



UNHCR Statement

on the right to an effective remedy in relation to accelerated asylum procedures
Issued in the context of the preliminary ruling reference to the Court of Justice of the European Union from the Luxembourg Administrative Tribunal regarding the interpretation of Article 39, Asylum Procedures Directive (APD); and Articles 6 and 13 ECHR

1. Introduction

1. On 3 February 2010, the *Tribunal administratif du Grand-Duché de Luxembourg 3^e chambre* (Luxembourg Administrative Tribunal, Third Chamber) lodged a request to the Court of Justice (“CJ” or “the Court”) for a preliminary ruling (Case C-69/10) concerning the interpretation of Article 39 (on “The right to an effective remedy”) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (“Asylum Procedures Directive” or “APD”).¹ This is the first preliminary ruling reference regarding the interpretation of the APD. In sum, the referring court asks whether the right to an effective remedy permits national regulations to deny a right of appeal on a decision to channel an application for international protection into an accelerated procedure.

2. The United Nations High Commissioner for Refugees (UNHCR) has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.² Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees, whereas the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”) and its 1967 Protocol relating to the Status of Refugees³ (“the 1967 Protocol”) oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). UNHCR’s supervisory responsibility extends to all EU Member States, as they are all States Parties to both instruments. While the 1951 Convention does not explicitly regulate asylum procedures, such procedures are essential, and therefore implicitly required, for States’ compliance with their obligations under the 1951 Convention. As such UNHCR has the responsibility to express itself on the choice of the procedure and the safeguards it contains.

¹ European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, 2005/85/EC, at: <http://www.unhcr.org/refworld/docid/4394203c4.html>.

² UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

³ UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

3. UNHCR's supervisory responsibility has been reflected in European Union law. Article 78(1) of the Treaty on the Functioning of the European Union⁴ stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Convention. Further, Declaration 17 to the Treaty of Amsterdam provides that "*consultations shall be established with the United Nations High Commissioner for Refugees (...) on matters relating to asylum policy*".⁵ In addition, Article 18 of the Charter of Fundamental Rights of the European Union⁶ states that the right to asylum shall be guaranteed with due respect for the rules of the 1951 Convention and the 1967 Protocol. EC secondary legislation also emphasizes the role of UNHCR. For instance, Recital 15 of the Qualification Directive ("QD") states that consultations with the UNHCR "*may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.*" The supervisory responsibility of UNHCR is also specifically articulated in Article 21 of the APD.⁷ It is also reflected in the Regulation establishing a European Asylum Support Office (EASO),⁸ which recognizes UNHCR's expertise in the field of asylum⁹ and foresees a non-voting seat for UNHCR on EASO's Management Board.¹⁰

4. Against this background, UNHCR in this Statement expresses its view on the issues arising in the preliminary ruling reference of 3 February 2010. The aim of this statement is to reaffirm that an accelerated asylum procedure, including one under the Asylum Procedures Directive, should always respect minimum procedural safeguards, both in law and in practice. Following the introduction in Part 1 of this Statement, Part 2 sets out UNHCR's position on accelerated procedures, while Part 3 expresses UNHCR's view on the right to an effective remedy. In this context, Part 4 discusses the specific questions before the Court in this case.

2. UNHCR's position on accelerated asylum procedures

Purpose and scope of accelerated procedures

⁴ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

⁵ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community*, OJ C 340, 10.11.1997, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

⁶ European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), at: <http://www.unhcr.org/refworld/docid/3ae6b3b70.html>.

⁷ APD, see note 1.

⁸ European Commission, *Proposal for a Regulation of the European Parliament and of the Council Establishing a European Asylum Support Office*, COM(2009) 66 final, 18.02.2009, at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0066:FIN:EN:PDF>, (hereafter "EASO"). The proposal was adopted in second reading by the European Parliament the 18 May 2010.

⁹ Recital 9 of the EASO Proposal indicates that "*the Office should act in close cooperation with the Office of the UN High Commissioner for Refugees (UNHCR) in order to benefit from its expertise and support*".

¹⁰ Recital 14 of the EASO Proposal underlines that "given its expertise in the field of asylum, UNHCR should be a non-voting member of the Board so that it is fully involved in the work of the Office". UNHCR's membership on the EASO Management Boards is governed by Article 23(4).

5. In UNHCR's view, national procedures for the determination of refugee status and subsidiary protection status may include special procedural devices for dealing in an expeditious manner with applications which are obviously without foundation as not to merit a full examination at every level of the procedure. Such applications have been termed either "*clearly abusive*" or "*manifestly unfounded*" and are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 Convention or to any other criteria justifying the granting of asylum.¹¹ While short time limits in first instance asylum proceedings aim to ensure the efficient and cost-effective examination of cases, the need to process asylum applications in a rapid and efficient manner cannot prevail over the effective exercise of the prohibition of *refoulement*.¹²

6. UNHCR recognizes and supports the need for efficient asylum procedures. This is in the interests both of applicants and Member States. However, Member States should not dispense with key procedural safeguards or the quality of the examination procedure to meet time limits or numerical targets. Sacrificing key procedural safeguards and/or setting short time limits for the examination may result in flawed decisions which will defeat the objective of an efficient asylum procedure, as they may prolong proceedings before the appeal instance.

7. Compelling protection reasons may also be a basis for processing a claim on a priority basis through an accelerated procedure, for example in cases which are clearly well-founded, allowing a swift positive decision on the asylum application.¹³ In several EU Member States,¹⁴ an accelerated procedure is used for such cases. This may be a useful practice which helps reduce the burden on decision-making structures and releases resources to deal with more complex cases. Article 23(3) APD is explicit in stating that applications which are likely to be well-founded may be prioritized or accelerated.

8. Short time-limits in first instance proceedings and rules which serve to curtail significantly or prevent the exercise by applicants of procedural rights granted by EU law, *per definitio* results in a more cursory review of relevant facts. This may undermine the effective exercise of EU fundamental rights such as protection from

¹¹ UN High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983, at: <http://www.unhcr.org/refworld/docid/3ae68c6118.html>.

¹² See also Parliamentary Assembly of the Council of Europe Resolution on accelerated asylum procedures, which states that Member States should ensure a balance between the need to process asylum applications in a rapid and efficient manner and the need to ensure there is no compromise over international obligations including under the Refugee Convention and the ECHR. Council of Europe: Parliamentary Assembly, *Resolution 1471 (2005) on Accelerated Asylum Procedures in Council of Europe Member States*, para. 8.1.17 October 2005, 1471 (2005), at: <http://www.unhcr.org/refworld/docid/43f349e04.html>.

¹³ *Ibid.* para. 8.1.3.

¹⁴ This includes Greece (Article 8 (2) PD 90/2008 states that examination of an application may be prioritized when it may reasonably be considered to be well-founded), Italy (Article 28 of Legislative Decree No. 25/2008), Slovenia (according to Article 54 IPA, the competent authority may decide the application in the accelerated procedure "*if the entire operative event has been established on the basis of facts and circumstances from the first to the eighth sub-paragraph of Article 23 of this Act inasmuch as they have been presented.*") Notably, Article 54 IPA was never applied) and Spain (Article 25 (1) (a) of the New Asylum Law provides that the urgent RSD procedure will be applied to manifestly well-founded applications lodged in country only).

refoulement and the right to asylum. In addition, the effective exercise of individual procedural safeguards may be prejudiced as a result of the speed of the procedure.¹⁵ The speed of the first instance procedure may affect the effectiveness of, for example, the right of information (Article 10 (1) (a) APD), the right to a personal interview (Article 12 APD) or the right to legal assistance and representation (Article 15 and 16 APD). When insufficient time is granted during the procedure to exercise these rights or to benefit from them, their effectiveness is undermined or negated.

9. The CJ has not yet ruled on short time-limits in asylum procedures, nor the length of asylum procedures as a whole. Nevertheless, it has consistently held that access to a remedy requires actual access within a reasonable period to a court or tribunal as defined by Community law.¹⁶ The Court has also recognized that the shortness of national time-limits for bringing proceedings or for raising new pleas in appeal proceedings may undermine the effectiveness of a right granted by EU law. The general rule applied by the Court is that in the interests of legal certainty, it is compatible with Community law to lay down *reasonable time-limits* for bringing proceedings.¹⁷ Such time-limits may not be so short as to make rights conferred by Community law practically impossible or excessively difficult to exercise.¹⁸

10. Within the framework of EU law, the asylum procedure provides for the exercise of specific rights conferred by instruments forming part of the Common

¹⁵ This is also recognized by the Council of Europe: Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009, which states that the time taken for considering an application shall be sufficient to allow a full and fair examination, with due respect to the minimum procedural guarantees to be afforded to the applicant. The Parliamentary Assembly of the Council of Europe states in its Resolution 1471 (2005)1 on accelerated asylum procedures in Council of Europe member states that it must be ensured that a reasonable time frame be established that guarantees access to essential procedural safeguards. Note that the European Court of Human Rights (hereafter: “ECtHR”) is of the opinion that the State’s objective to save time and expedite the proceedings does not justify disregarding such a fundamental principle as the right to adversarial proceedings. *Nideröst-Huber v. Switzerland*, ECtHR 27 January 1997, Appl. No. 18990/91, para. 30. According to the CJ’s case law, the ECtHR has special significance as a source for the general principles of EU law. See *Johnston*, Case 222/84, European Court of Justice, 15 May 1986, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61984J0222:EN:HTML>; See also, Article 6(2) on the Treaty on the European Union.

