

## **DISCUSSION PAPER ON ASYLUM DECISION-MAKING**

### **EU MINISTERIAL CONFERENCE ON ASYLUM, 13-14 SEPTEMBER 2010, BRUSSELS**

By : Madeline Garlick (UNHCR), 23 August 2010

#### **1. Introduction**

The Ministerial Conference on Asylum, initiated by the Belgian EU Presidency, affords a valuable opportunity for Ministers, senior officials, international organizations and civil society to reflect in detail and engage in dialogue on key challenges facing the establishment of a Common European Asylum System (CEAS). According to the European Council in Tampere (1999) and Stockholm (2009), this system should entail harmonized practices and standards in accordance with the 1951 Convention and other relevant treaties. It should also include "common procedures for the granting and withdrawing of uniform asylum or subsidiary protection" under Article 78 TFEU. High-quality, consistent asylum decision-making is a critical element for the achievement of these goals.

Asylum procedures as such are not regulated by the terms of the 1951 Convention, nor by the other international and European Conventions which are considered as the major sources of refugee law and international protection obligations. However, in order to ensure that people eligible for protection under those instruments can be identified, there must be effective access to fair and efficient decision-making processes, attended by appropriate safeguards and procedural rights. Moreover, there are obligations to afford due process and basic procedural rights derived from other legal contexts, as well as the procedural standards recognized by the Court of Justice of the EU as forming part of the "general principles of Community law". These safeguards and procedural rights should be integral to the asylum decision-making processes of all Member States.

Procedures must not only be fair, but also efficient, workable and cost-effective. In this respect, the quality of the first instance procedure in particular emerges as vitally important. In the EU in 2009, almost 20% of people who were recognized as needing protection received it only on appeal<sup>1</sup>. The costs – both in financial and human terms – of ineffective first instance processes are significant. It is not in the interests of states nor of asylum seekers that such a high proportion of cases receive recognition of their protection needs only at appeal.

In considering which future standards for asylum decision-making in the EU should be set – including through legislation, practical measures (including cooperation among EU Member

---

<sup>1</sup> Source: UNHCR Global Trends 2009. In 2009, 312,188 decisions on protection, first instance and second instance) were taken in EU countries. Among the EU Member States for which separate figures are available to UNHCR for first and second instance (i.e. all those except for Austria, Hungary and Romania), 19% were taken at second instance (13,545 out of 72,192 decisions to grant protection).



States) and other initiatives – some see the risk of abuse as the major concern to be addressed. The fear appears to be that strengthened decision-making procedures will not only result in increased recognition rates, but could also attract asylum seekers who believe that it will be possible for them to receive benefits from the system, even if they do not have a well-founded fear of persecution or serious harm.

It is acknowledged that only around one fourth of asylum-seekers are recognized in the EU as needing protection<sup>2</sup>. However, this does not necessarily signify bad faith on the part of all other claimants. Some people may indeed seek asylum, without satisfying the grounds for protection, because they are moving for other reasons and there are no other migration channels available. However, others may not be aware of the legal criteria which apply, may not fully understand the purpose of the process, or may genuinely be in need of some form of assistance, although their situation does not give rise to an international protection obligation. Some people who in fact need protection may be denied recognition because very strict procedures, with limited timeframes and safeguards, do not provide them with the effective opportunity to establish their claims. Others are denied because of restrictive or erroneous interpretations of the refugee definition or subsidiary protection criteria.

The UN High Commissioner for Refugees, Mr. António Guterres, has argued that the best way to address abuse of asylum processes is to utilise “fast and fair processes yielding accurate decisions”.<sup>3</sup> This must involve high-quality first instance decision-making and comprehensive and reliable appeals. Investment in such systems can yield savings in the longer term, as swift decisions - whether positive or negative - can more easily be implemented.

This paper examines the issues identified as the themes for the Asylum Decision-Making workshop. However, it will do so in a wider context, drawing on relevant research and linking these issues, where appropriate, to other aspects of the asylum procedure.

## 2. Training of personnel

---

<sup>2</sup> Source: UNHCR Global Trends 2009. In 2009, 312,188 decisions on protection, first instance and second instance) were taken in EU countries. Of these 77,452 (25%) were decisions to grant some form of protection. These comprised 38,326 (12%) decisions to grant refugees status and 39,126 (13%) which were decisions to grant other forms of protection. A total of 234,736 were decisions to reject or otherwise close the case.

