ILPA Comments on *Commission Proposal for a Directive of the European Parliament and the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) Com (2009) 554, 21 October 2009*

I. Introduction

The Immigration Law Practitioners' Association (ILPA) is a professional association with over 900 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum through training, disseminating information, research and analysis. ILPA is represented on numerous government and other stakeholder and advisory groups. ILPA gave evidence to the House of Lords Committee on the European Union on the original versions of the Procedures and Qualifications Directives as well as hosting a seminar on these with the International Association of Refugee Law Judges in which the UK Border Agency, members of the judiciary and the UNHCR participated, and providing evidence to the European Commission.

This document contains the ILPA comments on the *Commission Proposal for a Directive of the European Parliament and the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) COM(2009) 554, 21 October 2009*, referred to herein as 'the Proposal for a Recast Procedures Directive' or simply 'the Proposal', and the attached Explanatory Memorandum of the Commission is referred to as the 'Explanatory Memorandum.' The current Directive is referred to as 'the Procedures Directive.'

ILPA commented at length on the proposal for the Procedures Directive in 2004, highlighting the many serious concerns about the compatibility of that measure with fundamental rights.[1] The Procedures Directive negotiations were tortuous and the resulting drafts entailed a consistent erosion of procedural standards, such that in March 2004 an NGO Alliance called for the withdrawal of the Procedures Directive, noting that it was likely to lead to denial of access to protection.[2] UNHCR also made two unprecedented interventions, 'warning that several provisions … would fall short of accepted international legal standards … [and] … could lead to an erosion of the

[1] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13. See ILPA, *Analysis and Critique of Council Directive onminimum standards on procedures in Member States for granting and withdrawing refugee status* (30 April 2004).

[2] ECRE, ILGA Europe, Amnesty International, Pax Christi International, Quaker Council for European Affairs, Human Rights Watch, CARITAS-Europe, Médecins Sans Frontières, Churches' Commission for Migrants, Save the Children in Europe, *Call for withdrawal of the Asylum Procedures Directive* (22 March 2004). Concerns were reiterated by ECRE, Amnesty International and Human Rights Watch Press Release, *Refugee and Human Rights Organisations across Europe Express their Concern at the Expected Agreement on Asylum Measures on breach of International Law* (28 April 2004).

global asylum system, jeopardizing the lives of future refugees.'[3] Nonetheless, the Directive was adopted on 1 December 2005.

ILPA again raised concerns about the Procedures Directive in its submissions on the Commission Green Paper on the future Common European Asylum System,[4] stating that

> 'The Procedures Directive in particular reflects a piecemeal and discretionary approach to procedural fairness at odds with that embodied in the binding general principles of EC law. In various areas, the apparent discretion afforded by the [Procedures Directive] is constrained by the general principles of EC law. Well-established and entrenched principles of EC law guarantee a right to a hearing, a reasoned decision and effective judicial protection. The latter also has implications for legal aid. At present, we face a period of prolonged legal uncertainty as the implications of the general principles are teased out in the judicial arena.'

ILPA identified the following provisions of the Procedures Directive as particularly problematic in that they fail to guarantee a full consideration of the asylum claim:

- dubious grounds for dispensing with asylum interview. (Article 12(2)(c) and 23(4)(a), (c), (g), (h), and (j));
- dubious grounds on which applications may be 'deemed' to be withdrawn. (Article 20);
- inadequate rules on legal aid and assistance (Articles 15 & 16);
- inadequate rules on an effective remedy and suspensive effect (Article 39).

ILPA in contrast urged a single procedure for Subsidiary Protection and Refugee Status, and the abandonment of special procedures. The provisions on special procedures of concern included:

- the general license to accelerate procedures (Article 23(3));
- the expansive notion of first country of asylum (Article 26(b));
- 'Safe' Third Country as embodied in the Procedures Directive, as it fails to guarantee adequate access to protection in the third country or assessment of the safety of the country for the particular applicant (Article 27);
- Super 'Safe' Third Country provisions, which completely bar access to protection (Article 36);
- 'Safe' Country of Origin (Articles 29-31);
- border procedures (Article 35).

Against that background, the Proposal is an attempt to undo some of the degradation of procedural standards heralded by the Procedures Directive. As we stressed in our CEAS Green Paper Submission, fundamental rights compliant standards are legally required as a bare minimum under EU and International Law. The Procedures Directive needs reform, as a matter of urgent legal necessity. The Court of Justice stated clearly in its ruling in the Family Reunification Directive that,

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[3] UNCHR Press Release, *Lubbers calls for EU asylum laws not to contravene international law* (29 March 2004); UNCHR Press Release, *UNHCR regrets missed opportunity to adopt high EU asylum standards (*30 April 2004).

[4] ILPA Submission in response to the Commission Green Paper on the future Common European Asylum System ('CEAS') COM(2007) 301 final (ILPA, London, 30 September 2007). Hereafter 'CEAS Green Paper Submission'.

'a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights.'[5]

ILPA accordingly acknowledges the Commission's recognition that many current procedural standards are deficient, and that higher standards are needed to ensure compliance with fundamental rights (in particular the general principles of EU law and the Strasbourg jurisprudence on Articles 3 and 13 ECHR in particular), the Qualification Directive [6] and international and EC obligations of *non-refoulement*. ILPA concurs with the Commission that
'The proposed amendments are, to a large extent, informed by evolving case law of the European Court of Justice regarding the general principles of Community Law, such as the right to defence, the principle of equality of arms, and the right to effective judicial protection.'[7]

As the Lisbon Treaty has granted the Court of Justice full jurisdiction over asylum matters, ILPA stressed the desirability of legislative reform in order to avoid much litigation.

As the Commission's consultation revealed, vindicating ILPA's prediction, the Procedures Directive facilitated a 'proliferation of disparate procedural arrangements as national level.'[8] Regrettably, at the time the Proposal was issued, we did not have a complete picture of the implementation of the Procedures Directive across the EU. The Commission's Explanatory Memorandum refers to its 'careful analysis of the transposition measures,'[9] yet ILPA notes that the Commission's Report on the Application of the Procedures Directive was not published until September 2010.[10] A number of other studies have examined EU asylum systems in practice, including crucially the UNHCR study on implementation of the Procedures Directive,[11] which examines 12 Member States, including the UK.[12] In this comment, we have drawn on the *UNHCR Procedures Directive Study* in particular, and on one academic work, which has examined the Procedures Directive's workings in Belgium, Spain, Poland, UK, the Netherlands, Germany and Italy.[13] We have also had the benefit of the Meijers Committee submission on the Qualification Directive and Procedures

[5] Case C-540/03 *Parliament v Council*, 27 June 2006, para 23.
[6] Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L/304/12.
[7] Explanatory Memorandum, p 6.
[8] *Ibid,* para 1.1.
[9] *Ibid,* para 2
[10] Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 September 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, COM(2010) 465 final, 8 September 2010.
[11] UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice A UNHCR Study on the application of key provisions of the Asylum Procedures Directive in Selected Member States* (UNHCR, Brussels, March 2010).
[12] Belgium, Bulgaria, Czech Republic, Finland, France, Germany, Greece, Italy, Netherlands, Slovenia, Spain, United Kingdom.
[13] Karin Zwaan (ed) *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, Nijmegen, 2008).

Directive Proposals[14] and ECRE's comments on the Proposal for a Recast Procedures Directive,[15] and the UNHCR comments thereon.[16]

More particularly, given ILPA's particular area of expertise, we draw on UK experiences with various procedural devices in the Proposal. We hope that, by highlighting the UK experience, both positive and negative, the Recast Procedures Directive may be improved. Indeed, to the extent that the Proposal reflects practices which have been tried and failed in the UK, the relevance of ILPA's input is clear.

ILPA regrets the UK government decision not to opt in to the Proposal. As we already stated in our joint submission with the AIRE Centre,[17] we agree with the House of Lords Committee on the European Union and the Commission's analysis that the UK will continue to be bound by the existing instruments if it does not opt in to the new ones.[18] We concur with the analysis of the House of Lords Committee on the European Union that in the light of this 'it is not so much desirable as essential that the Government should opt in.'[19] As our previous submission argued, the UK government's reasons are largely based on dubious readings of the Proposal.

The Proposal will have to be adopted by co-decision of the European Parliament, with a qualified majority in the Council. ILPA has high expectations of the Parliament's legislative input. The European Parliament issued highly critical opinions on the Procedures Directive,[20] which were ignored as the Council was required to merely consult, rather than actually heed, the Parliament. Now, the Commission with the Parliament can secure real legislative impact.

Accordingly, we address this comment in particular to the European Parliament, in particular to the Committee for Civil Liberties, Justice and Home Affairs, and the rapporteur, Sylvie Guillaume MEP.

II. Key Features of the Proposal

1. Minimum Standards cf. Common Standards

The Tampere Conclusions identified as an aim of the CEAS 'common standards for fair and efficient asylum procedure' and in the longer term, 'a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.'[21] The Hague Programme reiterated the aim of 'the establishment of a

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[14] Meijers Committee, *Note of the Meijers Committee (Standing Committee of experts on international immigration, refugees and criminal law) on the proposals for recasting the Qualification Directive (COM(2009) 551) and the Procedures Directive (COM(2009) 554),* (4 February 2010).

[15] Comments from the European Council of Refugees and Exiles on the European Commission Proposal to Recast the Asylum Procedures Directive, (ECRE, Brussels, May 2010).

[16] UNHCR Comments on the Commission's 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, (UNHCR, Brussels, August 2010).

[17] ILPA and the AIRE Centre comments to the UK Border Agency on the re-cast Procedures and Qualifications Directives (ILPA/AIRE Centre, London, 8 December 2009).

