ILPA Comments
on the Revised Commission Proposal of 1 June 2011 on common procedures for granting and withdrawing international protection status (Recast)
COM(2011) 319 final

5 December 2011

I. Introduction

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

ILPA has already commented on the Original Recast Proposal[1] in September 2010.[2] This set of Comments on the Revised Proposal should be read together with that earlier document. In preparing these Comments, ILPA had the benefit of the ECRE Comments on the Revised Proposal;[3] the Observations of the International Commission of Jurists[4] and the Statewatch Analysis.[5]

The Commission issued the Revised Proposal as the Original Recast Proposal failed to garner sufficient support from national Governments in the Council, despite discussions in the Council for some time, particularly during the Spanish Presidency in 2010. It appears that national Governments raised diverse objections based on the specificities of their own asylum procedures, as well as general concerns to limit procedural rights. Before the Commission issued the Revised Proposal, the European Parliament issued its first reading position in April 2011.[6] While this might lead one to expect that the Revised Proposal

[1] COM(2009) 551 final, Brussels, 21 October 2009.
[2] ILPA Comments on Commission Proposal for a Directive of the European Parliament and Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) COM(2009) 551, 21 October 2009. (16 September 2010). Hereafter 'ILPA (2010)'.
[3] ECRE Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to recast the Asylum Procedures Directive (COM (2011) 319 final), September 2011. Hereafter 'ECRE (2011)'.
[4] International Commission of Jurists, *ICJ Observations on the 2011 Recast Proposal of the Asylum Procedures Directive: Compromising Rights and Procedures*. Hereafter 'ICJ (2011)'.
[5] Steve Peers, *Statewatch Analysis: Revised EU Asylum Proposals 'Lipstick on a Pig'* (Statewatch, London, 2011).
[6] European Parliament *European Parliament legislative resolution of 6 April 2011 on the proposal for a directive of the European Parliament and the Council on minimum standards on procedures in Member States for granting and withdrawing international protection* P7_TA(2011)0136.

would seek to incorporate the views of the Parliament (given that the Directive will ultimately be adopted by the ordinary legislative procedure so affording the Parliament a power of co-decision), instead the Commission gave great sway to the diverse and even idiosyncratic views of national governments. The Commission thereby seems to have diminished its own institutional opportunity to improve procedural standards by forging a compromise between a qualified majority of national Governments and the Parliament.

In the meantime, the Council and Parliament have reached agreement in principle on the Recast Qualification Directive.[7] In addition, the amendment to the Long-Term Residents Directive to include beneficiaries of international protection has been agreed.[8] These legislative developments require more rigorous determination procedures to ensure their effectiveness and consistent application across the EU.

Moreover, since the Original Recast Proposal was adopted, courts have continued to condemn the human rights violations arising out of domestic asylum proceedings. The ruling of the Grand Chamber of the ECtHR in *MSS v Belgium and Greece*[9] reveals egregious procedural and substantive shortcomings. Strasbourg's interim jurisdiction is extremely overburdened and this shows how deficits in procedural protection at the national level lead to prolonged procedures before higher and supranational courts. Strasbourg's being so overburdened prompted an unprecedented statement by the President of the European Court of Human Rights, Jean-Paul Costa, 'reminding both Governments and applicants of the Court's proper but limited role in immigration and asylum matters and emphasising their respective responsibilities to co-operate fully with the Court.'[10] Notably, requests against the UK are the most numerous, with in 2010 'more than 2000 requests' against it.[11]

II. The Role of the UK Government

The UK maintains that it will not opt-in to the Recast Procedures Directive. The latest Ministerial Statement on this matter seems unhelpfully to assume that it is too burdensome to ensure procedural fairness for all asylum seekers 'whether their claims are valid (sic.) or not.'[12] This statement reveals the error at the