<sup>3</sup> Remarks to the Informal Justice and Home Affairs Council, Brussels, 15 July 2010 <http://www.unhcr.org/4c44034f9.html>.



As part of recent research undertaken by UNHCR in 12 Member States,<sup>4</sup> training of personnel involved in **interviewing** asylum applicants, as well as of **interpreters** for asylum interviews, was specifically examined. The amount, level and nature of training was found to vary widely, with fewer than half of the Member States surveyed in the research conducting compulsory and formal training for newly-recruited interviewers. Arrangements for ongoing support and mentoring after initial recruitment also varied widely (from 14 to 70 days). Training in specialized skills likely to be required for asylum interviews – including for interviewing children, or people with special needs – was also provided in only a few countries. By way of good practice, some states provided specific training to personnel who specialized in a particular country or region of origin.

Despite the critical importance of their role for the information-gathering and subsequent decision-making process, training for interpreters, by comparison, was found to be limited or non-existent in the 12 Member States surveyed in the research.<sup>5</sup>

In addition to interviewing and interpreting, which are specialized and demanding skills, there are many other aspects of the asylum decision-making process which require special knowledge and techniques. Among others, **research, evidence gathering and evidence assessment; analysis of legal criteria** and their **application** to facts; effective **communication** (including with people from different cultures); and **drafting** skills are all crucial to the process and its outcome. While the content and levels of training in these areas was not part of UNHCR's research, UNHCR's general observation is that it varies significantly in Europe.

Sharing of the identified good practices, and promotion of their use through practical cooperation and dialogue among states, is an important way to address this. Development of tools – such as the **European Asylum Curriculum**, shortly to be taken over by the European Asylum Support Office (EASO) – is another vital contribution. However, to ensure that a sufficient level of basic training is guaranteed for participants in the asylum decision-making process, it would appear necessary to define **minimum requirements** in EU law. As budget limitations and conflicting political priorities place further pressure on asylum systems, explicit EU obligations to furnish a basic level of initial and ongoing training would ensure that at least some of the quality concerns are addressed. In this respect, provisions foreseen in the European Commission (EC)'s recast proposal for the Asylum Procedures Directive could contribute to ensuring a more harmonised and rigorous approach to training across the EU.

### 3. Personal Interviews

---

<sup>4</sup> UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, available at: <http://www.unhcr.org/refworld/docid/4c63e52d2.html> (hereafter 'UNHCR APD Report').

<sup>5</sup> UNHCR APD Report, section 5.



The interview is an essential and crucial component of the decision-making process,<sup>6</sup> given the opportunity it provides for the gathering of vital facts and putting of questions which can clarify, supplement or fill gaps in information that is contained in an applicant's initial file. The extensive grounds on which **personal interviews may be omitted** under Article 12(2) of the Asylum Procedures Directive (APD) may thus lead to problematic results. This is the case where, for instance, omission of an interview is permitted because the application is considered as raising irrelevant or minimally relevant issues, or the applicant has made "inconsistent, contradictory, improbable or insufficient representations" which make his or her claim "clearly unconvincing". In such circumstances, it could be argued, an interview is needed to enable the interviewer or decision-maker to ask questions to address the lack of clarity. The EC recast proposal to reduce the grounds for omitting interviews could have the potential to ensure that interviews are used to gather better information, and thereby provide a stronger foundation for good decisions.

**Preparation for interviews** is another vital area where Member States' practice appears at present to vary widely.<sup>7</sup> Sufficient time and information to enable effective preparation, both for interviewers and applicants, is likely to ensure a more focused approach to questioning and more coherent answers. However, it would appear that time and other resource constraints prevent some states from providing caseworkers with time to read, research and otherwise prepare the file. This may be counter-productive in the long run, as experiences show that ill-prepared interviews may consume more time and have less productive outcomes than those guaranteed at least a minimum of preparation time.

