

‘The Recast Asylum Procedures Directive 2013/32/EU:
Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee’

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1. Introduction

This piece provides a detailed analysis of the Recast Asylum Procedures Directive (Recast APD).¹ Although we are now two decades into harmonization of asylum procedures at the European Union (EU) level,² we begin in Part 2 by revisiting the rationale for this process. While we may be ‘too far in’ to go back, unless we are clear what the aim of harmonization is, we cannot assess whether we are meeting it. In the case of asylum procedures, we contend that the most persuasive rationale for procedural harmonization, in an EU legally committed to refugee protection,³ is to ensure fair procedures, and to prevent a race to the bottom in procedural standards. Efficiency must serve fairness, not *vice versa*. Indeed by its nature, efficiency is about how to achieve ends, not which ends to aim for.⁴

However, the original Asylum Procedures Directive (APD)⁵ failed to meet this aim by a long margin, at least in part as it was agreed by the 15 national governments acting

* The authors thank Madeline Garlick for sharing her work on the Recast APD, and Francesco Maiani and Minos

¹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L180/60, 29 June 2013 (Recast APD).

² In 1992, the three London Resolutions formed the first soft-law method of harmonization. The three resolutions covered countries in which there is generally no serious risk of persecution, manifestly unfounded applications for asylum and a harmonized approach to questions concerning host third countries. Council of the European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum (‘London Resolutions’)*, 30 November 1992.

³ Charter of Fundamental Rights of the European Union OJ C364/1, 18 December 2000 (entry into force 1 December 2009) (EUCFR), Art. 18; Consolidated Version of the Treaty on the Functioning of the European Union OJ C326/1, 26 October 2012 (entry into force 1 December 2009), Art. 78.

⁴ See further, F. Ippolito and S. Velluti, ‘The recast process of the EU asylum system: a balancing act between efficiency and fairness’ (2011) 30(3) RSQ 24; M. Reneman, ‘Speedy Asylum Procedures in the EU: Striking a Fair Balance between the Need to Process Asylum Cases Efficiently and the Asylum Applicant’s EU Right to an Effective Remedy’ (2014) 25(4) IJRL 717.

⁵ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L236/13, 13 December 2005 (APD).

unanimously in the Council, leading to a Directive embodying low standards, great complexity, and apparently limitless room for derogation from its central guarantees.⁶ It facilitated the use of special procedures, in particular based around safe country concepts, both safe country of origin (SCO) and safe third country (STC).⁷ The Recast APD is the product of the new, post-Lisbon legislative environment, so as Part 3 suggests, it comes with high hopes for improvement, particularly given the Parliament's relatively new role as co-legislator on asylum matters. Part 3 briefly sets out the process leading to the adoption of the Recast.

Part 4 contains the analysis of the measure. The Recast APD contains many improvements on its predecessor, but overall our assessment is mixed, particularly if we assess it in terms of the objective of setting clear basic minimum standards of fairness. We attempt to explain this ambivalent outcome by suggesting that the Directive reflects two competing stereotypical views of the asylum seeker. On the one hand, there is a strong notion that asylum procedures must work to weed out 'abusive' claims. The notion of 'abuse' pervades the measure, but is ill defined. It seems that normal procedures are not deemed fit to deal with some abusive applications, so additional procedural mechanisms are devised. In contrast, there is also a strong acknowledgement that some asylum seekers are particularly vulnerable or have special needs (as will be seen, different terminologies are used in different contexts). Again, normal procedures are not regarded as suitable for these vulnerable souls either, so further procedural mechanisms are devised, and they are released from the rigours of the procedures devised for the abusers. As we argue, these stereotypes create complexity, and crowd out the basic notion of refugee status determination (RSD) as a process for *recognising* refugees, on the assumption that many (although of course not all) of those who apply will be so recognised.

2. Why Harmonize Procedures?

2.1 International Refugee and Human Rights Law

When we look at the international refugee regime, legally grounded in the 1951 Convention on the Status of Refugees and its 1967 Protocol (CSR), we note that it does not contain procedural rules for determining who is a refugee. It assumes that the refugee population is readily identifiable, and accords them status, a defined package of rights. Indeed, as the United Nations High Commissioner for Refugees (UNHCR) reiterates, RSD is declaratory rather than constitutive.⁸

Over time, the issue of how to determine who is a refugee came to greater prominence, with the UNHCR Handbook succeeding in creating a soft-law framework for RSD by States.⁹

⁶ C. Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7(1) EJML 35; P. de Bruycker 'Le niveau d'harmonisation législative de la politique européenne d'immigration et d'asile' in O. Edström, F. Julien-Laferrrière and H. Labayle (eds), *La politique européenne d'immigration et d'asile: bilan critique cinq ans après le Traité d'Amsterdam* (Bruylant 2005) 45; C. Costello, 'The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles' in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice? EU immigration and asylum law after 1999* (Hart 2007).

⁷ Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices' (n 6).

⁸ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (2011) UN Doc. HCR/IP/4/Eng/REV.1, December 2011, para. 28.

⁹ Of course, much RSD around the world is conducted by UNHCR rather than by States. In a recent review of its mandate for RSD, UNHCR noted the importance of having States do RSD: UNHCR, *Providing for Protection: Assisting States with the assumption of responsibility for refugee status determination - A preliminary review* (2014) PDES/2014/01, March 2014. On the soft law character of the Handbook, see F. Maiani, 'Les procédures nationales d'asile et leur environnement juridique international: encadrement, dialogue, apprentissage' (2013) 28 ASYL 21.

Nonetheless, the variety of forms of RSD remains, and in many parts of the world, *prima facie* procedures are used on a group basis, particularly, but not exclusively, in cases of ‘mass influx’.¹⁰ This and other forms of group determination sometimes lead to the attribution of a temporary status, but not necessarily so. These practices should give us pause, as they illustrate that if applied appropriately, protection may be afforded refugees, without intensely individualized and judicialized procedures. This brief global excursus is simply to remind us that refugee protection requires refugees to be recognized as such, but does not demand any particular form of procedures for this. So, at the international level, we seem to manage fine, or at least OK, without formal procedural harmonization.

International human rights law (IHRL) has now come to have a defining influence on international refugee law (IRL). This is most well-established in creating a linkage between human rights violations and the central IRL concept of persecution.¹¹ However, it also extends to procedural matters, as IHRL demands that rights protection be effective and that rights violations be subject to effective remedies. Thus, for instance, as will be discussed further below, many issues concerning asylum procedures in Europe come before the ECtHR in Strasbourg, which now routinely finds deficiencies in asylum procedures which exposed individuals to an unacceptable risk of *refoulement*, typically as violations of Articles 3 and 13 of the European Convention on Human Rights (ECHR).¹² Under the Inter-American system, further protections for asylum seekers have also been developed.¹³ These judicial interventions contribute to procedural harmonization, in that certain procedural practices become defined elements of the requisite ‘effective remedy’ under IHRL.

As will be seen, one of the notable features of the Recast APD drafting process is the impact of Strasbourg case law, with certain improvements introduced to reflect the jurisprudence, as discussed in Part 4 below. However, the Recast is by no means fulsome in its embodiment of the Strasbourg standards, and on some key issues (automatic suspensive effect and legal aid, for instance) may set up new rounds of litigation as domestic practices ostensibly legitimated by the Recast lead to practices in tension with the ECHR. All in all though, the Recast illustrates that IHRL (in particular the Strasbourg court) does provide a forum for developing important principles of procedural fairness, which provide minimum standards to which regional harmonization ought to adhere.

To conclude, neither IRL nor IHRL requires procedural harmonization. Both systems contribute to harmonization by setting forth principles on fair procedures that apply to RSD (if it is done), and what sort of remedies should be applicable for rights protection to be effective. So while both bodies of law constrain any regional harmonization that takes place, neither in itself provides a rationale for that process.

2.2 At the EU Level

Accordingly, to identify the rationales for procedural harmonization, we must look for reasons specific to the EU context. Before we examine the official rationales within the Common European Asylum System (CEAS), it may be worth recalling that in many if not

¹⁰ M. Albert, ‘Prima facie determination of refugee status: An overview and its legal foundation’ (2010) RSC Working Paper Series No. 55.

¹¹ As reflected in Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304/12, 30 September 2004 (QD). See further H. Battjes in this volume.

¹² Case 33/76 *Rewe-Zentralfinanz* [1976] ECR 1989; Case 45/76 *Comet* [1976] ECR 2043. See further M. Dougan, *National Remedies Before the Court of Justice* (Hart 2004); T. Tridimas, *The General Principles of EC Law* (2nd Ed. Oxford University Press 2006).

¹³ D. Cantor and S. Barichello, ‘The Inter-American human rights system: a new model for integrating refugee and complementary protection?’ (2013) 17(5-6) *IJHR* 689.

most fields, substantive EU harmonization proceeds *without* detailed procedural harmonization. In these contexts, the requirements of equivalence and effectiveness constrain how domestic procedures should work, but no more.¹⁴ We also find positive mutual recognition in many contexts, without procedural harmonization. For instance, family permits for the family members of EU Citizens are valid across the EU, even in the absence of procedural harmonisation.¹⁵

These examples illustrate that, under the normal decentralized practices of the EU, procedural harmonization is a relative rarity. The institutional structure applying to asylum seekers looks anomalous: we are moving to a system of tighter procedural harmonization, with ostensibly common substantive rules, but no mutual recognition of positive determinations.¹⁶ This institutional oddity should require us to think twice: Member States seem to trust one another enough to recognise rejections of asylum claims, but not the recognition of refugees. Further procedural harmonization, under these conditions, could serve as an additional trust-building mechanism, but such a role is not obvious. Under these conditions, we suggest that procedural harmonization requires additional justification: If it is not needed for some EU statuses, which are mutually recognised without uniform procedures, why for others? There would seem to be needed a sector-specific rationales particular to the asylum context. So in the next section, we search for such rationales.

