Immigration Law Practitioners' Association (ILPA)
Analysis and Critique of
Council Directive
on minimum standards on procedures in Member States
for granting and withdrawing refugee status (30 April 2004)[*]

July 2004

INTRODUCTION

The Immigration Law Practitioners' Association (ILPA) is the UK's professional association of immigration lawyers, advisers and academics practising or engaged in immigration, asylum and nationality law. ILPA has more than 1,100 members including lawyers, advice workers, academics and law students. Through its membership ILPA has access to a wide range of experience on asylum issues.

This paper sets out a legal analysis and critique of *Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* ('the Directive'). Final agreement on the text of the Directive was reached on 29 April 2004, subject to Parliamentary scrutiny reservations from the German, Netherlands, Swedish and UK delegations.[1] The European Parliament is also to be re-consulted on the text of the Directive. Its formal adoption will take place in autumn, so requiring an unanimous vote of the 25 current Member States in the Council.

If adopted as currently drafted, there are compelling reasons for annulment of the Directive in its entirety.

Chapter 1 sets out the manner in which the Directive may be challenged, and the legal consequences of such challenge. It argues that the Directive is liable to be annulled in its entirety.

Chapter 2 examines the Directive provision by provision for compliance with binding standards of international and regional human rights law and EC institutional law and identifies those provisions that violate these binding standards.

The **Annex** sets outs these binding standards with which the Directive must comply, providing a detailed synthesis of the requirements of the various norms of international, regional and EU human rights law. In addition, the pertinent institutional provisions of the EC Treaty as they apply to the Directive are also outlined, in particular the principles of limited competence and institutional balance.

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[1] Asile 33, Interinstitutional File 2000/0238 CNS, 30 April 2004.

CHAPTER 1 CHALLENGING THE VALIDITY OF THE DIRECTIVE

1. The Legal Challenge in Context

The Directive's drafting process has led to a consistent diminution in standards, such that in March 2004 an NGO Alliance called for the withdrawal of the Directive, noting,

> 'with deep regret that the most contentious provisions are all intended to deny asylum seekers access to asylum procedures and to facilitate their transfer to countries outside the EU. We are concerned about the effect that this abdication from international law obligations will have on refugee protection within the EU and elsewhere, as well as on the EU's credibility in the international refugee and human rights debate.'[2]

In addition, UN High Commissioner for Refugees Ruud Lubbers expressed concerns about the Directive, 'warning that several provisions … would fall short of accepted international legal standards … [and] … could lead to an erosion of the global asylum system, jeopardizing the lives of future refugees.'[3] The day after the Directive's adoption, UNHCR reiterated its concerns, in particular in relation to the Directive's safe third country provisions and those non-suspensory appeals, which would allow Member States to deport asylum seekers whilst their appeals were pending. It noted in particular that the Directive would allow 'a number of .. restrictive and highly controversial practices that are currently only contained in one or two member states national legislation but could, as of 1 May 2004, be inserted in the legislation of all 25 EU Member States.'[4]

Amnesty International's own analysis was as follows:

> 'The directive on asylum procedures, approved in April 2004, is a striking example of the influence of national agendas on the harmonisation process. After years of arduous negotiations, this directive has become a mere catalogue of national practice, allowing member states to retain national legislation which includes significant departures from accepted international refugee and human rights law.
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> The lack of adequate procedural safeguards is all the more worrying given that it may nullify the positive elements included in other instruments

[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).

[3] UNCHR Press Release *Lubbers calls for EU asylum laws not to contravene international law* (29 March 2004).

[4] UNCHR Press Release *UNHCR regrets missed opportunity to adopt high EU asylum standards (*30 April 2004).

> such as the [Q]ualification [D]irective.[5] At the time of its adoption, Amnesty International welcomed the fact that the [Q]ualification [D]irective included a proper interpretation of the Geneva Convention regarding non-state agents of persecution. The [Q]ualification [D]irective also goes beyond international law standards by creating an obligation for member states to grant subsidiary protection to persons who do not qualify for refugee protection under the Geneva Convention but who are nonetheless in need of international protection.
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> However, these positive elements may have very little impact in practice given the remaining possibilities for member states to develop fast track procedures and to bar access to adequate refugee status determination procedures.'[6]

In addition, ECRE has also criticised the Directive for failing to safeguard access to a fair and efficient asylum determination procedure. ECRE notes while the Directive contains some safeguards, 'there are many restrictions and exemptions allowed which provide limited rights to asylum seekers while safeguarding Member States' powers to derogate from the exercise of key obligations, meaning the Directive does not guarantee a fair and efficient asylum procedure for all. ECRE believes there are five minimum guarantees from which there should *never* be derogation (even in so-called accelerated procedures): access to free legal advice, access to UNHCR/NGOs, a qualified and impartial interpreter, a personal interview and a suspensive right of appeal. Four out of the five are not guaranteed by the Procedures Directive.'[7] ECRE concludes,

> 'At a level of concrete outcomes, most of the Amsterdam Treaty objectives have been met in relation to asylum. Namely the adoption of the Directives on Temporary Protection, Reception Conditions and the criteria on Qualification for international protection and the rights attached were achieved, as was agreement on other relevant instruments such as the Dublin II Regulation and the Directive on Family Reunification. Notwithstanding these developments, one of the most important instruments for refugee protection relating to the minimum standards in asylum procedures has yet to be adopted and the rush to agree a 'general approach' on it by the 1 May 2004 has led to a number of key provisions being left to the discretion of Member States, demonstrating a clear failure to achieve a significant level of harmonisation on this instrument. In fact the substantial deterioration of standards permitted by this Directive has been so alarming that ECRE and other NGOs called for the withdrawal of the proposal on the basis that if implemented some of its provisions would breach Member States' obligations under

[5] Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, agreed in Council 30 April 2004. Asile 21, Interinstitutional File 2001/ 0207 CNS, 31 March 2004.

[6] Amnesty International *The European Union – Now More Free, Secure and Just? Amnesty International's Human Rights Assessment of the Tampere Agenda* (Brussels 2 June 2004).

[7] ECRE *Broken Promises – Forgotten Principles. An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection, Tampere 1999 – Brussels 2004*. (Brussels 20 June 2004), 17.

international refugee and human rights law, as well as the EU Charter of Fundamental Rights.'[8]

2. The need for anxious scrutiny

Refugee protection is a cornerstone of international human rights law, being enshrined in the 1951 Convention on the Status of Refugee and the 1967 New York Protocol (hereafter 'the Refugee Convention') and encompassing norms of *jus cogens* such as *non-refoulement*. Article 14(1) of the Universal Declaration of Human Rights provides:

> Everyone has the right to seek and to enjoy in other countries asylum from persecution.

Asylum procedures must be accessible and fair in order to for refugee protection to be meaningful. Fairness requires procedures which ensure outcomes that are accurate, efficient and acceptable.[9] While errors will always occur in an administrative system, no system can be considered fair if the probability of error is too high. In the asylum context, where the cost of inaccurate decisions is likely to be the loss of human lives, procedural rigour is all the more important. As Lord Bridge observed in the British House of Lords, 'The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.'[10]

Deciding on refugee claims has been described as 'the single most complex adjudication function in contemporary Western societies.'[11] The complexity arises out of 'the need for the decision-maker to have a sufficient knowledge of the cultural, social and political environment of the country of origin, a capacity to bear the psychological weight of hearings .. and of consequent decisions which may prove fatal, and an ability to deal with legal issues such as the subtle international definition of the refugee …'[12] The Directive embodies many perverse and dangerous choices in relation to asylum procedures, in particular on the allocation of resources between first instance and appellate levels. This will only lead to a greater likelihood of error in asylum determination due to the overall reduction of procedural guarantees, and inevitably and lamentable, to *refoulement* as refugees are erroneously deported or refused access to proper procedures.

In so doing, the Directive embodies a betrayal of the EU's promise to guarantee fundamental rights. Historically, the promise of universal fundamental rights has been compromised by the need for state authorities to guarantee these rights. 'The Rights of Man', writes Arendt in *The Origins of Totalitarianism*, were 'defined as

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[8] *Ibid*, 28.
[9] Stephen Legomsky 'An Asylum Seeker's Bill of Rights in a Non-Utopian World' (2000) *Georgetown Immigration Law Journal* 619.
[10] *Bugdaycay v Secretary of State for the Home Department* (1987) ImmAR 250, 263.
[11] Cécile Rousseau, François Crépeau, Patricia Foxen, France Houle 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board' (2002) *Journal of Refugee Studies* 1, 1-2 citing Peter Showler, Chair of the Canadian Immigration and Refugee Board (2000).
[12] *Ibid*.

"inalienable" because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.'[13] Unless this Directive is annulled, the EU must be regarded as symptomatic of the inability to protect fundamental rights outside traditional state contexts, or even worse, serving as the means whereby its Member States dismantle their internal systems of protection. The EU legislature has created the conditions for these violations of fundamental rights, and thus the EU legislature should be held legally accountable. Otherwise the EU embodies not constitutional discipline and the rule of law beyond the state, but rather merely the venue for Member States' gradual dismantling of the post-war progress towards realising universal human rights.

3. Means of challenge

Article 230 EC allows direct challenges to Community measures to be brought before the Community courts, while Article 234 EC allows indirect challenges via national courts and then to the ECJ by way of preliminary reference. For an individual to challenging a directive directly, although theoretically possible, is practically impossible due to the test for 'direct and individual concern.'[14] However, privileged applicants may bring direct challenges. These are the Commission, Council, European Parliament and the Member States.

Any individual can raise questions of Community law before her national courts. While the national court may declare a Community measure valid, only the ECJ may declare it invalid.[15] Thus, if a national court is in doubt as to the validity of an EC measure, it must refer the issue to Luxembourg for determination. In the meantime, the national court has jurisdiction deriving from its Community law role, to suspend the application of the EC measure or national implementation measures.[16]

However, under Title IV EC special jurisdictional provisions apply. Article 68 EC provides that only final courts can refer questions to the ECJ.[17] Under other areas of EC law all national courts may refer and indeed the definition of what constitutes a court is for the ECJ to determine. A final court is one whose decision is not subject to appeal.[18] Such final courts must refer questions to the ECJ, but what of the lower national courts, who appear to be precluded from so doing. The better view is that they are at least empowered to grant interim measures.[19]

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[13] Hannah Arendt *The Origins of Totalitarianism* (Andre Deutsch London 1986, 1st ed 1951) 292.
[14] See, for example, Joined Cases T-172/98, 175/98 -177/98 *Salamander* [2000] ECR II-2487.
[15] Case 314/85 *Foto-frost* [1987] ECR 4199.
[16] Cases C-C-143/89 and 92/89 *Zuckerfabrik* [1991] ECR I-415; Case C-465/93 *Atlanta* [1995] ECR I-3761.
[17] By an order of 31 March 2004, in Case C-51/03 *Nicoleta Maria Georgescu*, the ECJ rejected as inadmissible a reference from a lower instance national court, requesting an interpretation of the visa regulation as it applied to Romanian nationals entering the EU. The interpretation was pertinent to the determination of criminal liability before the referring court. Nonetheless, the ECJ was required to reject it as inadmissible, due to the constraints on which national courts may refer set out in Article 68 EC.
[18] Case C-99/00 *Lyckesog* [2002] ECR I-4839.
[19] Steve Peers 'Who's Judging the Watchmen? The Judicial System of the 'Area of Freedom, Security and Justice' (1998) *YEL* 337, 354-356.

4. Fundamental Rights and Minimum Legislative Standards

The European Union is under a duty to ensure respect for fundamental rights in its legislative, as well as administrative and judicial function, even when it lays down minimum standards for Member States.

As the ECJ has consistently held, fundamental rights form an integral part of the general principles of Community law whose observance the Court ensures.[20] In so doing, the ECJ ensures that the EU legislature itself complies with fundamental rights, and that Member States in implementing and giving effect to fundamental rights also respect such rights.[21] The ECJ's case law extending its fundamental rights review to acts of the Member States within the scope of Community law reflects the reality of the fused yet decentralised elaboration and application of Community law. The formulation the Court employs to describe its own task, namely ensuring the 'observance of fundamental rights', reflects the need for the ECJ to be vigilant that the complex and novel forms of legislative activity at the EU level do not result in avoidance of legal constraints. The ECJ is concerned to ensure that fundamental rights are 'observed', regardless of which actors must observe them.

Thus Weiler explains the extension of review to Member State implementing measures (which he terms 'agency review') as follows:

> 'All of us often fall into the trap of thinking of the Community as an entity wholly distinct from the Member States. But of course, like some well known theological concepts, the Community is, in some senses, its Member States; in some senses separate from them. This, as 2,000 years of Christian theology attests, can at times be hard to grasp. But in one area of Community life it is easy. … Not to review [national implementing acts] would be legally inconsistent with the constant human-rights jurisprudence and, from the human rights policy perspective, arbitrary..'[22]

In the current context, we are faced with a similar apparent dilemma. In the Directive, the EC legislature purports to lay down minimum standards on asylum procedures. In implementing the Directive, the Member States are naturally bound by EC fundamental rights law,[23] which in many instances will preclude them from following the letter of the Directive, which fails to elaborate standards sufficiently protective of fundamental rights. Thus, it appears at first glance that fundamental rights may be sufficiently safeguarded by review of national implementing acts alone, so long as the Directive really does only lay down minimum standards, so that the national implementing act may be required to go 'higher' than the Directive. However, this argument ignores the fact that the task of the ECJ is to ensure 'observance' of

[20] See the Annex for a detailed account of the particular rights and principles applicable in this instance.
[21] Case 5/88 *Wachauf* [1989] ECR 2609; Case 260/89 *ERT* [1991] ECR I-2925.
[22] JHH Weiler 'Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space' in *The Constitution of Europe* (Cambridge Cambridge University Press 1999) 102, 120-121.
[23] Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd v The Scottish Ministers*, Opinion of Advocate General Mischo, 20 September 2001, Judgement 10 July 2003 [2003] ECR I-7411.

fundamental rights within the EC legal order generally. To shift the entire duty of observance to the national level does not accord with the ECJ's constitutional task.

Where the EU lays down binding standards for its Member States in an area directly concerned with fundamental rights, it cannot leave Member States the freedom to breach those rights. While this may not be explicit in the current jurisprudence of the ECJ, it follows from the fact that one of the purposes of some EU legislation, including this Directive, is precisely to ensure respect for fundamental rights by the Member States, and in any event is the logical result of the case law requiring Member States to respect fundamental rights in implementation.

5. Annulment rather than Re-Interpretation

In reviewing the Directive, the ECJ will also face a choice as to whether to insist on its interpretation in compliance with fundamental rights, or annulling the measure for failure to comply with these standards. From the outset, it has been apparent that fundamental rights do create interpretative obligations, and that compliance with these rights may in some instances be secured by means of interpretation, rather than invalidation.[24] However, the ECJ's task, as stated in the *Biotech Case*,[25] is to 'review the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed.'[26] As such, it is not always sufficient to read vague EC measures in compliance with fundamental rights, where the very vagueness that facilitates such interpretation *itself* violates basic requirements of legality in the protection of fundamental rights.

It is instructive to examine recent challenges to the validity of directives in order to elucidate the limits of interpretation as a tool to secure compliance with fundamental rights. In the *Biotech* case, the ECJ interpreted the impugned directive in light of its preambular language.[27] In particular, the ECJ referred to the preambular statement that all processes the use of which offends against human dignity were excluded from patentability.[28] Although these safeguards were framed in very general terms, the ECJ concluded that 'the Directive frame[d] the law on patents in a manner sufficiently rigorous to ensure that the human body effectively remains unavailable and inalienable and that human dignity is thus safeguarded.'[29]

Two recent challenges to the data protection directive raise similar issues.[30] In *Rechnungshof*, the ECJ held that collecting information on income and communicating to third parties was an infringement of private life under Article 8 ECHR, as part of the general principles of EC law. As to whether the interference was necessary, the ECJ stated that Article 8(2) required that the measure was proportionate to a legitimate aim pursued, with the Member States enjoying a margin

[24] Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.
[25] Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079.
[26] Para 70.
[27] Para 73.
[28] Para 76.
[29] Para 77.
[30] Case C-465/00, C-138/01, C-139/01 *Rechnungshof* 20 May 2003; Case C-101/01 *Lindqvist* 6 November 2003.

of appreciation in this regard.[31] It was for the national court to determine, whether such wide disclosure was 'necessary for and appropriate to the aim of keeping salaries within reasonable limits.'[32] In *Lindqvist*[33] the ECJ noted that while the Member States had a margin of manoeuvre in implementing the Directive, 'there [was] nothing to suggest that the regime it provide[d] lacks predictability or that its provisions [were], as such, contrary to the general principles of Community law and, in particular, to the fundamental rights protected by the Community legal order.'[34] It is 'at the stage of the application at the national level of the legislation implementing [the Directive] in individual cases that a balance must be found between the rights and interests involved.'[35] Thus, it was for 'the national authorities and courts responsible for applying the national [implementing] legislation to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.'[36]

This means that when the ECJ appraises the compatibility of the Directive with the general principles of Community law, in particular fundamental rights, it may quite correctly take into account the fact that as a directive it is a measure which requires legislative elaboration and implementation by the Member States. As such, fundamental rights protection is partly assured at the national level. Thus, for example, its provisions do not have to comply with as rigorous a standard of clarity as say, the EC Regulation embodying the Common Customs Code, which automatically forms part of the domestic legal system and is implemented by national officials in a manner which affords them little discretion.

However, re-interpretation is insufficient to sufficiently safeguard fundamental rights in this case.