¹⁶ *Wilson v. Ordre des avocats du barreau de Luxembourg*, C-506/04, European Court of Justice, 19 September 2006, para. 60, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0506:EN:HTML>; *Mediocurso v. Commission*, C-462/98 P, European Court of Justice, 21 September 2000, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0462:EN:HTML>; *Firma Laub GmbH & Co. Vieh & Fleisch Import-Export*, C-428/05, European Court of Justice, 21 June 2007, para. 27, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0428:EN:HTML>.

¹⁷ See, for example, *Dilexport*, C-343/96, European Court of Justice, 9 February 1999, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61996J0343:EN:HTML>; *Grundig Italiana*, C-255/00, European Court of Justice, 24 September 2002, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0255:EN:HTML>; *Kempter*, C-2/06, European Court of Justice, 12 February 2008, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0002:EN:HTML>; *Raffaello Visciano v. Istituto nazionale della previdenza sociale*, C-69/09, European Court of Justice, 22 January 2010, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009O0069:EN:HTML>.

¹⁸ See, for example, the following judgments mentioned in note 17, *Kempter*, *Raffaello*, para. 44; *Grundig Italiana*, para. 37-41 and also *Peterbroeck*, C-312/93, European Court of Justice, 15 December 1995, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61993J0312:EN:HTML>.

European Asylum System, including the right to be recognized as a refugee or as being entitled to subsidiary protection status. Any acceleration of the examination of an application for asylum must be in accordance with general legal principles of Community law and must not render practically impossible or excessively difficult the exercise of rights or the fulfillment of procedural safeguards; this is generally referred to as the principle of effectiveness.¹⁹ Procedural guarantees as enshrined in Chapter II of the Asylum Procedure Directive, including the right to be heard,²⁰ must be maintained.²¹

11. Efficient and fair first instance asylum procedures²² are in the interest of both applicants and states. They guarantee that the process does justice to the rights of applicants and the obligations of states and may alleviate the demands on the appeal instance. An efficient and fair first instance asylum procedure, allowing for a full examination of an asylum application, requires a reasonable time frame, including minimal procedural safeguards. Omitting key procedural safeguards, and/or setting short time limits for the examination, may result in flawed decisions which will defeat the objective of a fair and efficient asylum procedure and may prolong proceedings before the appeal instance.

12. When requesting asylum, applicants must be given adequate time to exercise their rights, including, inter alia, the right to be informed, in a language which they understand, of the procedure to be followed, of their rights and obligations during the procedure, the possible consequences of not complying with their obligations and not cooperating with the authorities, the right to receive the services of an interpreter, to consult in an effective manner a legal adviser or other counsellor, to communicate with a refugee-assisting organization, to be given the opportunity of a personal interview and/or to lodge an appeal, the right to remain, the right to be informed, the right to an interpreter, the right of notification, and the right to be interviewed.

13. The following paragraphs illustrate the implications of the principle of effectiveness for the speed of the procedure regarding two specific guarantees: firstly, the right to information; and secondly, the right to legal assistance and representation. The same line of reasoning may be applied to other procedural rights or duties contained in the APD.

The right to information

¹⁹ *Pontin v. T-Comalux SA*, Case C-63/08, European Court of Justice, 29 October 2009, para. 43, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008J0063:EN:HTML>. Also, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, Case C- 432/05, European Union: European Court of Justice, 13 March 2007, para. 43, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0432:EN:HTML>.

²⁰ See Articles 10, 12 and 15 APD. The right to have an opportunity of a personal interview and for the applicant to make his/her views known is supported by the CJ in *Sopropé – Organizações de Calçado Lda v. Fazenda Pública*, Case C- 349/07, European Union: European Court of Justice, 18 December 2008, paras. 36, 37, 49 and 50, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0349:EN:HTML>.

²¹ M. Reneman, Access to an Effective Remedy in European Asylum Procedures, *Amsterdam Law Forum*, vol. 1, No. 1, 2008, 68, www.amsterdamlawforum.org.

²² See UNHCR, *General Conclusion on International Protection*, ExCom Conclusion No. 65 (XLII) – 1991, 11 October 1991, at: <http://www.unhcr.org/excom/EXCOM/3ae68c404.html>; ExCom Conclusion No. 71 (XLIV) – 1993, at: <http://www.unhcr.org/refworld/docid/4a7c4b882.html>.

14. A person's entitlement to be informed of his/her rights and duties²³ during asylum proceedings is essential in order to be able to exercise these rights or comply with these duties. The right to information is rendered ineffective if the person concerned is not able to act on the basis of the information provided. This may, for example, be the case when an asylum procedure starts immediately after the information has been provided to the applicant, and is limited to only a few days.

15. The principle that a reasonable time is necessary in order to enable the person who received information on his/her rights and obligations to act in accordance with this information is explicitly recognized in Article 10 (1) (a) APD. This provision requires that the information on the asylum procedure be given "*in time to enable [the asylum applicant] to exercise the rights guaranteed in the Procedures Directive and to comply with the obligations described in Article 11 APD*". It should be concluded that the principle of effectiveness prohibits deadlines and procedural rules which allow asylum applicants insufficient time to act upon information on their rights and obligations given to them during the proceedings.

The right to legal assistance

16. The right to legal assistance and representation is undermined when proceedings permit no or very little time to discuss the case with a legal adviser.²⁴ It should be acknowledged that more time is needed when the legal advisor and the person concerned are only able to communicate through an interpreter. The strict application of a short time-limit for legal assistance without taking into consideration the individual circumstances of the case may thus undermine the effectiveness of the right to legal assistance and representation in asylum procedures.

Law and jurisprudence on time limits

17. The ECJ has recognized in its case law in non-asylum cases that the shortness of time-limits may undermine the effectiveness of rights granted by EU law.²⁵ As described above, it has ruled that parties should be granted reasonable time effectively to exercise their right to be heard or to submit the necessary evidence. Furthermore it has held that time-limits for bringing proceedings or raising new pleas during appeal proceedings must be reasonable. Here, the Court takes account of the principle of legal certainty and balances this against the principle that rights under EU law should be effectively protected.

18. The APD allows accelerated procedures to be applied to all asylum applications,²⁶ but does not stipulate minimum time-limits for specific steps in asylum procedures. It does however contain some indications that reasonable time must be

²³ Article 10(1)(a) APD.

²⁴ In the 48-hour accelerated procedure in the Netherlands, five hours of free legal assistance are provided to asylum applicants in first instance proceedings. The Committee against Torture, in its Concluding Observations regarding the Netherlands following a 2007 review, expressed its concerns on the limited number of hours for legal assistance in this procedure and on the fact that an asylum-seeker may not be assisted by the same lawyer throughout the proceedings. It recommended that all asylum seekers have access to adequate legal assistance and may be, as appropriate, assisted by the same lawyer from the preparation of the first interview to the end of the proceedings. Committee against Torture, Concluding Observations the Netherlands 3 August 2007, CAT/C/NET/CO/4.

²⁵ For case references, see notes 16 and 17.

²⁶ Article 23(4) APD.

granted to the applicant in order to substantiate his/her claim with statements and documentation.

19. It follows from the case-law of the ECtHR and the views of the CAT and Human Rights Committee that time-limits may not be so short as to prevent a person who claims that s/he faces the risk of *refoulement* from substantiating this claim. The ECtHR in *Jabari* held that:

*[the] automatic and mechanical application of a short [five day] time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention.*²⁷

3. Effective remedies: UNHCR's position and relevant law and principles

20. With regard to the 1951 Convention, UNHCR supports the right of an individual to appeal a first (negative) decision. In UNHCR's view, it is essential that the appeal must be considered by an authority, court or tribunal, separate from and independent of the authority which made the initial decision and that a full review is allowed.²⁸

21. UNHCR considers that the right to an effective remedy in asylum cases includes the right to appeal a (negative) decision made in an accelerated procedure.²⁹ To be effective, the remedy must provide for a review of the claim by a court or tribunal, and the review must examine both facts and law based on up-to-date information. In addition, in respect of the principle of non-*refoulement*, the remedy must allow automatic suspensive effect except for very limited cases.³⁰ While a remedy against a decision to channel a claim into an accelerated procedure may not be required, if an accelerated procedure in law or practice effectively prevents an asylum applicant from exercising basic procedural rights, and thereby prevents him/her from pursuing an asylum claim, this is neither in line with international standards, nor EU law requirements (see Art. 23(1) APD).

