the Federal Act on Administrative Procedure<sup>218</sup> provides for the exemption of procedural and court costs for appeals proceedings if the appellant is destitute, and the claim has a chance of success. Art. 65 (2) of the same law provides for the appointment of a lawyer if the applicant is not able to represent herself/himself. Legal aid for asylum seekers is integrated with the general system. If

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<sup>215</sup> For example, legal aid is not available to pay for an advocate to represent at an appeal to a Tribunal against the refusal to grant welfare benefits and there are significant limitations upon the legal aid that is available in personal injury cases, where applicants are expected to finance the case through conditional fee agreements.

<sup>216</sup> However, the Legal Services Commission have recently consulted on proposed changes that could include a requirement to limit the availability of 'Civil legal aid' (which is to say the legal aid available in civil cases for where an appeal or application is heard in the County Court or the Higher Courts). At present, the extent of the proposed possible changes are not clear.

<sup>217</sup> For further information see Chapter IV section 6 below.

<sup>218</sup> Bundesgesetz über das Verwaltungsverfahren, VwVG // Loi fédérale sur la procédure administrative, PA.

the asylum seeker is destitute and the appeal is not futile, procedural and court costs will in practice be waived. However, in many cases the request for legal aid is denied because they are considered futile. In practice legal aid in the sense of free legal representation is granted very restrictively in asylum cases. In most cases the Court states that there is no need for a lawyer as the asylum seeker only needs to submit facts and there is a legal obligation for the authorities to investigate the facts of the case and the applicable law “ex officio”. Legal aid lawyers are not state employees, but lawyers in private practice who are engaged case-by-case. All lawyers registered in the cantonal lawyers' register are obliged to take over a certain number of criminal law cases in which the applicant is obliged to be represented by a lawyer. In practice this is not a problem because there are a sufficient number of lawyers in each field who take over cases voluntarily. This includes cases of state-funded legal aid. There are no citizenship or residency requirements to be eligible for free legal aid.

#### **4.2 The Role of Legal Advisors and Non-governmental Organisations**

This section provides information on the role of legal advisors and non-governmental organisations within the legal aid system for asylum seekers.

**Austria:** According to Austrian law, legal advisors may, in principle, perform a variety of tasks during the asylum procedure, specifically when legal representation by a lawyer is not required. Two categories of legal advisors exist in Austria, ‘Rechtsberaters’ (legal advisors) and Flüchtlingsberater (refugee advisors). “Rechtsberater” are legal advisors who give advice to and assist asylum seekers during the admission procedure and are present in preliminary interviews. They are contracted for five years by the Ministry of Interior and paid through the Ministry’s integration fund. Thus the Ministry influences both the financing and the scope of legal aid services provided. As further explained in section 14 below, in the case of unaccompanied children legal advisors must give advice and represent them during the admission procedure.<sup>219</sup> They also are responsible for lodging appeals on behalf of unaccompanied children. They can lodge appeals for adults as well but those services are not paid for by the State. Also there are “Flüchtlingsberater” (refugee advisors) who assist asylum seekers during the asylum procedure. The Austrian government is under a legal obligation to provide “a sufficient quantity” of “Flüchtlingsberater” (refugee advisors) in practice. Flüchtlingsberater are mostly employed by NGOs and seconded to the State for a fixed number of hours per week. In addition some NGOs run counselling centres financed through funds and donations as the number of “Flüchtlingsberater” is insufficient in practice. These organisations provide information concerning the asylum procedure, make submissions, write appeals and file complaints against detention pending deportation, where applicable. They also assist in filling out forms applying for legal aid and do all forms of social counselling.

**Belgium:** Legal advisors may be volunteers or staff members of NGO’s. They provide general information to asylum seekers on the asylum procedure, assist the asylum seeker in preparing for an interview or filling in the questionnaire for the asylum application, conduct COI-research and consult with the asylum seeker’s lawyer. If they meet the definition of a “person of trust” in the Royal Decree on the functioning of and the procedure before the Commissioner General for Refugees and Stateless Persons (CGRS), legal advisors may accompany the asylum seeker during

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<sup>219</sup> See Article 64 and 65 Federal Act Concerning Granting of Asylum (2005 Asylum Act – Asylgesetz 2005), Federal Law Gazette (FLG) I No. 100/2005 (unofficial consolidated version) available at <http://www.unhcr.org/refworld/pdfid/46adc62c2.pdf>.

the interview at the CGRS.<sup>220</sup> A “person of trust” is defined in the Royal Decree as a person specially mandated by the asylum seeker to assist him or her while the application is being examined and who does so in a professional capacity. Only those assisting persons in a professional capacity, such as social workers, or representatives of NGO’s active in the sector of asylum can be considered as “persons of trust” for that matter. The staff member of the CGRS responsible for the file can verify whether the “person of trust” meets the definition. In addition to this according to the Royal Decree the staff member of the Commissioner General can oppose the presence of the “person of trust” during the interview.

**Czech Republic:** Staff of NGO’s play a role in assisting asylum seekers during the administrative stage of the asylum procedure. OPU<sup>221</sup> offers services that vary from only general legal advice to full legal representation. This is totally dependent on whether OPU has capacity and funding to provide such services.

**Denmark:** The Danish Immigration Ministry funds the Danish Refugee Council (DRC) to assist asylum seekers but resources are limited. The DRC offers legal assistance in the form of counselling visits to asylum centres, phone and email counselling and a weekly advice session at the headquarters of DRC in Copenhagen. Interpreters are available for counselling sessions in asylum centres. In other circumstances or locations interpreters are only provided exceptionally. Local community organisations also provide legal assistance, but to a lesser extent. Legal advisors may assist asylum seekers during the entire asylum procedure but in practice advisors mostly assist asylum seekers before the first instance stage of the procedure (with regard to the Dublin Regulation and general information on the Danish asylum procedure) and after the last instance decision on appeal.

**Finland:** Legal advisors may assist asylum seekers from the start of the asylum procedure and are required to have a master’s degree in law. Legal information is sometimes provided by NGO staff who are not yet lawyers but in such cases they work under the supervision of a lawyer working in the organisation.

**France:** Legal advisors working in NGOs provide free legal advice to asylum seekers in most cases. This is linked to one of the primary tasks of reception centres for asylum seekers (Centres d’Accueil de demandeurs d’asile - CADA), which is to provide administrative, social and medical assistance. In most CADA a social worker is present who has a legal background or is knowledgeable about the asylum procedure and who assists asylum seekers with advice on the asylum procedure. However, there are no formal requirements for the provision of this service with regard to legal qualifications or competences.<sup>222</sup> Legal advice and orientation information for asylum seekers is provided through reception platforms, which are often the first point of information for asylum seekers before they apply for asylum and are accommodated in a CADA.<sup>223</sup> In the detention centres for removal (1900

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<sup>220</sup> The Commissioner General for Refugees and Stateless Persons is the responsible first instance authority in the asylum procedure. See Royal Decree of 11 July 2003 on the functioning of and the procedure at the Commissioner General for Refugees and Stateless Persons as amended by the Royal Decree of 18 August 2010, Moniteur belge, 3 September 2009.

<sup>221</sup> Organizace Pro Pomoc Uprchlikum (Organisation for Aid to Refugees).

<sup>222</sup> It should also be noted that there are only 272 CADA in France with a total capacity of approximately 21.000 places. Many asylum seekers stay in a CADA more than one year (500 days on average in 2008) which means that CADA cannot accommodate all asylum seekers in France (47.600 in 2009) in practice).

<sup>223</sup> In France in the reception platforms asylum seekers receive information about the asylum procedure, social rights and access to the CADA. Those platforms often function as emergency accommodation.

persons applied for asylum in those centres in 2008) the authorities currently fund the presence of NGOs, which provides legal advice (not representation although they in practice provide support for lodging appeals).<sup>224</sup>

**Germany:** There is limited involvement of legal advisors in the asylum procedure as only lawyers (Rechtsanwalt) can represent asylum applicants before the Courts. However refugee councils and welfare organisations as well as Amnesty International play a supporting role and cooperate with lawyers assisting asylum seekers mainly by conducting country of origin information -research in individual cases. It should be noted that it is not compulsory to have a lawyer at the first instance of the procedure (Verwaltungsgericht). Theoretically, advisors from welfare organisations can assist asylum seekers during the procedure before the Federal Office for Migration and Asylum or during the procedure before the Administrative Court. However, this rarely happens in practice. Some organisations financially support certain important test cases, which can set a precedent for other asylum claims.

**Greece:** The NGO the Greek Council for Refugees assists asylum seekers during the asylum procedure depending on its capacity and resources. Lawyers in the legal unit there provide legal assistance and advice to asylum seekers.

**Hungary:** Legal advisors are entitled to provide legal advice and represent asylum seekers in the administrative stage of the asylum procedure before the Office of Immigration and Nationality. They conduct country of origin research, explain the asylum procedure to asylum seekers, fill in forms and may accompany asylum seekers to hearings in the procedure or assist with other administrative formalities in the asylum procedure. Only solicitors or lawyers are entitled to assist and represent asylum seekers before the courts.

**Ireland:** Caseworkers (paralegals) of the Refugee Legal Service provide assistance to asylum seekers under the supervision of in-house lawyers/solicitors at the start of the asylum procedure. Their tasks include the provision of information to asylum seekers and assistance to vulnerable asylum seekers with the completion of their questionnaires in preparation for the first instance interview, accompanying vulnerable asylum seekers to interview and later in the process preparing submissions for leave to remain in the State. Where a negative decision is issued at first instance, the solicitor will either represent the applicant in relation to the appeal or refer the applicant to a private practitioner on the panel of the Refugee Legal Service. Following receipt of any negative decision, the solicitor will also assess whether grounds exist to challenge the decision by way of judicial review proceedings in the High Court. If the solicitor believes there are grounds for review, the case is referred to the specialised Judicial Review Unit of the Refugee Legal Service. If legal aid is granted to bring proceedings before the High Court a barrister experienced in administrative law and protection law is also appointed to represent the applicant before the High Court.

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Asylum seekers can use the address of the reception platform as their official address to receive mail correspondence with regard to their asylum procedure. Asylum seekers in France require an official address in order to be able to register their asylum application and start the asylum procedure. It also allows them to have access to medical care for instance as long as they are not accommodated in one of the CADA. The reception platforms are currently being nationalised and have come under the supervision of the French Office for Immigration and Integration (OFII).

<sup>224</sup> Cimade, Forum Réfugiés, France terre d'asile, Assam, Ordre de Malte. It should be noted that the legal background of staff was one of the selection criteria for the contract in the detention centres for removal.

**Italy:** NGO staff provide legal advice including information on preparing for an asylum interview. However, they are not allowed to represent asylum seekers in the Court or assist them during interview.

**Lithuania:** Legal advisors can only provide primary legal aid at the first instance administrative stage of the asylum procedure. This includes legal advice to unaccompanied children seeking asylum after the application has been lodged and being present at their request during the substantive interview.

**Romania:** Legal advisors can submit grounds for appeal notices on behalf of asylum seekers, conduct country of origin information research, explain the asylum procedure to asylum seekers including informing them of their rights and obligations, and assist the asylum seeker during interviews at the administrative stage of the procedure.

**Slovenia:** Asylum seekers are only entitled to legal aid at the appeal stage and not at the first instance stage of the procedure. However, to a certain extent free legal advice is provided through national European Refugee Fund (ERF) projects. A lawyer from the NGO PIC<sup>225</sup> is present at the reception centre for asylum seekers on a daily basis and can also be present at the registration of the asylum application upon request of the asylum seeker. However, this is subject to the granting of projects. Sometimes there are gaps in the provision of assistance of up to 8 months between ERF-grants during where no legal advice is available.

**Spain:** Legal advisors may assist asylum seekers from their arrival until the final decision on their application. Their assistance is limited to providing advice prior to the first instance interview, assisting the asylum seeker during the first instance interview, researching Country of Origin Information (COI) and generally assisting asylum seekers with administrative requirements. Legal advisors usually also are in contact with the caseworkers at the relevant government Ministry in order to discuss individual cases during the examination at the first instance. Some legal advisors working in NGO's are able to undertake all aspects of legal aid if they are registered with a Bar Association. The possibility for asylum seekers to be assisted by recognised NGOs is laid down in the Spanish Asylum Act, which also states that the authorities shall promote the activities of such NGOs.<sup>226</sup>

**The Netherlands:** Legal advisors can assist asylum seekers from the moment the asylum application is lodged and assist the asylum seeker in preparing the interview at first instance. They are usually volunteers or paid staff from the Dutch Council for Refugees. Legal advisors are not entitled to formally represent the asylum seeker in the asylum procedure and cannot lodge any kind of appeal on behalf of the asylum seeker. Legal advisors must be distinguished from legal aid lawyers who only play a role after the initial interview.<sup>227</sup>

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<sup>225</sup> Legal Informational Centre for NGOs Slovenia (PIC).

<sup>226</sup> See Law 12/2009 of 30 October 2009 on the right of asylum and subsidiary protection, which transposed the Asylum Procedures Directive into Spanish legislation. The law entered into force on 20 November 2009.

<sup>227</sup> It should be noted that asylum seekers only have access to a legal aid lawyer after the initial interview. He or she prepares the asylum seeker for the second interview. Legal aid lawyers also draft a response to the 'intention to reject the application' (a provisional decision indicating what the final decision will most likely be). They also lodge an appeal against a negative decision.

**United Kingdom:** Legal advisors are able to undertake all aspects of legal aid in initial applications and appeals to the First Tier Tribunal Immigration and Asylum Chamber (FTTIAC) and Upper Tribunal (Immigration and Asylum Chamber) if they are suitably accredited and meet regulatory requirements. Legal representation of asylum seekers in the High Court, Court of Appeal and Supreme Court must be done under the supervision of a solicitor or employed barrister. Advocacy in the High Court, Court of Appeal and the Supreme Court can only be undertaken by barristers in independent practice or solicitors with higher rights of audience.

**Norway:** Free legal aid is provided by NGO's but they have limited capacity in practice.<sup>228</sup> One NGO is funded by the government to provide general information on the rights and obligations of asylum seekers subsequent to their arrival in Norway.

**Switzerland:** No state-funded legal aid is granted for the services provided by legal advisors merely in the form of legal advice. It is only possible to apply for state-funded legal aid for legal representation. Any person can represent an asylum seeker in the asylum. Theoretically, legal aid can be granted in the first instance procedure as well as the appeal procedure. However, in practice legal aid is usually not granted in the first instance procedure. Regarding legal representation during the first instance, the authorities assume that this is not necessary in the first instance procedure due to following factors: a) the Federal Office for Migration has a legal obligation to investigate the relevant facts and the applicable law "ex officio"; b) a neutral NGO observer (Hilfswerksvertreter) is present at the interview; c) free legal advisory services operated by NGOs are available.<sup>229</sup> There are NGOs in almost all the cantons who provide free legal advice and/or representation for asylum seekers. These legal advisory services are coordinated by the Swiss Refugee Council. They are not funded by the State. The authorities justify this by referring to the system of Hilfswerksvertreter during asylum interviews. However, this reasoning has been strongly criticized by the Swiss Refugee Council, because while it has certain positive effects on the quality of the procedure, the system of the Hilfswerksvertreter cannot replace a system of publicly funded legal advice. In the appeal procedure, applicants are more likely to be granted legal aid, but the practice is still very restrictive. The funding of the legal advisory services comes mainly from the Swiss Refugee Council's member agencies and regional church groups. The Swiss Refugee Council provides a regular information service including country-specific and legal updates to the networks. It also organizes six-weekly strategy meetings. In addition to the networks, lawyers subscribe to the regular news update issued by the Swiss Refugee Council. The Council also organizes training sessions on asylum related topics. As legal assistance is never state-funded, NGOs provide this service. They provide free legal assistance at all stages of the procedure. They provide legal advice and advice on the prospects of success at the appeal stage. NGOs also assist asylum seekers with submitting an appeal or write the appeal themselves as representatives of the asylum seeker. However, as noted above, these services are not publicly funded but can be reimbursed if legal aid is granted in the appeal procedure and a staff member of an NGO is appointed as legal representative of the asylum seeker. However, it should be noted that the legal representative will only be appointed and reimbursed by the court if he/she is a fully qualified lawyer registered in the cantonal lawyers' register. Any person who is not a registered lawyer can represent an asylum seeker, but will not be reimbursed for his/her work unless the appeal is granted. In such case compensation will be granted to the asylum seeker as the prevailing party, which includes the representative's work. In addition to members of NGOs providing legal advice and representing asylum seekers in appeals procedures, volunteers without

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<sup>228</sup> These NGOs include NOAS, SEIF, Hjelp Til Selvhjelp, Studentrettshjelpskontorene mv.

<sup>229</sup> Judgment of the Asylum Appeals Commission EMARK 2001/11.

formal legal education provide general advice and assistance to asylum seekers in all stages of the procedure.

### 4.3 Requirements for Legal Aid Providers

This section provides a brief overview of training and other professional requirements for legal aid providers in the field of asylum.

**Austria:** Only lawyers representing asylum seekers at the Constitutional Court level are required to be members of a Bar Association. As far as legal advisors are concerned, formal qualification requirements vary along the category of legal advisors. "Rechtsberater" (legal advisors) need a masters degree in law, unless they have been employed for at least five years in a church-based or private organisation in the area of legal counselling for asylum seekers. There are currently no formal requirements for "Flüchtlingsberater" (refugee advisors). Formal requirements for all other advisors are either non-existing or dependent upon funding contracts, project requirements or are set by the employer themselves. There are no training requirements for lawyers.

**Belgium:** Lawyers providing legal aid in 'second line' (legal representation) are required to be members of a bar association and such lawyers must follow specific training programmes in asylum law. NGO's that wish to provide 'first line' legal aid (advice only) can apply to the Ministry of Justice. Conditions include being a non-profit organisation, having at least one staff member with a law degree and having provided legal advice for at least two years. Reportedly many NGOs provide such advice without such official recognition from the Ministry of Justice. There are no formal requirements for legal advisors but in most cases they have a law degree or work as social assistant for an NGO.

**Czech Republic:** Staff members of NGO's mostly provide free legal assistance. According to the Asylum Act, if an NGO provides legal aid there is a formal requirement that it can only done by persons holding a law degree.<sup>230</sup> Private lawyers also need to be member of the Czech Bar Association to provide legal aid. Legal advice can be provided by law students working for NGO's. However, where NGO staff members assist and represent asylum seekers before the Court they need to be graduated law students.

**Denmark:** Private lawyers are required to be a member of the bar association but do not need any specific training, minimum practical experience or knowledge of foreign languages to represent asylum seekers. There are no formal qualification requirements for legal advisors. However in practice legal advisors are mostly staff members of NGO's and have a background in law or political science.

**Finland:** Lawyers are not required to be members of a lawyers' association nor are there any specific requirements for such lawyers with regard to training or specific expertise in asylum cases. The only requirement for legal advisors, who may assist asylum seekers from the start of the asylum procedure, is that they have a masters degree in law.

**France:** Lawyers dealing with asylum cases do not require membership of a lawyers' association specialised in asylum and/or immigration law, however membership of a bar association is required. No specific training in asylum law is required. There are

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<sup>230</sup> See § 35 of the Code of Administrative Justice, 150/2002. Available at <http://www.nssoud.cz/docs/caj2002.pdf>.

no formal requirements with regard to legal qualifications or competences of legal advisors, who operate mainly in the reception centres in France and are in most cases the only sources of legal assistance and information during the first instance of the asylum procedure.

**Germany:** Legal aid lawyers need to be accredited with a Bar Association (Rechtsanwaltskammer) to represent asylum seekers in the asylum procedure. There is no requirement under German law for lawyers to have specific expertise or knowledge of national or EU asylum law in order to represent asylum seekers. There is an exception to the provision of legal advice in the system of “Rechtsdienstleistungsgesetz” whereby staff in welfare organisations or other NGO’s can provide legal advice to asylum seekers but only if a lawyer supervises them.

**Greece:** Lawyers and legal advisors do not require any specific expertise or training in asylum and refugee law to be able to assist and represent asylum seekers. Membership of the bar association is the only requirement. Only lawyers can represent asylum seekers before the Courts. Lawyers at the stage of the Conseil d’Etat are required to have approximately eight years experience to represent asylum seekers at hearings there. However legal advisors may assist asylum seekers during interviews at the Police Headquarters.

**Hungary:** Legal aid lawyers are not required to have specific training or minimum practical experience nor knowledge of foreign languages. Also no formal qualification requirements for legal advisors are laid down in Hungarian legislation for providing legal assistance to asylum seekers.

**Ireland:** Membership of a specialised lawyers’ association is not a requirement for lawyers practising in this area. In order to provide legal aid to asylum seekers private lawyers need to have a valid practising certificate as a solicitor of the Law Society or to be a member of the Irish Bar. Any solicitor or barrister on the Private Practitioners Scheme is also required to hold a valid Tax Clearance Certificate in compliance with the Department of Finance regulations. The only additional requirement for solicitors and barristers joining the Private Practitioner Scheme to represent and advise asylum seekers is to undertake training provided by the Refugee Legal Service and the UNHCR in advance of being assigned any cases.

**Italy:** Membership of a Bar association is a requirement for all lawyers. There are no specific training requirements under the legal aid regime for lawyers aiding asylum seekers except that they must have at least two years of experience as a professional lawyer. This is a general requirement for all lawyers providing legal aid. There are no formal qualifications required of legal advisors active in NGO’s providing free legal assistance but in any case they can only provide legal assistance to a certain extent.

**Lithuania:** Legal advisors must have the following qualifications: a Bachelor or Master’s degree, a “lawyers’ professional qualification degree” and have at least two years of experience in legal work.

**Romania:** Membership of the local bar association is a requirement while the Romanian Council for Refugees also organises specialised training events for lawyers.<sup>231</sup> In the Romanian system lawyers can select the courts and area of law

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<sup>231</sup> Although the training events organised were free of charge some lawyers did not participate for a variety of reasons including workload and the location of the seminar (although it was organised in a

they wish to practice in. The assumption is that these lawyers are specialised in the area of law they want to provide assistance for and that they speak a foreign language. In practice many lawyers do not meet this requirement. Legal advisors must be law faculty graduates. NGOs such as the Romanian National Council for Refugees provide legal assistance to asylum seekers and have specialised legal advisors.

**Slovenia:** Lawyers do not require membership of a specialised lawyers association to provide legal aid to asylum seekers. The main requirement is to have passed a bar exam. There is no specific requirement of knowledge of refugee law, which is problematic. There is also no control mechanism in place to monitor the quality of the lawyer's work, which is equally problematic as it may lead to "abuse" of the legal aid scheme to earn money without putting much effort into the case.<sup>232</sup> Legal advisors mainly operate in the Slovenian reception centre where they provide information and general legal assistance. They are required to have a law degree, be students in the fourth year of law studies at the University, have finalised a legal clinic in refugee law and have knowledge of English.

**Spain:** In order to provide legal aid services to asylum seekers a lawyer needs to be a member of a bar association and be registered in the "Turno de Extranjeria". In addition he or she needs to complete specific training in aliens and asylum law which is organised by the bar associations<sup>233</sup> and have five years of experience as a lawyer. If they fulfil these conditions they can be appointed by the bar association to assist an asylum seeker under the free legal aid scheme. Legal advisors who are staff members of NGOs can provide legal advice to asylum seekers without being a member of a bar association. However they cannot represent asylum seekers without such membership and thus *de facto* need to be registered as barristers at the Bar Association in such cases.<sup>234</sup> Legal advisors working in NGOs receive training in refugee law before they are entitled to provide advice to asylum seekers.

**The Netherlands:** Lawyers must have dealt with at least twelve cases under the supervision of an experienced lawyer before they are allowed to deal with asylum cases themselves. Moreover lawyers need to attend a course or training on asylum, including EU asylum law, at least once a year. In order to be entitled to accept legal aid cases, private lawyers need to be registered with the Legal Aid Board and submit themselves to an audit every three years by the Dutch bar association. If the final result of the audit is negative the lawyer or law firm is no longer allowed to provide state funded legal aid. No specific qualification and training requirements exist with regard to legal advisors. However, legal advisors working for the Dutch Council for Refugees follow specialised courses provided by the Dutch Council for Refugees itself. These courses deal with asylum law in general as well as techniques to deal with vulnerable asylum seekers for instance.

**United Kingdom:** Membership of a Bar association is not required per se to provide legal aid. The requirement for the provision of all immigration and asylum legal

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town centrally located in order to facilitate participation of lawyers from all relevant cities such as Galati, Suceava, Baia Mare, Timisoara and Bucharest).

<sup>232</sup> However, the proposed amendment of the Slovenian Act on International Protection includes the requirement of regular trainings to improve lawyers' knowledge of refugee law.

<sup>233</sup> Some bar associations in Spain organise several trainings in asylum law per year whilst others only organise one training session on an annual basis.

<sup>234</sup> One can be registered as a practising lawyer or a non-practising lawyer in the Bar Association in Spain.

advice and representation is that the person providing legal advice and representation in respect of immigration or asylum law must either be authorised by a designated professional body to practice<sup>235</sup> or be registered with the Office for the Immigration Services Commissioner<sup>236</sup> (OISC). The OISC has different levels of advisors which limits the level of work that can be undertaken. It can be a criminal offence to provide legal advice or representation if the 'lawyer' providing advice is not so regulated.<sup>237</sup> There are different codes of conduct that the different regulatory bodies apply.<sup>238</sup> In addition to the regulatory authority's standards, the Legal Services Commission also has particular standards that have to be met. One set of standards relate to individual caseworkers knowledge of law and procedure and skills. A second set of standards (the Specialist Quality Mark and the terms of the contract between the provider and the LSC) have more general quality as well as performance obligations that providers have to meet. As far as training and accreditation requirements are concerned appropriately regulated persons who give legal aid funded advice and representation have to have been accredited under the Immigration and Asylum Accreditation Scheme which was set up by the Legal Services Commission and Law Society, but is now run by the Law Society alone.<sup>239</sup> The scheme is divided into five levels: probationer caseworker; caseworker; probationer senior caseworker; senior caseworker, advanced caseworker. Senior and advanced caseworkers can also become accredited supervisors. There is a set of standards that cover immigration, asylum and nationality law, in relation to caseworker and senior caseworker grades. Before becoming a probationer the applicant must pass a multiple-choice test. To become a caseworker or senior caseworker (probationer or otherwise), applicants must pass three tests, set at a level appropriate to the level of work required. The tests examine interviewing and drafting skills as well as knowledge of asylum and immigration law. To become an advanced caseworker the candidate must have either excelled in the tests or have other examples of high-level work or other attributes. Supervisors have to be accredited to at least senior caseworker level and pass a separate test. All regulatory authorities require that those they regulate (whether doing legal aid or privately paying work) must undertake Continuous Professional Development (CPD). This requires doing a certain number of hours of approved training or other activities each year. The Legal Services Commission's Specialist Quality Mark requires that each caseworker receives six hours CPD of which 50% has to be in immigration, asylum or nationality law. Supervisors have to undertake six hours CPD which all have to relate directly or indirectly to immigration, nationality and asylum law. Those who are regulated by the OISC have to undertake eight to sixteen hours CPD depending on the level of the caseworker.

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<sup>235</sup> For e.g. the General Council of the Bar, the Solicitors Regulation Authority, the Institute of Legal Executives or the Solicitors Regulation Authority.

<sup>236</sup> The OISC is a regulatory body set up in 2000 in order to provide regulation of previously unregulated immigration advisors known as the 'OISC'.

<sup>237</sup> Section 91 of the Immigration and Asylum Act 1999 provides that it is a criminal offence to provide legal advice or representation if the lawyer providing advice is not regulated.

<sup>238</sup> The OISC code is found here: [www.oisc.gov.UK/how\\_to\\_become\\_an\\_immigration\\_adviser/code\\_of\\_standards/](http://www.oisc.gov.UK/how_to_become_an_immigration_adviser/code_of_standards/); the Solicitors Regulation Authority Code (see section 2 and 3 in particular) is found here <http://www.sra.org.UK/solicitors/code-of-conduct.page>. The Bar Code of Conduct is found here: [www.barstandardsboard.org.UK/standardsandguidance/](http://www.barstandardsboard.org.UK/standardsandguidance/).

<sup>239</sup> Brief details of the scheme are found here: [www.legalservices.gov.UK/civil/immigration/accreditation.asp](http://www.legalservices.gov.UK/civil/immigration/accreditation.asp).

**Norway:** Lawyers assisting asylum seekers are not required to be member of a lawyers' association or a specialised immigration/asylum association. Legal aid can only be provided on a professional basis by lawyers (in order to obtain a 'lawyers license' (advokatbevilling) a law degree + additional professional education is required) or by "registered legal assistants" (rettshjelper) for which a law degree is also a requirement. Only lawyers with an "advokatbevilling" are entitled to represent persons before the Courts. However, lawyers who want to be on the list of legal aid lawyers need experience and specific training.

**Switzerland:** There is no obligation for legal representatives to be lawyers or part of the lawyers' association for asylum proceedings. Therefore, any person can represent an asylum seeker in the asylum procedure. However, in cases of detention only lawyers who are registered in the lawyers' register of their canton can be legal representatives regarding the question of detention. Legal representatives will only be appointed and reimbursed by the Federal Administrative Tribunal under the legal aid scheme if he/she is a fully qualified lawyer registered in the cantonal lawyers' register. Any person who is not a registered lawyer can represent an asylum seeker, but will not be reimbursed for his/her work. There are no specific requirements for lawyers with regard to training or minimum practical experience. Legal advisors do not require any special qualifications but the Swiss Refugee Council, which coordinates the legal advice centres has produced guidelines on legal advice and legal representation. The Swiss Refugee Council also organizes training sessions on relevant topics for lawyers and legal advisors.

#### **4.4 Means Testing**

As described above in Chapter III section 3.1 means testing refers to an examination of the asylum seekers financial situation when considering his or her eligibility for legal aid.

**Austria:** Free legal representation is only available at the Constitutional Court level in Austria therefore only at that stage is a "sufficient means" test applied for the provision of legal aid.<sup>240</sup> The procedure for asylum cases is that only the Constitutional Court applies a "sufficient means" test by examining a questionnaire on the applicant's financial resources at the appeal stage. The same test applies as for Austrian nationals. It should be noted that asylum seekers are legally entitled to work after three months since they lodged their application. However in practice it is impossible for them to receive the necessary permission from the "Arbeitsmarkt Service" (employment service).<sup>241</sup>

**Belgium:** No means test is applied for accessing legal aid.

**Czech Republic:** Asylum seekers are usually automatically granted legal aid before the Court upon request on the basis of their financial situation and their 'vulnerable legal status'.

**Denmark:** No means test is applied in practice in Denmark.

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<sup>240</sup> During the administrative stage and the Asylum Court appeal stage legal assistance is available in Austria through the services of either the 'Rechtsberater' or the 'Flüchtlingsberater'.

<sup>241</sup> The Arbeitsmarkt service firstly examines where other citizens, EU nationals or other third country nationals could undertake the work available before offering a position to asylum seekers, therefore in practice asylum seekers have very limited access to employment in Austria.

**Finland:** A sufficient means test is only applied at the appeals stage of the asylum procedure. Legal aid is made available free of charge for asylum seekers whose income is below 600 € at the appeals stage. Legal aid is granted on the basis of all the asylum seekers' available means i.e. income, expenditures and maintenance liability for day-care fees or children maintenance payments for instance.

**France:** The legal aid office of the Court Nationale du droit d'asile (CNDA), the Appellate Body, examines eligibility for legal aid on the basis of a sufficient means test. A maximum income level is laid down in a legislative decree, which is assessed by the CNDA.<sup>242</sup> The applicant must contribute to the cost of legal aid if he or she has the available resources to do so. It should be noted that in France asylum seekers have the right to work after one year after they lodged their application with the discretionary permission of the local administrative authority.

**Germany:** A means test is applied for legal aid at the appeal stage. The decision whether or not legal aid is granted for court proceedings is decided by the same judge who examines the case. The sufficient means test consists of an examination of whether the asylum seeker is depending on social benefits.<sup>243</sup> Sometimes there is a delay on the Court deciding on the grant of legal aid. In such situations, sometimes lawyers request some financial contribution from asylum seekers as they assist them with the appeal. It should be noted that asylum seekers only have a right to work one year after they have lodged their application.

**Greece:** no means test is applied in order to be eligible for legal aid.

**Hungary:** Asylum seekers are automatically entitled to legal aid at all stages of the asylum procedure if they benefit from State-provided reception facilities due to their lack of financial means, which in practice is the case for the majority of asylum seekers in Hungary. According to the general means test in the Legal Aid Act<sup>244</sup> legal aid is granted if the applicants income does not exceed the minimum pension amount<sup>245</sup>. The means test is applied by the Central Office of Justice of the Ministry of Justice and Law Enforcement.<sup>246</sup> It should be noted that asylum seekers are only allowed to work after one year after they lodged their asylum application in Hungary. However they are immediately allowed to do some part-time work in the reception centre.

**Ireland:** Asylum seekers in Ireland have a right to low cost legal aid and have access to the services of the Refugee Legal Service at all stages of the asylum procedure. Civil legal aid is not free and a contribution from the person eligible for legal aid is also required. The contribution is significantly lowered in the case of asylum seekers seeking legal representation in respect of their protection applications. This is because of the unique position of asylum applicants who are not entitled to normal social welfare allowances, usually reside in State provided "direct provision" hostels,

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<sup>242</sup> Décret n° 91-1266 du 19 décembre 1991 portant application de la loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique. The amount is adjusted every year.

<sup>243</sup> This also includes an obligation for asylum seekers to disclose their personal and economic situation to prove that they need assistance. See European Migration Network, *Ad-Hoc Query on the Legal Aid in International Protection Procedures*, October 2009, at p. 6.

<sup>244</sup> Act no. LXXX of 2003 on legal aid.

<sup>245</sup> See section 5 of the Legal Aid Act.

<sup>246</sup> See European Migration Network, , *Ad-Hoc Query on the Legal Aid in International Protection Procedures*, October 2009 at p. 7.

have an income of only €19.10 per week and have no right to work.<sup>247</sup> Where an asylum applicant is in State provided “direct provision” accommodation their total contribution in respect of advice and aid is €6. Where an asylum applicant is staying in private accommodation (a small minority of cases), a €10 contribution is payable for advice and €40 for legal aid. A further contribution of €35 is payable by all applicants in the event that legal aid for Judicial Review in the High Court is granted. An application may be made to reduce or waive a legal aid contribution. The Refugee Legal Service is responsible for assessing all such applications for legal aid.

**Italy:** Asylum seekers have the right to legal aid for the purpose of the judicial proceedings. The decision to grant legal aid is taken by a body of the lawyers association that operates at the local court level. A means test is applied. The amount required to constitute sufficient resources is established in law for all civil law matters. At the time of writing the gross income of the applicant should not exceed 10.628, 16 € per year. It should be noted that according to Italian legislation, asylum seekers are allowed to work after six months after they lodged an asylum application. It is sufficient for asylum seekers to make a declaration of lack of financial resources. However, it is possible that in practice asylum seekers, in particular when staying in CARA centres or detained in CIE centres, may not have access to legal aid at the appeal stage because they are unable to submit certain documents such as a codice fiscale or an identity card. However, this seems to be a very strict application of the law on legal aid by certain cities.<sup>248</sup>

**Lithuania:** asylum seekers only have a right to free legal representation at the appeals stage. Lithuanian legislation includes a sufficient means test, which is to be applied by the Migration Department but up until the time of writing it had not been applied in practice. It must be noted that asylum seekers do not have the right to work in Lithuania.

**Romania:** The decision to grant asylum seekers legal aid is taken by the judge on a case-by-case basis at the request of the asylum seeker. While no means test as such exists, judges duly take into account the limited financial allowance asylum seekers receive (3,6 lei per day). Asylum seekers only have a right to work after one year since the start of the asylum procedure and no final decision has been taken within that period.

**Slovenia:** In theory no means test is applied in order to access legal aid at the appeals stage of the asylum procedure. However, in practice the Ministry of the Interior will usually check whether the asylum seeker has his or her own resources, including in the context of the asylum seeker’s right to work.<sup>249</sup> Cases are not automatically halted while an asylum seeker requests legal aid but a postponement of the case can be requested.

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<sup>247</sup> The Refugee Act 1996 (as amended) does not make any provision for asylum seekers’ right to work. In 1999, a once-off right to work scheme was introduced for those, who entered Ireland before 26 July 1999 and who were in Ireland for more than one year. Asylum seekers who entered Ireland after that date are not entitled to work regardless of the duration of their asylum procedure.