First, where a Community legislature confers on national authorities broad discretionary powers in a fundamental rights sensitive area, the ECJ must be vigilant to the likelihood that unless the requisite safeguards are enshrined in the directive itself, the implementation process is an ineffective means to ensure protection of fundamental rights. To rely on interpretation and implementation to protect fundamental rights will lead to piecemeal litigation and a slow gradual clarification of the requisite procedural safeguards. In contrast, to annul the Directive would amount to holding the EC legislature responsible for the likely consequences of its legislative measures. Any other approach treats fundamental rights as binding on national governments as administrators of EC law, but not in their role as part of the EC legislative apparatus.

Secondly, while many national constitutional systems use interpretative duties to protect fundamental rights, such duties have principled and practical limitations. Principled limitations arise out of the limited propriety of judicial re-writing of legislation. Practical limitations arise out of the undesirability to have the meaning of fundamental rights sensitive legislation develop piecemeal over time through judicial

[31] Para 83.
[32] Para 90.
[33] Case C-101/01 *Lindqvist* 6 November 2003.
[34] Para 84.
[35] Para 85.
[36] Para 90.

interpretation. Such practices imperil the legal certainty and legality that is a requisite feature of permissible encroachments on fundamental rights. In this case, the ECJ should acknowledge that simply requiring national authorities to re-interpret the provisions of the directive is too dramatic a transformation of the broad facilitatory language. It goes beyond what should be accomplished through judicial re-writing.

Thirdly, annulment is in keeping with the spirit, scheme and wording of the Treaty. The Treaty establishes a community based on the rule of law.[37] Accordingly, the principle of legality applies to the Community, as well as the national level. In addition, the Treaty establishes review of legislative, as well as administrative acts. To rely solely on national implementation and administration to protect fundamental rights amounts to an institutional choice to favour judicial review of administrative action over judicial review of legislation. Such a choice is not in keeping with a systematic understanding of the Treaties. The scheme of the Treaty indicates that Community legislative measures should be liable to annulment on the same grounds and in the same way as Community and national implementation measures. In addition, this outcome accords with Article 222 EC, which provides that the ECJ 'shall ensure that in the interpretation and application of the Treaty, the law is observed.' Where Community legislation facilitates and incentives violations of fundamental rights by national authorities, the Court must allocate responsibility for such violations to the Community legislature. Any other outcome would imperil the effectiveness of protection of fundamental rights in the Community legal order.

6. Annulment in its entirety rather than severance

In its judgement in the *Tobacco Advertising* case,[38] the ECJ annulled the impugned directive in its entirety, on the basis that 'given the general nature of the prohibition of advertising and sponsorship of tobacco products laid down by the directive, partial annulment of the directive would entail amendment by the Court of provisions of the directive. Such amendments are a matter for the Community legislature. It is not therefore possible for the Court to annul the directive partially.'[39]

In his Opinion, AG Fennelly gave more detailed guidance on the issue of severability. The directive was annulled on grounds of lack of competence, although parts of the directive were within the EC's internal market competence. In rejecting the option of partially annulling the Directive, the AG noted that until then the 'Court [had] not laid down any general guidelines on the question of the severability of the valid and invalid parts of a legislative measure.'[40] However, from the case law, it was apparent that two conditions must be satisfied for partial annulment:

> 'First, where a particular provision is discrete and, thus, severable without altering the remaining text; and, secondly, where the annulment of that

[37] See, for example, Case 294/83 *Parti ecologiste `Les Verts' v Parliament* [1986] ECR 1339, para 23; Case C-2/88 *Zwartveld and others* [1990] ECR I-3365 para. 16; Case C-314/91 *Weber v Parliament* [1993] ECR I-1093 para 8.
[38] Case C-376/98 [2000] ECR I-8419.
[39] Para 117.
[40] Para 122.

> provision does not affect the overall coherence of the legislative scheme of which it forms a part.'[41]

On the issue of how to determine the requirements of legislative coherence, the AG referred to the following dicta of the Irish Supreme Court:

> '[T]here is a presumption that a statute or a statutory provision is not intended to be constitutionally operative only as an entirety. This presumption, however, may be rebutted... if what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently, or if the remainder would not represent the legislative intent, the remaining part will not be severed and given constitutional validity. It is essentially a matter of interpreting the will of the legislature in the light of the relevant constitutional provisions... . If the courts were to sever part of a statutory provision as unconstitutional and seek to give validity to what is left so as to produce an effect at variance with legislative policy, the Court would be invading a domain exclusive to the legislature and thus exceeding the court's competency.'

And the Supreme Court of the United States in *Lynch v US*, Brandeis J. said:

> 'It is true that a statute bad in part is not necessarily void in its entirety. A provision within the legislative power may be allowed to stand if it is separable from the bad. But no provision, however unobjectionable in itself, can stand unless it appears both that, standing alone, the provision can be given legal effect and that the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall.'

In applying these criteria to the particular case, the AG noted that the parts of the directive which could be upheld did not coincide with any distinct or severable wording. Accordingly, 'No obviously severable provision offers itself to the clean cut of an order of annulment.'[42] Secondly, 'the preserved parts would represent only part of the subject- matter of the ban which was clearly conceived of in global terms by the Community legislator. The Court would bring the axe to the tree but seek to allow some of the branches to survive, despite the fact that the eighth recital in the preamble to the Directive refers to the interdependence between various forms of advertising and to the risk of distorting competition between them.'[43]

Applying these criteria to the Asylum Procedures Directive, a similar conclusion will be drawn. While not all its provisions are legally dubious, many are. The common list of safe countries of origin under Article 30 of the Directive exceeds EC competences and the procedure provided for its adoption violates the institutional provisions of Title IV EC. While it might be argued that the latter illegality would taint the common list adopted under this procedure rather than the parent Directive, the better view is that the Directive itself, in establishing the improper procedure, is

[41] *Ibid*.
[42] Para 127.
[43] Para 128.

also tainted with illegality. A similar procedural defect is evident in the procedure for creating the list of supersafe countries of origin under Article 35A.

Could these two Articles be severed? These are two discrete provisions, which do, at first glance, offer themselves up for severance without judicial re-writing. However, Articles 30 and 35A are referred to other provisions of the Directive, where the limitations on the procedural guarantees in these scenarios are set out. However, on balance, it is likely that the first criterion is fulfilled. With regard to the second criterion, whether the overall coherence of the Directive would be impaired by severance, the better view is that Directive aims to establish the framework for a common system of interlocking provisions, several of which create mechanisms to deflect responsibility for asylum seekers. A proper understanding of the objectives of the measure requires careful reading of its preambular language, not yet available. Once this text is available, it may well be that the Directive should be viewed as establishing a system, rather than a range of discrete procedures, such that severance would not be an appropriate remedy.

With regard to the provisions of the Directive entailing fundamental rights violations, the issue is more straightforward. As outlined in Chapter 2, many of the Directive's provisions will lead to fundamental rights violations in their implementation. In addition, the failure to enshrine proper fundamental rights standards is itself a violation of the requirement of legality in fundamental rights sensitive areas. These legal shortcomings are features of so many of the Directive's provisions that severance would be inappropriate.

7. Consequences of Invalidation

The ECJ may rule that the EC act remains in force until it is replaced. Article 231 EC allows such orders in case of successful challenge to regulations, and the ECJ has extended this power to directives and decisions.[44] However, as Peers notes 'the court usually does this in cases of procedural irregularity; surely the court should preclude itself from exercising this jurisdiction if legislation is found invalid because of a breach of human rights principles.'[45]

A further possibility is that the ECJ may limit the effects of its ruling to those who have brought challenges already. This normally only occurs if the ruling with have unforeseen financial implications for the Member States or for individuals. It is difficult to see how this would arise in the case of a challenge to the Asylum Procedures Directive.

[44] Case C-295/90 *EP v Council* [1992] ECR I-4193; Case C-360/93 *Parliament v Council* [1996] ECR I-1195.

[45] Steve Peers 'Challenging the validity of EC immigration and asylum law' (2003) *Immigration, Asylum and Nationality Law* 22, 25.

CHAPTER 2 APPRAISAL OF THE DIRECTIVE

Introduction

This Chapter examines first, the Directive's scope; secondly, its general procedural guarantees; thirdly, the various provisions on accelerated, inadmissible and special procedures, including those based on safe country concepts, and fourthly, and finally, the provisions on appeals.

The Directive's tortuous negotiation has left its mark on its provisions. The Directive lacks clarity in terms of language, structure and coherence. Its complexity and incoherence is particularly reflected in the multiplicity of procedures and practices provided for, amounting to a catalogue of national worst practices, now liable to adoption across the 25 Member States. The Directive contains so many optional provisions that as a harmonisation exercise, it is of dubious utility.

The general procedural guarantees in the Directive (Chapter II, Articles 5-22) are *weak and inadequate*. The main shortcomings are the conditional nature of the right to a personal interview (Article 10) and the absence of a right to legal aid at the initial stage (Article 13). It allows Member States a sweeping discretion to detain asylum seekers (Article 17). Further, and of even graver concern, the Directive will greatly expand the bases for the application of accelerated, inadmissible and special procedures (Articles 23 -25), which may well result in a majority of asylum applicants being channelled through such procedures. Thus, even those minimal guarantees enshrined in the Directive may routinely be set aside.

Many of the Directive's guarantees are *so heavily qualified* as to be illusory. For example, Article 7(1) provides that asylum applications are to be neither 'rejected nor excluded' 'on the sole ground' that the applications have not been made as soon as possible. However, this already limited guarantee is further qualified in Article 23(4)(i) which provides that failure to apply earlier, 'without reasonable cause .. having had the opportunity to do so' is one of the grounds upon which Member States may lay down accelerated procedures.

1. Scope

Article 3 Scope

Under Article 3(1), the Directive applies to 'applications for asylum made in the territory, including at the border, or in the transit zones of the Member States and to the withdrawal of refugee status.' Article 2(b) defines 'application for asylum' as 'an application by a third country national or stateless person which can be understood as a request for international protection from a Member States under the [Refugee Convention]. Any application for international protection is presumed to be an application for asylum, unless the person concerned requests another kind of protection that can for applied for separately.' This provision is a sensible one, in that

it does not distinguish between applications for refugee status[46] and for complementary protection.[47] However, Member States may draw such distinctions in terms of how they apply the Directive, as Articles 3(3) and 3(4) make clear. Under Article 3(3), where Member States use of procedure in which asylum applications are treated as applications for refugee status and complementary protection 'they shall apply [the] Directive throughout their procedure.' By implication, when Member States treat such applications differently, the Directive need only be applied to applications of refugee status in the narrow sense. In addition, Article 3(4) states that Member States may apply the Directive 'for deciding on applications for any kind of international protection.'

These distinctions are in principle regrettable in that it will lend itself to the creation of a multiplicity of procedures. Of course it is conceivable that a Member State would employ the Directive only as regards Convention refugee applications (to which the Directive's low standards must necessarily apply) and establish proper, robust, safe procedures to deal with complementary protection. This would mean that most *refoulement* concerns would be met by the complementary protection procedures, as *refoulement* under other international instruments, in particular ECHR and CAT, is broader than under the Refugee Convention. However, this would appear to be a fanciful scenario, so this paper takes the view that while the application of separate procedures is a possibility, it is altogether unlikely that separate complementary protection procedures would be established to cure all the concerns about the diminution of procedural standards in the Directive.

The other limitation contained in Article 3 relates to 'requests for diplomatic and territorial asylum.' While under international law it may be permissible to treat such applications differently, it is regrettable that as some Member States, particularly the UK and Denmark, contemplate the introduction of external asylum processing, the opportunity was not seized to clarify that such systems must comply with the basic international norms set out in detail in the Annex.

Article 3A Responsible authorities

Article 3A requires all Member States to designate a 'determining authority', defined in Article 2(e) as 'any quasi-judicial or administrative body in a Member State responsible for examining asylum applications and competent to take decisions at first instance. In Ireland's case, an Annex has been included to clarify that this means the Refugee Applications Commissioner, not the Refugee Appeals Tribunal. This means that many of the Directive's guarantees apply only at the first instance stage, while others are confined to the appeal stage. The failure to create a single set of procedural standards is a regrettable.

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[46] Article 2(f) of the Directive defines 'refugee' as 'a third country national or stateless person who fulfils the requirements of Article 1 of the [Refugee Convention] as set out in Article 1 of the [Qualification Directive].'

[47] Other kinds of international protection as defined by Articles 2(e) and 15 of the Qualification Directive. Article 2(e) defines subsidiary [complementary] protection as arising where there are substantial grounds to believe that there is a real risk that the individual will suffer 'serious harm' if returned. Article 15 defines 'serious harm' as the death penalty/execution; torture, inhuman, or degrading treatment or punishment; and 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.'

Under Article 3A(1) is it apparent that only designated determining authorities are covered by the basic procedural guarantees, in particular those in relation to the requisite features of an appropriate examination in terms of knowledge and expertise (Article 7(2)), and those setting out the requirements for a decision (Article 8). In contrast, Member States may establish a plethora of other bodies with an adjudicative role, whose personnel merely 'have the appropriate knowledge or receive necessary training to fulfil their obligations when implementing [the] Directive.' (Article 3A(3). This reflects the multiplicity of procedures the Directive allows and may spawn an institutional labyrinth of decision-making bodies, each subject to different procedural guarantees. Such other bodies may be established for the following purposes:

- transfers to third countries;

  It is difficult to see the justification for allowing states to create separate bodies for such decisions, particularly as in accordance with *TI*,[48] such cases require the same standard of individualised assessment as any other asylum claims.

- 'taking the decision on the application in light of national security provisions';

  Creating a separate institution to take such decisions is legally incorrect. Although national security considerations may be pertinent to assessments on the application of exclusion clauses under the Refugee Convention, they are entirely irrelevant to the assessment under the ECHR, CAT and ICCPR, as exemplified by the *Chahal* case.[49] To dilute procedural protections in the potentially most sensitive and politicised of cases can only lead to biased and erroneous decisions.

- the preliminary examination provided for subsequent examinations under Article 33;

  The creation of separate procedures for subsequent examinations is regrettable and the consequent dilution of procedural standards risks *refoulement*.

- processing border applications under Articles 35(1);
- 'refusing permission to enter' under the special border procedures under Articles 35(2) to (5);

  The reference to 'refusal to enter' highlights the dangerous feature of this procedure, namely that it may lead to *refoulement* due to the proper examination of the asylum claim.

- the procedure on supersafe third country under Article 35A.

  This procedure establishes one of the most worrisome aspects of the Directive, in that it allows transfers to such countries without any regard

[48] Application No 43844/98 *TI v UK* (7 March 2000).
[49] *Chahal v UK* (1997) 23 EHRR 413.

for the individual safety of the application. To allow Member States to establish separate bodies to deal with such cases exacerbates this problem.

Article 4 More favourable provisions

Article 4 provides that 'Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, *insofar as those standards are compatible with this Directive*.' (emphasis added). This latter phrase indicates that where the provisions of the Directive are mandatory and exhaustive (as is the case, for example, in relation to the common list of safe countries of origin under Article 30), the Member State may not introduce more favourable standards. This appears to be a contradiction in terms, and Article 4 reflects the fact that the Directive goes beyond setting minimum standards. As such, it exceeds the competences of the EC under Title IV EC.

2. General Procedural Guarantees

Chapter II of the Directive (Articles 5 – 22) purports to establish basic procedural guarantees.

Article 5 Access to the procedure

The promising title of this Article is belied by its contents. Article 5(1) provides that Member States 'may require that applications for asylum be made in person and/or at a designated place.' All very well, if the applicant is not detained or deflected at the border and thus precluded from reaching this 'designated place.'

Article 5(2) provides that Member States 'shall ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf.' However, this is undermined by Article 5(3) which allows 'dependent adults' to have applications submitted 'on their behalf'. The dependent adult must consent, but 'consent shall be requested at the time the application is lodged or, at the latest, when the personal interview with the dependent adult is conducted.' In some instances, this may prevent victims of sexual violence, particularly women, from recounting their experiences, thus jeopardising the assessment of their claims.

Article 5(4) allows Member States to determine in national legislation the treatment of minors and unaccompanied minors in the procedure. Given that human rights standards are highly evolved in this area, it is regrettable that they were not specified in the Directive.

Article 5(5) provides: 'Member States shall ensure that authorities likely to be addressed by someone who wishes to make an asylum application are able to advise that person how and where he/she may make an application and/or require these authorities to forward the application to the competent authority.' This appears to be a convoluted acknowledgment of the institutional asylum labyrinth, and that applicants will not necessarily know who will be responsible for processing their claim.

Article 6 Right to remain in the Member State pending the examination of the application

Article 6(1) provides that the right to remain in the territory lasts only until the first instance decision is taken. The right to remain is thus significantly limited in temporal scope. Under the Directive, appeals need not have suspensory effect (Article 39), and the limited temporal of the right to remain reflects this choice. In effect, this means that the right to appeal may be illusory, in that the asylum seeker is liable to deportation before the process is fully concluded. This is particularly worrisome as in most EU Member States there is a high rate of overturning refusals of asylum applicants on appeal. As UNHCR has argued, 'as the text stands, "the vast majority" of rejected asylum seekers who lodge an appeal will not be permitted to remain in the EU until their appeals are decided – despite the fact that in several European countries 30-60 percent of initial negative decisions are subsequently overturned on appeal.'[50]

The right to remain is also geographically limited. Article 2(m) of the Directive defines 'remain in the Member State' as remaining in the territory, 'including at the border or in transit zones of the Member State in which the application for asylum has been made or is being examined.' In effect, this facilitates the practices of confinement and detention in transit zones which were condemned as contrary to Article 5 ECHR in *Amuur*.[51] It denudes the notion of 'in' the Member State of meaning, in that it allows asylum seekers to be confined at the border. In addition, it runs counter to the established view that access to the territory in a real-world sense is necessary in order to allow access to the practical services and facilities necessary for a proper asylum system to be accessible.