2.3 Asylum-Specific Rationales

The official discourse surrounding the CEAS identifies a composite set of objectives in relation to procedural harmonization. For instance, the Stockholm Programme provides that:

While CEAS should be based on high protection standards, due regard should also be given to fair and effective procedures capable of preventing abuse. It is crucial that individuals, regardless of the Member State in which their application for asylum is lodged, are offered... the same level [of treatment] as regards procedural arrangements and status determination. The objective should be that similar cases should be treated alike and result in the same outcome.¹⁷

The Commission has stated that a ‘common asylum procedure should be *fast and fair*’.¹⁸ As regards the tools to meet this aim, full harmonization has not been envisaged. The original APD was expressly a ‘minimum standards’ Directive. The Recast describes itself as setting

¹⁴ See further P. Craig and G. de Burca, *EU Law: Text, Cases and Material* (5th edn, OUP 2011) ch. 8.

¹⁵ Case C-202/13 *McCarthy* [2014] OJ C189/6. For analysis of this ruling, see S. Peers, ‘The CJEU confirms short-term free movement rights for EU citizens’ third-country family members’ *EU Law Analysis* (18 December 2014), <<http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-confirms-short-term-free.html>> accessed 25 January 2015.

¹⁶ The exception is found in the amendment to the Long-Term Residents Directive, which permits refugees to move to other EU States after five years lawful residence: Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ L16/44, 23 January 2004 (Long-Term Residents Directive), as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection OJ L 132/1, 15 May 2011. At least half of the time they spend as asylum seekers will count to that five years, but this is subject to further conditions. Mutual recognition of negative asylum decisions is however institutionalized. In effect, the Dublin system means that asylum-seekers have one-shot: see Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast) OJ L180/31, 29 June 2013 (Dublin III Regulation).

¹⁷ European Council, *The Stockholm Programme — An open and secure Europe serving and protecting citizens*, OJ C115/1, 4 May 2010, s.6.2.

¹⁸ European Commission, *Amended Proposal for a Directive of the European Parliament and of the Council common procedures for granting and withdrawing international protection status (Recast)*, COM(2011) 319, 1 June 2011, 1.

‘common standards’, but remains according to Article 5 thereof, minimum in effect. Accordingly ‘Member States may introduce or retain more favourable standards on procedures for granting and withdrawing international protection,’¹⁹ so long as these remain compatible with the rest of the Recast APD. Also, harmonization is partial, in that the measure aims to leave flexibility to ‘*accommodate the particularities of national legal systems.*’²⁰ The European Council in setting out strategic guidelines following the Stockholm Programme, anticipates the implementation of the recast asylum *acquis* to produce ‘high common standards and stronger cooperation, creating a level playing field where asylum seekers are given the same procedural guarantees and protection throughout the Union.’²¹ However, this claim seems more rhetorical than real, given that identical procedures are not in reality envisaged even under the Recast.

These formulations set out generic notions of fairness, efficiency and uniformity, which treat harmonization as both means and ends. Accordingly, our starting premise is that the principal aim of procedural harmonization must be to ensure procedural fairness. Yet, as discussed above, the normal approach under EU law and IHRL, as outlined above, is to establish principles to guide and constrain procedures, rather than detailed rules. Many diverse procedural forms are intrinsically fair, so there would seem to be little justification for general harmonization in the name of fairness.

However, there is a further dimension to the EU asylum context that we must recall: regulatory competition. The EU sets up a system where States compete to deflect and deter asylum seekers. This has been well-established, and can be regarded as axiomatic in the conditions of relative internal freedom of movement within the EU.²² In this context, if we are committed to procedural fairness, the role of EU standards would be to prevent a regulatory race to the bottom by establishing clear minimum standards. In this context, we might reasonably conclude that principles of procedural fairness are not enough, as these require goodwill and judicial oversight to police, and opt instead to commit to clear procedural rules.

If this is indeed the best rationale for procedural rules at the EU level, an EU institutional problem should come to mind: In the first phase of the CEAS, the governments who were charged with agreeing the minimum procedural standards were the same executives who had an interest in maintaining their discretion to manipulate procedural standards downwards. The normal constraints on governmental dominance of EU law-making, namely the role of the Commission in controlling its draft proposal, and a role for the European Parliament (EP), were lacking. In this context, perhaps the outcome of the original APD was not surprising. More on that anon.

For now, we conclude by reiterating that maintaining fair procedures, by committing to clear minimum standards, as detailed as necessary to preclude a race to the bottom, seems to be the strongest rationale for procedural harmonization at the EU level.

If we are committed to fairness, the notion of *efficiency* needs careful examination.²³ There need be no conflict between the two, but they are qualitatively different notions. Fairness is a value, whereas efficiency merely describes a means of achieving an aim or acting coherently with a particular value, such that time, effort and costs are well spent. The aim of fairness must be set, and then questions of efficiency are by their nature secondary. Unfortunately, some practices undertaken in the name of efficiency are liable to undermine

¹⁹ Recast APD, Art. 5.

²⁰ European Commission (n 18) 2.

²¹ Council of the European Union, *European Council Conclusions 26/27 June 2014*, EUCO 79/14 CO EUR 4 CONCL 2, 27 June 2014, para. 7.

²² G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill 2000).

²³ On the ambiguity of the concept of ‘efficiency’ in the asylum context, see A. Betts, ‘What Does “Efficiency” Mean in the Context of the Global Refugee Regime?’ (2006) 8 BJIPR 148.

fairness. Making swift decisions is desirable, but not at the cost of fairness. Making swift positive decisions seems likely to be fairer than swift negative ones, given the relative risk of error in asylum procedures. Fair and fast best cohere in front-loading of administrative and support resources, to ensure good quality first instance decision; and in measure to recognize strong claims quickly. In the analysis in Part 4, we identify aspects of the Recast that reflect these tensions.

3. From the Original to the Recast APD

3.1 Implementation of and Litigation on the APD

As mentioned in the preceding section, the original APD was adopted by the 15 national governments (then comprising the Council) by unanimity. As a result, a lowest common denominator result was unsurprising. Enough ink has been spilled critiquing the original APD.²⁴ At the time of its drafting, UNHCR and other asylum non-governmental organizations (NGOs) made an unprecedented intervention demanding that it be withdrawn, as it contained such poor rules which in their view would lead to breaches of substantive international legal commitments.²⁵

Once the APD was adopted, two rescue strategies emerged: Firstly, it was hoped that in implementation, things would improve; and secondly, that via litigation, the CJEU would reinterpret the most problematic provisions. On implementation, it seems that the APD coincided with greater complexity and some degradation of procedural standards.²⁶ As regards litigation, few preliminary references were made to try to tighten up problematic provisions of the APD. It will be recalled that until 2009, only courts of highest instance could make reference on EU asylum matters. When that limitation on references was removed, and cases did begin to go to the CJEU, it tended to take a relatively cautious approach in its rulings, recognising that the APD left much leeway to national governments.²⁷ This is notwithstanding the strong procedural protections offered under EU general principles which, it was originally argued, would offer the opportunity for judicial improvement.²⁸ By contrast, the Strasbourg Court continues to be the venue for much litigation on asylum procedures, and has recently found that the application of procedures in France, Belgium and Spain failed to provide effective protection.²⁹ The Recast took into account the case law, in particular that of the Strasbourg court, but not always in a straightforward or entirely fulsome manner.

²⁴ See Costello, 'The APD in Legal Context' (n 6).

²⁵ ECRE, ILGA Europe, Amnesty International, Pax Christi International, Quaker Council for European Affairs, Human Rights Watch, CARITAS-Europe, Médecins Sans Frontières, Churches' Commission for Migrants, Save the Children in Europe, *Call for withdrawal of the Asylum Procedures Directive* (22 March 2004); UNCHR Press Release, Lubbers calls for EU asylum laws not to contravene international law (29 March 2004); UNCHR Press Release, UNHCR regrets missed opportunity to adopt high EU asylum standards (30 April 2004).

²⁶ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* (2010) March 2010, <<http://www.unhcr.org/4c7b71039.pdf>> accessed 25 January 2015 (APD Study); European Commission, *Report on the application of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status*, COM(2010) 465, 8 September 2010 (APD Implementation Report). See also C. Costello, 'Implementation of the Procedures Directive (2005/85) in the United Kingdom' in K. Zwaan (ed), *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers 2008) 111.

²⁷ Case C-69/10 *Samba Diouf* [2011] ECR I-07151; Case C-277/11 *MM* [2013] OJ C 26/9; Case C-175/11 *HID* [2013] OJ C 86/3.

²⁸ Costello, 'The APD in Legal Context' (n 6).

²⁹ *IM v France* Appl no 9152/09 (ECtHR, 2 February 2012); *Hirsi Jamaa v Italy* Appl no 27765/09 (ECtHR, 23 February 2012); *Singh v Belgium* Appl no 33210/11 (ECtHR 2 October 2012); *ME v France* Appl no 50094/10 (ECtHR, 6 June 2013); *Mohammed v Austria* Appl no 2283/12 (ECtHR, 6 June 2013); *AC v Spain* Appl no 6528/11 (ECtHR, 22 April 2014).