<sup>248</sup> According to the Asylum Act asylum seekers are entitled to legal aid under the same conditions laid down in the Legal Aid Act, which requires the submission of a number of documents, including a codice fiscale. However, for asylum seekers a statement of lack of financial resources instead of a codice fiscale is sufficient. This is, however, not applied in the same way everywhere in Italy.

<sup>249</sup> In Slovenia asylum seekers have a right to work only if their identity is established beyond doubt, after one year after they lodged an asylum application and as long as the asylum authority has not taken a decision within that period and the delay cannot be attributed to the asylum seeker.

**Spain:** In Spain if an asylum seeker does not have sufficient financial resources they have a right to legal aid once they have applied for asylum. The practice up until now was that it was almost always granted as asylum seekers were considered to lack the necessary resources. However, due to ambiguous wording in the new Article 22 of the Aliens Act<sup>250</sup> it is not longer clear whether or not legal aid will be provided at the appeal stage.<sup>251</sup> Cases are halted until a decision is taken on the right to legal aid by the Competent Commission on legal aid (Comision de Asistencia Juridica Gratuita) if legal aid is mandatory (for example at the border and in detention) or if the Court decides so. A means test applies and each Autonomous Community determines the exact income-threshold for the test. In 2009 for example, an applicant's income had to be lower than 14.762.66 € per year in order to be eligible for free legal aid. The test is applied by the Legal Aid Commission on the basis of documents establishing the applicant's lack of resources. This can be a document certifying the lack of income or unemployment. It should be noted that in Spain asylum seekers have a right to work six months after they have applied for asylum until a first instance decision has been taken. In case of a negative first instance decision asylum seekers no longer have the right to work.

**The Netherlands:** Asylum seekers have a right to legal aid at all stages of the asylum procedure. A means test applies in theory but in practice all newly arrived asylum seekers are considered to have insufficient means for paid legal aid. The "test" consists of signing a declaration stating that they do not have sufficient resources. However, applicants who may reasonably be considered to have sufficient means or applicants who make a subsequent application after having lived in the Netherlands and received an income (in the form of social security benefits or through paid labour) have to fill out a more comprehensive form. The test is applied by the Legal Aid board and the local authority (gemeente). Applicants must contribute to legal aid if they are able to but it must be noted that asylum seekers have a limited right to work in the Netherlands (only "seasonal labour" during a limited number of days per year).

**United Kingdom:** Asylum seekers in the UK have a right to legal aid, subject to the reservations relating particularly to sufficient means testing. The contracted Legal Services Commission supplier decides on whether an applicant may have free legal aid or not. In order for this to be evaluated a very complex means test is applied by the Legal Services Commission contracted supplier in the case of controlled work and the Legal Services Commission itself in case of Licensed Work.<sup>252</sup> The test includes an assessment of the individual's income and assets, combined with those of any partner or spouse. However, in practice the majority of asylum seekers do not have sufficient means to be disqualified from legal aid as they are usually prohibited from working. However, in accordance with Article 11 of the Reception Conditions

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<sup>250</sup> Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social (BOE núm. 10, de 12 de enero), en su redacción dada por la Ley Orgánica 8/2000, de 22 de diciembre (BOE núm. 307, de 23 de diciembre), por la Ley Orgánica 11/2003, de 29 de septiembre (BOE núm. 234, de 30 de septiembre), por la Ley Orgánica 14/2003, de 20 de noviembre (BOE núm. 279, de 21 de noviembre) y por la Ley Orgánica 2/2009, de 11 de diciembre (BOE núm. 299, de 12 de diciembre). Accessible at <http://www.mir.es/SGACAVT/derecho/lo/lo04-2000.html>.

<sup>251</sup> The Asylum Aliens Act confirms that legal aid is a right but it is unclear if free legal aid will be provided if the applicant lacks financial resources.

<sup>252</sup> Legal aid for legal representation in respect of High Court, Court of Appeal or Supreme Court hearings scheme is covered under the Licensed Work legal aid scheme. Legal aid for any appeal to the Asylum and Immigration Tribunal funded under a scheme called Controlled Legal Representation. Legal advice and representation in the initial application is funded under a scheme called Legal Help.

Directive applicants can apply for the right to work if their application has not been decided within 12 months.<sup>253</sup> Only for Licensed Work can the applicant be obliged to contribute to the cost of legal aid if able and if the applicant is not eligible for Legal Help or Controlled Legal Representation he or she does not receive any help. It must be noted that legal aid providers must report success rates and that legal aid is subject to audit by the Legal Services Commission.

**Norway:** In Norway under the general legal aid system no means test is applied to prioritised cases. Therefore in the asylum procedure both before the administrative authorities and the Immigration Appeals Board legal aid is not dependent on a means test. However if the applicant requests a review of the validity of the administrative authorities decision before the Courts than legal aid is dependent on a means test. In order to obtain legal aid for an appeal procedure before the court, the level of income is taken into account. Applicants will only be granted legal aid when their annual income is below NOK 240,000 and have a total income of less than NOK 100,000. However, the applicant will have to pay 4250 NOK him or herself, unless the applicant has an income below 100,000 NOK, in which case no costs have to be paid by the applicant him/herself. It should also be noted that in detention legal aid is never dependent on a means test.

**Switzerland:** A sufficient means test is applied in Switzerland. According to the practice of the Swiss Federal Supreme Court, a person lacks sufficient resources if he or she is unable to pay for the costs of legal aid without having to draw upon the means necessary to cover his/her own basic needs or that of his or her family (subsistence level). The Swiss Conference on Social Aid (SKOS) has established guidelines on the relevant minimum subsistence level for single persons and families. Due to the fact that asylum seekers are usually unemployed, it is normally easy to establish their lack of means. If they are dependent on social aid, they usually need a written confirmation of the competent cantonal authority. Asylum seekers can be given a work permit after three to six months, with certain restrictions. For the means test, they need to provide evidence of their salary. The means test is applied by the Federal Office for Migration in the first instance (although in practice at this stage legal aid is not granted) and by the Federal Administrative Court in the appeal procedure.

#### 4.5 Merits Testing

**As shown above in Chapter III section 3.2 a ‘merits-of-the-claim’ test or ‘merits test’ involves an assessment of the prospects of success of the case in determining eligibility for legal aid.**

**Austria:** Austria applies a ‘merits-of-the-claim’ test with regard to applications for legal aid in front of the Constitutional Court. The Court can refuse legal aid if the claim has no reasonable chance to succeed or is considered manifestly unfounded (“nicht mutwillig oder aussichtslos”).

**Belgium:** Eligibility for free legal aid is not subject to a merits test.

**Czech Republic:** In general, no merits test is applied when accessing legal aid for asylum seekers. However in a recent case the County Court in Prague refused free legal aid as the Court considered that the case had no prospects of success.

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<sup>253</sup> The UK government has, in response to the recent ZO (Somalia) introduced a further restriction on access to the labour market (see [www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2010/275292/50-implementation-zo-somalia](http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2010/275292/50-implementation-zo-somalia) ).

**Denmark:** Eligibility for free legal aid is not subject to a merits test.

**Finland:** Eligibility for free legal aid is not subject to a merits test.

**France:** a ‘merits-of-the-claim’ test is only applied with regard to the proceedings before the Conseil d’Etat for the following types of claims: inadmissible appeals,<sup>254</sup> manifestly unfounded appeals or when the appeal does not address the reasons for refusal in the decision of the CNDA. However, when considering the merits of the claim no hearing is organised nor is evidence on the claim presented and tested before the Conseil d’Etat.

**Germany:** In Germany the merits-of-the-claim test applies at all stages and is based *inter alia* on whether or not the appeal was lodged timely and whether there is any new ruling of the Federal Administrative Court existing relating to the country of origin of the asylum seeker. There is no Court hearing organised to consider the merits of the claim, which is done by the same judge who will also preside over the appeal. Rulings of the Federal Administrative Court are taken into account as well as the credibility of the applicant’s claim by the presiding judge. The case is not halted when an applicant requests for legal aid.

**Greece:** A ‘merits-of-the-claim’ test is applied. In Greece legal aid for the proceedings before the Council of State<sup>255</sup> can be refused if the appeal is manifestly unfounded or inadmissible.

**Hungary:** Eligibility for free legal aid in asylum cases is not subject to a merits test.

**Ireland:** A means and merits test applies to the granting of civil legal aid. In practice, however, a merits test is not applied in relation to appeals of a first instance decision to the Refugee Appeals Tribunal, so that every applicant for asylum may have the benefit of legal advice and representation in relation to their appeal. The merits test is applied in relation to judicial review proceedings.<sup>256</sup> The merits of the claim are also examined when legal aid is requested for additional services, such as expert medical reports or translation of further documentary evidence. The Legal Aid Board or designated committee of the Board has overall responsibility for the granting of legal aid. In the event that legal aid is refused, an applicant may seek a review of the decision and appeal the decision to the Appeals’ Committee of the Legal Aid Board.

**Italy:** A merits-of-the-claim test exists which is not very strictly applied with regard to the first appeal but is more strictly applied with regard to any onward appeal. The test is that the appeal should not be manifestly unfounded which is tested through an examination of the asylum seekers’ statements and the documentation submitted. It is carried out by the legal aid board of the bar without organising a hearing but based on the evidence presented by the asylum seeker. It should be noted that the test may vary from one town to another. In case the legal aid board of the bar refuses legal

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<sup>254</sup> This refers to an appeal submitted outside the time limits for appealing the first instance decision.

<sup>255</sup> Due to the reform of the asylum procedure under PD 81/2009, the Council of State has become the only appeal body in the Greek asylum procedure.

<sup>256</sup> Apart from satisfying a means (financial eligibility) test an applicant for Civil Legal Aid must also generally satisfy a merits test for legal aid under the Civil Legal Aid Act to demonstrate that he/she has "as a matter of law reasonable grounds for bringing the proceedings", is "reasonably likely to be successful in the proceedings" and that the proceedings are "the most satisfactory means by which the result sought may be achieved".

aid, the asylum seeker can apply for legal aid directly to the civil court during the appeal procedure in which case the civil court will take a decision on legal aid as well.

**Lithuania:** Eligibility for free legal aid is not subject to a merits test.

**Romania:** Eligibility for free legal aid is not subject to a merits test.

**Slovenia:** Eligibility for free legal aid is not subject to a merits test.

**Spain:** General legislation on legal aid includes a possibility to refuse legal aid in cases, which have little prospect of success, but in practice it is never applied in asylum cases.

**The Netherlands:** Only a 'limited' merits-of-the-claim test applies. Only in cases where the applicant has clearly no legal interest in lodging an appeal or where no substantial legal aid can be given, may the allowance to the lawyer for legal aid be refused. However, even in such cases the lawyer may lodge an appeal against such refusal. In appeals against the refusal for legal aid a hearing will be organised where evidence supporting the asylum claim may be presented and tested.

**United Kingdom:** A very low merits test is applied with regard to Legal Help at the initial stage of the asylum procedure and is invariably met. A more demanding merits test applies in the context of the Controlled Legal Representation scheme at the appeal stage of the procedure. The test is set out in the Funding Code. Legal representation will be refused if the prospects for a successful outcome for the client are (i) unclear or borderline, save where the case has a significant wider public interest, is of overwhelming importance to the client or raises significant human rights issues or (ii) poor. At the same time a cost benefit test is applied. Legal Representation will also be refused unless the likely benefits to be gained from the proceedings justify the likely costs, such that a reasonable private paying client would be prepared to take the proceedings, having regard to the prospects of success and all other circumstances. The same tests under the Funding Code apply with regard to legal representation in respect of applications to the High Court. It should be noted that the contracted supplier also applies this test with a potential appeal by the client to the Legal Services Commission's Independent Funding Adjudicator. The provider must apply guidelines on the merits of a case and this must be recorded on file.<sup>257</sup> Legal aid providers must report success rates and legal aid is subject to audit by the Legal Services Commission.

**Norway:** A merits test can only be applied at the appeal stage.<sup>258</sup> The main elements to be considered in this test is whether the case is similar to cases where legal aid is mandatory, the importance of the case for the individual concerned and whether the appeal is likely to be successful. Whereas technically speaking no merits test applies at the first instance administrative stage of the asylum procedure, in case of manifestly unfounded applications fewer hours of assistance can be claimed than for regular cases. This sanction is applied by the Directorate of Immigration (UDI) without organising a specific hearing as to whether or not legal aid is justified or not.

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<sup>257</sup> Recent research indicated problems with the evaluation of the merits. See Devon Law Centre, *Asylum Appellate Project – Final Report*, March 2010.

<sup>258</sup> It should be noted that in Norway it is the County governor's office that will decide whether legal aid will be granted when legal aid is provided on discretionary grounds, as is the case in the area of immigration and asylum. Where legal aid is mandatorily granted or when the applicant only needs to fulfil certain financial criteria, the Court itself will decide on whether or not legal aid is granted.

If on appeal the applicant is granted a status the legal aid rate will subsequently be set at the level of regular cases. Every asylum seeker receives a certain amount of legal aid however the amount of time granted is dependent on the merits of the claim.

**Switzerland:** According to the law a merits-of-the-claim test needs to be applied at each stage of the procedure. However, in practice the test is only applied in the appeal procedure. A general test is applied according to which legal aid can only be granted for cases that may potentially be successful, i.e. the appeals do not appear to be futile. The test is applied in addition to the sufficient means test described above. However, legal representation is granted only if it is necessary for the protection of the individual's rights, for example if complicated questions of law and facts are involved. In practice the merits test is applied quite strictly. Often the Court denies the necessity for professional legal representation. The test is applied in theory at first instance by the Federal Office for Migration and in practice by the Federal Administrative Court at the appeal stage. The test is applied by the Court on the basis of the written materials in the asylum seeker's file and the evidence submitted. No specific hearing is organised to apply the merits-of-the-claim test.

#### **4.6 Appointment of a Legal Aid Provider**

This section provides information on the ways in which a legal aid advisor or representative is appointed in the national system of the countries surveyed.

**Austria:** A formal request is not necessary for legal assistance from legal advisors. Legal aid by lawyers before the Constitutional Court must be formally requested to the Court that will decide on whether or not to grant legal aid based on a merits and sufficient means test.

**Belgium:** The applicant can request legal aid at the local Legal Aid Office organized in each province. In practice, this is each department of the Bar Association. The office reviews the situation of the asylum seeker and designates a lawyer to take charge of their case. When legal aid is provided through an nomination by the Bar Association then the asylum seeker may not select a particular lawyer. In urgent cases aid is provided by a "stand-by lawyer".<sup>259</sup> However, in situations whereby the applicant directly contacts a lawyer on the list of voluntary lawyers for legal aid provision, this lawyer can also request authorisation from the Legal Aid Office to work on their behalf. There is a shortage of qualified lawyers reported for asylum seekers who are in detention at the border.<sup>260</sup>

**Czech Republic:** In the Czech Republic requests for legal aid are made through a standard form, which is used in all court proceedings.<sup>261</sup> Asylum seekers may not select their preferred lawyer. The lawyer is selected from a list of lawyers by the Court.<sup>262</sup> The number of legal aid lawyers in the Czech Republic is not considered to

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<sup>259</sup> See Article 508/9 of the Judicial Code.

<sup>260</sup> See also Chapter IV section 11 below.

<sup>261</sup> It should be noted that formally the right to paid legal representation is guaranteed from the start of the asylum procedure. Every asylum seeker has theoretically the possibility to contact a private lawyer to represent him or her. However, in practice such possibilities are limited because of the language barrier and the fact that the number of lawyers who specialise in this field is small.

<sup>262</sup> See European Migration Network, *Ad-Hoc Query on the Legal Aid in International Protection Procedures*, October 2009, at p. 4. It should be recalled that asylum seekers are informed about their rights to legal assistance at the start of the procedure. They are provided with a list of NGO's offering free legal assistance by the Ministry of Interior. However, in practice asylum seekers who are detained may face practical problems with contacting such legal advisors as the use of phones in those centres is

be sufficient as there are only about twenty to thirty lawyers available in NGO's offering free legal assistance while on average about one thousand five hundred asylum seekers apply for asylum in the Czech Republic.<sup>263</sup>

**Denmark:** Asylum seekers receive a list of lawyers registered by the Refugee Appeals Board once their asylum claim has been refused at first instance. Sometimes staff at the asylum centres assist asylum seekers in the process of finding a lawyer. Detained asylum seekers are automatically granted legal aid at the Court, which reviews the detention decision every four weeks. Asylum seekers may select a preferred lawyer from the list. Both the Immigration Office and NGO's inform asylum seekers of their rights with regard to legal aid. Some lawyers specialised in asylum law have established a network to share information and experience.

**Finland:** At the start of the asylum procedure applicants are informed of their right to free legal aid by the authorities. Asylum seekers are provided with information on available lawyers in reception centres and at police stations. The Refugee Advice Centre also visits reception centres to provide asylum seekers with such information. A list of lawyers is made available by the reception centres and Police and border guards also have their own lists of lawyers available to assist asylum seekers. Asylum seekers may select their preferred lawyer but reception centres usually work with certain lawyers. If asylum seekers indicate they wish to make use of another lawyer the reception centre may refuse to pay for it.<sup>264</sup> Although in principle every asylum seeker is entitled to have a lawyer, due to increasing number of asylum applications in Finland, not all asylum seekers have legal representation while it may also take months before they have contact with a lawyer. In particular the shortage of lawyers specialised in asylum is becoming a problem in Finland.<sup>265</sup> There is only one NGO, the Refugee Advice Centre, which has specialised lawyers. The quality of legal aid provided by private lawyers can vary significantly.

**France:** In France asylum seekers are informed of the fact both that a lawyer will be provided to them by the CNDA upon request in cooperation with the Bar Association at the start of the procedure and that they are entitled to legal aid at the appeal stage. When the request is made within the time limit for introducing an appeal<sup>266</sup> the deadline is postponed until a lawyer is appointed.<sup>267</sup> If the request is made less than a month before the hearing at the CNDA or at the hearing at the CNDA legal aid can be granted provisionally by the judge presiding over the chamber.<sup>268</sup> Detained asylum seekers are generally provided with the phone number of the local bar

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restricted and visiting possibilities are limited. See Chapter IV section 12 for further information on the issues concerning legal aid in detention centres.

<sup>263</sup> Moreover, in the Czech Republic NGOs providing legal services (OPU and SOZE) depend on European Refugee Fund resources. However, funds were not allocated until April in 2009 so both NGOs had to cut their legal assistance services in the beginning of last year. See UNHCR, *Asylum Procedures Study*, Section 16: The right to an effective remedy, at p. 35.

<sup>264</sup> Before the first instance decision the legal aid costs are covered by the Ministry of the Interior. In practice as the bills are sent to the reception centres, the latter can decide the source of legal help the asylum seekers are entitled to. At the appellate stage the costs are paid through public legal aid system.

<sup>265</sup> According to UNHCR "access to specialised lawyers is also problematic in the remote areas of Finland where reception centres for asylum applicants are increasingly being built". See UNHCR, *Asylum Procedures Study*, Section 16: The right to an effective remedy, at p. 33.

<sup>266</sup> The time limit is up to one month after the notification of the first instance decision.

<sup>267</sup> See <http://www.cnda.fr/ta-caa/quels-sont-les-effets-de-la-demande-daide-juridictionnelle> .

<sup>268</sup> This is pending confirmation by the Legal aid Office of the CNDA of the provisional decision to grant legal aid.

association as they are not systematically informed of their rights. Also in France where currently about 100 lawyers are registered at the legal aid office of the CNDA, it is considered that there is a lack of capacity.

**Germany:** Asylum seekers receive an information leaflet at the start of the procedure at the Federal Office, which includes information on the provision of legal aid. For those asylum seekers who are illiterate the information is provided orally. A very detailed official form has to be filled out and a copy of the documentation concerning the applicant's asylum application and social benefits has to be attached. Asylum seekers who are not detained may be represented by a lawyer of their own choice. Many asylum seekers find a lawyer through other asylum seekers from the same country of origin, relatives or refugee organisations. However, detained asylum seekers receive a list of lawyers they may contact.

**Greece:** Asylum seekers may seek legal representation of their own choice at their own expense at all stages of the procedure but even with paid legal representation in practice it is difficult to obtain. There is no particular system in place to help the asylum seeker in finding legal aid to appeal to the Council of State. In practice, the applicant may have to pay the fees for annulment in advance and if the judge considers the application admissible, part of the fees are reimbursed to the asylum seeker.<sup>269</sup> Also in Greece where legal aid services mainly provided by NGO's the number of available lawyers specialised in asylum law is considered to be insufficient.

**Hungary:** Asylum seekers are informed of their rights by the Office of Immigration and Nationality (hereinafter OIN) at the first interview in the asylum procedure. The request for legal aid must be submitted through an official form to the Central Office of Justice. The form includes questions with regard to all the eligibility criteria for legal aid. Asylum seekers receive a list of lawyers operating in the region where they reside and may select a preferred lawyer. As discussed further in section 4.15 below no remedies exist for the asylum seekers who are dissatisfied with the quality of representation of their lawyer and no complaints mechanism exists in Hungary. In fact asylum seekers have no possibility to request a change of lawyer. According to the 2003 Act no. LXXX on legal aid only lawyers are entitled to stop representing the client on the basis of a lack of cooperation and mutual trust. Detained asylum seekers may have more difficulties in finding a lawyer than other asylum seekers as they have less means of communication and need more time to contact the Office of Justice. In Hungary only a few law firms have qualified lawyers to work with asylum seekers. In addition, the Hungarian Helsinki Committee's lawyers network has four lawyers available to assist asylum seekers under a legal aid scheme in addition to eight lawyers working with the HHC seven of which are part time.

**Ireland:** When an asylum seeker applies for asylum he or she is provided with the contact details of the Refugee Legal Service, UNHCR and other relevant agencies. In Ireland, applicants requesting legal aid must complete a Refugee Legal Service Registration Form and a letter of consent enabling the Refugee Legal Service to obtain a copy of the file from the Office of the Refugee Applications Commission/Refugee Appeals Tribunal or the Department of Justice. Once an asylum seeker is registered with the Refugee Legal Service a caseworker and solicitor are assigned to his or her case. Asylum seekers do not have the right to select a preferred lawyer as the Legal Aid Board nominates a solicitor of the Board for the purpose of providing the applicants with legal representation or advice. An

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<sup>269</sup> See UNHCR, *Study on Asylum Procedures, Section 16 – The right to an effective remedy*, p. 33.

application may be made for another lawyer than the one nominated by the Board which may grant such request if it considers the asylum seekers' wish reasonable in all the circumstances.

**Italy:** There is no specific information provided by the authorities to asylum seekers with regard to the right to legal aid. According to the law information leaflets should be provided by the authorities but in practice they are only available in various languages at the website of the Ministry of Interior. In reality asylum seekers will generally only receive information through refugee assisting non-governmental organisations. In Italy there are two alternative ways of requesting legal aid. Each court in Italy has a legal aid office, which is organised by the local lawyer's association board. Asylum seekers can apply directly in the office of the local legal aid office for a legal aid lawyer. In order to do so the asylum seeker must show the administrative decision that must be appealed, any substantiating documents and explain the reasons for the appeal. Alternatively the asylum seeker can contact a lawyer of his or her choice who is on the list of legal aid lawyers.<sup>270</sup> If the lawyer accepts to represent the asylum seeker under the legal aid regime he or she will also assist with the legal aid application. This legal aid application must include the signed consent of the asylum seeker. If asylum seekers do not indicate in their application for legal aid the name of a preferred lawyer, a lawyer from the list will be appointed.

**Lithuania:** Asylum seekers are informed about their rights in the legal aid system before each interview. Asylum seekers can either contact a lawyer who provides free legal aid directly or through the services of the Migration Department.

**Romania:** Asylum seekers are informed about their rights in the legal aid system by the Romanian National Council for Refugees. A request for legal representation must be submitted to a judge who will then approve it and order the local bar association to appoint a lawyer. The latter appoints a lawyer from a list of lawyers available for free legal representation of asylum seekers. It should be noted that the Court will of its own motion verify whether the applicant can afford a lawyer if the applicant has not made such request. Asylum seekers may not choose their preferred lawyer but a change of lawyer may be requested. It is also possible to apply with the Romanian National Council for Refugees, a NGO, for the paid services of a specialised lawyer. If accepted, the specialised lawyer will replace the lawyer appointed within the legal aid system.

**Slovenia:** Asylum seekers are informed about their rights with regard to legal aid and legal representation on arrival at the reception centre. Information sessions are organised in the reception centre by the non-governmental organisation PIC.<sup>271</sup> However, this is only the case when this activity is funded through the ERF. In periods where such activity is not covered by an ERF grant, such information is provided by civil servants. In Slovenia asylum seekers can choose a refugee counsellor from a list made available by the Ministry of Interior. Only those on the list are remunerated for their services under the legal aid regime. Social assistants in the reception centre as well as in detention centres assist asylum seekers with contacting refugee counsellors. Both the quality of refugee counsellors and the numbers available are problematic in Slovenia.<sup>272</sup>

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<sup>270</sup> This information is generally available on the internet.

<sup>271</sup> Legal Informational Centre for NGOs Slovenia (PIC).

<sup>272</sup> UNHCR reports that at the time of its research on asylum procedures in 12 EU Member States it found that only 6 legal advisers were actually operating in practice in Slovenia. See UNHCR, *Asylum Procedures Study. Section 16 - The right to an effective remedy*, at p. 33. March 2010.

**Spain:** In Spain there are two options regarding the appointment of a lawyer or legal advisor. Asylum seekers who apply for asylum in country<sup>273</sup> can ask for the assistance of a free legal advisor included in a list of non-governmental organisations specialised in refugee law. This list is provided by the Spanish authorities (Asylum Office).<sup>274</sup> Alternatively asylum seekers may also request a lawyer who is registered at the “Turno de Extranjeria” of the competent Bar Association of the province where they lodged their application.<sup>275</sup> Applicants may in principle not choose their legal aid lawyer but some Bar Associations allow it. When a legal aid lawyer is appointed by the Comision de Asistencia Juridica Gratuita it is difficult to change to another lawyer unless upon agreement between the first appointed lawyer and the preferred lawyer of the asylum seeker. Numbers are also in general considered sufficiently in Spain, but it may vary according to the province concerned. For instance, there are 800 legal aid lawyers registered in the “turno de extranjeria” in Madrid who do 1 24h-shift every 50 days (with a maximum of 6 cases per shift).<sup>276</sup>

**The Netherlands:** The Dutch Council for Refugees informs asylum seekers of their rights to legal aid. The authorities provide an information leaflet while information is also provided at the interview. Asylum seekers may select their preferred lawyer but free legal representation through the Legal Aid Board is only granted if the preferred lawyer is registered with the Board.

**United Kingdom:** Diverse systems exist to assist asylum seekers in finding a lawyer. For non-detained asylum seekers, in Birmingham, Liverpool and the North East there is supposed to be a system whereby they are allocated an appointment with an advisor. There is an advisor finder available on the Community Legal Service website.<sup>277</sup> The LSC funding regime does not encourage providers to run advice surgeries (there used to be funding for what was called 'Level 1 work' which could be used to fund such surgeries). Some NGO's operate free telephone advice lines (e.g. Asylum Aid), which can facilitate referrals. Other NGOs such as the Refugee Council provide support to asylum seekers in helping to find them lawyers.

Asylum seekers who are detained in Immigration Removals Centres are supposed to be able to access Legal Services Commission funded advice surgeries. However, there are reports that this does not meet the need. Asylum seekers who are put through the Detained Fast Track are allocated a Legal Services Commission funded representative. Those representatives benefit from exclusive contracts for the provision of publicly funded advice and representation in those removals centres.<sup>278</sup> Asylum seekers who are detained in prison have particular difficulties because there is no scheme to try to facilitate their access to legal aid.

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<sup>273</sup> At the OAR – Asylum office in Madrid or at the Migrant Office outside Madrid.

<sup>274</sup> In this option there is generally no need for them to prove a lack of resources. Recently some Autonomous Administrations (e.g. Madrid) have started asking for evidence to show the lack of resources whereas a declaration of honour by the asylum seeker used to be enough as they were presumed to be without sufficient financial resources.

<sup>275</sup> In this option the asylum seeker will have to provide evidence of the lack of financial resources and a certificate drafted by the Spanish Treasury Department.

<sup>276</sup> Note that this information was obtained at the time of the research and numbers may vary.

<sup>277</sup> See <http://www.communitylegaladvice.org.uk/en/directory/directorysearch.jsp>.

<sup>278</sup> The exception being where another provider has been representing the client and has already completed 5 hours work on the case.

Asylum seekers do not have a real possibility to select a preferred lawyer when free legal representation is provided. In the Detained Fast Track lawyers are allocated through an exclusive contracting regime. In all other cases much depends on geographical location and availability. Providers are only supposed to represent clients outside their geographic area if the client has tried at least two representatives in their locality and those providers are unable to help. In the United Kingdom the matter is disputed. The Legal Services Commission (a non-departmental public body sponsored by the Ministry of Justice that runs the legal aid scheme in England and Wales) is of opinion that there is sufficient provision. However, there have been reports that in some areas of the country asylum seekers are not able to access legal advice and representation within the short time limits within which initial claims and appeals can be processed<sup>279</sup>. Moreover, due to limitations placed on public funding in 2003 and 2007 “many good quality providers are no longer working in the area of asylum”. As of February 2009, the Legal Services Commission was undertaking a tendering process where providers had to bid for all asylum and immigration legal aid work for the next 3 years under new terms. This tender was based on a new analysis of the need for provision in certain areas of the country. The results of this tender will have a significant impact on whether legal aid funded lawyers are accessible.

**Norway:** Asylum seekers are informed of their right to legal aid by their lawyer and through the information provided at the reception centre immediately upon arrival. There is no organised system in place to assist the asylum seeker in finding a lawyer. There is also very limited legal aid in the first instance procedure, and asylum seekers will in general have to pay for legal assistance themselves at this stage. In practice asylum seekers may get assistance from staff working in the detention centre where they reside or receive information from other detainees. Police and staff in detention centres are not allowed to recommend specific lawyers but refer in practice to directories for lawyers. Some lawyers have contacts at major reception centres, which may facilitate their assignment in certain cases.<sup>280</sup> In many cases asylum seekers use their own network to contact a lawyer. In case of a negative decision on their application, a legal aid lawyer will be appointed from a list, which is open to only a limited number of lawyers, unless they already had chosen a specific lawyer before. If the county governor considers a change of lawyer to be necessary for e.g. in case of retirement or illness, costs will be taken charge of under the legal aid scheme . If the case is complex the second lawyer may also have his/her costs covered under the legal aid scheme but not the extra hours resulting from the change of lawyers.

**Switzerland:** Asylum seekers are in practice only informed of their rights by NGOs providing legal advice. The Swiss Refugee Council can provide asylum seekers with addresses of lawyers specializing in asylum law. Often asylum seekers also find a lawyer through their own networks, for example other asylum seekers from the same country of origin. The Swiss Refugee Council is permitted to make information leaflets available in the reception centres and at the airport. A number of NGOs that provide legal advice to asylum seekers are located in the proximity of reception centres and at the airport. In addition, a list of NGOs providing legal advice is distributed by a representative of a registered aid organisation (Hilfswerksvertreter) at the hearing. The Hilfswerksvertreter attend hearings as observers and they usually provide information leaflets to asylum seekers at the hearing if it is likely that the

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<sup>279</sup> See Independent Asylum Commission, “Saving Sanctuary”, 2008, available at <http://www.citizensforsanctuary.org.uk/pages/reports/SavingSanctuary.pdf>

<sup>280</sup> This practice rarely occurs anymore in Norway but occurred in the past and was criticized.

asylum seeker concerned will be transferred to a canton. Asylum seekers are moved to different cantons after having stayed in the reception centre for a maximum of 60 days. It is generally more difficult for asylum seekers to find a lawyer specialised in asylum law from the cantons as they can often not afford the travel expenses. Asylum seekers in detention awaiting expulsion also have a right to legal representation regarding the question of detention according to Swiss law and should be provided with a list of lawyers. To a certain extent asylum seekers may select their preferred lawyer if free legal aid is provided. If the applicant asks for a lawyer who has already agreed to take over his/her case, the court will most likely appoint this person as his/her legal representative. Asylum seekers may also try to find a new lawyer at any stage of the procedure but without support from the authorities. There is in theory a sufficient number of lawyers but that is only because free legal aid is only granted in very few cases in practice. Even in the cases for which free legal aid is granted, the costs are not reimbursed until after the final judgement. Therefore, most asylum seekers cannot afford a private lawyer. Apart from lawyers, there are legal advisory services provided by NGOs in almost all the cantons.

#### **4.7 Legal aid and Translation, Interpretation and Expert Consultations**

This section provides information on the extent to which translation, interpretation and expert consultations within the asylum procedure is covered by the legal aid system.

**Austria:** Translation and interpretation of administrative proceedings and court proceedings is provided for by the national authorities but not as part of the legal aid regime. Documents are also translated by the interpreters who are at the disposal of the first instance or appellate body. Medical examinations and evidence is not covered under the legal aid regime but is provided for under the health care system.

**Belgium:** Interpretation and translation of documents for the administrative and court proceedings are provided by the authorities. Translation of documents and interpretation services for meetings between the lawyer or legal advisor and the asylum seeker can be arranged. Permission must be requested of the Legal Aid Office in order to use qualified interpreters certified by the Tribunal. It is also possible to seek the assistance of a specialised organisation. However, there is a limit to the translation of documents covered by the legal aid regime. Costs for medical examinations and evidence and supporting evidence and witnesses are not covered under the legal aid regime.

**Czech Republic:** Translation and interpretation costs at first instance and at the appeal stage are not covered by the legal aid regime but are automatically provided by the State. Also personal documents belonging to the applicant are translated where necessary, at the first instance by the Ministry of Interior. Costs relating to translation and interpretation of meetings between lawyers or advisors and their clients are not paid for by the legal aid system. Costs relating to expert consultations including medical examinations and supporting evidence and witnesses are also not covered under the legal aid regime.

**Denmark:** Translation and interpretation of administrative proceedings, court proceedings, meetings between the lawyer and the client and documents specific to the applicant are covered by the legal aid regime. Costs for expert consultations are covered only in exceptional cases. Additionally, Amnesty International organises a group of medical experts who sometimes assist with medical examinations in torture cases on a voluntary basis.

**Finland:** Translation and interpretation of administrative proceedings, court proceedings, meetings between the lawyer and the client and documents specific to the applicant are covered by the legal aid regime. Also expert consultations with regard to medical examinations and evidence are covered by the legal aid regime.

**France:** In France translation and interpretation during the interview before the OFPRA and the hearing before the CNDA are paid by the State. Expert consultations are not covered by the legal aid regime. No interpreters are made available to facilitate communication between the lawyer and the asylum seeker.

**Germany:** Translation and interpretation and expert consultations are not covered by legal aid. Interpreters are made available for the procedure before the BAMF if the applicant does not have sufficient knowledge of German.<sup>281</sup>

**Greece:** In theory translation and interpretation costs related to the administrative procedure are covered by the legal aid regime. Interpreters should be available for the examination of asylum claims. However in practice the reality is very different.<sup>282</sup> Thomas Hammarberg, the Commissioner for Human Rights of the Council of Europe following his visit to **Greece** in 2008 noted “with grave concern that the problem of lack of sufficient interpretation has been a chronic problem in the Greek asylum system”. The costs for expert consultations are not covered by the legal aid regime.

**Hungary:** Translation and interpretation and expert consultations are not covered by legal aid.

**Ireland:** Translation and interpretation of administrative proceedings are paid for by the state. This is also the case in respect of detention hearings or in other cases where the asylum seeker is giving evidence apart from judicial review proceedings taken by the applicant. Translation and interpretation for meetings between the lawyer or advisor and client are covered by the legal aid system. The translation of documents specific to the applicant is also covered by the legal aid system. Similarly the legal aid system covers expert consultations such as medical examinations and evidence and supporting evidence and witnesses. However, the latter is not automatic and legal aid must be applied for and granted for each matter taking into account the merits of the claim as noted in section 5 above.

**Italy:** The legal aid system covers the costs of translation and interpretation of administrative proceedings and court proceedings although for the latter this is not automatically granted. Costs relating to interpretation services to facilitate meetings between lawyers and their clients and to the translation of documents specific to the asylum seeker are not covered by the legal aid system. Costs related to medical examinations and supporting evidence from other parties such as witnesses are also not covered by the legal aid system.

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<sup>281</sup> See IGC, *Asylum Procedures Report*, at p. 179.