Other basic safeguards which could be seen to assist the applicant are also likely to benefit the authorities, if they lead in practice to more effective disclosure of information by applicants. Vigorous efforts are needed to ensure **confidentiality** is respected, and to assure the applicant that his/her information will be handled confidentially, to encourage him/her to bring forward all relevant information. Where interviews are conducted in environments which are not conducive to full disclosure, the process is less efficient, and in the worst case may deny the claimant an effective opportunity to provide vital information which is decisive for the claim. For instance, where gender-related issues arise, having gender-sensitive procedures and guarantees that confidentiality is respected are essential safeguards.

In addition to training, the interview process can be strengthened through further guidance to interviewers and interpreters (and potentially others in the asylum process) regarding appropriate **standards of conduct**. Professional, focused and ethical working methods must be ensured – not only to protect the integrity of the asylum process – but also to facilitate establishment of the trust and conducive environment needed to ensure that asylum applicants can present their claims. Good practice is seen in several Member States at present, where Codes of Conduct have been developed and are applied to both interviewers and interpreters. Such tools and practices could be replicated and/or established through common Codes of Conduct at EU level, potentially under the guidance of the EASO.

---

<sup>6</sup> UNHCR APD Report, section 4, p 1.

<sup>7</sup> UNHCR APD Report, section 5.



**The record of interview** is also an essential element in the decision-making process. Without means to verify and check the content of an applicant’s statement, for the purpose e.g. of comparing it with other later-emerging evidence, decision-makers at first as well as second instance (where further hearings or interviews may not be available) would be unable to reach sound and defensible decisions.

The form and detail of interview records at present varies widely from one Member State to another, including full transcripts, audio or video-recording, and written summaries.<sup>8</sup> Such different approaches are permitted by the APD, which specifies only a “written report” – but which requires that report to contain “at least the essential information regarding the application, as presented by the applicant..”<sup>9</sup> The discretion, implied by this article, to determine what information is “essential” allows scope for subjective approaches which may not guarantee the quality which is needed in interview records, which in turn can affect the accuracy of the final decision. This is particularly important in countries where the person who takes the decision is not the person who interviewed the claimant and recorded his/her claim. On this basis, it has been argued that as a minimum, EU norms should require either a verbatim transcript, or a detailed summary with an audio- or video-recording available as a reference.

The applicant’s **approval of the content of the interview report** is a further important requirement to ensure the veracity and reliability of evidence based on which decisions are taken. While the APD does not require this, it permits states to ask applicants to approve the content of a report. UNHCR’s research observed that some states require applicants to approve the content of reports that they have not had an opportunity to check.<sup>10</sup> Translation of the report may not always be provided, even in cases where it would be needed to enable the applicant to understand the content for the purposes of approving or amending it. In other cases, no opportunity to approve the report is provided; or applicants are asked to approve without any means to make amendments or record objections. Such practices would seem likely to increase significantly the risk of error in interview records – as well as raising the prospect of breaches of applicants’ procedural rights.<sup>11</sup>

#### 4. Gathering, interpretation and use of evidence

The Qualification Directive (QD) addresses the gathering of evidence, providing in Article 4(1) that Member States “may consider it a duty of the applicant to submit as soon as possible all

---

<sup>8</sup> UNHCR APD Report, section 6.

<sup>9</sup> Article 14(1) APD.

<sup>10</sup> UNHCR APD Report, section 6.

<sup>11</sup> Article 8 of the Charter of Fundamental Rights provides that personal data (which could include information recorded in interview reports) “must be processed fairly for specified purposes” and “everyone has the right of access to data which has been collected regarding him or her, and the right to have it rectified.”

elements needed to substantiate the application.” However, the burden of proof is a shared one, as confirmed by the further sentence stating: “In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.”

In connection with this general provision, the APD requires Member States to ensure that “precise and up-to-date information is obtained from various sources, such as ... UNHCR, as to the general situation prevailing in the countries of origin of applicants...” and that this be “made available to the personnel responsible for examining applications and taking decisions”.