[18] HL Paper 6 of session 2009-10 and Appendix Three.

[19] *Ibid,* para 18.

[20] See, for example, European Parliament, Committee on Civil Liberties, Rapporteur Kreissl-Dörfler, Report on the amended proposal for a Council Directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status (A6-0222/2005, 29 June 2005).

[21] Tampere European Council, 15-16 October 1999, Presidency Conclusions, Annex A, paragraphs 14 and 15.

common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection.'[22] However, this aim of 'a common procedure' is ambiguous, and as the then Treaty competence was confined to setting minimum standards. Accordingly, it is better understood as a common procedure for Refugee Status and Subsidiary Protection (which should be referred to as a 'single procedure') established by minimum legislative standards. The Procedures Directive did not establish a single procedure. A clear improvement in the Proposal is the establishment of a single procedure for Refugee Status and Subsidiary Protection, in keeping with the practice in many Member States, including the UK. In the UK, there is a single procedure for consideration of whether an applicant will be granted refugee status or subsidiary protection.[23]

In welcoming a single procedure, however, we do not endorse the notion of common EU wide procedural standards. Notwithstanding that the new post-Lisbon legal base refers to 'common procedures,'[24] as ILPA explained at length in its Comments on Green Paper on CEAS, ILPA contends that the adoption of common EU standards in this field is inappropriate and liable to lead to violations of fundamental rights norms, deriving from domestic, EU and international law. Cases pending before the Court of Justice will explore the minimum standards nature of the Qualification Directive,[25] which in turn will clarify the notion of minimum standards in EU asylum law more generally.

The Proposal is ambiguous on this point. While it reiterates the Hague Programme aim of progressing towards a common asylum procedures and a uniform status[26]; it also refers to the aim of the European Pact on Immigration and Asylum 'single asylum procedure comprising common guarantees'.[27] The proposal is entitled 'minimum standards' on procedures in Member States for granting and withdrawing international protection. The Proposal in general embodies a 'minimum framework'[28] and allows more favourable national standards.[29] However, it replicates a problematic feature of the Procedures Directive, in describing the 'safe' country of origin and 'safe' third country provisions as 'common'.

ILPA contends that only minimum standards are legally appropriate in this context.

2. A Single Procedure for Refugee Status and Subsidiary Protection

As mentioned, the Proposal requires Member States to apply the standards therein to all applications for 'international protection', defined as both Refugee Status and Subsidiary Protection (Article 3(1)).

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[22] European Council 4-5 November 2004, Presidency Conclusions, Annex 1, page 17, final paragraph. See ILPA, *Response to the Hague Programme: EU Immigration & Asylum Law and* Policy, January 2005.

[23] Termed 'Humanitarian Protection'. See Immigration Rules (HC 395) http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/

[24] Article 78 TFEU.

[25] Pending Cases C-57/09 Reference from the BVerWG *Germany v B* 10 February 2009 and C-101/09 *Germany v D* 13 March 2009, Opinion of AG Mengozzi, 1 June 2010. See further G Gilbert 'Exclusion under the Qualification Directive and the German Reference' Paper presented at the IARLJ Conference, Berlin, 19-20 October 2009.

[26] Explanatory Memorandum, para 1.2.

[27] *Ibid,* para 1.3.

[28] Proposal, Recital 10.

[29] Proposal, Recital 12 & Article 5.

Many aspects of this development are positive. However, as long as the scope and rights attached to the two statuses remain distinct, it is important that the single procedure does not undermine the distinct features of each. Article 9(2) of the Proposal reflects the distinction, stating that 'applications for international protection shall first be examined to determine whether applicants qualify as refugees. If not, they shall be examined to determine whether the applicants are eligible for subsidiary protection.' As the Court of Justice recently confirmed in *Abdullah v Germany*,[30] 'the [Qualification Directive] governs two distinct systems of protection, that is to say, firstly, refugee status and, secondly, subsidiary protection status, in view of the fact that Article 2(e) of the Directive states that a person eligible for subsidiary protection is one 'who does not qualify as a refugee.' Cessation of Subsidiary Protection is not a condition for the cessation of Refugee Status and cessation of Refugee Status 'occurs without prejudice to the right of the person concerned to request granting of subsidiary protection status, in the case where all the factors, referred to in Article 4 [Qualification Directive], which are necessary to establish that he qualifies for such protection under Article 15 [Qualification Directive] are present.'[31] This ruling has procedural implications, in that it requires that although there may be a single procedure, the two statuses remain distinct.

3. 'Abuse of Rights' Rhetoric

In its Explanatory Memorandum, the Commission introduces the notion that robust first instance determinations prevent abuse and enhance efficiency. ILPA welcomes the emphasis on frontloading, long advocated. However, we wish to sound a note of caution concerning the references to 'abuse' throughout the Commission's Explanatory Memorandum. The notion of abusive asylum applications suggests that an application for asylum which is unsuccessful may *ex post facto* be deemed to have been 'abusive', or even more worryingly, that there is a category discernable *ex ante* as 'abusive' applications. ILPA rejects both notions, and stresses the dangers that this vague concept could undermine both the right to seek and be granted asylum. The protean concept of 'abuse' figures throughout the Commission's Memorandum. The Commission refers to the influential submissions of certain Member States, which were concerned 'to maintain procedural arrangements aimed at preventing abuse'[32] and later it links abuse and integrity of asylum systems and repeated and manifestly unfounded applications.[33] In contrast, it also refers to first instance procedural improvements would 'contribute to preventing abuse of procedures by improving applicants' awareness of applicable requirements leading *inter alia* to better compliance with procedural obligations.'[34] In this formulation, abuse is hardly abuse at all, but non-compliance with procedural obligations due to their opacity.

The Proposal does not explicitly refer to abuse. However, certain provisions do reflect the notion that procedures should be tighter in order to prevent certain practices, implicitly deemed improper, in particular Articles 12 and 35.

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[30] Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Abdullah v Germany,* Opinion of AG Mazák 15 September 2009, ECJ Judgment 2 March 2010.
[31] ECJ, paras 79-80.
[32] Explanatory Memorandum, para 2.
[33] *Ibid*, p 4.
[34] *Ibid*, p 6.

Article 12 enhances the cooperative obligation on applicants for international protection. Article 12(1) now additionally provides that
'Applicants for international protection shall cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) [Qualification Directive].'

The Procedures Directive itself only contains a permissive clause, allowing Member States to impose obligations to cooperate 'insofar as these obligations are necessary for the processing of the application.' ILPA submits that it is inappropriate for the Proposal to render the Qualification Directive provisions mandatory, given that Article 4 Qualification Directive contains a careful balanced dialogic framework for the assessment of evidence in the asylum process.[35]

The other worrisome element of the Proposal concerns the rules pertaining to subsequent applications under Article 35. Article 35(6) is maintained, also allowing Member States to be excessively harsh in refusing to examine subsequent applications, requiring applicants to show that they were 'incapable' of making out their claim in the original examination. The UNHCR Procedures Directive Study has revealed ample evidence that subsequent applications are commonly a reaction to inadequate, often accelerated, first decisions. In this context, any supposition that subsequent applications are abusive is incorrect. Subsequent applications are a common occurrence within the UK. On 14 October 2009, in response to the large numbers of subsequent applications generated by the UK's Refugee Status Determination system, the UK Border Agency changed the way in which such applications could be made and the way in which they are processed, requiring, often destitute, applicants to travel all the way to Liverpool to submit such applications but not providing any support toward the costs of travel.[36]

4. Gender & Asylum Procedures

The Proposal contains copious references to gender concerns. ILPA welcomes the Commission's recognition that women's particular experiences warrant recognition in the asylum process. In particular, ILPA notes following provisions:

- Article 6(4) aims to safeguard the individual right to make a separate application, in cases where an application is made on behalf of a dependent adult.
- Article 10(4) – exception to single decision for family 'where disclosure of particular circumstances of a person to members of his/her family can jeopardize the interests of that person, including cases involving gender and/or age based persecution. In such cases, separate decision shall be issued to the person concerned.'
- Article 12(2)(d) allows the competent authorities to search the applicant. The Proposal adds 'provided the search is carried out by a person of the same sex.'

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[35] G Noll, 'Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive' (2006) *European Public Law* 295. See further R Thomas, 'Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined' (2006) *European Journal of Migration and Law* 79.

[36] See http://www.ukba.homeoffice.gov.uk/asylum/outcomes/unsuccessfulapplications/further-submissions/. ILPA has repeatedly protested the changes in letters and in meetings and indeed had been given permission to intervene in a High Court case on the changes, a challenge later withdrawn when the person bringing the challenge was permitted to make his application by post.