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[7] See <register.consilium.europa.eu/pdf/en/11/pe00/pe00050.en11.pdf >, 24 November 2011.
[8] Directive of the European Parliament and Council amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, 16 March 2011.
[9] Application No 30696/09 *MSS v Belgium and Greece* 21 January 2011.
[10] Statement Issued by the President of the European Court of Human Rights concerning *Requests for Interim Measures* (Rule 39 of the Rules of Court) (Press Release and Practice Directive, 11 February 2011).
[11] Cf. 400 against the Netherlands and more than 300 against France. *Ibid,* p. 1.
[12] Written ministerial statement by Damian Green MP, laid in the House of Commons on 13 October 2011. The key statement as regards the Revised Proposal is:
"The amended Procedures Directive would place restrictions on accelerated procedures, and on the making of asylum appeals non-suspensive (where a right of appeal can be exercised out of country only), which would endanger a number of systems that the UK operates to manage straightforward asylum claims effectively- in particular our Detained Fast Track which provides speedy but fair decisions for any asylum seekers whose claims are capable of being decided quickly.

heart of the UK's recourse to special procedures, namely that it assumes that protection needs can be assessed without proper procedures.

Although the Directive will not be binding in the UK, the UK Government appears nonetheless to be taking an active role in seeking to reduce the standards in the Recast. In one position paper, the UK has joined with Germany and France in insisting on broad discretion for accelerated procedures; facilitating the 'effective management of multiple claims'; avoiding the ' "judicialisation"' of first instance procedures and ensuring exceptions to the suspensive effect of appeals.[13] The tone of the note is unfortunate, referring to the prevalence of multiple abusive claims 'hijacking' the asylum system. In contrast, the real picture as portrayed, for instance, in the UNHCR Procedures Directive Study, reveals that repeat applications follow-on all too frequently from faulty accelerated first-instance procedures.[14]

Furthermore the Revised Proposal envisages a role akin to that of the UK's Special Advocate in Article 23(1)(a). As is explored in Part IV below, ILPA joins the ICJ in criticizing this development. [15]

III. General Comments

The main procedural guarantees have been watered down in the Revised Proposal.

- *Exceptions for 'large numbers' of applicants*

Throughout the Revised Proposal, Member States are permitted to dispense with procedural guarantees in the case of arrivals of 'large numbers' of applicants. (Article 6(4) registration; Article 14(1) personal interview by the responsible authority; Article 31(3) six-month target for making asylum determination.) The criterion of a 'large number' is unacceptably vague. Moreover, the particular waivers granted in these cases seem unwarranted. It should of course be borne in mind that the EU has as its disposal the Temporary Protection Directive[16] for cases of mass influx.

- *Communicative guarantees undermined*

Unfortunately, rather than giving us the correct means by which to consider asylum claims effectively and to deter abuse, both Directives subject Member States' asylum systems to unjustified regulation and focus excessively on enhancing the rights of all asylum seekers whether their claims are valid or not. This would have significant cost implications for the UK." See the *ILPA and the AIRE Centre Comments to the UK Border Agency on the draft recast procedures and qualification directives,* December 2009.

[13] Council of the European Union, Note from German, French and United Kingdom delegations, 12168/11, ASILE 54, 27 June 2011

[14] UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice: A UNHCR Study on the application of key provisions of the Asylum Procedures Directive in Selected Member States* (UNHCR, Brussels, March 2010). See further UNHCR *Safe at Last? Law and practice in selected EU Member States with respect to asylum-seekers fleeing indiscriminate violence* (UNHCR, Geneva, July 2011).

[15] See ICJ (2011), p. 12.

[16] Temporary Protection Directive. CITE

The Revised Proposal introduces significant changes to the Original Recast Proposal on the personal interview, transcript and medico-legal reports. In particular, it reduces the transcript requirement to one for a 'thorough report' (Article 17).

- *Legal aid and assistance reduced*

The Revised Proposal significantly dilutes the procedural entitlements concerning legal assistance and aid. It distinguishes between 'legal and procedural information' which is to be free of charge at first instance (Article 19) and legal assistance proper, which need only be free of charge in limited circumstances at the appeal stage (Article 20). In addition, Member States are permitted to arrange provision of legal assistance by bodies lacking the independence characteristic of legal advisers (Articles 21). This does not appear in the current Procedures Directive.

- *Accelerated and border procedures proliferate*

The Revised Proposal extends the grounds for accelerating assessment, and in particular integrates the grounds for acceleration and for border procedures (Article 31(6)), thereby greatly expanding the scope for border procedures to be used to make substantive asylum determinations.