<sup>282</sup> This has been described as a “chronic problem” in the Greek asylum system in the Hammarberg Report on Greece. See Commissioner for Human Rights of the Council of Europe, *Report by Thomas Hammarberg following his visit to Greece on 8-10 December 2008*, CommDH(2009)6 Strasbourg 4 February 2009, p. 10. UNHCR also documented “severe deficiencies in the provision of interpretation”, in particular at crucial Police Directorates at land and sea borders with Turkey where no Police Directorate had ever recruited permanent interpreters. See UNHCR, *Observations on Greece as a country of asylum*, December 2009, p. 15-16. See also the IGC *Asylum Procedures report 2009* stating that “the services of interpreters are mandated by law and efforts are being made to cover the needs for interpretation at all stages of the procedure, in cooperation with non-governmental organisation (NGOs)”. IGC, *Asylum Procedures Report*, at p. 199.

**Lithuania:** Translation and interpretation services for administrative and court proceedings is not covered by the legal aid scheme but is organised by the Migration Department and the Court. Translation and interpretation for meetings between the lawyer or advisor and client and of documents specific to the applicant and expert consultations are not covered by the legal aid scheme.

**Romania:** The legal aid system covers the costs related to the translation and interpretation of administrative proceedings and interpretation of court proceedings but does not cover the costs related to interpretation of meetings between lawyer or advisor and client and the translation of documents specific to the applicant and expert consultations.

**Slovenia:** All decisions by the administrative authorities and Courts are translated into a language that the asylum seeker understands. Costs related to translation and interpretation of administrative proceedings are only covered under an ERF funded project for legal aid provided at first instance. Costs relating to the interpretation of court proceedings, the translation of documents specific to the asylum seeker and expert consultations are not paid for through the legal aid system. However interpretation services for meetings between the refugee counsellor or lawyer and the asylum seeker are covered by legal aid.

**Spain:** Translation and interpretation of administrative proceedings and country of origin information including personal documentation that is specific to the applicant and unavailable in Spanish is covered by the legal aid system during the first instance procedure. This is not the case for translation and interpretation of court proceedings and meetings between a lawyer or legal advisor and their clients. Medical examinations and other expert evidence are not normally covered by legal aid. However, depending on the circumstances of the claim, expert medical examinations may be covered if a judge considers it necessary for the examination of the claim.

**The Netherlands:** The legal aid system covers the costs of translation and interpretation of administrative and court proceedings, meetings between lawyer or advisor and client, documents specific to the applicant. Costs of expert consultations including medical examinations and evidence can be covered. However, the latter does not come within the legal aid regime. If a lawyer wants to submit expert opinions he or she has to apply for funding from the COA (Central Agency for the Reception of Asylum Seekers) but usually the total costs are not compensated for in reimbursements.

**United Kingdom:** Translation and interpretation of administrative and court proceedings are provided by the UK Border Agency<sup>283</sup> and the First-tier or Upper Tier Tribunal (Immigration and Asylum Chamber) respectively.<sup>284</sup> Translation and interpretation for meetings between the lawyer or advisor and the client of material that is specific to the applicant and costs related to expert medical examinations and supporting evidence and witnesses are covered under the legal aid regime.<sup>285</sup>

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<sup>283</sup> Funding is only available for interpreters instructed by the applicant where the lawyer is permitted to attend.

<sup>284</sup> The lawyer can provide an interpreter to assist the applicant in instructing counsel if such disbursement is approved.

<sup>285</sup> However, it can be very difficult to obtain permission from the Legal Services Commission if the expert's fees are beyond the disbursement limits and the case is not at the appeal stage.

**Norway:** Interpretation of administrative and court proceedings is paid for by the legal aid system as well as interpretation of meetings between lawyer and client. The translation of relevant documents should be undertaken by the administration. The administration decides whether or not it is necessary to translate documents provided by the asylum seekers or his/her applicant. Costs relating to expert medical examinations, other supporting evidence and witnesses may be covered by the legal aid system upon application at the discretion of the county governor.

**Switzerland:** The costs of translation and interpretation services for administrative proceedings, meetings between the lawyer and the asylum seeker and the translation of relevant personal documents are paid for by the legal aid system. Also costs related to medical examinations, other supporting evidence and witnesses are covered. This is not the case for costs of translation and interpretation during court proceedings as the latter is a strictly written procedure. As a general remark it should be noted that lawyers may include all their activities in their debit note. However, as they are compensated per time, it is possible that the Court reduces the amount of time it deems necessary for the case and thus the amount of legal aid for the lawyer. As mentioned before, free legal representation is rarely granted in asylum cases.

#### **4.8 Legal Aid in the Asylum Procedure: the Preliminary Interview**

This section provides information on the role of legal advisors and lawyers during the preliminary interview.

**Austria:** A preliminary interview is used only for the purpose of gathering information with regard to the travel route, the identity and nationality of the asylum seeker. In general, asylum seekers do not submit a written statement of the reasons for requesting asylum as part of an application for asylum. In theory a legal advisor or lawyer may assist the applicant to prepare the application but in practice asylum seekers do not have a legal advisor before they lodge their application unless they have paid a lawyer themselves to represent them. Flüchtlingsberater can be requested to assist asylum seekers with their application in theory. Free Legal assistance may also be available for this purpose depending on whether NGO's have capacity to provide this service or not. It should be noted that certain parts of the asylum seekers' file are not disclosed by the asylum authorities to the applicant's legal advisor. This is, for instance, the case with information regarding consultations of other Dublin states on the application of the Dublin Regulation during the admissibility procedure or "certain internal comments of the authority".

**Belgium:** In Belgium the asylum application is lodged with the Office des Etrangers (hereinafter OE), at the border or in a detention centre. Once the application is registered a preliminary interview is held directly and focuses on questions relating to travel route, nationality and identity of the applicant. During that time the applicant also receives a questionnaire to be completed on the reasons for the application, which must be sent to the first instance authority, the Commissioner-General for Refugees and Stateless persons within five days. In practice the questionnaire is often completed directly at the OE, which can result in mistakes in some cases particularly if applicants are not aware of the importance of the questionnaire. Legal advisors may in theory help asylum seekers to prepare the application but at this stage often the applicant has not been in contact with any lawyer or legal advisor. Free legal assistance is not available for this purpose. While legal advisors and lawyers may attend all other hearings and interviews in the asylum procedure this is not permitted for the preliminary interview at the OE. However, a guardian must be

present at the preliminary interview for unaccompanied children<sup>286</sup> while a person holding parental supervision under his or her national law must be present at the interview for any asylum seeker below 18.<sup>287</sup>

**Czech Republic:** Prior to the first instance procedure there is no preliminary interview but asylum seekers normally submit a written statement of their reasons for requesting asylum. Legal advisors are not permitted to help the asylum seeker to prepare the application at this stage.

**Denmark:** In the normal procedure, asylum seekers firstly meet with the police and fill out an application form. This is followed by a short preliminary interview that should deal exclusively with the travel route of the applicant but in practice also includes brief questions about the applicant's reasons for seeking asylum. Legal advisors may assist applicants to prepare the application. A lawyer can only assist an asylum seeker at this stage of the procedure at his or her own personal expense. Since filling out the application form takes place shortly after arrival, the asylum seeker will rarely have been in contact with any organisations providing free legal assistance. It should be noted that in case the asylum application is channelled through the manifestly unfounded accelerated procedure, asylum seekers do not fill out an application form as their cases are processed immediately. This procedure is applied for those asylum seekers originating from countries, which are listed as safe countries of origin.<sup>288</sup>

**Finland:** An application for international protection is submitted to the police or the border control authorities on arrival in Finland or shortly after that. Applicants always submit a written statement of their reasons for requesting asylum. If the applicant is illiterate than a police officer will write down their reasons for requesting asylum with the assistance of an interpreter. Legal advisors are not entitled to assist asylum seekers to prepare this statement for their asylum application. Once an asylum application has been submitted there is a short interview where the police or Frontier Border Guard establishes the applicant's identity, travel route, and means of entering the country. At this point, information about the applicant's family members and other close relatives is also gathered. Legal advisors may assist the applicant during this interview. In theory a legal advisor could be present when the applicant submits an asylum application but this happens very rarely in practice. Often legal advisors will not have had any contact with asylum seekers at this early stage of the procedure.

**France:** Generally there is no preliminary interview prior to the first instance proceedings but applicants normally submit a written account of the reasons for requesting asylum.<sup>289</sup> In theory legal advisors may help the applicant to prepare the

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<sup>286</sup> See Article 9 Royal Decree of 11 July 2003 establishing certain elements of the procedure to be followed by the department of the Aliens office responsible for the examination of asylum applications, *Moniteur belge*, 27 January 2004.

<sup>287</sup> Article 10 of Royal Decree of 18 August 2010 amending the Royal Decree of 11 July 2003 establishing certain elements of the procedure to be followed by the department of the Aliens office responsible for the examination of asylum applications, *Moniteur belge*, 3 September 2010.

<sup>288</sup> By the end of August 2010 (time of concluding this survey), this list included all EU Member States + 23 outside the EU, namely Albania, Australia, Benin, Bosnia-Herzegovina, Canada, Ghana, Iceland, Japan, Kosovo, Croatia, Macedonia, Moldova, Mongolia, Montenegro, New Zealand, Niger, Norway, Russia, Switzerland, Senegal, Serbia, Tanzania, USA. For Kosovo and Russia exceptions apply for specific minorities and profiles.

<sup>289</sup> However, a preliminary interview may be conducted at the "prefecture" (local administration) on the travel route and identity of the applicant for the purpose of the application of the Dublin Regulation and the application of the accelerated procedure.

application but in practice this never happens as asylum seekers are badly informed of the possibilities to access legal assistance.

**Germany:** Asylum seekers have a preliminary interview with a border guard or police officer where detailed questions are asked about their travel route and identity. Normally this interview does not examine the grounds for asylum. Legal advisors may assist applicants to prepare the application. As mentioned in section 4.2 legal advisors from welfare organisations can assist asylum seekers at this stage of the procedure and before the Federal Office for Migration and Asylum however this rarely happens in practice.

**Greece:** There is no preliminary interview prior to the first instance proceedings and applicants do not have to submit a written statement of their reasons for requesting asylum. Legal advisors may assist applicants to prepare the application but it is at the applicant's own expense. There is no free legal assistance available for this purpose. It should be noted that though law does not prescribe it a preliminary interview sometimes does take place in some police directorates.<sup>290</sup>

**Hungary:** A preliminary interview is organised on the travel route and the collection of personal data including fingerprints by a staff member of the Office of Immigration and Nationality (OIN). In certain cases asylum seekers who are assisted by legal advisors may also submit a written statement. Legal advisors may assist applicants to prepare the application and have access to the applicant's file with the exception of information used to prepare the decision and country of origin information and other information that is available to the determining authority. Free legal assistance is available for this purpose.

**Ireland:** Asylum seekers must complete an initial application form following their encounter with an immigration official. When the asylum seeker attends the preliminary interview at the Refugee Applications Commissioner he or she is asked further questions, the application form for asylum is completed and fingerprints are taken. He or she will then be given a questionnaire containing approximately fifty questions in relation to the asylum application, which includes a personal statement on the reasons for requesting asylum. Legal advisors may assist asylum seekers in preparing the application but in practice the Refugee Legal Service is only capable of providing such a service to vulnerable applicants, such as minors. As soon as an applicant registers with the Refugee Legal Service, a form of authority is sent to the first instance authority requesting a copy of the applicant's file. Subject to certain delays in translating the Questionnaire, these files are generally received.<sup>291</sup>

**Italy:** Asylum seekers firstly meet with a police officer prior to the first instance interview in order to register their application. On that occasion the asylum seeker is requested to fill out an application form explaining the reasons for leaving his or her

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<sup>290</sup> For example in the Athens Aliens Directorate a detailed preliminary interview has been known to take place sometimes.

<sup>291</sup> There is a difficulty, however, in that if an applicant contacts a representative after his or her substantive interview and asserts that there were difficulties during the interview (at which no representative was present on his or her behalf - which is the case for most applicants), a legal representative will not be furnished with a copy of the Section 11 Interview Notes (a written record kept by the interviewer of what was said during interview) until after a decision is made. This can significantly impede a legal representative's ability to understand and assess the extent of the issues arising. Under old procedures, which were abolished in 2003, the applicant would receive a copy of his or her interview notes on the day of the interview and could bring them to his legal representative who, in all cases, could choose to lodge submissions within 7 days on any points arising.

country. If no interpreter is available the asylum seeker is allowed to write down his or her account in his or her own language. Documentation supporting the case may be produced at this or a later stage. Asylum seekers may get some advice and support from legal advisors if they manage to get in touch with a legal advisor before the application is lodged but in any case legal advisors may not be present at the police station where the application is registered.

**Lithuania:** An interview prior to the first instance procedure is organised where both basic identification questions and questions on the reasons for requesting asylum are asked. Asylum seekers normally also submit a written account of the reasons for their asylum application. Legal advisors are permitted to assist the asylum seeker in preparing the application and supporting submissions but it is not covered under the free legal aid scheme.

**Romania:** A preliminary interview is organised at first instance with a staff member of the Romanian Immigration Office, which immediately deals with the reasons for requesting asylum. Asylum seekers normally submit a brief written statement of the reasons for requesting asylum but sometimes this is done by a staff member of the Romanian Immigration Office who is responsible for registering the asylum application. Asylum seekers must attend all interviews and hearings and may be assisted during the entire procedure by a staff member of UNHCR or a non-governmental organisation on request depending on their capacities.

**Slovenia:** Persons who wish to apply for asylum are referred to the police to establish their identity and their travel route to Slovenia and in order to record a personal statement on their reasons for asking asylum. A written record of this interview is submitted to the relevant authority, which is the Section for International Protection in the Ministry of the Interior. Legal advisors are prohibited from helping asylum seekers to prepare their asylum application. Asylum seekers fill out the application form together with a “public official” or civil servant and must state their reasons for requesting asylum autonomously. The public official will then complete the application taking into account the applicant’s interview and any additional evidence or identity documents in the asylum seeker’s possession. Free legal assistance is not specifically available for this purpose but asylum seekers may seek help from a legal advisor from a NGO funded under ERF depending on their capacity to assist.

**Spain:** Asylum seekers are requested to submit their applications as soon as possible and in any case within one month after entry. The asylum procedure starts with a preliminary interview where the asylum seekers is informed about his/her rights and duties, the procedure, and the possibility to contact UNHCR and those NGOs who provide advice to persons in need of international protection. Besides that, the asylum seeker has to provide all those elements together with his/her own statement that contribute to substantiate the application. Among others, he/she can provide documentation about his/her age, background, identity, nationality or nationalities, places of previous residence, previous applications for international protection, travel itineraries, travel documents and reasons for which he/she seeks protection. The asylum seeker, where appropriate, should consent his/her statements to be recorded, provided he/she have been previously informed about this point. Legal aid lawyers may assist asylum seekers in preparing their asylum application but asylum seekers often are not aware of the possibility to contact legal aid lawyers before they lodge their application. Asylum seekers can also provide written statements if they wish to do so and legal aid lawyers may assist asylum seekers during all stages of the asylum procedure.

**The Netherlands:** A first interview is conducted with the asylum seeker by the Immigration and Naturalisation Service (IND)<sup>292</sup> which registers the asylum seeker's identity and nationality, the asylum seekers' travel route and any documents he or she submits. A second interview concerns the reasons for requesting asylum. Asylum seekers do not normally submit a written account of the reasons for requesting asylum although it happens in exceptional cases for example when the asylum seeker has psychological problems. Legal aid lawyers may assist asylum seekers in preparing their asylum application but asylum seekers rarely come into contact with legal aid lawyers before they lodge their application. Once the application is lodged legal aid lawyers may assist asylum seekers during all stages of the asylum procedure. However, legal aid lawyers are only reimbursed for the tasks they perform after the initial interview. Before the initial interview asylum seekers are usually only assisted by legal advisors. The Dutch Council for Refugees can only provide general information on the asylum procedure at that stage.

**United Kingdom:** A preliminary interview known as a 'screening' interview is organised prior to the first instance proceedings in which basic identity questions, questions on the travel route and limited questions relating to the reasons for requesting asylum are asked. Applicants are not required to submit a written account of the reasons for requesting asylum<sup>293</sup> but as a matter of good practice many legal representatives do so. Legal advisors may help the applicant to prepare the application and make submissions,. Best practice indicates that legal advisors should gather evidence, including country of origin information, for submission to the decision maker in order to make an informed assessment of the need for international protection.

**Norway:** Asylum seekers are registered by the police where they also submit briefly at this initial stage the reasons for their fear for persecution before the actual interview with the Directorate of Immigration (hereinafter UDI) staff takes place. Asylum seekers also normally submit a written statement of their reasons for requesting asylum before the UDI interview. Lawyers may help the asylum seeker to prepare the application and provide supporting submissions at this stage. The lawyer will have access to the applicant's file upon request and to a limited degree of the country of origin information available to the determining authority. It should be noted that only unaccompanied children and cases where national security concerns may rise or where exclusion clauses may be applied, have a right to legal aid at this stage of the procedure. Other asylum seekers may apply for legal aid at this stage but in practice it is very rarely granted. In practice, very few asylum seekers receive legal aid in the first instance.

**Switzerland:** In Switzerland a preliminary interview takes place at the start of the asylum procedure. This preliminary interview deals with personal data and the travel route. In principle only a brief account of the reasons for claiming asylum should also be recorded at this stage. This should normally be a short interview but in reality it often lasts for several hours and a considerable number of questions concern the merits of the asylum claim. The record of this interview is also later used by the Federal Office for Migration to identify credibility issues and any contradictory statements made by the applicant in the substantive asylum interview. The

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<sup>292</sup> Immigratie-en Naturalisatie Dienst.

<sup>293</sup> Apart from the Early Legal Advice Pilot where the applicant's legal representatives are required to submit a witness statement before the interview. This was designed to test the effectiveness of the principle of frontloading and the Pilot's evaluation was positive about this change. See J. Aspden, *Evaluation of the Solihull Pilot*, October 2008.

preliminary interview is conducted by the border police at the airport and by the Federal Office for Migration in the reception centres. Asylum seekers' statements at the preliminary interviews are recorded in writing by either the border police or the Federal Office for Migration. Legal advisors may in theory assist asylum seekers to prepare the application but in practice asylum seekers only come into contact with legal advisors after they have lodged their application. Legal representatives may but are not obliged to attend all interviews and must be informed well in advance of the time and place of the interview.

#### **4.9 Legal Aid in the Asylum Procedure: the Asylum Interview**

This section provides information on the role of legal advisors and lawyers during the main asylum interview.

**Austria:** asylum seekers must attend all interviews in the asylum procedure in person while a legal advisor may also be permitted to attend interviews. It should be recalled that in Austria a right to legal aid by a private lawyer only exists for proceedings before the Constitutional Court, which means that in practice at the first instance, and at the first appeal stage legal assistance and 'representation' is provided by legal advisors. The asylum seeker must respond to questions in person and no exceptions are made for particularly vulnerable applicants.<sup>294</sup> However, if the asylum seeker is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control a "procurator" will be appointed. Guidelines on the conduct of interviews were developed through an ERF funded project. If the legal advisor representing the client is unable to attend the interview it will not be postponed and another advisor will be asked to replace them. However, in the case of unaccompanied children a legal advisor must be present in order to conduct the interview. Legal advisors may intervene and participate in the interview if they have a mandate to represent the asylum seeker. This includes the possibility to make comments or ask additional questions during or at the end of the interview. However, to clarify legal advisors are only allowed to ask additional questions if there are present as the legal representative of the asylum seeker. Legal advisors do have access to the applicant's file but do not have access to the country of origin information relied upon by the authority in advance. As noted in section 8 on preliminary interviews above certain part of the file may not be disclosed to the lawyer for example if there are Dublin proceedings, or comments from the authorities are on file. In many cases there is insufficient time in the first instance procedure before the interview for the legal advisor to become familiar with the applicant's file. This is less of a problem at the appeals stage. It must be noted that legal advisors are not expected to research and provide country of origin information but it is good practice to do so. In any case the legal advisor must respond to the country of origin information that is presented by the authorities. Certain tasks relating to the preparation of submissions such as recording the asylum seeker's statement and gathering evidence, are provided for depending on the resources and funds of non-governmental organisations involved in the provision of legal advice.

**Belgium:** In Belgium asylum seekers are required to be present during the main asylum interview at the first instance authority (CGRS). Legal advisors<sup>295</sup> or lawyers may attend this interview and free legal aid is available for this purpose. Asylum

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<sup>294</sup> There may be justified reasons why an applicant is not able to attend the interview. In such case the interview is postponed.

<sup>295</sup> In order for legal advisors to be able to be present during the interview, they must meet the definition of "person of trust" as laid down in the Royal Decree of 18 August 2010. Only persons assisting asylum seekers in a professional capacity such as social workers or representatives of NGO's active in the field of asylum can be considered as "persons of trust".

seekers must respond in person to questions during interviews and hearings. No exceptions are made in principle for vulnerable asylum seekers but internal guidelines exist on the interviewing of such categories of asylum seekers. The applicant's statements are recorded by way of handwritten notes of the caseworker of the CGRS. Interviews or hearings are rarely postponed in situations where the legal advisor or lawyer cannot attend. Legal advisors may intervene, make comments and ask additional questions during or at the end of the interview at the first instance authority. In general they have sufficient time with the applicant to represent them effectively in the interview. However, legal advisors or lawyers have no access to the applicant's file before the decision of the first instance authority. It must be noted that the applicant or applicant's counsel is expected to conduct some country of origin information research. All tasks related to the preparation of submissions such as gathering evidence and participating in the interview are paid for under the legal aid system. However, there is a limit to the amount of documents that can be translated under the legal aid regime. Also costs relating to medical reports and other expert reports are not covered under the legal aid regime.

**Czech Republic:** At the first instance, an asylum seeker is interviewed by a civil servant from the Department of Asylum and Migration Policy in the Ministry of the Interior. Asylum seekers are obliged to respond in person to questions during the personal interview. Free legal aid is only available at the appeals stage however legal advisors from non-governmental organisations play a role at this stage of the asylum procedure. Legal advisors may usually not intervene during the interview but can make comments at the end of the interview. Interventions during the interview may be allowed by some caseworkers of the Ministry on a discretionary basis. Legal advisors are not permitted to ask additional questions during or at the end of the interview. In practice there is usually sufficient time for contact between the applicant and their legal advisor before the personal interview with the exception of those asylum applications processed while the applicant is in the transit border zone and for certain manifestly unfounded procedures.<sup>296</sup> Case law has established the principle that the person representing the asylum seeker must be given the opportunity to access the entire dossier of his or her client with the exception of information that is labelled as "secret" by the government authorities.<sup>297</sup>

**Denmark:** Asylum seekers are required to be present during the main interview. Asylum seekers must also respond in person to questions and there are no exceptions for particularly vulnerable asylum seekers. It should be noted that normally the decision in the asylum application is taken by one civil servant in the Danish Immigration Office. However for particularly complex cases the decision is endorsed by two civil servants. The Danish Refugee Council (DRC) offers legal assistance in the form of occasional counselling visits to the asylum centres, providing counsel by phone and by e-mail and a weekly counselling session at the headquarters of the DRC in Copenhagen. In principle legal advisors are allowed to attend the first instance interview, but this happens very rarely and would be at the asylum seekers' own expense. Free legal aid is generally only available at the appeals stage in Denmark. However, in a few cases some vulnerable asylum seekers are assisted by volunteers during the interview.<sup>298</sup> In Denmark the lawyer or

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<sup>296</sup> For further information on border procedures and accelerated procedures in the Czech Republic see section 11 below and Chapter III, section 5.3.

<sup>297</sup> This concerns information provided by intelligence services.

<sup>298</sup> It should be noted that a personal representative is appointed to assist all unaccompanied children. This representative is present during all interviews of unaccompanied children. See Chapter IV section 14 below for further information.

legal advisor will be granted access to all information relevant to the case upon request. However this is not applicable in situations where the applicant is suspected of terrorism. In such cases the Minister of Justice can order that certain evidence or material is not disclosed to the lawyer.<sup>299</sup>

**Finland:** The claim is examined by the Finnish Immigration Service at first instance of the asylum procedure. Legal aid is available throughout the asylum procedure in Finland and legal advisors may attend both interviews. Applicants must respond in person to questions at the interview. Interviews may be postponed in case the lawyer or legal advisor is unavailable. Legal advisors may intervene and participate in the interview by way of making comments and asking additional questions. Generally they also have sufficient time and contact with the asylum seeker in advance of the interview. The applicant or applicant's counsel is not expected to do country of origin information research but the lawyer is compensated for these activities. Gathering evidence and the participation of the lawyer in the interview is paid for through the legal aid system. In Finland the legal advisor or lawyer is provided with all the information held by the determining authority when requested. However, some difficulty is reported with regard to Dublin II Regulation cases where responses from other Member States in take charge or take back requests are not disclosed by the Finnish Immigration Office, nor is any information given about the stage of the Dublin procedure. All depends on the goodwill of the official handling the case as there are no clear rules. The authorities may also withhold language analysis reports on the applicant's files.

**France:** In France asylum claims are examined at the first instance stage by civil servants in a specialized authority, OFPRA. Asylum seekers must attend the substantive asylum interview. It should be recalled that free legal aid is only available at the appeals stage. France does not implement Article 16(4) of the Asylum Procedures Directive as lawyers cannot attend interviews at the first instance. Applicants must respond in person to questions at hearings and there are no exceptions for vulnerable applicants. In France the lawyer has access to the notes recorded by the official during the interview but no access to country of origin information relied upon by OFPRA, the first instance authority. However, it should be noted that the asylum seeker only receives part of the OFPRA-file (only the questions and answers) immediately together with the first instance decision, which often only has a short motivation. The notes of the OFPRA official relating to the substantial reasons for the refusal are only sent by the Appeal body (CNDA) to the asylum seeker and his/her lawyer *after* the appeal has been lodged. This means that the appeal must be lodged by the lawyer without having seen this part of the file. Also in some cases OFPRA refers to "according to our information" without disclosing the actual information or the sources.

**Germany:** At the first instance, asylum seekers are interviewed by one civil servant "Sachbearbeiter Asyl" at one of the nine branches of the Federal Office of Asylum (BAMF). Asylum seekers must be present at all interviews and hearings and must respond in person to questions. If an asylum seeker does not appear for an interview and has no medical certificate to cover his or her absence the BAMF may decide on the application without a personal interview. No specific guidelines exist with regard to interviewing vulnerable asylum seekers but some staff members of the BAMF have received specific training on interviewing minors or victims of gender related persecution. However, in practice vulnerable asylum seekers are rarely referred to

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<sup>299</sup> According to the ELENA Co-ordinators knowledge this decision has been made in relation to four cases so far in Denmark.

the specialised staff members<sup>300</sup> (who are not available in each of the 19 branch offices of the BAMF) for efficiency reasons. Lawyers are allowed to assist at all interviews and hearings, including at the BAMF but it is not a requirement. In practice in many cases lawyers do not attend interviews or hearing if asylum seekers are unable to pay their fee as this is not covered by free legal aid. Also another obstacle to the presence of the lawyer at the interview is that applicants often have their interview very quickly after arrival and in fact do not have an opportunity to contact or mandate a lawyer (“Rechtsanwalt”). As mentioned above, free legal aid is only available at the appeals stage. There is no obligation for the BAMF to postpone an interview at the request of a lawyer but in practice caseworkers are rather flexible. Legal advisors may intervene and participate in the interview including making comments and asking additional questions. Legal advisors or lawyers have access to the complete file of the BAMF or the Court upon request. Courts files are sent to the lawyer whilst the files of the BAMF have to be requested at the regional branch office. Lawyers also have access to the BAMF’s country of origin information as long as they claim it is necessary for the case and provide the number of the case they are dealing with to the BAMF.

**Greece:** In Greece the first instance decision is taken by the Head of the Police Authority of the Prefecture based on a recommendation of a panel. In theory the panel consists of 2 policemen, a representative of the prefecture and a representative of UNHCR.<sup>301</sup> Asylum seekers must be present at all interviews and hearings while legal advisors or lawyers may attend all interviews and hearings except in transit zones, where lawyers’ access to asylum seekers may be restricted for national security reasons.<sup>302</sup> Lawyers are permitted to intervene but in practice their intervention is not always unhindered. According to the Presidential Decree lawyers are allowed to be ‘present’. However, in a Police Directorates circular the ‘presence of the lawyer’ was interpreted as meaning the lawyer could only be present during the interview but was unable to intervene. Following complaints against this practice, in Aliens police directorate in Athens this practice does not apply anymore although the lawyer’s intervention is still not unhindered. The lawyer can ask additional questions but not directly to the applicant but “through the chairperson” of the committee. The “chairperson of the committee” finally decides whether a question should be asked. In other police directorates, the “presence and non-intervention” principle of the lawyer applies probably still – many “refugee committees” still believe that lawyers should not intervene. These changes in the practice occurred after the Presidential Decree 81/2009 and the drastic deterioration of the asylum procedure. It should be noted, however, that the free legal aid is only available at the appeal stage and even then it is very restricted.<sup>303</sup> Asylum seekers must respond in person to questions at hearings and interviews and no exceptions are made for vulnerable asylum seekers. Hearings or interviews may proceed even if the lawyer or legal advisor is unable to attend the interview. It should be noted that for the majority of interviews no legal representative is present. Representatives of asylum seekers should in theory have access to the asylum seekers whole file.

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<sup>300</sup> It should be noted that this specialized staff members are not available in each of the 19 branch offices of BAMF.

<sup>301</sup> After the adoption of Presidential Decree 81/2009 which abolished the administrative appeal procedure UNHCR withdrew from the Panel.

<sup>302</sup> See Article 16(2), second sentence Asylum Procedures Directive.

<sup>303</sup> See Chapter III, section 3.4. above for further information.

**Hungary:** The asylum claim is examined by an administrative body, the Office of Immigration and Nationality. Asylum seekers must be present during the asylum interview at the Migration Department unless they are unfit to be interviewed. Legal advisors are allowed to attend all interviews and hearings. Free legal aid is available throughout the asylum procedure with legal advisors assisting asylum seekers in the administrative procedure and lawyers representing them before the Courts upon appeal. The applicant must respond in person to questions and no exception is made for vulnerable applicants. Generally interviews are held even if the legal advisor or lawyer is unable to attend. However, some caseworkers are more flexible than others in this matter. Legal advisors may intervene and participate in the interview and make comments and ask additional questions.

**Ireland:** Asylum claims are examined at the first instance by a specialized authority, the Refugee Applications Commissioner (ORAC). The ORAC then makes a recommendation to the Minister for Justice, Equality and Law Reform who follows the recommendation and issues a decision. Asylum seekers must personally attend any interviews or appeal hearings. Legal representatives, including Refugee Legal Service caseworkers, may attend at the first instance interview. In practice, caseworkers always attend the interviews of unaccompanied children and may attend the interviews of other vulnerable persons. Legal representatives (in practice, either solicitors or barristers, instructed by solicitors) may represent the asylum seeker at appeal. In practice, legal information is provided to the applicant at an appointment with their caseworker in advance of the submission of their questionnaire or in advance of interview. Unless the applicant is vulnerable, case specific advice is not generally provided. During the interview asylum seekers must respond in person to questions. No express exceptions are made for vulnerable asylum seekers but in certain cases interviews have been postponed or limited to specific points. Legal representatives may make comments at the end of the first instance interview and request the interviewer to ask additional questions. Legal representatives are generally given sufficient time and contact with the asylum seeker to prepare the hearing. Difficulties can arise in circumstances where the applicant is subject to an accelerated procedure and procurement of an expert report from SPIRASI (The Centre for the Care of Survivors of Torture), for example, is required which takes several weeks or months. In this situation, as there is no express provision for such events, practitioners are dependent on the discretion of the decision makers to accept such reports after the interview has been held or after an appeal has been lodged and before a decision is issued. In advance of a decision issuing, the legal representative will not know specifically which country of origin information will be relied on by the determining authority. Also good practice in Ireland should be noted whereby there is a specialised legal aid regime for potential victims of trafficking. Legal aid in such cases is not merits or means tested and no minimal contribution by the applicant is required. Also specially trained lawyers provide legal assistance to this particular category of asylum seekers.

**Italy:** In Italy a specialized authority called the Territorial Commission examines the asylum claim at first instance. Asylum seekers are required to be present at the personal interview before the panel of the Territorial Commission.<sup>304</sup> Applicants suffering from certain medical conditions may be exempted from the interview in which case a decision can nevertheless be taken. Lawyers may be present during the interview but asylum seekers are obliged to respond in person to questions. There is only an exception made for minors who are interviewed together with their

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<sup>304</sup> The Territorial Commission consists of 1 officer of the prefecture (Ministry of Interior), 1 representative of the police, 1 member appointed by the local authority (usually a social assistant appointed by an association of municipalities) and 1 representative of UNHCR.

parents and unaccompanied children. The latter are represented by a guardian. Lawyers may participate in the personal interview before the panel of the Territorial Commission and may make comments during or at the end of the interview. However it should be noted that lawyers representing client's at this stage of the procedure are only present at the asylum seeker's own expense. Free legal aid is only provided at the appeal stage. At the interview lawyers are not allowed to raise additional questions but they may suggest relevant questions to the panel. It is open to the Territorial Commission panel to then decide whether or not to ask the suggested question. It is important to note that legal advisors who are mainly staff of non-governmental organisations, are able to provide advice in preparation for the main asylum interview but are not allowed to assist asylum seekers during their interview. In Italy the asylum seeker and his or her representative must have access to the asylum seekers file according to the law. The documentation available in the individual's file is usually limited. As a general rule only the first instance authority has access to the database on Country of Origin Information (COI) of the Ministry of Interior.

**Lithuania:** In Lithuania asylum claims are examined by the Migration Department. Asylum seekers must attend all interviews and may attend hearings. Lawyers may attend all interviews, however this is at the client's own expense as free legal aid is only provided at the appeals stage. There is an exception to this, however, for unaccompanied children and other vulnerable asylum seekers, where lawyers must be present for their interviews at the initial stage. Asylum seekers, including vulnerable asylum seekers must respond in person to questions in interviews. Interviews and hearings are generally conducted even if the lawyer cannot attend, except in the case of vulnerable asylum seekers. In Lithuania only lawyers are allowed to assist and represent asylum seekers during interviews. However, legal advisors can also provide primary legal aid at this stage of the procedure. Privately paid legal advisors do have access to the asylum seeker's file and the country of origin information that is already included in the file. All information is available to the lawyer except information coming from the State Security Department.

**Romania:** In Romania asylum claims are examined by staff at the Romanian Immigration Office, Direction for Asylum and Integration. Asylum seekers must attend all interviews and hearings and may be assisted during the entire procedure by a staff member of UNHCR or a non-governmental organisation on request. Asylum seekers must respond to questions during hearings in person with the exception of mentally disabled persons. UNHCR guidelines on interviewing vulnerable asylum seekers apply. Interviews or hearings can be postponed once, including in the case of vulnerable asylum seekers, in case the legal advisor is not available. Legal advisors may intervene and participate in in-person proceedings, make comments and ask additional questions. In Romania legal aid is only available at the appeal stage but legal advisors can assist asylum seekers before the administrative authorities. All information that is not related to national security concerns or classified is available to the legal advisor or lawyer.

**Slovenia:** In Slovenia asylum claims are examined by staff at the Department for International Protection within the Ministry of Interior. Asylum seekers must be present at all interviews organised at first instance while legal advisors may also attend all interviews. It should be noted that asylum seekers are only entitled to free legal aid at the appeal stage. However, as already mentioned above, to a limited extent, free legal advice is provided through ERF projects with local non-governmental organisations. Asylum seekers must respond in-person during interviews but an exception is made for those applicants who are unable to do so. The International Protection Act requires the asylum authority to ensure that

interviews are conducted in a way which allows to take into account the asylum seeker's individual circumstances and vulnerability. The interview should also allow the asylum seeker to present his or her case comprehensively. However, the fact that the legal advisor is unable to attend an interview at the first instance does not prevent the interview from taking place. Legal advisors may intervene during the interview and, make observations at the end of the interview and may ask additional questions at the end of the interview. However in practice in some cases, the legal advisors' comments and additional questions are not registered by the interviewing official or only at their discretion on the grounds of whether the official considers the question relevant. In Slovenia in practice the refugee counsellors have a right to consult the asylum seeker's file without restriction.<sup>305</sup>

**Spain:** The first instance authority is the Ministry of Interior and asylum applications are examined by the Asylum Office (Oficina de Asilo y Refugio (OAR)). The Interministerial Commission on Asylum and Refugees (Comision Interministerial de Asilo y Refugio (CIAR))<sup>306</sup> submits a proposal for a decision to the Ministry of Interior that decides on the outcome of the claim. Asylum seekers must be present during interviews at first instance. A distinction is made for interviews held at the border whereby it is mandatory for a legal advisor or lawyer to be present during the interview.<sup>307</sup> In case of an in-country application an asylum seeker can ask for a lawyer to be present but the interview can take place in absence of a lawyer. For additional interviews legal advisors/lawyers may be present upon request of the applicant. Free legal aid is available throughout the asylum procedure in Spain and legal advisors assist asylum seekers at the interview stage. Applicants must in general respond in person to questions except where a physical or legal impediment exists. Family members may not normally be present during the interview unless in exceptional cases where it is considered particularly necessary. Particularly vulnerable asylum seekers may be exempted from responding in-person. Where they are present legal advisors may intervene in in-person proceedings during or at the end of the interview. They may also ask additional questions but in practice this does not happen very often. Good practice is noted in Spain whereby legal advisors are in contact with the caseworkers at the initial decision-making authority in order to discuss individual cases during the examination of asylum seeker's claims. The Sixth Additional Protocol to the Asylum Act provides that non-governmental-reports on country of origin information (COI) and other reports will be included in the asylum seekers' file. However, at this stage the legal advisor does not have access to the asylum seekers' file or the country of origin information available to the first instance authority. On the other hand, in practice the asylum seeker's legal advisor or lawyers in many cases provide country of origin information to support the application although these costs are not covered by the legal aid system. However, the non-governmental organisations such as ACCEM and CEAR who conduct this research receive project funding to do this and provide the collected information for free to lawyers assisting asylum seekers. Regarding access to information in Spain the Asylum Act does not provide any guidance on how to interpret the term "relevant information" as in accordance with Article 16(1) of the Asylum Procedures Directive.