- Article 14(3)(b) attempts to gender-sensitise the interview, by providing that 'wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant concerned so requests.' A similar provision applies with regard to interpreters. (Article 14(3)(c))

The UK experience in the development of Gender Guidelines is noteworthy. The UK Border Agency published Gender Guidelines in 2004, revised in 2006.[37] Notably, the UK Guidelines go not only to matters of procedure, but also to the substantive assessment of claims, in light of the fact that persecution and human rights abuses of women often take different forms from those suffered by men, which have historically been under-recognised in asylum procedures. In particular, the core refugee law concepts of 'membership of a social group' and 'political opinion' require a gender-specific interpretation. ILPA notes the proposed changes to the Qualification Directive, in particular the new reference to gender in defining 'particular social group' ground for persecution in article 10(1)(d). The adoption of Gender Guidelines which integrate procedural and substantive matters is necessary, as UNHCR recognises in its Procedures Directive Study.[38]

The existence of guidelines is only a first step. UK experience demonstrates the persistent failure to respect those guidelines once in place. A 2006 study found a failure to follow the guidelines[39] and more recently, Human Rights Watch has critiqued the impact of the Detained Fast Track procedure on women asylum seekers[40] and UNHCR raised serious concerns about the process in its fifth Quality Initiative Report, including systematic use of detention on grounds of making an asylum claim, misapplication of vulnerability criteria, lack of access to information and insufficient time to make sound decisions.[41]

In February 2006 the UK Border Agency New Asylum Model Quality Team examined a month's intake to the female detained fast track process in Yarl's Wood Immigration Removal Centre in order to determine whether the cases were handled in accordance with the gender guidelines.[42] The report recommended that a more robust referral mechanism for the detained fast track be identified, for better identification of potential gender-related claims which are not suitable for fast-track processes. It also recommended the establishment of 'a specific and detailed training programme for all Case Owners in NAM, which deals with gender-related issues in the asylum process and ensures all Case Owners are aware of their obligations under the Gender Asylum Policy Instruction.'[43]

In September 2007, Bail for Immigration Detainees' research into women's experiences of the detained fast track process at Yarl's Wood found that complex

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[37] Asylum Policy Instruction (API), *Gender Issues in the Asylum Claim* October 2009. A further revision is awaited.
[38] Above n 11.
[39] S Ceneda and C Palmer '"Lip Service" or Implementation? The Home Office Gender Guidance and women's asylum claims in the UK' (Asylum Aid, March 2006)
[40] Human Rights Watch *Fast Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK* (Human Rights Watch, February 2010).
[41] UNHCR in the UK *Quality Initiative Project Key Observations and Recommendations February 2007- March 2008,* published July 2008 (known as the 'Fifth Quality Initiative Report'.
[42] *Yarl's Wood Detained Fast-Track Compliance with the Gender API: A Report by the NAM Quality Team* (Home Office, August 2006).
[43] *Ibid*, p 12.

gender cases were still being inappropriately referred to the detained fast track process.[44]

Research produced jointly by the POPPY Project and the Refugee Women's Resource Project at Asylum Aid considered all the asylum claims made by women who were trafficked into the UK and subsequently supported by the POPPY Project during 2007 and who went through the New Asylum Model process. Whilst improvements were found on procedural issues such as providing female Case Owners and interpreters, the rate of success at appeal showed that the quality of initial decision-making remains an issue. All the women in the sample whose cases were completed at the time of the research (12 women) were refused at initial stage but the decision was overturned on appeal. The findings had implications for a wide spectrum of cases including other forms of gender persecution.[45]

The Refugee Council's Vulnerable Women's Project concluded that:

> 'A lack of gender sensitivity in the asylum procedure and evidence assessment of asylum claims has further restricted women's access to protection in the UK. A number of improvements have been made following the introduction of gender guidelines by the Home Office, UNHCR's audit of decisions through the Quality Initiative (QI) and the implementation of the New Asylum Model for determining claims. Nevertheless, survivors of sexual violence suffer from a shortage of female interviewers and interpreters, from being wrongly detained during the process, from decision-makers lacking the skills to assess gender issues and making incorrect assumptions about their credibility in the face of medical evidence; and from the poor quality of information used about women's situation in their country of origin.'[46]

The Independent Asylum Commission conducted an independent citizens' enquiry into the UK asylum system and concluded that the Government's own gender guidelines were inconsistently observed, women's cases bases on sexual violence are not properly presented under the fast track system and that gender specific claims for asylum were not adequately addressed by the asylum system.[47]

Rights of Women considered the question of whether the UK meets its international obligations in relation to violence against women. As a framework for analysis their report used the Beijing Platform for Action (BPfA), a global policy document which identifies violence against women as one of twelve critical areas of concern, which must be addressed to ensure women's equality and empowerment. When the UK signed the Beijing Declaration and committed to implementing the Beijing Platform for Action in 1995, it confirmed that women's rights are human rights and that the elimination of violence against women is critical in order to secure women's empowerment and advancement in society. Of all public authorities addressed in 'Measuring Up?' including the police and Crown Prosecution Service, Rights of

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[44] Bail for Immigration Detainees (BID), *Refusal Factory: Women's experiences of the detained fast track asylum process at Yarl's Wood Immigration removal centre* (BID, 2007).

[45] POPPY Project and Refugee Women's Project at Asylum Aid, *Good Intentions: a review of the New Asylum Model and its impact on trafficked women claiming asylum* (Eaves, 2008), p 21.

[46] Refugee Council, The Vulnerable Women's Project, *Refugee and Asylum Seeking Women affected by Rape or Sexual Violence: Literature Review*, February 2009, p 46. See also Women's Asylum News, Issue No 91, April 2010, p 1-5.

[47] Independent Asylum Commission, *Deserving dignity,* Independent Asylum Commission, 2008, p 42.

Women reported greatest concern about the policies and practices of the UK Border Agency concluding that:

> "It is our view that the UKBA has not adopted a gender sensitive approach in its responses to women at risk of or experiencing violence. UKBA policies do not adequately meet the needs of asylum-seeking women, women with an insecure immigration status experiencing violence, women who have been trafficked or women who are at risk of forced marriage. The BPfA requires States to address the needs of the most disadvantaged women. Rather than adhere to this requirement, the UKBA's focus on immigration control and lack of consideration for the gender specific needs of women with an insecure immigration status places women at increased risk of violence. This is an unacceptable situation."[48]

5. Identifying Applicants with Special Needs

Recital 20 identifies the need for special procedural guarantees for applicants with special needs, 'such as unaccompanied minors, persons who have been subjected to torture, rape or other serious acts of violence or disabled persons'. Article 2(d) contains the definition of applicant with special needs, namely

> 'an applicant who due to age, gender, disability, mental health problems or consequences of torture, rape or other serious forms of psychological, physical or sexual violence is in need of special guarantees in order to benefit from the rights and comply with the obligations in accordance with this Directive.'

The key article is Article 20 - Applicants with special needs

> '1. Member States shall take appropriate measures to ensure that applicants with special needs are given the opportunity to present the elements of an application as completely as possible and with all available evidence. Where needed, they shall be granted time extensions to enable them to submit evidence or take other necessary steps in the procedure.
>
> 2. In cases where the determining authority consider that an applicant has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence as described in Article 21 of Directive […/…/EC] [laying down minimum standards for the reception of asylum seekers (the Reception Conditions Directive)], the applicant shall be granted sufficient time and relevant support to prepare for a personal interview on the substance of his/her application.

The key safeguard for such applicants under Article 20(3) is that their procedures shall not be accelerated under Article 27(6) nor deemed unfounded under Article 27(7).

The Proposal does not specify a process for deeming applicants to be 'vulnerable'. Accordingly, the efficacy of these provisions may be seriously undermined, as it is likely that any claim to vulnerability may well be disputed, and may also be centrally related to the contested facts of the asylum claim. Based on the UK experience, ILPA doubts whether any preliminary screening mechanism can properly identify applicants

[48] Rights of Women, *Measuring up? UK compliance with international commitments on violence against women in England and Wales*, Rights of Women, 2010, p 137.

with special needs. In the absence of any appropriate screening mechanism, these provisions are of little utility, particularly as applicants with special needs are still likely to be siphoned into accelerated procedures. In this regard, ILPA notes that the recommendation advanced by Mrs Debauche[49], the rapporteur on 'vulnerable persons with special needs', at the EU Ministerial Conference on Quality and Efficiency in the Asylum Process, on September 13-14, emphasised the need for 'early and continuous identification' of such persons[50].

For example, the Independent Chief Inspector of the UK Border Agency's Report on the Liverpool Asylum Screening Unit of August 2009[51] demonstrated the unsuitability of ASUs to determine routing into Detained Fast Track. One of the four key recommendations made in the report was for the UK Border Agency to take immediate steps to improve the facilities to ensure the privacy of asylum applicants and the needs of children.[52] For example, the Independent Chief Inspector noted that:

> "Staff expressed concern that the facilities did not afford adequate levels of privacy for the customer as their conversations could easily be overheard by people in neighbouring booths. This was particularly likely if family groups were being interviewed together crammed into one booth".[53]

UK experience demonstrates that the supposed screening for placement in detained fast track does not identify victims of torture.[54]

On age determination, ILPA has demonstrated that '[t]he UK Border Agency's current position: to divide those who say that they are children into children, adults and the doubtful, using the 'strongly suggests' test is reasonable on paper but does not in ILPA members' experience always work in practice.'[55] Article 21(5) deals with the contentious issue of age determination by medical examination, which has been widely criticised, both by courts and medical professionals.[56] The new limitation on use of such examinations to cases where 'following his/her general statements and other relevant evidence, Member States still have doubts concerning his/her age' seems unlikely to have much practical impact. The new requirement that 'Any medical examination shall be performed in full respect of the individual's dignity, selecting the less invasive exams' is important, but unhelpfully vague. Informed consent, freely given, is required for such examinations and in circumstances where

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[49] Laurence Debauche-Discart, Member of the Oddyseus Academic Network's coordination team
[50] This recommendation arose out of a workshop attended by representatives of Governments and civil society, at which reports were given of good practice in certain Member States highlighting such need.
[51] Independent Chief Inspector of the UK Border Agency, Liverpool Asylum Screening Unit: Unannounced Inspection, 10 August 2009, http://icinspector.independent.gov.uk/wp-content/uploads/2010/03/liverpool_asu.pdf.
[52] *Ibid,* p 6.
[53] *Ibid,* p 14.
[54] ILPA comments on the proposed Asylum Instruction on Handling Claims Involving Allegations of Torture (ILPA, London, 30 March 2010) Available at <www.ilpa.org.uk/submissions/10%2003%2030%20ILPA%20to%20Bill%20Brandon%20Torture%20Instruction.pdf>.
[55] ILPA Comments on Assessing Age: Asylum Process Guidance Version 5, 5 November 2009 (ILPA, London, 15 January 2010), 3, available at <www.ilpa.org.uk/submissions/10%2001%2015%20Assessing%20Age%20Asylum%20Process%20Guidance.pdf>.
[56] ILPA *When is a child not a child* (ILPA, London, November 2007) (to which reference was made in the Supreme Court judgment in the case of *R(A) v Croydon, R(C) v Lambeth* [2009] UKSC 8). UN Committee on the Rights of the Child. Forty-Ninth Session, CRC/C/GBR/CO/4, 3 October 2008; Royal College of Paediatrics and Child Health guidelines in the assessment of age (December 2009).

an individual faces removal or detention if consent is not forthcoming it is unlikely to be possible to determine that this is the case. Moreover, even with informed consent, freely given, there remains the question of how subjecting a child to an medical examination for a non-therapeutic purpose is compatible with obligations to make the best interests of the child a primary consideration.