²⁷ *Jabari v. Turkey*, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000, at: <http://www.unhcr.org/refworld/docid/3ae6b6dac.html>.

²⁸ UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, para. 192 (vi), January 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

²⁹ UNHCR ExCom, Conclusion No. 8 (XXVIII), 1977, para. (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.*” at: <http://www.unhcr.org/refworld/docid/3ae68c6e4.html>.

³⁰ When there is clearly abusive behavior on the part of the applicant, or where the “*unfoundedness*” of a claim is manifest, the automatic application of suspensive effect could be lifted. UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, page 51, at: <http://www.unhcr.org/refworld/docid/42492b302.html>.

22. In a recent study on implementation of the APD in selected Member States,³¹ UNHCR examined state laws and practice with regard to available remedies against asylum decisions. The research highlights the importance of an effective remedy which fulfills the requirements of the APD and ECHR, permitting full and rigorous scrutiny of negative decisions, in order to safeguard against the risk of denial of applicants' substantive rights to asylum and to refugee status under the 1951 Convention and other forms of protection. Selected relevant findings of the research are set out in the Annex to this statement.

European Court of Human Rights (ECtHR)

23. The ECtHR has produced extensive case law³² on the question of effective remedies. According to the ECtHR, "rigorous scrutiny" of an arguable claim is required because of the irreversible nature of the harm that might occur.³³ The remedy must be effective in practice as well as in law. It must take the form of a guarantee, and not a mere statement of intent or a practical arrangement,³⁴ and it must have automatic suspensive effect.³⁵ The right to an effective remedy exists when the individual has an arguable claim.³⁶ In essence a claim is arguable if it is supported by demonstrable facts and not manifestly lacking grounds in law.³⁷ Article 13 of the ECHR requires an effective remedy for everyone whose rights under the ECHR have been violated. In *Klass and others v. Germany*, the ECtHR found that Article 13 should be interpreted as requiring an effective remedy before a national authority for those who claim that their rights and freedoms under the Convention have been violated.³⁸ Further, according to the ECtHR, Art. 13 ECHR, in conjunction with Article 3 ECHR, "requires independent and rigorous scrutiny of a claim that there

³¹ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, at: <http://www.unhcr.org/refworld/docid/4bab55752.html>.

³² *Delcourt v. Belgium*, judgment of 17 January 1970: "... [I]n a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision"; *König v. Germany*, 28 June 1978: "... paragraph 1 of Article 6 (art. 6-1) is also relevant under the 'criminal charge' head..."; *Öztürk v. Germany*, 21 February 1984: "...it would be contrary to the object and purpose of Article 6, (art. 6) which guarantees to 'everyone charged with a criminal offence' the right to a court and to a fair trial, if the State were allowed to remove from the scope of this Article (art. 6) a whole category of offences merely on the ground of regarding them as petty.... Having regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (art. 6).

³³ *Jabari v. Turkey*, para. 50, see note 27.

³⁴ *Čonka v. Belgium* Application No. 51564/99, ECtHR, 5 February 2002, para. 83.

³⁵ *Gebremedhin [Gaberamadhien] c. France*, judgment of 26 April 2007, Appl. No. 25389/05, para. 66.

³⁶ Kees Wouters, *International Legal Standards for the Protection from Refoulement, A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture*, Intersentia, 2009, pp. 331.

³⁷ *Boyle and Rice v. United Kingdom*, judgment of 27 April 1988, ECtHR, Application Nos. 9659/82, 9658/82, para. 52; P. Boeles, *Fair Immigration Proceedings in Europe*, The Hague; Boston; London: Martinus Nijhoff Publishers 1997, p. 271.

³⁸ *Klass and others v. Germany*, judgment of 6 September 1978, ECtHR, Application No. 5029/71, para. 64.

exist substantial grounds for fearing a real risk of treatment contrary to Article 3 ECHR and the possibility of suspending the implementation of the measure impugned”.³⁹ The appeal procedure must include sufficient procedural safeguards, including sufficient time to lodge the appeal.⁴⁰ The individual should have access to legal aid and representation. The ECtHR has found that remedies which have virtually no prospect of success in a particular case are ineffective.⁴¹

24. In the context of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3, the remedy required by Article 13 must have automatic suspensive effect.⁴² Under the ECHR, the appeal system as whole must allow for suspensive effect.⁴³ According to the ECtHR, if the ordinary appeal procedure does not have automatic suspensive effect it must be possible for the individual to use an urgent procedure to prevent the execution of a deportation order and await the outcome of the ordinary appeal.⁴⁴

Human Rights Committee

25. The prohibitions on *refoulement* contained in the ICCPR,⁴⁵ together with the general obligation on States to provide an effective remedy,⁴⁶ provide for a right to have a review or appeal of a negative decision which is available in law and practice, is accessible for the individual, allows a competent national authority to deal with the substance of the claim, and has the authority to grant appropriate relief. According to the Human Rights Committee, a decision on appeal must be binding.⁴⁷

³⁹ See *Jabari v. Turkey*, para. 41, see note 27.

⁴⁰ HRC, Concluding Observations on France, 31 July 2008, UN doc. CCPR/C/FRA/CO/4, para. 20, in which concerns were raised by the Human Rights Committee regarding a 48-hour time limit for lodging an appeal. In *Alzery v. Sweden*, the complainant had no real time to appeal the decision to deport him; he was expelled only hours after the decision to expel him was taken, HRC: *Alzery v. Sweden*, 10 November 2006, No.1416/2005, para. 3.10.

⁴¹ *Salah Sheekh v. The Netherlands*, Council of Europe: European Court of Human Rights, 11 January 2007, at: <http://www.unhcr.org/refworld/docid/45cb3dfd2.html>.

⁴² *Gebremedhin [Gaberamadhien] c. France*, para. 66, see note 35; *K.R.S. against the United Kingdom*, Application No. 32733/08, Decision of 2 December 2008, <http://www.unhcr.org/refworld/pdfid/49476fd72.pdf>.

⁴³ Wouters, Section 3.4.3b, see note 36 *Gebremedhin [Gaberamadhien] c. France*, see note 35, and *Čonka v. Belgium*, para. 79, see note 34.

⁴⁴ See *Čonka*, note 34.

⁴⁵ HRC, General Comment Number 31 (2004), para. 12.

⁴⁶ See Article 2(3) ICCPR.

⁴⁷ P. Boeles, p. 109, see note 37; Wouters, pp. 628, see note 36.

4. Questions before the court

4.1 Question 1: Is Article 39 of Directive 2005/85/EC to be interpreted as precluding national rules such as those established in the Grand Duchy of Luxembourg by Article 20(5) of the Amended Law of 5 May 2006 on the right of asylum and complementary forms of protection, pursuant to which an applicant for asylum does not have a right to appeal to a court against the administrative authority's decision to rule on the merits of the application for international protection under the accelerated procedure?

26. While the decision to channel a claim into an accelerated procedure may not amount to denial of a substantive right as such, accelerated procedures as practiced in some Member States may effectively prevent applicants from exercising a substantive right, including the right to asylum under the Charter of Fundamental Rights of the European Union, Art 18, and the right to refugee protection under the 1951 Convention, as well as refugee status or subsidiary protection under the Qualification Directive.

27. The types of decisions against which an effective remedy must be available under Article 39(1)(a) APD are not enumerated exhaustively. UNHCR interprets Article 39 (1) APD to require that any negative decision in connection with an application for international protection is subject to the right of the claimant to an effective remedy from a court or tribunal.⁴⁸ Article 39 (1) APD requires an effective remedy before a “*court or tribunal*” but does not explicitly define either term. UNHCR considers that this provision can be understood to mean a review body which is independent of the first instance determining authority, and which has power to consider questions of fact and law.⁴⁹

28. Individuals are generally entitled to effective judicial protection of the rights conferred on them by the Community legal order.⁵⁰ Effective judicial protection is a general principle of EC law.⁵¹ This requires that the appeal body has the power to

⁴⁸ The wording used is “*a decision taken on their application for asylum*” which is then followed by a list of three examples which is clearly non-exhaustive because of the use of the word “*including*”. There does not appear to be any decision in connection with an asylum application which will not be subject to the right of the claimant to seek an effective remedy from a court or tribunal subject to the exception stated in Article 39 (5) APD, where an applicant has been granted a status which offers the same rights and benefits under national and Community law as refugee status by virtue of the QD.