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<sup>305</sup> Article 16(1) Asylum Procedures Directive was not transposed in the Slovenian Act on International Protection.

<sup>306</sup> The CIAR includes a representative from the Ministry of Interior (chair), Ministry of Foreign Affairs, Ministry of Justice, Ministry of Labour and Immigration and the Ministry of Equality. UNHCR Spain participates in a consultative capacity. The CIAR submits its proposal for a decision on the basis of the information produced by the applicant, the OAR's report and the UNHCR's opinion in addition to information provided by NGOs.

<sup>307</sup> For further information see Chapter 4 section 11 on border procedures below.

According to Article 18 of the Asylum Act asylum seekers have in principle a right to know the content of their file at all times. However, in practice access to the file during the administrative procedure may be restricted for legal advisors. Information that could jeopardise national security concerns or information provided by other EU member states or Spanish embassies may not be disclosed.

**The Netherlands:** At the first instance, asylum claims are examined by staff of the 'Immigratie- en Naturalisatiedienst' (IND), a specialised administrative authority. Asylum seekers must attend the asylum interview at the first instance stage and possible additional interviews. Legal aid lawyers may attend the interviews but this rarely happens in practice. In some cases volunteers including legal advisors from the Dutch Council for Refugees attend the substantive asylum interviews. It should be noted that free legal aid is available throughout the asylum procedure. Asylum seekers must in practice respond in person to questions at interviews and Dutch legislation does not provide for exceptions in the case of vulnerable asylum seekers.<sup>308</sup> However, in relation to vulnerable asylum seekers free legal aid is available to establish their vulnerability for example by instructing medical practitioners. Interviews may be postponed within reasonable time limits and for good reasons such as when the lawyer is unable to attend the interview but this is not an obligation. In principle the interview will take place without the presence of a legal advisor or legal aid lawyer since the law does not require the presence of the legal advisor or legal aid lawyer and it is stated explicitly in the Aliens Act that legal aid lawyers should not delay the start of the procedure. In the case of vulnerable asylum seekers the postponement of the interview can be discussed with the first instance authority (IND). It should be noted that since the entry into force of the new asylum procedure, every asylum seeker has the possibility to undergo a medical examination. This may result in postponement of the interview or adapting the way the interview is conducted to the medical problem. Legal aid lawyers may participate in the interviews at the IND and may intervene under certain conditions: the legal aid lawyer may ask the IND caseworker to repeat and rephrase the question if the legal aid lawyer thinks that the asylum seeker contradicted him or herself or did not understand the question correctly. The legal aid lawyer may also intervene in case he or she thinks that the interview is conducted in an unfair way or the asylum seeker is mentally or physically unfit to attend. The legal aid lawyer may also indicate that additional questions are necessary. No preparation time is given to the lawyer before the first interview takes place while the Dutch Council for Refugees can only provide general information on the asylum procedure at that stage. After the first interview the legal aid lawyer has two hours to introduce him/herself to the asylum seeker, discuss the first interview with the asylum seeker and prepare for the second interview.

In the regular asylum procedure a second interview can only take place at least six days after the asylum seeker applied for asylum. After the second interview additional remarks can be submitted to the IND before the preliminary decision is taken within two weeks. After the IND has taken a preliminary decision, written observations can be sent within a period of four weeks. The applicant or applicant's counsel is expected to do country of origin information research. Regarding access to information all information that the authorities have should be accessible to legal aid lawyers according to the principle of equality of arms. However, this is not always the case. The authorities can limit access to information on the basis of protection of sources of information or to protect certain methods of investigation. Internal memo's

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<sup>308</sup> However, some NGOs have started a pilot project with the authorities (IND) on specific methods to interview asylum seekers with psychological problems. The project evaluates various methods (written interviews, interviewing through a mediator/family member, at a safe location etc) and has resulted in draft guidelines. The results of the project should become available in 2010.

and reasons for positive asylum decisions are not always disclosed. Applicants can invoke the Public Information Act to gain public disclosure of the information upon which a decision is based.<sup>309</sup>

**United Kingdom:** Asylum applications are examined by civil servants in a specialised administrative authority, the UK Border Agency. In the United Kingdom applicants must be present during all interviews and hearings and legal advisors or lawyers may attend all interviews and hearings, however they are only funded under the legal aid scheme to attend interviews exceptionally. These exceptions include interviews for unaccompanied children, asylum seekers in the Detained Fast Track and asylum seekers in the Early Legal Advice Pilot.<sup>310</sup> At interviews asylum seekers must respond in person to questions but exceptions are made for vulnerable applicants. Specific guidelines exist for interviewing children and other vulnerable applicants. Moreover UK Border Agency policies exist with regard to special cases, victims of trafficking and gender issues.<sup>311</sup> Also legal aid is available to instruct practitioners to provide medical reports to establish an asylum seeker's vulnerability. Hearings and interviews can be postponed at the discretion of the UK Border Agency. Legal advisors may intervene and participate in in-person proceedings and make comments during or at the end of the interview. However, except in the Early Legal Advice Pilot, legal advisors are not allowed to ask additional questions that may have been overlooked. Generally legal advisors are given sufficient time and contact with the applicants and their files except in case of the detained fast track<sup>312</sup>. Best practice indicates that legal advisors should gather evidence, including country of origin information, for submission to the decision maker. In the UK applicants are able to obtain a copy of their file under data protection legislation, which stipulates that some information such as the official's names or information relating to national security can be withheld.

**Norway:** Asylum applications are examined by civil servants within the UDI, Norwegian Directorate of Immigration under the instruction of the Ministry for Justice and Internal Affairs. As already mentioned above, only unaccompanied children and or cases where national security concerns may rise or where exclusion clauses may be applied, have a right to free legal aid at this stage of the procedure. Other asylum seekers may apply for free legal aid at this stage but in practice it is very rarely granted. In Norway in general all information of the file is provided to the lawyer with the exception of information that must be kept secret to protect third parties, national interests etc. Also sources may be protected when providing the lawyer access to the information used in the case.

**Switzerland:** Asylum seekers must be present at the substantive asylum interview. Lawyers may but are not obliged to attend all interviews and must be informed well in

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<sup>309</sup> For a description of the changes to the asylum procedure in the Netherlands as of 1 July 2010 see Annex IV to this survey.

<sup>310</sup> J. Aspden, *Evaluation of the Solihul Pilot*, October 2008 .

<sup>311</sup> See [www.UKba.homeoffice.gov.UK/sitecontent/documents/policyandlaw/asylumprocessguidance/theasyluminterview/guidance/conductingtheasyluminterview.pdf?view=Binary](http://www.UKba.homeoffice.gov.UK/sitecontent/documents/policyandlaw/asylumprocessguidance/theasyluminterview/guidance/conductingtheasyluminterview.pdf?view=Binary) and [www.UKba.homeoffice.gov.UK/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/processingasylumapplication1.pdf?view=Binary](http://www.UKba.homeoffice.gov.UK/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/processingasylumapplication1.pdf?view=Binary) and [www.UKba.homeoffice.gov.UK/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/victimsoftrafficking.pdf?view=Binary](http://www.UKba.homeoffice.gov.UK/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/victimsoftrafficking.pdf?view=Binary) and [www.UKba.homeoffice.gov.UK/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/genderissueintheasylum.pdf?view=Binary](http://www.UKba.homeoffice.gov.UK/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/genderissueintheasylum.pdf?view=Binary)

<sup>312</sup> For further information on accelerated procedures see section 3.5 above.

advance of the time and place of the interview. As mentioned above, free legal aid is only rarely granted in Switzerland and in general not during the first instance procedure. Asylum seekers must respond in-person to questions and no exceptions are made for vulnerable categories of asylum seekers. However; the Federal Office for Migration applies internal guidelines on questioning particularly vulnerable asylum seekers. Lawyers may ask additional questions. They may also request postponement of interviews but this is at the discretion of the authorities. Asylum seekers may be accompanied by any person of their choice.<sup>313</sup> Such a person may also be present at the interview but is not allowed to intervene in any manner. Therefore, a legal advisor who does not represent the asylum seeker may be present at the interview as a person accompanying the asylum seeker but may not intervene or ask questions. In addition, a "Hilfswerksvertreter" is present at the asylum interview.<sup>314</sup> This person is a representative of one of the member agencies of the Swiss Refugee Council. The department of the Swiss Refugee Council that coordinates the "Hilfswerkvertretung" has to be notified of asylum hearings five working days in advance in order to ensure that the Swiss Refugee Council member agencies can assign one of their representatives to each hearing. However, it should be noted that the obligation to notify a hearing five working days in advance does not apply with regard to organisations providing legal advice, but only for those organisations that send neutral observers i.e. Hilfswerkvertreter to the hearings. On the rare occasions that free legal aid is granted at the first instance procedure it does not cover research on general country origin information, as this is an obligation for the authorities, although the applicant also has an obligation to substantiate the claim. Only the lawyers' participation in interviews is covered by the legal aid system according to the general system of compensation per time. In Switzerland the Asylum Procedures Directive is not applicable however similar practice exists as in Article 16 of the Directive. According to national general administrative law, the asylum seeker or his or her lawyer is entitled to have access to his or her file after the first instance decision, or before the first instance decision when the inquiries have been concluded. After the asylum procedure is concluded, access to the records is governed by data protection law. Upon written request the authorities can provide the asylum seeker or his or her lawyer with a copy of the file. The authorities can only refuse to disclose certain information for important public interests such as the internal or external security of the State, important private interests or if a document is considered "internal". During the pending asylum procedure, the file is provided free of charge. After the asylum procedure, administrative fees are imposed.

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<sup>313</sup> However asylum seekers are not allowed to request the presence of another person involved in the asylum procedure. For further information see Article 29(2) of the Asylum Act (Asylgesetz, AsylG Loi sur l'asile, LAsi)

<sup>314</sup> Hilfswerksvertreter are staff members of a certified aid organisation which may attend the asylum interview provided the asylum seeker agrees in accordance with Art. 30 of the Asylum Act. Absence of the Hilfswerkvertreter is not an obstacle to the interview taking place. A certain number of member agencies of the Swiss Refugee Council appointed by the Federal Council are authorized to send representatives to interviews, and they are coordinated by the Swiss Refugee Council. The costs for the "Hilfswerksvertreter" are paid by the state. The "Hilfswerksvertreter" attends the interview as an observer only. He/she does not represent the asylum seeker as such. His/her function is to check the correctness of the procedure. He/she may not intervene in order to help the asylum seeker, but he/she may request that certain questions be asked in order to clarify the facts or may suggest that further investigations be conducted. The "Hilfswerksvertreter" may also raise objections. Any such objections must be noted in the records. Although "Hilfswerksvertreter" are only observers and not entitled to represent the asylum seeker, their presence has a positive influence on the quality of the interview. In a decision of 10 July 2001, the Swiss Asylum Appeals Commission ruled that although asylum seekers might need legal representation during the first stage of the asylum procedure, any subjective disadvantage the applicant might have (age, social situation, language, legal knowledge, mental health) can be alleviated by the fact that, *inter alia*, the observer status of certified NGO representatives is statutorily recognized in the asylum procedure. NGOs have noted that the observer status is not equivalent to representing the interests of a client and speaking on his/her behalf.

#### 4.10 Legal Aid in the Asylum Procedure: the Appeal Authorities

This section provides a general overview of the scope of the appeal in the countries included in this survey as well as the type of tasks that are covered by the legal aid systems in the countries concerned at the appeal stage. A distinction is made between first appeal and the onward appeal. This relates to the fact that the right to legal assistance and representation at the appeals stage is guaranteed under Article 15 of the Asylum Procedures Directive only with regard to first appeals and not with regard to onward appeals.<sup>315</sup>

**Austria:** Both facts and points of law are re-evaluated at the appeal stage and the appellate body, the Asylum Court (Asylgerichtshof) has the power to change the decision on the merits of the claim itself. The Asylum Court deals with all asylum appeals and is a specialized body. However, new facts and evidence relating to the claim may only be submitted under the following limited conditions: i) if the applicant's individual circumstances or the situation changes upon which the first instance decision was based; (ii) if the procedure conducted by the first instance authority was irregular; (iii) if these new facts and evidence were not accessible to the asylum seeker at the time of the first instance decision or if the asylum seeker were unable to submit these new facts and evidence at that time. Preparation of submissions and participation of legal advisors in hearings at the appeal stage are paid for on project basis through the ERF process and other funds by NGO's where the resources permit this. It should be noted that at this stage legal aid is still only available through NGO's. A higher instance onward appeal can be lodged with the Constitutional Court if it is considered that there is a potential violation of the Constitution. The Constitutional Court can dismiss the appeal on the ground that it does not invoke a violation of the Constitution. Legal aid is only provided by lawyers during these onward appeals to the Constitutional Court subject to a means test as noted in section 6 on the appointment of a lawyer above. If the Constitutional Court grants legal aid for the full amount it covers preparation of submissions, participation in hearings and any additional tasks.

**Belgium:** Both facts and points of law are re-evaluated at the initial appeal stage and the appellate body has the power to change the decision on the merits of the claim. At this stage lawyers gain access to all the documents relied upon by the Commissioner –General for Refugees and Stateless Persons (CGRS) in making the decision. As far as is known national security concerns have not been used to deny appellate authorities and lawyers access to information. Evidence can be re-evaluated while the CGRS is a party before the appellate body. The appellate body is an administrative court, called the Council for Aliens Litigation (CAL)<sup>316</sup> and is presided over in most cases by one judge. However decisions can be taken by three judges in particular cases, for example after an annulment of a first decision of the CAL or when the president of the chamber considers it necessary in the interest of uniform jurisprudence or in particularly difficult or important cases. The CAL is competent to deal with all asylum and immigration appeals and is a specialized body. Both the preparation of submissions and the participation in hearings is paid for through the legal aid system. As noted in section 4.5 on merits testing above legal aid is available at this stage and not subject to a merits test. There is a presumption

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<sup>315</sup> According to Article 15(3) Asylum Procedures Directive "Member State may provide in their national legislation that free legal assistance and/or representation is granted (a) only for procedures before a court or tribunal in accordance with Chapter V and not for any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review".

<sup>316</sup> Conseil du contentieux des Etrangers, Raad voor Vreemdelingenbetwistingen.

that the asylum seeker does not have means either. Legal aid is also available at the border to appeal any refusal to admit the asylum seeker into Belgian territory. An onward appeal (cassation) can be lodged with the Council of State under strict conditions. The applicant must be granted leave to appeal by the Council of State on restricted grounds such as a breach of formal requirements or it is necessary to ensure uniform jurisprudence. Preparation of submissions, preparation of hearings and any additional task related to the appeal before the Council of State is covered by the legal aid regime.

**Czech Republic:** The scope of the first instance appeal is limited as only the evidence submitted during the first instance procedure can be evaluated. The Court cannot collect information *proprio motu* and it can only refer the case back to the first instance authority. It has no power to change the decision on the merits of the claim. The Court deals with all appeals under the Administrative Justice Code. However a specialized judge decides appeals in asylum cases. The preparation of submissions and the participation of the lawyer in hearings before the Court can be repaid to the private lawyer per task. Also free legal aid is available to appeal inadmissible asylum applications according to the general rules applicable to free legal aid before the Court.<sup>317</sup> An onward appeal can be lodged with the Supreme Administrative Court (in BRNO) which is competent to review complaints challenging final decisions of regional courts in matters of administrative justice, whereby complainants seek the annulment of an administrative decision<sup>318</sup>. However the onward appeal is considered inadmissible if the legal question has already been dealt with before. Legal representation of applicants before the Supreme Administrative Court is obligatory and asylum seekers can apply for free legal aid for the procedure before the Supreme Administrative Court.

**Denmark:** Evidence is re-evaluated at the appeal stage and the Refugee Appeals Board, the appellate body which is specialised to deal with asylum appeals, has the power to change the first instance decision on the merits of the claim. During the appeal hearing a staff member of the first instance authority, the Immigration Office is also present. Both the preparation of submissions and the participation in hearings of the appellate body is paid for by the legal aid system. Free legal aid is available at the appeal stage. There is no right to an appeal beyond the first appeal in Denmark. Regarding inadmissible applications, it should be noted that free legal aid is not available for this purpose in Denmark, appeals in such a situation are only possible before the Ministry and such appeals have no suspensive effect.<sup>319</sup>

**Finland:** A specialized chamber of the Helsinki Administrative Court deals with all asylum appeals. It also deals with other administrative appeals from decisions taken by other public authorities. It has the power to either change the decision on the merits of the claim or refer the case back to the Finnish Immigration Service for a new evaluation in case new facts have come to light that were not known or taken into account before. Evidence is re-evaluated by the Court on appeal and the appeal is not restricted to points of law. However in practice the factual findings of the Finnish Immigration Service are presumed to be very reliable and it is difficult to overturn them at appeal. Preparation of submissions to and participation in hearings before the appellate body is covered by the legal aid system.<sup>320</sup> A higher appeal is

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<sup>317</sup> See section 4. 11 below for further information on the admissibility procedure at the border.

<sup>318</sup> More information is available at <http://www.nssoud.cz>.

<sup>319</sup> See IGC, *Asylum Procedures Report*, at p. 108.

<sup>320</sup> Regarding access to legal aid, a means test is applied at the appeal stage as noted in section 4.4 above.

possible before the Supreme Administrative Court if the applicant is granted leave to appeal before the Court. Preparation of submissions, preparation of hearings and any additional task related to the appeal before the Supreme Administrative Court is covered by the legal aid regime.

**France:** The appellate body, the Court Nationale du Droit d'Asile (CNDA), a specialized asylum court has the power to change the decision on the merits of the claim and to re-evaluate the evidence upon which the first instance decision is based. However, the factual findings by the first instance authority are given important weight in the proceedings and in practice the burden of proof is on the applicant. Preparation of submissions to the Appellate Body is not covered by the legal aid regime, however the lawyer's participation at the hearing is paid for under legal aid.<sup>321</sup> Hearings at the CNDA can be postponed in case the lawyer is unable to attend but in certain cases the Court will require that the lawyer is replaced by a colleague rather than postponing the hearing. France does not have a system of legal advisors. Lawyers are entitled to intervene and participate in the hearings, make comments and ask additional questions. Generally lawyers have sufficient time and contact with the asylum seeker and his file before the hearing although the file is usually not complete.<sup>322</sup> In France there is a possibility of a further appeal, "pourvoi en cassation" before the Conseil d'Etat which is limited to points of law. If the Conseil d'Etat finds the decision of the CNDA erred in law, the case is referred back to the CNDA. Preparation of submissions by the lawyer, preparation of hearings by the lawyer and any additional task related to the appeal before the Conseil d'Etat are covered by the legal aid regime.

**Germany:** In Germany the Administrative Court is a specialized Court, which deals with the examination of all asylum appeals. It can review evidence already submitted to the Federal office and consider new evidence and facts for e.g. political changes in the country of origin. The appeal considers both facts and points of law. If new facts and evidence are considered before the Court the merits of the case are assessed without reference to the earlier factual findings of the BAMF. Legal aid is available at the appeal stage but is subject to a means test. Legal aid may also be granted for inadmissible claims<sup>323</sup> depending on the merits test. Generally lawyers have sufficient time and contact with the asylum seeker before the hearing. The Administrative Courts have the power to change the decision on the merits of the case. Tasks relating to the preparation of submissions at the appeal stage such as drafting statements, preparing motions and the participation in hearings of the Administrative Court are paid for through the legal aid system. There is also a right to a further appeal before the Higher Administrative Court. The Higher Administrative Court has discretion to permit a further appeal ("Berufung") or not. However, also the first appeal Court, the Administrative Court has the power to declare its decision open to appeal. In practice this is often applied in situations where the law has changed or the situation in the country of origin has changed. Then the Administrative Court will seek guidance from the Higher Administrative Court for future similar cases. Preparation of submissions and hearings before the Higher Administrative Court is covered by the legal aid regime. Lawyers have access to the complete file of the Court upon request and the files are sent directly to the lawyer.

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<sup>321</sup> In France, free legal aid is available at the appeal stage, subject to a merits test. See also Chapter III, section 3.

<sup>322</sup> See also section 4.9 above for further information. It should also be noted that no interpreters are made available to facilitate communication with the asylum seeker. Also hearing dates may be fixed leaving little time to lawyers to prepare the hearing, while postponement of the hearing date is rarely granted.

<sup>323</sup> Inadmissible claims in Germany are technically only Dublin II Regulation cases.

**Greece:** Since July 2009<sup>324</sup> under the Presidential Decree 90/2008 asylum seekers only have the possibility to lodge an appeal with the Conseil d'Etat (Council of State). This Court deals with appeals against many kinds of administrative decisions and is not a specialised Court. PD 90/2008 abrogated the examination of asylum appeals by the Appeals Committee. Now the only remedy available against a first instance refusal is an annulment application before the Conseil d'Etat. This appeal is limited to points of law and the Court body has no power to change the decision on the merits of the claim but can only annul the decision on points of law. The Court can only refer the case back to the Administration in order to consider the decision afresh. Preparation of submissions to and participation in hearings before the Council of State is covered by the legal aid system. However as shown in section 4.9 above on the asylum interview legal aid is very restrictive in Greece. Lawyers are only permitted to take one case per year under the free legal aid scheme and only senior lawyers with approximately eight years experience can represent asylum seekers at hearings before the Council of State. There is also no possibility for any further appeal after the Council of State.. If the first instance authority rejects the asylum application on national security grounds, which are not explicitly mentioned in the decision, it is, according to the jurisprudence of the Council of State, under an obligation to communicate the relevant information to the Court. It is then up to the Court to decide whether it will inform the applicant and his or her lawyer of those grounds. So far there was only one such decision taken on this basis, which was consequently withdrawn.

**Hungary:** In Hungary the Administrative branch of the Budapest Metropolitan Court examines all asylum appeals.<sup>325</sup> It is not a specialized Court and deals with administrative decisions taken by other public authorities also. The appeal deals in principle with points of law under general rules of administrative law but in asylum cases the Court is also under an obligation to hear the asylum seeker in person. The Court may also change the first instance decision based on the findings of the Court during the hearing. The factual findings by the first instance authority are in general not questionable although additional information may be submitted to the Court. In such cases the Courts will order that a new procedure must be initiated at the OIN to assess the facts of the case again. Free legal aid is available subject to a means test and lawyers represent asylum seekers before the Court. Preparation of submissions to and participation in hearings before the Metropolitan Court is covered by the legal aid system. The decision of the appeal Court is final and there is no possibility for further onward appeals in the Hungarian asylum procedure.

**Ireland:** In Ireland the asylum appeal authority is a specialised Tribunal called the Refugee Appeals Tribunal. The Tribunal can review all aspects of the decision (facts and law) and hears evidence on the day of the appeal hearing. Where cases are deemed to be manifestly unfounded, decisions are made on the basis of the papers only and there is no hearing before the Tribunal. This appellate body has the power

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<sup>324</sup> In July 2009 the new Presidential Decree 30/2009 came into force, which changed the appeal structure in Greece.

<sup>325</sup> However, the proposed reform of the Asylum Act, expected to enter into force on 1 January 2011, includes a decentralisation of the Budapest Metropolitan Court. Appeals in asylum cases will be dealt with by the court of the place of residence/address of the asylum seeker. This means that the competent court will be the court of the location of the state-provided reception facility, the private accommodation of the asylum seeker or the alien policing jail where the asylum seeker is detained. A Hungarian version of the draft law is available at [http://www.otm.gov.hu/web/jog\\_terv.nsf/580a78b1a38daf90c12570f50028c03c/373CC68054EC4BCCC125777B002FEB4C/\\$FILE/2007\\_I\\_tv\\_modositas.pdf?OpenElement](http://www.otm.gov.hu/web/jog_terv.nsf/580a78b1a38daf90c12570f50028c03c/373CC68054EC4BCCC125777B002FEB4C/$FILE/2007_I_tv_modositas.pdf?OpenElement) .

to change the decision on the merits of the claim. Legal aid is available subject to a means test. Preparation of submissions to the appellate body and participation in hearings before the Refugee Appeals Tribunal are covered by the legal aid system. Legal advisors also have the power to represent asylum seekers before the Tribunal. There is also a right to apply to the High Court by way of judicial review of a Tribunal decision. This is not a review of the merits of the case as the High Court judge can only grant or refuse judicial review reliefs, e.g., the High Court can grant an order quashing the refugee status decision. In case of a successful judicial review the case is typically remitted for reconsideration by the decision making body. In order to apply to the High Court, asylum seekers must engage a solicitor to bring judicial review proceedings on their behalf, and the Court must grant leave for judicial review. A high number of judicial review applications are brought in Ireland. Preparation of submissions and hearings before the High Court is covered by the legal aid regime. However, legal aid for judicial review is subject to a merits test and in practice is granted only in a minority of cases. Regarding access to information copies of the relevant files are made available to the asylum seeker and his or her representative and the Refugee Appeals Tribunal. The current legislative framework provides for possible non-disclosure of information in limited circumstances in the interests of national security or public policy.

**Italy:** The appellate body; the “Tribunale – sezione civile”<sup>326</sup> re-examines the case, which means that evidence is re-evaluated and that the Tribunal has the power to decide on the merits of the case. This is not a specialized body but has the authority to decide on a asylum appeals amongst other appeals. The decision of the Tribunal can be appealed at the “Corte d’Appello, the Court of Appeal within 10 days. As noted in Section 4.4 and 4.5 legal aid is only available at the appeal stage subject to a means and merits test. The latter test has become very strict with regard to appeals against the decision of the Tribunal. There is a right to onward appeal against the decision of the Court of Appeal within 30 days before the Cassation Court, which only deals with points of law. However, the merits test for eligibility for legal aid is stricter at this stage. In practice it is very difficult to obtain legal aid for an onward appeal but when granted both the costs related to the preparation of submissions as well as the participation in hearings is covered by the legal aid system. It should be noted that the appeal at the Cassation Court can only be lodged by Cassation Court – lawyers. At least 12 years of experience is required for these lawyers. In Italy an asylum application can be declared inadmissible if the person has been recognised as a refugee in another country or when the person lodged a new claim without submitting new elements. An asylum application can be declared manifestly unfounded for instance where the application was merely lodged to delay expulsion. Legal aid can be obtained to appeal such decisions but as it is subject to a merits test, legal aid is not necessarily granted. Appeals in inadmissible cases and manifestly unfounded cases do not have automatic suspensive effect. However, suspensive effect can be requested in these cases to the Court on an individual basis. All other appeals before the Tribunal have automatic suspensive effect. Further appeal against the decision of the Tribunal does not have automatic suspensive effect either. Suspension can be obtained from the Court of appeal.

**Lithuania:** In Lithuania the appellate body, the Vilnius District Administrative Court has the power to change the decision on the merits of the claim and can in some cases also refer the case back to the first instance authority. It should be noted that the Vilnius District Administrative Court is not a specialized court but deals with all appeals related to administrative decisions by public authorities. The hearings are

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<sup>326</sup> Appeals are dealt with by the civil section of the Tribunals.

held before a panel of three judges. The asylum seeker is not obliged to attend an appeal hearing. It can re-evaluate the evidence upon which the first instance decision is based and consider both facts and points of law. New evidence can only be submitted at this Court if it was not possible to submit it at an earlier stage in the asylum procedure. It should be noted that in practice the factual findings by the first instance authority are given important weight on appeal. Free legal aid is available at this stage subject to a means test. Free legal aid is available to appeal an inadmissible decision on an asylum claim. Preparation of submissions to and participation in hearings before the appellate body is covered by the legal aid system. Lawyers are paid to participate in hearings, while the costs related to the procedure before the court is normally waived in case applicants do not have an income. Applicants' travel costs to the court are also reimbursed. A further onward appeal is possible before the Supreme Administrative Court in which both facts and points of law may be reviewed. Preparation of submissions and preparation of hearings on higher appeal are also covered by the legal aid regime. Regarding access to information in principle all the information available to the first instance body is subject to examination by the appellate authority. However, national security concerns have been used to deny lawyers access to information on their client's file.

**Romania:** The appeal consists of a full review of the first instance decision in which both facts and points of law are evaluated. The local Court (Judecatoria) competent for the region where the regional branch of the Immigration Office is located considers the asylum appeal. This is not a specialized court however most judges receive specialized training on protection issues in seminars organised by UNHCR Romania, the Romanian Immigration Office and the Romanian National Council for Refugees. Depending on the individual judgment of the competent judge, deference will be given to the factual findings of the first instance authority. If the asylum seeker's claim is not considered credible according to the judge, the factual findings at the initial stage will be given more weight. The appellate body (Judecatoria)<sup>327</sup> has the power to change the decision on the merits of the claim. In reality, lawyers often do not have sufficient time and contact with the asylum seeker prior to the appeal hearing.<sup>328</sup> Tasks such as the preparation of submissions and participation of lawyers in appeal hearings before the appellate body are covered by the legal aid system. However, the remuneration for all these tasks is low and often paid with considerable delay. It should be noted that Roccord, the research and documentation centre of the Romanian National Council for Refugees undertakes COI research free of charge at the request of lawyers or judges. An onward appeal is possible beyond the first appeal but is limited to points of law only.<sup>329</sup> Participation of the lawyer in hearings and additional tasks related to country of origin information research are covered by the legal aid system. In addition a higher instance appeal is possible to the Constitutional Court which is limited to potential violations of the Constitution. All information available to the first instance authority is also subject to examination by the appellate authority but not available to the lawyer. National security concerns have not been used to deny appellate authorities access to certain information. In such case the appellate authority would have the power to order the State to grant access to the file.

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<sup>327</sup> In Romania the appeal bodies are named after the city where they are located (e.g. Judecatoria Galati, Judecatoria Radauti, Judecatoria Somcuta Mare, Judecatoria Timisoara) or in the case of Bucharest the sector in Bucharest where it is located (e.g.: Judecatoria Sectorului 4).

<sup>328</sup> As stated in Chapter III section 3.3.4 free legal aid is only available at the appeal stage under the presumption that the applicant does not have sufficient means to instruct a lawyer himself or herself.

<sup>329</sup> The onward appeal instance is again named after its location: Tribunal of Bucharest, Tribunal of Galati, Tribunal of Suceava, Tribunal of Maramures, Tribunal of Timisoara.

**Slovenia:** Both points of law and the facts are reviewed at the first appeal stage. The first instance appeal body is the Administrative Court of the Republic of Slovenia. This Court consists of different departments and only judges in the Department for the protection of constitutional rights examine asylum appeals. If the administrative court determines that the factual findings at first instance were incorrect the case is referred back to the first instance authority to be reviewed. However, the Court can also change the decision on the merits in theory, although in practice this never happens. In theory both the preparation of submissions to the appeal court and the refugee counsellors' participation in the hearing before the appeal court is paid for through the legal aid system. However, in practice hearings are very rarely organised.<sup>330</sup> Normally the Court does not decide on the asylum case itself but remits the application to the authorities again in order to ensure that they correctly establish the facts of the case. There are appeal hearings for challenges to detention but there are no hearings for asylum appeals in Slovenia. The Court only relies upon written submissions therefore the work of a lawyer and access to legal aid is vital. The lawyer's role is crucial and since there is a low number of asylum seekers in Slovenia there will always be a legal aid lawyer available, however the quality of representation can sometimes be questionable. The absence of appeal hearings can be problematic if the first instance decision was based on credibility issues. This can often be due to misinterpretation or because the government official interviewing assumed certain facts and clarifications were not sought. It is possible to overturn these credibility decisions at the appeal by showing that the government interviewer should have done follow up questions and clarified issues. Further appeal is possible to the Supreme Court on the following grounds: on the basis of a violation of procedural requirements, a wrongful application of substantive law or incomplete fact-finding. Costs relating to the preparation of submissions and participation in hearings are covered under the legal aid system although as noted above in practice no appeal hearings are held in Slovenia.<sup>331</sup> Free legal aid is available to appeal against an inadmissible decision. All information available to the first instance authority is also subject to examination by the appellate authority. National security concerns have not been used to deny appellate authorities access to certain information.

**Spain:** In Spain a distinction must be made between the appeal against a negative decision on the merits of the claim and against inadmissibility decisions. The Administrative Chamber of the National High Court deals with appeals against a negative decision on the merits of the asylum application and re-evaluates the evidence submitted at the first instance. It is an appeal on both the facts and points of law. This Court deals with all areas of law as does the Central Administrative Court. However the Central Administrative Court deals with appeals against inadmissibility decisions.<sup>332</sup> Free legal aid is also available to appeal inadmissible claims. If an

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<sup>330</sup> In Slovenia legal aid is available at the appeal stage, subject to a means test.

<sup>331</sup> It should also be noted that asylum seekers may complain on constitutional grounds to the Constitutional court of Slovenia, on the basis that their human rights were violated. Even though this remedy is mentioned in the Act of International protection, the same Act does not mention that free legal aid provided by refugee counsellors covers this remedy as well.

<sup>332</sup> These are mainly Dublin cases; See Chapter IV Section 13 below for further information. Art 20 of Spanish Asylum Act describes the causes of inadmissibility, which are in summary: a) Dublin cases (the majority of the inadmissibility cases; b) When Spain is not responsible for examining the asylum in accordance with international conventions to which it is party c) if the applicant is already a refugee; d) when the applicant comes from a safe third country, e) if the applicant had been refused and submits a new application with other personal data, provided that no significant new circumstances arises, f) if the applicant is a national of a Member State of the European Union.

appeal on an admissibility decision is successful then the asylum application is referred back to the first instance authority to consider the merits of the claim. In contrast to this where the National High Court deals with an asylum appeal against a decision on the merits of the claim it does not have to refer the case back to the first instance authority but has the power itself to grant protection to the applicant. The legal aid system covers all necessary tasks in the appeal process according to the general system for legal aid in asylum cases.<sup>333</sup> Asylum seekers also have a right to a further onward appeal. In this respect two kinds of onward appeal exist. The National High Court may act as a third instance appeal against the decision of the Central Administrative Courts in inadmissible applications. Also the decisions of the National High Courts on asylum appeals are themselves subject to onward appeal (cassation) before the Supreme Court (“Tribunal Supremo”). The Supreme Court can either decide to grant international protection or to refer the case back to the first instance authority in situations where it overrules the confirmation of the inadmissibility decision of the first instance authority by the Central Administrative Court and the National High Court. The grounds for cassation are laid down in Law 29/1998 of 13 July on the Administrative Courts. Free legal aid is also available for such onward appeals under the general legal aid rules. Regarding access to information in Spain the Asylum Act does not provide any guidance on how to interpret the term “relevant information” in Article 16(1) of the Asylum Procedures Directive. According to Article 18 of the Asylum Act asylum seekers have in principle a right to know the content of their file at all times. However, in practice access to the file during the administrative procedure may be restricted for legal advisors. Information that could jeopardise national security concerns or information provided by other EU member states or Spanish embassies may not be disclosed. After a negative decision, the legal advisor will be given access to the file in order to prepare the appeal but certain classified information may not be accessible. Certain case law establishes the principle that national security may prevail over the individual interest of the asylum seeker but must be justified. If such justification is considered to be insufficient, the appellate body may order the first instance authority to clarify such justification.<sup>334</sup>

**The Netherlands:** The District Court of The Hague which has 16 different branches across the Netherlands examines all asylum appeals. At the asylum appeal stage all aspects of the first instance decision are reviewed although there is often only a marginal review of the credibility of the asylum seeker in practice. Facts and points of law are re-evaluated and the appellate body, the District Court, can annul the first instance decision and refer the case back to the first instance authority without the possibility of changing the decision on the merits of the claim. It is optional for the asylum seeker to attend the appeal hearing unless ordered by the Court which rarely happens in practice. Preparation of submissions to and participation in hearings before the appellate body is covered by the legal aid system.<sup>335</sup> A right to appeal beyond the first appeal exists before the Administrative Jurisdiction Division of the Council of State. Such appeal is limited to points of law. The Council of State has a specialized chamber dealing with asylum claims but is competent to deal with decisions taken by other public authorities also. The participation of lawyers in

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<sup>333</sup> As shown in Chapter III, section 3.4. and in Chapter IV, section 9 above free legal aid is available at all stages of the asylum procedure in Spain.