3.2 The Recasting Process

Against the background of EU enlargement from a Union of 15 to one of 28, domestic procedural implementation, piecemeal litigation, legislative reform became all the more important. The Commission proposed a Recast of the APD in 2009,³⁰ and issued an Amended Recast Proposal in 2011.³¹ The second proposal was necessary as the first failed to garner sufficient support from national governments in the Council, despite discussions in the Council for some time, particularly during the Spanish Presidency in 2010. It appears that national governments raised diverse objections based on the specificities of their own asylum procedures, as well as general concerns to limit procedural rights. Before the Commission issued the Amended Proposal, the EP had issued its first reading position by April 2011.³² While this might lead one to expect that the Amended Proposal would seek to incorporate the views of the Parliament (given that the Directive would ultimately be adopted by the ordinary legislative procedure, so affording the Parliament a power of co-decision), instead the Commission gave great sway to the diverse and even idiosyncratic views of national governments. Space precludes a thorough analysis of the Amended Recast Proposal, but the UNHCR has commented thereon,³³ as have various NGOs have commented extensively thereon, including the Immigration Law Practitioners' Association (ILPA),³⁴ the European Council on Refugees and Exiles (ECRE),³⁵ the International Commission of Jurists³⁶ and Statewatch.³⁷

The recasting process on the APD reflects a pattern identified in empirical scholarship on the new institutional setting of co-decision in the enlarged EU. In particular, as Lopatin has studied, the EP has shifted away from the generally pro-refugee stance of the era when it had no real legislative clout, to a situation in which it has become increasingly willing to agree restrictive measures with the Council.³⁸

3.3 The Recast APD

3.3.1 The Ambivalent Outcome

³⁰ European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, COM(2009) 551 final, Brussels, 21 October 2009.

³¹ European Commission, *Amended Proposal for a Recast APD* (n 18).

³² European Parliament, *European Parliament legislative resolution of 6 April 2011 on the proposal for a Directive of the European Parliament and the Council on minimum standards on procedures in Member States for granting and withdrawing international protection*, P7_TA(2011)0136, 6 April 2011.

³³ UNHCR, *UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final*, January 2012.

³⁴ ILPA, *Comments on the Revised Commission Proposal of 1 June 2011 on common procedures for granting and withdrawing international protection status (Recast) COM(2011) 319 final*, 5 December 2011.

³⁵ ECRE, *Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to recast the APD (COM (2011) 319 final)*, 1 September 2011.

³⁶ International Commission of Jurists, *Compromising Rights and Procedures: ICJ Observations on the 2011 Recast Proposal of the APD*, September 2011 (ICJ (2011)).

³⁷ S. Peers, 'Statewatch Analysis: Revised EU Asylum Proposals "Lipstick on a Pig"' *Statewatch* (2011), <<http://www.statewatch.org/analyses/no-132-asylum.pdf>> accessed 25 January 2015.

³⁸ E. Lopatin, 'The Changing Position of the European Parliament on Irregular Migration and Asylum under Co-decision' (2013) 51(4) *JCMS* 740. See further J. Helstroffer and M. Obidzinski, 'The EU legislation game: the case of asylum law' (2011) BETA Working Paper 16/20114; J. Helstroffer and M. Obidzinski, 'Codecision procedure bias: the European legislation game' (2013) 36 *Eur J Law & Econ.* 1. Contrast S. Espinoza and C. Moraes, 'The Law and Politics of Migration and Asylum: The Lisbon Treaty and the EU', in D. Ashiagbor, N. Countouris and I. Lianos (eds), *The European Union after the Treaty of Lisbon* (CUP 2012) 156.

We note the European Commission's public assessment of the key achievements of the Recast APD:

The new Asylum Procedures Directive is much more precise. It creates a coherent system, which ensures that asylum decisions are made more efficiently and more fairly and that all Member States examine applications with a common high quality standard. It sets clearer rules on how to apply for asylum: there have to be specific arrangements, for example at borders, to make sure that everyone who wishes to request asylum can do so quickly and effectively.

Procedures will be both faster and more efficient. Normally, an asylum procedure will not be longer than six months. There will be better training for decision-makers and more early help for the applicant, so that the claim can be fully examined quickly. These investments will save money overall, because asylum seekers will spend less time in state-sponsored reception systems and there will be fewer wrong decisions, so fewer costly appeals.

Anyone in need of special help - for example because of their age, disability, illness, sexual orientation, or traumatic experiences - will receive adequate support, including sufficient time, to explain their claim. Unaccompanied children will be appointed a qualified representative by the national authorities.

Cases that are unlikely to be well-founded can be dealt with in special procedures ('accelerated' and 'border' procedures). There are clear rules on when these procedures can be applied, to avoid well-founded cases being covered. Unaccompanied children seeking asylum and victims of torture benefit from special treatment in this respect.

Rules on appeals in front of courts are much clearer than previously. Currently, EU law is vague and national systems do not always guarantee enough access to courts. As a result, many cases end up in with the European Court of Human Rights in Strasbourg, which is costly and creates legal uncertainty. The new rules fully comply with fundamental rights and should reduce pressure on the Strasbourg court.

Member States will also become better equipped to deal with abusive claims, in particular with repetitive applications by the same person. Someone who does not need protection will no longer be able to prevent removal indefinitely by continuously making new asylum applications.³⁹

In contrast, Steve Peers' assessment is more mixed:

The revised Directive definitely provides for certain improvements, as regards access to the procedure, the standards during the administrative decision-making (including deadlines), the extent of judicial review, the right to stay on the territory, the standards in special procedures, reductions in the number of exceptions and reduction of the complexity of the system (except as regards the exceptions relating to victims of torture et al and unaccompanied minors, which are respectively highly unclear and virtually unreadable;...). However, Member States still retain a good deal of flexibility to set fairly low standards as regards the special procedures and in a couple of respects (as regards new listings of 'super-safe third countries' and a new exception from the right to legal aid) standards have been lowered. The important question of whether the list of accelerated proceedings is exhaustive or not is not clearly answered, and there is no improvement at all as regards the rules on legal aid (quite the reverse). Certainly many more improvements to this Directive could and should have been made.⁴⁰

³⁹ European Commission, *A Common European Asylum System*, MEMO/13/532, 12 June 2013.

⁴⁰ S. Peers, 'The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig?' *Statewatch* (8 April 2013) 15.

We share Peers' more ambivalent assessment. We root this in our framing of the two stereotypes that seem to have informed the legislation, namely the 'abusive' and the 'vulnerable' applicant, with various procedural mechanisms aiming to deal with each category. The basic ideal that the asylum procedure should accord all claimants similarly, as the procedure itself identifies who is a refugee and who is not, is overtaken with procedural complexity, as different types of claims are siphoned into different systems.

4. Key Aspects of the Recast APD

4.1 Access to Procedures

Ensuring access to asylum procedures for those who reach the EU is a challenge. In some Member States, detention on arrival precludes access to information on asylum. In others, asylum must be sought by physically going to a particular place, rendering the act of claiming difficult. The Recast APD makes significant improvements, by clarifying its scope of application (4.1.1); seeking to ensure access to asylum for detainees (4.1.2); clarifying the determining authority (4.1.3); and introducing rules on the registration of claims (4.1.4).

Yet, welcome as these clarifications are, none of them addresses the most serious access challenge, namely the absence of safe routes to seek asylum from outside the EU. Various official policies preclude safe, legal access to asylum in the EU, ranging from visa policies and carrier sanctions, to illegal pushbacks and various forms of cooperation between EU and third country border officials, of varying degrees of formality.⁴¹ Some legal developments, such as the developing concept of 'jurisdiction' in IHRL⁴² and EU law,⁴³ may help bring some of these practices under legal control. However, these legal developments are not fully reflected in institutional practice. The lack of safe modes of entry to the EU has been widely noted in relation to the Syrian refugee crisis.⁴⁴ Many mechanisms could be developed to allow asylum seekers safe and legal access to the EU from countries of origin or transit, in particular forms of Protected Entry Procedures (PEPs).⁴⁵ Already set out is a roadmap to develop these procedures, starting with a more flexible use of the present Visa Code, which allows the issuance of Humanitarian Visas with limited territorial validity under derogation from normal entry requirements, and developing further EU rules on the issuance of Protection Visas.⁴⁶ It is arguable that the Visa Code actually requires the issuance of such Humanitarian Visas if EU Member States are to meet their international and EU obligations.⁴⁷

⁴¹ For a recent survey, see J. Hathaway and T. Gammeltoft-Hansen, 'Non-refoulement in a world of cooperative deterrence' (2014) U of Michigan Law & Econ Research Paper No. 14-016.

⁴² See further C. Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12 HRLR 287.

⁴³ C. Costello and V. Moreno-Lax, 'The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model' in S. Peers, T. Hervey, J. Kenner and A. Ward (eds), *Commentary on the EU Charter of Fundamental Rights*, (Hart Publishing 2014) 1658.

⁴⁴ UNHCR, 'Syrian Refugees in Europe: What Europe Can Do to Ensure Protection and Solidarity' (2014) 11 July 2014, < <http://www.refworld.org/docid/53b69f574.html> > accessed 25 January 2015.

⁴⁵ European Commission, *An open and secure Europe: making it happen*, COM(2014) 154, 11 March 2014 develops the idea of Protected Entry Procedures (PEP). These are defined by Noll as 'an overarching concept for arrangements allowing a non-national to approach the potential host state outside its territory with a claim for asylum or other form of international protection and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final' in G. Noll, J. Fagerlund and F. Liebaut, *Study on the feasibility of processing asylum claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure* (European Commission – Danish Centre for Human Rights 2002) 3.

⁴⁶ C. Hein and M. Damato, *Exploring avenues for protected entry in Europe* (Italian Council for Refugees 2012).