In addition, under Article 6(2) the right to remain may be restricted in cases of subsequent applications, for which special restricted procedures may be applied (Article 33 & 34). Thus would lead to a possibility of *refoulement* and is perverse in light of the accelerated procedure applicable to subsequent applications.

Article 6(1) also provides that 'the right shall not constitute an entitlement to a residence permit.' This provision may have serious legal implications. Under the UNCAT case law, security of residence is required in order to protect against *refoulement*.[52] Under Article 13 ICCPR, which protects aliens 'lawfully on the territory' of a state from expulsion without due course of law, applies, according to the Human Rights Committee, to refugee claimants who receive residency permits pending the determination of their status are protected by Article 13.[53] If the consequence of Article 6(1) were to diminish the scope of protection of the ICCPR, this would be particularly worrying. In addition, the language of Article 6(1) on this issue – 'shall not constitute an entitlement to a residence permit' appears to preclude the Member State from granting one, which would appear to be in excess of the EC's competence to establish only minimum standards in this field.

[50] UNCHR Press Release, above n 3.
[51] Application No 19776/97 *Amuur v France* (25 June 1996).
[52] See, for example, Communication No 96/1997 *AD v Netherlands* (24 January 2000).
[53] Human Rights Committee *General Comment 15(27) on the position of aliens under the Covenant* UN doc A/41/40 22 July 1986.

Article 7 Requirements for the examination of applications

Article 7(1) Prompt Application

Article 7(1) provides that asylum applications are to be neither 'rejected nor excluded' 'on the sole ground' that the applications have not been made as soon as possible. However, this clearly allows failure to make a prompt application to be *a* factor in the asylum determination. This already limited guarantee is further qualified in Article 23(4)(i) which provides that failure to apply earlier, 'without reasonable cause .. having had the opportunity to do so' is one of the grounds upon which Member States may lay down accelerated procedures and treat applications as manifestly unfounded. This is regrettable, as late application (even without excuse) is irrelevant to the merits of the asylum claim, and simply places a further barrier to the applicant's access to the full procedure.

In addition, it may lead to *refoulement*. As is evident in the case law of the ECtHR, in particular *Jabari v Turkey*,[54] the application of strict time limits to asylum applicants is inappropriate. Similarly, the UNCAT Committee has recognised that late submission of information is not inconsistent with the existence of genuine risk of treatment contrary to the CAT on return, particularly where the accounts of victims of torture were under examination.[55]

Article 7(2) Requirements of an appropriate examination

These requirements are generally welcome, in that they confirm the need for individual, objective and impartial assessments (Article 7(2)(a)), based on precise and up-to-date information from various sources such as UNHCR 'as to the general situation prevailing in the countries of origin of applicants for asylum' and 'where necessary, in countries through which they have transited.' (Article 7(2)(b)). While the reference to country of origin information is welcome, the formulation of the reference to third countries, referring to 'transit' is worrisome, is that it reflects the fact that the safe third country provisions appear to be triggered by mere transit, rather than connection with the third country, in defiance of international standards. On the crucial issue of translation, Article 7(4) merely provides 'Member States may provide for rules concerning the translation of documents relevant for the examination of applications.'

As noted in relation to Article 3A above, these requirements only apply to 'determining authorities' in the narrow sense. Moreover, appeals authorities are to have access to the country specific information (Article 7(3)), but are not subject to the other obligations. Thus, one of the laudable features of the Directive is undermined by its restricted scope of application.

Article 8 Requirements for a decision by a determining authority

Article 8(1) requires that decisions are in writing, and that negative decisions generally contain 'the reasons in fact and in law … and information on how to

[54] Application No 40035/98 *Jabari v Turkey* (11 July 2000).
[55] Communication No 15/1994 *Tahir Houssain Khan v Canada* (18 November 1994) para 12.3.

challenge a negative decision.' However this need not be done where the application is provided with complementary protection under the Qualification Directive.[56] In addition, and more worrisome, 'Member States need not provide information on how to challenge a negative decision in writing where the applicant has been informed at an earlier stage either in writing or by electronic means accessible to the applicant of how to challenge such a decision.' (Article 8(2)). This restriction seems at best petty, and at worst as an attempt to prevent the utilisation of appeals procedures.

Article 9 Guarantees for applicants for asylum

The guarantees set out in Article 9 apply primarily at first instance, a regrettable limitation. As regards appeals, Article 9(2) provides that only the right to an interpreter, to communicate with UNHCR and to have notice of the decision (Articles 9(1)(b), (c), and (d)) apply. The right to be informed of the nature of the procedure does not apply to appeal (Article 9(1)(a) nor the right to be informed of the decision (Article 9(1)(e)). There are no reasonable grounds upon which to draw such a distinction, particularly as regards such basic guarantees.

As regards the right to be informed (Article 9(1)(a)), this is unjustifiably restricted in that it provides that the applicants will be informed only in 'a language they may reasonably be supposed to understand.' This risks seriously compromising the right to be informed. Similarly, the right to an interpreter (Article 9(1)(b)) is also restricted to whenever this is 'necessary', an undefined term, save for the proviso that an interpreter is deemed necessary where there will be an interview, and 'appropriate communication cannot be ensured without such services.' The qualified nature of this right is further reflected in Article 11(3)(b) which provides that the interview need not necessarily take place in the applicant's preferred language, where there is 'another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate in.' Clearly, such a qualification fails to recognise the difficult and possible traumatic nature of the interview for the applicant, and the paramount importance of facilitating effective and open communication. The human rights standards discussed in detail in the Annex emphasise these requirements.

Article 9(1)(c) Communication with UNHCR

As regards communication with UNHCR (or organisations working on its behalf), the formulation is a negative one, precluding Member States from denying applicants the opportunity to communicate with UNHCR (Article 9(1)(c)). It would be preferable if Member States were positively required to provide this opportunity, in light of the organisation's privileged supervisory role under the Refugee Convention. In addition, the scope is limited to UNHCR and its delegates, rather than other NGOs assisting asylum seekers. Article 35 of the Refugee Convention obliges states parties to cooperate with UNHCR. Article 21 of the Directive seeks to reflect this cooperative obligation in EC law. However, the negative formulation of Article 9(1)(c) fails to reflect the requisite degree of positive cooperation.

Article 9A Obligations of the applicants for asylum

[56] Above n 5.

Article 9A(1) allows Member States to impose on applicants for asylum obligations to cooperate with the competent authorities 'insofar as these obligations are necessary for the processing of the application.'

Article 9A(2)(a) allows Member States to require asylum applicants to 'report to competent authorities or to appear there in person, either without delay or at a specified time.' While some reporting obligations may be sensible, the open-ended nature of this discretion may facilitate excessively burdensome obligations. Article 9A(2)(b) allows Member States to require applicants to hand over relevant documentation, such as their passports. Similarly, Article 9A(2)(d) provides 'the competent authorities may search the applicant and the items he/she carries with him/her'. The only express qualification is that this must be 'necessary' for the processing of the application. Where an applicant is unwilling or unable to do so, it is unclear what the consequence should be. While EC law frequently allows Member States to specify the consequences of breach of EC provisions, here, EC law is vesting a discretion in Member States to establish duties, whose scope and ramifications are at best unclear, and at worst, draconian.

Article 10 Persons invited to a personal interview

The centrality of the interview to the asylum determination process is reflected in EXCOM Conclusions No 8 and 30 and in the case law of the ECHR, Human Rights Committee and UNCAT Committee, as set out in detail in the Annex. Indeed this principle was reflected even in the 1995 Council Resolution on Minimum Guarantees for Asylum Procedures, which provided 'Before a final decision is taken on the asylum application, the asylum seeker must be given an opportunity of a personal interview with an official qualified under national law.'[57] In contrast, the Directive adds several new exceptions to this requirement, gravely undermining the reliability and fairness of asylum determinations.

Article 10 (1) restricts the right to a personal interview to the applicant for asylum. However, as explained above, Article 5(2) allows Member States to provide for an application to be made by one applicant on behalf of his/her dependents, including adult dependents, provided that the latter consent. However these dependents have no right to an interview under Article 10(1), which merely states the Member States *may* also give the opportunity of a personal interview to each of the adults. (Bizarrely, the Directive allows consent of the dependent adult to be given at the interview stage, which need not take place.) This raises serious concerns, particularly in light of our understanding of gender based persecution and the difficulties many victims of rape and other sexualised violence may have in disclosing their experiences, in particular to or in the presence of their husbands. Although Article 11(1) seeks to address such concerns, by providing that 'a personal interview shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have family members present.' However this weak guarantee is constrained by the restricted scope of Article 10 itself.

[57] Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures [1996] OJ C274/3, para14.

As well as the limited personal scope of the right to an interview, Article 10(2) sets out a list of sweeping exceptions to this entitlement. These include where:-

- The competent authority has already had a 'meeting' with the applicant under the Qualification Directive[58] (Article 10(2)(b)).

- Where it is not 'reasonably practicable' to hold an interview (Article 10(3))

- A specific example of where an interview is deemed not to be 'reasonable practicable' is where the authority is of the opinion that the 'applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his / her control' The only flimsy safeguard is that 'When in doubt, Member States *may* require medical or psychological certificate.' (Article 10(3)).

- The competent authority considers the application unfounded on any number of grounds (Article 10(2)(c)). This is a dramatic change introduced at the last minute of drafting. The grounds mentioned are those set out in Article 23(4)(a) (c) (g) (h) and (j). These are respectively where the applicant raises little relevant evidence; safe country of origin / safe third country; the claim is 'clearly unconvincing' due to the applicant's 'inconsistent, contradictory, unlikely or insufficient representations'; the applicant has made a subsequent application raising no new issues; the application is made 'to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/ her removal.'

  This section potentially renders the guarantee to an interview meaningless. The asylum seeker typically receives no independent advice, legal or otherwise, when filling out the initial application, which generally takes the form of a long and complicated questionnaire. The interview is necessary in order to allow the applicant to clarify any discrepancies, inconsistencies or omissions in his/her account. Instead, the Directive envisages that such applications are to be regarded as 'clearly unconvincing' and thus no interview provided. This could be the *death-knell of reliable asylum determinations*.

If the right to an interview is refused on any of these bases, the authority may nonetheless decide on the application. In light of the restrictions on the right to appeal, these restrictions on the right to an interview are cause for grave concern. The Directive also permits authorities to take decisions where an applicant fails to appear for interview 'unless he/she had good reasons for the failure to appear.' (Article 10(6)). This is regrettable, as Article 20 provides a specific procedure where applications may be treated as abandoned which contains some safeguards.

Article 11 Requirements for a personal interview

As noted above, Article 11(1) provides that 'a personal interview shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have family members

[58] Above n 5.

present.' However this weak guarantee is constrained by the restricted scope of Article 10 itself.

Article 11(2) provides that the interview 'must take place under conditions which ensure appropriate confidentiality.' Article 11(3)(a) provides that 'the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability, insofar as it is possible to do so.' Despite the final restrictive phrase, this expresses a laudable sentiment. It is only to be regretted that it does not inform the Directive's other guarantees. For example, the interpretation requirements set out in Article 11(3)(b) are inadequate, as discussed above. Given that the right to an interpreter (Article 9(1)(b)) is restricted to whenever this is 'necessary' and that the interview need not necessarily take place in the applicant's preferred language, where there is 'another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate in' is it difficult to see how this can be seen as an expression of sensitivity to the applicant's vulnerability.

Article 12 Status of the report of the personal interview

Article 12(1) requires Member States to ensure that a written report is made of every personal interview. However, this does not have to be a complete transcript (as proposed by the Commission in 2002), rather it need contain only 'the essential information regarding the application.' Given that the interview is the main fact-finding opportunity, the failure to establish a requirement of a full record is lamentable. Such practices were condemned by the ECtHR in *Chahal*.[59]

In addition, the applicant need not be proved the opportunity to comment on the accuracy or completeness of the report (Article 12(3) merely allows Member States so to do). This raises further concerns that accounts of interviews are open to misinterpretation, manipulation and distortion. This is particularly worrisome as the Directive does not guarantee that the individual interviewer will actually take the decision on the application. The raises the very real risk of erroneous decisions, where a decision-maker is called upon to determine a claim based only on this scant account.

Article 13 Legal assistance

The right to legal assistance and representation is an essential safeguard in the asylum process. As outlined in the Annex, legal aid is also an aspect of EU fundamental rights law and the Article 6 case law of the ECtHR is applicable to asylum determinations, where these involve the enforcement of EC rights. This is evident in the formulation of Article 47 EUCFR.

However, under the Directive there is only a basic entitlement merely to consult a lawyer at the applicant's own cost. (Article 13(1)). Member States are only required to provide 'free legal assistance and/or representation' for appeals (many of which it must be recalled, will have no suspensory effect). (Article 13(2)) This approach is utterly counterproductive, as many errors made at first instance arise as where

[59] Above n49.

claimants misunderstand procedures and processes. Such errors are often difficult to correct at the appeal stage. As such, legal advice / representation at the initial stage are the best way to ensure fair and reliable determinations, avoiding lengthy appeals.

The right to free legal assistance / representation under Article 13(2) is also heavily qualified and may be limited by the Member States on any or all of these grounds:

- Only for procedures before a Court or tribunal under Chapter V and 'not to any onward appeals of reviews provided for under national law'. This would exclude legal aid for judicial review of administrative decisions;
- Only to those who lack sufficient resources;
- Only to legal advisers specifically dedicated to assisting asylum applicants;
- Only if the appeal or review is likely to succeed. This latter ground is subject to the caveat that legal assistance / representation is not 'arbitrarily restricted'. This requirement requires careful scrutiny in light of the jurisprudence of the ECtHR in *Del Sol*[60] and *AERTS*[61]

Further restrictions are permitted under Articles 13(5), which allows monetary and temporal restrictions and 13(6), which permits a reimbursement requirement, once the 'applicant's financial situation has improved considerably or if the decision to grant such benefits was taken on the basis of false information supplied by the applicant.'

Article 14 Scope of legal assistance and representation

Article 14(1) contains a provision dealing with the legal adviser's access to the applicant's file allows access to 'such information in the applicant's file as is liable to be examined by the authorities [referred to in Chapter v]' .. 'insofar as the information is relevant to the examination of the application'. This is inadequate, given that access to the file is an important was to ensure accurate and fair decisions. Indeed, it is the only effective way to ensure that the general information relied on by the authorities is up-to-date, accurate and relevant to the applicant's case.

In addition, Article 14(1) contains potentially sweeping grounds of exception, allowing refusal of disclosure of information 'where disclosure of information or sources would jeopardise national security, the security of organisations or persons providing the information or the security of the person to whom the information relates.' More alarmingly, it allows refusal to disclose where the information would compromise either the 'investigative interests relating to the examination of applications of asylum' or the 'international relations of the Member States.'

This is an ungainly attempt to harmonise national evidential laws where very different standards and approaches prevail. As such, it risks diminishing procedural protections currently available in many Member States. In cases where Article 3 ECHR (or indeed any other Convention guarantee) is applicable, failure to disclose information will amount to a violation of Article 13 ECHR on effective remedies.[62]

[60] Application No 00046800/99 *Del Sol v France* (26 February 2002).
[61] Application No 00025357/94 *Aerts v Belgium* (30 July 1998).
[62] See discussion in Annex, Part 6.1.

Article 15 Guarantees for unaccompanied minors

If asylum applicants are under eighteen years old and are not accompanied they must be designated an assistant to help them make their claim. But exceptions are also provided for, such as if the applicant 'will in all likelihood' be an adult by the time the decision is taken. The Member States 'may use medical examinations to determine the age of unaccompanied minors' (Article 15(5)).

Article 16 deleted

Article 17 Detention

The provision on detention is terse and vague, leaving Member States an alarming degree of discretion in this matter. There is no definition of detention, nor are the grounds for its use specified. Article 17(1) merely provides that 'Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.' The only procedural safeguard is that there must be a possibility of 'speedy judicial review.'

It is doubtful whether detention of asylum seekers prior to the assessment of the claim is permissible under the ECHR, which foresees only pre-deportation detention under Article 5(1)(f). Moreover, the open-ended discretion enshrined in Article 17 cannot be regarded as compatible with the requirement of 'legality' for deprivations of liberty under the ECHR and the ICCPR. Article 17 will in likelihood also lead to violations of Article 31 of the Refugee Convention, which in principle precludes the penalisation of asylum seekers, whether by detention or otherwise, except in a limited range of exceptional circumstances.

Article 18 deleted

Article 19 Procedure in case of withdrawal of application

Article 19 deals with explicit withdrawal of the application, allowing Member States a range of options. Under Article 19(1) if the Member State has foreseen this under national law, the authority may take a decision either to take a decision to discontinue the application or to reject it. Under Article 19(2) the authority may simply discontinue without taking any decision.