<sup>334</sup> For example Supreme Court Judgment of October 2, 2008. Appeal n° 66/2006 “*Safeguarding national security is a basic requirement of any democratic state, and may constitute a necessary restriction on the exercise of certain fundamental rights*”

<sup>335</sup> As shown in Chapter III, section 3.4., subject to a means test and limited merits test free legal aid is available at all stages of the asylum procedure in the Netherlands.

hearings and additional tasks related to country of origin information research are covered by the legal aid system. However, country of origin information gathered will only be taken into account in case the higher instance authority reopens the case. Regarding access to information the Netherlands applies a specific system whereby the Court can order the State to grant either full or partial access to the file where the legal aid lawyer has been denied access on security grounds. It can propose to the parties in the case to agree that only the Court has access to the sensitive information. If there are “compelling reasons” there is a possibility to keep certain documents or information outside the proceedings or the authorities provide the information under the condition that only the Court can take notice of it. The Court ensures the equality of arms between parties by deciding if it is legitimate to keep certain information wholly or partially secret. The Court balances the interest for secrecy referred to by the party against the interest of public access.<sup>336</sup>

**United Kingdom:** The first appeals reviews are held by the First Tier Tribunal (Asylum and Immigration Chamber) which is an independent Tribunal dealing with asylum appeals as well as other immigration and nationality matters. It reviews both facts and points of law while evidence is re-evaluated at the date of the hearing. The First Tier Tribunal (Immigration and Asylum Chamber) has the power to allow the appeal on the merits and that decision must be respected by the Home Office, unless it is overturned after further challenge. Preparation of evidence, submissions to and

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<sup>336</sup> The Government Information (Public Access) Act (Wet Openbaarheid van Bestuur) functions as the minimum standard. According to the jurisprudence the following can be referred to by the government as compelling reasons: the protection of sources, respect of personal/private life of used sources and protection of methods of investigation.<sup>336</sup> For the Court to give a ruling on the basis of, among other elements, secret information or documents, the other party in the proceeding needs to give its permission. The asylum seeker can always refuse such permission and hereby make the use of partly disclosed information to the Court in the proceeding impossible. This refusal of permission happens only exceptionally as it can be to the disadvantage of the asylum seeker. The government fulfils its obligation to provide information by sending the documents underpinning a report to the Court and letting the Court decide if disclosure is justified. Therefore if the asylum seeker refuses his/her permission (as referred to in art. 8:29(5) of the General Administrative Law Act (AWB)), the consequences of such refusal cannot be to the disadvantage of the Minister of Justice[0]. Article 8:31 AWB states that in case a party does not fulfill its obligation to provide the Court with information, the Court may draw the conclusions from this as it sees fit. If the asylum seeker refuses permission, the assumption will be that the report is accurate and correct. When the government does not expose all the information substantiating its (negative) decision, the asylum seeker can invoke the Public Access Act to ask for disclosure. The Court will assess whether disclosure is justified. The right to disclosure based on the Public Access Act serves only the public interest of a good and democratic administration. The Council of State has ruled that the interest of the applicant cannot be taken in account when considering the disclosure of information on the basis of the Public Access Act. Established case law of the Council of State states that the Minister, can in general attach more weight to the interests of protection of sources and research methods and techniques than the interest of public access. It should also be noted that the government not only uses individual and general reports drafted by the Ministry of Foreign Affairs, but also reports by the Dutch Secret Service (AIVD-reports). The Dutch secret service has the task to carry out security investigations relating to persons, organisations or countries. When the AIVD provides secret evidence Article 87 of the Dutch Intelligence and Security Act 2002 (Wet op de inlichtingen- en veiligheidsdiensten 2002, WIV 2002) applies instead of Article 8:29 AWB which is applicable to information provided by the Ministry of Foreign Affairs. Whereas with regard to information provided by the latter the court ensures the equality of arms between parties and decides whether the refusal or restriction of information in asylum proceedings is justified, this is not the case if the secret information concerns AIVD Data. In such case, according to Article 87 WIV 2002, the decision whether restricting access is justified is exclusively taken by the Minister of Interior, which means that the AIVD *de facto* controls whether secrecy is legitimate. This was included by the legislator in order to prevent that the court gives an ‘incorrect status’ to the material and erroneously decides that the secret material should be disclosed. The Minister of Interior is not dismissed from the obligation in Article 8:45(2) AWB, to provide the relevant information to the court. The court can ask for the relevant AIVD information and documents on basis of Article 8:45 Awb. However because of Article 87 WIV 2002, the Minister can deny the court information and the court cannot assess whether this is justified. The court may draw its own conclusions from this, as it sees fit, including that the government’s decision is not carefully taken.

participation in hearings before the appellate body is covered by the legal aid system, although many lawyers considered that the level of payment under the graduated fee regime is insufficient to undertake good quality work. In the UK it is possible to have a further onward appeal. A 'permission' stage exists in all onward appeals where the test is whether the First Tier Tribunal has arguably made an error of law that has made a material difference to the outcome of the appeal. The scope of the appeal is whether a material error of law has been made and, if so, the case will be re-heard on the merits, usually by the First Tier Tribunal. For applications for permission to appeal to the Upper Tribunal (which only has jurisdiction to consider errors of law) legal aid will only be granted on the basis that there was sufficient merit in the application when it was made, albeit at an enhanced rate. If the appeal is to be made to the Court of Appeal, it is funded on a non-conditional basis. Participation in hearings and any additional tasks are also covered by the legal aid system. Regarding access to information the Secretary of State is under a legal obligation to file a number of documents with the tribunal on appeal. These include the notice of the decision to which the notice of appeal relates, any document served on the applicant giving reasons for that decision, any statement of evidence form completed by the applicant, any record of an interview with the applicant in relation to the decision being appealed, any other unpublished document which is referred to in the decision or relied upon by the Secretary of State. It must be noted that the Secretary of State also must serve on the applicant a copy of all those documents at the same time as filing them to the Tribunal, except for documents, which the respondent has already sent to the appellant<sup>337</sup> There is no information available to the first instance authority that is not subject to examination by the appellate authority and the asylum seeker's lawyer may review all information. Appeals that raise evidence which is considered to engage national security concerns are considered by a different appellate body, the Special Immigration Appeals Commission. This Commission was set up by the Special Immigration Appeals Commission Act 1997, in response to the ECtHR's ruling in respect of Article 13 in *Chahal v UK*.<sup>338</sup> The Commission has a special procedure for the examination of evidence that is said cannot be disclosed. The Courts have extensively examined the fairness of these procedures.<sup>339</sup>

**Norway:** In Norway the Immigration Appeals Board (UNE)<sup>340</sup> has the competence to deal with asylum appeals along with other immigration and nationality cases. Heads of Board (nemndledere) in the Immigration Appeals Board must meet the same formal requirements as judges in Primary Courts. The appeal reviews both facts and points of law, which re-evaluates in principle all factual findings of the first instance authority. The appellate body (UNE) has the power to change the decision on the merits of the claim. It should be noted that the appeal is first reviewed internally by the UDI (the first instance authority)<sup>341</sup> itself to determine whether there are new elements in the case. If the UDI does not amend its original decision, the appeal is forwarded to the UNE.<sup>342</sup> Costs relating to the preparation of submissions by a lawyer and the lawyers' participation in hearings are paid for through the legal aid system.<sup>343</sup> The appeal may be dealt with in a number of different ways at the UNE

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<sup>337</sup> Consolidated Asylum and Immigration (Procedure) Rules 2005 for First-tier Tribunal.

<sup>338</sup> ECtHR, *Chahal v UK*, 70/1995/576/622, 15 November 1996.

<sup>339</sup> For example, the House of Lords decision in *RB (Algeria) v SSHD* [2009] UKHL 10.

<sup>340</sup> Dette er Utlendingsnemnda.

<sup>341</sup> Utlendingsdirektoratet.

<sup>342</sup> See IGC, *Asylum Procedures Report*, at p. 283.

<sup>343</sup> Legal aid is available at the appeal stage in Norway subject to a means test.

whether by the Appeals Board Administration, a Head of Board alone, a three member panel in the absence of the asylum seeker or, a three member panel with the asylum seeker being present or by an extended board, the manner of which is at the discretion of the Appeals Board. Dublin cases and manifestly unfounded cases are in general decided by the Appeals Board Administration whilst all other cases are in general dealt with by a Head of Board. The assessment by the Head of Board as to whether the case needs further clarification will determine the rest of the process. Only cases raising issues of principle will be presented to an extended board. This includes cases where the Board considers adopting a position that is contrary to UNHCR guidelines and recommendations. In 2008 24% of regular asylum cases examined on the merits were handled by a Board (appeals in all asylum cases except Dublin cases and manifestly unfounded cases). In around 80% of these cases the asylum seeker was present at the hearing. Similar to all immigration cases it is possible for a further onward appeal before the ordinary courts, the Appellate Court and finally the Supreme Court. The court competent to litigate against the Kingdom of **Norway**/the Immigration Appeals Board is the Oslo City Court. Regarding access to information the appeal body does not have access to the “internal files” of the first instance authority. Such files are not shared with the asylum seeker or his or her lawyer either. Despite this, any factual information is not considered to be internal and is in principle accessible to the appeal authority, the asylum seeker and his or her lawyer. It should be noted that the appellate authority has the power to order the State to grant access to the file but this power is rarely used in such cases. The security grounds on which access was denied are not specified in the decision. There will only be a reference to the relevant article in the Public Administration Act.

**Switzerland:** The scope of the asylum appeal is limited to violations of federal legislation, including excessive use of discretionary power, wrong or incomplete establishment of the relevant facts and or the inadequate nature of the first instance decision<sup>344</sup>. Evidence is re-evaluated by the Federal Administrative Court which in principle builds on the findings of the first instance decision unless the facts were established in a wrong or incomplete manner. If the facts were wrongly established the Federal Administrative Court can refer the case back to the Federal Office for Migration. The Federal Administrative Court has the power to either change the first instance decision on the merits of the claim or identify legal or factual errors and refer the case back to the Federal Office for Migration. In an appeal procedure against an inadmissibility decision<sup>345</sup> the Federal Administrative Court can only decide on the legality of such decision. If the Court rules that the case was incorrectly declared inadmissible the case is referred back to the Federal Office for Migration for examination of the asylum claim. Costs relating to the preparation of submissions are covered by the legal aid system. It should be noted that in Switzerland the asylum appeal procedure is a written procedure and no hearings take place. There is also no possibility for a further onward appeal in Switzerland.

According to the law, free legal aid can be granted in the inadmissibility procedure. The deadline for appeals against inadmissibility decisions is five workdays from the notification of the decision. This period can be insufficient in practice, especially if asylum seekers do not contact a legal advisory service or lawyer until after they have received their first instance decision. It should also be noted that the budget of the legal advisory services has decreased over the last years; therefore opening hours are limited, which causes problems with keeping the short deadline.

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<sup>344</sup> Art. 106 of the Asylum Act, Asylgesetz, AsylG, Loi sur l'asile, LAsi.

<sup>345</sup> This is known as Nichteintreten in Switzerland.

#### 4.11 Legal Aid and Border Procedures

This section provides a brief overview of the practice at the border for the Member States surveyed and includes information on the time spent in transit zones at borders and airports and the legal assistance and other related information that is available.

**Austria:** At the border in Austria there is an admissibility procedure and also the possibility for claims to be examined completely in a specialized procedure at the airport. At the preliminary interview a decision is taken on whether the claim will be examined at the specialised procedure at the airport or not. If it is likely that the application will be refused due to safe third country reasons or Dublin II responsibilities, or the application is likely to be dismissed for other reasons, then the asylum seeker is obliged to consult a legal advisor who is present during the next hearing. The admissibility procedure cannot exceed 20 days, unless consultations with other EU Member States appear to be necessary. If the Federal Asylum Agency intends to reject the application during the airport procedure, UNHCR has to be informed within one week. An asylum application lodged at the airport can only be rejected if there is no substantial evidence that the asylum seeker would be granted protection status. Furthermore, the rejection has to be approved by the UNCHR. Instead of a 14-days deadline, the appeals have to be submitted in seven days. The applications are examined by the Asylum Court within two weeks. The decision on refusal of entry can be appealed but due to the lack of a suspensive effect and free legal aid, the judicial review of a decision by the Asylum Court is often late, rendering it useless, because the foreigner has already been expelled.<sup>346</sup> Legal aid is only available through 'Rechtsberaters' who visit the airport and provide advice and there is no access to Flüchtlingsberater. The border procedure is not halted whilst the asylum seeker tries to contact a lawyer and the asylum seeker is not admitted to the territory during this time.

**Belgium:** There is no specific admissibility procedure at the border. However, when an asylum seeker enters the territory without the required documentation and claims asylum at the border he or she may be detained. Free legal aid is available to appeal a refusal to enter Belgium. If the asylum seeker's claim is examined at the airport by the Commissioner General for Refugees and Stateless Persons (CGRS) legal aid lawyers are permitted to attend these interviews. Similar to asylum applications in country, free legal aid is available at both the first instance of the asylum procedure and to lodge an appeal against the negative decision on the asylum application. One obstacle to the provision of effective legal assistance is the fact that at the border it may take some time before free legal aid lawyers are effectively appointed to assist and represent asylum seekers in detention at the border when an accelerated asylum procedure applies. The practice varies depending on where the asylum seekers are being detained and the method of selecting the legal aid lawyers.<sup>347</sup> The procedure at the border is not halted whilst the asylum seeker contacts a lawyer and the applicant is also not admitted to the territory during this time.

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<sup>346</sup> Hungarian Helsinki Committee, *Access to Protection at Airports in Europe, Report on the monitoring experience at airports in Amsterdam, Budapest, Madrid, Prague, Vienna and Warsaw*, 2008, p. 16.

<sup>347</sup> For further information see CIRE e.a., *Faire Valoir ses droits en Centre Fermé. Un état des lieux de l'accès à l'aide juridique dans les centres fermés pour étrangers en Belgique*, Juin 2009).

**Czech Republic:** There is a specific administrative procedure at the border to examine whether the asylum seeker may enter the territory.<sup>348</sup> Both the asylum application and the application to enter the Czech Republic are examined at the same time at the border. If the Ministry of the Interior does not reach a decision on the asylum application at the border within four weeks, the asylum seeker is automatically granted entry to the Czech territory. During this time those asylum seekers who cannot sufficiently establish their identity are held in a “reception centre at the international airport” according to the Asylum Act. An appeal is possible against both the decision to refuse entry to the territory and a refusal decision on the asylum application. The appeal on entry refusal must be made within 7 days of the decision. The appeal against the negative asylum decision is suspensive in all cases with the exception of asylum claims considered inadmissible<sup>349</sup> or manifestly unfounded.<sup>350</sup> Only organisations such as OPU provide legal assistance and representation during the first instance administrative procedure. In theory OPU can represent and accompany the asylum seeker during the asylum interviews at the airport. However, due to limited capacity and resources, OPU is limited to visiting the airport reception centre once a week so it will depend on whether they are present at the time when the asylum seeker will be interviewed in order for an adviser to accompany them during the interview. OPU staff members are required to request permission to represent asylum seekers for each individual case, which also creates problems in practice and sometimes results in asylum seekers not being assisted in practice as OPU staff members may not receive such permission timely. The procedure at the border can be very fast and in some situations asylum seekers may simply not have the time to request legal assistance. An additional recent problem is also that the authorities have started to move asylum seekers from the “reception centre at the airport” to detention centres in-land because of a lack of capacity at the airport centre. In those cases a legal fiction is applied whereby those asylum seekers are still considered to be at the border and not in the territory resulting in less procedural safeguards. The procedure at the border is not halted whilst the asylum seeker contacts a lawyer and the applicant is also not admitted to the territory during this time.

**Denmark:** Only a small number of asylum seekers apply at the airport and there is no specific admissibility procedure for asylum claims at the border. As soon as a person without entry documents applies for asylum at the border, the police authorities contact the Immigration Service, which is then responsible for the asylum claim. There are no detention centres at the border and persons applying for asylum at the airport would in most cases only spend a few hours at the airport before being

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<sup>348</sup> This decision must be made within 5 days of an asylum application being made. Applicants will be refused entry for a number of reasons according to Article 73 Asylum Act: If the person can not sufficiently establish their identity; if the person used false documentation or if the person is considered a threat to public security or public order.

<sup>349</sup> According to Czech legislation an asylum claim is considered inadmissible if the asylum seeker is an EU citizen, if another Member State is responsible for examining the claim under the Dublin II Regulation, if the asylum seeker obtained refugee status in another Member State of the EU, if the asylum seeker found effective protection in the first country of asylum, or if the asylum seeker repeatedly lodged asylum applications without submitting new facts or finding.

<sup>350</sup> According to Czech legislation there are a number of reasons for a claim to be considered manifestly unfounded however only in these two scenarios will the manifestly unfounded asylum claim result in a non-suspensive appeal i.e. when the asylum seeker is from a safe country of origin or safe third country as designated by the Czech Republic unless it is proven in his/her particular case that this country cannot be deemed safe or the asylum seeker holds more than one citizenship and failed to avail of the protection of that country and he/she has not proven that he/she could not avail of the protection of that country.

transferred to a reception centre near Copenhagen where their asylum application would be further processed.

**Finland:** There is no admissibility procedure at the Finnish border. However an applicant can apply for international protection with the border control authorities upon entry according to Section 95 of the Finnish Alien's Act (432/2009). At the Helsinki-Vantaa airport there is some limited accommodation for asylum seekers who are free to move around the airport. After the initial phase of the process, asylum seekers are admitted to the territory and transferred to a reception centre or detention centre. At the border the border control authorities or police investigate the asylum seeker's identity, travel route and entry into Finland for the purpose of lodging the asylum application. This includes information on the asylum seekers' family and country of origin. Afterwards the case is transferred to the Finnish Immigration Service (MIGRI), which will examine the asylum seekers' protection claim. In theory the applicant has a right to an interpreter and to legal assistance at the border, however in practice there is not always an interpreter present though one can be available by phone and there never is legal assistance available.<sup>351</sup> In case where the applicant is from a 'so called' safe country of origin (when the asylum seeker is a citizen of the EU)<sup>352</sup> the border guard informs the MIGRI to ensure that the claim is processed in an accelerated procedure.

**France:** There is an admissibility procedure to decide on entry to the territory for the purpose of seeking asylum.<sup>353</sup> The Minister for Immigration, in consultation with OFPRA will authorize entry to the territory for the purpose of seeking asylum, with the exception of asylum claims considered to be manifestly unfounded. Upon entry, the asylum seeker will be granted a "*laisser passer*" and must lodge the asylum application in a Prefecture within 8 days. If the asylum claim is considered manifestly unfounded by the Minister of Immigration and the person is refused entry to the territory, the asylum seeker can lodge an urgent appeal before the Administrative Tribunal. This appeal has automatic suspensive effect.<sup>354</sup> For the purpose of this appeal, the asylum seeker can request to be represented by a lawyer.

During the procedure at the French border asylum seekers are held in waiting zones (zones d'attente). In reality, these zones are closed centres and people can be held there for a maximum of 20 days. Today, 50 waiting zones exist in "Metropolitan **France**" but few of them have accommodation facilities.<sup>355</sup> In those cases, agreements have been made with hotels to accommodate the persons "held in the waiting zone". One of the most important waiting zone is ZAPI 3 situated at the Roissy-Charles de Gaulle airport. According to the law, these waiting zones are accessible in all circumstances at the request of the lawyer (*avocat*) except in case of "force majeure". In practice, however, lawyers do not often visit their clients in the

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<sup>351</sup> It should be noted that the presence of lawyers or legal advisors at the border is not prohibited however

<sup>352</sup> The Finnish Immigration service may consider an asylum seekers' country of origin as a safe country of origin where this country has a stable and democratic political system, where it has an impartial and independent judicial system and where it adheres to the main international conventions on human rights and no serious human rights violations have taken place. No lists of safe countries of origin exist and EU Member States are considered safe countries of origin. See IGC, *Asylum Procedures Report*, at p. 130.

<sup>353</sup> For reasons of clarity this is referred to in this study as the Asylum Procedure at the border, even though formally it is not an asylum procedure according to French law.

<sup>354</sup> The appeal now has automatic suspensive effect following the 2007 ECtHR case of *Gebrehmedine v France*. See ECtHR, *Gebrehmedhin v. France*, Application no. 25389/05, 26 April 2007.

<sup>355</sup> A number of waiting zones are physically situated in police offices

waiting zones. Various non-governmental organisations also have the right to visit the waiting zones.<sup>356</sup> As an example at Roissy-Charles de Gaulle airport, ANAFE has signed a contract with the State allowing 15 volunteers to assist asylum seekers at the border and they have a right to visit the waiting zone 2 times a week in order to provide legal assistance. ANAFE also provides a permanent assistance by phone. It should be noted that 93% of all asylum seekers at the border in France are lodged in Roissy. It is very unclear what happens in the waiting zone of Orly airport and outside Paris. Moreover, French police also conduct 'so called' "contrôles passerelles", controls at the exit point of aeroplanes allowing border guard police (PAF) to return third country nationals without any monitoring possible by organizations or the possibility for the persons concerned to contact those organizations. The procedure at the border is not halted whilst the asylum seeker contacts a lawyer and the applicant is also not admitted to the territory during this time.

**Germany:** It depends on the type of border as to whether there are asylum procedures in place in accordance with Article 35(1) of the Asylum Procedures Directive for instance, asylum procedures are in place at airports and some seaports whilst there are no procedures in place at land border areas. Applicants are detained throughout the border procedures. In theory legal representatives are permitted to attend interviews at the border but in practice the main problem is that lawyers are not notified in sufficient time about the asylum interview. The interview is not postponed if the lawyer is unavailable and therefore in practice the border asylum interview is often held without a lawyer. At the airport border procedures legal aid is available for example at the project at the Frankfurt airport but it is not available everywhere. A number of sea ports (for example Hamburg, Bremerhaven, Wilhelmshaven, Kiel) are rather frequently used by asylum seekers especially if they are entering through Russia and North Eastern Europe. If a 'stowaway' is reported there to the harbour police, the case will be dealt with at the border. At present, these "silent" cases may be substantially higher in number than those entering at the airports.

**Greece:** At the airport, asylum seekers are confined to areas, which are defined as international zones. If no final decision is made on their asylum claim at the airport within 4 weeks then the asylum seeker is allowed to enter the country and his/her asylum claim is examined according to the provisions of the PD 90/2008 as amended by PD 81/2009. In cases of mass influx asylum seekers may be transferred to places near the airport and/or the port where they are accommodated. This is not provided for in the Greek law and in practice the asylum seekers are detained during this period. According to Article 24(1) Presidential Decree 90/2008 asylum seekers are entitled to consult a lawyer or a legal advisor at their own expense at the border. There is no explicit provision in the law providing for the attendance of legal representatives at interviews at the border. However, in the past lawyers working at the Greek Council for Refugees registered asylum applications and helped asylum seekers submit asylum claims for the authorities in mass influx cases. The procedure at the border is not halted whilst the asylum seeker contacts a lawyer and the applicant is also not admitted to the territory during this time unless a decision on the claim is not taken within one month.

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<sup>356</sup> For example Accueil aux médecins et personnels de santé réfugiés en France (APSR) ; Amnesty International, section française ; L'Association nationale d'assistance aux frontières pour le étrangers (ANAFE) ; La CIMADE ; France Terre d'asile ; Forum réfugiés ; Groupe accueil et solidarité (GAS) ; Le Groupe d'information et de soutien des immigrés (GISTI) ; La Ligue des droits de l'homme ; Le Mouvement contre le racisme et pour l'amitié entre les peuples (MRAP).

**Hungary:** In Hungary there is an airport procedure carried out in the transit zone of the international airport in Budapest. The same legal provisions apply for these proceedings as for the “general” pre-assessment procedure carried out within the country. The only difference is the maximum timeframe of the pre-assessment procedure. At the airport the pre-assessment period may last for a maximum of 8 days whilst in other cases in country the timeframe is 15 days. At the airport, asylum seekers have to stay in designated holding areas within the transit zone. In theory legal aid providers are entitled to be present at all procedural acts, including the interviews similarly to privately retained legal representatives.

**Ireland:** There is limited information available on the practice at the border and airports. This is due to the fact that there is no presence of non-governmental organisations or legal representatives at these areas. When asylum applications are made at the border, most applicants are released to state provided direct provision accommodation and are obliged to report to the Office of the Refugee Applications Commissioner for registration of their claim<sup>357</sup> and receive information on their rights, including legal aid. A small number of applicants are detained and their access to legal aid is more difficult as noted in section 4.12 below. The Immigration Act 2004 does not permit an appeal against a refusal to enter the State. According to Section 8 of the Refugee Act 1996 (as amended) an applicant must be informed of his/her right to consult a solicitor. In practice, the Refugee Legal Service generally becomes involved after any interviews take place at the airport, though there is no obvious legal impediment to prior involvement. Under the current legislation, with the exception of those facing an exclusion order, everyone applying for protection at the border shall be granted a protection application permission and permitted to enter the State for the examination of their asylum claim.

**Italy:** In Italy asylum applications are not dealt with at the border. If a person applies for asylum at the border or airport, he/she should be admitted to the territory and the asylum application should be dealt with in-land. There is however a decision on whether the person should be admitted to the territory at the border. The border authorities have no discretionary power. Therefore if a person applies for asylum at the border they must be admitted to the territory. If the person concerned does not request asylum at the border or when the authorities do “not clearly understand that the person is seeking protection”, they are considered not to have applied for asylum and therefore not admitted to the asylum procedure. Such persons are refused entry to Italy and immediately returned. Whilst at the airport people can stay for a limited time in the transit zone. In the past NGOs used to have a small office at the airport where they could provide legal advice to people. However this was only available to persons who were admitted into the territory. In Italy no legal aid is generally available at the first stage of the procedure. Asylum seekers arriving in Lampedusa experience difficulty in accessing the asylum procedure as well as obtaining legal assistance in practice.

**Lithuania:** In theory free legal aid is available to appeal a decision to refuse admission to the territory at the border. However in practice this may be difficult as the person may be deported without an opportunity to contact a lawyer to prepare an appeal. During this time period, asylum seekers are accommodated in a closed centre and can be detained or up to forty eight hours. However recently a border monitoring agreement with UNHCR and the Red Cross started and therefore the lack of time to contact a lawyer is less of a problem now. In theory, lawyers should be able to attend the interviews at the border, however in practice free legal aid lawyers

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<sup>357</sup> For further information see Section 8(1) Refugee Act 1996 (as amended).

are only invited to attend interviews involving unaccompanied children or vulnerable persons. An obstacle to legal aid is also the fact that it is only granted at the specific request of the asylum seeker at the border. This is dependent upon the asylum seeker being properly informed of their right to legal aid by the Migration Department. The procedure should in theory be halted at the border. In practice though few asylum seekers request legal aid so it is usually only provided at the appeal stage. The asylum seeker is not admitted to the territory during this time. The Migration Department either refuses to grant 'territorial asylum' or refuses asylum and issues an order to leave the country or grants 'territorial asylum' for the purpose of examining the claim. In that case they are granted a Foreigner's Registration Certificate and admitted to the territory.

**Romania:** At the border the asylum authorities may make one of three possible decisions: a) to grant the asylum seeker a form of protection and give him/her access to the territory; b) grant the applicant access to the territory in order to apply for asylum in the regular procedure in country; c) reject the asylum application. In theory legal representatives are permitted to attend interviews at border procedures but in practice non-governmental organisation staff assist asylum seekers at the border. If an applicant is refused asylum at the border they will not receive access to the territory. They have the opportunity to appeal the decision and in such cases non-governmental organisations will help with the submission of the appeal grounds. The applicant can also request permission from the Court to obtain a free legal aid lawyer. During the border proceedings in Romania, if the applicant is not granted access to the territory he/she is placed in a special facility in the border police area and confined to that space. Asylum seekers can only be held in this special facility for up to 20 days. After that time the authorities are obliged to grant them access to the territory and continue their asylum claim in the regular procedure in country. In reality over the last few years only a small number of asylum applications were submitted at the borders. The procedure at the border is not halted whilst the asylum seeker contacts a lawyer and the applicant is also not admitted to the territory during this time.

**Slovenia:** There is a special procedure provided for in the law for asylum claims submitted at the airport and ports but it is not implemented in practice. This procedure involves claims examined in accelerated procedures.<sup>358</sup> In theory these claims would then be examined as soon as possible but in practice these procedures are not implemented at the border and no one is detained at the airport. According to Slovenian law, the asylum seekers would be kept in the transit zone of the airport or port during this procedure. In theory legal representatives would have access to the asylum interviews. The same restrictions apply as for non-border procedures in accessing free legal aid in that it is only available for the appeal procedure. If the border procedures were applied, the applicants would have a right to contact caseworkers at PIC<sup>359</sup> at the first instance and refugee counsellors at the second instance.

**Spain:** There is a special<sup>360</sup> procedure at the Spanish borders. During border proceedings applicants are kept in detention until they receive a decision on their

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<sup>358</sup> There also is a special procedure in Slovenia at the airport concerning claims whereby another Member State is responsible under the Dublin II Regulation.

<sup>359</sup> This was the organisation selected under the ERF Funding call.

<sup>360</sup> The special procedure at the border may include an inadmissibility procedure (Art. 20 of the Spanish Asylum Act) or refusal following an examination of the asylum claim (Art. 21 paragraphs 2- a and 2-b of the Spanish Asylum Act ).

request to enter the territory. This usually takes 4 days but can take up to 10 days. If the claim is found to be inadmissible or there are reasons for refusal the asylum seeker has 2 days in which to request an administrative review. The Spanish authorities will then have 2 days to respond to this request. Subsequently, if the Spanish authorities still find the application inadmissible or there are grounds for refusal the person will be expelled unless an appeal is made and a judge grants a suspension order (“medida cautelar”) on expulsion. According to the Spanish Asylum Act<sup>361</sup> legal aid is mandatory when claims for asylum are made at the border. The procedure is halted whilst an asylum seeker contacts a lawyer. The asylum seeker is not admitted to the territory until a positive decision is taken on admissibility of their claim.

**The Netherlands:** There is no admissibility procedure as such in the Netherlands. Free legal aid is available to appeal against a negative decision on the merits of the application when asylum seekers are detained at the border. During border proceedings asylum seekers are detained in a detention centre in Schiphol (grenshospitium) or confined to the application centre Schipol. Legal aid representatives are permitted to attend interviews at the border according to the law but in practice they rarely make use of it. A legal advisor or lawyer is automatically appointed once an asylum application is submitted at the border. The applicant is also not admitted to the territory during this time.

**United Kingdom:** In the UK there is just a screening interview at the border to determine how the claim will proceed. The applicant is detained at the border during this process. At the screening stage the asylum applicant will usually not have any contact with a lawyer. At the applicant’s own expense a lawyer can attend the screening interview. No legal aid is available at this stage of the procedure with the exception of asylum applications submitted by separated children or if the case has criminal law implications. Then the legal aid will be funded and a legal representative will be present at the interview.

**Norway:** There are no border procedures present in Norway. However there is an accelerated procedure at the border for manifestly unfounded cases.

**Switzerland:** There is provision for an admissibility procedure and asylum procedure at the airport. The decision on entry to the Swiss territory must be taken within 2 days. This decision can be appealed. If the asylum seeker is not admitted to the territory, he or she is sent to the reception facilities in the transit zone of the airport. In the airport procedure, a decision on the asylum claim has to be taken within 20 days of lodging the asylum claim. If the procedure takes longer, the asylum seeker is admitted to Swiss territory and allocated to a canton. Asylum seekers can spend a maximum of 60 days in the transit zone of the airport. Asylum appeals at the airport have to be submitted within 5 working days. Similarly, Switzerland has a border procedure at the two international airports (Zurich-Kloten and Geneva-Cointrin) but not at the land borders. In Switzerland at the airport, applicants reside in accommodation facilities in the transit zone. Free movement is restricted to the transit zone of the non-Schengen area. The Swiss law grants the right to one daily walk outside, with permission granted beforehand and the asylum seekers are accompanied by the airport police. Asylum seekers who are residing in the federal reception and registration centres close to the borders (Basel, Vallorbe, Chiasso and Kreuzlingen) need written permission to leave the premises. With that permission,

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<sup>361</sup> Law 12/2009 of 30 October, regulating the right of asylum and subsidiary protection.

they can leave the centre on weekdays from 9am to 5pm and on weekends and holidays from 9am to 7pm.

#### 4.12 Legal Aid and Detention

This section provides an overview of the implications of detention on the availability of legal aid for detained asylum seekers in the countries surveyed. This section also contains more general information on certain aspects of the asylum procedure in case of detention.

**Austria:** The main issue regarding access to legal aid for detainees in Austria concerns those asylum seekers who are not already instructing legal representatives. In Austria access is *de facto* rendered impossible as usually legal advisors are not informed about persons in detention and legal advice is usually not available in detention centres. In Austria the most important practical barrier to access to detention centres for legal advisors/ lawyers is that they require a mandate from the asylum seeker in order to be able to access the centre. Detainees who have no legal advisor are often not informed of their rights whilst in detention including the possibility of accessing legal aid in order to lodge an appeal in the asylum procedure. In practice, if the asylum seeker manages to contact legal representatives outside he or she can give a lawyer a mandate to represent them and then receive visits, but there are no legal counselling services offered directly to asylum seekers in detention. Asylum seekers in detention are given access to phones for private calls and interpreters are present.

**Belgium:** During detention the applicant's asylum claim is expedited. The examination of the asylum claim takes place as soon as possible as the administration, the Commissioner General for Refugees and Stateless Persons (CGRS) must decide within 15 days. Any asylum appeal must then be lodged within 15 days after notification of the negative decision of the CGRS.<sup>362</sup> A decision is reached within approximately 10 days on appeals to the Conseil de Contentieux des Etrangers – Council for Aliens Litigation (CAL).<sup>363</sup> The hearing of the CAL in appeals concerning detained asylum seekers take place at the offices of the CAL in Brussels and not in detention centres. According to Belgian law, the presence of the asylum seeker is not strictly required during the hearing in the CAL if a lawyer represents him or her. Legal aid is available in detention procedures according to the general rules on legal aid. Legal aid is also available to appeal the decision to detain. However, it should be noted that different practices exist with regard to organising access to free legal aid in the various detention centres. This means that the quick assignment of a free legal aid lawyer depends on which detention centre the asylum seeker is in. In general the staff of the various detention centres submits requests for free legal aid on behalf of the detainees. On this issue it should be noted that Belgian non-governmental organisations have recommended and obtained that “first line legal aid”<sup>364</sup> should systematically be organised by the Bar Association in order to ensure that “second line legal aid”<sup>365</sup> is ensured when necessary. Regarding practical

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<sup>362</sup> Following the reform of the Belgian Aliens Act, the time for lodging an appeal against a negative decision of the CGRA to the CAL was 15 days in all cases. Following a judgment of the Constitutional Court of June 2008, the deadline for lodging appeals before the CAL is 30 days in all cases, except where the individual concerned is detained, in which case the time limit for lodging an appeal is 15 days. See Court Constitutionnelle, Arrêt No. 81/2008, 27 mai 2008.

<sup>363</sup> It should be noted that non-compliance with these time limits does not result in any consequences in practice.

<sup>364</sup> In the Belgian context this means legal assistance and not representation.

<sup>365</sup> In the Belgian context this means legal representation by lawyers.

barriers to access in detention in Belgium it may be problematic to receive the dossier by fax in case of detention while lawyers may have to make an appointment to visit their clients in certain cases. Some detention centres are located in a remote area, which makes it sometimes difficult for lawyers to visit their clients. Legal aid lawyers providing “first line legal aid” in the detention centre are not allowed to act on behalf of the detained asylum seekers but must submit an official request to the legal aid office of the local Bar Association to appoint a “second line legal aid lawyer” to represent the asylum seeker, for instance to lodge an appeal to the Court. Interpreters are available at the detention centres to facilitate communication between the lawyers and the asylum seeker. Lists of interpreters are available at the local Legal Aid Office of the relevant Bar Association. However, in practice it is often difficult to find a reliable interpreter who is available at short notice and willing to travel to the detention centre, which is often in a remote area. Moreover, the lawyer is in charge of contacting the interpreter. In some cases, lawyers are forced to use the services of an interpreter outside the lists of interpreters available at the Bar Association, because the listed interpreters are unable to reach the detention centre timely or are not available. In those cases the interpreters’ services are hired at the expense of the asylum seeker. Interpretation for the asylum interviews held in the detention centres is provided by the CGRS.