⁴⁷ This is based on the wording of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) OJ L243/1, 15 September 2009, and the application by analogy of the recent CJEU judgment in Case C-84/12 *Koushkaki* [2014] OJ C52/7. See further U. Iben Jensen, *Humanitarian Visas: Option or Obligation?* (2014) European Parliament, DG IPOL, PE509.986, September 2014.

These matters are not addressed in the Recast APD, understandable politically perhaps, but a serious protection gap nonetheless. The impact of the Recast APD on access is significant, but it does not deal with access from outside the EU.

4.1.1 *The Scope of the Recast APD*

The Recast improves access in the following ways: First, it has a broader scope than the APD and applies to all applications for international protection, both refugee status (RS) and subsidiary protection (SP). All Member States had moved to apply a single procedure to both RS and SP over time anyway, with the exception of Ireland who, at the time of writing, is in the process of introducing a single procedure.⁴⁸ In *MM*, the CJEU found the Irish procedures for subsidiary protection lacking, as they did not afford effective procedural and judicial protection.⁴⁹ The Recast APD may also be applied to any applications for protection falling outside the Recast Qualification Directive (Recast QD).⁵⁰ Member State responses to the Syrian refugee crisis demonstrate that *ad hoc* national statuses remain an important aspect of how States respond to refugee arrivals.⁵¹

The application for international protection may be made in the territory, at the border, in the transit zones or in the territorial waters of the Member States.⁵² The addition of the reference to the ‘territorial waters’ is significant, given increasing maritime arrivals. However, it will also be recalled that duties to asylum seekers and migrants are triggered under IHRL once a state exercises ‘jurisdiction’, which may occur outside the territorial waters as *Hirsi v Italy*⁵³ illustrates. Moreover, EU duties, including under the Schengen Borders Code and even more broadly the EU Charter of Fundamental Rights, are potentially more extensive.⁵⁴ It is still the case that Member States may require the application to be made in person and/or at a designated place.⁵⁵ If the applicant applies to the wrong body, the APD required Member States to ensure that authorities likely to be addressed by someone wishing to make an application for asylum could advise that person on how and where to make such an application or require these authorities to forward the application to the competent authority.⁵⁶ The Recast APD extends this to require authorities such as the police, border guards, immigration authorities and personnel of detention facilities to have the relevant information and to ensure that their personnel receive the necessary level of training to advise applicants.⁵⁷ The Recast APD now also requires that Member States ensure a person has an effective opportunity to lodge an application as soon as possible.⁵⁸

4.1.2. *Access to Asylum for Detainees*

⁴⁸ AIDA, *Highlights from Ireland 2014: On the way to a single and shorter procedure for people seeking asylum in Ireland?* (9 September 2014) <<http://www.asylumineurope.org/reports/country/republic-ireland#sthash.ipUqyDkD.dpuf>> accessed 02/02/2015.

⁴⁹ *MM* (n 27).

⁵⁰ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L337/9 (Recast QD).

⁵¹ UNHCR (n 44).

⁵² APD, Art. 3(1); Recast APD, Art. 3(1).

⁵³ *Hirsi Jamaa* (n 29).

⁵⁴ Costello and Moreno-Lax (n 43).

⁵⁵ APD, Art. 6(1); Recast APD, Art. 6(3).

⁵⁶ APD, Art. 6(5).

⁵⁷ Recast APD, Art. 6(1) third subpara.

⁵⁸ Recast APD, Art. 6(2).

Detention of asylum seekers on arrival would seem often to be of dubious legality, given that IHR and EU law now contain more detailed requirements concerning detention.⁵⁹ The APD stated merely that Member States were not to hold a person in detention for the sole reason that she was an applicant for asylum.⁶⁰ The Recast APD requires that the grounds for and the conditions of detention, as well as the guarantees available to detained applicants, be in accordance with the Recast RCD.⁶¹ When an applicant is detained, there should be ‘speedy judicial review’.

The Recast APD works on the premise that some will be detained, and aims to ensure that detention should not impede access to making asylum claims. Individuals who are in detention facilities or at border crossing points must also be given information about how to make an application for international protection under the Recast APD. Article 8(1) requires Member States to provide such persons with the information necessary and the opportunity to make an application for international protection. Arrangements for interpretation are to be made to the extent necessary to facilitate access to the asylum procedure. The Preamble explains further that this means in the least the ‘basic communication necessary to enable the competent authorities to understand if persons declare their wish to apply for international protection should be ensured through interpretation arrangements.’⁶²

Organizations and persons providing advice and counselling to applicants are also to be given effective access to applicants present at border crossing points, including transit zones at external borders.⁶³ Member States may draw up rules regarding the presence of such organizations and persons, in particular the requirement that prior agreement of the competent authorities is obtained. Limits on such access may only be imposed where national law deems them objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible. As Garlick notes, while these provisions ‘promise significantly improved access to advice for people held at borders or in transit zones’, much depends on how the exceptions are applied.⁶⁴

4.1.3 The Determining Authority

Member States are to designate a determining authority ‘responsible for an appropriate examination of applications’.⁶⁵ The determining authority is defined as ‘any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases’.⁶⁶

The recast places a number of obligations on Member States to regarding the quality of the determining authority. This reflects the objective of ‘front-loading’, namely ensuring that the determining authority making first-instance decisions is fully equipped to assess claims and take high-quality decisions thereby avoiding the need for such decisions to be

⁵⁹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L180/96, 29 June 2013 (Recast RCD); *Saadi v UK* Appl no 13229/03 (ECtHR 29 January 2008). Note that *Saadi v UK* has been widely criticized, and in some more recent cases, the ECtHR has accepted that there is some merit in the argument that as asylum seekers have an EU right to reside in the EU while their claims are processed, regarding them as ‘attempting to effectuate an irregular entry’ once their claims are registered is problematic: *Suso Musa v Malta* Appl no 42337/12 (ECtHR 23 July 2013).

⁶⁰ APD, Art. 18.

⁶¹ Recast APD, Art. 26.

⁶² Recast APD, Preamble, Recital 28.

⁶³ Recast APD, Art. 8(2).

⁶⁴ M. Garlick, ‘The Procedures Directive’ in S. Peers, E. Guild, M. Garlick and V. Moreno-Lax (eds), *EU Immigration and Asylum Law* (2nd edn, Vol. 3, Martinus Nijhoff 2014) 229.

⁶⁵ APD, Art. 4(1); Recast APD, Art. 4(1).

⁶⁶ Recast APD, Art. 2(f).

overturned on appeal. First, the determining authority is to be ‘provided with appropriate means, including sufficient competent personnel to carry out its tasks’.⁶⁷ Secondly, training is to be provided for the personnel of the determining authority. The training is to cover essentially the same areas as the European Asylum Support Office provides. This includes information on international human rights and the EU asylum *acquis*, how to handle asylum applications from minors and vulnerable persons with specific needs, interview techniques, utilizing expert medical and legal reports and how to produce and use country of origin information.⁶⁸ Member States must also ‘take into account the relevant training established and developed by the European Asylum Support Office (EASO)’.⁶⁹ Though it does not state exactly what this means in practice, it would seem to refer to the possibility of using the training courses established by EASO for asylum authorities.⁷⁰

The determining authorities of the territory in which the application is made are to deal with the application,⁷¹ even if the application is made to the authorities of another Member State carrying out immigration controls there. This provision envisages juxtaposed controls, and seeks to ensure that the responsibility of the territorial State is assured.

There are, however, a number of exceptions in the Recast APD allowing other authorities to examine applications when processing cases within the Dublin Regulation or when granting or refusing permission to enter at the border or in transit zones.⁷² This is a reduced list compared to the APD, which allowed other authorities to deal with the application under national security provisions, to conduct preliminary examinations in the case of a subsequent application, or when an application was made from a STC.

4.1.4 Registration of Claims

The Recast establishes time limits for registering asylum applications. Following an application for international protection, the determining authority is to register the asylum seeker within three working days. If the application is made to another authority likely to receive such applications, but not competent for the registration under national law, registration must take place no later than six working days after the application is made.⁷³ The Recast clarifies that ‘an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned.’⁷⁴

If a ‘large number of simultaneous applications’ for international protection make it very difficult in practice to respect the time limit, Member States may provide for that time limit to be extended to ten working days.⁷⁵ ECRE notes that rather than extending the time limit another option might have been to temporarily rely on the personnel of another authority given the purely administrative nature of registration.⁷⁶

The ‘large number’ exception recurs throughout the Recast, for instance as regards time limits for examination,⁷⁷ and in relation to border procedures.⁷⁸ This exception is

⁶⁷ Recast APD, Art. 4(1).

⁶⁸ Recast APD, Art. 4(3) which requires ‘Member States shall provide for relevant training which shall include the elements listed in Article 6(4)(a) to (e) of Regulation (EU) No 439/2010.’

⁶⁹ Recast APD, Art. 4(3).

⁷⁰ European Asylum Support Office, *Training and Quality*, <http://easo.europa.eu/about-us/tasks-of-easo/training-quality/>, accessed 02 February 2015.

⁷¹ APD, Art. 4(1), second sub-para; Recast APD, Art. 4(5).

⁷² Recast APD, Art. 4(2).

⁷³ Recast APD, Art. 6(1).

⁷⁴ Recast APD, Art. 6(4).

⁷⁵ Recast APD, Art. 6(5).

⁷⁶ ECRE (n 35) 14.

⁷⁷ Recast APD, Art. 31(3)(b).

⁷⁸ Recast APD, Art. 43(3).

worryingly vague and ECRE considered it as amongst the changes made in the Commission's amended proposal,⁷⁹ 'apparently justified by the need for efficiency'.⁸⁰ This proviso is of course amenable to judicial clarification. The CJEU would be required to give the 'large number' concept a purposive interpretation, and one which did not undermine the effectiveness of the guarantees in the Recast.⁸¹ Accordingly, despite the text's silence on the threshold for establishing a large number of claims, it would seem to require a surge in applications that is a large and unanticipated increase, rather than simply allowing governments to claim that the volume of arrivals *per se* permitted recourse to this proviso.