⁴⁹ See UNHCR, APD comments 2005; see also UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 41 and 43, at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

⁵⁰ Amnesty International, *The Dublin II Trap: Transfer of Asylum Seekers to Greece*, 2010, at: <http://www.amnesty.fi/mita-teemme/teemat/pakolaiset-ja-siirtolaiset/materiaalit/the-dublin-ii-trap-transfers-of-asylum-seekers-to-greece/primapaper/48>, citing the following cases: “Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the application of provisions of Community law,” *Lili Georgieva Panayotova and Others v. Minister voor Vreemdelingenzaken en Integratie*, C-327/02, European Court of Justice, 16 November 2004, para. 27, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0327:EN:HTML>.

⁵¹ *Union de Pequenos Agricultores*, C-50/00, 2002. *Union de Pequenos Agricultores*, C-50/00, European Court of Justice, 25 July 2002, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0050:EN:HTML>.

review both facts and issues of law⁵² and to quash, if necessary, the decision of the administrative authorities⁵³ and to grant interim relief.⁵⁴ Effectiveness also implies that the person should be able to access judicial protection in legal and practical terms.⁵⁵

29. The CJ and the national courts may take into consideration whether an effective judicial remedy is available in which potential errors made during an accelerated first instance proceeding are rectified. As well, a court may be called upon to consider whether the person concerned enjoyed effective access to his/her procedural rights, including under the APD, in first instance proceedings.

EU Charter on Fundamental Rights

30. The EU Charter on Fundamental Rights provides for effective remedies in asylum proceedings, in particular the right to appeal in administrative proceedings where fundamental rights are at issue. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in Article 47 of the EU Charter on Fundamental Rights. They are entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law and 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.

31. Article 47 of the EU Charter of Fundamental Rights sets out the right to an effective remedy before a judge, and the guarantees that assure access to justice under the conditions inherent to the "Community based on law", as defined by the ECJ with reference to the rule of law. These provisions derive from Articles 6 (Right to a fair trial) and 13 (Right to an effective remedy) of the ECHR. However, taking into account in particular the case law of the CJ, the drafters of the Charter in Article 47 appear to have extended and defined more precisely the remedy it confers.

32. The fundamental principles related to access to justice have a general field of application in the Charter. The result is that Article 47 also governs contentious administrative matters subject to EU law, and complements Article 41 of the Charter (Right to Good Administration)⁵⁶ by providing for an opportunity to

⁵² See *Dörr and Ünal*, C-136/03, European Court of Justice, 2 June 2005, para. 57, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:182:0005:01:EN:HTML>.

⁵³ *Commission v. Austria*, C-424/99, European Court of Justice, 27 November 2001, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999J0424:EN:HTML>.

⁵⁴ *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, see note 19.

⁵⁵ Relevant ECtHR judgments concerning the right to an effective remedy include: *NA. v. United Kingdom*, Application No.25904/07, judgment of 17 July 2008 (full and *ex nunc* assessment of expulsion cases falling within the scope of Article 3 ECHR); See *Jabari*, (the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible) see note 27 and *Chahal v. United Kingdom*, Application No. 22414/93, judgment of 15 November 1996 (under Art. 13, the appeal body must be competent to examine the substance of the applicant's complaint); *Muminov v. Russia*, Application No. 42502/06, judgment of 11 December 2008 (ability of the appeal authority to effectively review the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate); *Čonka*, see note 34, *Jabari*, see note 27, *Gebremedhin*, see note 35, (on the automatic suspensive effect of a remedy).

⁵⁶ *Article 41(1)*: "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union."

initiate proceedings against administrative measures. According to the case law of the Court of Justice, this considered as a fundamental right enshrined in the general principles of Community Law. As stated by the Court in *Panayotova*,

*Community law requires effective judicial scrutiny of the decisions of national authorities taken pursuant to the applicable provisions of Community law, and that this principle of effective judicial protection constitutes a general principle which stems from the constitutional traditions common to the Member States and is enshrined by the European Convention for the Protection of Human Rights and Fundamental Freedoms.*⁵⁷

This implies an obligation for the EU and the Member States to respect minimal procedural safeguards in the asylum procedure at first instance.

APD

33. APD Article 23 stipulates that the examination procedure at first instance must be conducted in accordance with the basic principles and guarantees of Chapter II of the APD, and should be concluded as soon as possible, without prejudice to an adequate and complete examination.⁵⁸

34. Article 23 (3) APD states that Member States may prioritize or accelerate any examination.⁵⁹ The terms “prioritize” and “accelerate” are not further defined in the Directive and no definition has been proposed in the European Commission’s proposal for a recast of the APD.⁶⁰ UNHCR understands “prioritize” to mean a

(2) This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions. [...]

⁵⁷ See for instance:

a) right to have own affairs handled impartially, fairly and within a reasonable time: European Court of Justice, *Panayotova and others v. Minister voor Vreemdelingenzaken en Integratie*, 16 November 2004, Case C-327/02, paragraph 27 (Rights guaranteed by Community Law requires a procedural system which “... ensures that the persons concerned will have their applications dealt with objectively and within reasonable time”) at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0327:EN:HTML>.

b) right to be heard: European Court of Justice, *Sopropé – Organizações de Calçado Lda v Fazenda Pública*, Case C-349/07, 18 December 2008, para. 36 (Observance of the rights of the defence is a general principle of Community law which applies where the authorities are minded to adopt a measure which will adversely affect an individual.), para. 37 (In accordance with that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. They must be given a sufficient period of time in which to do so), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0349:EN:HTML>. See also, *inter alia*, *Commission v Lisrestal and Others*, paragraph 21, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995J0032:EN:HTML>, and *Mediocurso v Commission*, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0462:EN:HTML>, para.36.

⁵⁸ Article 23 (1) and (2) APD.

⁵⁹ Article 23 (3) APD states that “Member States may prioritise or accelerate **any** examination in accordance with the basic principles and guarantees of Chapter II, including where the application is likely to be well-founded or where the applicant has special needs.” (emphasis added)

⁶⁰ APD Recast Proposal 2009.

decision by a Member State to give precedence to an application and examine it prior to the examination of other applications. “*Accelerate*” is understood to mean when a Member State decides to conduct the examination of an application at greater speed than other applications so that a first instance decision is taken within a shorter timescale than in the general or regular procedure.⁶¹

35. It should be emphasized that, in accordance with Article 23 (2) of the APD, any acceleration should be without prejudice to an adequate and complete examination of the claim.⁶² The curtailment of procedural guarantees - such as the right to be heard in a personal interview; and excessively short time frames which restrict applicants’ ability to fulfil their obligations and exercise their rights, as well as the manner in which the determining authority fulfils its obligations - can result in an inadequate and incomplete examination of some applications.

36. UNHCR’s research on the implementation of the APD, published in 2010,⁶³ found that law and practice on the prioritization and acceleration of examinations in the 12 Member States it studied were disparate and difficult to compare. With no definition in the APD of what constitutes an “*accelerated examination*,” the term “*accelerated procedure*” simply implies that, at the national level, the examination is conducted within a shorter time than other procedure(s). At the European Union level, however, UNHCR’s research found that the label “accelerated procedure” is attached to procedures that are so diverse in form and duration that the term becomes ambiguous and unhelpful.

37. All aspects of the examination procedure diverge across the 12 Member States examined in UNHCR’s research,⁶⁴ including the grounds for prioritization and/or acceleration, the authority that decides to prioritize or accelerate, the purpose of the accelerated procedure, the manner in which the examination is accelerated, the safeguards which apply, and the time frames within which decisions should be taken. Some accelerated procedures operate within very short time frames which render the exercise of rights and obligations by the applicant, and the conduct of a complete examination by the determining authority, extremely difficult. Indeed, in the accelerated procedures of some Member States, an essential safeguard, the personal interview, may be omitted. This increases, invariably and substantially, the potential for erroneous first instance decisions. In some Member States, the average duration of and safeguards applicable to the accelerated examination are comparable to the regular procedures of other Member States. In some Member States surveyed, the acceleration of the examination appeared to be the norm,⁶⁵ or risks becoming the norm, rather than the exception.⁶⁶

⁶¹ The timescale may be shorter due to the fact that shorter time limits are imposed and/or due to the fact that the first instance accelerated procedure derogates from procedural steps applicable to the regular procedure.

⁶² Article 23 (2) APD states that “*Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.*”

⁶³ UNHCR, *Improving Asylum Procedures*, Chapter 9, see note 31.