Article 20 Procedure in case of implicit withdrawal or abandonment of the application

As noted above, under Article 10(6), the Directive also permits authorities to take decisions where an applicant fails to appear for interview 'unless he/she had good reasons for the failure to appear.' This is regrettable, as Article 20 provides a specific procedure where applications may be treated as abandoned where there is 'reasonable cause' for so believing. Under Article 20(1)(a) this may be assumed when the applicant fails to provide essential information or has not appeared for personal interview 'unless the applicant demonstrates within a reasonable time that his failure was due to circumstances beyond his control.' Article 20(1)(b) allows such conclusions to be drawn when the application 'has absconded or left without

authorisation the place where he/she lived or was held, without contacting the competent authority within a reasonable time' or 'he/she has not within a reasonable time complied with reporting duties or other obligations to communicate.' Member States are permitted to 'lay down time limits or guidelines.' While there may well be a need for procedures to deal with implicit abandonment, there is a risk that these may be applied too rigidly, in a manner than excludes *bona fide* applicants.

In this respect, it is particularly worrisome that there appears to be no provision for the applicant to explain his/her failure to report under Article 20(1)(b). Rather, Article 20(2) foresees that applicants must request that their application be re-examined under Articles 33 & 34, which is the abridged procedure for subsequent applicants (and may not provide a right to remain in the Member State pending determination). In addition, Member States can lay down time limits after which re-opening is not possible. While Article 20(2) provides that 'Member States shall ensure that such a person is not removed contrary to the principle of *non-refoulement*' the facilitation of the application of rigid time-limits may well undermine this guarantee.

Article 21 The role of UNHCR

Article 35 of the Refugee Convention obliges states parties to cooperate with UNHCR. Article 21 of the Directive seeks to reflect this cooperative obligation in EC law. However, as outlined above, the negative formulation of Article 9(1)(c) fails to reflect the requisite degree of positive cooperation.

Article 22 Collection of information on individual cases

This Article precludes Member States from disclosing information to the 'alleged actors of persecution' of the asylum application. However it is curiously drafted, referring only to 'directly disclosing' such information. This would seem to gravely compromise its efficacy as a safeguard.

3. Accelerated, Inadmissible and Special Procedures

The Directive provides extensive grounds to qualify or indeed set aside even the basic guarantees discussed in the previous section (Chapter II, Articles 5 – 22 of the Directive), such that accelerated procedures risk becoming the norm, rather than the exception.

Article 23 Examination procedures

Article 23(1) requires applications to be processed in accordance with the basic principles and guarantees discussed in the previous section (Chapter II, Articles 5 – 22 of the Directive). Article 23(2) contains a largely hortatory provision on dealing with cases within 6 months. Where no decision is taken within 6 months, 'the applicant concerned shall be informed of the delay' (Article 23(2)(a)) or be given a non-binding indication of the timeframe for a decision (Article 23(2)(b)).

Article 23(3) vests an open-ended discretion under which Member States may subject any application to accelerated procedures, provided they comply with the basic

Chapter II requirements. In addition, the Directive also includes an indicative list of 15 grounds upon which Member States may apply accelerated procedures. (Article 23(4)). In light of the absence of time limits in Chapter II itself, it is unclear how accelerated procedures will differ from main procedures. What is apparent is that on certain grounds, under accelerated procedures, there will be no interview. Article 29(2) provides that such applications may be regarded as manifestly unfounded. The only dubious qualification is that the 'examination procedure [be] in accordance with the basic principles and guarantees of Chapter II.' Given that these principles and guarantees are so woefully inadequate, this provides little comfort. It may be recalled that the rights to interview and legal assistance are heavily qualified and there is no guarantee of reasonable time to prepare a case. The 15 grounds set out in Article 23(4) include many which have no bearing on the substance of the applicant's claim, such as Article 23(4)(i) which deals with failure to make a prompt application or Article 23(4)(m) that the applicant poses a risk to national security.

Article 24 Specific procedures

In addition to the general discretion to apply accelerated procedures, in three specific instances, Member States may derogate from the basic principles and guarantees set out in Chapter II.

- The preliminary examination under Section IV of Chapter III of the Directive (Articles 33 – 34) on subsequent applications;

- Section V of Chapter III of the Directive (Article 35) on border applications;

- Section VI of Chapter III of the Directive (Article 35A) on supersafe third country.

Each of these is discussed in turn below.

Article 25 Inadmissible applications

Article 25(1) provides that Dublin Convention transfer cases are inadmissible. This runs counter to the ECHR jurisprudence in *TI*,[63] which requires an examination of the individual claim before such transfer is possible.

In accordance with Article 25(2), inadmissible applications arise in six other categories:

- Another Member State has granted refugee status

- *Article 26 A non-EU country is the 'first country of asylum'*

  This refers to where the applicant has already been recognised as a refugee in another country or where he/she otherwise enjoys 'sufficient protection in that country, including benefiting from the principle of non-refoulement.' The

[63] Above n 48.

only additional specification is that the Member States *may* take into account some of the principles applicable to safe third country under Article 27.

- *Article 27 A non-EU country is a 'safe third country'*

  See below.

- The applicant has been granted complementary protection. However, this only applies if the person has complementary protection which is of equivalent status to refugee status. In other words, it only applies in relation to those Member States who exercise the option under the Qualification Directive[64] to treat complementary protection as an equivalent status.

- The applicant has been granted protection on some other grounds 'pending the outcome of an asylum procedure.' Again, this only applies to applicants for complementary protection where such protection entails an equivalent status to refugee status, as a result of the appropriate Member State decision under the Qualification Directive.[65]

- A dependent has lodged an application satisfying the conditions under Article 5(3).

Article 27 A non-EU country is a 'safe third country'

The safe third country provisions of the Directive fail to comply with international standards and potentially undermine asylum protection within the EU. The Directive allows Member States to remove asylum-seekers to any country willing to accept them, often without any consideration of the merits of their claims or even any detailed consideration of the application of the 'safe third country' concept. In effect, the proposal allows Member States to shift responsibilities to third countries, regardless of whether the applicant has any meaningful link with that country, and regardless of whether the applicant will be protected against *refoulement*.

In contrast, the ECtHR has clarified that the application of safe third country procedures does not absolve the county of asylum of its duties under Article 3.[66] The *TI*[67] case clearly illustrates that transfers to third countries, where sufficient safeguards are not in place, are not compatible with the ECHR. Thus, international law places the responsibility for the asylum applicant on the country where the application is lodged. Accordingly, that state is only entitled to transfer responsibility where four conditions are fulfilled:-

- The criteria for the determination of countries as safe must be adequate

  Currently, the criteria set out in Article 27(1)(a) – (d) of the Directive are inadequate in that they prescribe only minimal requirement, namely 'life and

[64] Above n 5.
[65] *Ibid.*
[66] Above n 48.
[67] *Ibid.*

liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion'; respect of the principle of *non-refoulement* under the Refugee Convention and other international instruments; and the possibility to request refugee status 'and, if found to be a refugee, 'to receive protection in accordance with the [Refugee] Convention'.

- Third country is safe for *individual* applicant and the burden of proof on safety of the third country lies with the country of asylum.

  At present Article 27(2)(b) simply requires Member States to set out 'rules on methodology' to determine whether the concept is applicable to 'a particular country or to a particular applicant.' 'Such methodology shall include case by case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe.' This grants Member States an option to ignore the individual circumstances and privilege the generalised determination of safety. This is tempered by Article 27(2)(c), which provides that Member States must elaborate rules 'in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.' In addition, in relation to the effective remedy under Article 38(1), Member States are required to provide for rules 'in accordance with their international obligations' on the 'grounds of challenge for a decision' under these provisions.

- Third country agrees to admit the applicant to a fair and efficient determination procedure.

  The only attempt to address this issue in the Directive is in Article 27(3)(b) which requires Member States to provide the applicant with 'a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.' In addition, under Article 27(4) where the third country does not admit the asylum applicant 'to its territory' Member States must admit him/her to a procedure. However, this also fails to guarantee access to an asylum determination procedure in the third country.

- Meaningful link between applicant and third country

Article 27(2)(a) again leaves it to national legislatures to elaborate 'rules requiring a connection between the person seeking asylum and the third country concerned based on which it would be reasonable for that person to go to that country.'

Article 28 deleted

Article 29 Cases of unfounded applications

Article 29 had the original laudable aim of restricting the scope and impact of manifestly unfounded procedures. Thus, Article 29(1) provides that with the

exception of the special procedures for withdrawn or apparently withdrawn applications under Articles 19 and 20, Member States may only consider an application unfounded if the authority has established that the applicant does not qualify for refugee status or complementary protection under the Qualification Directive.[68] However, this is undermined by the range of permissible exceptions under Article 29(2), which essentially refers back to the 15 permissible grounds for accelerating procedures under Article 23(4), discussed above. Member States may consider such applications 'if [they are] so defined under national legislation' as manifestly unfounded.

Article 30 Safe country of origin

Recent practice of certain Member States has illustrated that the safe country of origin principle is often used in a way which amounts to discrimination among refugees in violation of Article 3 of the Refugee Convention, Article 21 EUCFR and Article 26 ICCPR.

Article 30(1) Mandatory list – competence concerns

The Directive creates a procedure to establish a common list of countries which all Member States must treat as 'safe countries of origin'. The Commission originally proposed that Member States should have an option whether to apply the principle in their asylum law, subject to strict safeguards. However, in October 2003 the Council agreed that Member States would be required to apply this principle, at least for a common list of states deemed 'safe'. Many Member States do not currently operate safe country of origin systems. Accordingly, aside from the clear human rights concerns, this is the first time that EU Member States will be required to dilute their standards of protection by a measure of EC law. This raises serious *competence concerns*, as the EU is only entitled to establish 'minimum standards' in this area. In contrast, Article 30(1) states that countries on the common list 'shall be regarded by the Member States' as safe countries of origin. Thus, they are precluded from adopting higher standards in this field. This is the case notwithstanding Article 30B(3), which provides that 'Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept' and the provision of some individual assessment under Article 30(1). While individual Member States may add to the list, they may not subtract from it, even if the human rights situation in a particular country deteriorates.

Article 30(2) Procedural Impropriety

The *procedure* for agreeing this common list is suspect. It is to be determined by the Council by QMV, with mere consultation of the European Parliament. There is a legal impediment to creating such an implementation mechanism, as it is not envisaged in Title IV EC. Rather, what the Treaty envisages in Article 67(5) EC, is that once the Council has adopted 'common rules and basic principles' in relation to asylum procedures by unanimity, further measures in this field *must* be adopted under co-decision. Thus, agreeing the common list by QMV with mere consultation would

[68] Above n 5.

infringe the prerogatives of the European Parliament, and disturb the institutional balance of the Treaty.

Article 30(3) - (6) Removal of countries from the list

Even if the accuracy of the original list could be assumed, human rights situations can change rapidly. The process is not sufficiently receptive to the possibility of deterioration of human rights standards. Where an individual Member State requests the Commission to propose an amendment to the list, that Member State is then temporarily freed of the requirement to treat applications from that country as unfounded. However, until the Commission proposes the formal amendment to the list, and that amendment is agreed by the Council by QMV, other Member States remain obliged to treat the country as safe.

Article 30(2) & Annex II Criteria for determining safety

The most obvious difficulty in drawing up a list is determining whether a country is 'safe'. The complexity of the decision alone may lead to errors. The politicised decision-making process may often lead to foreign policy concerns tainting the objectivity of the assessment. The criteria to establish a safe country of origin are set out in Annex II of the Directive. The main criterion is that there is 'generally and consistently' no 'persecution' (as defined in the Qualification Directive[69]), no torture or inhuman or degrading treatment or punishment; and no threat by reason of indiscriminate violence in situations of international or internal armed conflict. This is to be established on the basis of 'the legal situation, the application of the law within a democratic system and the general political circumstances.' In addition, Annex II sets out 4 non-exhaustive criteria to be taken into account in this analysis:-

(a) the relevant laws and regulations of the country and the manner in which they are applied;

(b) observance of the rights and freedoms laid down in the ECHR and/or the ICCPR and/or the UNCAT, in particular the rights from which derogation cannot be made under Article 15(2) of the said ECHR**;**

(c) respect of the non-refoulement principle according to the Refugee Convention;

(d) provision for a system of effective remedies against violations of these rights and freedoms.

Article 30A Member States Individual 'Safe Country' Designations

Article 30A deals with national designation of safe countries of origin. Under Article 30A(1) Member States may treat additional countries as 'safe' countries of origin, using the criteria set out in Annex II. In derogation from Article 30A(1), Article 30A(2) provides that Member States may maintain in force provisions treating countries as safe (or under Article 30A(3) parts of countries) where it is established merely that persons are generally not subjected to persecution, torture, inhuman or

[69] *Ibid.*

degrading treatment. The only qualification is merely a preambular statement to the effect that 'where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstance, the designation of the country as safe can longer be considered relevant for him/her.'

Article 30B Application of the safe country of origin concept

The Directive does not provide for an adequate examination of whether the particular country is safe for the individual applicant. Under Article 30B(2) all such applications are to be treated as unfounded, provided that it is safe for the particular applicant. However, this is presumed once the applicant is a national of the country. In the case of stateless persons, it is sufficient if the applicant was formerly habitually resident in the country 'of origin'. The entire burden of rebutting this presumption rests on the applicant, who is required in the context of an accelerated procedure, to submit 'serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances in terms of his/her qualification as a refugee.' (Article 30B(1)).

Article 31 deleted

Article 32 deleted

Articles 33, 33A, 34 Subsequent Applications

Article 33(1) gives Member States a choice as to whether to consider 'further representations or a subsequent application' as part of an on-going procedure 'insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.' However, there is no duty to consider subsequent information, no matter how relevant or cogent, which is regrettable in light of the ECtHR and UNCAT Committee case law emphasising the need for flexibility in dealing with late submissions in the cases of victims of trauma and torture.

Article 33(2) allows the establishment of special procedures, where the initial application has been withdrawn or deemed withdrawn or a decision has been taken on the initial application. Most worryingly, this may be applied to decisions which are still open to appeal. Article 33(3) requires a special preliminary examination of subsequent applications, in order to ascertain whether there are 'new elements or findings' relating to whether the applicant is a refugee or in need of complementary protection. Under Article 33(4), where these new elements 'significantly add' to the claim, the application must be examined under the basic procedural guarantees. In other situations, Member States have options as to whether to instigate a further procedure. (Article 33(5)-(7)).

Article 33A

Article 33A allows the special procedure for subsequent applications to be applied in a completely unrelated scenario, namely where 'either intentionally or owing to gross negligence' the applicant 'fails to go to a reception centre or to appear before the competent authorities at a specified time.' This cannot be construed as anything other

than a punitive measure, which is unrelated to the merits of the asylum claim, and thus, an entirely unjustified application of a procedure designed for another purpose.

Article 34 Procedural rules for subsequent applications

The basic procedural guarantees in Article 9(1) apply to the preliminary examination for subsequent applications. However, Member State may introduce additional stricter rules, in the form of obligations to provide new evidence in certain forms or within certain times, or to dispense with the interview. The only safeguard is that such conditions 'must not render access of the applicants for asylum to a new procedure impossible nor result in the effective annulment or severe curtailment of such access.' (Article 34(2)). Article 34(3)(a) requires Member States to inform applicants of the outcome of the preliminary assessment, although not in writing, merely 'in an appropriate manner.' Article 34(3)(b) states that 'if one of the situations referred to in ***Article 33(2)*** applies', the authority shall examine the application in accordance with the basic procedural guarantees. ***This appears to be a drafting error as logically it should refer to Article 33(4), not 33(2).***

Article 35 Border Procedures

Under Article 35(1), '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 the applications made at such locations.' However, the reference to the basic principles in Chapter II is not mandatory, in that under Article 35(2) these may be set aside 'in order to decide, at the border or in transit zones, on the permission to enter their territory of applicants for asylum who have arrived and made an application for asylum at such locations' where such procedures comply with the other safeguards in Article 35(1) and they are 'in accordance with the laws or regulations in force at the time of the adoption of this Directive.' The safeguards for such border procedures are set out in Article 35(3), which provides:
'The procedures referred to in paragraph 2 shall ensure in particular that the persons concerned:

- shall be allowed to remain at the border or transit zones of the Member State, without prejudice to Article 6; and
- must be immediately informed of their rights and obligations, as described in Article 9 (1) (a); and
- have access, if necessary, to the services of an interpreter, as described in Article 9 (1) (b); and
- are interviewed, before the competent authority takes a decision in such procedures, in relation to their application for asylum by persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law, as described in Articles 10 to 12; and
- can consult a legal adviser or counsellor admitted or permitted as such under national law, as described in Article 13 (1); and
- have a representative appointed in the case of unaccompanied minors, as described in Article 15 (1), unless Article 15(2) or (3) applies.

Moreover, in case permission to enter is refused by a competent authority, this competent authority shall state the reasons in fact and in law why his/her application for asylum is considered as unfounded or as inadmissible.'

These provisions in effect provide for detention of asylum-seekers without judicial review and without consideration of individual circumstances for a period of up to four weeks. Article 35(4) provides:

> 'Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 2 is taken within a reasonable time. When a decision has not been taken within *four weeks*, the applicant for asylum shall be granted entry to the territory of the Member State in order for his/her application to be processed in accordance with the other provisions of this Directive.' (emphasis added).

Border procedures generally run counter to the acknowledged necessity of admitting asylum seekers to the territory, in order to carry out a proper asylum process. It defies logic and fairness to treat asylum applicants who apply at the border so differently. The provisions are also perverse in that they create incentives to enter countries illegally, rather than claim asylum at the frontier. They also discourage prompt application. Moreover any attempt to limit state responsibility to applicants at the border will fail, as established norms of international law dictate that states are equally as responsible in such circumstances as they are for applicants in-country.

Article 35(5) provides:

> 'In the event of particular types of arrivals or arrivals involving a large number of third country nationals or stateless persons lodging applications for asylum at the border or in a transit zone, which makes it practically impossible to apply there the provisions of paragraph 1 or the specific procedure set out in paragraphs 2 and 3, those procedures may also be applied where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.'