III. Detailed Analysis and Critique

Article 3 – Scope

The Inclusion of 'Territorial Waters'

Recital 19 and Article 3 of the Proposal reflect the inclusion of 'territorial waters' within the scope of the Directive. As UNHCR notes,[57] this reflects the Commission's view as already expressed in 2007 regarding the Procedures Directive.[58] ILPA welcomes this inclusion, but notes importantly that human rights obligations may extend beyond a states territory (be that land or sea) into any area where it exercises effective control, including on the high seas.[59]

- **Recommendation:** Amend Article 3 to reflect the full scope of human rights jurisdiction.

Article 4 – Responsible Authorities

ILPA welcomes the requirement that the determining authority have 'sufficient numbers of competent and specialized personnel' and the requirements concerning training programmes for decision makers. The specifications concerning training in Article 4(2) are also welcome. ILPA draws attention to the UK experience with the UNHCR Quality Initiative.[60] ILPA welcomes the deletion of provision for various non-specialist bodies to decide asylum claims, and regrets the continued provision in Article 4(3) for non-specialist bodies to deal with Dublin transfers. Given the complex human rights-sensitive issues that arise in Dublin cases, ILPA contends that they are not a matter for non-specialists.

- **Recommendation:** Delete Article 4(3) and 4(4) on specialised Dublin authorities.

Juxtaposed Controls

Article 4(5) introduces a new rule on juxtaposed controls. It states that

> 'Applications for international protection made in a Member State to the authorities of another Member State carrying out border or immigration controls there shall be dealt with by the Member State in whose territory the application is made.'

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[57] UNHCR *Briefing to the House of Lords on the adoption and application of the proposed EU Asylum Procedures and Qualifications Directives,* UNHCR London, January 2010.

[58] European Commission, *Commission Staff Working Document Study on international law instruments in relation to illegal immigration by sea* 15 May 2007, SEC(2007) 691, available at <ec.europa.eu/justice_home/doc_cenre/immigration/illegal/doc/sec_2007_691_en.pdf>.

[59] See, eg, Application No 3394/03 *Medvedeyev and Others v France* 23 March 2010.

[60] The UNHCR reports and Ministerial responses are available here: <www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports>.

ILPA has previously highlighted the problems with juxtaposed border controls.[61] The Proposal's clarification of responsibility is welcome, but its operation in practice will be challenging. The rationale for juxtaposed controls in one state (the territorial state) is to prevent asylum seekers from reaching the territory of the second, deflecting, state. Accordingly, we should expect those officials of the deflecting state to hand over asylum seekers willingly to the territorial Member State. Yet, there is a clear accountability gap as the Proposal does not place any duties on the authorities of the deflecting State. Indeed, there is much to commend the approach of treating the juxtaposed control as a 'virtual frontier' of the deflecting State.[62] If this approach is not taken, at the very least the Proposal should ensure that the provisions of Article 6 are amended to clarify the process of handing over asylum seekers to the authorities of the territorial state in the context of juxtaposed controls.

- **Recommendation**: Article 4 should expressly refer to the international human rights and refugee law obligations and confirm that member states should respect those obligations in the operation of juxtaposed controls.

Article 5 – More favourable provisions

ILPA welcomes this statement, and as per Section II.1 above, urges accordingly that no provisions in the Proposal be considered to create common standards.

Article 6 – Access to designated authorities

ILPA welcomes the new duty on Member States to 'ensure … an effective opportunity to lodge the application with the competent authority as soon as possible.' This reflects the general requirement of EU law as stated by the CJEU in *Panayotova*.[63] Article 6(8) refers to the role of border guards, police and immigration authorities and other authorities 'likely to be addressed by someone who wishes to make an application for international protection.' ILPA joins with ECRE in having concerns about the formulation 'dealing with applications for international protection' for border guards and other authorities.[64] It should be completely clear that only responsible authorities under Article 4 deal with asylum claims. Other authorities' role is to ensure applicants' claims are promptly registered so that they can be considered by the responsible authorities.

Article 6(9) requires that applications be registered within 72 hours 'from the moment a person has expressed his/her wish to apply for international protection' pursuant to Article 6(8)(1). Article 6(9) is ambiguous and ought to be clarified to ensure that the time runs from the moment the person expresses his/her wish not only to the

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[61] ILPA, *Response to the Consultation Document: Private freight searching and fingerprinting at Juxtaposed controls*, 28 July 2006.

[62] For an examination of the legal background, although not directly on this specific point, see. *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55 ('Roma Rights Case') and *Al-Saadoon & Mufdhi v UK* ECHR (case no. 61498/08) where the handing over of two Iraqi detainees to the Iraqi authorities by British forces in Iraq was, in the circumstances of the case, found to violate Articles 3, 13 and 34 of the European Convention on Human Rights. The cases are relevant to the potential legal consequences and obligations surrounding the position of the authorities of one State acting on the territory of another.

[63] Case C–327/02 Panayotova [2004] ECR I–11055.

[64] ECRE, above n 15, 12.

designated competent authorities, but also to other authorities, namely 'the border guards, police and immigration authorities, and personnel of detention facilities.' To achieve its stated aim of ensuring access, the time must run from when the wish is expressed, not simply from when the request is communicated to the competent authorities.

ILPA welcomes the addition to Article 6(4) as a contribution towards safeguarding the individual right to make a separate application, in cases where an application is made on behalf of a dependent adult.

Article 6(7) is welcome in that it reflects the international legal entitlement of all minors to make an application for asylum. The discriminatory reference in Article 6(7)(c) to married minors should be deleted.

- **Recommendation:** The limited role of border guards, police and immigration authorities and other authorities 'likely to be addressed by someone who wishes to make an application for international protection' should be clarified, so as to safeguard the position of the trained designated responsible authorities under Article 4.
- **Recommendation:** Article 6(9) should be amended to clarify when the time begins to run.
- **Recommendation:** The word 'unmarried' in Article 6(7)(c) should be deleted.

Article 7 - Information and counselling at border crossings points and detention facilities

Article 7 is entirely new. ILPA welcomes the acknowledgment that access depends on early provision of information. Article 7(3) refers to access by 'organizations providing advice and counselling to applicants for international protection.' However, ILPA agrees with ECRE[65] that 'counselling' is vague, and so the reference should be expanded to include organisations and individuals providing legal advice and legal representation to asylum seekers in the asylum procedure.

- **Recommendation:** ILPA recommends that Article 7(3) be added expanded to include 'organisations and individuals providing legal advice and legal representation to asylum seekers in the asylum procedure.'

Article 8 – The right to remain in the Member State pending the examination of the application

A series defect in the Procedures Directive is that it does not provide for a right to remain pending the resolution of all appeals, thereby violating the requirement of suspensive effect under Article 13 ECHR and EU general principles. This defect is remedied by Articles 41(5) and (6) of the Proposal, thereby enhancing Article 8 thereof. ILPA welcomes the new Article 8(3) which reiterates that the principle of *non-refoulement* may preclude extradition of asylum seekers.

- **Recommendation:** Delete the 'competent authorities are satisfied that' in Article 8(3) to make the guarantee stronger.

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[65] *Ibid*, 14.

Article 9 – Requirements for the examination of applications

ILPA welcomes the new requirement in Article 9(2) that eligibility for refugee status be examined before subsidiary protection. The additional requirement to disclose country of origin information relied upon to the applicant and his/her legal advisor reflects a welcome codification of the EU rights of defence.[66] ILPA welcomes the new provision in Article 9(3)(d) 'the personnel examining applications and taking decisions are instructed and have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, child or gender issues.' Article 9(3)(c) refers to knowledge of refugee law, but should, also refer to human rights (domestic, EU and international) and the training requirements in Article 4(2).

- **Recommendation:** Add to Article 9(3)(c) reference to human rights law and the training requirements in Article 4(2).

Article 10 – Requirements for a decision by the determining authority

ILPA has concerns about the licence to rely on earlier information concerning appeals rights, and so urges deletion of Article 10(2), second paragraph. ILPA welcomes the exception to the granting of family decisions (Article 10(3)), where to do so 'would jeopardize the interests of that person, including cases involving gender and/or age based persecution.' This complements Article 6(4) of the Proposal.

- **Recommendation:** Article 10(2), second paragraph should be deleted.