- *Implicitly withdrawn applications rejected and closed*

The Revised Proposal permits the rejection of applications if they are deemed 'implicitly withdrawn' (Article 28), with Member States permitted to set a time-limit after which they may no longer be reopened.

** Presumptions of safety reinforced*

ILPA has repeatedly criticized the rules on safe third country in the Procedures Directive. *MSS v Belgium and Greece*,[17] on Dublin transfers, should have prompted a profound re-think of the use of presumptions of safety generally. The Opinions of the Advocate General in *NS*[18] and *ME*[19] demonstrate that as a matter of EU law there may well be a duty to process particular asylum claims in order to render the right to asylum (Article 18 EUCFR) effective.

Regrettably, the Commission has maintained these provisions in the Revised Proposal *in toto*. It merely makes a vague commitment to a later review of safe third country (STC) rules. Shockingly, in one respect, the procedural safeguards for the so-called European or 'Supersafe Third Country' (SuperSTC) provision have been reduced: The right to an effective remedy no longer applies to them (Article 46(1)(a)(iv)).

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[17] Above n XXX.
[18] Case C-411/10 *NS*, 22 September 2011.
[19] Case C-493/10 *ME*, 22 September 2011.

IV. Legitimising and Transplanting the 'Special Advocate'

Article 23 on the scope of legal assistance maintains the broad discretion to use secret evidence. Article 23(1) reduces the right to access to the file where information is deemed to be sensitive, namely where 'disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection … or the international relations of the Member States would be compromised.' Clearly, these grounds are vague and far too broad, as ILPA previously identified.[20]

The Revised Proposal makes more explicit the reference to a role analogous to the UK's Special Advocate mechanism (Article 23(1)(a)). The Original Proposal referred to access to secret evidence for 'a legal adviser or counselor who has undergone a security check'. The Revised Proposal adds an alternative, to grant access to the secret evidence 'at least, to specialised services of the State that are allowed under national law to represent the applicant for this specific purpose.'

ILPA has particular concerns about this development. Its inclusion in the Revised Proposal appears to be an attempt to legitimise under EU law this most dubious of mechanisms, which potentially undermines the EU commitment to the rule of law and procedural fairness. To appreciate the significance of this move, it is necessary to place it in the context of the intense on-going legal contestation surrounding the role of Special Advocates and the use of secret evidence more generally.[21]

The UK introduced the system of Special Advocates when the European Court of Human Rights ruled that its failure to disclose secret evidence in proceedings violated the European Convention on Human Rights.[22] Over time, the role has been extended to 21 different contexts where, it is claimed, national security precludes the disclosure of evidence to the affected individual.[23] In subsequent cases, some important safeguards have been developed. The Grand Chamber of the European Court of Human Rights has insisted, for example, that to comply with Article 6 of the European Convention on Human Rights, sufficient information must be given to the individual concerned to allow him/her to give effective instructions to the Special Advocate.[24] The Grand Chamber recorded that the use of Special Advocates had "attracted considerable criticism, including from the Appellate Committee of the House of Lords, the House of Commons Constitutional Affairs Committee, the Parliamentary Joint Committee on Human

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[20] See ILPA (2010), p. 20.

[21] For a thorough assessment, see JUSTICE *Secret Evidence* (JUSTICE, London, 2009). For academic analyses, see Adam Tomkins 'National Security and Due Process of Law' (2011) *Current Legal Problems* 1; Aileen Kavanagh 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) *Modern Law Review* 836.

[22] *Chahal v UK*

[23] Joint Committee on Human Rights, 16th Report of 2009-2010, HL 64, HC 395.

[24] *A v UK* (2009) 49 EHRR 29; *Secretary of State for the Home Department v AF* [2009] UKHL 28.

Rights, the Canadian Senate Committee on the Anti-Terrorism Act, and the Council of Europe Commissioner for Human Rights." (Paragraph 199 of the judgment). It recorded that serving Special Advocates had described:

> "…the serious difficulties they faced in representing appellants in closed proceedings due to the prohibition on communication concerning the closed material. In particular, the special advocates pointed to the very limited role they were able to play in closed hearings given the absence of effective instructions from those they represented."