⁶⁴ *Ibid.*

⁶⁵ Greece: according to figures supplied by UNHCR Athens, from January to November 2008, 95 per cent of applications were examined in the accelerated procedure. Slovenia: of the total of 65 reviewed decisions taken in 2008, 51 were taken in the accelerated procedure.

⁶⁶ In the Netherlands, there is a proposal to introduce a “*normal*” eight day procedure. In 2009, in the Parliamentary document with respect to the proposal for a new Aliens Act, dated 29 June 2009, 31

38. In UNHCR's view, the personal interview in particular is crucial as it provides the applicant with an opportunity to explain comprehensively and directly to the authorities the reasons for the application; and it gives the determining authority the opportunity to establish, as far as possible, all the relevant facts and to assess the credibility of the oral evidence. As such, UNHCR considers that the personal interview should be an essential component of the asylum procedure.⁶⁷

39. Accelerated procedures that deny applicants certain procedural safeguards, for example, personal interviews, or otherwise reduce safeguards, such as limited time periods for lodging an appeal, could, in some circumstances, limit or preclude an applicant from exercising his or her substantive right to seek asylum and receive international protection. This means effective remedies against decisions taken in accelerated procedures must permit rigorous scrutiny of whether the applicant's substantive rights have been respected, in order to fulfill the requirements of Article 39(1).

4.2 Question 2: If the answer [to question 1] is in the negative, is the general principle of an effective remedy under Community law, prompted by Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, to be interpreted as precluding national rules such as those established in the Grand Duchy of Luxembourg by Article 20(5) of the Amended Law of 5 May 2006 on the right of asylum and complementary forms of protection, pursuant to which an applicant for asylum does not have a right to appeal to a court against the administrative authority's decision to rule on the merits of the application for international protection under the accelerated procedure?

40. In UNHCR's view, a provision excluding an appeal of a decision to channel a claim into an accelerated procedure does not necessarily contradict ECHR Article 6 and 13. However, if the accelerated procedure in question does not entail basic safeguards to ensure that the individual can have his/her claim considered in a fair procedure, it may preclude the applicant from exercising his/her substantive rights to refugee status or subsidiary, or complementary forms of protection, under, inter alia, the 1951 Convention, ECHR and Qualification Directive. This implies that a remedy against a decision in an accelerated procedure must permit rigorous scrutiny of the first instance decision.

41. While the case law of the ECtHR, including in the case of *Maaouia v France*,⁶⁸ has concluded that Article 6 is not seen as applying in expulsion proceedings, for example, some expert commentators consider that the obligations laid down in Article 6 ECHR, which enshrines the right to a "*fair and public hearing*

994 No. 3, the State Secretary of Justice stated on page 6 that prolonged procedures increasingly will be the exception, and expects that 40 per cent of applications will be dealt with in the proposed eight day procedure. All asylum seekers would be interviewed, receive the intended decision and would have to provide corrections and additional information in the first four days of this proposed procedure. There would be a rest period of six days before this procedure, during which some research into the asylum claim would be conducted (e.g. fingerprinting and Eurodac search).

⁶⁷ UNHCR, *Improving Asylum Procedures*, see note 31, Chapter 4.

⁶⁸ *Maaouia v. France*, Appl. no. 39652/98, Council of Europe: European Court of Human Rights, 5 October 2000, at: <http://www.unhcr.org/refworld/docid/3ae6b74c0.html>.

within a reasonable time by an independent and impartial tribunal established by law”, apply to all Community rights, including administrative proceedings such as asylum procedures.⁶⁹

ICCPR

42. A further basis for the right to an effective remedy in asylum cases under international law is found in the ICCPR,⁷⁰ which provides safeguards against expulsion⁷¹ and an appeal right against decisions which could lead to removal.⁷² If a claim for protection from *refoulement* has been assessed and, according to the State, no substantial grounds exist for believing that there is a real risk of irreparable harm, the individual has a right to challenge the decision. The right to appeal exists when the forced removal is inevitable.⁷³ In accordance with Article 2(3) ICCPR, States Parties undertake to ensure that a “*person whose rights or freedoms as herein recognized are violated shall have an effective remedy*”.⁷⁴ There should be an opportunity for effective, independent review of the decision to expel.⁷⁵ In addition, States parties shall undertake that such a remedy is:

*...determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.*⁷⁶

43. A further basis for procedural safeguards binding on EU Member States in cases involving the risk of *refoulement* is thus found in Article 2(3) ICCPR. In

⁶⁹ See John Barnes, “A Manual for Refugee Law Judges relating to European Council QD 2004/83/EC and European Council Procedures Directive 2005/85/EC”, 2007 at p. 54 which states that “[i]t is important also to emphasise that the ECJ has not accepted the limitation which the ECtHR placed upon the extent of its jurisdiction by classifying asylum and immigration claims as claims to which Article 6 ECHR did not apply. The effect of bringing the issue of effective protection onto a Community law base is, therefore, to increase the scope of the protection offered to claimants to include Article 6 ECHR rights” and at p. 52 cites para. 420 of Hemme Battjes, *European Asylum Law and International Law*, Martinus Nijhoff Publishers, Leiden, Boston, 2006 which states “[i]nternational law has served as a source of inspiration for the general principles of Community law concerning appeal proceedings, as well as for Article 47 Charter. But these principles, and this Charter provision offer in several respects more extensive protection. To begin with, they require an effective remedy if the right guaranteed by Community law is affected (the ‘arguable claim’ requirement does not apply). Moreover, the obligations laid down in article 6 ECHR apply to all Community rights (thus not only to ‘civil rights and obligations or criminal charges’) – including administrative proceedings, such as asylum procedures.”

⁷⁰ *International Covenant on Civil and Political Rights*, Articles 2(3), 13 and 14, 16 December 1966, UNTS, vol. 999, p. 171, at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>.

⁷¹ Articles 13, 14 ICCPR.

⁷² Article 2(3) ICCPR. For detailed analysis, see Wouters, *International Standards for the Protection from Refoulement*, 2009, pp. 412–3 and 419.

⁷³ In general, this means when a deportation order has been issued. See HRC, *Khadje v. the Netherlands*, 15 November 2006, No. 1438/2005, para. 6.3 HRC, Concluding Observations on Ukraine, 28 November 2006, CCPR/C/UKR/CO/6, para. 9.

⁷⁴ Article 2(3) of the ICCPR. See also HRC, Concluding Observations on the Hong Kong Special Administrative Region, 12 November 1999, UN doc. CCPR/C/79/Add.117, para. 145, in which the Committee stated that “[i]n order to secure compliance with articles 6 and 7 in deportation cases, the HKSAR [Hong Kong Special Administrative Region] should ensure that their deportation procedures provide effective protection against the risk of imposition of the death penalty or torture or inhuman, cruel or degrading treatment”.

⁷⁵ See *Alzery*, para. 11.8, see note 40.

⁷⁶ Article 2(3)(b) of the ICCPR. HRC, *Judge v. Canada*, 20 October 2003, No. 829/1998, para. 10.9.

addition, safeguards can be found in Article 13 ICCPR. Moreover, important principles of impartiality, fairness and equality as developed under Article 14(1) are also applicable in *refoulement* cases.⁷⁷

European Court of Human Rights

44. In asylum and deportation cases, the ECtHR has stressed “*the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged [by the applicant] materialized*”.⁷⁸ It has accordingly interpreted Article 13, in conjunction with Article 3, to require governments to suspend deportation proceedings pending an “*independent and rigorous scrutiny*” of the applicant’s claims.⁷⁹ The expulsion before a definitive decision on status may violate obligations under Articles 3 and 13 of ECHR.⁸⁰

45. Similarly, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3.⁸¹ The remedy required by Article 13 must be “*effective*” in practice as well as in law. It must take the form of a guarantee and not of a mere statement of intent or a practical arrangement⁸² and it must have automatic suspensive effect.⁸³

46. In *Salah Sheekh*, the ECtHR reiterated that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with that Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see *Čonka v. Belgium*, no. 51564/99, para. 79, ECHR 2002-I).⁸⁴

47. The ECtHR, along with the Committee Against Torture and Human Rights Committee (see further below), have all recognized that short time-limits in asylum procedures may hinder a person from substantiating his/her claim of a risk of *refoulement* and therefore undermine the effectiveness of the prohibition of *refoulement*.⁸⁵ Furthermore in *Chahal* the ECtHR stated

⁷⁷ Wouters, pp. 418-419, see note 36; Boeles, *European Journal of Migration and Law*, 2008, pp. 113-115.

⁷⁸ See *Čonka*, para. 79, see note 34; *Jabari*, para. 50, see note 27; *Baysakov and others v. Ukraine*, ECtHR 18 February 2010, Appl. No. 54131/08.

⁷⁹ See *Baysakov; Bahaddar v. the Netherlands*, ECtHR 19 February 1998, Appl. No. 25894/94.