Article 11 – Guarantees for applicants for international protection

Article 11 does introduce some procedural improvements, but fails to deal with all the shortcomings of the Procedures Directive. For example, it still refers to communication 'in a language which they may be reasonably supposed to understand.' Article 11(1)(c) refers to access by UNHCR. As in the Procedures Directive, this is expressed in negative terms, and should be expressed more positively. Article 11(1)(c) also refers to 'any other organisation providing legal advice or counselling to asylum seekers in accordance with the national legislation of that Member State.' In contrast, Article 7(3) refers to access by 'organizations providing advice and counselling to applicants for international protection.' ILPA recommended above that Article 7(3) should be amended to include 'organisations and individuals providing legal advice and legal representation to asylum seekers in the asylum procedure,' so a similar amendment should be included.

- **Recommendation**: The reference to 'language which they may be reasonably supposed to understand' should be deleted and replaced with a 'language which they understand' throughout.
- **Recommendation:** As in Article 7(3) refer to 'organisations and individuals providing legal advice and legal representation to asylum seekers in the asylum procedure.'

[66] See, eg, Joined Cases C-402/05 P and C-415/05 P *Kadi* 3 September 2008.

- **Recommendation:** The State's duty to cooperate with UNHCR should be expressed positively, so the phrase 'they shall not be denied the opportunity to' should be deleted.

Article 12 – Obligations for applicants for international protection

As discussed above in Section II.3, the amendment to Article 12(1) appears to strengthen the duty to cooperate with regard to the information set out in Article 4(2) of the Qualification Directive. ILPA welcomes the gender sensitisation in Article 12(2)(d) concerning searches. The Proposal adds 'provided the search is carried out by a person of the same sex.'

- **Recommendation:** The circumstances in which non-cooperation is excusable and consequences of non-cooperation should be spelled out clearly. ILPA remains concerned about negative evidential presumptions in this field.

Article 13 – Personal interview

ILPA welcomes the deletion of Article 12(2)(b) and (c) Procedures Directive, which apparently allow Member States to dispense with interviews on a range of dubious grounds, linked to the overbroad notion of unfoundedness in the Procedures Directive, which includes, for instance, where the applicant made 'inconsistent, contradictory, improbable or insufficient representations.' In our submission on the Procedures Directive, we argued that these provisions potentially marked the 'deathknell of reliable asylum determinations.'[67]

Article 13(1) of the Proposal requires that the interview 'on the substance of the application… shall always be conducted by the personnel of the determining authority.' The grounds for dispensing with the interview have been narrowed considerably (linked to the reforms on unfoundedness), such that it is only for positive refugee status decisions (Article 13(2)(a)) and cases where the applicant is 'unfit or unable to be interviewed owing to enduring circumstances beyond his/her control' (Article 13(2)(b)). While this is welcome, ILPA agrees with the recommendation of ECRE that the words 'when in doubt' be removed from Article 13(2)(b) because the determining authority will not have medical expertise to assess the medical or physical condition of an asylum-seeker[68].

- **Recommendation:** ILPA welcomes this strengthening of the entitlement to an interview, but suggests that the provision could usefully include a rule on adjournment, where the applicant is temporarily unfit or unavailable for interview. At present, Article 13(3) states that the 'absence of a personal interview in accordance with this Article shall not prevent the determining authority from taking a decision on an application for international protection.'
- **Recommendation:** The words 'when in doubt' should be removed from Article 13(2)(b)

Article 14 – Requirements for a personal interview

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[67] Above n 1.
[68] ECRE, above n 15, p21

ILPA welcomes many of the improvements in Article 14. Article 14(3)(a) should include reference to the 'personal *and* general circumstances' rather than 'personal or general circumstances.; Article 14(3)(b) attempts to gender-sensitise the interview, by providing that 'wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant concerned so requests.' A similar provision applies with regard to interpreters. (Article 14(3)(c)).

Article 14(3) also includes two new provisions:
(d) ensure that the person who conducts an interview on the substance of an application for international protection does not wear a uniform;
(e) ensure that interviews with minors are conducted in a child-friendly manner.
ILPA endorses the aim of making the interview process sensitive to gender and to children, but regards these provisions as regrettably vague, in particular Article 14(3)(e) on 'child-friendly' interviews.

- **Recommendation:** Article 14(3)(a) should include reference to the 'personal *and* general circumstances' rather than 'personal or general circumstances'.

- **Recommendation:** To avoid vagueness, the concept of a 'child-friendly interview' should be linked to the 'best interests' standards in the UN Convention on the Rights of the Child and the observations of the UN Committee on the Rights of the Child.

Article 15 – Content of a personal interview

ILPA welcomes this provision, which ties to the personal interview to the elements of the claim as set out in Article 4 Qualification Directive. In particular Article 15(b) requires that the 'applicant has an adequate opportunity to give an explanation regarding elements needed to substantiate the application which may be missing and/or any inconsistencies or contradictions in his/her statements.' The requirement reflects caselaw of the ECtHR and indeed the Court of Justice on the right to be heard.[69]

Article 16 – Transcript and report of personal interviews

Article 16 is new. It provides as follows:

> 1. Member States shall ensure that a transcript is made of every personal interview.
> 2. Member States shall request the applicant's approval on the contents of the transcript at the end of the personal interview. To that end, Member States shall ensure that the applicant has the opportunity to make comments and/or provide clarifications with regard to any mistranslations or misconceptions appearing in the transcript.
> 3. Where an applicant refuses to approve the contents of the transcript, the reasons for this refusal shall be entered into the applicant's file. The refusal of an applicant to approve the contents of the transcript shall not prevent the determining authority from taking a decision on his/her application.
> 4. Without prejudice to paragraphs 1 and 2, Member States may make a written report of a personal interview, containing at least the essential

[69] Above n 64.

information regarding the application, as presented by the applicant. In such cases, Member States shall ensure that the transcript of the personal interview is annexed to the report.
5. Member States shall ensure that applicants have timely access to the transcript and, where applicable, the report of the personal interview before the determining authority takes a decision.

- **Recommendation:** ILPA agrees with ECRE that verbatim transcripts of asylum interviews and a reasonable opportunity for the person seeking asylum and his/her lawyer to make comments and provide clarifications on the transcript before the decision is made must be mandatory and that audio-taping of interviews with the consent of the person seeking asylum is considered a useful back-up tool to the transcript of the interview and can be an important element of 'front-loading' the asylum process.

Article 17 – Medico-legal reports

ILPA welcomes this new provision on medico-legal reports and the reference in Recital 21 to the Istanbul Protocol.[70]

'1. Member States shall allow applicants, upon request, to have a medical examination carried out in order to support statements in relation to past persecution or serious harm. To that end, Member States shall grant applicants a reasonable period to submit a medical certificate to the determining authority.
2. Without prejudice to paragraph 1, in cases where there are reasonable grounds to consider that the applicant suffers from post-traumatic stress disorder, the determining authority, subject to the consent of the applicant, shall ensure that a medical examination is carried out.
3. Member States shall provide for relevant arrangements in order to ensure that impartial and qualified medical expertise is made available for the purpose of a medical examination referred to in paragraph 2.
4. Member States shall provide for further rules and arrangements for identification and documentation of symptoms of torture and other forms of physical, sexual or psychological violence, relevant to the application of this Article.
5. Member States shall ensure that persons interviewing applicants in accordance with this Directive receive training with regard to the identification of symptoms of torture.
6. The results of medical examinations referred to in paragraphs 1 and 2 shall be assessed by the determining authority along with other elements of the application. They shall, in particular, be taken into account when establishing whether the applicant's statements are credible and sufficient.'

- **Recommendation:** ILPA notes this provision acknowledging the importance of medical examinations as corroboration. We suggest that the reference in Article 12(2) to 'post-traumatic stress disorder' be removed, and instead that a medical examination be carried out for all 'serious medical conditions, whether physical or psychological.'

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[70] *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Submitted to UNHCR, 9 August 1999.

Article 18 – Right to legal assistance and representation

ILPA welcomes the long-overdue inclusion of a right to free legal assistance at first instance in Article 18(2)(a). At present, the Procedures Directive only includes a right to consult a lawyer at the applicant's 'own cost'. Notwithstanding that applicants should 'normally' be provided with 'the opportunity to consult a legal advisor or other counsellor' the Procedures Directive only imposes upon Member States to ensure that free legal assistance and/or representation be granted upon request on appeal, 'in the event of a negative decision by a determining authority.' The Proposal is a significant improvement, in that it aims to frontload resources. In 2007, the UK Border Agency (UKBA) and the Legal Services Commission (LSC) ran a joint pilot project for improving the quality of asylum decisions. The pilot aimed to guarantee asylum applicants access to high quality advice and support from legal advisors from the earliest stages of the asylum process, an example of front-loading. The conclusions from Solihull found that such front-loading results in better quality decisions and that the overall quality of service was improved.[71] Yet, the first instance right to legal assistance in Article 18(2)(a) is too narrowly drawn, including 'at least, the provision of information on the procedure to the applicant in the light of his/her particular circumstances and explanations of reasons in fact and in law in the case of a negative decision.'

The appellate entitlement in Article 18(2)(b) is more broadly formulated, to include 'at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.' However, a new addition to Article 18(3) states that in appeals, 'Member States may choose to only make free legal assistance and/or representation available to applicants insofar as such assistance is necessary to ensure their effective access to justice. Member States shall ensure that legal assistance and/or representation granted pursuant to this paragraph is not arbitrarily restricted.' Given that the entitlement is generally confined to those who lack sufficient resources (Article 18(3)(a)), ILPA contends that this new addition is unhelpfully vague. Legal aid should be viewed as a condition for effective access to justice in all cases where the applicant lacks sufficient resources, and the matter is sufficiently complex. In all asylum appeals, this complexity may be assumed.