In the background to this exception are various on-going EASO pilot projects, where officials from other Member States assist with preliminary aspects of the asylum process in other countries.⁸² Although labelled 'joint processing', these are far from the formal joint processing of actual decisions, and seem more geared, at least at present, to allow for learning opportunities and developing trust across Member States. EASO so far has conducted eight preliminary joint processing pilot projects across 12 Member States covering issues such as unaccompanied minors, country of origin information, registration and case management and assessments of vulnerability.

4.2 Inadmissible Applications

Like its predecessor, the Recast sets out circumstances where applications may be deemed inadmissible, and Member States can refrain from examination of the substantive claim.⁸³ Article 10(1) of the Recast APD makes clear that this cannot be done on the sole ground that an application was not submitted as soon as possible. Importantly, the Recast APD appears to make the list of circumstances in which a Member State might find an application inadmissible exhaustive, using the language of 'only if' rather than 'if'.⁸⁴

The circumstances set out are: Where another Member State has granted international protection; where a country which is not a Member State is considered as a first country of asylum (FCA); where there is a STC for the applicant; when the application is a subsequent application without any new elements or findings having arisen or having been presented by the applicant; and where the applicant lodges an application, after he or she has consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application. An application made by an unaccompanied minor can only be considered inadmissible if there is a country that may be considered a STC for the applicant, provided that to do so is in the minor's best interests.⁸⁵

The Recast APD introduces the possibility for applicants to present their views regarding the application of inadmissibility criteria in their particular circumstances before the determining authority decides on the admissibility of an application for international protection.⁸⁶ Member States are thus required to conduct a personal interview and may omit this only in the case of a subsequent application. (It will be recalled that subsequent applications are assumed often to be abusive). Member States may provide that personnel of

⁷⁹ European Commission, *Amended Proposal for a Recast APD* (n 18).

⁸⁰ ECRE (n 35), 5.

⁸¹ Recast APD, Preamble, Recital 18 deems it in the interest of both Member States and asylum seekers 'that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out.'

⁸² EASO, *Newsletter - September 2014* <<http://easo.europa.eu/wp-content/uploads/EASO-Newsletter-September.pdf>> accessed 3 February 2015.

⁸³ APD, Art. 25; Recast APD, Art. 33.

⁸⁴ APD, Art. 25(2); Recast APD, Art. 33(2).

⁸⁵ Recast APD, Art. 25(6)(c).

⁸⁶ Recast APD, Art. 34.

authorities other than the determining authority conduct the personal interview on the admissibility of the application for international protection.⁸⁷ In such cases, Member States are to ensure that such personnel receive in advance the necessary basic training, in particular with respect to international human rights law, the Union asylum *acquis* and interview techniques.⁸⁸

4.2.1 First Country of Asylum

The next ground for considering an application inadmissible under Article 33(2) is where there is a FCA. A country is designated as a FCA if an applicant has been recognized in that country as a refugee and can still avail him or herself of that protection, or where they otherwise enjoy sufficient protection in that country, including benefiting from the principle of *non-refoulement*.⁸⁹ This is on the proviso that the applicant will be readmitted to that country. Member States are given the option to consider the criteria for classifying a country as a STC before applying the FCA concept. However, as in the original APD, this remains optional and those safeguards are not assured. The Recast introduces the requirement that ‘the applicant shall be allowed to challenge the application of the [FCA] concept to his or her particular circumstances’. This is an important additional safeguard, but the Recast does not spell out that, if the FCA concept is deemed inapplicable, the claim should be assessed in the normal process.

4.2.2 Safe Third Country

Member States may apply the STC concept only when satisfied that the applicant’s life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group, or political opinion; the principle of *non-refoulement* is respected; removal will not violate the right to freedom from torture and cruel, inhuman or degrading treatment; and the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the CSR.⁹⁰ Article 38(1)(b) of the Recast APD adds the requirement that there must be no risk of serious harm as defined in the Recast QD.

As previously, Member States are required to adopt legislation setting out the required connection between the person seeking asylum and the third country, making it reasonable for that person to go to that country. The methodology to be used by competent authorities in determining whether the STC concept may be applied to a particular country or to a particular applicant is also to be laid down by national law. This must include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe. Finally, national legislation must provide for an individual examination of whether the third country concerned is safe for a particular applicant. Under such rules, the applicant must be able challenge the application of the STC concept on the grounds that they would be subjected to torture, cruel, inhuman or degrading treatment or punishment. As with FCA, Article 38(2)(c) of the Recast APD allows the applicant to challenge the existence of a connection between them and the third country. Once a decision is made that there exists a STC for the applicant, the Member State is to inform the applicant and provide them with a document for the authorities of the third country, in the language of that country, informing them that the application has not been examined in substance.⁹¹ It is doubtful whether this will really work to ensure access to the asylum procedures in the STC to which deportation is contemplated. If the STC does not permit the

⁸⁷ Recast APD, Art. 34(2).

⁸⁸ Recast APD, Art. 34(2).

⁸⁹ APD, Art. 26; Recast APD, Art. 35.

⁹⁰ APD, Art. 27; Recast APD, Art. 38.

⁹¹ APD, Art. 27(3); Recast APD, Art. 38(3).

applicant to enter its territory, Member States are to ensure access to a first instance procedure.⁹²

The impact of the STC concept is difficult to measure. UNHCR, in its research on the application of key provisions APD across selected Member States, found that only in Spain and the UK was the STC concept applied in law and in practice (the report did not consider the superSTC concept) applied.⁹³ The UK seems only to have applied the concept to the USA, Switzerland and Canada.⁹⁴ Spain has applied the concept on a case-by-case basis to some Latin American and African States but reportedly never uses the concept as the sole ground for rejecting and application or declaring it inadmissible.⁹⁵ This led UNHCR to conclude that ‘while Member States appear to support the notion, the concept is largely symbolic, and holds little practical use.’⁹⁶

4.2.3. *SuperSTC*

The Recast also carries the ‘SuperSTC’ concept over from the APD. If a competent authority has established that the applicant for asylum is seeking to enter or has entered illegally into its territory from a European STC, the Member State may provide that no, or no full, examination of the application and the safety of the applicant, shall take place where.⁹⁷

The criteria for being designated a European STC are more stringent than those for a STC. To be designated a European STC, a country must have ratified and observe the provisions of the CSR without any geographical limitations; have in place an asylum procedure prescribed by law; and have ratified the ECHR and observe its provisions, including the standards relating to effective remedies.⁹⁸ Even in the context of the Dublin System, the CJEU has made clear that conclusive presumptions of safety are not acceptable.⁹⁹

Under the APD, it was for the Council to designate which countries were European STCs,¹⁰⁰ however the CJEU annulled the listing mechanism for breaching EU constitutional requirements.¹⁰¹ Evidently, the option of creating a listing mechanism that would comply with the Treaties (presumably one with some input from the EP, and majority in the Council) was not palatable. Accordingly, the idea of common lists is not found in the Recast APD.

Instead, Member States are to inform the Commission periodically of the countries to which this concept is applied.¹⁰² As Peers notes, the effect is that there can be new listings of ‘superSTC’, which amounts to a lowering of standards from the APD.¹⁰³ After EU enlargement, the potentially ‘super safe’ countries in the European region are fewer: Writing in 2010, ECRE noted that the concept could potentially be applied to asylum seekers entering via Ukraine. ECRE criticised the potential for this given that Ukraine was then a critical entry point for Chechen asylum seekers, meaning this provision might in practice result in

⁹² APD, Art. 27(4); Recast APD, Art. 38(4).

⁹³ UNHCR, *APD Study* (n 26) 300.

⁹⁴ *Ibid*, 302.

⁹⁵ *Ibid*, 300.

⁹⁶ *Ibid*, 305.

⁹⁷ APD, Art. 36; Recast APD, Art. 39.

⁹⁸ Recast APD, Art. 36(2).

⁹⁹ Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department ME v Minister for Justice, Equality and Law Reform*. [2011] ECR I-13905, para. 103.

¹⁰⁰ APD, Art. 36(2)(d) and (3).

¹⁰¹ Case C-133/06 *Parliament v Council* [2008] ECR I-3189. The CJEU annulled and severed the provisions allowing for mandatory common lists of safe countries (third and of origin) to be adopted, as the procedure envisaged (unanimity in the Council and mere consultation of the European Parliament) violated the Treaty. See further P. Craig, ‘Casenote on Case C-133/06 *EP v Council (delegation of legislative power)*’ (2009) 46 CMLRev 1265.

¹⁰² Recast APD, Art. 39(7).

¹⁰³ Peers (n 40) 15.

refoulement.¹⁰⁴ As with the FCA and STC concepts, the Recast APD grants the applicant the possibility ‘to challenge the application of the concept of European STC on the grounds that the third country concerned is not safe in his or her particular circumstances.’¹⁰⁵

As we will discuss later in Part 4.15, while there is a right to appeal against a decision not to examine or examine fully an application due to the SuperSTC concept, there is no clear-cut automatic entitlement to suspend the effect of removal pending this appeal. The provisions on suspensive effect are complex.¹⁰⁶ This contrasts with appeals following the application of the ordinary STC concept, which are suspensive.¹⁰⁷

4.3 Right to Remain Pending a Decision

Applicants are allowed to remain in the Member State until a decision at first instance is made.¹⁰⁸ There are two exceptions here which would appear to be exhaustive. The first is where the application is a subsequent application.¹⁰⁹ The second is where extradition is required to another Member State pursuant to a European Arrest Warrant, or to a third country, or to international courts or tribunals.¹¹⁰ The Recast APD requires that the authorities be satisfied extradition will not amount to direct or indirect *refoulement*.¹¹¹ It would appear that this determination is to be made by the extradition authorities, not the asylum ones, which itself may pose a risk of *refoulement*.¹¹²

The right to remain in the appeal stage links with the suspensive effect of appeals, which as is set out below (4.15.2), is a requirement of the ECHR if there is a risk of treatment contrary to Article 3 ECHR. Whether the Recast APD meets this requirement is discussed further below at 4.15.2.