⁸⁰ See ECtHR, *Jabari*, note 27, and subsequent case-law, specially, ECtHR, *Gebremedhin*, note 35, para. 67.

⁸¹ *Jabari*, para. 40, see note 27.

⁸² *Čonka*, paras. 75 and 83, see note 34.

⁸³ *Gebremedhin*, para. 66, p. 15, see note 35, *K.R.S.*, see note 42.

⁸⁴ *Salah Sheekh v. The Netherlands*, see note 41.

⁸⁵ In *Bahaddar v. the Netherlands* the ECtHR considered that “*in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled.*” According to the Court for that reason “*time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.*” *Bahaddar*, see note 79.

*that it is neither in the interests of the individual applicant nor in the general public interest in the administration of justice that the decision on an asylum case involving considerations of an extremely serious and weighty nature be taken hastily, without due regard to all the relevant issues and evidence.*⁸⁶

CAT and Human Rights Committee

48. The Committee Against Torture and Human Rights Committee in their concluding observations with regard to several EU Member States (Finland⁸⁷, France⁸⁸, Latvia⁸⁹ and the Netherlands⁹⁰) expressed their concerns about the speed of the asylum procedure.⁹¹ The most concrete concerns were raised with regard to the Netherlands. In 2007 the Committee Against Torture pointed at the difficulties faced by asylum-seekers in the [...] Netherlands in substantiating their claims under the accelerated procedure of the 2000 Aliens Act, which could lead to a violation of the non-*refoulement* principle provided for in article 3 CAT.⁹²

49. Accelerated procedures that deny applicants certain procedural safeguards, for example, personal interviews, or otherwise reduce safeguards, such as limited time

⁸⁶ *Chahal, v. United Kingdom*, see note 55.

⁸⁷ CAT Concluding Observations and Recommendations regarding Finland of 21 June 2005, CAT/C/CR/34/FIN. The CAT stated that the “accelerated procedure” allows an extremely limited time for applicants for asylum to have their cases considered thoroughly and to exhaust all lines of appeal if their application is rejected.

⁸⁸ CAT Concluding Observations and Recommendations regarding France of 3 April 2006, CAT/C/FRA/CO/3. The CAT was concerned about the summary nature of the so-called priority procedure for consideration of applications filed in administrative holding centers or at borders, which does not enable the risks covered by Art. 3 CAT to be assessed.

⁸⁹ CAT Concluding Observations and Recommendations regarding Latvia of 19 February 2008, CAT/C/LVA/CO/2 and CCPR Concluding Observations and Recommendations regarding Latvia of 6 November 2003, CCPR/CO/79/LVA. The Committees were concerned at the short time limits, in particular for the submission of an appeal under the accelerated asylum procedure.

⁹⁰ CCPR Concluding Observations and Recommendations regarding the Netherlands of 25 August 2009, CCPR/C/NLD/CO/4 and CAT Concluding Observations and Recommendations regarding the Netherlands of 3 August 2007, CAT/C/NET/CO/4. See also CEDAW concluding observations regarding the Netherlands of 5 February 2010, CEDAW/C/NLD/CO/5, where the CEDAW considers that even if extended to eight days, as envisaged by the Netherlands, the short length of the accelerated asylum procedure remains unsuitable for vulnerable groups, including women victims of violence and unaccompanied children, and therefore urges the State party to introduce in the procedure the possibility for women victims of violence and unaccompanied minors to fully explain their claims and to present evidence on their situation at a later stage.

⁹¹ Note that the CAT also expressed its concerns with regard to the 48-hour procedure in Norway, which was used for the rejection of asylum-seekers from countries generally regarded as safe and whose application is assessed as manifestly unfounded after an asylum interview. CAT recommends Norway to ensure that a genuine consideration of each individual case can still be provided for under the “48-hour procedure” and to keep under constant review the situation in those countries in respect of which that procedure is applied. CAT Concluding Observations and Recommendations regarding Norway of 5 February 2008, CAT/C/NOR/CO/5.

⁹² The Committee was particularly concerned that “*the 48-hour timeframe of the accelerated procedure may not allow asylum seekers, in particular, children, undocumented applicants and others made vulnerable to properly substantiate their claims.*” Furthermore the Committee pointed at the fact that only five hours were available for legal assistance and that asylum applicants were required to submit supporting documentation that they are “*reasonably expected to possess*”. The Committee also took into account that appeal procedures only provide for a “marginal scrutiny” of rejected applications and that the opportunity to submit additional documentation and information was restricted. The Committee stated that the State party may be required to establish criteria for cases which may or may not be processed under the accelerated procedure, in order to ensure that those in need of international protection are not exposed to the risk of being subjected to torture.

periods for lodging an appeal, could lead to a denial of the applicant's substantive rights. Remedies against decisions taken in such accelerated procedure must permit rigorous scrutiny of whether the applicant qualifies for international protection, in order to fulfil the requirements of ECHR Articles 6 and 13.

5. Conclusion

50. While a provision such as Article 20(5) of the Luxembourg Act of 5 May 2006 on asylum and complementary forms of protection -- providing no remedy against the decision to channel asylum claims into accelerated procedures, but only against the final decision -- may be consistent with Article 39 APD and Articles 6 and 13 ECHR, this is the case only so as long as accelerated procedures afford the applicant access to all procedural safeguards essential for the enjoyment of the right to an effective remedy. These include, for instance, provision of information to applicants on how to appeal, and to which appeal body, reasonable time-limits within which to appeal, legal and linguistic assistance with the submission of the appeal, and access to the case file in a timely way.

51. Given the binding nature of the ECtHR jurisprudence on all EU Member States, an effective remedy under the APD should have the same features as those required under the ECHR, including a full review of both facts and law based on updated information by a court or tribunal, and the possibility to request suspensive effect during appeal. If not, the remedy against the final decision will not be effective.

52. In addition, an accelerated procedure should always entail respect for certain minimum safeguards, both in law and in practice. It is possible that failure to respect minimum safeguards as those foreseen in chapter II of the APD may effectively prevent applicants from exercising a substantive right such as the right to asylum under Article 18 of the Charter of Fundamental Rights of the European Union and the right to international protection under the 1951 Convention and other relevant treaties.

UNHCR
21 May 2010

ANNEX

EFFECTIVE REMEDIES: EU MEMBER STATE PRACTICE

1. Remedies against decisions in asylum procedures: general

1. Through interviews with various stakeholders in the Member States of focus, UNHCR in its recent study on the implementation of the APD⁹³ examined whether the legislative right of appeal against negative decisions on asylum claims (including in accelerated and regular procedures) was accessible in practical terms. The research indicated that, in practice, there are various and numerous impediments for prospective appellants in some Member States. The following constitutes a list of some of the obstacles identified in the research:

- Inadequate information provided to applicants on how to appeal, and to which appeal body.
- Extremely short time-limits within which to appeal.
- Lack of linguistic assistance for applicants with regard to information on how to appeal and with the submission of the appeal.
- A shortage of legal advisers and a lack of competent legal advisers.
- Applicants prevented from lodging the appeal in person as required by national procedural rules.
- Difficulties in accessing the case file in a timely way, in order to know the grounds upon which the negative decision is based and prepare the appeal accordingly.

The appellants' physical access to the court or tribunal is hindered by distance and lack of financial resources to travel.

2. A number of these impediments may combine to render the right of appeal ineffective in practice. Moreover, the obstacles listed above tend to be exacerbated when the applicant is in detention, and shortened time limits generally apply.

3. In a majority of the Member States surveyed by UNHCR in its APD Study,⁹⁴ the appellate body competent to review negative decisions on applications for international protection has jurisdiction to review questions of both fact and law. This is the case in Belgium,⁹⁵ Bulgaria,⁹⁶ the Czech Republic,⁹⁷ Finland, France,⁹⁸

⁹³ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, at: <http://www.unhcr.org/refworld/docid/4bab55752.html>.

⁹⁴ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, at: <http://www.unhcr.org/refworld/docid/4bab55752.html>.

⁹⁵ Article 39/2, 1, Aliens Act.

⁹⁶ Article 146 Administrative Procedures Code (APC).

⁹⁷ Section 76 Act No. 150/2002 Coll., Code of Administrative Justice; Issue No. 61/2002 of the Collection of Laws of the Czech Republic (pp. 3306-3330) on April 17, 2002, and entered into force on January 1, 2003 "*Decision-making without an order to hear the matter:*

(1) The court shall revoke the contested decision for procedural faults without a hearing by means of judgment

a) on grounds of non-reviewability consisting in incomprehensibility or for absence of reasons for the decision,

Germany,⁹⁹ Italy,¹⁰⁰ Slovenia,¹⁰¹ Spain¹⁰² and the United Kingdom.¹⁰³ However, in relation to Belgium and the UK, this general statement must be qualified with regard to some specific cases.