- **Recommendation:** ILPA recommends the entitlement to legal aid be equalized in scope for the first instance and appellate stages, to also include attendance at asylum interviews in line with Article 19(3).
- **Recommendation:** The entitlement to legal aid must be extended for procedures under Chapter IV, on withdrawal of international protection status.
- **Recommendation:** The new addition to Article 18(3) should be deleted.

Article 19 – scope of legal assistance and representation

Article 19(1) enshrines the general principle of access to the file, an aspect of the EU right of defence. However, it is subject in its second paragraph to an excessively broad exception and its final phrase 'or where the investigative … compromises' should be deleted. Article 19(1)(a) contains a new provision to mitigate the harshness

[71] See J Aspden 'Evaluation of the Solihull Pilot' http://www.asylumaid.org.uk/data/files/publications/137/Solihull_Pilot.pdf

of the national security exception to the disclosure of information to legal advisers. Article 19(1)(a) requires Member States to 'grant access to the information or sources in question at least to a legal advisor or counsellor who has undergone a security check, insofar as the information is relevant to the examination of the application or taking a decision to withdraw international protection.' ILPA's experience of the 'Special Advocate' procedure in the UK leads ILPA to be concerned about this proposal and to consider that it will not deliver justice in practice. Where Special Advocates are used before the UK's Special Immigration Appeals Commission they can see the information but cannot take instructions from the appellant. The appellant's representative can take instructions, but cannot see the material. As a result, the appellant is poorly placed to defend him /herself against even the most unfounded and erroneous allegations. The Special Advocate may be able to persuade the Commission that material should be disclosed, but where this is unsuccessful, there is little that the Special Advocate can do to protect the interests of the appellant. ILPA has also seen Special Advocates used in an ever widening range of cases. It is a principle of natural justice that a person should know the case against him/her. Article 19(3) also introduces the following entitlement: 'Member States shall allow the applicant to bring to the personal interview a legal adviser or other counsellor admitted or permitted as such under national law.' ILPA recommends that the entitlement to first instance legal aid in Article 18(2)(a) should be extended to cover attendance at personal interviews.

- **Recommendation:** ILPA recommends that the final phrase of Article 19(1) second paragraph 'or where the investigative … compromises' should be deleted.
- **Recommendation:** Article 19(1)(a) should be to make provision for an appellant and his/her legal representatives to know the case against him/her in accordance with the principles of natural justice.
- **Recommendation:** The entitlement to first instance legal aid in Article 18(2)(a) should be extended to cover attendance at personal interviews.

Article 20 – Applicants with special needs

As explained in Part II.5 above, while ILPA appreciates that this provision pursues a legitimate aim, ILPA doubts whether appropriate screening mechanisms can be devised. Applicants at risk are still likely to be siphoned into accelerated procedures. The better approach is simply to regard all applicants as needy, and not accelerate any procedures. Time limits in the asylum determination process may not be so short that they prevent an applicant who claims they face *refoulement* from substantiating their claim.[72] Applicants with special needs may need more time to effectively prepare their case. They also may need more time to be identified or to identify themselves as having special needs. Accelerated procedures fail to give applicants an effective access to the asylum procedure, in particular if they are vulnerable. Accordingly, Article 20 should be amended so as to ensure appropriate measures are taken in respect of all applicants, whether having or identified as having special needs or not. Such amendment would, however, protect applicants with special needs since what is appropriate must be determined by reference to the needs of the applicant.

- **Recommendation:** Amend Article 20(1) by substituting 'all applicants' for 'applicants with special needs'.

[72] *Bahaddar v. the Netherlands* (Application no. (145/1996/764/965), 19 February 1998. *Chahal v. the United Kingdom* (Application no. 70/1995/576/662), 25 October 1996.

Article 21 – Guarantees for unaccompanied minors

ILPA acknowledges that Article 21 is a considerable improvement over the current provision in Article 17 Procedures Directive on the appointment of special representatives for unaccompanied minors. However, both the representative of the unaccompanied minor *and* legal advisors should be present at interview, and Article 21(1)(b) amended accordingly.[73] The exceptions to the entitlement should be removed: Member States are permitted to 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' (Article 21(2)(a)) or 'is married or has been married.' (Article 21(2)(b)) Both provisions should be deleted.

ILPA's concerns about the use of medical examinations for age determination are explained in Part II.5 above.

- **Recommendation:** Amend Article 21(1)(b) so that both special representatives and legal advisors are entitled to be present at interview.
- **Recommendation:** Delete Article 21(2).
- **Recommendation:** As to medical examinations to determine age, ILPA does not consider that the proposal as drafted addresses the questions of informed consent, freely given or of obligations to make the best interests of the child a primary consideration.

Article 22 - Detention

ILPA welcomes the clear reference to the Receptions Conditions Directive. We refer to our previous comments on the proposal for a recast Reception Conditions Directive, which contains extensive submissions on detention.[74]

Article 23 – Procedure in case of withdrawal of the application

Article 23 maintains the Procedures Directive position, allowing authorities to reject applications in cases of explicit withdrawal of applications. However as ECRE points out, drawing on the UNHCR Procedures Directive Study,[75] withdrawal is often unrelated to protection matters, and may be as a result of misunderstandings on the part of the applicant. If authorities have taken negative decisions on the basis of such dubious withdrawals, applicants must then rely on establishing the onerous grounds for subsequent applications. ILPA joins ECRE in recommending a more flexible approach, where assessment would be discontinued, but resumed if appropriate.

- **Recommendation:** Remove the entitlement to reject applications in the case of explicit withdrawal.

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[73] ECRE, above n 15, 31.
[74] ILPA Commentaries on Proposed European Commission Directives, (ILPA, London, 7 May 2009), available at <www.ilpa.org.uk/submissions/090507%20ILPA%20commentaries%20on%20proposed%20European%20Comm.pdf>.
[75] ECRE, above n 15, 28-29.

Article 24 – Procedure in case of implicit withdrawal or abandonment of the application

ILPA has concerns about the excessive discretion afforded by Article 24(1) to deem applications implicitly withdrawn and so urges that the grounds in Article 24(1) be treated as exhaustive, and that the absconding ground in Article 24(1)(b) permit the applicant to explain absences. ILPA welcomes the deletions in Article 24(2), which make the process for resuming examinations more favourable to applicants. The provision could be further improved by requiring determining authorities to resume examinations, not merely that the applicant might request that his/her case be reopened.

The other significant textual addition is the statement that this provision is Article 24(3) stating that the Article is 'without prejudice to the Dublin Regulation'. The Commission's Explanatory Memorandum states that the Proposal 'underlines that the notion of implicit withdrawal of applications should not be an obstacle for applicants to re-access asylum procedures in the responsible Member State.'[76] The key Dublin Regulation guarantee is that asylum applications '*shall* be examined by a single Member State,'[77] which must be read in light of the right to asylum under Article 18 EUCFR.

- **Recommendation:** Article 24(1) should be amended so Member States might assume applications withdrawn 'only when' rather than 'in particular when' the conditions set out in (a) and (b) prevail.
- **Recommendation:** The absconding ground in Article 24(1)(b) should be deleted.
- **Recommendation:** Amend Article 24(2) first paragraph so as to include an entitlement not merely to request reopening, but rather 'is entitled to have his/her case reopened.'

Article 25 – Role of UNHCR

This provision contains no significant changes, except for the generic change to refer to 'international protection.' In our comment on the Procedures Directive, we regretted casting the duties of Member States vis-à-vis UNHCR in passive terms. , and

- **Recommendation:** As per the comment on Article 11 above, States should be obliged actively to engage with UNHCR and to facilitate UNHCR in fulfilling its mandate

Article 26 – Collection of information on individual cases

This provision contains no significant changes, except for the generic change to refer to 'international protection.'

- **Recommendation:** Article 26 should be amended to inlcudee an express prohibition where the person cannot be satisfied that the person to whom

[76] *Ibid*, p 5.
[77] Article 3(1) Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 222.

disclosure is made will not communicate the information to the alleged persecutors.

CHAPTER III – PROCEDURES AT FIRST INSTANCE

Article 27 – Examination Procedure

A key addition is the 6 month longstop under Article 27(3). It provides:

> 'Member States shall ensure that a procedure is concluded within 6 months after the application is lodged.
> Member States may extend that time limit for a period not exceeding a further 6 months in individual cases involving complex issues of fact and law.'

Under Article 27(4), the consequences of failure to adhere to the time-limit are clarified:

> 'Member States shall ensure that, where a decision cannot be taken within the time period referred to in subparagraph 1 of paragraph 3, the applicant concerned shall:
> (a) be informed of the delay; and
> (b) receive, upon his/her request, information on the reasons for the delay and the time-frame within which the decision on his/her application is to be expected.
> The consequences of failure to adopt a decision within the time limits provided for in paragraph 3 shall be determined in accordance with national law.'

Article 27(5) and (6) introduce a bifurcation between prioritisation and acceleration, reflecting the commitment in Recital 16 and the limits on acceleration. Article 27(5) allows prioritisation:

> (a) where the application is likely to be well founded;
> (b) where the applicant has special needs;
> (c) in other cases with the exception of applications referred to in paragraph 6.