Article 35A Supersafe third countries in the European region

Article 35A embodies one of the most alarming aspects of the Directive. It provides that Member States may deny access to the procedure to all asylum seekers who arrive 'illegally' from designated countries. The most alarming aspect of these provisions is that they do not require any individual assessment of the safety of the third country for the particular applicant. Chain refoulement and refugees in orbit are the inevitable consequence.

Article 35A(1) Denial of protection

Article 35A(1) refers to the applicant 'seeking to enter or who has entered illegally.' Member States may provide 'no, or no full, examination' of the asylum claim of such persons. A further issue of concern is that this mechanism denigrates protection issues to matters of mere *border control*, effectively allowing illegal entry to determine asylum claims, in contravention of Article 31 of the Refugee Convention.

It is not entirely clear whether the common list of supersafe third countries raises competence concerns. In contrast to the common list of safe countries of origin under

Article 30(1) which requires all Member States to treat such applications as unfounded, under Article 35A(1) Member States are not required, but merely allowed, to refuse examination of such claims. However, to complicate matters, Article 35A(3) refers to the common list of countries 'that shall be regarded as safe for the purposes of [Article 35A(1)].' Reading the two provisions together, it appears that Member States are still implicitly permitted to apply higher standards, so the minimum standards competence of the EC under Title IV is not exceeded.

Article 35A(3) Procedure for agreeing common list

The procedure for agreeing this common list is suspect. It is to be determined by the Council by QMV, with mere consultation of the European Parliament. As is the case with regard to the common list of safe countries of origin under Article 30(2). To reiterate, there is a legal impediment to creating such an implementation mechanism, as it is not envisaged in Title IV EC. Rather, the Treaty envisages in Article 67(5) EC that once the Council has adopted 'common rules and basic principles' in relation to asylum procedures by unanimity, further measures in this field *must* be adopted under co-decision. Thus, agreeing the common list by QMV with mere consultation would infringe the prerogatives of the European Parliament, and disturb the institutional balance of the Treaty.

These supersafe third country provisions are subject to even weaker procedural guarantees than those under the normal safe third country procedures under Article 27. Thus, all the concerns about undermining international legal responsibility may be reiterated here. None of the four conditions for transfer are fulfilled by the procedural safeguards under Article 35A:-

- The criteria for the determination of countries as safe must be adequate.

  Article 35A(2) Criteria

  These provisions are grounded on the assumption that countries in the European region may be assumed to be safer than others – 'supersafe'. The criteria are ratification of the Refugee Convention without any geographical limitations; having in place an asylum process and ratification of the ECHR and observing its provisions, including those on effective remedies. The countries potentially at issue, neighbouring the enlarged European Union, include Albania, Belarus, Bulgaria, Croatia, Macedonia, Romania, the Russian Federation, Serbia & Montenegro, Norway, Turkey, Ukraine and Switzerland.

  Many of these countries, although they may have adopted asylum laws, implement them only in a very limited fashion and in effect cannot provide access to a proper procedure. As such, transferring applicants to such countries may amount to a denial of international protection. Indeed, there is much evidence to rebut any generalised assumption of safety in relation to these countries. For example, ECRE provides recent examples in relation to Turkey, the Russian Federation and Bulgaria, indicating a failure to provide

refugee protection.[70] In 2003, Turkey removed two Uzbek asylum seekers, despite a request to suspend deportation from the European Court of Human Rights. Although Turkey is a party to the ECHR and the Refugee Convention, the applicants' asylum arguments were not heeded. The ECtHR will now examine whether the deportations amounted to a violation of Article 3 ECHR. In the Russian Federation, asylum seekers are denied access to the procedure if they are undocumented and may be subsequently removed to third countries which are unsafe. In the case of Bulgaria, the Commission's own accession reports acknowledge serious shortcomings in the asylum system.[71]

- Third country is safe for *individual* applicant and the burden of proof on safety of the third country lies with the country of asylum.

  Under Article 35A(1), there are no safeguards in place and no legal accountability for such decisions leading to a real risk of violation of the obligation of *non-refoulement*. Article 35A(4) merely states that Member States shall lay down 'modalities for implementing [Article 35A(1)] … in accordance with the principle of *non-refoulement* under the [Refugee] Convention including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law.'

- Third country agrees to admit the applicant to a fair and efficient determination procedure.

  The only attempt to address this issue in the Directive is in Article 35A(5)(b) which requires Member States to provide the applicant with 'a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.' In addition, under Article 35A(6) where the third country does not admit the asylum applicant, Member States must admit him/her to a procedure. However, this also fails to guarantee access to an asylum determination procedure in the third country.

- Meaningful link between applicant and third country

  There is no provision for such a guarantee, except as may be provided by individual Member States under the 'modalities' foreseen by Article 35A(4).

4. Withdrawal of Refugee Status

Articles 36 & 37 Withdrawal of refugee status

The provision on withdrawal of refugee status is mandatory, indicating a significant policy shift away from previous practices, which treated refugee status as *de facto* permanent. In contrast, Article 36 provides 'Member States *shall* ensure that an examination may be started to withdraw the refugee status of a particular person when

[70] ECRE *Recommendations to the Justice and Home Affairs Council on the Safe Third Country Concept at its Meeting 22-23 January 2004* (15 January 2004).
[71] European Commission *2003 Regular Report on Bulgaria's Progress towards Accession*, 104-105.

new elements or findings arise indicating that there are reasons to reconsider the validity of his/her refugee status.' The wording is vague, in sharp contrast to the detailed provisions of Article 1C(1)-(4) of the Refugee Convention, which sets out in detail the circumstances in which refugee protection ceases. The wording of Article 36 is unfortunate in that it refers to the 'validity' of refugee status, rather than its cessation due to changed circumstances.

Article 37 sets out the procedures applicable to the withdrawal of refugee status. These are:

- to be informed in writing that the case is being reconsidered and the reasons for such reconsideration (Article 37(1)(a));
- to be given the opportunity to submit reasons why refugee status should not be withdrawn (Article 37(1)(b));
- to receive a reasoned decision in writing (Article 37(2));

If a decision to withdraw is made, Article 37(2) provides that additional procedural guarantees become applicable, including the free legal assistance (subject to all the applicable restrictions under Article 13(2)); access to the file for the legal adviser (again subject to the restrictions under Article 14(1); and the role of UNHCR under Article 21. It is regrettable that these very basic procedural guarantees only become applicable when once the initial decision is taken. This will only increase the likelihood of erroneous first-instance decisions, as legal advice and assistance are not available at the outset. It should be recalled that the decision to withdraw refugee status 'should be as formal as the process for the grant of status, given the stakes for the individual.'[72]

Of even graver concern is the derogation from Article 37(1)-(3) set out in Article 37(4). 'Member States may decide that the refugee status lapses by law in case of cessation under Article 11(1)(a) – (d) of the [Qualification Directive]' or 'if the refugee has unequivocally renounced his/her recognition as a refugee.' In these cases, no procedural guarantees must be respected.

5. Appeals

Articles 38 The right to an effective remedy

The Directive amplifies the current trend towards restricting appeals, and allowing deportation while appeals are pending. Article 38 provides not a right to appeal as such, but rather a 'right to an effective remedy, before a court or tribunal.'

Article 38(1) sets out a range of negative decisions (a) – (e) against which an individual must have 'the right to an effective remedy before a court or tribunal.' Article 38(2) requires Member States to provide for 'time limits and other necessary rules for the applicant to exercise his/her right to an effective remedy' and under

[72] Joan Fitzpatrick and Rafael Bonoan 'Cessation of Refugee Protection' in Erika Feller, Volker Türk and Frances Nicholson *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection* (UNHCR / CUP Cambridge 2003), 491, 515.

Article 38(4) may lay down time limits 'for the court or tribunal to examine the decision of the determining authority.'

Article 38(3) requires Member States 'where appropriate' to adopt rules 'in accordance with their international obligations' dealing with whether the remedy has suspensive effect. The options permitted indicate that very often, the right to remain will be eroded or illusory. Rules should deal with whether 'the remedy … shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome' and 'the possibility of legal remedy or protective measures where the remedy … does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an *ex officio* remedy.' It remains to be see whether the reference to 'in accordance with their international obligations' is sufficient to ensure compliance ECHR case law on the requirements of effective remedies (eg *Jabari v Turkey*[73]; *Hilal v UK*[74]).

Article 38(5) allows applications for the effective remedy to be treated as inadmissible, where the applicant has been granted complementary protection under the Qualification Directive.[75] The claim may be rejected as 'inadmissible or unlikely to succeed on the basis of insufficient interest on the part of the applicant in maintaining the proceedings.'

Article 39(6) allows Member States to lay down rules on the abandonment of applications for an effective remedy.

Article 39 *deleted*

Article 40 *deleted*

[73] Above n 54.
[74] Application No 00045276/99 (6 March 2001) *Hilal v UK* (2001) EHRR 2.
[75] Above n 5.

ANNEX BINDING STANDARDS

Introduction

The main criteria for appraising the Directive are those of human rights law, EU international and regional.[76]

EU human rights 'form an integral part of the general principles of Community law whose observance the [ECJ] ensures. For that purpose, the [ECJ] draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights. The [ECHR] has special significance in that respect. As the [ECJ] has also held, it follows that measures are not acceptable in the Community which are incompatible with observance of human rights thus recognised and guaranteed..'[77] Article 6 TEU provides that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. As such it must respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States. The EU Charter of Fundamental Rights, although non-binding, provides guidance.

Human rights enshrined in international instruments are also relevant. The ECJ has recognised that when EC legislation expressly purports that it is not in violation of an international treaty, failure to comply with that treaty is a ground of invalidity.[78] In the case of the Asylum Procedures Directive, the EC Treaty itself requires that this legislation be 'in accordance with the [Refugee Convention] and other relevant treaties'.[79] The other relevant treaties are, at a minimum, the International Covenant on Civil & Political Rights ('ICCPR'), UN Convention against Torture ('CAT') and naturally the ECHR. The pertinent requirements of each of these instruments are set out in the following sections.

1. Refugee Convention

The *Refugee Convention* is binding on the EC in this area. Article 63(1) EC provides that the Community must act in accordance with the Refugee Convention. This Convention contains the definition of a refugee (Article 1A); the prohibition on *non-refoulement* (Articles 32 and 33) and a prohibition on discrimination (Article 3).

1.1 The Definition of 'Refugee' and *Non-refoulement*

Procedural safeguards are implied by the Refugee Convention's definition of a refugee and in the prohibition of *refoulement*, which require an individualised assessment of whether the applicant has a subjective fear of persecution and whether this fear is objectively well-founded based on her personal narrative which caused her fear and motivated her flight, and the reasons for which she was unwilling or unable to seek her country's protection. The centrality of the concept of 'fear' in both the refugee definition and in the non-refoulement guarantee makes it clear that

[76] For a discussion, see Peers, above n 45.
[77] Case C-299/95 *Kremzow v Austria* [1977] ECR I-2629.
[78] Case C-377/98 *Netherlands v EP and Council* [2001] ECR I-7079.
[79] Article 63(1) EC.

determination procedures must be personal and individual.[80] As the UNHCR Handbook explains '[s]ince fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement of the situation prevailing in the country of origin.'[81] The Handbook then turns to the concept of 'well-founded' fear, and concludes that both subjective and objective elements must be taken into account.[82] While there is considerable academic debate about the correct balance between subjective and objective appraisal,[83] it is undeniable that the Convention requires a personal and individual assessment.

Thus, the procedural requirements inherent in the Refugee Convention are that the decision maker must afford the applicant a hearing, grant her access to a procedure for this purpose, and allow her to remain in the host state for the duration of their procedure. Rejection at the frontier must respect the principle of *non-refoulement* in just the same way as the internal asylum process. 'No other analysis is .. consistent with the terms of Article 33(1).'[84] This is in keeping with general public international approaches to state responsibility, as 'rejection at the frontier will normally fall within the jurisdiction of the State for the purposes of the application of human rights norms. These developments are material to the interpretation of the prohibition of *refoulement* under Article 33(1) of the [Refugee Convention].'[85]

1.2 Procedural Guarantees

Article 16 Refugee Convention provides that in matters pertaining to access to the courts, a refugee must be treated as if she were a national of her state of habitual residence. Where nationals of the state of habitual residence have access to the courts to challenge the validity of administrative action, Article 16 requires that asylum seekers also have such access.[86]

As well as these procedural standards inherent in the express terms of Refugee Convention, the Executive Committee of the Convention also provides in its Conclusions on International Protection ('Excom Conclusions'), authoritative

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[80] Article 1(A)(2) of the Refugee Convention relates to a 'well-founded fear of being persecuted *for reasons of*' one of the five Convention grounds, being race, religion, nationality, political opinion and membership of a particular social group. In contrast, Article 33(1) refers to a threat of persecution '*on account of*' one of the five grounds. On whether these involve different standards see Guy Goodwin-Gill *The Refugee in International Law* (OUP Oxford 1996), 51 and 138-139.

[81] Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1, reedited, Geneva January 1992, UNHCR 1979, para 37.

[82] *Ibid*, para 38.

[83] See, for example, James Hathaway *The Law of Refugee Status* (Butterworths Toronto 1991), Patricia Tuitt *False Images – Law's Construction of the Refugee* (Pluto Press London 1996) 80-83; Costas Douzinas & Ronnie Warrington 'A Well-founded Fear of Justice: Law & Ethics in Postmodernity' in Jerry Leonard (ed) *Legal Studies as Cultural Studies* (SUNY Press New York 1995) 209.

[84] Sir Elihu Lauterpacht & Deniel Bethlehem 'The scope and content of the principle of *non-refoulement*' in Erika Feller, Volker Türk and Frances Nicholson *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection* (UNHCR / CUP Cambridge 2003), 87, 113.

[85] *Ibid* 115.

[86] Pieter Boeles *Fair Immigration Procedures in Europe* (Martinus Nijhoff The Hague 1995).

guidance on the meaning of the Convention. Although not formally binding, they are relevant to the interpretation of the international protection regime. ExCom Conclusions constitute expressions of opinion which are broadly representative of the views of the international community. The specialist knowledge of ExCom and the fact that its Conclusions are taken by consensus add further weight. Of particular relevance are:

- Determination of Refugee Status, No. 8 (XXVIII) (1977)
- The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, No. 30 (XXXIV) (1983)

In addition, the UNHCR Handbook sets out the basic requirements of asylum determinations:

> '(i) The competent official (e.g., immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments. He should be required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.
>
> (ii) The applicant should receive the necessary guidance as to the procedure to be followed.
>
> (iii) There should be a clearly identified authority-wherever possible a single central authority-with responsibility for examining requests for refugee status and taking a decision in the first instance.
>
> (iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
>
> (v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status.
>
> (vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.
>
> (vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.'[87]

In addition, the important principle of granting asylum seekers the benefit of the doubt is also enshrined.

[87] UNHCR Handbook, above n81, para 192.

> 'After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. … [I]t is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.'[88]

1.3 Detention and the Refugee Convention

Article 31 provides as follows:

> '1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.'

One implication of this guarantee is that it is only after an individual's claim to refugee status has been examined that penalties could be imposed. Otherwise a state cannot be sure that it is meeting its obligations under Article 31.[89] Imposing penalties on asylum seekers without regard to the merits of their claims 'will likely also violate the obligation of the State to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction.'[90] This also has procedural implications, in that

> 'effective implementation .. requires concrete steps … In the light of experience and in view of the nature of the obligations laid down in Article 31, States should take the necessary steps to ensure that refugees and asylum seekers within its terms are not subject to penalties. Specifically, States should ensure that refugees benefiting from this provision are promptly identified, that no proceedings or penalties for illegal entry or presence are applied pending the expeditious determination of claims to refugee status and asylum, and that the relevant criteria are interpreted in the light of the applicable international law and standards.'[91]

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[88] *Ibid* para 203.
[89] Guy Goodwin-Gill 'Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention and protection' in Erika Feller, Volker Türk and Frances Nicholson *Refugee Protection in International Law – UNHCR's Global Consultations on International Protection* (UNHCR / CUP Cambridge 2003), 185, 187.
[90] *Ibid.*
[91] *Ibid,* General Consideration No 6, 254.

The UNHCR's Revised Guidelines on Detention of Asylum Seekers (1999)[92] confirm that 'as a general principle, asylum-seekers should not be detained' and that 'the use of detention is, in many instances, contrary to the norms and principles of international law.' The Revised Guidelines also re-affirm the ExCom position that detention is only permissible in exceptional circumstances, when it is reasonable, proportional and necessary in order to attain a limited range of objectives:

> 'If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and / or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.'[93]

Alternatives to detention must always be explored, the choice being 'influenced by an individual assessment of the personal circumstances of the asylum-seeker concerned and prevailing local conditions.'[94] This is particularly important given that detention is employed without justification in many instances. For example, the detention of asylum seekers in order to prevent them absconding is generally not necessary. One empirical study has demonstrated that only 2% of asylum seekers released on bail absconded.[95]

1.4 Cessation of Refugee Protection

Article IC(1) – (4) of the Refugee Convention set out the circumstances in which the Convention ceases to apply to refugees due to a change in *individual circumstances.* These are (i) re-availment of national protection; (ii) re-acquisition of nationality; (iii) acquisition of a new nationality; (iv) re-establishment in the State of origin. Article 1C (5) and (6) deal with cessation due to changed *general circumstances* in the country of origin. Article 1 C (5) states that the Convention ceases to apply if:

> 'He can no longer, because the circumstances in connexion with which he has been recognised a refugee have ceased to exist, continue to refuse himself of the protection of the country of his nationality; provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution to avail himself of the protection of the country of nationality; [or]'

As Article 1c(6) provides:

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[92] UNHCR *Revised Guidelines on Detention of Asylum Seekers* (February 1999).
[93] ExCom Conclusion No 44 (XXXVII) 1986, para b, reaffirmed in Guideline 3 of the *Revised Guidelines.*
[94] *Revised Guidelines*, above n 92, Guideline 4.
[95] Irene Bruegel and Eva Natamba *Maintaining Contact: What happens after detained asylum seekers get bail?* (Social Science Research Papers No 16, South Bank University 2002).