The importance of objective, comprehensive and current information – including Country of Origin Information (COI) -- to the accuracy of asylum decision-making is undeniable and has been recognized by the European Court of Human Rights for the purpose of assessing a risk of violation of Article 3 ECHR.<sup>12</sup> However, state practice and tools vary widely. Some Member States operate sophisticated COI databases, and conduct targeted fact-finding missions to countries and regions of origin and transit, thereby generating additional information which is readily accessible to their personnel; others depend exclusively on general public sources. While resource imbalances are a reality, some initiatives now underway for more cooperation among Member States on COI – notably the proposed Common Portal, as well as joint fact-finding missions – are expected to improve the situation. In addition, publicly-available tools – including UNHCR’s Refworld database – aim to disseminate as widely as possible key COI for use by all stakeholders and participants in asylum processes. A further interesting step to pursue would be more harmonised or joint interpretation of and conclusions on protection needs based on widely-accepted COI.

Further adjustments to rules and practices on COI could help ensure better access to and use of COI to aid decision-making in a number of states. Greater commitment to transparency and wider use of public material by decision-makers would help to ensure not only that the system is more credible, but would help to ensure that the quality of the material is effectively maintained. If an applicant, lawyer or researcher observes an inaccuracy in a public report that a State makes available, this can serve as an extra check on the content of such material. More comprehensive training in researching, but also the interpretation and use of COI, could also help asylum decision-makers and caseworkers.

## 5. Credibility assessment

---

<sup>12</sup> See para. 136 of the judgment *Salah Sheekh v NL* which reads as follows: “given the absolute nature of the protection afforded by Article 3, [the Court] must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting states, agencies of the United Nations and reputable non-governmental organisations.” *Salah Sheekh v. The Netherlands*, Council of Europe: European Court of Human Rights, *Application no. 1948/04*, 11 January 2007, available at: <http://www.unhcr.org/refworld/docid/45cb3dfd2.html>.





One of the most important, but least regulated, aspects of asylum procedures is arguably the assessment of credibility. It is apparent from general observation of asylum procedures in the EU that a significant proportion of claims are rejected because the applicant cannot submit sufficient evidence to support the claim and his or her statement is not considered credible.<sup>13</sup> However, the criteria, tools, expertise and legal grounds on which this conclusion is reached vary. There are no provisions at EU level which address the subject, leaving it to individual states to decide how to operate their evidentiary assessments. Without a coherent approach to this issue, decisions will continue to diverge, and there is a risk that credibility remains a largely or wholly subjective assessment.

While it is clear that the assessment of evidence involves not only law, but psychology as well, there could be significant benefits for the EU in further analysis of the issue of credibility assessment, to determine when and how it is used in asylum decision-making, and whether further guidance or regulation in this area is needed. There is no doubt that this issue could prove sensitive or difficult methodologically to address, but it is nonetheless a vital one.

---

<sup>13</sup> "Proof, Evidentiary assessment and Credibility in Asylum Procedures", Edited by Gregor Noll, Martinus Nijhoff Publishers, 2005. ISBN: 90 0414 0654; and Jenni Millbank, "The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Determinations, *International Journal of Refugee Law*, 2009 21(1) at: <http://ijrl.oxfordjournals.org/cgi/reprint/21/1/1>.

## 6. Accelerated/prioritized procedures

Accelerated and prioritized procedures are widely used by Member States,<sup>14</sup> concerned in particular about dealing swiftly with what are seen as unfounded claims. Yet there is no definition of “accelerated procedures” under EU law. While it is generally understood that such procedures should be completed in a shorter timeframe than the mainstream process, in practice UNHCR has observed that such procedures can vary in length between two days and three months.<sup>15</sup>

A key feature of the APD’s provision on accelerated procedures, in article 23, is the requirement that such procedures be carried out “*in accordance with the basic guarantees and safeguards of Chapter II*” [of the APD].

There is concern that in practice, accelerated procedures are being used in some states in a way which means that the basic safeguards of Chapter II APD are not, in fact, available.<sup>16</sup> This includes the right to receive full information about the procedure (Art 10(1) (a) APD); to have access to an interpreter (Art 10(1) (b) APD); to communicate with UNHCR (Art 10(1) (c) APD), to consult a legal advisor (Art 15 APD), among others. Where procedures are conducted so swiftly that there is not an opportunity for the applicant to exercise these rights, the minimum requirements of the APD for accelerated procedures are not met.