4. In Belgium, the appeal body (Council for Aliens Law Litigation) has full jurisdiction over all decisions of the first instance determining authority. It does not have full jurisdiction over decisions of the Aliens Office relating to the preliminary examination of subsequent applications, or applications from EU citizens.¹⁰⁴ Instead, the scope of review is limited to a review of the legality of the decision.¹⁰⁵

5. In the United Kingdom, negative decisions may be appealed in-country to the specialized Asylum and Immigration Tribunal which has jurisdiction to review questions of both fact and law. However, no in-country right of appeal is available, when the determining authority decides that the claim is clearly unfounded¹⁰⁶ or where there is a national security issue.¹⁰⁷ Furthermore, there is no right of appeal in most safe third country cases,¹⁰⁸ or where a decision is made not to re-open the

b) because the facts of the matter which the administrative authority took as the grounds for the contested decision are contrary to the documents or are not supported by them or require extensive or essential supplementing,

c) for substantial breach of the regulations on proceedings before an administrative authority if it could result in an unlawful decision on the matter itself.”

Section 78 CAJ“(1) If the complaint is justified, the court revokes the contested decision as unlawful or for procedural faults. The court also revokes the contested decision as unlawful if it finds that the administrative authority exceeded the legally defined bounds of discretionary power, or abused it.”

See section 71(1)(d) CAJ concerning the requirement for stating grounds when lodging an appeal: *“Counts of charges from which it must be clear for which factual and legal reasons the complainant considers the statements of the decision illegal or null.”*

⁹⁸ With regard to the Cour Nationale du Droit d’Asile (National Court for the Right to Asylum).

⁹⁹ Section 86 (1) Code of Administrative Court Procedure.

¹⁰⁰ According to Article 35 of Legislative Decree 25/2008, appeals are lodged at a Civil Court. On the basis of the Italian Constitution (Art. 103 and 113 in particular) and as a general rule, the Civil Courts have full jurisdiction on points of law and fact.

¹⁰¹ Article 27 of the Act on Administrative Dispute.

¹⁰² Article 67 of the Law on the Administrative Jurisdiction. This is the case for both administrative judges of the National High Court and the Administrative Chamber of the National High Court. In case of revocation of refugee status which can only be appealed to the Supreme Court, the Court reviews both facts and law.

¹⁰³ Sections 84, 85 and 85A of the Nationality, Immigration and Asylum Act 2002, and with regard to appeals before the Asylum and Immigration Tribunal.

¹⁰⁴ Article 57/6, 2 of the Aliens Act.

¹⁰⁵ In relation to applications from EU citizens, the only possibility foreseen is an appeal of annulment. This means that the CALL can only examine the decision on its legality (Article 39/2, para. 2 of the Aliens Act). The appeal will not examine the substance of the application, nor will it have automatic suspensive effect (a separate appeal for suspension of the expulsion measures must be lodged). In relation to subsequent applications the only appeal against a decision of the AO not to consider the subsequent application (Article 51/8 of the Aliens Act) is an appeal of annulment, which has no suspensive effect. Article 51/8 of the Aliens Act states that in principle it is not possible to lodge a request for the suspension of the challenged decision, as long as article 51/8 of the Aliens Act has been correctly applied (see binding limitative interpretation of the Constitutional Court given in its judgments of 14 July 1994 and 27 May 2008).

¹⁰⁶ Nationality Immigration and Asylum Act 2002 s 94.

¹⁰⁷ Nationality, Immigration and Asylum Act 2002 s 97A (2)&(3). In national security cases appeals are heard by the Special Immigration Appeals Commission, see Special Immigration Appeals Commission Act 1997.

¹⁰⁸ Section 33 and Schedule 3 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004.

asylum procedure following withdrawal, or not to further examine a subsequent application.¹⁰⁹ It also applies where a subsequent application could have been raised in a previous appeal¹¹⁰ or a claim could have been made earlier.¹¹¹ The UK authorities claim to have transposed the requirements of Article 39 (1) APD on the basis that where there is no statutory in-country right of appeal, the applicant may still seek judicial review of the decision.¹¹²

6. However, as the scope of judicial review is restricted to a review of the lawfulness of the decision, and not the merits, the issue of whether judicial review can provide an effective remedy in the asylum and immigration context is still a contested one. In the UK, the courts can conduct a more rigorous level of review in human rights cases, including asylum cases.¹¹³ More intense review can also be invoked where EU law is involved.¹¹⁴ However, the effectiveness of judicial review as a remedy continues to be challenged before the ECtHR.¹¹⁵ In English law, judicial review examines only the manner in which the decision was made, and not the merits of the impugned decision. While the ECtHR has held in a leading decision that judicial review in England can be considered to constitute an effective remedy, two judges dissented, stating that “*it appears to me that a national system ... which excludes the competence to make a decision on the merits cannot meet the requirements of Article 13 [ECHR].*”¹¹⁶

7. A significant exception in law, among those Member States surveyed, relates to provisions in the Netherlands which limit the scope of review by the first tier appeal body (District Court). In Dutch administrative law, a strict distinction is made between full judicial scrutiny of a decision and marginal scrutiny. Marginal scrutiny means that the court can only review the reasonableness of a decision, and will only annul the decision if it is considered unreasonable. The Administrative Law Division of the Council of State has held that only marginal scrutiny shall apply to the facts as established by the determining authority; the evidence that the determining authority relied upon in making its decision; and the credibility assessment made by the determining authority. The District Court is obliged to defer to the fact-finding of the determining authority, and only review the reasonableness of the decision based on the facts as presented by the determining authority.¹¹⁷ Thus, while the determination of uncontroverted facts is subject to full judicial review, the determining authority’s assessment of disputed or contested facts is reviewed only marginally. The Committee against Torture has expressed its concerns that appeal procedures provide for marginal scrutiny only of rejected applications.¹¹⁸

¹⁰⁹ When this is considered not to constitute a ‘fresh claim’ as defined by Immigration Rule 353.

¹¹⁰ Section 96 (1) of the Nationality Immigration and Asylum Act 2002.

¹¹¹ Section 96 (2) of the Nationality Immigration and Asylum Act 2002.

¹¹² Annex A of the Explanatory Memorandum to the Asylum (Procedures) Regulations 2007.

¹¹³ *R v. Secy of State for Home Dept ex p Daly* [2001] UKHL26, *Huang and Kashmiri v. Secy of State for Home Dept* [2007] UKHL 11; *Bugdaycay v. Secy of State for Home Dept* [1987] AC 514.

¹¹⁴ *R v. Chief Constable of Sussex, ex parte ITF* [1999] 2 AC 418.

¹¹⁵ *KRS v. UK* ECtHR Application No. (32733/09), 2 December 2008. This challenge was unsuccessful.

¹¹⁶ *Vilvarajah v. UK* – Applications Nos. 13163/87, 13164/87 and 13165/87, ECtHR judgment of 30 October 1991. Dissenting opinion by Judge Walsh, supported by Judge Russo.

¹¹⁷ See also J. van Rooij, *Asylum Procedure versus Human Rights*, April 2004, www.rechten.vu.nl/documenten.

¹¹⁸ Para. 7 (d), CAT/C/NET/CO/4 August 2007.

8. In the Netherlands, where there is a limited scope of review by the first tier appellate body, there is in law the possibility of an onward appeal, but only on important points of law.¹¹⁹ In the Netherlands, lawyers, judges and academics have argued that given the Dutch 48 hour accelerated procedure, the marginal scrutiny exercised by the District Courts, together with the stringent restrictions on the submission of new evidence, this does not comply with the requirements of an effective remedy.¹²⁰

9. At the time of UNHCR's APD 2008 research in Greece, the appellate body (the Appeals Board) reviewed both facts and law. However, in 2009 the Appeals Board was abolished by law and the only appellate body by mid 2010 is the Council of State which only has jurisdiction to review the legality of the decision by the determining authority and does not review the facts. This is consequently the only appeal instance for an appellant and there is no possibility of an onward appeal. This means that the only authority which examines the facts is the determining authority - the Aliens' Directorate of the Greek Police Headquarters. UNHCR's research has revealed that the determining authority's interviews at first instance, as observed by UNHCR, generally lasted five to ten minutes and that questioning did not serve to address the grounds for a potential claim. The information recorded on interview forms was extremely brief and often standard. Decisions were also brief and standard, and no further information was contained in case files. Notwithstanding the creation, at first instance, of an Advisory Refugee Committee composed of two police officers and an official of the Aliens and Immigration Directorate, UNHCR is concerned that applicants for international protection in Greece do not receive an adequate examination of their application, and that the right to seek an annulment of a decision on a point of law only – without any review of the facts - is not an effective remedy.