However, as Article 6 of the European Convention on Human Rights does not, at present, apply to them,[25] the UK Courts do not currently impose these disclosure obligations in the asylum and removal context. In the case of *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, the House of Lords found that the Special Immigration Appeals Commission's use of closed material did not deny the appellants their right to a fair hearing. The question is raised by another case currently pending before the Supreme Court.[26] Meanwhile, Mr Othman, whose case was part of the *RB* litigation has taken his case to the European Court of Human Rights. *Othman* (*Abu Qatada*) *v UK* (application 8139/09), raises the question of the use of Special Advocates in deportation proceedings. Justice, Human Rights Watch and Amnesty International are intervenors in the case.

Article 6 ECHR is not the only pertinent guarantee of fair procedures. As EU law applies to asylum proceedings, the general principles of EU law and Article 47 of the Charter of Fundamental Rights of the European Union also apply. The Court of Appeal has referred questions to the Court of Justice to clarify the EU law on this matter.[27] While the reference concerns the deportation of an EU citizen, EU human rights law tends to apply with equal rigour irrespective of the nationality of the individual, the decisive factor being the applicability of EU law to the issue. Moreover, the Luxembourg Court in the *Kadi* litigation saga has insisted upon individuals having access to evidence being relied on against them, with the General Court expressly following the Grand Chamber of the European Court of Human Rights in *A v UK*.[28]

ILPA's objection to Article 23(1)(a) of the Revised Proposal is that it cuts across these developing human rights safeguards as they are described in the jurisprudence of the European Court of Human Rights and of the Court of Justice of the European Communities. On its face, the revised proposal seems to allow Member States to use any such mechanisms 'allowed under national law.' The apparent EU permission to use such procedures may lead to their being transplanted to other EU Member States. Of particular note is the International

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[25] *Maaouia v France*

[26] *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898. .

[27] Reference for a Preliminary Ruling from the Court of Appeal, 17 June 2011. Case C-300/11 *ZZ v Secretary of State for the Home Department* [2011] OJ C252/20.

[28] Joined Cases C-402/05 & C-415/05 P *Kadi and Al Barakaat v Council* [2008] ECR I-6351; Case T-85/09 *Kadi v Commission* [2010] ECR II-0000, paras. 176-177.

Commission of Jurists' assessment that transplanting the Special Advocate Procedure is particularly likely to lead to unfairness, as it depends on 'a strong independent judiciary, and a vigorous, experienced and independent Bar.' The more these institutional supports are absent or weak, the more it is 'a system which has dangers for the rule of law and … may prove to be no more than a façade of justice to what is an inherently unfair procedure.'[29] The Special Advocate procedure has been described as 'predicated on the non-existent Canadian precedent'.[30]

[29] International Commission of Jurists, *Assessing Damage, Urging Action Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (ICJ, Geneva, 2009), p. 99.
[30] Audrey Macklin 'Transjudicial Conversations about Security and Human Rights' *CEPS Special Report*, March 2009, p. 13.

V. Detailed Analysis and Critique

Responsible Authorities

Article 4 – Responsible Authorities

ILPA regrets the reinstatement of Member State discretion to have a body other than the designated responsible authority decide border procedures. In addition, the training requirement for staff of the determining authority has been diminished in that under Article 4(3) follow-up training need only be provided 'where relevant.' The Original Recast Proposal contained a detailed list of the contents of training, which has now been omitted in favour of a reference to the European Asylum Support Office regulation[31], which is less detailed in this regard. As ECRE recommends, reference to training in the crucial matter of evidential assessment and the benefit of the doubt in asylum determinations ought to be included.[32]

ILPA also regrets that in spite of the ruling of the European Court of Human Rights in *MSS v Belgium and Greece*,[33] which asserts the need for careful scrutiny of the risks involved in Dublin transfers, Member States may still leave it to other bodies to undertake Dublin determinations.

Minimum Standards

Article 78 of the Treaty on the Functioning of the European Union now requires the adoption of 'common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status.' The title of the Revised Proposal refers to 'common procedures.' However, as ILPA has previously explained, in this field it is important that Member States retain leeway to adopt higher domestic standards to comply with their own domestic constitutional guarantees and international human rights obligations. Accordingly, ILPA welcomes the clarification that the Revised Proposal still establishes only minimum standards (Article 5). While the Preamble no longer refers to 'a minimum framework for the application of the [Qualification Directive]' but instead describes the main purpose of the Directive as 'to further develop the standards for [asylum] procedures', Article 5 is determinative of this issue.