The grounds for use of accelerated procedures are not exhaustively defined in the Directive – although 16 illustrative grounds are set out in Article 23, permitting states to apply accelerated procedures in a wide variety of circumstances. The listed grounds have been criticized on the basis that they permit acceleration for reasons unrelated to the strength of a claim.<sup>17</sup> This means that an applicant, who may have strong grounds for protection, and a claim involving complex elements in need of careful scrutiny, could be channelled into an accelerated procedure because, for instance, s/he presented false documents. UNHCR and others have argued that applicants’ behaviour during the procedure, or failure to comply with procedural or formal requirements, should not be the basis for acceleration of claims, notably when such processes afford few procedural safeguards. Such procedures should be reserved for claims which are clearly abusive or manifestly unfounded,<sup>18</sup> in the sense that they raise no grounds for protection.

---

<sup>14</sup> UNHCR APD Report, section 9.

<sup>15</sup> UNHCR APD Report, section 9.

<sup>16</sup> UNHCR APD Report, section 9.

<sup>17</sup> 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. Available at: <http://www.unhcr.org/43661ea42.html>.

<sup>18</sup> Executive Committee Conclusion No. 30(XXXIV) of 1983 refers to claims which are “so obviously without foundations as not to merit full examination at every level of the procedure. Such claims have been termed



In practice, it is observed that Member States use accelerated procedures based on a wide variety of grounds, extending beyond the non-exhaustive list in the Directive. Yet it would appear that highly accelerated procedures, which are limited to a few days or week(s), may result in problems which can fundamentally affect the quality of asylum decision-making. These include less time for submission of complete and detailed applications in writing; less time for interviewers and interviewees to prepare for interviews; less time to gather relevant evidence; difficulty in ensuring effective opportunities for applicants to disclose traumatic experiences; and reduced time for analysis and drafting of reasoned decisions, among others.

Key questions thus arise about whether and how accelerated procedures can be regulated and implemented in a way that guarantees an effective opportunity for applicants to exercise their basic procedural rights. When processing of claims is accelerated, it is important to consider what steps can be taken to ensure that quality of decision-making is not compromised. As stipulated in the Council of Europe Guidelines on the protection of human rights in the context of accelerated asylum procedures: "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."

## 7. Conclusion and elements for reflection

The disparities in decision-making on asylum claims by EU Member States have been recognized and regretted for years now, since the first phase EU instruments were transposed, and their implementation has made clear that harmonization has not been achieved.<sup>19</sup> However, despite the acknowledgements, it would appear that the differences are still very significant.<sup>20</sup>

Identifying and addressing the causes of these variations requires detailed analysis. Research – including both official evaluations commissioned by the European Commission and Parliament, as

---

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".

<sup>19</sup> European Union: Council of the European Union, *European Pact on Immigration and Asylum*, 24 September 2008, 13440/08, available at: <http://www.unhcr.org/refworld/docid/48fc40b62.html>; and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, *Policy plan on asylum - An integrated approach to protection across the EU*, COM/2008/0360 final, 17 June 2008, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>.

<sup>20</sup> Source: UNHCR Global Trends 2009. Analysis of refugee recognition rates in the EU for applicants from a number of countries shows first instance rates varying from 0% to 79% for Iraqis, 0% to 33% for Afghans, 2% to 66% for Eritrea, 0% to 29% for Ethiopians, 0% to 62% for Iranians, 0% to 44% for Somalis and 0% to 63% for Sri Lankans. When all forms of protection are included, the rates are 0% to 93% for Iraqis, 0% to 87% for Afghans, 62% to 92% for Eritrea, 0% to 33% for Ethiopians, 5% to 85% for Iranians, 0% to 96% for Somalis and 0% to 65% for Sri Lankans, showing varying interpretations of the different protection regimes.





well as other independent research - confirms that the discrepancies will not be reduced unless both law and practice are closely scrutinized and subject to further adjustment.

Some key areas of EU asylum law are the subject of proposals from the European Commission which would increase the level of procedural safeguards in asylum procedures. While some observers fear that this would constitute a "pull factor", the improvement in the quality of asylum decision-making which these proposals would support would help to ensure that more accurate decisions are taken in the first instance. This is in the interest both of people in need of protection, and of the states with responsibility for examining their claims.