> 'Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; provided that this provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution to avail himself of the protection of the country of his former habitual residence.'

In their recent authoritative analysis of these provisions, Fitzpatrick and Bonoan[96] explain that in terms of procedural guarantees, an individual process is also required for the withdrawal of refugee status. Moreover that process 'should be as formal as the process for the grant of status, given the stakes for the individual.'[97]

2. International Covenant on Civil and Political Rights 1966

The *International Covenant on Civil and Political Rights* is also applicable. All EU Member States have ratified the ICCPR,[98] although not all have recognised the right of individual petition to the Human Rights Committee provided in the Optional Protocol. The ECJ has taken into account the jurisprudence of the Human Rights Committee in its development of EC fundamental rights law.[99]

2.1 *Non-refoulement* under the ICCPR

Like its regional counterpart, the ICCPR entitles the individual to protection against torture and cruel, inhuman or degrading treatment or punishment (Article 7) which entails a *non-refoulement* guarantee. In its General Comment No 20 (1992), the Human Rights Committee explained the implications of Article 7 prohibiting torture or cruel or inhuman or degrading treatment or punishment.[100] In stated, *inter alia*:

> 'In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end.'[101]

The Human Rights Committee has examined the compatibility of expulsion and extradition with Article 7 in several cases.[102] *Chitat v Canada* concerned extradition to the US, which would lead to the possible imposition of the death

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[96] Fitzpatrick and Rafael, above n 72, 491.
[97] *Ibid* 515.
[98] Austria (1978); Belgium (1983); Cyprus (1969); Czech Republic (1993); Denmark (1972); Estonia (1989); Finland (1975); France (1980); Germany (1973); Greece (1997); Hungary (1974); Ireland (2002); Italy (1978); Latvia (1992); Lithuania (1991); Luxembourg (1983); Malta (1990); Netherlands (1978); Poland (1977); Slovakia (1993); Slovenia (1992); Spain (1977); Sweden (1971); United Kingdom (1976).
[99] See, for example, Case C-249/96 *Grant* [1998] ECR I-629.
[100] Human Rights Committee *General Comment 20* HRI/HEN/1/rev.1, 28 July 1994.
[101] *Ibid*, para 9.
[102] For example, Communication No 469/1991 *Chitat v Canada*; Communication No 539/1993 *Cox v Canada*; Communication No 706/1996 *GT v Australia*.

penalty there. The Committee emphasised that 'if a State party extradites a person within its jurisdiction in such circumstances, and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.'[103]

2.2 Fair Procedures & ICCPR

Lawfully present non-citizens also enjoy substantive and procedural protection against removal. Article 13 provides:

> 'An alien lawfully on the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.'

Determinations of the lawfulness of an alien's entry or stay must also be taken in accordance with Article 13.[104] Refugee claimants who receive residency permits pending the determination of their status are protected by Article 13.

Article 14 ICCPR is the general fair procedures guarantee. Article 14(1) provides:

> 'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…'

The Human Rights Committee has adopted a broad view of the scope of Article 14(1), which suggests that it would apply to refugee determination proceedings, though this point has not been directly decided. From the case law of the Committee,[105] it appears that once it can be determined on the merits before a court of law or the executive decision determining the public law right in question is subject to judicial review, Article 14 is applicable. On this analysis, Article 14(1) would have a very broad scope, extending, *inter alia* to all decisions subject to judicial review.[106] In addition, Article 2(3) ICCPR requires states to provide persons whose ICCPR rights are violated with an effective remedy.

2.3 Detention & the ICCPR

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[103] *Ibid* para 14.2.

[104] Human Rights Committee *General Comment 15(27) on the position of aliens under the Covenant* UN doc A/41/40 22 July 1986.

[105] Communication No 236/1987 *VMRB v Canada* (1988); Communication No 654/1995 *Kwame Williams v Canada* (1997) 304 (1998) 5 International Human Rights Reports 601.

[106] Stephen Bailey 'Rights in the Administration of Justice' in David Harris & Sarah Joseph *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press Oxford 1995), 209 at 212.

In *A v Australia*[107] the Human Rights Committee set out criteria on what was required in order to avoid arbitrary detention. It stressed the importance of periodic review of detention in order to assess the cogency of the grounds for detention. It also stated:

> 'the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.'[108]

The Human Rights Committee also stressed the importance of effective remedies, and that reviewing bodies should be empowered to order release from illegal detention.[109]

3. UN Convention Against Torture 1984

The UN Convention Against Torture ('CAT') has been ratified by all 25 EU Member States.[110] The jurisdiction of the UNCAT Committee under Article 22 CAT has been accepted by all the current Member States, bar the United Kingdom, Czech Republic, Malta, Slovakia and Slovenia.

Article 1 defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.' Article 16(1) refers to 'cruel, inhuman or degrading treatment or punishment'. CAT provides a narrower definition of torture than the ECHR 'in respect of both state acquiescence and motivation.'[111] However, although at first reading, the CAT has a narrower definition of torture that is confined to state entities, the UNCAT Committee has interpreted it in a broad and inclusive way, for example to protect from *refoulement* a victim of inter-clan violence in Somalia - a country which lacks any form of effective central government.[112]

CAT includes in Article 3(1) a duty that 'no state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

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[107] Communication No 560/1993 *A v Australia* (1997).
[108] *Ibid* para 9.4.
[109] *Ibid* para 9.5.
[110] Austria (1987); Belgium (1999); Cyprus (1991); Czech Republic (1993); Denmark (1987); Estonia (1991); Finland (1989); France (1987); Germany (1990); Greece (1988); Hungary (1987); Ireland (2002); Italy (1989); Latvia (1992); Lithuania (1996); Luxembourg (1987); Malta (1990); Netherlands (1989) Poland (1989); Slovakia (1993); Slovenia (1993); Spain (1987); Sweden (1987); United Kingdom (1989).
[111] Nicholas Blake & Raza Husain *Immigration, Asylum and Human Rights* (OUP Oxford 2003), 84-85.
[112] Communication No 120/1998 *Elmi v Australia* (25 May 99).

The UNCAT Committee has provided guidance on the nature of the risk assessment exercise under Article 3(1). The Committee stated that the aim of the assessment is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return. The existence of a consistent pattern of gross, flagrant or mass violations of human rights is relevant to this assessment. However, the aim of the determination is to identify whether the individual is personally at risk, additional personal grounds must also exist.[113] Conversely, the absence of a consistent pattern of gross, flagrant or mass human rights violations does not mean that a person cannot be considered to be in danger of being subjected to torture or other treatment prohibited by Article 3 CAT upon return in his specific circumstances.[114]

As regards the standard of risk assessment, it is crucial to note that the risk must simply be 'beyond mere theory or suspicion'. It does not have to meet the test of being highly probable.[115] The risk to which the individual would have to be exposed has been described as 'foreseeable, real and personal'.[116] Thus, it may be argued that the Committee requires a less strict standard to the risk criterion than the ECHR. However, it has also been suggested that these different formulations under the ECHR, ICCPR and CAT may not be material 'particularly as the Human Rights Committee, the European Court of Human Rights and the Committee Against Torture … have all indicated in one form or another that, whenever an issue of *non-refoulement* arises, the circumstances surrounding the case will be subjected to rigorous scrutiny.'[117]

The Committee has also emphasised the skills required by decision-makers, including very accurate and specific knowledge of the political and social situation in the country of origin[118] as well as the ability to understand and evaluate the psychological aspects of the process.[119] Even if the facts adduced by the author are not coherent, this should not be fatal to a claim for protection. The Committee has reiterated the rationale of Article 3 CAT, which requires the authorities to be sure that the individual's safety is not endangered. Accordingly, late submission of claims and lack of corroboration should not be taken as evidence of lack of credibility, and these were

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[113] Communication No 15/1994 *Tahir Houssain Khan v Canada* (18 November 1994) para 12.2; Communication No 103/1998 *SMR & MMR v Sweden* (5 May 1999); Communication No 41/1996 *Kikosi v Sweden* (8 May 1996); Communication No 185/2001 *Chedli Ben Ahmed Karoui v Sweden* (25 May 2002).

[114] Communication No 13/93 *Matumbo v Switzerland* (27 March 1994), para 9.3.; Communication No 144/1999 *AM v Switzerland* (16 February 2001) (2002) 9 International Human Rights Reports 36, para 6.3 and Communication No 137/1999 *GT v Switzerland* (4 June 2000) (2002) International Human Rights Reports 40, para 6.3.

[115] General Comment on the implementation of Art 3, A/53/44, Annex IX, para 6:
'Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However the risk does not have to meet the test of being highly probable.' Affirmed in Communication No 149/1999 *AS v Sweden* (15 February 2001) (2001) 8 International Human Rights Reports 970, para 8.6; Communication No 122/1998 *MRP v Switzerland* (15 February 2001) (2001) 8 International Human Rights Reports 967, para 6.4.

[116] *Ibid.*

[117] Lauterpacht & Bethlehem, above n 84, 161.

[118] Communication No 120/1998 *Sadiq Shek Elmi v Australia* (25 May 1999).

[119] Communication No 101/1997 *Halil Haydin v Sweden* (16 December 1998).

common features of the accounts of victims of torture.[120] Doubts about credibility and unexplained inconsistencies do not diminish the existence of substantial grounds.[121]

The risk of expulsion is not avoided by the grant of a temporary residence permit, where there is no guarantee it will be renewed as long as the risk persists.[122]

4. UN Convention on the Rights of the Child 1989

All EU Member States have ratified the 1989 Convention on the Rights of the Child ('CRC'). The CRC protects the child against discrimination (Article 2.1), provides that in all activities concerning children, the best interests of the child shall be a primary consideration (Article 3.1), guarantees protection in regard to registration and identity (Articles 7, 8), against separation from parents (Article 9), and in regard to family reunion (Article 10).

Separate provision is also made in respect of children as refugees (Article 22). Notwithstanding a number of declarations and reservations, as well as the general nature of some of the obligations assumed, the principle of effectiveness of obligations evidently requires States parties, in legislation on admission and removal and in the implementation of policies, to ensure that the rights of the child are protected and that the best interest of the child standard is upheld.

5. European Convention on Human Rights

The *European Convention of Human Rights* is of particular importance, being both binding on all the Member States, and the pre-eminent source of the EU's own internal fundamental rights standards. Of particular relevance is the ECtHR's case law on *refoulement* under Article 3; effective remedies under Article 13; detention under Article 5 and collective expulsion under Article 4, Protocol 4.

6.1 ECHR *Non-refoulement*

The European Court of Human Rights has detailed the robust procedural standards that must be respected in cases of removal, in order to ensure that there is no substantial risk of treatment in violation of Article 3 ECHR (or indeed Article 4, Protocol 4 on collective expulsions.) The ECtHR's approach is informed by the absolute nature of the Article 3 guarantee and the potential irreversibility of the harm. Whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another country, the responsibility of the State to safeguard him or her against such treatment is engaged in the event of expulsion.[123] The risk assessment requirement in Article 3 has inherent procedural ramifications. In addition, Article 13 ECHR provides everyone whose Convention rights are violated shall have an effective remedy before a national authority.' Once there is an arguable claim of infringement

[120] Communication No 15/1994 *Tahir Houssain Khan v Canada* (18 November 1994) para 12.3.
[121] Communication No 13/93 *Matumbo v Switzerland* (27 March 1994).
[122] Communication No 96/1997 *AD v Netherlands* (24 January 2000), para 7.3.
[123] *Soering v UK* (1989) 11 EHRR 439.

of a Convention right, the guarantee of effective remedies becomes relevant.[124] This section thus focuses on the procedural ramifications of the ECtHR case law on Articles 3 and 13. *TI*[125] makes clear that 'the existence of mechanisms to deal with asylum seekers within the European Union does not displace the guarantees in the Convention.'[126]

The Strasbourg jurisprudence is informed by the desire to ensure that Article 3 is 'practical and effective'.[127] In these circumstances the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.[128] The scope of protection of the ECHR against *refoulement* is thus broader than the Refugee Convention. Non-state agents of persecution can also give rise to Article 3 claims.[129] In *Vilvarajah v UK*[130] the ECtHR set out the general approach to the appraisal of risk in the context of removals. First, it examines the issue in light of all available information, including information obtained of its own motion. Secondly, while its assessment is based primarily on the facts as know and ought to be known by the state, it also takes into account subsequent information. Thirdly, ill-treatment must attain a minimum level of severity if it is to trigger the application of Article 3. A mere possibility of ill-treatment is not sufficient. The ECtHR also held that the availability of judicial review did in principle amount to an effective remedy under Article 13.

On the particular facts of the case, the ECtHR held that the UK's removal of Sri Lankan failed asylum seekers did not breach Article 3. Although there was a possibility of ill-treatment, this was not sufficient to give rise to a breach of Article 3. Again however, the Court emphasises that not only was the general situation in Sri Lanka taken into account, but also the particular situation of the applicants. It noted that there were no special or distinguishing features in their cases that could or ought to have enabled the authorities to foresee that they would be ill-treated on return. This implies that an individualised procedure is an inherent requirement of the risk assessment demanded under Article 3.

Similarly, in *Hatami v Sweden*,[131] the Commission found a violation of Article 3, where the Swedish authorities denied an asylum application on the basis of negative inferences drawn in relation to the applicant's credibility, due to contradictions and inconsistencies in his story. The Commission in contrast noted that the interview which formed the basis for the decision 'lasted less than ten minutes with interpretation provided over the telephone' and the report thereon was 'of one page and does not explain or set out in any detail the applicant's situation.' Furthermore, the contents of the report were not explained to the applicant who could not read the language used. The Swedish authorities also doubted aspects of the applicant's claim due to the vagueness of his description of the ill-treatment he suffered in detention in his country of origin, and his failure to mention this upon arrival. Again here the

[124] Application No 00044599/98 *Bensaid v UK* 6 February 2001, [2001] INLR 595.
[125] Application No 43844/98 *TI v UK* (7 March 2000).
[126] Colin Harvey 'The Right to Seek Asylum in the European Union' (2004) *European Human Rights Law Review* 17, 22.
[127] *Ibid,* para 88.
[128] Above n 49.
[129] *Ahmed v Austria* (1997) 24 EHHR 278; *HLR v France* (1998) 26 EHRR 29.
[130] (1992) 14 EHRR 248.
[131] Application No 32448/96 *Hatami v Sweden* (23 April 1988).

Commission stressed that 'no reliable information' could be deduced from the original peremptory interview[132] and that subsequent evidence did substantiate the applicant's claim. Of particular note is the fact that the Commission stated explicitly that 'complete accuracy [was] seldom to be expected by victims of torture'.[133]

Jabari v Turkey[134] is of particular relevance to the issue of expedited procedures. In that case, Turkey had refused to grant temporary residence to the applicant (as a non-European asylum seeker) due to her failure to comply with a five-day requirement under the pertinent national regulations and had failed to make an application on arrival. The Court held that the 'automatic and mechanical application of such a short time-limit for submitting an asylum claim must be considered at variance with the protection of the fundamental value embodied in Article 3.'[135] The national court had failed to examine the substantive aspect of her claim. Given that there was general and particular evidence of risk, the Court found a breach of Article 3. An Article 13 violation was also found, due to the failure to provide a forum for the examination of the substantive issues underlying the alleged potential violation of Article 3, and the lack of suspensive effect of the available court procedures.

Similar sensitivity to the difficulties asylum seekers may experience in recounting their experiences is evident in *Bahaddar v Netherlands*.[136] In considering whether domestic remedies were exhausted (in particular whether the remedies were genuinely available) the ECtHR noted that time limits must not be so short, or applied so inflexibly, as to deny an asylum applicant a realistic opportunity to prove his or her claim, in light of the sensitive nature of the determination.[137]

The ECtHR has also clarified the point at which duties arise, namely as soon as an individual seeks admission, provided he/she is within the state's jurisdiction. Accordingly, border applications are also included. Thus, for example, in *Nsona v Netherlands*[138] the ECtHR confirmed that while the Netherlands authorities were entitled to refuse access to the country, such refusal had to comply with the obligations of the state under the Convention. On the facts, the manner in which the removal was effected did not amount to 'inhuman and degrading treatment.'