Basic Procedural Guarantees

Article 6 – access to the procedure

While the Original Recast Proposal referred to the 'right' to make an application for asylum (Article 6(2)), the revised proposal refers to having an 'effective opportunity' to do so. The most significant proposed change is in Article 6(4),

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[31] Parliament and Council Regulation No 439/2010 establishing a European Asylum Support Office [2010] OJ L132/11.
[32] ECRE (2011), p. 7.
[33] Application No 30696/09 *MSS v Belgium and Greece* 21 January 2011.

which creates an exception where a 'large number' of requests for international protection are 'simultaneously' made. In such cases, the deadline for the registration of such claims may be extended from 72 hours to seven working days. These criteria are unacceptably vague, and in any event, the 72 hour period would seem to be ample for registration even in cases of large influxes. The Revised Proposal also waters down the quite sensible requirement in Article 6(5). The Original Recast Proposal stated that authorities 'likely to be addressed' by protection seekers should be 'able to advise … how and where … [to] make such an application' and that Member States 'may require these authorities to forward the application to the competent authority.' The Revised Proposal omits this requirement, and instead simply states that 'Member States shall ensure that the personnel of authorities likely to receive such declarations has relevant instructions and receives the necessary training.' (Article 6(3)(2)).

Article 7 - Applications made on behalf of dependents or minors

The right of minors to apply for asylum needs amplification in light of the UN Convention on the Rights of the Child. In addition, ECRE points out a potential pitfall in allowing 'representatives' of minors to make applications on their behalf, in light of the fact that the Revised Proposal no longer requires such representatives to be impartial, as was required under Article 21(1)(a) of the Original Recast Proposal.[34]

Article 8 – Information and counseling at border crossing points and in detention facilities

This provision has been significantly weakened. In particular, Article 8(2) no longer allows organisations providing advice and counseling to have access to detention facilities, although it is contained in the Revised Reception Conditions Proposal.[35]

Article 9 – Right to remain in the Member State pending the examination of the application

Article 9(2) also refers to exceptions where the person seeking protection is being extradited or surrendered under the European Arrest Warrant. The safeguard envisaged in Article 9(3) is that 'an extradition decision will not result in direct or indirect *refoulement* in violation of international obligations of the Member States.' ILPA urges that this provision be amended to clarify that it applies to all the decisions under Article 9(2), including surrender under the European Arrest Warrant.

Article 12 – Guarantees for applicants for international protection

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[34] ECRE (2011), p. 10. See the Fundamental Rights Agency *Separated, asylum-seeking children in European Union Member States: Comparative Report* (2011).

[35] Amended Proposal for a Directive of the European Parliament and Council laying down standards for the reception of asylum seekers COM(2011) 320 final, 1 June 2011. Article 10(4).

The Revised Proposal reiterates the existing notion that information should be provided in the language the asylum seeker understands or 'may reasonably be supposed to understand.' The maintenance of this standard in light of evidence of the dangers of initial miscommunication is regrettable.[36]

Article 14 – Personal interview

As observed at the outset, the Revised Proposal introduces a new exception where there are a 'large number' of simultaneous applications. In such instances, personnel of 'another authority' may temporarily be involved in conducting interviews. The additional safeguard in Article 2(b) where interviews are dispensed with due to incapacity is undermined by the fact that it is only when 'in doubt' that the '[T]he determining authority shall consult a medical expert to establish whether the condition that makes the applicant unfit or unable to be interviewed is temporary or permanent.'