The rationale for the distinction seems to be rooted in the notion that prioritisation protects the applicant and is suitable for stronger claims, that are amenable to swift acceptance, while acceleration is suitable for weak claims, amenable to swift refusal. However, without definitions and additional safeguards, these two practices will be indistinguishable in practice. ILPA doubts whether any appropriate filtering mechanism could be devised to determine which claims belong under which procedure. Experience with the UK Detained Fast-Track reveals official vacillation on its rationale, illustrating that procedures introduced to lead to swift positive determinations all too easily become unhinged from that original rationale, and are employed for swift, dubious, refusals. ILPA has made its position on the UK detained fast track procedure very plain.[78] As we already stated in our joint submission with the AIRE Centre:

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[78] See ILPA, *The Detained Fast-Track Process: a best practice guide* (ILPA, London, 2008)*;* See e.g. ILPA's 28 February 2005 response to the Department of Constitutional Affairs consultation *Asylum and Immigration Tribunal* Fast Track procedure rules; ILPA's submission to the Joint Committee on Human Rights Inquiry into the Treatment of Asylum Seekers, October 2006 and ILPA's further submission to the Committee following the publication of its report, in the form of a memorandum dated September 2007. See also ILPA's February 2008 and March 2009 submissions to the Home

'A procedure that rushes a person through the decision-making process without time to gather the necessary evidence, then sees that person make a fresh claim shortly after the process has ended because the evidence is now available and calls into doubt the original decision, is not a fair process and is not an efficient one.'

'The UK has waivered between characterisation of the detained fast-track as suitable for cases that can be *decided* quickly[79] and as suitable for cases that are clearly unfounded, i.e. cases that can be *refused* quickly. The approach outlined in the Proposal is that accelerated procedures may only be applied to cases likely to be susceptible of a quick refusal. Both approaches are problematic, as is evidenced by the UK example. ILPA has expressed particular concern that screening for inclusion in the detained-fast procedure cannot pick up those characteristics (such as being a survivor of torture or of trafficking) that make a person unsuitable for the procedure.[80] Because its screening criteria do not work, the sample of cases entering the detained fast-track is essentially a random one….'[81]

Article 27(6) is a significant improvement over the Procedures Directive, the list of grounds is greatly reduced in scope and is exhaustive. In addition, Article 27(9) importantly states that
'The fact that an application for international protection was submitted after an irregular entry into the territory or at the border, including in transit zones, as well as the lack of documents or use of forged documents, shall not *per se* entail an automatic recourse to an accelerated examination procedure.'

Nonetheless, it still permits acceleration on inappropriate grounds in Article 27(6)(b) (c) and (d). It will be recalled that the Proposal precludes acceleration of claims of applicants with special needs (Article 20). Article 27(8) requires 'reasonable time limits' for the adoption of a decision in the accelerated procedure. However, there is no definition of accelerated procedures, and the leeway to establish 'reasonable time limits' seems too vague to preclude the main source of poor decisions here, that they are taken too fast.

- **Recommendation:** As there is no way to screen claims to identify vulnerable applicants, ILPA objects to the both concepts. While in principle, prioritisation is desirable, unless it is *only* used for positive decisions, in practice, it is liable to amount to acceleration, even of the claims of the most vulnerable.
- **Recommendation:** As long as such procedures are permitted, the only ground is that in Article 27(6)(a), so Article 27(6)(b) to (d) should be deleted.
- **Recommendation**: As long as such procedures are permitted, ILPA joins with the Meijers Committee in calling for a definition of 'accelerated procedures' in Article 27(6), clarifying that all the normal procedural entitlements are respected therein.

Affairs Committee Inquiry into Human Trafficking and ILPA's submissions to the The Tribunal Procedure (Upper Tribunal) Rules 2008 – consultation on rule amendments for Asylum and Immigration Upper Tribunal Chamber, 29 September 2009, all available on www.ilpa.org.uk at the Submissions page.

[79] See for example the Enforcement Guidance and Instructions Chapter 55.4

[80] See ILPA's February 2009 response to the consultation on the Detained Fast Track & Detained Non-Suspensive Appeals - Intake Selection (AIU Instruction) and ILPA's further comments of September 2008 published after the publication of the revised intake selection.

[81] Above n 17, p 16.

- **Recommendation:** As long as such procedures are permitted, ILPA joins with the Meijers Committee in calling for a minimum time-limit for the asylum procedure or specific phases thereof. [cf. ECRE, 34]

Article 28 – Unfounded applications

Article 28 now states that 'Without prejudice to Article 23 [on explicit withdrawal], Member States shall only consider an application for international protection as unfounded if the determining authority has established that the applicant does not qualify for international protection pursuant to [the Qualification Directive]'. The article must be read with Article 27(7), which allows applications to be deemed 'manifestly unfounded' if the any of the grounds in Article 27(6) apply, and 'an adequate and complete examination' is carried out. Read together, the result is ambivalent. Both provisions seem to presuppose a full examination. In that instance, the notion of 'manifestly unfounded' loses significance. Yet, the grounds for acceleration do reflect the notion of a substantively weak claim, albeit not quite as overbroad as the Procedures Directive's current notion of 'unfoundedness.'

- **Recommendation:** The Proposal should not permit Member States to deem applications to be manifestly unfounded. A well-designed determination procedure can deal with very weak claims expeditiously, but without prejudging them at an early stage. For this reason, ILPA considers that proposals to permit accelerated procedures are flawed and should be omitted.

Article 29 – Inadmissible applications

ILPA notes the more restricted grounds of inadmissible in Article 29. ILPA maintains its consistent objection to third country procedures, and urges that Article 29(2)(c) be deleted.

- **Recommendation:** Article 29(2)(c) should be deleted.

Article 30 – Special rules on an admissibility interview

> '1. Member States shall allow applicants to present their views with regard to the application of the grounds referred to in Article 29 in their particular circumstances before a decision to consider an application inadmissible is taken. To that end, Member States shall conduct a personal interview on the admissibility of the application. Member States may make an exception only in accordance with Article 36 in cases of subsequent applications.
> 2. Paragraph 1 shall be without prejudice to Article 5 of [the Dublin Regulation].'

In *Petrosian,*[82] the Court of Justice noted the complexity of Dublin returns and the importance of time to assess the suitability of the case for return and to secure the response of the receiving state. In the context of the application of the FCA and STC concepts as foreseen in Article 30, it is reasonable to assume that the matter may be even more complex, and that the fundamental rights concerns surrounding return are even more weighty and the risk that the transferee's claim will not be properly considered are higher.

[82] Case C-19/08 *Migrationsverket v Petrosian and Others* 29 January 2009.

- **Recommendation**: While the move to include the safeguard of an admissibility interview is welcome, ILPA submits that safeguards similar to those operating under the Dublin Regulation ought to be applicable.
- **Recommendation:** The exception concerning subsequent applications is too broad and should be limited to cases where 'a subsequent application can be considered admissible on the basis of the written material provided by the applicant for international protection or where the applicant for international protection is unfit or unable to be interviewed.' (ECRE, 36)

Article 31 – The concept of first country of asylum

The first country of asylum provision remains largely unchanged, so ILPA maintains its previous criticisms. In particular, the text refers to 'sufficient protection' in the receiving state, rather than 'effective protection.'

- **Recommendation:** Replace the term 'sufficient' with 'effective.'

Article 32 – The safe third country concept

Article 32 adds a condition to 'safe' third country removal, namely that removal will not expose the asylum seeker either to 'serious harm' within the meaning of the Qualification Directive. ILPA welcomes this addition, but notes remaining shortcomings in the safe third country provision, in particular, leaving it to the Member States to specify key safeguards pertaining to the requisite degree of connection between the asylum seeker and the third country and the nature of the individual safety assessment. On the latter, Article 32(2)(c) now refers to the applicant's right to challenge the application of safe third country procedures 'on the grounds that the third country is not safe in his/her particular circumstances. The applicant shall also be allowed to challenge the existence of a connection between him/her and the third country.'

- **Recommendation:** ILPA reiterates its grave concerns about the 'safe' third country procedure in general, in particular in the context of the enlarged EU and the human rights records of the States on the EU's periphery. On this basis, the safe third country provisions ought to be deleted.

Article 33 – National designation of third countries as safe countries of origin

Article 33 refers to the safe country of origin criteria in Annex II, which remains unchanged. In this context, ILPA reiterates its original concerns about these safe country of origin criteria.[83]

- **Recommendation:** Delete the safe country of origin provisions on safe countries of origin. [cf. ECRE 41]

Article 34 – The safe country of origin concept

[83] See e.g.ILPA *Analysis and critique of Council Directive on minimum standardso n proceduresin Member States for granting and withdrawing refugee status* (30 April 2004 July) 2004

Article 34(2) continues to leave it to the Member States to 'lay down in national legislation further rules and modalities for the application of the safe country of origin concept.'

- **Recommendation:** Delete the safe country of origin provisions. [cf. ECRE 41]

Article 35 – Subsequent application

As explained above in Section II.3, ILPA submits that the provisions on subsequent applications are still too harsh. Article 35(6) is maintained, allowing Member States to be excessively harsh in refusing to examine subsequent applications, requiring applicants to show that they were 'incapable' of making out their claim in the original examination. The UNHCR Procedures Directive Study has revealed ample evidence that subsequent applications are commonly a reaction to inadequate, often accelerated, first decisions. In this context, any supposition that subsequent applications are abusive is incorrect. It may also be the case that some evidence was not available at the time of the initial application.