4.4 Basic Procedural Guarantees

Member States are to ensure that the examination of an application is appropriate.¹¹³ This should include, first, that decisions are made individually, objectively and impartially. Secondly, that the personnel responsible for examining applications and taking decisions have access to precise and up-to-date information obtained from various sources regarding the general situation prevailing in applicants’ countries of origin and, where necessary, countries through which they have transited. Thirdly, the personnel examining applications and taking decisions know the relevant standards applicable in the field of asylum and refugee law. The Recast APD also introduces the possibility to seek advice from experts on particular issues such as medical, cultural, religious, child-related or gender issues.¹¹⁴ This latter provision is an instance where we see the notion of applicants with special needs or characteristics requiring differentiated treatment. However, the language of the provision is facultative, only allowing such advice to be sought, not requiring its use.

Member States are also to ensure a number of particular guarantees for applicants.¹¹⁵ Applicants are to be informed of their rights and obligations during the procedure, the possible consequences of not complying with their obligations and not cooperating with the

¹⁰⁴ ECRE (n 35) 42.

¹⁰⁵ Recast APD, Art. 39(3).

¹⁰⁶ Recast APD, Art. 46(6)(d).

¹⁰⁷ Recast APD, Art. 46(5).

¹⁰⁸ APD, Art. 7; Recast APD, Art. 9.

¹⁰⁹ Recast APD, Art. 9(2).

¹¹⁰ Recast APD, Art. 9(2).

¹¹¹ Recast APD, Art. 9(3).

¹¹² Garlick (n 64) 230.

¹¹³ APD, Art. 8(2); Recast APD, Art. 10(3).

¹¹⁴ Recast APD, Art. 10(3)(d).

¹¹⁵ APD, Art. 10; Recast APD, Art. 12.

authorities, the consequences of an explicit or implicit withdrawal, and the relevant time-frame and means at their disposal. This is now to be done in a language ‘they understand or are reasonably supposed to understand’ rather than a language they ‘may reasonably be supposed to understand’.¹¹⁶ Applicants are also to receive the services of an interpreter for submitting their case to the competent authorities whenever necessary.¹¹⁷

Applicants must not be denied the opportunity to communicate with UNHCR.¹¹⁸ The APD prevented applicants being denied communication ‘with any other organisation working on behalf of the UNHCR in the territory of the Member State pursuant to an agreement with that Member State’.¹¹⁹ The Recast APD extends this to ensure applicants have the opportunity to communicate with ‘any other organisation providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned’.¹²⁰

Finally, Article 12(1)(d) of the Recast APD adds the requirement that applicants and, if applicable, their legal advisers or other counsellors, shall have access to country of origin information and to the information provided by experts given to the determining authority, where the determining authority has taken that information into consideration for the purpose of taking a decision on their application.

All in all, while there are some minor improvements in the Recast over the Original APD, the major contributions of the Recast lie elsewhere.

4.5 Obligations of the Applicants

The Recast APD now requires that Member States oblige the applicant to cooperate with the authorities,¹²¹ whereas this was previously optional.¹²² These obligations may include the requirement to report to the competent authorities or appear in person, either without delay or at a specified time; to hand over relevant documents in their possession; and to provide information regarding their current place of residence and keep the authorities up to date with any changes in that matter.¹²³ Member States may also require applicants have their photograph taken by the competent authorities and that the applicant’s oral statements are recorded provided he or she has been previously informed thereof.

Member States may also make provision for the authorities to search the applicant and the items carried with them.¹²⁴ The Recast adds the requirement that the search must be carried out by a person of the same sex with full respect for the principles of human dignity and physical and psychological integrity.¹²⁵ This is typical of its approach to vulnerability: The power to search is not itself significantly constrained by clear rules at EU level. Rather, basic human rights values are reiterated (and would apply even if not stated), with a concession to ‘vulnerability’ in the express requirement of the same sex of the person carrying out the search. This is a welcome addition yet by confirming the right to search it may lend itself to legitimating searches more rather than less.

4.5.1 The Personal Interview

¹¹⁶ APD, Art. 10(1)(a); Recast APD, Art. 12(1)(a).

¹¹⁷ APD, Art. 10(1)(b); Recast APD, Art. 12(1)(b).

¹¹⁸ APD, Art. 10(1)(c); Recast APD, Art. 12(1)(c).

¹¹⁹ APD, Art. 10(1)(c).

¹²⁰ Recast APD, Art. 12(1)(c).

¹²¹ Recast APD, Art. 13(1).

¹²² APD, Art. 11(1).

¹²³ APD, Art. 11(2); Recast APD, Art. 13(2).

¹²⁴ APD, Art. 11(2)(d); Recast APD, Art. 13(2)(d).

¹²⁵ Recast APD, Art. 13(2)(d).

An applicant will usually be given the opportunity of a personal interview before a decision is taken on their application.¹²⁶ The Recast states the interview ought to be given by the personnel of the determining authority, unless a ‘large number’ of simultaneous applications make this impossible in practice. If so, the interview may be carried out by personnel of another authority, so long as they have received the relevant training.¹²⁷ This might become relevant in future joint processing pilots run by EASO discussed above in section 4.1.4. Personal interviews have been excluded until this point to avoid “avoid political, legal, linguistic and financial questions in relation to further joint action on analysis of cases, and/or making recommendations or taking legally binding decisions.”¹²⁸ Although ‘personnel of another authority’ remains unspecified, as a matter of EU law, there would seem to be no impediment to some involvement from officials of other Member States. National law, in contrast, might well limit such activities. It has been noted that Member States are still reluctant to grant authority to external personnel on the grounds it ‘could undermine in some way national control over processes, or parts of processes, that can lead to granting the right to enter and remain in their territory’ see it as ‘constituting a potential encroachment on Member States’ sovereignty.’¹²⁹

The Recast significantly reduces the circumstances in which a personal interview may be omitted. It may be omitted in cases where the determining authority can grant RS on the basis of evidence available.¹³⁰ This could facilitate the front-loading of administrative resources. It may also be omitted if the applicant is deemed unfit or unable to be interviewed owing to enduring circumstances beyond his or her control.¹³¹ Under the APD an interview could be omitted, where the competent authority had already had a meeting with the applicant for the purpose of assistance with the application and submission of any essential information regarding the application¹³² or if a complete examination of the information provided by the applicant, led to the conclusion the application was unfounded.¹³³ These sweeping exceptions were one of the worst features of the original APD, so the Recast is a clear improvement in this respect.

The recast strengthens some of the requirements in the APD. Member States are to ‘ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant’s cultural origin, gender, sexual orientation, gender identity or vulnerability.’¹³⁴ This contrasts with the weaker analogous provision in the APD that the person conducting the interview must be ‘sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant’s cultural origin or vulnerability, insofar as it is possible to do so’.¹³⁵ The CJEU has ruled on the practical application of the original APD provision in relation to asylum claims where persecution due to the applicant’s sexuality is alleged. First, it held that while questions based on stereotyped notions of homosexuality may be useful, ‘the assessment of applications for the grant of refugee status on the basis

¹²⁶ APD Art. 12(1); Recast APD Art. 14(1).

¹²⁷ Recast APD, Art. 14(1) second subpara.

¹²⁸ E. Guild, C. Costello, M. Garlick, V. Moreno-Lax and M. Mouzourakis, ‘New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection’ (2015) CEPS Papers in Liberty and Security in Europe No. 77, 28.

¹²⁹ *Ibid*, 28.

¹³⁰ Recast APD, Art. 14(2)(a).

¹³¹ Recast APD, Art. 14(2).

¹³² APD, Art. 12(2)(b).

¹³³ APD, Art. 12(2)(c).

¹³⁴ Recast APD, Art. 15(3)(a).

¹³⁵ APD, Art. 13(3)(a).

solely of stereotyped notions associated with homosexuals' would not satisfy the provision.¹³⁶ Furthermore, it would breach this requirement if an applicant was not considered credible on the grounds he did not reveal his sexual orientation at the first possible opportunity.¹³⁷

The Recast APD also introduces a number of additional requirements for personal interviews.¹³⁸ The interview, wherever possible, ought to be conducted by a person of the same sex where the applicant so requests, unless the determining authority considers the request unrelated to difficulties the applicant might have presenting the grounds of their application in a comprehensive manner.¹³⁹ The interviewer is also not to wear a military or law enforcement uniform.¹⁴⁰ The interpreter must be able to ensure appropriate communication between the applicant and the person who conducts the interview. Communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly.¹⁴¹

When conducting a personal interview, the Recast APD requires the determining authority to ensure the applicant is given an adequate opportunity to present the elements needed to substantiate their application.¹⁴² This includes the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in the applicant's statements. This again is a significant improvement over the original APD, which allowed contradictory statements to be a ground for deeming claims unfounded, and in turn dispensed with the interview on this basis.¹⁴³

In the recent case of *A, B and C*,¹⁴⁴ Advocate General Sharpston deplored the absence of any guarantee in the original APD on giving notice to an applicant when their credibility is in doubt before a negative decision on their claim is taken,¹⁴⁵ and found it necessary under the principle of good administration to ensure that applicants have the opportunity to address questions regarding their credibility.¹⁴⁶ The CJEU did not comment explicitly on this issue focussing instead on requirements of the determining authority behave in a manner sensitive to the applicants circumstances including their cultural origin or vulnerability.¹⁴⁷

4.5.2 Interview Reports and Recordings

The Recast APD also introduces more extensive requirements to record interviews. The APD required that a written report contained 'at least the essential information' presented,¹⁴⁸ while the Recast requires that there is a 'thorough and factual report containing all substantive elements or a transcript' of the interview.¹⁴⁹ The Recast APD allows for an audio or audio-visual recording of the interview and for this recording, or a transcript thereof, to be made available in connection with the applicant's file.¹⁵⁰ Under the APD, Member States could

¹³⁶ Joined Cases C-148/13, C-149/13 and C-150/13 *A, B and C* (CJEU, 2 December 2014) para. 62.