Article 15 – Requirements for a personal interview

ECRE identifies two improvements in the Revised Proposal, namely that both the personal and general circumstances of the applicant are to be taken into account, in the preparation for the interview and the interview itself. Both sexual identity and gender are to be taken into account.[37]

Article 17 – Report and recording of personal interviews

The provision on the report for a personal interview (Article 14 Original Recast Proposal) has been deleted and replaced with a less demanding requirement to make a 'thorough report containing all substantial elements' of every personal interview. (Article 17(1)). However, the applicant's opportunity to comment has been improved. Member States must request her approval thereof 'at the end of the personal interview or within a specified time-limit' (Article 17(3)). Reasons for any refusal to approve the report are to be recorded, and do not prevent a decision being taken. (Article 17(4)). As ECRE observes, comment at the end of the interview seems unlikely to allow for proper scrutiny of the report if the asylum seeker has been upset or exhausted by the interview process.[38]

Article 18 – Medical Reports

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[36] See further the Fundamental Rights Agency *The duty to inform applicants about asylum procedures: The asylum-seeker perspective* (2011). See also the Chief Inspector of the UK Border Agency's *Liverpool Asylum Screening Unit: Unannounced Inspection 10 August 2009,* published 16 September 2009 and the report of the Children's Commissioner for England and Wales *Claiming Asylum at a Screening Unit as an Unaccompanied Child*, March 2008.

[37] ECRE (2011) p. 15. As ECRE points out, this is a requirement under the European Convention on Human Rights: Application No 41827/07 *RC v Sweden* 9 March 2010, paragraph 51. 'In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicants to Iran, bearing in mind the general situation there and his personal circumstances.'

[38] ECRE (2011), p. 17.

Article 18(2) clarifies that medical reports are required 'where the determining authority considers that there is reason to believe that the applicant's ability to be interviewed and/or to give accurate and coherent statements does not exist or is limited as a results [sic.] of post-traumatic stress disorder, past persecution or serious harm.' Article 18(6) now merely requires that the medical report be 'assessed … along with other elements of the application.' The previous version included the important clarification that it should 'in particular, be taken into account when establishing whether the applicant's statements are credible.' The importance of such clarification is highlighted by studies of the way in which medical evidence is dealt with in the UK context.[39]

Article 20 – Free legal assistance and representation in appeals procedures

Article 20(3) introduces a merits test for free legal assistance at the appeals stage.

Article 21 – Conditions for the provision of legal and procedural information free of charge and free legal assistance and representation

The aim of the new Article 21(1) appears to be to allow Member States' flexibility in the organisation of free legal assistance.[40] Services may be provided by 'non-governmental organisations, government officials, or specialised services of the State.' This provision opens up the spectre of legal advisers who lack the appropriate degree of independence from the State in general, or even asylum decision-makers more specifically. This would not only undermine the rationale for legal assistance in the asylum process, but also compromise lawyers' ethical duty to act on instructions and in the interests of their clients. Accordingly, ILPA recommends that the words 'government officials, or specialised services of the State' be deleted.

Article 23 – Scope of legal assistance and representation

See Part IV above for detailed critique.

In its consultation paper *Proposals for the Reform of Legal Aid in England and Wales* of November 2011, the UK Ministry of Justice stated:

> ***"Asylum***
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> *4.38 Legal aid currently funds Legal Help and Representation on issues relating to asylum. This includes legal advice for nearly all asylum*

[39] Freedom from Torture, *Body of Evidence: Treatment of Evidence of Medico-Legal Reports for Survivors of Torture in the UK Asylum Tribunal* (May 2011)

[40] Recital 17 – free legal and procedural information at first instance 'It would be disproportionate to require Member States to provide such information only through the services of qualified lawyers. Member States should therefore have the possibility to find the most appropriate modalities for the provision of such information, such as through non-governmental organisations, government officials or specialized services of the State.'

applicants at the application stage, representation for most asylum appeals before the First-tier and Upper Tribunal (Immigration and Asylum Chamber), and advice on appealing to higher courts.

4.39 We propose to continue to provide this publicly funded legal assistance in asylum cases. In making this judgement we have considered the nature of the issues at stake. In these cases, they are about the immediacy and severity of the risk to the individual: if an applicant for asylum is returned to an unsafe country, they could suffer persecution, torture or death.

4.40 We have also taken into account the particular vulnerability of this group. When making their case, asylum applicants may have recently fled persecution or torture. In these circumstances, it may be difficult for them to navigate their way through the asylum process without legal assistance. In addition, applicants for asylum may be traumatised and so find it more difficult to represent themselves.

4.41 We also recognise the importance of continuing to provide free legal assistance and/or representation in the event of a negative asylum decision as set out under Article 15 of the 2005 EU Asylum Procedures Directive.

4.42 Therefore the Government considers it appropriate to retain Legal Help and Controlled Legal Representation for asylum cases. ..."