In addition, in *TI v UK*[139] the court held that 'indirect removal .. to an intermediary country, which is also a Contracting State, [did] not affect the responsibility of the State to ensure that the applicant is not, as a result of the decision to expel, exposed to treatment contrary to Article 3.' The UK sought to remove the applicant, a Sri Lankan asylum seeker, to Germany under the Dublin Convention arrangements. However, there was a risk of chain *refoulement*, as a deportation order had already been issued by Germany having been refused asylum there. In determining that the UK was permitted to send the applicant to Germany, the ECtHR relied on the fact that he would be entitled to make a fresh asylum application there, and that these

[132] *Ibid* para 104.
[133] *Ibid* para 106.
[134] Above n 54.
[135] *Ibid* para 40.
[136] Application No 145/1996 *Bahaddar v Netherlands* (19 February 1998).
[137] *Ibid,* para 45.
[138] Application No 23366/94 *Nsona v Netherlands* (28 November 1996).
[139] Above n 72.

proceedings would provide effective protection of the applicant's Article 3 rights. It is particularly noteworthy that the ECHR's decision was based on an in-depth appraisal of the procedures applicable in Germany and assurances that the applicant's case would be re-examined. Although there remained a possibility that the second application would be refused, this was neither sufficiently concrete nor determinate to amount to a real risk of *refoulement*. In addition, in assessing the applicant's Article 13 claim, the Court noted the practice of the English courts to carefully review Dublin Convention removals in light of divergences in national asylum laws and practices. In light of the existence of this safeguard, the Court found compliance with Article 13. The case clearly illustrates that transfers to third countries, where such safeguards are not in place, are not compatible with the ECHR.

Applicants will not succeed in their Article 3 claims where they fail to raise sufficient evidence. Thus, for example, in *HLR v France*[140] it was found that there was no risk of treatment in breach of Article 3, where the applicant failed to provide evidence, either general or particular, of the likelihood of such treatment. Similarly, in *Mamatkulov v Turkey*[141] the ECtHR held that although there was evidence of breaches of Article 3 in the country of origin, Uzbekistan, there was no evidence of a particular risk faced by the individual applicant. Again in *Venkadajalasarma v The Netherlands*[142] the Court found the deportation of Ski Lankan Tamils permissible, in light of the generally improved situation in that country, and the particular applicant's relatively 'low-level' activities in the dissident group. In *Cruz Varas v Sweden*[143] the Court found no risk of infringement of Article 3 in the removal of a failed asylum seeker to Chile in light of the changed general circumstances there and the very considerable delay (18 months) in providing details to the Swedish authorities of his alleged ill-treatment in Chile. Again, however, in that case, the Court emphasised the 'thorough examination' by authorities with 'particular knowledge and experience' of the applicant's claim.

In *Chahal v UK*[144] the Court emphasised the importance of effective remedies in Article 3 cases.

> 'Given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.'[145]

Although this did not necessarily require court proceedings, where a non-judicial body is at issue, its role will be carefully examined to ensure that it can determine the legality of the deportation on the basis of the Article 3 risk assessment. In the circumstances, an Article 13 violation was established Chahal was not entitled to legal representation before the decision-making body, he was only provided with an outline of the basis for the body's report and its decision was non-binding and confidential.

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[140] *HLR v France* (1998) 26 EHRR 29.
[141] Application Nos 00046827/99 and 00046951/99 (6 February 2003).
[142] Application No 00058510/00 (17 February 2004).
[143] (1992) 14 EHRR 1.
[144] Above n 49.
[145] *Ibid* para 151.

6.2 Suspensory Appeal

ECtHR case law on the requirements of effective remedies clarifies that appeals must have suspensory effect. In *Jabari v Turkey*[146] an Article 13 violation was found where the applicant was refused asylum on procedural grounds. The only domestic remedy available was judicial review. However, this entitled the applicant neither to suspend the application of the deportation order nor to have her substantive claim of a risk of Article 3 violation examined. The ECtHR reiterated the robust nature of the Article 13 guarantee in this context, requiring 'independent and rigorous scrutiny' of the substantive claim *and* 'the possibility of suspending the implementation of the measure impugned.'[147] Similarly in *Hilal v UK*[148] the Court reiterated the rigorous Article 13 standards, requiring 'the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and grant some relief', a remedy that was effective 'in practice as well as in law.'[149]

Conka v Belgium [150] clarifies that suspensive effect is required not only in Article 3 cases, but also where other Convention guarantees are potentially infringed. The case concerned a violation of the prohibition of collective expulsion under Article 4, Protocol 4. The ECtHR stated that it was incompatible with Article 13 for the authorities to execute decisions incompatible with the Convention, whose effects were potentially irreversible, before compatibility with the Convention has been examined.[151] The Court examined the limited availability of the remedy of suspending deportation and found it in violation of Article 13.[152] Secondly, Article 13 required guarantees, not mere 'statements of intent' or 'practical arrangements' with regard to stays of deportation. Accordingly, a system which did not provide secure legal assurances that deportation would not take place, could not be regarded as embodying the rule of law.[153] The Court rejected the state's arguments based on administrative convenience or judicial economy.[154]

6.3 ECHR Detention

Article 5(1) ECHR sets out the right to liberty and the exhaustive circumstances in which it can be limited. If detention is to be compatible with the Convention, it must be 'in accordance with a procedure prescribed by law.' The grounds of permissible detention set out exhaustively in Article 5. In *Conka v Belgium*[155] the ECtHR clarified that detention under Article 5(1)(f) does not require that the detention be reasonably necessary, merely that it is being taken with a view to deportation.[156] The Court emphasised that the list of exceptions to the right to liberty in Article 5 was exhaustive and that these were to be interpreted restrictively. In light of this

[146] Above n 70.
[147] *Ibid* para 50.
[148] Application No 00045276/99 (6 March 2001) (2001) EHRR 2.
[149] *Ibid* para 75.
[150] Application No 51564/99 (5 February 2001) (2002) 34 EHRR 54.
[151] *Ibid* para 79.
[152] *Ibid* para 82.
[153] *Ibid* para 83.
[154] *Ibid* para 84.
[155] (2002) 34 EHRR 54.
[156] *Ibid* para 38, citing *Chahal* (above n 49) para 112.

proposition, it is doubtful whether any system of widespread detention of asylum seekers is permissible, as it could not be regarded as necessarily 'in contemplation of deportation.' Until the individual examination of the individual's claim has been carried out, the state cannot reasonably maintain that it is contemplating her deportation.

The requirement of legality has substantive implications. It means that the law must lay down the procedures for that specific type of detention; these procedures must be followed in the particular case; the procedures themselves must be compatible with the Convention; and, the law must be accessible to those affected by it and sufficiently precise so that the implications of its application are foreseeable.[157]

In *Amuur v France*[158] the ECtHR held that where national law authorises a deprivation of liberty it must be sufficiently accessible and precise in order to avoid all risks of arbitrariness. In that case, the applicants were detained in the international zone of a French airport, on the basis of vague provision of national legislation and an unpublished circular. The ECtHR found that neither provision constituted a 'law' of sufficient 'quality' such as to avoid arbitrariness.[159] In *Conka v Belgium*[160] the manner in which arrest and detention were carried out (by trickery) was sufficient to compromise legality. The detention here was unlawful as it was brought about by a ruse – the asylum seekers were invited to the police station in order to complete their applications.[161] The requirement of legality had to be 'reflected in the reliability of communications…, irrespective of whether the recipients are lawfully present in the country or not.'[162] As regards Article 5(4) access to justice, the ECtHR found that the applicants were prevented from making any 'meaningful appeal' to the domestic court[163] due to time constraints and a delay in contacting the applicants' lawyer.[164] In *Shamsa v Poland*[165] the ECtHR emphasised the basic requirement of legal certainty which applied in the context of detention, requiring that the conditions governing deprivations of liberty is sufficiently precise and predictable.[166] As the detention was not the result of an explicit decision specifying its nature and duration, it could not be regarded as fulfilling this requirement.

The ECtHR also guards the integrity of the Refugee Convention. Thus, in *Amuur*, it also stated that 'States' legitimate concern to foil the increasingly frequent attempts to get around immigration restrictions must not deprive asylum seekers of the protection afforded by these Conventions' being the ECHR *and* the Refugee Convention.[167] As regards the requirement of effective protection, the ECtHR stated:

> 'Although by force of the circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its

[157] Harvey, above n 126, 29.
[158] Application No 19776/97 (25 June 1996).
[159] *Ibid* para 53.
[160] (2002) 34 EHRR 54.
[161] *Ibid* para 41.
[162] *Ibid* para 42.
[163] *Ibid* para 55.
[164] *Ibid* paras 45-46.
[165] Applications Nos 00045355/99 and 00045357/99 (27 November 2003).
[166] *Ibid* para 49.
[167] *Ibid* para 43.

> prolongation requires speedy reviews by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum seeker of the right to gain effective access to the procedure for determining refugee status.'[168]

Thus, effective protection required not only speedy judicial review, but also access to a proper asylum procedure. As Harvey puts it,

> 'The Court attached significance to the plight of asylum seekers. It took their particular problems into account, both in its assessment of the applicability of Article 5(1), and its substantive judgment on compatibility. This is reflected in its focus on the right to effective access to a determination process. The right is a vital aspect of refugee protection and one which the Court recognised as significant. The Court acknowledged how states might try to avoid their Convention obligations by creating lawless spaces. It was alive to the problem and addressed it in this judgment.'[169]

In *Chahal v UK*[170] the duration of permissible detention pending deportation was considered. In light of the very exceptional nature of the applicant's case, it was held that his prolonged detention was not excessive. However, the substantive requirement of lawfulness was violated on the facts. Mr Chahal argued his detention on national security was arbitrary in that the domestic courts were not in a position to review the underlying basis of this determination by the relevant government minister. In this respect, the ECtHR stressed the existence of the 'advisory panel' procedure, whereby 'experienced judicial figures' reviewed the evidence for the national security decision, so that the procedure could not be regarded as 'arbitrary'. It did however constitute a violation of Article 5(4) ECHR, which provides that anyone deprived of his liberty 'shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if not lawful.' The Article 5(4) violation arose as Chahal was not entitled to legal representation before the advisory panel; he was only provided with an outline of the basis for the report; the panel's decision was non-binding and confidential.

6.4 Synthesis of ECHR Requirements

From this ECtHR case law, the following principles may be derived:-

- Article 13 ECHR applies once there is an arguable case that an ECHR right has been breached. There is no need to show an actual violation of another right.
- Article 3 ECHR applies where there are substantial grounds for believing that the person, if returned, faces a real risk of torture or inhuman or degrading treatment or punishment.

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[168] *Ibid*.
[169] Harvey, above n 126, 31.
[170] Above n 49.

- The ill-treatment must attain a minimum level of severity if it is to trigger the application of Article 3.
- The must be a thorough examination of the applicant's individual circumstances and the general situation prevailing in the country of return in order to assess the risk of treatment contrary to Article 3 on return.
- The examination need not be conducted by a court, but the decision-making body must be independent.
- Other factors in relation to the body that are pertinent are whether legal representation is possible and the binding nature of its determinations.
- The risk assessment must be based on all available evidence at the time of purported deportation.
- In carrying out the risk assessment, the applicant's conduct (such as whether he/she poses a security risk) is irrelevant.
- The particular circumstances and vulnerabilities of the applicant must be taken into account. Accordingly, the authorities must not overemphasise the significance of inaccuracies or inconsistencies in his/her account in drawing negative credibility inferences. In addition, proper translation must be provided.
- Asylum seekers generally, and victims of torture in particular, cannot to be expected to provide immediate, fully coherent accounts.
- The mechanistic application of time limits is inappropriate.
- The body's decisions must have suspensive effect.
- Detention of asylum seekers is only permitted in contemplation of deportation, and must comply with substantive conditions of legality.

6. Customary International Law on *Non- Refoulement*

The Community legislature must also respect norms of customary international law.[171] *A fortiori*, norms of *jus cogens* such as *non-refoulement* must be accorded primacy.[172]

Jus cogens refers to peremptory norms, which protect the interests of the world community and the very essence of the international legal system, which cannot be departed from. In 1989, ExCom concluded that all states were bound to refrain from *refoulement*, as such conduct was 'contrary to fundamental prohibitions against these practices' *jus cogens*'.[173] In the 1984 Cartagena Declaration, a group of central and south American states agreed that *non-refoulement* 'is imperative in regard to refugees and in the present state of international law should be regarded and observed as *jus cogens*.'[174]

A recent authoritative examination of the scope and content of non-refoulement in customary international law concluded that the principle could be expressed as follows:

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[171] Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019; Case C-162/96 *Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-3655.
[172] For a discussion, see Jean Allain 'The *jus cogens* nature of non-refoulement' (2002) *International Journal of Refugee Law* 533.
[173] ExCom Conclusion No 55 'General Conclusion on International Protection' (1989), para (d).
[174] UNHCR Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons: Regional Instruments (1995), 206, para 5.

> 'No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.'[175]

Observance of this rule requires not only that recognised refugees should not be returned to peril, but also that asylum seekers be admitted to an asylum determination procedure in order to be given an opportunity to explain this case. It applies to asylum seekers at the border and in country. As such, it entails inherent procedural obligations. Where procedures are inadequate, they can themselves be considered to be in violation of the fundamental norm of *non-refoulement.*

7. EU Human Rights Law

In addition, the *EU*'s own internal *human rights standards* are binding on the EU's legislature. Accordingly, any aspects of the Directive that fail to comply with these standards should be annulled. These standards are currently part of the general principles of Community law, being judge-made principles inspired by the constitutional traditions common to the Member States and relevant international human rights law, in particular the ECHR. In key areas, in particular in relation to the right of access to justice, the EU internal standards are higher than those of international law, and appropriately so.

The *EU Charter of Fundamental Rights* ('EUCFR') is also a pertinent to determining the content of EU human rights law. Although currently non-binding,[176] it represents a synthesis of existing EU protections. As such, it is referred to in this paper in order to elucidate the *current* standards of EU fundamental rights protection. Although the ECJ has yet to refer to the Charter in a judgement, it has been cited by several Advocates General[177] and by the Court of First Instance.[178] As described by

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[175] Lauterpacht & Bethlehem, above n 84, 163.

[176] The instrument was then solemnly declared at Nice, rather than given legal status in the Treaties. The subsequent Convention on the Future of Europe ('CFE'), which deliberated from February 2002 to July 2003, was charged with considering the Charter's legal status. A specific Working Group of the CFE was established to examine the Charter and accession to the ECHR. While it did not alter the Charter's substantive provisions, the so-called 'horizontal clauses' that purport to clarify the legal scope and effects of the instrument, were revised.

[177] AG Alber, Case C-340/99 *TNT Traco* [2001] ECR I-4109; AG Tizzano, Case C-173/99 *BECTU* [2001] ECR I-4881*;* AG Mischo Cases C-122/99 and 125/99 D v Council [2001] ECR I4319; AG Jacobs Case C-270/99 *PZ v EP* [2001] ECR I-9197; AG Stix-Hackl Case C-49/00 *Commission v Italy* [2001] ECR I-8575; AG Jacobs Case C-377/98 *Netherlands v Council* above n14; AG Geelhoed Case C-413/99 *Baumbast* [2002] ECR I-7091; AG Leger Case C-309/99 *Wouters* [2002] ECR I-1577; AG Leger Case C-353/99 *Hautala* [2001] ECR I-9565; AG Geelhoed Case C-313/99 *Mulligan* [2002] ECR I-5719; AG Stix-Hackl Case C-131/00 *Nilsson* [2001] ECR I-10165; AG Stix-Hackl Case C-60/00 *Carpenter* [2002] ECR I-5719; AG Stix-Hackl Case C-459/99 *MRAX* [2002] ECR I-6279; AG Mischo Case C-20/00 *Booker* [2003] ECR CHECK; AG Stix-Hackl Case C-210/00 *Kaserei* [2002] ECR I-6453; AG Colomer Case C-208/00 *Uberseering* [2002] ECR I-9919; AG Geelhoed Case C-224/98 *D'Hoop* [2002] ECR I-6191; AG Jacobs Case C-5-/00P *UPA* [2002] ECR I-6677; AG Jacobs C-206/01 *Gemo;* AG Jacobs C-112/01 *Schmidberger;* AG Colomer Case C-466/00 *Kaba*; AG Geelhoed Case C-491/01 *BAT;* AG Colomer C-187/01*Gozutok*; AG Geelhoed Case C-63/01 *Evans*; AG Stix-Hackl Case C-34-38/01 *Enirisorse*; AG Tizzano Case C-138/01 *Neukomm*; AG Geelhoed Case C-25/02 *Rinke*; AG

one of their number, 'Some Advocates General, within the Court of Justice and without ignoring that the Charter does not have any *autonomous* binding effect, have nevertheless emphasised its clear purpose of service as a substantive point of reference for all those involved in the Community context.'[179] AG Mischo described the Charter as the embodiment of 'the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed in the Community legal order.'[180]

The synthetic nature of the EUCFR is reflected in its final provisions, which aim to ensure that it maintains interpretative harmony with its sources - EU law[181] the ECHR[182] and indeed, most controversially, national constitutional standards.[183] The general provisions also limit the Charter, by providing that it is principally addressed to the Union's institutions[184] and does not create any new competences for the EU.[185] The Convention of the Future of Europe added three new provisions which each aim to clarify the limited scope of the Charter and its links with existing instruments.[186]

Colomer Case C-204/00 *Aalborg Cement*; AG Colomer Case C-205/00 *Irish Cement*; AG Colomer Case C-213/00 *Italcementi*; AG Colomer Case C-217/00 *Bozzi Unichem*; AG Colomer Case C-219/00 *Cementir*; AG Geelhoed Case C-256/01 *Allonby*; Case C-165/01 *Betreibsrat*; AG Colomer Case C-117/01 *KB*.

[178] Case T-54/99 *Max Mobil* [2002] ECR II-729; Case T-177/01 *Jego-Quere* [2002] ECR II-2365; Case T-211/02 *Tideland Signals* [2002] ECR II-3781; Cases T-377/00, T-379/00, T-260/01 and T-272/01 *Philip Morris* [2003] 1 CMLR 21.

[179] *Kaba*, Opinion footnote 74.

[180] *Booker Aquaculture*, Opinion, para 126.