There is no provision for legal aid clinics in the detention centres in Belgium. However, two pilot projects have recently been initiated by the Bar Association of Liège at the detention centre in Vottem and by the Bar Association of Brugge for the detention centre in Brugge, whereby sessions are organised by lawyers providing legal advice to those detained. Regarding Article 16(2) of the Asylum Procedures Directive and access to closed centres in Belgium, Directors of detention centres are entitled to take measures against a visitor whenever there are serious indications that the contact between the detainee and the visitor endangers national security, public security or public policy or when the security of the centre or the prevention of punishable acts so require. Such measures include an oral warning, ending of the visit or refusing access to the centre.<sup>366</sup> Such measures are implemented on a case-by-case basis.

**Czech Republic:** In the Czech Republic a distinction must be made between legal aid at the first instance and legal aid at the appeal stage. For legal aid provided at the first instance it depends on funding that is provided by the State to organisations providing legal aid. Sometimes the travel costs to the detention centre are covered by the agreement with the organisation especially when the provision of legal aid would imply travelling long distances, travel costs would be included in the funding. For legal aid at the appeal stage, travel costs to the detention centre are always covered for private lawyers, but not necessarily always granted to organisations providing legal aid at the appeal stage. Lawyers or legal advisors can only meet with the asylum seekers in detention centres in a special room for visitors. After the transposition of the Asylum Procedures Directive lawyers or legal advisors faced difficulties in accessing detention facilities and have to rely on staff members of the centre providing information on legal services to the detainees. Lawyers/legal advisors also require approval from the Ministry of Interior to access the detention centres. However, in this regard OPU notes that they never experienced any difficulty in getting access. Those “restrictions” are implemented as a general measure. The main practical barriers are the need for approval from the Ministry of Interior to access the centre and the fact that detention centres are in remote areas which are difficult to reach via public transport. Other practical barriers have been imposed by

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<sup>366</sup> Article 31 Royal Decree of 2 August 2002.

the management of particular detention centres such as the centre Bela-Jezova centre where OPU can only provide legal advice on certain week days and within fixed hours (10-12 and 14-16:45). In light of the high number of foreigners detained this can sometimes reduce the accessibility of legal aid considerably. Regarding interpretation in the Czech Republic in detention centres, it all depends on the terms of the project for funding of legal aid concluded with the State. Sometimes expenses for translations of communication between the legal aid provider and the asylum seeker are covered but not always. There is restricted access to phones in the detention centres in the Czech Republic. OPU on a regular basis visits reception and detention centres to provide basic information on the rights of asylum seekers. Visits must be within specific visiting hours applicable to the centre. Regarding meeting with clients, a specific room is provided for consultation with the asylum seeker. Free legal aid is available under the generally applicable rules to appeal the negative decision on an asylum application. Also the decision to detain can be appealed separately to the Administrative Court and the same rules with regard to legal aid apply.

**Denmark:** When an asylum seeker is in detention, the Danish Immigration Service prioritises those cases and examines the case as quickly as possible. Free legal assistance is available and it covers the costs of travel of the legal aid provider to the detention centres. Interpreters are available at the detention centres. They are either physically present at the centre or their services are provided by phone. When the Danish Refugee Council (DRC) provides legal assistance in detention centres, interpreters are provided by the refugee council itself, which is part of its agreement with the government on the provision of legal assistance to asylum seekers. All asylum seekers who are detained are informed of their right to receive counselling by the DRC. The authorities themselves also inform DRC when an asylum seeker requires counselling. In practice this means that DRC visits the detention centre approximately once a week. Lawyers provide free legal representation to detained asylum seekers concerning their detention. With regard to their asylum application the general rules apply i.e. free legal assistance namely counselling by DRC is available during the first instance stage and free legal representation is available at the appeal stage<sup>367</sup> (except for cases rejected in the expedited manifestly unfounded procedure for which the DRC agrees with the Immigration Service's assessment). It should be noted that in Denmark, if asylum seekers are detained, in most cases they are not detained for the whole duration of the asylum procedure but only at the start of the asylum procedure and once the asylum application has been finally rejected for the purpose of removal. As regards security measures there have been limitations on visits based on national security reasons on a case-by-case basis.<sup>368</sup>

**Finland:** A decision on detention made by the authorities or a District Court is not subject to appeal as such in Finland. The person held in detention may make a complaint about the decision of the District Court and there is free legal aid available for that purpose. However the process is very slow so complaints are generally not used in practice. Every two weeks the Finnish District Courts holds a session to review the detention order. At this hearing the detained asylum seeker is present along with a lawyer. Often these lawyers representing the applicants for their detention in Court have limited knowledge on the asylum claim itself. Sometimes this is a problem and causes prolonged detention for the asylum seeker. Usually the lawyer who is handling the asylum claim is not the same lawyer handling the

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<sup>367</sup> This is with the exception of accelerated manifestly unfounded applications for which the Danish Refugee Council agrees with the Immigration Service's assessment.

<sup>368</sup> However, these have been very rare.

detention case. Regarding access to clients in detention centres, sometimes lawyers are not timely informed of the fact that their client has been taken into detention, which can have serious consequences with respect to the use of possible legal remedies. It should be noted that asylum seekers who are temporarily in police custody are in practice treated under the Coercive Measures Act which means they do not have the same rights as those asylum seekers detained in an aliens' detention centre. When visiting at the aliens detention centre, the personnel of the centre has to be informed of the visit but no permission is required. Interpreters are requested to visit detention centres when needed and sometimes they are available via phone also. Once a week lawyers from the Refugee Advice Centre visits the detention centre to meet detainees. These advice sessions by the Refugee Advice Centre include the provision of basic information about the asylum procedures, but there can also be private meetings for further clarifications about an asylum seeker's case as well as meetings to arrange the appeal of a negative asylum decision. Also the personnel of alien's detention centres may make a list of detainees who wish to meet a lawyer and then they arrange an interpreter in advance for any consultation visits.

**France:** In France detention centres are generally difficult to reach by public transport and in some detention centres confidentiality may be an issue. OFPRA applies a priority procedure whilst the asylum seeker is in a retention centre. Asylum claims need to be examined within 96 hours. An appeal to the asylum court (CNDA) is possible but does not suspend the expulsion decision. The asylum seeker can request legal aid at the appeal stage, however the request does not halt the appeal procedure. This means that in practice, in those cases, the appeal against the refusal decision of the OFPRA is often not effective. Regarding interpretation services in detention centres in France, according to Article L. 551-2 of the Code of entry and residence of aliens and asylum law (CESEDA) third country nationals can ask for the assistance of an interpreter for their interactions with the administration. However, no interpreters are put at the disposal of lawyers in the retention centres. Interpreters are only provided by non-governmental organisations assisting third country nationals. Lawyers can make use of their services in an informal way. Due to financial limitations, these interpreters are often volunteers or interpretation is provided via telephone.

Article L. 553-6 of the CESEDA states that « foreigners held in retention must receive reception, information and support in order to ensure the effective implementation of their rights and to prepare their departure ». The conditions to intervene in the retention centres are laid down in the regulatory part of the CESEDA. According to Article R.553-14: "to allow the effective exercise of the rights of foreigners held in an administrative retention centre, the Minister of Immigration concludes a contract with one or more organizations (personnes morales) with a mission to inform the foreigners and to help them exercise their rights. In order to do so, the organization ensures, in each centre where it is charged to intervene, information through the organization of regular information sessions (permanences) and the distribution of documentation. These activities are ensured by one non-governmental organization per centre. This means in practice that organizations are contracted to provide services in the retention centres (one organization per centre) through a permanent presence in the centre in order to provide legal support to the foreigners held in the retention centre (information, advice and support for lodging asylum appeals).

Regarding the use of legal aid clinics in France the following information was gathered for this survey. Subsequent to a competition in 2010 France was divided in 8 parts (one part is the overseas territories, including the Indian Ocean , the Antilles and the Caribbean, where the situation in the retention centres is in some cases

unacceptable)<sup>369</sup>. In addition to CIMADE; Forum Réfugiés, FTDA, The Order of Malta and ASSFAM now provide services in the retention centres. A “pilot committee” has been established between those organizations in order to establish a common vision on the situation in retention centres in France.

With regard to the decision to hold a person in the retention centre, various situations must be distinguished. There are two judicial orders in France. According to the Constitution, the civil judge (juge judiciaire) must guarantee individual liberty. As a result, within 48 hours since the start of the deprivation of liberty, the foreigner must be brought before the “Juge de la liberté de la détention (liberty and detention judge) (JLD) in order to decide whether detention is lawful as well as the prolongation of the retention. The person will appear again before the JLD 15 days later.<sup>370</sup> Currently, a person cannot be held in a retention centre longer than 32 days. At the hearing before the JLD, the foreigner can request that a lawyer will be appointed “ex officio”. At the same time, the Administrative Tribunal is competent to control the legality of the acts of the administration, including the measure to hold a person in retention and the expulsion decision which is the basis for the retention decision.

In case an urgent appeal is lodged against the “return to the border” (arrêté préfectoral de reconduite à la frontière) before the Administrative Tribunal, it suffices to request for a legal aid lawyer paid by the State in the appeal. These decisions concern expulsion of irregular migrants to their country of origin. The person is usually assisted by an “on duty-lawyer” (avocat de permanence) in those cases.

**Germany:** In Germany it may be very complicated for an asylum seeker to contact a lawyer when he/she is held in the Frankfurt airport detention zone before entry to Germany, in particular if the person arrives in the weekend or at night. As a result lawyers in Frankfurt have established an ‘emergency service’ (day and night). In all other cases there is sufficient time to contact a lawyer although detention centres are often in remote areas which make it more difficult, but not impossible to establish and maintain contact. In Germany the applicant’s asylum claim is expedited when the asylum seeker is detained. The interpreter’s costs are not covered by legal aid, therefore the lawyer may bring with him and be assisted by an interpreter but only at his/her own or the client’s expense. There is no state practice concerning the use of ‘legal aid clinic’s in Germany however some lawyers in Berlin and Eastern Germany provide a pro bono service in one detention centre near to Berlin. Legal aid to appeal the grounds for detention is not excluded by law but in general Courts rarely grant it.

**Greece:** Under the normal procedure a person who applies for asylum while in detention and against whom a deportation order has been issued shall remain in detention and the application shall be examined with the utmost priority. Depending on the circumstances the police authorities may order the detention of asylum seekers for a maximum of 60 days in order to clarify the circumstances of entry, the identity and country of origin of the applicants or on the grounds of public interest or public order. Asylum seekers may also be detained when it is considered necessary for the speedy and effective completion of the examination of their asylum claims. Free legal aid provided for by the Greek legislation covers only the representation at the Council of State. Regarding the use of legal aid clinics in Greece, these have only

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<sup>369</sup> The situation in the retention centre of Mayotte has been criticised by Amnesty International. See Amnesty International, *Amnesty International Report 2009. France – Migrants, asylum seekers and refugees*. Available at <http://report2009.amnesty.org/en/regions/europe-central-asia/France>.

<sup>370</sup> It should be noted that a new draft law will be presented in fall 2010 in the French Parliament. The draft law proposes to prolong the maximum period of detention to 45 days and to require the intervention of the JLD only after 5 days.

been applied in cases of implementation of EU funded programmes on a case by case basis. However in practice detention centres are located in remote areas while at the same time there have been reports about lawyers refused access to a detention facility even if they had the name of the asylum seeker they wanted to visit (which is a requirement for lawyers to have access to a detention centre) as the director of the centre claimed that the asylum seeker concerned was not in their custody. Lawyers can only access detention centres if they have the specific name of the clients. However as reported by the CPT access to lawyers for detainees is problematic in practice.<sup>371</sup>

**Hungary:** In Hungary big detention facilities are located close to the border in remote areas and far from Budapest and other big cities, which impede access to legal assistance. Regarding asylum seekers who are detained in alien policing jails<sup>372</sup> practice shows that despite the fact that they are entitled to free legal aid under the Act on Free Legal Aid no. 80 of 2003 as asylum seekers, in practice they are not aware of this possibility. Official forms are not provided to them in detention to request legal aid. Apart from that, even if detainees receive the legal aid request forms, they are only available in the Hungarian language so it is difficult for them to fill in the form. With the exception of the Hungarian Helsinki Committee no other organization or lawyer regularly visits detention facilities so the number of asylum seekers that can be assisted to fill in these request forms is limited. Therefore, detained asylum seekers' access to legal aid depends on the limited capacity of the Hungarian Helsinki Committee. Interpreters are not available in detention centres and public phones installed in the common area of the corridors may be used for only 10 minutes a day for private purposes. In some of the recently installed detention facilities, public phones are only available once or twice a week for 5 to 10 minutes. Regarding the use of legal aid clinics, the Hungarian Helsinki Committee used to have legal clinics in 3 Hungarian towns (Budapest, Győr, Debrecen) providing general legal assistance to asylum seekers but this is no longer happening. There is no information available as to whether any other organization is co-ordinating such legal clinics. Legal counsels are appointed to detained foreigners to represent them at the Court hearing when deciding upon the alien policing detention beyond 72 hours of detention.<sup>373</sup>

Practice with regard to the detention of asylum seekers in Hungary has worsened in 2010 and the use of detention is increasing. Currently 15 "temporary detention facilities" are run by the Police of which 11 were previously police prisons for the detention of persons charged under criminal law for a period of in principle 72 hours and in any case no longer than 15 days. However, in the current situation, third country nationals, including asylum seekers detained for immigration related reasons, may well spend up to 6 months in these detention facilities in inadequate circumstances. In some cases three detainees have to share a cell of 10m<sup>2</sup> without direct access to toilet or bathroom. In those temporary detention facilities no courtyard or open air activities are possible notwithstanding a provision in the law guaranteeing the right of detainees or one hour of open air activity per day.

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<sup>371</sup> CPT CPT/Inf (2008) 3, *Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 27 February 2007*, Strasbourg, 8 February 2008.

<sup>372</sup> According to the new Hungarian policy, the majority of asylum seekers detained are single adult males. Recently, in practice detention is increasingly being used.

<sup>373</sup> Under section 59(5) of the Third Country Nationals Act "The Court shall appoint a representative ad litem for any third-country national or his/her family member who does not understand the Hungarian language and is unable to contract the services of a legal representative on his/her own."

According to the Hungarian Helsinki Committee these recently opened detention facilities are not in compliance with human rights standards, including standards set by the Committee for the Prevention of Torture. Asylum seekers in temporary detention facilities have no access to psycho-social counseling or internet while there is no or extremely limited information available on asylum seekers' rights, free legal aid and the possibility to contact NGOs. Access to legal assistance and representation for asylum seekers in temporary detention facilities is generally not ensured, except for the 4 police jails the Hungarian Helsinki Committee has access to.<sup>374</sup> Services provided to asylum seekers in other reception facilities through ERF projects are not available to asylum seekers in the temporary detention facilities, which may be discriminatory. The creation of additional temporary detention facilities is foreseen as the full capacity is almost always used.

**Ireland:** The asylum claim is expedited whilst the asylum seeker is in detention. This is pursuant to Section 10(4) of the Refugee Act 1996 (as amended).<sup>375</sup> There are practical barriers for clients who may be at the port or airport to access counsel in Ireland as there are no NGO's or immigration lawyers in those locations. Also those detained for removal purposes are detained in prisons as there are no specific centres for immigration detainees. Professional visiting hours are short and interpreters are not generally on-site in those centres which may impede them in effectively accessing a lawyer in all situations.<sup>376</sup> Communication with clients by telephone in prison creates difficulties where there is a language barrier. This can make it difficult to convey messages quickly to a detained applicant. It is not generally possible to call a client in detention at short notice, they can call out, but do not have access to interpreters for this purpose. Visiting times and the duration of visits are limited. This may be particularly problematic for vulnerable asylum seekers and because the procedures are expedited in detention. Legal aid is available to challenge asylum related detention pursuant to Section 9(8) of the Refugee Act 1996 (as amended). The Refugee Legal Service (RLS) also represents detained asylum seekers in respect of their substantive asylum claim. Regarding legal aid clinics, the RLS provides an information service to the main prison in which asylum seekers are detained.

**Italy:** Expedited asylum procedures are provided for detained asylum seekers. The procedure in detention is expedited at appeal level. The time limit to lodge an appeal against the negative decision in the asylum procedure is 15 days in those cases instead of 30 days in regular cases. It should be noted that asylum seekers in Italy are rarely detained. They are only detained in case they apply for asylum after they have received a decision to return in order to prolong their stay in Italy, in Article 1F Geneva Convention exclusion cases or in case they have been sentenced in Italy for certain crimes. Sometimes it happens that asylum seekers entered the country in Lampedusa, were transferred to the mainland after they applied for asylum in Lampedusa and later on were checked by the police and detained because the police were not aware that they already applied for asylum. In Italy access to

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<sup>374</sup> Kiskunhalas, Győr, Nyírbátor, Budapest airport.

<sup>375</sup> On this point please note that in the 2009 ORAC annual report it was stated that "The Office also continued to prioritise applications from applicants in detention in line with statutory requirements. A total of 231 applications were received from persons in detention. This figure constitutes 8.6% of all applications received in 2009.

<sup>376</sup> Where rejected asylum seekers are detained in a prison for the purposes of removal, a new procedure introduced in 2010 requiring 24 hours prior booking for professional visits may impact the asylum seeker's ability to communicate with his/her lawyer.

detention centres is particularly problematic in Lampedusa due to its location. There are also no lawyers present on Lampedusa.

There are approximately 15 detention centres in Italy. Lawyers have access to those centres but only if they have the name of their client beforehand. They cannot spontaneously visit the detention centre or offer their services. Lawyers may enter detention facilities for asylum seekers but only to meet with their own clients. Limitations on the possibility for lawyers to visit closed areas may be applied on a case-by-case basis. There have been cases where lawyers did not receive immediately permission to enter the detention facility where their client resided because they had not received yet a document appointing them as his or her lawyer. Sometimes a number of administrative requirements need to be fulfilled which can take a lot of time before the lawyer can actually enter the centre in order to see his or her client.. There are no interpreters provided for meetings with lawyers however there are interpreters provided for the asylum interviews with government officials. Free legal aid is only available at the judicial stage after the first initial decisions as for all asylum seekers in Italy. An appeal against the detention procedure is possible but only the legality of the detention can be challenged. In such cases a lawyer must always be present at the hearing. A lawyer will be appointed “*de officio*” from a list of lawyers, if the person concerned does not have a lawyer

**Lithuania:** The asylum claim is not expedited whilst the applicant is in detention. Lawyers are paid under legal aid for preparation of documents and representation in court. Meetings with clients might be necessary part of that, but it is not financially beneficial for lawyers to meet clients more than necessary in order to arrange preparation of documents and representation in court, because they are not separately paid for the meetings. Interpreters are not available in detention centres. Lawyers usually try to arrange translation themselves. As legally translation is the duty of Migration Department, lawyers might insist on translators being provided by Migration Department, but such arrangement would take much time. There is a Lithuanian Red Cross – Vilnius University – UNHCR project of Refugee Law Clinic. Students do not visit detention places regularly, but they are allowed to visit there with Red Cross Lawyers if they are informed about specific asylum seekers in detention. Legal aid available to challenge the detention as well as a negative asylum decision. Regarding access to detention centres, legal advisors are permitted to visit their clients during working hours in the Foreigner’s Registration Centre. Asylum seekers have the right to use paid telephone services and receive correspondence without restrictions.

**Romania:** Interpreters are not available at detention centres in Romania. The lawyer may come with an interpreter paid by him/herself or use an interpreter via phone. Lawyers must also request permission to visit in advance to the Director of the detention centre. The Jesuit Refugee Service Romania provides regular legal assistance in both Otopeni and Arad detention centres. Free legal aid is available to appeal the decision to detain the asylum seeker as well as in relation to the asylum claim. However the applicant often only meets the lawyer in court and speaks with him briefly a few minutes before the court session or they do not communicate at all if no interpreter is present.

**Slovenia:** In Slovenia there is no legal aid clinics in the detention centres, however within the Faculty of Law in Ljubljana there is a legal clinic on refugee law. The clinic has two parts to it, 30 hours of theoretical introduction and practical work at governmental or non-governmental organisations. Students involved in the practical part of the clinic at the NGO “Parvno-informacijski center za nevladne organizacije” can visit the detention centre where they assist with providing legal counselling to the

detainees. However this is not performed very regularly. Free legal aid is available for the appeal both against the decision to detain and an appeal against a negative decision in the asylum procedure. As for visiting clients in detention, visits should be announced in advance. Regarding interpretation in Slovenia, interpreters for free legal aid are not available in the detention centre. The lawyer has to arrange an interpreter by himself/herself. Phones are not available in the meeting areas in detention centres so lawyers must use their own mobile phones to contact interpreters.

**Spain:** In Spain no specific complaints on access to detention centres have been reported so far and the situation seems to have improved as far as access to detention facilities for social workers and lawyers is concerned. Social assistance is provided by the Spanish Red Cross while some Bar Associations provide SOJ services (legal orientation) in certain detention centres (such as Barajas Airport). During detention at the border the examination of the asylum claim is expedited. Equally the procedure is accelerated when the asylum claim has been submitted by an asylum seeker held in a detention centre for foreigners, Centro de Internamiento de Extranjeros (CIE).<sup>377</sup> The timing for the accelerated procedure equals half of the time foreseen for the ordinary procedure. There are interpreters available to attend asylum interviews with the authorities however if the detainee needs to consult with his or her lawyer (or vice versa), there is no interpreter available for this purpose. There are public phones available for detainees at the detention centres. In general privacy is ensured during consultations in a specific room in the centre.

The Spanish Red Cross and in certain Spanish provinces, non-governmental organisations or Barrister Associations make agreements with autonomous regional or central authorities in order to provide legal and social assistance for asylum seekers in detention centres. Legal assistance entails providing information about the detainee's rights, the asylum procedure itself and how to request free legal aid. Free legal aid is available in relation to the asylum claim but not specifically for appealing the decision of detention unless habeas corpus applies. The lawyer appointed in case of a removal order can ask the judge to release the detainee if certain conditions apply. According to Article 19(4) of the Spanish Asylum Act asylum seekers are entitled to consult a lawyer in detention and at the border. However, regulations introducing *de facto* limitations may be adopted for reasons of security, public order or purely managerial reasons. So far they have not been adopted.

**The Netherlands:** A distinction must be made between two types of detention: detention after access to Dutch territory has been denied (border detention) and detention aimed at forced return (Aliens Detention).

The asylum seeker who applies for asylum at the Schiphol Airport will be denied access to the territory. The detention can be prolonged for a variety of different reasons for example if the Dublin II Regulation could possibly be applied to the

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<sup>377</sup> It is necessary to make a distinction between detention facilities at the border (for asylum seekers who make their claim at the border and are waiting for an answer to their request, or for immigrants who do not claim for asylum and are awaiting forced return for not complying with requirements needed to enter Schengen territory) and the CIEs (Centro de Internamiento de Extranjeros), detention centres for irregular immigrants who are awaiting deportation. A person is placed in custody at the CIE following an administrative decision, a decision that must be approved by a judge. The maximum period of custody in the CIE is 60 days. If a detainee is not deported at the end of this period, he/she has to be released. Among the irregular immigrants detained at the CIEs could be potential asylum seekers who could claim for asylum, so if any of the detainees wish to claim asylum, an asylum procedure will start and free legal aid will be provided. In that case the removal order will be suspended temporarily until a decision on the asylum claim is made.

asylum seeker; the possible application of the Article 1F Refugee Convention exclusion clause or in case additional research is necessary of the asylum seeker's identity and nationality, of the submitted documentation, or the asylum account. No time limit exists for the examination of the asylum claim purely on the basis that the applicant is detained. The immigration authorities are however required to act expeditiously (*handelen met voortvarendheid*). The expectation should be that the additional research would be finished within six weeks. When this research cannot be finished within six weeks the interest of the asylum seeker will be balanced against the immigration authorities' interests. In principle the interest of the asylum seeker will have more weight and the asylum seeker will be released. This will however not be the case if the asylum seeker is refusing to cooperate with inquiries. When an asylum seeker applies for asylum when he is in Aliens Detention the decision on the asylum application must be given within six weeks.

In the Netherlands certain limitations regarding access to detention centres exist for logistical reasons for instance in detention facilities where prior to the visit of a client an appointment has to be made within specific visit hours. These limits apply on the basis of general rules applicable in all detention facilities and are justified on managerial reasons. Regarding communication payphones are available on the corridors and are accessible only when detainees are allowed to leave their rooms during fixed hours. The sending and receiving of letters to and from lawyers is without restriction. There is however no access to the internet. Detention facilities are often located in isolated and remote areas and difficult to access. Security procedures can take a lot of time and limit access seriously where the rooms where lawyers can meet their clients are small and uncomfortable. This is particularly the case for the detention centre at Schilhol (CD Schiphol Oost) which has no windows and where it can get very hot in summer. Rooms have very thin walls, which affects privacy. In addition from the rooms in the centre no phonecalls can be made to the outside world. There are no interpreters available at detention centres. Legal aid lawyers and legal advisors from the Dutch Council for Refugees can, however, have an interpreter via phone. Lawyers can also arrange for an interpreter to accompany them to the detention centre when they plan to have an extended meeting with one of their clients.

There are no "legal aid clinics" as such in the Netherlands. There are, however, other mechanisms available in order to provide legal assistance to detained applicants.<sup>378</sup> In detention centres which houses asylum seekers who have been denied entry into the Netherlands at the border, the Dutch Council for Refugees is present five days a week. The Dutch Refugee Council assists the detainees and contacts them regularly. Asylum seekers can also request a meeting with staff from the Dutch Refugee Council.

In the other detention centres, which house asylum seekers who have been arrested in The Netherlands and have been subsequently detained, the Dutch Council for Refugees is not present. The organisation has requested permission to be present or be allowed to visit there as well, but the Ministry has denied these requests so far. Recently, a legal service has been set up for those detention centres. This service originates from the penal prison system. They mostly pass on information from a lawyer to his/her client in detention. They have no specific knowledge of asylum

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<sup>378</sup> Firstly, a distinction must be made between detention centres which house asylum seekers that have been arrested in the Netherlands (often after not having bought a train ticket, for example), were subsequently detained, and asked for asylum from detention centres which house asylum seekers who are new to the Netherlands and are in detention because they have been denied entry to the Netherlands.

issues. Furthermore, their presence is quite limited. For example, in Alphen aan den Rijn, a detention centre of about 800 detainees/inhabitants, they are present four hours a week. In principle free legal aid is available in the Netherlands both for challenging the detention and for the asylum claim itself.

**United Kingdom:** According to Home Office policy asylum claims in detention at the initial stage should be expedited for example as under the detained fast track procedure. In respect of appeals when an asylum seeker is in detention the appeal is expedited under the Tribunal procedural rules.<sup>379</sup> Free legal aid covers the expense of having an interpreter present at immigration removal centres and fast track detained centres. During the legal advice surgeries phones are available to contact an interpreter in the specific language required. Legal aid is provided to request bail at the Tribunal and legal aid is also provided to challenge the legality of the detention in High Court and in general for the asylum claim also. Regarding legal aid clinics in the UK the Legal Services Commission has recently run a procurement exercise on the provision of legal advice at immigration removal centres. The legal aid clinics consist of on-site advice surgeries which usually are held twice weekly at every immigration removal centre. There is also a fast track duty service on a rotation basis for the provision of advice and representation for asylum applicants whose claims are being examined under the detained fast track procedure.

**Norway:** In Norway very few asylum seekers are detained and if so mostly in Trandum Detention Centre, close to Oslo airport. When lawyers want to visit asylum seekers in detention they have to “book” a visiting room ahead of their visit. Visits are only possible between 7 am and 7 pm. There might be other limitations that are usually justified by the shortage of staff in the detention centre concerned. Regarding the appointment of lawyers whilst in detention in practice asylum seekers may get assistance from staff working in the detention centre where they reside or receive information from other detainees. Police and staff in detention centres are not allowed to recommend specific lawyers but refer in practice to phone directories. In some cases asylum seekers are detained in ordinary prisons where lawyers will have access on the same conditions as other prisoners with regard to visiting rooms and visiting hours. If an asylum seeker is detained during the refugee determination procedure his/her case is usually given priority in the asylum procedure. Lawyers must bring their own interpreters, who are covered by legal aid within limits. Phones are also in general available for detainees. An asylum seeker in detention is granted the same legal aid in the asylum case as other asylum seekers in the regular procedure. Regarding detention of asylum seekers, this follows the same rules as in criminal procedural law. Asylum seekers can be detained for up to 2-3 days by the police and no legal aid will be provided to challenge this detention. However further detention can only be decided by the Court, and a lawyer is granted legal aid on a fixed rate basis, the same legal aid as in criminal cases.<sup>380</sup> It should be noted that the new Immigration Act states that detainees should be presented to the Court for the detention hearing the “next day if possible” upon being detained. Also a recent case from the Supreme Court has confirmed that a lawyer should be appointed from the moment the detainee should be presented before the Court.<sup>381</sup>

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<sup>379</sup> Consolidated Asylum and Immigration (Fast-track Procedure) Rules 2005 for First-tier Tribunal.

<sup>380</sup> For example a first time detention hearing is for 5 hours plus one 1 hour visit per 14 days, 0.15 hours per day in detention, repeat detention hearings – 2 hours. If the detention hearing (including breaks and delays) last more than an hour, this is added per half hour. If the detainee chooses to appeal the detention order, half an hour is granted to give written grounds for appeal.)

<sup>381</sup> Supreme Court Case Rt 2010 s 812.

**Switzerland:** A Federal Supreme Court decision<sup>382</sup> has ruled that destitute detainees awaiting deportation should be entitled to free legal representation regarding the question on detention, i.e. at least for the review by the judge after three months if further extension of the detention is justified. This is regardless of whether their particular case is legally sufficiently complex to warrant free legal representation. Therefore requests for legal aid concerning the question of detention should not be refused. Despite this, in practice detained asylum seekers have some difficulty in accessing legal assistance. This is due to the fact that non-governmental organisations are not automatically informed of asylum seekers being detained, and only some cantons ensure that asylum seekers have access to a list of lawyers if they request it. Upon request the detention authority staff should provide a list of lawyers for asylum seekers. However, asylum seekers are not always aware of their right to free legal representation for the review of their detention. The asylum seeker or his legal representative has to arrange an interpreter for meetings in the detention centre. Phones are also available for this purpose.

'Legal aid clinics' are being used in Zurich and Basel. In the prison at Zurich-airport, the Swiss Red Cross provides general legal and social advice to persons awaiting deportation. In Basel, the "Beratungsstelle für Asylsuchende der Region Basel" (BAS), a legal advice service provided by a non-governmental organisation, provides legal advice to persons in detention. The decision to detain and the asylum claim are two separate procedures with different responsible courts. A cantonal court is responsible to decide on the appeal against the decision to detain. For this procedure, free legal representation is more likely to be granted than in the asylum procedure.

#### **4.13 Legal Aid and Dublin Procedures**

This section provides information on the availability of legal aid for asylum seekers during Dublin procedures.

**Austria:** The general system of legal aid applies also for asylum seekers in the Dublin II procedure. Therefore legal aid is only available at the Constitutional Court level and inaccessible for asylum applicants in the Dublin procedure. However a 'Rechtsberater' is available during the Dublin proceedings in Austria.

**Belgium:** Legal aid is available for asylum seekers in the Dublin procedure but with an important restriction. During the interview relating to the application of the Dublin II Regulation the asylum seeker cannot be assisted by his/her lawyer or by a legal advisor. This in practice means that asylum seekers do not always indicate the reasons why they believe that their case should be examined in Belgium and not in the Member State which is responsible according to the Dublin II Regulation. Legal aid is available for the appeal against a decision to transfer the asylum seeker to the State responsible for examining the asylum application. The appeal must be lodged to the Court (Conseil du Contentieux des Etrangers – Council for Aliens Litigation) within 30 days after the decision<sup>383</sup>. The appeal has no suspensive effect as such but the applicant can request for a suspension of the Dublin decision pending the appeal according to the extremely urgent procedure (within 5 days), which is, however, rarely granted. Asylum seekers are increasingly being detained during the Dublin procedure resulting in quasi-automatic detention of Dublin cases according to the Belgian Ombudsman. Nevertheless, there is no obligation under Belgian legislation

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<sup>382</sup> Swiss Federal Court, BGE 122 I 49, <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm> (German).

<sup>383</sup> Article 39/57 Aliens Act of 15 December 1980.

to detain asylum seekers for the purpose of applying the Dublin Regulation.<sup>384</sup> As is the case for all asylum seekers in detention, NGO's have reported that sometimes information provided in the closed centres on the appeal procedures is incomplete.

**Czech Republic:** Asylum seekers taken back from other Member States under the Dublin procedure get access to legal aid as any asylum seeker whose asylum application is being processed in the Czech Republic. In theory the same rules with regard to legal aid apply regarding challenges to transfers to other Member States. However, in practice, asylum seekers are only informed of the fact that the Dublin Regulation is being applied in their case at a very late stage. There is a concern that asylum seekers may not have sufficient time to contact legal aid providers such as OPU to assist them in the Dublin procedure. There is in theory an appeal possible against a Dublin II Regulation decision to transfer but as the appeal is not suspensive, in practice asylum seekers do not get free legal aid to assist them with the challenge against the Dublin decision.

**Denmark:** Legal assistance is provided to asylum seekers by the Danish Refugee Council (DRC) or other organisations on the application of the Dublin Procedure. DRC officers, as well as staff members of other organisations active in the field, are able to act as representatives for asylum seekers in Dublin procedures and they may also lodge appeals to the Ministry, which occurs on a regular basis.<sup>385</sup> The appeal to the Ministry is the only appeal available against Dublin decisions and has no suspensive effect. Free legal representation by lawyers is not available to asylum seekers during the Dublin Procedure, including at the appeal stage. Representation by DRC and other organisations is free of charge but is only available as far as resources and capacity permits, which means that in many cases asylum seekers must lodge the complaint by themselves.

**Finland:** Legal aid is provided in Dublin procedures but sometimes the time limits make it difficult in practice to access a lawyer and receive legal aid. There have been incidents where reception centres personnel have not booked the appointment time with the lawyer automatically.

**France:** The decision by the Préfecture to apply the Dublin II Regulation can only be challenged before the Administrative Tribunal in a procedure according to the general rules that apply in administrative law i.e. the appeal must be lodged within 2 months and has no suspensive effect.<sup>386</sup> As Dublin cases are not considered to be asylum cases, legal representation with regard to the appeal against a Dublin procedure is not provided for under the same system as legal aid for asylum seekers whose claims are examined in France. This is because the decision to apply the Dublin II Regulation is taken by the Préfecture, and not by the specialized asylum body, the

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<sup>384</sup> See Médiateur Fédéral, *Investigation sur les centres fermés gérés par l'Office des Etrangers*, Juin 2009, §170. According to this report 90% of the asylum seekers detained in 2008 were "Dublin cases".

<sup>385</sup> Dublin transfers to Greece have been challenged systematically in Denmark.

<sup>386</sup> The Prefecture decides whether it is necessary to examine whether another Member States is responsible under the Dublin Regulation and to start contacting the other Member State responsible. In order to do so the Préfecture organises an interview with the asylum seeker to start the procedure. This decision by the Préfecture can only be challenged before the Administrative Tribunal and not before the CNDA. This will also mean that the asylum seeker does not receive a provisional residence permit for the purpose of processing the asylum application. This decision of the Préfecture to start the examination of which Member State is responsible needs to be distinguished from the decision to transfer the asylum seeker to the Member States responsible once the other Member State had accepted its responsibility. Against this decision to transfer an urgent appeal is possible ("référé liberté") to the Administrative Tribunal which must be decided within 48 hours by the Administrative Tribunal.

OFPPRA. A decision to transfer the asylum seeker under the Dublin Procedure is also susceptible to an appeal within two months and has no suspensive effect before the Administrative Tribunal. Under this procedure, the Administrative Tribunal can only verify the legality of the acts of the administration. Moreover, the applicant can request the suspension of the measure ('référé-suspension) but the administrative court might hear the case after the transfer has been executed<sup>387</sup>.