The Legal Aid, Sentencing and Punishment of Offenders Bill currently before the UK parliament does indeed propose to retain legal aid for these matters.

Article 24 – Applicants in need of special procedural guarantees

Crucially, Article 31(6) (accelerated and/or border procedures) and 32(2) (manifestly unfounded) do not apply 'where the determining authority considers that an applicant has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.'

Article 25 – Guarantees for unaccompanied minors

The changes to this article change the procedural protections for unaccompanied minors. The requirement that a representative be 'impartial' has been removed. Great discretion is afforded to Member States concerning representatives. They need only have 'the necessary expertise in the field of childcare.' The Original Recast Proposal required representatives to be 'impartial and independent', a requirement ILPA urges be reinserted.

There are improvements, including the provision of information about the procedure to the representative and the deletion of the exception for married minors.

There are failures to make improvements. Regrettably, the Revised Proposal retains the exception where minors will 'in all likelihood reach the age of 18 years before a decision at first instance is taken.' (Article 25(2)(a)).

Concerning medical examination to determine age (Article 25(5)), a new provision states that if doubts as to age 'persist after the medical examination, Member States shall assume that the applicant is a minor.' While this stipulation is an improvement given the indeterminacy of medical examinations on this topic, ILPA reiterates its previous objections to the use of medical examinations to determine age in general.[41]

Article 28 – Procedure in the case of implicit withdrawal or abandonment of the application

The Original Recast Proposal only permitted Member States to discontinue examination in cases of implicit withdrawal. The Revised Proposal reinstates the discretion to reject applications on this basis. Article 28(1) contains the crucial condition that applications may only be rejected after the determining authority 'considers the application to be unfounded on the basis of an adequate examination [under Article 4 of the Qualification Directive] and further to a personal interview.'

ILPA recommends that the provision allowing Member States to deem applications rejected after 'at least one year' (Article 28(2)) after which the application either cannot be re-opened or will be treated as a subsequent application be removed.

Article 31 – Examination procedure

The Revised Proposal increases the level of flexibility for Member States as regards the six month time-limit greatly, rendering it more a soft target than hard deadline. The grounds for extending the six-months to one year include complexity of the particular case (Article 31(3)(a)); where there are a 'large number' of applications (Article 31(3)(b)) and where the delay is due to the applicant's failure to comply with his/her obligations under Article 13 (Article 31(3)(c)). The consequences of failure to comply with time-limits is to be 'determined in accordance with national law' (Article 31(4)).

The most significant change is that the grounds for accelerated procedures now also provide a basis for border procedures, thereby greatly extending the scope for the latter (Article 31(6)). As ECRE points out, this would potentially allow border procedures to be applied even if the application was posed in the territory.[42] ILPA urges that this extension of border procedures be rejected outright.

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[41] ILPA (2010), p. 11-12.
[42] ECRE (2011), p. 29.

The Revised Proposal introduces two additional grounds for accelerated/border procedures. The first is where 'the applicant has made clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his/her claim clearly unconvincing in relation to whether he/she qualifies as a refugee or a person eligible for subsidiary protection …' While this text is tighter than the current Procedures Directive (Article 23(4)(g)), ILPA maintains it is still unacceptable as determining authorities need to investigate claims fully in order to make such fact-specific determinations.

The second new ground for accelerated/border procedures (Article 31(6)(g)) is even broader than under the current Procedures Directive. The current Procedures Directive states that the applicant 'is' 'a danger to the national security or public order of the Member State'. In contrast, the Revised Proposal states that he 'may for serious reasons be considered' to be so. This looser formulation poses a threat to fair procedures as, again, without full factual assessment, it is difficult to see how such a determination could be made.