10. In Slovenia, the Supreme Court has the power to consider points of law and fact, but like the Administrative Court before it, in practice, only reviews petitions on points of law. As a result, in Slovenia, only the determining authority examines the facts and, in practice, there is no review of the facts by a court or tribunal.

EU Member State Practice: Remedies against Decisions to Deal with Claims in an Accelerated Procedure

11. A limited review of state practice in EU indicates that numerous states do not offer an opportunity to challenge a decision to channel a claim into an accelerated procedure.¹²¹ In some Member States, applicants will not even be aware that their application is being examined with priority and/or in an accelerated manner, as no

¹¹⁹ Administrative branch of Council of State

¹²⁰ See for example the Commission Scheltema, *Evaluatie Vreemdelingenwet 2000, De Asielprocedure – deel 1* (2006), p. 77, L. Slingenbergh 2006, www.rechten.vu.nl/documenten, p. 95; T.P. Spijkerboer, *Het hoger beroep in vreemdelingenzaken*, Den Haag: Sdu 2002; P. Boeles, E.R. Brouwer, A.J.Th. Woltjer & K. Alfenaar, *Border Control and Movement of Persons, towards Effective Legal Remedies for Individuals in Europe*, Utrecht: Standing Committee of Experts in International Immigration 2004; VluchtelingenWerk Nederland, *Vreemdelingenwet 2000, een ontspoorde asielwet*, October 2006; T.P. Spijkerboer & B.P. Vermeulen 2005, p. 228.

¹²¹ See APD study, chapter 9, p. 21, "Opportunity to challenge the decision to prioritise".

formal decision is taken to prioritize and/or accelerate the examination.¹²² Indeed, it is often only evident from the decision on the application itself that the application was examined in an accelerated manner.¹²³ As a result, there is no formal decision which can be legally challenged, except upon appeal following a negative first instance decision taken in the accelerated procedure.

12. In the Netherlands and the UK, a legal representative may request that a “decision” to accelerate the examination be re-considered, but the decision is at the discretion of the case manager.¹²⁴ In the Netherlands, the legal representative has the possibility to submit his/her opinion after his/her client has been interviewed on the merits of the claim. S/he can request that the authorities do not take the first decision, and instead refer the application to the regular procedure in order to have more time to provide background information. However, given that the report of the personal interview is key, and later statements are not easily taken into account, referral of a case to the regular procedure may be of limited assistance.¹²⁵ In the UK, the “acceleration” element of the detained accelerated procedure (and not the “detention” element) can be queried by the legal representative, either by asking for an adjustment to timescales within the detained fast-track procedure, or by requesting that the application be removed from the accelerated (detained) procedure entirely (and thereby placed in the “regular” procedure).

13. In the Czech Republic, a decision by the determining authority not to allow entry into the territory (which results in an application for international protection

¹²² The Czech Republic, with regard to decisions taken on the basis of Section 16, Asylum Act: Act No. 325/1999 Coll. on Asylum and Amendment to Act No. 283/1991 Coll., on the Police of the Czech Republic, as amended (the Asylum Act), and Amendment to Act No. 359/1999 Coll. on Social and Legal Protection of Children, as amended; published in Issue No. 106/1999 of the Collection of Laws of the Czech Republic (pp. 7385-7404) on December 23, 1999, and entered into force on January 1, 2000 (“ASA”); Finland and Germany with regard to the informal prioritization of some examinations; Greece, Slovenia and Spain with regard to applications examined in the accelerated border procedure (although applicants do have the opportunity to request a re-examination of the initial decision, which may include a challenge to the decision to accelerate the examination). In Spain, if the application is admitted to the procedure – whether at the border or in-country - s/he is notified whether admission is to the regular or the accelerated procedure. This constitutes notification and not a formal decision, and therefore cannot be appealed before the courts.

¹²³ For instance, decision 77 in Finland (See APD Study, Chapter 9, p. 21), where the fact that the decision stated that the application was manifestly unfounded was indicative of the fact that the examination had been conducted in an accelerated manner. However, there was no other record in the case file to indicate that the examination had been accelerated. Similarly, in the Czech Republic, an applicant will only learn that the application was examined under Section 16 ASA once the decision is taken that the application is manifestly unfounded. This is also apparent in decisions in Slovenia.

¹²⁴ In the UK, see *Detained Fast Track Processes Operational Instruction on Flexibility in the Fast Track Process* (26 April 2005 – UKBA website) and the *Detained Fast Track (DFT) & Detained Non Suspensive Appeal (DNSA) – Intake Selection (AIU Instruction) v.2*. In UNHCR’s fifth Quality Initiative report to the Minister in March 2008, UNHCR noted its concern that in just over one in seven of the cases it had reviewed, a request was made for taking the case from the detained fast track (“DFT”) procedure which was not granted, and in a number of these cases inappropriate or inadequate reasons were given for refusing the request. In some cases there was no clear indication from the case file as to whether the request had been considered, or why it was refused: Paragraphs 2.3.68 and 2.3.70 of the fifth Quality Initiative report.

¹²⁵ Evidence which is not raised during the personal interview or in the submitted opinion of the legal representative, but is only raised at a later stage, may adversely impact the credibility.

being examined in the accelerated procedure under Section 73 ASA) can be challenged administratively with the determining authority, DAMP, one month after the decision was taken. Alternatively, it can be appealed to the administrative courts.¹²⁶ By contrast, it is not possible to challenge the decision to accelerate the procedure taken under Section 16 ASA (manifestly unfounded applications).

14. Similarly, in France, a decision of a *Préfecture* not to grant a temporary residence permit (which results in the application for international protection being examined in the accelerated procedure) is a formal decision which can be appealed before the administrative tribunal.¹²⁷ This legal remedy has no suspensive effect, except when the case is referred to the court under an emergency procedure (“*référé*”), and the judgment can take months or years.¹²⁸ The decisions of the *Préfectures* in principle should be reasoned and duly notified to the applicant.¹²⁹ In practice, however, this is not always the case. UNHCR audited 20 case files examined in the accelerated procedure. In most, there was a “*fiche de saisine de l’OFPRA en procédure prioritaire*” stating the decision of the prefecture regarding the request for a temporary residence permit. However, these decisions were not always well reasoned, and some were more detailed than others.¹³⁰

15. A further exception is permitted in the UK where applicants can apply to the Administrative Court (for England and Wales) or Court of Session (Scotland) for judicial review of the legality of the decision to channel the claim into accelerated procedures. Its scope is restricted to a review of the lawfulness of the decision, and not its merits. Permission to seek judicial review is not always granted.

¹²⁶ UNHCR obtained some evidence to suggest that the City Court in Prague does not always manage to take a decision within the maximum four month period in which an applicant may be detained at the airport. A local NGO, whose lawyer commutes to the transit area of the international airport showed UNHCR, on 22 April 2009, a copy of two decisions in which it took nine and ten months respectively for the CC in Prague to take a decision (No. 5 Ca 53/2008-37 of 12 December 2008 and No. 10 Ca 35/2008-83 of 3 December 2008).

¹²⁷ In the Rhône *Département*, the court is systematically seized by applicants who were refused a temporary residence permit and whose application was therefore channeled into the accelerated procedure.

¹²⁸ Cf. Article L.521-1 *du code de justice administrative*. In this regard, the Administrative Court in Lyon (« *tribunal administratif* ») always considers that the emergency procedure should be applied. This tribunal tends to suspend the decision of the *Préfecture* refusing a temporary residence permit for applicants who are nationals of safe countries of origin, and/or who apply for asylum in the framework of a subsequent application, and to order the *Préfecture* to deliver a temporary residence permit to these applicants, which should be valid until the decision of the CNDA on appeal. Therefore this case law creates a suspensive remedy before the CNDA (*NB*: this case law comes from a first instance administrative tribunal. It does not rule on the substance of the case, it can be overturned by a higher administrative court and it has no binding effect on other administrative tribunals. Only a ruling from the Council of State (*Conseil d’Etat*) would set a precedent. Cf. *Tribunal administratif de Lyon, M. B.P., Ordonnance du juge des référés, 2 février 2007, N°0700354; Tribunal administratif de Lyon, Mme EC, Ordonnance du juge des référés, 3 avril 2009, N° 0901637; Tribunal administratif de Lyon, Mr. KC, Ordonnance du juge des référés, 3 avril 2009, N° 0901635*).

¹²⁹ This is the case in the Rhône *Préfecture*, which has a longstanding tradition of reasoning its decisions because of the strict control undertaken by the administrative court (“*tribunal administratif*”). This is however not the case in all the *Préfectures*.

¹³⁰ APD Study, chapter 9, p. 23.