When the transfer decision is about to be executed, the asylum seeker is likely to be detained in a retention centre. This lawfulness of the detention can be challenged before the "Juge de la liberté et de la détention" under the same procedure as the one available to foreigners facing removal to their country of origin. Moreover, the transfer decision to the State responsible under the Dublin Regulation can be challenged before the administrative court: an urgent appeal (référé-liberté)<sup>388</sup> must be used when the asylum seeker is detained. There is no specific urgent procedure for Dublin cases. Access to legal aid is in those cases more difficult or unclear. In practice, legal advisors (NGO staff working in retention centres) are contacting lawyers to represent asylum seekers who then can submit a request for legal aid. At the same time, access to an effective remedy and legal aid may be impeded by specific administrative practices. For instance, it has been noted that asylum seekers to be transferred under the Dublin Regulation are sometimes put in the retention centre the evening before the departure of the airplane early the next morning. This means that in those cases the asylum seekers concerned in practice have no possibility to have any kind of legal advice from either a lawyer or NGO staff.

**Germany:** The practical problem regarding legal aid in the Dublin procedure is that decisions are in many cases issued to the applicant so shortly before the transfer that he/she is not able to take any legal steps. That is the reason why legal aid generally is not granted in Dublin procedures at the moment. Furthermore, the German law excludes in § 34 (2) Asylum Procedural Law any kind of "vorläufiger Rechtsschutz" (interim measure to stop the transferral by the court). Only since Sept. 2009 has the Federal Constitutional Court stopped in nine cases this practice when transferrals to Greece were challenged. This suspension mechanism is only for the limited time until the Court will decide the main question about asylum procedures in Greece in a test case and only for the transfer to Greece as an exemption, not for transfers to any other country.

**Greece:** General provisions on free legal aid are applicable to the Dublin procedure. Therefore no legal aid is available except in limited conditions for appeals to the Council of State.

**Hungary:** General problems related to free legal aid also occur in Dublin procedures. Asylum seekers are often uninformed about the possibility to request free legal aid. Also the official forms to submit such request are not available in the facilities where asylum seekers are held under the Dublin procedure.<sup>389</sup> In general it is only the Hungarian Helsinki Committee that provides specific free legal assistance for asylum seekers with the necessary expertise on a regular basis. It is problematic that free

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<sup>387</sup> It should be noted that in Paris, the hearing usually takes place within 2 or 3 weeks. Moreover, strict admissibility criteria apply for such an appeal.

<sup>388</sup> This is an urgent appeal possible before the Administrative Tribunal whenever there is an imminent risk that there will be a serious violation of a fundamental freedom, such as the right to asylum, will be violated.

<sup>389</sup> There are either the closed reception facility in Békéscsaba or in case of detention in alien policing jails in Hungary.

legal aid is not systematically performed by state agencies for e.g. a legal aid service for asylum seekers but now the availability of legal aid depends on the capacity of an NGO.

**Ireland:** Legal aid is available for all aspects of the Dublin procedure including access to appeal and judicial review. However, access to legal advice in respect of these matters can be limited and in some cases effectively removed by the simultaneous notification of a first instance decision and transfer order at the time of arrest for the purpose of removal, which can happen within hours. Therefore asylum seekers may not have sufficient time to contact a lawyer to challenge the decision to transfer to another Member State under the Dublin procedure.

**Italy:** In Dublin cases the examination on the merits of the case in order to obtain legal aid is more stringent, as the body that decides on legal aid in Dublin cases is different.<sup>390</sup> The system in Italy is that decisions relating to residence of foreigners on the territory are dealt with by the TAR (Administrative Regional Court) except for family reunification cases and asylum cases. The latter cases are being dealt with by the Civil Courts. The TAR only deals with the legality of the decision and does not enter into the facts. As far as legal aid with regard to appeals in Dublin cases is concerned this also means that it is another legal aid board which deals with the application for legal aid in a Dublin case. The legal aid board in the TAR deals more strictly with applications for legal aid than the legal aid board in the Civil Courts. The same merits test applies, but whereas this test is not being applied very rigorously in the Civil Courts, it is applied more strictly by the legal aid board of the TAR. It is very important for the lawyer to show very clearly why the appeal against the Dublin decision would have a chance of success. By definition this is more difficult to do compared to actual asylum cases as the TAR only looks into the legality of the decision. Therefore, if a Dublin transfer decision is withdrawn it is usually the result of discussions between the lawyer and the Dublin Unit, rather than a procedure in Court. There are no statistics on the number of Dublin cases in which legal aid was refused. Generally, there are not that many outgoing Dublin transfer cases in Italy in any case. It should also be noted that asylum seekers with a Dublin decision are not detained. They only receive a decision that they need to present themselves in the responsible Member State under the Dublin II Regulation.

**Lithuania:** Legal aid is not provided to asylum seekers subject to the Dublin procedure.

**Romania:** There are no specific problems reported in Romania regarding legal aid in the Dublin procedure except for the fact that the appeal does not suspend the transfer.

**Slovenia:** The main problem with the Dublin procedure is that there is no automatic suspensive effect of the appeal against the decision to be transferred to another Member State. However in practice the transfer does not take place on the same day as the communication of the decision and therefore the asylum seeker can seek legal aid. Legal aid is available for Dublin II Regulation appeals.

**Spain:** The general provisions on free legal aid are applicable to Dublin cases.

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<sup>390</sup> This is due to the fact that appeals to the Dublin decision are examined by a different judicial body, the TAR.

**The Netherlands:** With regard to Dublin procedures, the normal rules regarding free legal aid apply. There are no specific problems reported regarding legal aid in Dublin procedures.

**United Kingdom:** Legal Aid is provided under the fixed fee graduated scheme in Dublin procedures apart from Dublin cases involving minors where the legal aid is provided by hourly rate.

**Norway:** Legal aid is provided on an hourly rate in Norway and asylum seekers are only given two hours free legal aid work, which is often not sufficient. The fact that there is only a forty eight hour time limit for appeal must also be considered. If the Dublin appeal is granted suspensive effect at the Court then the lawyer is granted another 3 hours of free legal aid. Beyond this in special cases they can request an extension of the legal aid if they have worked more than double the hours but it is very difficult in practice to be granted this. It is only in exceptional cases and at the discretion of the County Governor.

**Switzerland:** Legal aid is rarely granted in asylum cases in general. Therefore in Dublin cases the Court may find the representation of a lawyer even less necessary because the procedure is only about which European State is responsible for the application.

#### **4.14 Legal Aid and Unaccompanied children in the Asylum Procedure**

This section explores the availability of legal aid for unaccompanied children in the asylum procedure. It also explores the link between legal guardians and legal representatives including whether the actions of guardians/representatives impacts upon the unaccompanied child's asylum claim and whether Article 17(2) Asylum Procedures Directive is applied in national legislation.<sup>391</sup> This section also contains information on whether lawyers who represent unaccompanied children receive specialized child-specific training within the context of Article 19(4) of the Reception Conditions Directive.<sup>392</sup>

**Austria:** There is no minimum age for claiming asylum in Austria. However guardians have to submit the asylum application on the behalf of unaccompanied children if they are under the age of 14. If the authorities dispute the child's age, an age assessment will be undertaken in parallel with the asylum procedure. In situations where the authorities determine the applicant to be an adult, this is not challenged by a lawyer, which has consequences on both the applicant's access to legal aid and any child-specific benefits. If the applicant is determined to be an adult then the guardianship will cease. If the applicant is recognised as an unaccompanied minor they are automatically appointed a Rechtsberater. Article 64(5) of the Federal Act Concerning the Granting of Asylum (2005 Asylum Act - Asylgesetz 2005) states "In the case of asylum seekers who are unaccompanied children, the legal adviser shall take part, as legal representative in the admission procedure, at every interrogation in the initial reception centre and at every interview in the admission

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<sup>391</sup> Article 17(2) of the Asylum Procedures Directive allows Member States to refrain from appointing a representative under three different circumstances. A representative in this context is defined in Article 2 (i) as meaning a "person acting on behalf of an organisation representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organisation which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests"

<sup>392</sup> Article 19(4) arguably applies not only to representatives or guardians but also lawyers and other legal aid providers. It states "Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs, and shall be bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work."

procedure". In practice Rechtsberater represent the asylum seeker at the admissibility stage whilst officials from the youth welfare service may assist with their claim later in the procedure. This can cause problems in practice as it has been known for Rechtsberater's to refuse to submit appeals on behalf of unaccompanied children. Unaccompanied children receive legal aid during the first instance procedure as well as at the appeal. Lawyers in Austria do not receive any specialized training to represent unaccompanied children. Article 17(2) of the Asylum Procedures Directive is not applied.

**Belgium:** There is no minimum age for applying for asylum in Belgian law but as soon as an unaccompanied minor arrives in Belgium, a specialized guardian is appointed. If the age of the applicant is disputed, there is no representation during the age determination procedure. A guardian is only appointed after the age has been determined. Belgian legislation allows unaccompanied children to lodge an asylum application by themselves but in practice as soon as a child is identified as an unaccompanied minor, a guardian is immediately appointed. It is the guardian's responsibility to submit the asylum application to the Aliens Office on behalf of the unaccompanied minor. The presence of a guardian during interviews on the asylum application is obligatory according to Article 3 (5°) of Royal Decree of 11 July 2003 on certain aspects of the procedure before the Aliens Office and Article 9§2 of the Law on Guardianship. Lawyers representing minors can also follow specialized training organised by the Bar Association. Article 17(2) of the Asylum Procedures Directive has not been transposed in Belgian legislation.

**Czech Republic:** There is no minimum age for an unaccompanied minor to apply for asylum. If the applicant's age is disputed, representation is available during the age determination. The unaccompanied minor can submit the asylum claim himself/herself and a guardian is present when the claim is lodged. The Ministry of Interior then requests the Court to appoint a legal guardian in accordance with Section 89 of the Czech Asylum Act. However, as this takes a long time, in practice, the Ministry also appoints guardians to unaccompanied children. This is usually a person working for an NGO.

**Denmark:** There is no minimum age in Danish law in order to be able to apply for asylum but a child must be assessed as "sufficiently mature" for the purpose of lodging an asylum application. The assessment of whether an unaccompanied child is considered mature enough to be subjected to an asylum procedure is done on a case-by-case basis and in particular when the minor is between 12 and 15 years old. If the unaccompanied child is 15 years or older he or she is generally considered sufficiently mature for the purpose of the asylum procedure. In situations where the unaccompanied child is not considered mature enough to submit an asylum claim, then the child is granted a residence permit.<sup>393</sup> Personal representatives or guardians do not submit asylum applications on behalf of the child. However, once the asylum claim is lodged a personal representative is appointed for all unaccompanied children. A similar provision to Article 17(2) of the Asylum Procedures Directive (which is not applicable in Denmark) is not included in Danish national legislation. Personal representatives are either professional staff members of the Red Cross or Red Cross volunteers. They are assigned to an unaccompanied child as soon as the asylum application is made and they must be present at each personal interview with the asylum seeker. An asylum interview with an unaccompanied child cannot be

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<sup>393</sup> In practice, however, unaccompanied children are only rarely considered not sufficiently mature for the purpose of the asylum procedure.

conducted in the absence of the personal representative<sup>394</sup>. In the regular first instance procedure, after the first instance decision also a legal aid lawyer is appointed to represent the unaccompanied child at the appeal stage. If an unaccompanied minor's asylum application is considered manifestly unfounded by the Immigration service, than a lawyer is automatically appointed to represent the child. As in all manifestly unfounded claims, the case is referred to the DRC for its opinion on whether it agrees with the Immigration Services' assessment. An interview is held at the DRC, which must be conducted in the presence of the personal representative and the lawyer. If the DRC agrees that the asylum application is to be considered as manifestly unfounded, there is no possibility to appeal such decision. It is important to point out that this is different for adult's claims processed in the manifestly unfounded procedure.<sup>395</sup>

**Finland:** There is no minimum age for claiming asylum in Finland. The process for appointing a guardian starts once an asylum application has been lodged. Article 17(2) of the Asylum Procedures Directive is not applied in national legislation in Finland. In practice, a guardian is appointed to every unaccompanied minor asylum seeker. The child's age is determined by the Finnish Immigration Service based on information received by the police. A legal guardian is appointed as soon as possible after the asylum claim has been lodged. If a medical age assessment reports that an applicant is an adult, then the duties of the guardian will cease. An asylum seeker who is a minor has the right to instruct a lawyer to assist them during the asylum procedure. In practice a minor is not usually aware of these rights, or able to demand them, and it is the representative carrying out the duties of the child's guardian who considers the need for and procures the services of a lawyer. The representative's role does not, involve acting as a legal counsel for the child, and often representatives do not have the qualifications to do so. The representative does not, however, have the obligation to procure a lawyer for the child, only to consider the need for legal aid. In practice there have been individual cases where the representative has not been aware of the child's right to and need for legal aid. In Finland problematic areas relating to the asylum claims of unaccompanied children include long asylum interviews, detention and the haphazardness of age determination, the availability of therapy and rehabilitation services and the lack of after-care.<sup>396</sup> However, a representative is automatically assigned to an unaccompanied minor seeking asylum and tasked with supervising the best interests of the child during the asylum procedure.

**France:** There is no minimum age in France in order to lodge an asylum application. However, a minor must always be represented by an adult for any legal act including lodging an asylum claim. If the applicant's age is disputed, in theory they should have

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<sup>394</sup> Due to the increased number of asylum applications by unaccompanied minors, the number of personal representatives is not sufficient anymore, which has resulted in a growing backlog of cases of unaccompanied children in the asylum procedure.

<sup>395</sup> In Denmark, adults are not entitled to free legal representation at the initial stage of the procedure when assessing whether the claim is manifestly unfounded or not. This means in practice that their asylum application can be finally rejected by the Immigration service without the asylum seeker having had access to a lawyer at any moment in the asylum procedure. Indeed, as is the case for unaccompanied minors, no appeal is possible against the decision of the Immigration Service (when the DRC agrees with their assessment) to reject the asylum application as manifestly unfounded. In case the DRC disagrees with the Immigration Services' assessment that the asylum application is manifestly unfounded, the negative decision can be appealed before the Refugee Appeals Board according to the normal asylum procedure, where the general rules on access to legal representation for asylum seekers apply.

<sup>396</sup> European Migration Network, *Annual Policy Report 2008. 08 Finland*, June 2009.

access to representation during any age determination procedure, however in practice they receive no assistance. If the unaccompanied minor is taken care of by the “child social services” (aide sociale à l’enfance – ASE), these services can be appointed as legal representatives (“tuteur”-guardian) by the judge (“juge des tutelles”) but this is in practice not yet the case. As long as the unaccompanied minor is not within the care of the ASE (which in practice can last for a long time) or if the ASE has not appointed a legal representative, the State Attorney (Procureur de la République) must assign an ad hoc administrator for the asylum application (the role of this ad hoc administrator is limited to this procedure). Ad Hoc Administrators are physical or moral persons who need to have a competence in the field of child protection and asylum and immigration law. For instance, some staff members of France Terre d’Asile (FTDA) are Ad Hoc Administrators. It should be noted that only a limited number of unaccompanied children apply for asylum in France (e.g. 447 in 2009). However, there is a lack of information with regard to this issue. Certain prefectures do not know that a minor can lodge an asylum application or do not contact the State Attorney (parquet) for the designation of an Ad Hoc Administrator.<sup>397</sup> This is an obstacle for children seeking asylum. However, children in theory have the possibility to write to the OFPRA directly and they will then contact the State Attorney (parquet). Also the child social services are not very familiar with asylum law and this is also the case with regard to certain organizations. Certain Ad Hoc Administrators are not very well informed about asylum issues which can result in decisions being taken which are not in the child’s best interests. Legal representatives for minors are allowed to participate at the interview before the OFPRA. In France legal representatives (*administrateurs ad hoc*) are appointed from the start of the asylum procedure. Legal aid is granted without any residence conditions to foreign children as long as they are under the age of 18 in France. Different ad hoc administrators need to be appointed for unaccompanied children in the “waiting zone” at the airport.<sup>398</sup> The role of these legal representatives is to assist the unaccompanied minor in all procedures during his or her detention in the waiting zone, including the asylum procedure. There are reportedly numerous problems in the waiting zone with regard to the designation of Ad Hoc Administrators. In practice, the child risks being expelled before he or she has been in contact with an Ad Hoc Administrator.

**Germany:** There is no minimum age to claim asylum in Germany. However unaccompanied children below the age of 16 need a legal guardian to file an asylum application for them. For those children aged between 16 and 18 a guardian is also appointed once they have claimed asylum. If an age determination procedure is conducted, the applicant has no access to representation to assist them. In Germany, guardians are mandated by the Court of Guardianship and are either a relative or a governmental official. Guardians have a very different role to lawyers working on behalf of children. Guardians are often state clerks and may not always work in the best interest of the child. The age of the child determines whether they can access free legal aid or not at the first instance stage of the asylum procedure. Young people from the age of 16 onwards are considered as adults within the asylum procedure. Therefore they have to lodge the asylum claim on their own and receive no free legal aid during the first instance procedure. However, the only exception is that they still have an appointed guardian once they are in the asylum procedure. Children under the age of 16 receive free legal aid for both the first instance procedure and any appeal procedure. In Germany the issue of access to legal aid is quite complex for unaccompanied children. The Court of Guardianship mandates a

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<sup>397</sup> See L 751-1 Code de l’Entrée et du Séjour des Etrangers et du Droit d’Asile.

<sup>398</sup> See L 221-5 Code de l’Entrée et du Séjour des Etrangers et du Droit d’Asile.

guardian, which is usually a government official for separated children. The guardian may decide that a lawyer is necessary but in that case the guardian must pay for their service. As a result, governmental guardians rarely instruct lawyers but private guardians often do. According to German law children under the age of 16 cannot lodge an asylum application themselves. Therefore if the guardian decides not to submit an asylum application on behalf of the child, the child has no legal remedy against the guardian's decision. Guardians in the German system also decide on whether or not a negative first instance decision should be appealed which in many cases governmental guardians are reluctant to do so.

**Greece:** According to Article 4(3) of P.D. 90/2008 *"A minor whether unaccompanied or not, aged above 14 years, can lodge an application on his/her own behalf, if the above mentioned competent authorities deem that s/he has the maturity to understand the consequence of his/her actions"*. In Greece while guardians should be appointed to represent minors they do not have the obligation to monitor and / or to be present at the examination of the asylum claim. In theory public prosecutors act as provisional guardians and can appoint a lawyer to assist the child in the asylum procedure. However, if the child is 16 years or older and therefore considered "mature" the asylum authorities are not obliged to notify the Public Prosecutor of the start of the asylum procedure. It should be noted that in Greece there is no specific age determination applied. In Athens, lawyers working at the legal unit of the Greek Refugee Council and other interested lawyers generally are appointed to represent unaccompanied children in the asylum procedure. Article 12 (1) - (3) of the Presidential Decree 90/2008 has transposed Article 17 (2)(a)-(c) of the Asylum Procedures Directive, which means that the Greek authorities refrain from appointing a representative where the unaccompanied minor *"will in all likelihood reach the age of maturity before a decision at first instance is taken"* or *"is married or has been married"*. According to UNHCR this leaves many unaccompanied and separated children without representation by a guardian or lawyer throughout the asylum procedure.<sup>399</sup> The Commissioner for Human Rights of the Council of Europe also has raised concerns regarding the serious deficiencies, which exist in the practice relating to the guardianship of unaccompanied asylum seeking minors.<sup>400</sup>

**Hungary:** There is no minimum age to claim asylum in Hungary. A legal guardian has to be automatically appointed for any unaccompanied minor in Hungary to represent the child's interests in any proceedings they may be subject to. The Asylum Act foresees in section 35(5) that *"If an incapable person wishes to submit an application for recognition in person, the refugee authority shall involve the representative by law (parents for example) in the refugee procedure or, in the absence thereof, shall request the appointment of a guardian."* In practice legal guardians are indeed appointed but they often lack the necessary expertise (in some cases also the necessary minimum foreign language skills) to assist in asylum or expulsion related cases of unaccompanied children and they often fail to submit appeals or any supporting documents that may help the minor's case (e.g. results of a country of origin information research). It can be quite problematic if a minor has protection needs but waives his/her right to appeal with the approval of their legal guardian. Also if the authorities try to readmit unaccompanied children at the border to neighbouring third countries (for e.g. Ukraine or Serbia) under bilateral readmission agreements the Hungarian Helsinki Committee (HHC) has never experienced that guardians submitted an appeal against the expulsion decision,

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<sup>399</sup> UNHCR, *Observations on Greece as a country of asylum*, December 2009, p. 14.

<sup>400</sup> Commissioner for Human Rights of the Council of Europe, *Report by Thomas Hammarberg following his visit to Greece on 8-10 December 2008*, CommDH(2009)6 Strasbourg 4 February 2009.

which raises serious issues regarding the quality of the legal aid provided by the guardian. The national contributor to this survey has no knowledge of Article 17(2) Asylum Procedures Directive being applied in Hungary.

**Ireland:** There is no minimum age to claim asylum in Ireland. There are also no legal guardians for minors under Irish law. However, such children are in the care of the Health Service Executive. If there is any dispute concerning the child's age, a representative is available during the age determination procedure. Section 8 of the Refugee Act 1996 leaves it to the discretion of the Health Service Executive to decide whether or not to make an asylum application on a child's behalf. Many concerns have been raised by a range of practitioners, refugee and children organisations and by the Law Society in relation to separated children in Ireland. Potential reforms called for the provision of a legal guardian to children in the asylum procedure.<sup>401</sup> Unaccompanied children receive advice from the Refugee Legal Service throughout the process and, in some situations, the caseworker/paralegal will attend the interview at ORAC with the child and his or her social worker. Article 17(2) has not been transposed into law in **Ireland**. Specialised training is provided to staff of the Separated Children's Unit in the Refugee Legal Service.

**Italy:** According to Italian law unaccompanied minors must automatically be granted a guardian. They can apply for asylum at the border or at police stations in country. There is no provision in the law imposing an age limit in order to be able to apply for asylum. The application can also be submitted with the assistance of a guardian. The Consiglio Italiano per i Rifugiati (Italian Refugee Council - CIR) is present in 4 sea ports (Venezia, Ancona, Bari and Brindisi) and is contacted to provide general legal advice to the unaccompanied minor, after authorisation by police authorities at the border. As soon as an unaccompanied minor applies for asylum and he or she is identified as a minor, police authorities (Questura- police Headquarters) must contact the Juvenile Court and the Giudice tutelare in order to initiate the guardianship procedure and appoint a legal guardian. Meanwhile police authorities suspend the asylum procedure until a legal guardian is appointed who will then accompany the child to the Questura to register the asylum claim. Both the police and the border guards play a role in the determination of the age of the minor. They can refer a minor to the hospital in order to undergo a medical examination i.e. bone testing according to the Greulich-Pyle method. If the authorities want to conduct a medical age assessment, this requires the consent of the unaccompanied minor or guardian if already appointed prior to the age dispute. Refusal to consent to the medical examination does not suspend the examination of the asylum application. No lawyer or guardian is present at the medical examination or age assessment. The Ministry of Interior drafted in July 2007 a policy circular stating that the benefit of the doubt should be applied to unaccompanied children if their age is unclear. The age of the asylum seeker also has implications on whether they will be detained or not as detention of unaccompanied children is prohibited in Italy. Border guards are now much more sensitive to the situation of minors. However, it is still unknown what happens at the border before an unaccompanied minor is allowed to apply for asylum and enter the territory so it may be that some are wrongly refused access to the territory.<sup>402</sup> In some cases unaccompanied children who are between 17 and 18 are

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<sup>401</sup> In 2006 the Law Society published its report "Rights based Child Law: the Case for Reform" and recommended a number of important points such as ensuring that the child has a suitable legal representation to deal with his or her immigration status or asylum claim.

<sup>402</sup> Minors may be considered as adults at the border, without an age assessment being carried out. At the same time, it also happens in practice that some minors present themselves as adults on the grounds that they do not wish to apply for asylum in Italy or in fact enter Italy because their goal is to reach another EU Member State and they want to avoid being fingerprinted.

being processed as adults.<sup>403</sup> In case an asylum seeker, including a minor, applies for asylum at the border he or she must be admitted to the territory.

In the accommodation centres run by SPRAR (System for protection of asylum seekers and refugees) there is a service that provides legal assistance and advice to unaccompanied children with regard to the asylum procedure. This is not necessarily provided in other accommodation centres outside the SPRAR where minors may be placed because of insufficient capacity in the SPRAR-centres. In those cases it depends whether unaccompanied children receive legal assistance or not. In some cases CIR and other NGO's receive requests for information about the asylum procedure from minors or guardians but nothing is foreseen on a structural basis.

The role of the guardians in the asylum procedure is important as it is mandatory for them to be present during the interviews of minors before the police Headquarters and the Territorial Commission. Guardians are social workers employed by the Communes and do not necessarily have the required expertise with regard to the asylum procedure. This is particularly the case in smaller towns where guardians have little experience with asylum law and do not have sufficient access to NGOs who can provide legal support. According to the Italian legislation the legal guardian is not allowed to delegate his or her responsibilities vis-à-vis the unaccompanied minor. It is also possible for appointed guardians to decide that the asylum procedure is not appropriate for the unaccompanied minor before or after the asylum application was lodged by or on behalf of the unaccompanied minor. However, in such cases the judge can intervene and can approve another guardian (pro-tutore) if the judge considers that the appointed guardian is not acting in the best interests of the child. In general interviews before the Territorial Commission are being conducted in a child-friendly manner. However, due to lack of expertise of guardians with regard to asylum and refugee law, statements of the unaccompanied minor and answers to questions from the Territorial Commission may remain general and lack a sufficient level of detail.

The asylum applications of unaccompanied children can be processed according to a prioritised procedure. Italy does not apply an accelerated procedure but certain cases of vulnerable asylum applicants, including unaccompanied children may be prioritised, which means that those cases can be considered before other cases. In practice in Italy the majority of minors obtain some kind of status to remain such as refugee status, subsidiary protection status or a residence permit on humanitarian grounds. According to Article 19 of Legislative Decree n. 268 of 25 July 1998, minors can not be expelled, except together with their parents. As a result, unaccompanied children who have not been granted any form of international protection is entitled to a residence permit because of their age ("minore età). Article 17(2) of the Asylum Procedures Directive is not transposed into Italian legislation.

**Lithuania:** Legal aid is provided for lawyers to assist unaccompanied children in submitting an asylum application. However in situations where the applicant's age is disputed, no legal advice is available during the age determination procedure. It

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<sup>403</sup> This may be particularly the case when minors are detected first by police authorities. They have an obligation to intervene to protect the child but this also implies they will need to contact municipalities responsible for accommodation for a child etc which can take time. Police authorities intervening in such cases are not specialised and lack expertise on the situation of minors and very often face difficulties of a practical nature such as to have police cars at their disposal for the whole period for the fingerprinting, the medical checks and researching of an ad hoc accommodation centre where the child can stay. In fact there are limited places in accommodation facilities for minors and that this may sometimes take time. Unaccompanied minors should normally be accommodated in specialised accommodation centres established within the SPRAR – system (System for protection of asylum seekers and refugees).

should be noted that there is no special representative appointed to the unaccompanied minor during the asylum procedure but they do have the assistance of a lawyer.

**Romania:** There is no minimum age to claim asylum in Romania. If a child younger than 14 requests asylum then the procedure is suspended until a legal guardian is appointed. A child who is 14 or older may submit his or her application for asylum by him or herself but will be appointed a legal guardian for the asylum procedure. In case of a negative first instance decision, the age of the child is relevant as to whether they will receive assistance from a lawyer in submitting an appeal. A child who is below 16 can submit an asylum appeal with the assistance of a legal guardian. However, if the child is older than 16 then he or she may submit the appeal alone without or her legal guardian. A specialised legal advisor is appointed to support unaccompanied children by the Romanian National Council for Refugees. Also lawyers representing such asylum-seeking children are provided with specialised child-specific training. In situations where the child's age is disputed a legal guardian, appointed from the General Directorate for Social Assistance and Child Protection assists the child during the age assessment. According to Article 16(3) of law 122/2006, "there is no need to appoint a legal guardian for the separated asylum seeker who will become an adult (become 18) within 15 days since he/she applied for asylum."

**Slovenia:** There is no minimum age for claiming asylum in Slovenia. If a minor is 15 years old, he or she has to submit the asylum application by himself, within the presence of his/her guardian. For a minor that is not capable to act independently in the procedure, the application is submitted by his/her guardian and his/her participation in the procedure depends on his/her capability of understanding the significance of the procedure. It should be noted that there is no specific age determination procedure in Slovenia. A representative is appointed as soon as the asylum seeker claims to be a minor. This person may not necessarily be a lawyer but will have received specialized training. Article 17(2)(c) applies in that if a minor is married or has been married then they will not be appointed a representative. The Centre for Social Workers is involved when an unaccompanied minor claims asylum. The Centre for Social Workers has a contract with an NGO called Slovenian Philanthropy who appoints a guardian whose role it is to then be present with the minor for every act within the asylum procedure. The guardian is not a lawyer. PIC and the Slovenian Philanthropy have a special arrangement where a lawyer from PIC is also involved in the first instance procedure, though this is not under free legal aid but actually under national ERF funding.

**Spain:** A guardian must submit the asylum claim on behalf of unaccompanied children in Spain. This is according to the Spanish Asylum Act, Law 12/2009 of 30 October, regulating the right of asylum and subsidiary protection, which applies to minors in general and to unaccompanied children.<sup>404</sup> If the applicant's age is disputed a representative assists him or her during the age determination procedure.<sup>405</sup> Child protection services take care of any unaccompanied children during the asylum procedure. A lawyer is appointed to represent the child from the

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<sup>404</sup> Articles 46, 47 and 48 of Law 12/2009 of 30 October, regulating the right of asylum and subsidiary protection.

<sup>405</sup> If there is an age dispute the Minors Prosecuting Office is informed in order to launch an age assessment procedure. This includes a medical test conducted in a hospital. If the minor refuses to undergo such a test the authorities are still not prevented from taking a decision on the asylum application. If the individual is determined to be a child, the child protection services will take care of them.

“Turno de Extranjera”.<sup>406</sup> Article 17(2) of the Asylum Procedures Directive has not been transposed in the domestic legislation.

**The Netherlands:** A guardian must submit an asylum claim on behalf of unaccompanied children under the age of 12 in the Netherlands. If the child’s age is disputed an age determination examination is undertaken. Article 17(2) (a) and (c) of the Asylum Procedures Directive is applied in that when an asylum seekers is 17 no guardian will be appointed and when the asylum seeker is married according to national law he/she is not considered a minor anymore and therefore no guardian will be appointed.

**United Kingdom:** There is no minimum age for claiming asylum in the UK and children do not need a representative to submit an asylum claim on their behalf. Article 17(2) of the Asylum Procedures Directive is not applied in the national legislation. Unaccompanied children are not provided with a legal guardian but are taken care of by key workers in the local authority. There is no representative within the meaning of Article 17(1) of the Asylum Procedures Directive. However all those representing unaccompanied children under the LSC funding must be accredited to senior caseworker level. Unaccompanied children receive legal aid at the first instance stage and may receive legal aid upon appeal depending on the merits assessment. Children also receive additional support from the Refugee Council Children’s Panel. This is a specialist panel of advisers who support unaccompanied children in the asylum procedure. There are approximately 30 advisers who travel all over the country to support unaccompanied asylum seeking children. They work with separated children and young people seeking asylum who are under the age of 18 when they enter the UK. As part of their work they give advice to people whose age is disputed and provide guidance through the asylum process to unaccompanied children. They assist with access to legal representation and accompany young people to asylum interviews, tribunals and appeal hearings, magistrates and crown court appointments. The Children’s panel does not provide legal assistance as such but they run general advice surgeries. If the child’s age is disputed there is a representative present for any age determination procedure undertaken.

**Norway:** There is no obstacle to a child of any age claiming asylum in Norway but if in practice they are too young then they need a guardian or lawyer to help them claim asylum. Older minors can claim asylum by themselves. There is only an auxiliary guardian granted for minors in the asylum procedure and not a legal guardian as such. The auxiliary guardian is only required to be with the minor during the substantive asylum interview. However according to Article 3 of Circular 2010/074 all unaccompanied children are automatically provided with lawyers at the first instance procedure. Where the age of the child is disputed they are required to undergo an age assessment procedure without any legal representation. In practice the age assessment procedure can take time to such an extent that the minors may be considered adults by the time the age assessment procedure is completed.

**Switzerland:** There is no minimum age for claiming asylum but the minor must have sound judgment in order to lodge his/her own claim. If he or she does not have the ability to comprehend the situation due to age or development a legal guardian is appointed to act on the child’s behalf. If the child’s age is disputed and an age

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<sup>406</sup> In every Bar Association a “Turno de menores” (list of lawyers specialised in minors) also exists but usually the legal aid lawyers from the turno de extranjeria assist the minors as the lawyers specialised in children’s rights normally are not specialised in international or asylum law.

determination procedure is carried out there is no representative present. A “person of trust” is only appointed after the age of the minor has been determined by the Federal Office for Migration. This “person of trust” must accompany and support the child through the asylum procedure. These people are not lawyers and the quality of work varies. They are required to have specific qualifications for dealing with minors but this is not always the case in practice. There is no provision for exceptions to appointing a representative or any similar provision to Article 17(1) of the Asylum Procedures Directive.

#### **4.15 Monitoring Mechanisms and Complaint Procedures**

This section addresses the availability of monitoring mechanisms and avenues of complaint and redress for poor legal assistance and representation in the countries surveyed.

**Austria:** There is no established complaints mechanism. If asylum seekers receive poor legal advice it is only possible for them to lodge a complaint with the Bar Association. There is no monitoring mechanism in place to monitor the quality of legal aid provision.

**Belgium:** If an asylum seeker is dissatisfied with their lawyer’s performance it is possible for them to file a complaint with the president of the Bar Association. The asylum seeker can also request a change of lawyer. The professional conduct of a lawyer providing legal aid to asylum seekers is governed by the general rules applicable to the legal profession. The Bar association controls the quality of the services provided by lawyers and the council of the Bar can decide to take a lawyer from the list of lawyers available for legal aid if their services are insufficient, in which case a disciplinary procedure is started.

**Czech Republic:** Asylum seekers have a possibility to lodge a complaint against their private lawyer with the Czech Bar Association. However this rarely happens and only occurs with the assistance and support of NGOs. An asylum seeker can request a change of representation if they are dissatisfied with their lawyer but this will only be granted for very serious reasons. Lawyers working for NGOs providing legal aid are subject to ethical codes and control mechanisms applicable within the organisation.

**Denmark:** Asylum seekers have the possibility to submit a complaint against a lawyer to the Refugee Appeals Board.<sup>407</sup> Usually a new lawyer will be appointed in such cases. However, this is not a formal complaints mechanism. The professional conduct of a lawyer is governed by the general rules applicable to the legal profession. Lawyers can be excluded from the Bar Association after a written warning if they do not meet the standards set by the association.

**Finland:** There is no formal complaints mechanism in Finland. Applicants may only request a change of lawyer if there is a breakdown of trust between the lawyer and client. Normally the lawyer will then inform the reception centre that they are no longer representing the applicant and that he/she is entitled to have another lawyer. There are also no formal monitoring mechanisms in place.

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<sup>407</sup> The Refugee Appeals Board is an independent, quasi-judicial agency, which deals with complaints relating to asylum decisions including asylum appeals.

**France:** There is a complaints procedure available to asylum seekers with the President of the Bar Association. No specific monitoring system is in place for lawyers providing legal aid to asylum seekers.

**Germany:** No complaints mechanism exists in Germany. In theory asylum seekers may lodge a complaint with the Court based on evidence that the lawyer is not competent or unwilling to represent the client properly but this is in practice impossible.

**Greece:** A complaints mechanism within the Bar Association exists which is also available to asylum seekers. No specific monitoring mechanism is in place for lawyers providing legal aid to asylum seekers.

**Hungary:** There is no complaints procedure in place for asylum seekers in Hungary. There are also no remedies available for the asylum seekers who receive poor legal advice. Asylum seekers do not even have the option of changing their legal representative. According to Hungarian law only lawyers are entitled to stop representing the client on the basis of a lack of cooperation. There are no specific monitoring mechanisms in place.