Subsequent Applications

Article 33 – Inadmissible applications
Article 40-42 – Subsequent Applications

Concerning 'inadmissibility', the significant change from the Original Recast Proposal concerns subsequent applications. The Original Recast Proposal referred to the applicant's lodging 'an identical application after a final decision.' The Revised Proposal makes it clearer that inadmissible subsequent applications arise only 'where no new elements or findings relating to the examination of whether the applicant qualifies as a refugee or a person eligible for subsidiary protection … have arisen or have been presented by the applicant.' (Article 33(2)(d)). Whether it is fair to deem such applications inadmissible depends on the procedural safeguards, in particular how the existence of 'new elements or findings' is to be assessed. Regrettably, while a personal interview is usually required for admissibility decisions, an exception may be made for subsequent applications (Article 34(1)).[43] Member States may also omit the examination if they determine that the applicant could have raised those new elements during the first procedure (Article 40(4)). This provision may imperil the very vulnerable applicants the Proposal ostensibly seeks to protect: It is they who are likely to withhold information about personal trauma. Without an interview and robust procedural guarantees, rejecting subsequent applications in the manner foreseen under the Revised Proposal is unfair and risks *refoulement*.

Safe Country Concepts

[43] Article 40 on Subsequent Applications requires a 'preliminary examination.' However, Article 42(2)(b) allows Member States to lay down rules providing that this examination 'to be conducted on the sole basis of written submissions without a personal interview', subject only to the caveat that 'Those rules shall not render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailment of such access.'

The Revised Proposal contains only minor changes to the safe country provisions (Articles 35-39), not the fundamental re-think that is so long overdue. Article 35 on 'first country of asylum' now states that the 'applicant shall be allowed to challenge the application of the first country of asylum concept to his/her particular circumstances.' A similar provision is included with regard to the assessment of the connection between the applicant and any putative safe third country (Article 38(2)(c)). There is a new duty to inform the Commission of the countries deemed to be 'supersafe' (Article 39(6)). These minor changes are underwhelming on their face; lamentable in light of the need for root and branch rethink of these mechanisms.

Border Procedures

As previously observed, Article 31(6) integrates the grounds for accelerated and border procedures, thereby greatly expanding the bases for the latter. Article 43(1)(b) confirms that this provision permits Member States to examine 'the substance of an application' at the border. ILPA supports the abolition of border procedures. If they are to be maintained in the Procedures Directive, they should be confined to the admissibility stage, as per the Original Recast Proposal.

Effective Remedy & Suspensive Effect

Shockingly, the right to an effective remedy no longer applies to Super Safe Third Country determinations (Article 46(1)(a)(iv)). The concept itself warrants abolition as it undermines access to asylum and risks *refoulement*. To deny a right to challenge such determinations amplifies this risk even further.

The Revised Proposal maintains the distinction of the Original Recast Proposal whereby normal appeals have suspensive effect (Article 46(5)) and =appeals against claims deemed unfounded or inadmissible are not automatically suspensive. Instead, 'a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon request of the concerned applicant or acting on its own motion.' (Article 46(6)). The individual must be allowed to remain while that determination is made (Article 46(7)). A clear line of jurisprudence of the European Court of Human Rights supports automatic suspensive effect as a requirement under Article 13of the European Court of Human Rights.[44] In *MSS*, the Grand Chamber of the European Court of Human Rights found an Article 13 violation, notwithstanding the existence of a special urgent procedure to request suspensive effect.[45]

In the absence of suspensive effect, failed asylum seekers facing removal increasingly have resource to the Rule 39 procedure of the European Court of Human Rights. Recourse to this procedure reflects the deficits in protection at

[44] Application No 30471 *Abdolkani and Karimnia v Turkey* 22 September 2008, para 108; Application No 54131/08 *Baysakov v Ukraine* 18 February 2010, para 71; Application No 25389/05 *Gebremedhin v France* 26 April 2007, para 66; Application No 42502/06 *Muminov v Russia* 11 December 2008, para 101.
[45] *MSS*, *supra.*, paras 388- 393.

the domestic level. The Commission had the opportunity in the Revised Proposal to insist on suspensive effect to give effect to the Strasbourg jurisprudence. In failing to do so, it undermines the Strasbourg system. The recent statement of the President of the European Court of Human Rights on Interim Measures urges Member States to

> 'provide national remedies with suspensive effect which operate effectively and fairly, in accordance with the Court's case-law and provide a proper and timely examination of the issue of risk. Where a lead case concerning the safety of return to a particular country of origin is pending before the national courts or the Court of Human Rights, removals to that country should be suspended. Where the Court requests a stay on removal under Rule 39, that request must be complied with.'[46]

ILPA
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[46] *Op.cit.*