For example, UNHCR has produced six reports on the quality of decision making as part of its QI project:

> 'Whilst noting some examples of good practice, UNHCR reports a number of serious concerns with the quality of first instance decision making in the DFT. In UNHCR's view, DFT decisions often fail to focus on the individual merits of the claim. Particular concerns highlighted in this report include an incorrect approach to credibility assessment, a high prevalence of speculative arguments and a lack of focus on material elements of the claim. There is also evidence that an excessively high burden of proof is being placed on applicants. Some Case Owners demonstrate a limited understanding of refugee law concepts and gender specific issues are often not correctly assessed in decisions. The Office further notes concern regarding the assessment of claims of torture, including limited understanding of the purpose of medical evidence in decision making. Although many of these issues have been highlighted in previous Quality Initiative reports, they appear to be particularly accentuated in DFT decisions.'[84]

Further, in 2009 the Chief Inspector of the UKBA undertook a thematic inspection of asylum which looked at managing cases including quality of decision making. Published in February 2010, the inspection found that all staff placed a strong emphasis on the quality of their decisions. However, the majority of Case Owners said they believed senior managers were more interested in the conclusion targets rather than quality.[85]

Recital 25 links with Article 35, stating 'Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should be able to dismiss an application as inadmissible in accordance with the *res judicata principle*.' The reference to *res*

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[84] UNHCR, *Quality Initiative Project Fifth Report to the Minister*, (UNHCR, March 2008), p vii. See also para. 2.3.4.

[85] Independent Chief Inspector of the UK Border Agency, *Asylum: getting the balance right? A thematic inspection July – November 2009,* Independent Chief Inspector of UKBA, February 2010, p.23.

judicata is new and ill-fitting in the asylum contexts concerning administrative procedures.

Article 29(2)(d) refers to as potentially inadmissible an application if 'the application has lodged an identical application after a final decision.'

Article 35(8) contains detailed allowing acceleration and implementation of subsequent applications. It states:

> 'If, following a final decision to consider a subsequent application inadmissible pursuant to Article 29 (2) (d) or a final decision to reject a subsequent application as unfounded, the person concerned lodges a new application for international protection in the same Member State before a return decision has been enforced, that Member State may:
> (a)make an exception to the right to remain in the territory, provided the determining authority is satisfied that a return decision will not lead to direct or indirect *refoulement* in violation of international and Community obligations of that Member State; and/or
> (b)provide that the application be subjected to the admissibility procedure in accordance with this Article and Article 29; and/or
> (c)provide that an examination procedure be accelerated in accordance with Article 27 (6) (f).
> In cases referred to in points (b) and (c) of the first subparagraph, Member States may derogate from the time limits normally applicable in the admissibility and/or accelerated procedures, in accordance with national legislation.'

See comments on Article 41(1) below.

Article 35(9) states:

> 'Where a person with regard to whom a transfer decision has to be enforced pursuant to [the Dublin Regulation] makes further representations or a subsequent application in the transferring Member State, those representations or subsequent applications shall be examined by the responsible Member State, as defined in [the Dublin Regulation], in accordance with this Directive.'
> This provision in effect prevents subsequent applications in cases where a Dublin transfer 'has to be enforced.'

Article 36 – Procedural rules (for subsequent applications)

ILPA contends that all normal procedural guarantees are respected in subsequent applications.

- **Recommendation:** ILPA recommends deleting Article 35(6) and amending Article 36 to ensure that all normal procedural guarantees are respected in subsequent applications.

Article 37 – Border procedures

The Proposal deletes the standstill clause which allowed Member States to maintain in force exceptional border procedures. ILPA welcomes this deletion. However, the maintenance of a border procedure sits ill with the provisions such as Article 13(1) which requires that the interview 'on the substance of the application… shall always

be conducted by the personnel of the determining authority.' Border guards are not the envisaged determining authority with the training presupposed by Article 4. Yet, Article 37 does not effectively constrain the use of border procedures. Rather it appears to permit admissibility and accelerated applications to be dealt with at the border. It states:
'Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on:

(a) the admissibility of applications made at such locations.;and/or
(b) the substance of an application in an accelerated procedure pursuant to Article 27(6).'

- **Recommendation:** ILPA recommends the abolition of all border procedures.

Article 38 – Revival of the European 'safe' third countries concept

The European 'safe' third country concept differs from its ordinary variant in that it permits Member States to conduct 'no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II.' As the Meijers Committee has identified, the Proposal creates added leeway for the European 'safe' third country device. The new Article 38 no longer makes reference to a European common list of such 'safe' third countries. In addition, it deletes the standstill clause. As a result, as the Meijers Committee has pointed out, it 'revives the European STC concept.'[86] The effect of the standstill clause in the Procedures Directive is that only Germany may avail of the current article, yet its domestic provisions have lost salience with the 2004 EU accessions. Now, under the Proposal, the new Member States may employ the European 'safe' third country concept to countries on their peripheries. This reinsertion is deeply regrettably, and undermines the Proposal's two key aims of securing access to asylum and to 'simplify and bring consistency to notions and devices.'[87]

- **Recommendation**: ILPA joins the UNHCR, ECRE and the Meijers Committee in strongly urging that Article 38 be deleted.

CHAPTER IV PROCEDURES FOR THE WITHDRAWAL OF INTERNATIONAL PROTECTION STATUS

Article 39 – Withdrawal of international protection status
Article 40 – Procedural rules

Abdullah v Germany,[88] strongly suggests that the same procedural standards should apply to both grant and withdrawal of international protection, in particular in emphasising that the same standard of risk assessment for cessation as for grant. The Court specified that this assessment must be undertaken with 'vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union.'

[86] Above n 14.
[87] Explanatory Memorandum, p 6.
[88] Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Abdullah v Germany,* Opinion of AG Mazák 15 September 2009, ECJ Judgment 2 March 2010.

The formulation in Article 40(3) on legal aid is peculiar. It states that 'Once the competent authority has taken the decision to withdraw the international protection status, Article 18(2) free legal assistance on request], Article 19(1) [access to file for legal representative], and Article 25 [role of UNHCR] are equally applicable.' The formulation might suggest that the entitlement is only applicable at the appeal stage under Chapter V.

- **Recommendation:** ILPA recommends that the same procedural standards apply to withdrawal as for grant of international protection.
- **Recommendation:** ILPA urges in particular that the entitlement to legal aid under Chapter IV be clarified.

CHAPTER V APPEALS PROCEDURES

Article 41 is a much improved entitlement to an 'effective remedy before a court or tribunal.' The Commission's Explanatory Memorandum highlights the key Strasbourg Article 13 caselaw and indeed Court of Justice rules on the right to effective judicial protection that have informed the redrafting. As ILPA made clear in its original Procedures Directive submission, the right to an effective remedy under Article 47 EUCFR is broader in scope than Article 13 ECHR. It applies to all asylum claims. Article 41 is simply an appropriate reflection of that fundamental right.

Article 41(1) provides:

> 1. Member States shall ensure that applicants for international protection have the right to an effective remedy before a court or tribunal, against the following:
> (a) a decision taken on their application for international protection, including a decision:
> (i) to consider an application unfounded in relation to refugee status and/or subsidiary protection status,
> (ii)to consider an application inadmissible pursuant to Article 29,
> (iii) taken at the border or in the transit zones of a Member State as described in Article 37(1),
> (iv) not to conduct an examination pursuant to Article 38;
> (b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 23 and 24;
> (c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34;
> (d) a decision refusing entry within the framework of the procedures provided for under Article 35(2);
> (e) a decision to withdraw of international protection status pursuant to Article 40.

ILPA welcomes this provision.

- **Recommendation:** To the list should be added a decision to make an exception to the right to remain, or to subject an application to admissibility or accelerated procedures in accordance with Article 35(8).

Article 41(2) provides:

> Member States shall ensure that persons recognized by the determining authority as eligible for subsidiary protection have the right to an effective remedy as referred to in paragraph 1 against a decision to consider an application unfounded in relation to refugee status. The person concerned shall be entitled to the rights and benefits guaranteed to beneficiaries of subsidiary protection pursuant to [the Qualification Directive] pending the outcome of the appeal procedures.

Article 41(3) provides:

> Member States shall ensure that the effective remedy referred to in paragraph 1 provides for a full examination of both facts and points of law, including an *ex nunc* examination of the international protection needs pursuant to [the Qualification Directive], at least in appeal procedures before a court or tribunal of first instance.

Article 41(4) provides:

> Member States shall provide for reasonable time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.
>
> The time limits shall not render impossible or excessively difficult the access of applicants to an effective remedy pursuant to paragraph 1. Member States may also provide for an *ex officio* review of decisions taken pursuant to Article 37.

Article 41(5) provides:

> Without prejudice to paragraph 6, the remedy provided for in paragraph 1 of this Article shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome.

Article 41(6) provides:

> In the case of a decision taken in the accelerated procedure pursuant to Article 27 (6) [and of a decision to consider an application inadmissible pursuant to Article 29 (2) (d) [identical subsequent application], and where the right to remain in the Member State pending the outcome of the remedy is not foreseen under national legislation, a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon request of the concerned applicant or acting on its own motion. This paragraph shall not apply to procedures referred to in Article 37.

ILPA urges deletion of three of the four grounds for accelerating procedures under Article 27(6). Even if this recommendation is adopted, ILPA contends that national legislation should never deny the right to a suspensive appeal.

Article 41(7) provides:

> Member States shall allow the applicant to remain in the territory pending the outcome of the procedure referred to in paragraph 6.

Article 41(8) provides:

> Paragraphs 5, 6 and 7 shall be without prejudice to Article 26 of [the Dublin Regulation].

Article 41(9) provides:

> Member States shall lay down time-limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.

Article 41(10) provides:

> Where an applicant has been granted a status which offers the same rights and benefits under national and Community law as the refugee status by virtue of [the Qualification Directive] , the applicant may be considered as having an effective remedy where a court or tribunal decides that the remedy pursuant to paragraph 1 is inadmissible or unlikely to succeed on the basis of insufficient interest on the part of the applicant in maintaining the proceedings.

Article 41(11) provides:

> Member States may also lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his/her remedy pursuant to paragraph 1, together with the rules on the procedure to be followed.

- **Recommendation:** Article 41(6) should be deleted. [cf. ECRE, 47]

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16 September 2010

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