¹³⁷ *Ibid*, para 71.

¹³⁸ Recast APD, Art. 15.

¹³⁹ Recast APD, Art. 15(3)(b).

¹⁴⁰ Recast APD, Art. 15(3)(d).

¹⁴¹ Recast APD, Art. 15(3)(c).

¹⁴² Recast APD, Art. 16.

¹⁴³ APD, Art. 12(2)(c). Under APD, Art. 23(4)(g) an application could be considered unfounded where the applicant made 'inconsistent, contradictory, improbable or insufficient representations' making their claim 'clearly unconvincing'.

¹⁴⁴ *A, B and C* (n 136).

¹⁴⁵ *Ibid*, Opinion of AG Sharpston, paras. 76-77.

¹⁴⁶ *Ibid*, Opinion of AG Sharpston, paras. 78-79.

¹⁴⁷ *Ibid*, paras. 62 and 71.

¹⁴⁸ APD, Art. 14(1).

¹⁴⁹ Recast APD Art. 17(1)

¹⁵⁰ Recast APD, Art. 17(2).

request the applicant's approval of the contents of the report for the personal interview and were to enter the reasons for any refusal to approve into the applicants file.¹⁵¹

The Recast APD also makes provision for the applicant to comment on their interview. Member States must now ensure that the applicant has the opportunity to make comments and/or provide clarification orally and/or in writing with regard to any mistranslations or misconceptions appearing in the report or in the transcript, at the end of the personal interview or within a specified time limit before the determining authority takes a decision. In order to do this, Member States must ensure that the applicant is fully informed of the content of the report or of the substantive elements of the transcript, with the assistance of an interpreter if necessary. Member States shall then request the applicant to confirm that the content of the report or the transcript correctly reflects the interview. This latter part may not be necessary where there is a recording of the interview. Further, where Member States provide for both a transcript and a recording of the personal interview, Member States need not allow the applicant to make comments on and/or provide clarification of the transcript.¹⁵²

Article 17(5) of the Recast APD also includes the requirement that applicants and their legal advisers or other counsellors have access to the report or the transcript and, where applicable, the recording, before the determining authority takes a decision.

4.5.3 Consequences of failure to appear for interview

If an applicant fails to attend a personal interview the determining authority is still to take a decision.¹⁵³ While absence ought not adversely affect the decision of the determining authority,¹⁵⁴ Member States may take into account the fact that the applicant failed to appear for the personal interview, unless he or she had good reasons for the failure to appear.¹⁵⁵ This strikes an ambivalent chord, and implicitly, some negative inferences may be drawn from failure to attend. However, the reality of reception conditions and lack of early advice in Member States are such that, as Garlick notes, there are many reasons why an applicant for protection 'who may be unaccustomed to formal legal processes, living under difficult circumstances notwithstanding being entitled to reception conditions – may fail to attend an interview.'¹⁵⁶

As is discussed further below, failure to appear may ultimately lead to an application being deemed withdrawn 'unless the applicant demonstrates within a reasonable time that his or her failure was due to circumstances beyond his or her control'.¹⁵⁷

4.6 Medical examination

Article 18 of the Recast APD introduces the requirement, when relevant, to arrange or fund a medical examination of the applicant in case of signs that might indicate past persecution or serious harm. All medical examinations are to be carried out by qualified medical professionals, although Member States may designate particular medical professionals who are to carry out these examinations. The result should be submitted to the determining authority as soon as possible. If medical examination is not deemed relevant, Member States are to inform applicants that they may, on their own initiative and at their own cost, arrange for a medical examination concerning signs that might indicate past persecution or serious

¹⁵¹ APD, Art. 14(3).

¹⁵² Recast APD, Art. 17(3)

¹⁵³ Recast APD, Art. 14(3).

¹⁵⁴ Recast APD, Art. 14(4).

¹⁵⁵ Recast APD, Art. 14(5).

¹⁵⁶ Garlick (n 64) 236.

¹⁵⁷ Recast APD, Art. 28(1)(a).

harm.¹⁵⁸ In either situation, the results of medical examinations are to be assessed by the determining authority along with the other elements of the application.¹⁵⁹

4.7 Legal support

A separate report by Barbara Mikolajczyk in this collection deals with the issue of legal support in detail. Accordingly, in this section, we only provide a brief overview. As Peers notes above, the legal aid provisions of the recast are complex, yet contain ‘no improvement at all... (quite the reverse).’¹⁶⁰

Most asylum seekers need advice and support about how to navigate the asylum process. The role of legal advice in particular is crucial: There is growing evidence that early legal advice is not only of great benefit to asylum seekers, but also assists front-loading and efficient determination of claims.¹⁶¹ For example, a front-loading Pilot conducted in 2007-2008 by UNHCR in the context of its Quality Initiative Project in the UK provides an example of the value of front-loading in the asylum process, in particular of early provision of legal advice as helping decision-makers by ensuring more evidence was made available to decision-makers at the first instance decision.¹⁶²

Legal aid has more recently come to the attention of the ECtHR which has emphasized its importance, noting how legal assistance and interpretation are necessary to ensure proceedings are conducted in the proper way.¹⁶³ In *MSS v Belgium and Greece*, it placed ‘lack of legal aid’ among several problematic elements to be remedied in accessing asylum procedures.¹⁶⁴ According to the ECtHR, legal aid ought to offer a ‘real and adequate opportunity’ to individual applicants to advance their claims.¹⁶⁵

At first instance, the original APD provided for access to legal assistance, but at the applicant’s own cost:

Member States shall allow applicants for asylum the opportunity, at their own cost, to consult in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their asylum applications.¹⁶⁶

The recast clarifies that the right to access legal assistance at the applicant’s own cost covers ‘all stages of the procedure, including following a negative decision.’¹⁶⁷ Article 20(2) also makes it optional for Member States to provide free legal assistance and representation at first instance should they wish.

The Recast APD introduced the requirement that Member States upon request, provide applicants at first instance with legal and procedural information free of charge.¹⁶⁸ Recital 22 of the Preamble to the Recast APD notes the interest in ensuring correct recognition of international protection at first instance and how the provision of information should help applicants better understand the procedure and thus comply with the relevant obligations. This

¹⁵⁸ Recast APD, Art. 18(2).

¹⁵⁹ Art. 18(3).

¹⁶⁰ Peers (n 40) 15.

¹⁶¹ B. Anderson and S. Conlan, ‘Providing Protection – Access to Early Legal Advice for Asylum Seekers’ (2014) August 2014 <<http://www.refworld.org/docid/53f2fbde4.html>> accessed 25 January 2015.

¹⁶² UNHCR, ‘Quality Initiative Project: Sixth Report to the Minister’ (2009) April 2009, 3 <http://www.unhcr.org.uk/fileadmin/user_upload/pdf/QI_Sixth_Report.pdf> accessed 25 January 2015.

¹⁶³ *IM v France* (n 29) paras. 145, 151 and 155. See also APD, Art. 12(1)(a)-(b) on interpretation and accessibility of information. Cf. APD, Art. 20ff, limiting access to free legal assistance and representation to appeal proceedings.

¹⁶⁴ *MSS v Belgium and Greece* Appl no 30696/09 (ECtHR 21 January 2011) para. 301.

¹⁶⁵ *Ibid*, para. 313.

¹⁶⁶ APD, Art. 15(1).

¹⁶⁷ Recast APD, Art. 22(1).

¹⁶⁸ Recast APD, Art. 19.

should include, at least, information on the procedure in the light of the applicant's particular circumstances. This again fits the aim of front-loading by improving the quality of first instance decisions. Should the application be rejected at first instance, Member States are also to provide, on request, information clarifying the reasons for such decision and explaining how it can be challenged.

It remains unchanged that the applicant is entitled to free legal assistance and representation only on appeal. The original APD allowed Member States to deny legal aid unless the appeal or review was likely to succeed.¹⁶⁹ The recast, however, shifts the burden of proof and requires that a court or tribunal declare the appeal to 'have no tangible prospect of success.'¹⁷⁰ Following the recast, this may be applied to unaccompanied minors only where their representatives are legally qualified according to the law of that country.¹⁷¹ Member States retain the possibility under the recast to place a number of conditions on the provision of legal and procedural information at first instance and on the provision of legal assistance and representation on appeal. As under the APD,¹⁷² Member States can restrict legal aid to those who lack sufficient resources; to services provided by advisers designated by national law; and for appeals procedures under the directive rather than any further appeals or reviews.¹⁷³ This would seem to comply with earlier CJEU decision in *DEB* where it was held that Article 47 CFR might require the granting of legal aid if it was necessary to be able to rely on that principle.¹⁷⁴ As under the APD,¹⁷⁵ Member States still retain the right to impose monetary or time limits and prevent fees and costs being more favourable than those accorded to their own nationals.¹⁷⁶ Both Directives also make provision for repayment should the applicant's situation improve or if an earlier decision on legal aid was made on the basis of false information.¹⁷⁷

The basic approach under the recast is legal information at first instance, and legal aid for legal advice and representation only at the appeal stage. Legal representation differs considerably from legal information. However detailed and precise, information about the asylum process does not amount to the assistance provided by a qualified legal advisor enabling the asylum seeker to support her particular case throughout the different stages of the application. Accordingly, it is regrettable that the Recast APD opts for free legal and procedural information rather than, as the Commission had proposed, free legal representation.¹⁷⁸ However, this does not rule out innovative methods to deliver cost-effective legal representation at the outset of the asylum procedure, via legal NGOs and other qualified organisations.