[181] Article 52(2) provides:

'Rights recognised in this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.'

[182] Article 52(3) provides:

'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

[183] Article 53 provides:

'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the [ECHR] and by the Member States' constitutions.

For a detailed analysis of Article 53, see Jonas Liisberg 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) *CMLRev* 1171; Anne-Marieke Widman 'Article 53: Undermining the Impact of the Charter of Fundamental Rights' (2002) *Colum J Eur L* 342.

[184] Article 51(1) provides:

'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.'

[185] Article 51(2) provides:

'This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined in the Treaties.'

[186] Article 52(4) provides:

'Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.'

Article 52(5) draws a distinction in terms of justiciability between principles / rights:

'The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.'

The CFE added a potentially significant preambular change to the Charter, such that it now provides that 'the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter.' It should be noted however that the Explanations have themselves been amended considerably since the Praesidium draft, the current version dating from 9 July 2003.[187] The elaborate provisions of the EUCFR provide useful clarification of the scope of certain pertinent rights and obligations.

7.1 Right to Asylum & *Non-refoulement* in EU Law

Particularly relevant in clarifying the scope of the general principles of EU law are the following provisions.

Article 18 EUCFR contains the 'right to asylum'. It provides:

> 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Constitution.'

In addition, Article 19 EUCFR deals with protection in the event of removal, expulsion or extradition. It provides:

> '1. Collective expulsions are prohibited.
> 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'

The explanatory note to Article 19 provides that Article 19(1) has the same meaning and scope as Article 4 of Protocol No 4 to the ECHR concerning collective expulsion. Its purpose is to guarantee that every decision is based on a specific examination and that no single measure can be taken to expel all persons having the nationality of a particular State. Paragraph 2 is said to incorporate the relevant case law from the European Court of Human Rights regarding Article 3 of the ECHR, including *Ahmed*[188] and *Soering*.[189]

Article 4 provides:

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

Article 52(6) provides:
'Full account shall be taken of national laws and practices as specified in this Charter.'

[187] Updated Explanations relating to the text of the Charter of Fundamental Rights, CONV 828/03, 9 July 2003.

[188] Above n 129.

[189] Above n 123.

The right in Article 4 is the right guaranteed by Article 3 of the ECHR, which has the same wording. By virtue of Article 52(3) of the Charter, it therefore has the same meaning and the same scope as the ECHR Article.

7.2 Fair Procedures / Access to Justice in EU Law

EU law embodies a higher standard of procedural fairness than the ECHR. The right to an effective remedy in Community law is of broader application and greater import than the Article 6 ECHR guarantee. Article 6 ECHR is a fair procedures guarantee that applies only to the determination of civil rights and obligations or criminal charges. The concept of 'determination of civil rights and obligations' is not all encompassing. Thus, for example, in a controversial line of case law, the ECtHR has consistently maintained that Article 6 does not apply to asylum determinations and decisions to expel aliens.[190] However, EC fair procedures guarantees are treated as deriving from EC law's inherent features, namely its effectiveness and uniformity. From this characterisation of the EC law, the ECJ has developed a robust case law on right to a judicial hearing and to an effective remedy,[191] which goes beyond the ECHR in scope (and indeed effect). Thus, for example, the individual who derives a right to protection under the Qualification Directive[192] should be able to invoke a right to a fair hearing as a matter of EC law, even though the ECHR guarantee in Article 6 may be inapplicable to that situation.[193]

This is reflected in the EUCFR provisions on effective remedies and fair procedures. Article 47 EUCFR clarifies the scope of the right to an effective remedy in EU law, namely that it applies in the case of the violation of any right or freedom 'guaranteed by the law of the Union' and that 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.' The Explanatory Notes to the Convention[194] confirm that the EC right to an effective remedy is more extensive than the ECHR[195] in that it applies regarding 'all rights guaranteed by Union law.' Again the Notes confirm that in EU law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law.[196] Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

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[190] See, most recently, Application No 39652/98 *Maaouia v France* (5 October 2000) (2001) 33 EHRR 1037, and the Commission decisions cited in para 35 of the judgment.

[191] For an overview, see for example, Paul Craig and Gráinne de Burca *EU Law – Text, Cases and Materials* (3rd ed, Oxford University Press), chapters 5 & 6; Takis Tridimas *The General Principles of EC Law*, (Oxford University Press, 1999), chapters 7 & 8.

[192] Above n 5.

[193] This was explicitly acknowledged by AG Colomber in Joined Case C-65/95 and C-111/95 *The Queen v Secretary of State for the Home Department, ex parte Mann Singh Shingara and Abbas Radiom* [1997] ECR I-3343. '[T]he doctrine expounded by the Court of Justice has raised the right of citizens to judicial protection to the status of an essential guarantee within the Community legal order. In contrast to the position in relation to Article 6 of the European Human Rights Convention, the requirement of effective judicial protection, in the Community sphere, is not limited merely to "civil rights" but extends to all rights deriving from the provisions of Community law.' Opinion, para 75.

[194] CONV 828/03 41.

[195] Case 222/84 *Johnston* [1986] ECR 1651; Case 222/86 *Heylens* [1987] ECR 4097; Case C-97/91 *Borelli* [1992] ECR I-6313.

[196] Case 294/83 *'Les Verts' v European Parliament* [1986] ECR 1339.

A general principle of EC law requires that Community law be effectively enforced in national courts. This principle 'has close affinity to the fundamental right of judicial protection which is guaranteed by Articles 6(1) and 13 ECHR.'[197] For the most part, case law on the general principle of effective enforcement has focused on the procedures and remedies that must be made available by national courts when issues of Community law are raised before them.[198] However, as is the case with all general principles, it also binds the Community institutions themselves. As such, it has been invoked by the ECJ in determining the meaning of Treaty provisions[199] and may provide the basis for a legal challenge to an EC legislative measure.

The leading case on access to justice is *Johnston v Chief Constable of the RUC*,[200] in which it was held that the requirement of judicial control was described as 'a general principle of law which underlies the constitutional tradition common to the Member States' and which was laid down in Articles 6 and 13 ECHR. Accordingly the Equal Treatment Directive was to be interpreted in light of this principle, such that all individuals were entitled to 'an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment.' Similarly, in *Heylens* the ECJ held that 'the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right.'[201]

Shingara & Radiom[202] illustrates the right to an effective remedy may be invoked to impugn a Community legislative measure. AG Colomer introduced a test redolent of the Article 13 ECHR case law on effective remedies and judicial review. He stated that the requirements of Community law were in principle satisfied by allowing the person concerned to apply for judicial review. However, if judicial review did not provide the opportunity to undertake complete and effective examination of such decisions, including review of their substance, Community law would require such restrictions to be set aside.[203] In addition, the AG examined the restriction on access to justice permitted under the directive. In so doing he examined whether any of the following were permissible, from the Community law standpoint:

- that government decisions affecting the free movement of persons may be excluded from review by the courts?
- that a court hearing an appeal against such government decisions may not be able to examine the substance of such measures?
- that suspension of the operation of such measures, by way of protection inherent in the court proceedings available for review thereof, is either not provided for or is excluded?[204]

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[197] Tridimas, above n 190, 277.
[198] Classic cases in this vein include Case 106/77 *Simmenthal* [1978] ECR 629; Case C-213/89 *Factortame* [1990] ECR I-2433; Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357.
[199] Case 294/83 *Les Verts v Parliament* [1986] ECR 1339; Case C-70/88 *Parliament v Council* [1991] ECR I-4529.
[200] Case 222/84 *Johnston* [1986] ECR 1651.
[201] Case 222/86 *Heylens* [1987] ECR 4097.
[202] Joined Case C-65/95 and C-111/95 *The Queen v Secretary of State for the Home Department, ex parte Mann Singh Shingara and Abbas Radiom* [1997] ECR I-3343.
[203] Opinion, para 94.
[204] Opinion, para 68.

As regards the exclusion of judicial remedies, he stated that 'the minimum permissible standard, according to that case law, necessarily implies that judicial review must be available for acts of the administration which adversely affect rights derived from Community law.'[205] As regard the restrictions on legal remedies in the courts, he stated that the requirement of effectiveness comprised two aspects: there must be no restrictions on the court's examination of the case and it must be in a position to ensure sufficient protection at the appropriate time.[206] In light of these requirements, he argued that effectiveness required that not only the 'formal validity' but also the 'merits' should be subject to judicial control.[207] As regards the non-suspensory effect of the legal remedies, he interpreted the directive as providing the possibility of suspensory effect for an appeal to a court, but not automatically requiring it. He was clear that any rule which withheld any suspensory effect for such appeals would not be compatible with Community law.[208]

Although the ECJ took a different approach,[209] it is submitted that that of the AG is appropriate to the examination of whether the Directive's provisions comply with the general principles of Community law.

6.2 Legal Aid in EU Law

With regard to legal aid, this means that the case law of the ECHR on legal aid under Article 6 ECHR is also applicable in all areas where EU rights are in dispute. Thus the ECHR case law on legal aid under Article 6 is applicable to the Asylum Procedures Directive. This is confirmed by Article 47 EUCFR which provides that 'Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.' It is difficult to imagine a situation where the necessity of legal assistance could be more pressing, given the applicant's unfamiliarity with the procedures and legal system and the seriousness of the determination for the individual.

In addition, the ECHR case law on legal aid is relevant, as it indicates the approach which should be followed in determining the EC right to effective judicial protection. In the landmark decision of *Airey v Ireland*, the ECtHR emphasised that the ECtHR was designed to safeguard the individual 'in a real and practical way'. Due to the absence of civil legal aid, it was held that Ireland had violated Article 6 ECHR. Although the state was not obliged to provide legal aid for each and every case concerning a 'civil right' under Article 6, it was so obliged when 'such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory … or by reason of the complexity of the procedure or of the case.' The ECtHR accepted that the applicant would not have been able to represent herself due to the complexity of the case, and that she was not in a position to secure *pro bono* legal representation.

[205] Opinion, para 79.
[206] Opinion, para 83.
[207] Opinion, para 87.
[208] Opinion, para 103.
[209] Based on the fact that Article 9 sets down only minimum guarantees.

In its subsequent case law, the Court has refined the criteria for assessment of whether legal aid is required under Article 6 ECHR.[210] In *McVicker v UK*,[211] the ECtHR held that there was no Article 6 violation where the applicant was in a position to represent himself in defamation proceedings. Similarly, in *Del Sol v France*,[212] no violation of Article 6 was found legal aid was denied by the Legal Aid Office of the Court of Cassation for lack of an arguable ground of appeal on point of law. Such selection of cases is permissible under Article 6. However, in contrast, in *Aerts*, the Court found a violation of Article 6(1) after noting that by 'refusing the application [for legal aid] on the ground that the appeal did not at that time appear to be well-founded, the Legal Aid Board impaired the very essence of Mr Aerts's right to a tribunal'.[213] Similarly, in *Bertuzzi v France*[214] the applicant established a violation of Article 6 where his legal aid proved meaningless as the lawyers appointed refused to represent him as he was suing a lawyer. The ECtHR stated that 'permitting the applicant to represent himself in proceedings against a legal practitioner did not afford him access to a court under conditions that would secure him the effective enjoyment of equality of arms that is inherent in the concept of a fair trial.' The admissibility decision in *Duyonov v United Kingdom*[215] suggests that legal aid is also required under Article 5(4) of the Convention.

To summarise, Article 6 ECHR requires civil legal aid to be provided where the applicant has insufficient means, and the nature of the case means that legal assistance is required to make access to justice meaningful. In assessing whether this is so, the ECtHR takes into account the complexity of case, the need to ensure equality of arms and the applicant's emotional involvement. Application of these criteria to the asylum determination process leads to the conclusion that in many, if not most instances, free legal aid would be a requirement.

7. EU Institutional Law

Other EU constitutional principles, in particular the principles of limited competence and institutional balance, must also be respected.

7.1 Limited Competence

The EU (or more accurately the European Community) has *limited competence*. It may only act 'within the limits of the powers conferred on it by [the EC Treaty] and of the objectives assigned to it therein' (Article 5 EC). In recent years, the effective delimitation of competences has taken on heightened legal and political significance, with national constitutional courts expressing concern at creeping competence expansion;[216] the ECJ's annulment of the Tobacco Advertising Directive;[217] and the draft Constitutional Treaty's new provisions on competences.

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[210] Application No 00022924/93 *Ait-Mouhoub v France* (28 October 1998); Application No 38199/97 *Patel v United Kingdom* (19 February 2002); Application No 00030308/96 *Faulkner v United Kingdom* (1 December 1998).
[211] Application No 46311/99 *McVicar v UK* (2002) 35 EHRR 22.
[212] Application No 00046800/99 *Del Sol v France* (26 February 2002).
[213] Application No 00025357/94 *Aerts v Belgium* (30 July 1998), para 60.
[214] Application No 00036378/97 *Bertuzzi v France* (13 February 2003).
[215] Application No 36670/97 *Duyonov v United Kingdom* (7 November 2000).
[216] For example the German Constitutional Court in *Brunner v the European Union Treaty* [1994] 1 CMLR 177.

In the asylum field, the Treaty circumscribes the EC's role in terms of form, substance and function. The most significant limitation is that as regards asylum procedures (as well as reception conditions, qualification as refugees and temporary protection) the EC may only enact *minimum standards*. This means that in all aspects of asylum procedures, Member States must remain in a position to offer higher standards. To properly reflect the principle of attributed competence, Member States must retain their capacity to apply higher standards in terms of substantive, procedural and personal scope of protection. That is, the Directive must not preclude them from protecting those who would not receive protection under the EC guarantees, or to grant protection seekers additional substantive and procedural rights to those available under EC law.

The Directive exceeds this competence in a number of key respects, as outlined in Chapter 1. In particular, the provisions for the creation of mandatory common lists of safe countries of origin (Article 30) and possibly supersafe third countries (Article 35A), prevent Member States from treating asylum applications from those countries more favourably, clearly in excess of the EC's competence to establish minimum standards.

7.2 Institutional balance

Institutional balance refers to the cooperative balance between the EU's institutions, as reflected in the Treaty. The ECJ enforces this balance, in particular guarding the prerogatives of the European Parliament.[218] Where the EC Treaty provides legislative procedures which give a role to the European Parliament, these must be followed, and failure to do so will amount to a breach of an essential procedural requirement, and consequently lead to the annulment of the measure.[219] Lenaerts explains this approach as a recognition that '[t]he European Parliament's participation in Community rule-making reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly.'[220]

Where there is a choice of procedures, the one which grants the European Parliament the greatest input must often be employed. Thus for example, in the *Titanium Dioxide* case,[221] the ECJ held that the impugned measure should have been adopted on the basis of the internal market legal base, rather than the environmental policy one, as the former granted the European Parliament greater input. This is not to suggest that such an outcome will always be favoured. The ECJ has rejected Parliament's attempts to invoke it in some cases, where the measure in question clearly falls within the purview of a legal base which provides only limited parliamentary input.[222]

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[217] Case C-376/98 [2000] ECR I-8419.
[218] Case 295/90 *Parliament v Council* [1992] ECR I-4193 (Students' residence directive); Case C-300/89 *Commission v Council* [1991] ECR I-2867 (Titanium Dioxide); Case C-271/94 *Parliament v Council* [1996] ECR I-1689.
[219] Case 138/79 *Roquette Freres v Council* [1980] ECR 3333; Case 139/79 *Maïzena* [1980] ECR 3393.
[220] Koen Lenaerts, Peit Van Nuffel, Robert Bray *Constitutional Law of the European Union* (London Sweet & Maxwell 1999) 441.
[221] Case C-300/89 *Commission v Council* [1991] ECR I-2867 (Titanium Dioxide).
[222] Case 68/86 *United Kingdom v Council* [1988] ECR 855 (Hormones); Case C-180/96 *United Kingdom v Council* [1998] ECR I-2265; Case C-269/97 *Commission v Council* [2000] ECR I-2257

As regards implementation methods, the *Plant Protection Products* case is relevant.[223] The impugned directive established a procedure to authorise discharges of plant protection products into groundwater on a conditional basis. The European Parliament argued that this system undermined the parent directive, which could only be amended by a legislative procedure entailing mandatory consultation of the Parliament. The Council argued that 'the mere fact that an implementing directive is not exhaustive cannot render it illegal.'[224] The ECJ accepted that the Council could not be required to draw up all the details of regulations or directives concerning the CAP according to the primary legislative procedure, but that the 'essential elements' had to be so laid down. Implementing measures had to respect the provisions enacted in the basic directive after consultation of the Parliament.[225] On the facts, the ECJ accepted the Parliament's assertion that the contested directive had modified the scope of the obligations imposed by the basic directive. Accordingly, as it was adopted without following the legislative procedure prescribed by the Treaty, which calls for parliamentary consultation, the impugned directive was annulled.

The Directive in this instance establishes procedures for the adoption of common lists of safe countries of origin and super-safe third countries. As explained in Chapter 1, these procedures violate essential procedural requirements for two reasons. First, Title IV EC establishes particular procedures to elaborate detailed rules. Secondly, the procedures go beyond what is acceptable in an implementation measure.

(Beef Labelling Regulation). For a discussion, see Kieran St C Bradley 'The Institutional Law of the European Union in 2000' (2001) *Yearbook of European Law* 245, 250-252.

[223] Case C-303/94 *Parliament v Council* [1996] ECR I-2943.

[224] Judgment, para 22.

[225] Judgement, para 23, citing Case 46/86 *Romkes v Officier van Justitie for the District of Zwolle* [1987] ECR 2671, para16, and Case C-156/93 *Parliament v Commission* [1995] ECR I-2019, para11.