**Ireland:** All solicitors are regulated by the Law Society of Ireland. With regard to lawyers practising in refugee law, the Refugee Legal Service drafts best practice guidelines for its solicitors and has a performance monitoring system for all in-house solicitors. An internal complaints procedure exists within the Refugee Legal Service as well as an independent monitoring committee. The monitoring committee may evaluate the quality and availability of legal services provided by the Refugee Legal Service to asylum seekers and deal with direct complaints from asylum seekers and requests for a change of solicitor. There are a number of options available if an asylum seeker receives poor legal advice. They may request a change of solicitor in writing, make a formal complaint to the Legal Aid Board or may complain to the Independent Monitoring Committee of the Refugee Legal Service. All solicitors are subject to the disciplinary proceedings of the Law Society of Ireland and complaints may also be made to the Law Society regarding a solicitor or to the Bar Council of Ireland in relation to a barrister. The Legal Aid Board also has a formal complaints mechanism. A copy of the complaints procedure is available in all Refugee Legal Services offices or from the Board's head office or any law centre.

**Italy:** It is possible for asylum seekers to request another lawyer when they are dissatisfied with the performance of the appointed lawyer or for any other reason. In this case they have to inform the lawyer and the Court in writing that they do no longer wish to be represented by him or her. The asylum seeker can then appoint a new lawyer of his or her choice from the list of legal aid lawyers. In case of misconduct by a lawyer, any client can lodge a complaint to the bar association which can start up a disciplinary proceeding. No specific monitoring mechanism is in place.

**Lithuania:** Asylum seekers may lodge a complaint with the Migration Department if they are dissatisfied with their lawyers' service. They can also request another lawyer. The 'Bar Law' only contains general professional obligations of a lawyer towards his/her clients such as the obligation to secure confidentiality. The Council of Advocates monitors the activities of practising lawyers but can only act on the basis of a clients' complaint.

**Romania:** The professional conduct of the lawyer is governed by the general rules applicable to the law profession generally and regulated by a specialised department

of the Bar Association. Asylum seekers may complain about their assigned lawyer to the local Bar Association or the judge in Court orally or in writing. In practice two cases have been reported so far and in both cases the Romanian National Council for Refugees provided funding for another lawyer to represent the asylum seekers concerned. The Romanian National Council for Refugees monitors the performance of the lawyers through feedback from legal aid beneficiaries and through direct monitoring of the work of their lawyers in Court.

**Slovenia:** Asylum seekers who are dissatisfied with their lawyers' service can lodge a complaint to the Advocate Chambers and can also request compensation for any damage suffered. Asylum seekers also may request a change of legal representative. One problem reported in Slovenia is that there is no control mechanism in place to monitor the effectiveness of a counsellor's work and some counsellors abuse the free legal aid scheme in order to earn some money, without putting much effort in legal work performed. There is no monitoring mechanism reviewing the quality of legal aid provided in Slovenia.

**Spain:** There are specific rules governing the conduct of legal aid lawyers registered at the "turno de extranjeria" which are developed by each Bar Association<sup>408</sup> and must be observed when dealing with asylum and immigration cases. Lawyers are also subject to general professional rules and asylum seekers can file complaints against their lawyer. A particular characteristic of the Spanish system is that Tribunals and Courts can also lodge a complaint against a lawyer for incompetent work. In such cases the Bar Association launches a procedure which may lead to either closure of the case or disciplinary sanctions by the Executive Board of the Bar Association.

**The Netherlands:** Asylum seekers can lodge a complaint against their lawyer before a monitoring committee: the "Commissie Rechtsbijstand Asiel en Vreemdelingenbewaring (the Committee of Legal Aid in Asylum and Aliens Detention). This monitoring committee can also assess the conduct and performance of a lawyer on its own initiative. The monitoring of lawyer's performance is also conducted through a system of "lawyers assessing lawyers" i.e. an intra-fraternal assessment. Asylum seekers may lodge a complaint with the Bar Association or the Legal Aid Board when they are dissatisfied with the performance of the assigned lawyer. The new lawyer or the Dutch Council for Refugees may in such cases submit a written complaint on behalf of the asylum seeker. The complaint will be examined by a three person panel of the committee set up by the Legal Aid Board. The panel assesses the lawyer's actions and whether he or she acted in accordance with the "lawyers act" (advocatenwet).

**United Kingdom:** Asylum seekers may complain to their present lawyer about their previous representative's performance and to a regulatory body. If the complaint is regarding the lawyer's assessment of the merits of the case for the purposes of legal aid in order to proceed with the case, there is the possibility to ask the LSC's Funding Review Committee to look at the case within two weeks.<sup>409</sup> Legal aid providers are obliged to inform clients of this possibility. Asylum seekers should be informed about complaints procedures as a matter of course as it is a professional obligation.

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<sup>408</sup> Each province in Spain has an established Bar Association.

<sup>409</sup> For further analysis of the refusal of 'Controlled Legal Representation' (i.e. Legal Aid) by lawyers in the UK see Devon Law Centre, *Asylum Appellate Project - Final Report*, March 2010. It is evident from the project's findings that changes need to be made to the public funding system for asylum cases or significant numbers of asylum seekers will continue to be denied access to justice.

However, there are many reports that this is not done in practice. Applicants can instruct other LSC funded lawyers if they have sufficient grounds for seeking a second opinion on the merits of the case but this will often require the submission of an official complaint. The new lawyer has to justify why the case has been taken on in accordance with set criteria. Asylum seekers should also be informed about the possibility of appealing to the Funding Review Committee in certain circumstances. However, in practice they are not informed as a matter of course about the possibility of seeking a second opinion. Moreover, the regulatory authorities in the United Kingdom<sup>410</sup> have the power to receive and investigate complaints, and can discipline those they regulate. The OISC and the Solicitors Regulation Authority have the power to intervene in practices or companies where there are significant failings. The Law Society runs the Immigration and Asylum Accreditation Scheme for all those (who are not barristers in private practice) who wish to provide publicly funded legal advice and representation. The Legal Services Commission undertakes audits of providers, particularly those set out in the Specialist Quality Mark and under contract. The OISC can also audit legal providers that it regulates. Regarding quality control the LSC has a quality marking system whereby organisations are recognised for meeting the LSC quality assurance standards.

**Norway:** An asylum seeker may file a complaint against the lawyer with the Disciplinary Commission of the Norwegian Bar Association.<sup>411</sup> The response of the Disciplinary Commission may vary and in severe cases, a lawyer can lose their license to practice law (advokatbevilling). The asylum seeker may also complain to the UDI. If the UDI receives several complaints regarding a lawyer, he or she may be removed from the lists of lawyers appointed to asylum seekers.<sup>412</sup>

**Switzerland:** The law on the Labour Mobility of Lawyers<sup>413</sup> contains certain rules regarding the conduct of the lawyers' activities and the principle of confidentiality. An authority exists in each canton which monitors and regulates compliance with those rules. If asylum seekers are dissatisfied with their lawyers' performance they have the possibility of lodging a civil complaint against the lawyer if he/she committed professional errors. However, asylum seekers are generally not aware that they have this option and the burden of proof is on the asylum seeker. Asylum seekers may also try to find a new lawyer at any stage of the procedure but without support from the authorities.

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<sup>410</sup> The General Council of the Bar, the Solicitors Regulation Authority, the Institute of Legal Executives and the Solicitors Regulation Authority.

<sup>411</sup> Advokatforeningens disiplinærutvalg.

<sup>412</sup> This is not, however, a ban on representing applicant as an asylum seeker may still request the assistance of this particular lawyer before a lawyer from the UDI list is appointed.

<sup>413</sup> Gesetz über die Freizügigkeit der Anwältinnen und Anwälte , Loi fédérale sur la libre circulation des avocats.

# ANNEXES

## ANNEX 1 - LIST OF RECOMMENDATIONS

1. All legal aid providers should receive both initial and ongoing training in refugee and human rights law.
2. An initial supervisory period by a more experienced legal aid provider including a competency examination or other mechanism to ensure the aptitude of the provider should be a requirement for all persons wishing to provide legal aid.
3. Sufficient public funding should be available to ensure that all legal aid providers can effectively provide free legal assistance and representation to asylum seekers.
4. Where the number of legal aid providers is insufficient to cover the demand States must take positive action to increase their capacity while ensuring at the same time the quality of the legal aid service. States should guarantee continuous funding for the provision of legal aid by NGOs, in particular where this is necessary to ensure the demand for legal aid is met in practice.
5. Where States apply a means test this should be based on the presumption that asylum seekers do not have sufficient resources to afford paid legal aid unless there is clear evidence to the contrary.
6. Rules on the reimbursement of legal aid where asylum seekers have knowingly concealed their own financial resources should only include sanctions which are proportionate to the offence.
7. Where States apply a 'merits-of-the-claim' test for legal representation it should only take place after a full examination of the asylum application has been carried out as required under international human rights law. The 'merits-of-the-claim' test should not be so stringent as to *de facto* prevent access to an effective remedy.
8. The right to *legal assistance* should not be subject to a 'merits-of-the-claim' test.
9. Asylum seekers must receive timely information in a language they understand on the system in place to appoint and contact a lawyer.
10. Any conditions required for the appointment of a legal representative should not be so restrictive as to effectively limit access to justice.
11. Legal aid should be made available to asylum seekers who lack resources at all stages of the asylum procedure as the right to legal assistance and representation is a fundamental part of a fair and efficient asylum procedure.
12. In those States that currently only provide legal aid at the appeals stage, exceptions should be made for vulnerable applicants including unaccompanied children. Given their specific vulnerabilities such asylum seekers should have access to free legal aid throughout the asylum procedure.
13. Translation and interpretation services should be freely and automatically available throughout the asylum procedure. ELENA calls upon States to ensure that

free interpretation and translation services are available to facilitate meetings between lawyers/legal advisors and their clients where necessary.

14. Where relevant for the examination of the asylum application, costs related to expert consultations should be included in the legal aid system unless already covered by the State through other sources.

15. Early legal assistance is vital for a fair and efficient asylum procedure. Asylum seekers should have the right to legal assistance for the preparation of their asylum application.

16. Lawyers or legal advisors should be permitted to accompany asylum seekers to the preliminary interview.

17. Legal aid should cover the presence of lawyers or legal advisors at asylum interviews. Their presence should be mandatory for interviews with vulnerable asylum seekers.

18. If an asylum seeker is represented by a lawyer or legal advisor, it should be possible to postpone or reschedule the asylum interview if the representative is unable to attend due to circumstances beyond his/her control.

19. Lawyers and legal advisors should be permitted to have an active role in the asylum interview and be able to intervene and provide comments and additional questions to assist the determining authority in identifying the protection needs of applicants.

20. During the asylum interview all representations and submissions from lawyers or legal advisors should be accurately recorded by the decision maker and taken into account when considering the asylum application.

21 States should ensure that the asylum seeker's lawyer or legal advisor has access to all information included in their client's file to guarantee that the principle of equality of arms is respected. Where full disclosure of the name of the provider of the information upon which the decision is based would jeopardise the security of the person concerned, appropriate measures must be applied protecting the source of the information while at the same time respecting the right of the lawyer or legal advisor to have access to the information in the asylum seeker's file.

22 Legal aid should be ensured not only for the initial appeal but also for any onward appeal. This should include both preparation for the appeal as well as the legal representatives' participation in any appeal hearing.

23. During border proceedings asylum seekers should be automatically granted legal aid and be effectively enabled to substantiate their claim in accordance with Article 4 of the Qualification Directive.

24. Legal aid providers should be granted effective access to asylum seekers in border and transit zones. This also involves the relevant border authorities informing legal advisors of the presence of asylum seekers at the border and allowing legal advisors and lawyers to participate in any asylum interviews held at the border.

25. All detained asylum seekers should automatically be granted a legal aid representative both for the purposes of their asylum application and review of their detention.

26. Upon arrival detention centre officials should provide asylum seekers with an information leaflet (translated in relevant languages) on their rights including the right to legal aid. Such a leaflet should also contain a contact list for lawyers and/or legal advisors.

27. States should facilitate 'legal aid clinics' on a regular basis within detention centres. The purpose of such clinics would be to provide general legal assistance to all detainees. If further legal representation is required on an individual basis, legal aid providers could then be instructed to represent individual asylum seekers.

28. Consultation rooms for lawyers and detainees should be provided in such a way as to ensure privacy and effective communication. Where necessary, access to interpreters either by phone or in person must be ensured.

29. Detained asylum seekers should not be prevented from contacting their lawyers and/or legal advisors either by phone or other means of correspondence.

30. The timescales in accelerated procedures must not be fixed and must be applied flexibly to ensure that sufficient time is given for the asylum seeker and their legal representative to effectively consult and obtain relevant evidence before the initial decision.

31. Legal aid should be available for manifestly unfounded claims particularly to appeal the decision to process the application as a manifestly unfounded claim.

32. Legal aid should be available for appeals against transfers under the Dublin II procedure. Asylum seekers must always be informed of the possibility to contact a lawyer to lodge an appeal. Equally lawyers must be given sufficient time to consult with their clients in order to effectively challenge transfers under the Dublin II procedure where there are protection concerns.

33. All unaccompanied children seeking asylum should be exempt from merits and means tests used for assessing the eligibility of applicants for legal aid. Legal aid should be provided automatically for such children at all stages of the asylum procedure.

34. Legal aid should be ensured throughout the age determination process.

35. Monitoring of the quality of legal aid provided is essential. As this involves an assessment of the professional performance of the legal aid provider, monitoring should preferably be carried out by independent committees operating within Bar Associations or other regulatory bodies.

36. A formal mechanism must be in place for asylum seekers to lodge a complaint against their lawyer and/or legal advisor where there are serious indications that the lawyer has committed professional errors. Such a mechanism must be accessible and asylum seekers must be properly informed of such possibility at the start of the asylum procedure.

## ANNEX II - NATIONAL LEGAL FRAMEWORK ON LEGAL AID AND ASYLUM PROCEDURES

**Austria:** Asylum Act 2005, 1 January 2006; Legal Aid for the Constitutional Court is provided in § 35 VfGG (Verfassungsgerichtshofgesetz) together with §63, etc ZPO (Zivilprozessordnung).

**Belgium:** Artikel 508/1 – 508/25 Gerechtelijk Wetboek van 10 oktober 1967 (Article 508/1 – 508/25 Judicial Code of 10 October 1967)

Koninklijk Besluit van 20 december 1999 tot bepaling van de nadere regels inzake erkenning van de organisaties voor juridische bijstand, alsook betreffende de samenstelling en de werking van de commissie voor juridische bijstand en tot vaststelling van de objectieve criteria van subsidiëring van de commissies voor juridische bijstand, overeenkomstig de artikelen 508/2, §3, tweede lid en 508/4 van het Gerechtelijk Wetboek, Belgisch Staatsblad, 30 december 1999. (Royal Decree of 20 December 1999 on rules for the recognition of organisations for legal assistance and on the composition and the functioning of the commission for legal assistance and on the objective criteria of financing the commissions for legal assistance according to Articles 508/2, §3, second sentence and 508/4 of the Judicial Code, Moniteur belge, 30 December 1999)

Koninklijk Besluit van 18 December 2003 tot vaststelling van de voorwaarden van de volledige of gedeeltelijke kosteloosheid van de juridische tweedelijnsbijstand en de rechtsbijstand, Belgisch Staatsblad, 24 December 2003. (Royal Decree of 18 December 2003 on the conditions for complete or partial provision free of charge of 'second line legal aid' and legal assistance, Moniteur belge, 24 December 2010).

Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen (Law of 15 December 1980 on access to the territory, establishment and removal of foreigners).

Koninklijk besluit van 11 juli 2003 houdende vaststelling van bepaalde elementen van de procedure die dienen gevolgd te worden door de dienst van de Dienst Vreemdelingenzaken die belast is met het onderzoek van de asielaanvragen op basis van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, zoals gewijzigd bij het Koninklijk besluit van 18 augustus 2010, Belgisch Staatsblad, 3 september 2010. (Royal Decree of 11 July 2003 establishing certain elements of the procedure to be followed by the department of the Aliens office responsible for the examination of asylum applications according to the law of 15 December 1980 access to the territory, establishment and removal of foreigners as amended by the Royal Decree of 18 August 2010, *Moniteur belge*, 3 September 2010).

Koninklijk besluit van 11 juli 2003 tot regeling van de werking van en de rechtspleging voor het Commissariaat-generaal voor de Vluchtelingen en de Staatlozen, zoals gewijzigd door het Koninklijk besluit van 18 augustus 2010, Belgisch Staatsblad, 3 september 2010. (Royal Decree of 11 July 2003 on the functioning of and the procedure at the Commissioner General for Refugees and Stateless Persons as amended by the Royal Decree of 18 August 2010, *Moniteur belge*, 3 September 2009).

**Czech Republic:** Criminal Law Code and Administrative Justice Code 15/2002; Act No. 325/1999 Coll. of 11 November 1999 on Asylum and Amendment to Act No. 283/1991 Coll., on the Police of the Czech Republic, as amended (the Asylum Act),

**Denmark:** Aliens Act 785 of 10 August 2009 (consolidated version).

**Finland:** Alien's Act 301/2004, 30 April 2004, Administrative Procedure Act 434/2003, Act on the Integration of Immigrants and Reception of Asylum Seekers 493/1999

**France:** Loi no 91-647 du 10 July 1991 relative à l'aide juridique ; Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA).  
Available at <http://www.legifrance.gouv.fr>.

**Germany:** Gesetz zur Änderung des Aufenthaltsgesetzes und weiterer Gesetze vom 14. März 2005 (Law on the amendment of the Residence law and other laws of 14 March 2005), Bundesgesetzblatt Jahrgang 2005 Teil I Nr. 16, 17 März 2005.

Gesetz zur Umsetzung Aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union vom 19 August 2007 (Act to implement Residence- and Asylum-Related Directives of the European Union of 19 August 2007), Bundesgesetzblatt Jahrgang 2008 Teil 1 Nr. 40, 8 September 2008.

Asylverfahrensgesetz (AsylVfG) (Asylum Procedure Act), Bundesgesetzblatt Jahrgang 2008 Teil I Nr. 40, 8 September 2008; Zivilprozessordnung (Civil Procedure Code)

Beratungshilfegesetz. Gesetz vom 18.06.1980 (BGBl. I S. 689), in Kraft getreten am 22.06.1980 bzw. 01.01.1981 zuletzt geändert durch Gesetz vom 17.12.2008 (BGBl. I S. 2586) m.W.v. 01.09.2009 (Law on legal advice of 18 June 1980 as last amended by the law of 17 December 2008)

**Greece:** Asylum Procedures: Presidential Decree 90/2008 as amended by Presidential Decree 81/2009. The Legal Aid Act is Law 3226/2004 "on the provision of legal aid to citizens of low income and other provisions" (Official Gazette 24 A), enacted to implement EC Council Directive 2003/8/EC of 27.1.2003. In the Greek asylum law context the relevant provision is Article 11 of presidential decree 90/2008

**Hungary:** Act LXXX of 2003 on legal aid (*a jogi segítségnyújtásról szóló 2003. évi LXXX. törvény*), published in Magyar Közlöny no. 129/2003. on 6.11.2003., entered into force on 1st April 2004; Act LXXX of 2007 on asylum (*a menedékjogról szóló 2007. évi LXXX. törvény*), published in Magyar Közlöny no. 83/2007. on 29.06.2007, entered into force 1st January 2008.

**Ireland:** Criminal Justice (Legal Aid) Act 1962; Civil Legal Aid Act 1995 and the Civil Legal Aid Regulations; Refugee Act 1996 (as amended).

**Italy:** Decreto legislativo nr. 25 of 28.1.2008 "Attuazione della direttiva 2005/85/CE recante norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento dello Status di rifugiato (Legislative decree n. 25 of 28.1.2008. Implementation of directive 2005/85/CE on minimum standards for the procedure applied in the Member States for the recognition of the status of refugee) published in Gazzetta Ufficiale Serie gen. N. 40 of 16.2.2008, entered into force on 3 March 2008.

Amended by D. Lvo del 3.10.2008 n. 159“Modifiche ed integrazioni al decreto legislativo 28 gennaio 2008, n. 25, recante attuazione della direttiva 2005/85/CE relativa alle norme minime per le procedure applicate negli Stati membri ai fini del riconoscimento e della revoca dello status di rifugiato” (legislative decree nr. 159 of 2008 amendments and integration to Legislative decree n. 25 of 28.1.2008. Implementation of directive 2005/85/CE on minimum standards for the procedure applied in the Member States for the recognition of the status of refugee), published in Gazzetta Ufficiale n. 247 of 21.10.2008, entered in force on 5 november 2008.

Decreto del Presidente della Repubblica 30 maggio 2002 n.115 parte III (Presidential Decree n. 115 of 30 .5.2002 part III (provisions on legal aid).

Decreto legislativo 25 luglio 1998 n. 286 Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero (Legislative decree n. 268 of 25 July 1998 Consolidated law of the provisions regarding immigration and the condition of aliens) published in Supplemento ordinario alla Gazzetta ufficiale Serie gen. N. 191 of 18 August 1998, as amended by subsequent law provisions .

**Lithuania:** Aliens Law of 29 April 2004, Order of the Minister of Interior on Examination of Asylum Applications of 15 November 2004.

**Norway:** Immigration Act of 15.05.2008 no 35, Public Administration Act of 10.02.1967, Legal Aid Act of 13.06.1980 no 35

**Romania:** Law 122/2006 (Asylum Procedures Law) Legal aid is provided by the Emergency Ordinance of the Government 51/2008 regarding judicial public aid in civil cases.

**Slovenia:** Zakon o brezplačni pravni pomoči (International protection Act), Ur.l. RS, št. 96/2004 (official gazette No. 96/2004), 30.8.2004  
2. Zakon o mednarodni zasciti (Free Legal Aid Act), Ur.l. RS, št. 111/2007 (official gazette No. 11162007), 5.12.2007

**Spain:** Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria. (Law 12/2009 of 30 October 2009 regulating the right of asylum and subsidiary protection), BOE Official Gazette no. 263 of 31 October 2009 (entry into force 20 November 2009). Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita.( Law 1/1996 of 10 January 1996 on legal aid). BOE (Official Gazette) no. 11, of January 12<sup>th</sup> 1996.

**The Netherlands:** Wet van 15 november 2007 tot wijziging van de Vreemdelingenwet 2000 ter implementatie van richtlijn nr. 2005/85/EG van de Raad van 1 december 2005 betreffende minimumnormen voor de procedures in lidstaten voor de toekenning of intrekking van de vluchtelingenstatus (PbEU L 326), (Law of 15 november 2007 to amend the Aliens Law 2000 implementing the directive 2005/85/EG). Published in the State Journal of the Kingdom of the Netherlands 2007, 450)

Besluit van 29 november 2007 tot aanpassing van het Vreemdelingenbesluit 2000 aan richtlijn nr. 2005/85/EG van de Raad van 1 december 2005 betreffende minimumnormen voor de procedures in lidstaten voor de toekenning of intrekking van de vluchtelingenstatus (PbEU L 326) ( Decree of 29 november 2007, to amend the

Aliens act 200 implementing directive 2005/85/EG) Published in the State Journal of the Kingdom of the Netherlands 2007, 484.

Regeling van de Staatssecretaris van Justitie van 7 december 2007, nr. 5521298/07, houdende wijziging van het Voorschrift Vreemdelingen 2000 (drieënzeventigste wijziging) (scheme of the state secretary of justice amending the regulation on Aliens 2000. Published in the Gazette 11 december 2007, nr. 240 / pag. 9 2007 484

Wet van 20 mei 2010 tot wijziging van de Vreemdelingenwet 2000 in verband met het aanpassen van de asielprocedure, *Staatsblad*, Jaargang 2010, Nr. 202 (Law of 20 May 2010 amending the Aliens Act 2000 with regard to the reform of the asylum procedure); Besluit van 23 juni 2010 tot wijziging van het Vreemdelingenbesluit 2000 in verband met het aanpassen van de asielprocedure en vaststelling van het tijdstip van inwerkingtreding van de Wet tot wijziging van de Vreemdelingenwet 2000 in verband met het aanpassen van de asielprocedure, *Staatsblad*, Jaargang 2010, Nr. 244 (Decree of 23 June 2010 amending the Aliens Decree 2000 with regard to the reform of the asylum procedure and the entry into force of the Law amending the Aliens Act 2000 with regard to the reform of the asylum procedure).

Wet van 23 december 1993, houdende regelen omtrent de door de overheid gefinancierde rechtsbijstand (Wet op de rechtsbijstand), *Staatsblad* 2003, nr. 502, 16 december 2003, laatst gewijzigd op 14 juni 2010 (*Staatsblad* 2010, nr. 234, 24 juni 2010) (Law of 23 December 1993, on regulating government financed legal aid (Law on legal aid), the State Journal of the Kingdom of the Netherlands 2003, nr. 502, 16 December 2003, lastly amended on 14 June 2010, published in the State Journal of the Kingdom of the Netherlands 2010, nr. 234, 24 juni 2010).

**United Kingdom:** The legal framework for the transposition of the Procedures Directive includes: The Immigration Act 1971; The Asylum and Immigration Appeals Act 1993; The Legal Aid Act 1988; Access to Justice Act 1998; The Immigration and Asylum Act 1999; The Nationality Immigration and Asylum Act 2002; The Asylum and Immigration (Treatment of Claimants) Act 2004; The Immigration Rules (HC 395) as amended, particularly Parts 11 and 12; The Asylum and Immigration Tribunal (Procedure) Rules 2005 SI No 230; The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 SI No 560; The Asylum (Designated Safe Third Countries) Order 2000 SI No 2245; Civil Procedure Rules Part 54: Judicial Review and Statutory Review and Practice Direction; The Immigration (Claimant's Credibility) Regulation 2004.

**Switzerland:** Article 29(3) of the Federal Constitution of the Swiss Confederation of 18 April 1999, Bundesverfassung der Schweizerischen Eidgenossenschaft (BV) Constitution fédérale de la Confédération suisse, (Cst.) AS<sup>414</sup> 1999 2556, ; Article 65(1) of the Federal Act of 20 December 1968 on Administrative Procedure, Bundesgesetz über das Verwaltungsverfahren (VwVG), Loi fédérale sur la procédure administrative (PA), AS 1969 737.

Asylum Act of 26 June 1998 (AsylA) Asylgesetz (AsylG) Loi sur l'asile (LAsi), AS1999 2262

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<sup>414</sup> AS = Amtliche Sammlung = Official Compilation of Federal Legislation

Federal Act of 16 December 2005 on Foreign Nationals (FNA) Bundesgesetz über die Ausländerinnen und Ausländer (AuG), Loi fédérale sur les étrangers (LEtr), AS 2007 5437.

Federal Act of 17 June 2005 on the Federal Administrative Court, Bundesgesetz über das Bundesverwaltungsgericht (VGG), Loi sur le Tribunal administratif fédéral (LTAF), AS 2006 2197.

Federal Act of 17 June 2005 on the Federal Supreme Court, Bundesgesetz über das Bundesgericht (BGG), Loi sur le Tribunal fédéral (LTF), AS 2006 1205.

Federal Act of 23 June 2000 on the free circulation of lawyers, Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte (BGFA), Loi fédérale sur la libre circulation des avocats (LLCA), AS 2002 863.

Ordinance 1 of 11 August 1999 on asylum regarding procedural questions, Asylverordnung 1 über Verfahrensfragen (AsylV 1), Ordonnance 1 sur l'asile relative à la procédure (OA 1), AS 1999 2302.

Ordinance 2 of 11 August 1999 on asylum regarding financing, Asylverordnung 2 über Finanzierungsfragen (AsylV 2), Ordonnance 2 sur l'asile relative au financement (OA 2), AS 1999 2318.

Ordinance 3 of 11 August 1999 on asylum regarding the handling of personal data, Asylverordnung 3 vom 11. August 1999 über die Bearbeitung von Personendaten (AsylV 3), Ordonnance 3 du 11 août sur l'asile relative au traitement des données personnelles (OA 3), AS 1999 2351.

### ANNEX III - ACCELERATED ASYLUM PROCEDURES GROUNDS

This table provides a brief snapshot of the implementation of Article 23(4) grounds for acceleration in the Asylum Procedures Directive. Many of the Member States also have other grounds for acceleration, information on which is beyond the scope of this survey. It should be noted that in Greece since the enactment of PD 81/2009 there is no acceleration procedure. Information is also included on the practice of acceleration in *Norway* and *Switzerland*.

Article 23 (4) APD grounds	Au	Be	Cz	De	Es	Fi	Fr
a) raised issues of no or minimal relevance	X	X		X	X	X	
b) clearly not a refugee		X	X	X		X	
c) i) safe country of origin	X		X	X	X	X	X
c) ii) safe third country	X		X	X	X	X	
d) presents false info or withholds info	X	X	X	X		X	
e) another application stating other personal data	X	X	X	X	X		X
f) uncertainty concerning nationality or identity	X	X	X	X			
g) inconsistent, contradictory, improbable or insufficient representations	X	X	X	X	X		
h) subsequent application with no new elements	X	X	X	X	X	X	X
i) application could have been made earlier	X	X	X	X	X		
j) application merely to delay or frustrate removal	X	X	X	X		X	X
k) failure to comply with procedural obligations	X	X	X	X	X		
l) unlawful entry and failure to apply early	X	X	X	X			
m) danger to national security or public order	X	X	X	X	X <sup>415</sup>		X
n) refusal to provide fingerprints		X	X	X			
o) subsequent application by previously dependent unmarried minor		X	X	X			

<sup>415</sup> It is considered a reason for refusal and subsequently a reason for an accelerated procedure as provided in Art. 25 (1)(f) of the Spanish Asylum Act.

Article 23 (4) APD grounds	Hu	le	It	Li	Rom	SI
a) raised issues of no or minimal relevance		X		X	X	X
b) clearly not a refugee				X		X
c) i) safe country of origin		X		X	X	X
c) ii) safe third country		X		X	X	X
d) presents false info or withholds info		X			X	X
e) another application stating other personal data						X
f) uncertainty concerning nationality or identity						X
g) inconsistent, contradictory, improbable or insufficient representations						X
h) subsequent application with no new elements					X	X
i) application could have been made earlier		X				X
j) application merely to delay or frustrate removal						X
k) failure to comply with procedural obligations						X
l) unlawful entry and failure to apply early			X			X
m) danger to national security or public order			X			X
n) refusal to provide fingerprints						X
o) subsequent application by previously dependent unmarried minor						X

In **Hungary** Article 23(4) has not been transposed into the national law. However, certain elements of Article 23(4) are reflected in the admissibility procedure.

In **the Netherlands** in principle, every asylum application can be accelerated and there is no explicit distinction made by the Dutch authorities in accordance with Article 23(4).

The **United Kingdom** applies a policy whereby whatever the nationality or country of origin of the asylum seeker, they may have their application accelerated (in a detained procedure) if after screening it is considered to be one where a quick decision can be made. This is assessed on a case-by-case basis. However, there is a general presumption that the majority of asylum applications are ones on which a quick decision can be made, unless there is evidence to suggest otherwise. Cases where it may not be possible to make a quick decision include but are not limited to family cases, unaccompanied asylum seeking children, applicants with medical conditions requiring 24 hour nursing, those presenting with acute psychosis.

In **Norway** there is a 48-hour procedure. The Norwegian Directorate of Immigration (UDI) has developed a list of countries for which the Directorate has sufficient information on the general security and human rights situation and from which the majority of applications have often been found to be manifestly unfounded. An asylum seeker from one of these countries will initially have his or her application

processed on its individual merits under the 48-hour procedure. Following an examination of the claim, these applications that are not found to be manifestly unfounded will be removed from the 48-hour procedure. Asylum seekers whose claims are rejected under the accelerated procedure may make an appeal before the Immigration Appeals Board (UNE). A request for suspensive effect may be granted, except where the claim for protection was considered by the Directorate to be manifestly unfounded. When a case is processed within the 48-hour procedure, the asylum seeker must submit a petition for suspensive effect within 3 hours of notification of the UDI decision.<sup>416</sup>

In **Switzerland** a system called DAWES is operated. This stands for “Dismissal of a Claim without Entering into the Substance” (Nichteintretensentscheid, décision de non-entrée en matière). Following the initial interview or the second interview, the authorities may decide to dismiss the claim without entering into the substance of the claim. In such cases, the application is examined on a priority basis under an accelerated procedure. Examples of the cases where it is applicable include where the asylum seeker has made misrepresentations about his/her identity or is able to go to a safe third country.<sup>417</sup> The most important difference compared with the regular procedure is that the asylum seeker only has 5 work days to submit an appeal against a DAWES decision (as opposed to 30 days against a negative decision on the merits of the claim).

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<sup>416</sup> IGC, *Asylum Procedures Report*.

<sup>417</sup> *Ibid.*

## ANNEX IV - LEGAL AID AND THE NEW ASYLUM PROCEDURE IN THE NETHERLANDS

A new asylum procedure entered into force in the Netherlands on 1 July 2010 which has also an impact on legal aid for asylum seekers during the asylum procedure.<sup>418</sup> While a comprehensive overview of new asylum procedure is outside the scope of this research,<sup>419</sup> three major changes are highlighted here as they have direct consequences for the provision of legal aid to asylum seekers:

First, a lawyer will be appointed to the asylum seeker before the official start of the asylum procedure. In the new system a 'Rest and Preparation period' precedes the asylum procedure. This period lasts for at least six days and is used by the Immigration Authorities for initial research with regard to the identity of the asylum seeker and the documents submitted by the applicant. In addition the asylum seeker is offered the opportunity to undergo medical examination. Most importantly, the asylum seeker is allowed to travel to the office of the appointed lawyer to prepare the asylum interview and the rest of the procedure. As a result, the first contact between the asylum seeker and a lawyer is established before the start of the asylum procedure. This is considerable progress compared to the situation that existed before 1 July 2010 where asylum seekers met with a lawyer for the first time after the initial interview.

Second, in the new asylum procedure in principle one lawyer represents an asylum seeker throughout the entire procedure. Before 1 July 2010 an asylum seeker was represented by two or three different lawyers in the accelerated asylum procedure (AC-procedure). As a result in many cases valuable time was lost because the new lawyer had to familiarise him or herself with the file. In addition it was more difficult for the asylum seeker to build up a relationship of trust with his or her lawyer.

Third, lawyers will have more time for the different tasks that have to be performed. Before 1 July 2010, the legal aid lawyer only had three hours to read the report of the interview and submit a written reaction to the intention of the IND to reject the asylum application. As of 1 July 2010 the lawyer has one day to read and examine the report of the interview and one day to submit a written reaction to the intention to reject the asylum application. However, it must be noted that the lawyer is not compensated for a full day for each of these tasks. The total compensation offered in the administrative phase is 12 points (which entails 12 working hours). This has not changed from the system that was already in force before 1 July 2010 and which is based on the average time needed to perform a task.

It is acknowledged that all three changes will probably contribute to improving the quality of legal aid. However, the Dutch Council for Refugees, an ECRE member organisation, has also raised concerns on other aspects of the new asylum procedure. These include the fact that in the new asylum procedure the accelerated procedure has become the "normal asylum procedure", which means that that in

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<sup>418</sup> See Wet van 20 mei 2010 tot wijziging van de Vreemdelingenwet 2000 in verband met het aanpassen van de asielprocedure, *Staatsblad*, Jaargang 2010, Nr. 202 and Besluit van 23 juni 2010 tot wijziging van het Vreemdelingenbesluit 2000 in verband met het aanpassen van de asielprocedure en vaststelling van het tijdstip van inwerkingtreding van de Wet tot wijziging van de Vreemdelingenwet 2000 in verband met het aanpassen van de asielprocedure, *Staatsblad*, Jaargang 2010, Nr. 244.

<sup>419</sup> For a detailed analysis (in Dutch) of the new asylum procedure see T. Spijkerboer, *De nieuwe asielprocedure*, available at [http://www.vluchtelingenwerk.nl/pdf-bibliotheek/Nieuwe\\_asielprocedure\\_Spijkerboer\\_2010.pdf](http://www.vluchtelingenwerk.nl/pdf-bibliotheek/Nieuwe_asielprocedure_Spijkerboer_2010.pdf).

principle all asylum seekers will have to undergo an asylum interview on day three of the general asylum procedure. The Dutch Council for Refugees is of the opinion that, particularly in complex cases, it is impossible to establish a full picture of the asylum motives within such a short time frame. The organisation also criticizes the fact that no full examination of the credibility of the asylum application is introduced. A third area of concern is the situation of asylum seekers at Schiphol airport as the 'Rest and Preparation period' will not be fully applied for them. This is due to the fact that asylum seekers are detained at Schiphol airport and the detention circumstances are not adequate for long term detention. A new detention facility is being built but will only be ready in 2013. As a consequence, asylum seekers at Schiphol airport cannot (fully) benefit from the Rest and Preparation period until that time. Finally it is also of concern that reception facilities are only provided until four weeks after rejecting the asylum application. This can create unnecessary difficulties for legal aid lawyers to keep in touch with the asylum seeker. The organisation believes reception conditions should be provided throughout the whole asylum procedure.