4.8 Time limits

Applications should be processed as soon as possible after an adequate and complete examination.¹⁷⁹ A number of time limits have been added to the recast. Article 31(3) introduces a time limit of six months from the lodging of the application for the conclusion of the examination procedure. There are a limited number of exceptions allowing Member States to postpone examination or extend the time limit, however this is all subject to an overall time

¹⁶⁹ APD, Art. 15(3)(d).

¹⁷⁰ Recast APD, Art. 20(3).

¹⁷¹ Recast APD, Art. 25(6)(d).

¹⁷² APD, Art. 15(3)(a),(b),(c).

¹⁷³ Recast APD, Art. 21(2).

¹⁷⁴ Case C-279/09 *DEB* [2010] ECR I-13849, para. 59.

¹⁷⁵ APD, Art. 15(5).

¹⁷⁶ Recast APD, Art. 21(4).

¹⁷⁷ APD, Art. 15(6); Recast APD, Art. 21(6).

¹⁷⁸ European Commission (n 18) 39.

¹⁷⁹ APD, Art. 23(2); Recast APD, Art. 31(2).

limit of 21 months from the lodging of the application.¹⁸⁰

The six month time limit may be extended for up to nine further months in limited circumstances, namely where complex issues of fact or law are involved; where there is a large number of simultaneous applications; or where the delay is clearly attributable to applicant's failure to comply with their obligations. In 'duly justified circumstances', Member States may take a further three months if this is necessary to ensure an adequate and complete examination of the application for international protection. The breadth of this exception suggests extension could easily become the norm.

If a Member State cannot take a decision within six months, the applicant must either be informed of the delay or given, upon request, information about the time-frame within which the decision is to be expected.¹⁸¹ The Recast no longer includes the proviso that such information does not obligate the Member State to take a decision within that time-frame.

The Recast APD introduces the possibility for Member States to postpone the examination procedure where 'the situation in the country of origin is uncertain, so long as this is expected to be temporary.'¹⁸² In such a case, Member States are to review the situation at least every six months; inform the applicants concerned within a reasonable time of the reasons for the postponement; and inform the Commission within a reasonable time of the postponement of procedures for that country of origin.¹⁸³ Again, it seems entirely likely that the situation in asylum seekers' countries of origin may often be 'uncertain' or in flux. That this should prevent swift decision-making again runs counter to the objective of front-loading and the desirability of recognising strong claims quickly.¹⁸⁴

4.9 The Decision

Notice of the decision on an application ought to be given within reasonable time of the decision by the determining authority.¹⁸⁵ Applicants are to be informed not just of the result of the decision but also given information about how to challenge a negative decision by the determining authority.¹⁸⁶ This must be in a language 'they understand or are reasonably supposed to understand'.¹⁸⁷

4.10 Prioritized Applications

According to Recital 19 to the Preamble of the Recast APD, Member States ought to have the flexibility to shorten the overall duration of the procedure, prioritizing certain applications. Member States are able to prioritize an examination 'in particular' if the application is likely to be well-founded or if the applicant is 'vulnerable' according to the RCD or 'in need of special procedural guarantees'.¹⁸⁸ In particular, the latter situation is said to apply to unaccompanied minors. This provision reflects a welcome attempt to ensure that strong claims are recognized quickly. The elements of a prioritized procedure remain undefined, though it could entail no interview if the determining authority is able to grant refugee status

¹⁸⁰ Recast APD, Art. 31(5).

¹⁸¹ APD, Art. 23(2); Recast APD, Art. 31(6).

¹⁸² Recast APD, Art. 31(4).

¹⁸³ Recast APD, Art. 31(4).

¹⁸⁴ ECRE points out that any postponement of the examination should be constrained by the EU general principle of good administration. ECRE, *Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)* (2014) December 2014, 35.

¹⁸⁵ APD, Art. 10(1)(d); Recast APD, Art. 12(1)(e).

¹⁸⁶ APD, Art. 10(1)(e); Recast APD, Art. 12(1)(f).

¹⁸⁷ Recast APD, Art. 12(1)(f).

¹⁸⁸ Recast APD, Art. 31(7).

on the basis of evidence available and the provisions of Article 14(2)(a), as discussed above, are utilized.

4.11 Accelerated Procedures - Ten Grounds

There are ten grounds for acceleration listed in the Recast APD. These are where:

- (a) the applicant, in submitting his or her application and presenting the facts, has only raised issues that are not relevant to the examination of whether he or she qualifies as a beneficiary of international protection by virtue of [the Recast QD]; or
- (b) the applicant is from a safe country of origin within the meaning of this Directive; or
- (c) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his or her identity and/or nationality that could have had a negative impact on the decision; or
- (d) it is likely that, in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality; or
- (e) the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information, thus making his or her claim clearly unconvincing in relation to whether he or she qualifies as a beneficiary of international protection by virtue of [the Recast QD]; or
- (f) the applicant has introduced a subsequent application for international protection that is not inadmissible...; or
- (g) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal; or
- (h) the applicant entered the territory of the Member State unlawfully or prolonged his or her stay unlawfully and, without good reason, has either not presented himself or herself to the authorities or not made an application for international protection as soon as possible, given the circumstances of his or her entry; or
- (i) the applicant refuses to comply with an obligation to have his or her fingerprints taken in accordance with [the Eurodac Regulation];¹⁸⁹ or
- (j) the applicant may, for serious reasons, be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law.¹⁹⁰

We will now discuss the grounds for acceleration in more detail. Given the complexity of the SCO notion, the second ground for acceleration,¹⁹¹ it is analyzed separately below.

Several grounds for acceleration increase procedural safeguards compared to their counterparts in the APD. The first ground listed covers applications not raising any new

¹⁸⁹ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes OJ L180/1, 29 June 2013.

¹⁹⁰ Recast APD, Art. 31(8).

¹⁹¹ Recast APD Art. 31(8)(b)

elements.¹⁹² The APD equivalent was broader, allowing for accelerated procedures where the applicant only raised issues that were ‘not relevant or of minimal relevance’.¹⁹³ The fifth ground, regarding ‘clearly inconsistent and contradictory, clearly false or obviously improbable representations’,¹⁹⁴ also slightly strengthens its APD predecessor¹⁹⁵ given the requirement for sufficiently verified country of origin information before such a decision can be made.

Other grounds for acceleration reflect elements that determined by the asylum seeker’s entrance into the Member State. Most asylum seekers in the EU are irregular entrants.¹⁹⁶ In this context, it must be recalled under Article 31 CSR, States commit not to:

[I]mpose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened..., enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The Recast APD provisions on acceleration aim to reflect Article 31 CSR, but seem to do so in a manner contrary to its non-punitive ethos. For instance, the third and fourth grounds for acceleration deal with situations where the applicant tries to avoid his or her identity being discovered either by misleading the authorities through the use of false documents, failing to disclose particular documents,¹⁹⁷ or seemingly destroying, in bad faith, identity or travel documents.¹⁹⁸ Recital 21 to the Preamble does state that where an applicant can show good cause, the lack of documents on entry or the use of forged documents should not *per se* entail an automatic recourse to accelerated procedures. Yet it is regrettable that in *Qurbani*,¹⁹⁹ the CJEU declined the opportunity to engage with Article 31 CSR, on the basis that it lacks jurisdiction to interpret this provision of international law due to it not been referred to directly in EU legislation. However, various provisions of the Schengen Borders Code do refer to the right to seek asylum.²⁰⁰ Under these circumstances, an argument that an interpretation of Article 31 CSR should have been forthcoming.

A number of the grounds reflect the stereotype of the abusive applicant. For instance, the seventh ground provides for acceleration where the applicant is merely applying to delay or frustrate the enforcement of an earlier or imminent decision resulting in their removal.²⁰¹ Similarly, procedures can be accelerated where a migrant with irregular status, without good reason, does not present themselves to the authorities or apply for asylum as soon as possible.²⁰² This was recognized as a permissible ground for applying a fast-track procedure in *ME v France*.²⁰³ In that case, ME had delayed making his asylum application for several years and the ECtHR did not accept this was due to ignorance of the asylum system.²⁰⁴ The Court accepted that the time limits under the accelerated procedure were very short, but noted that ME had already had three years within which to lodge his claim and benefit from the full

¹⁹² APD, Art. 23(4)(h); Recast APD Art. 31(8)(a)

¹⁹³ APD, Article 23(4)(a).

¹⁹⁴ APD Art. 23(4)(g); Recast APD, Art. 31(8)(e).

¹⁹⁵ APD Art. 23(4)(g).

¹⁹⁶ Hein and Damato estimate 90% of asylum seekers to enter the EU irregularly: Hein and Damato (n 46) 17.

¹⁹⁷ APD, Art. 23(4)(d); Recast APD, Art. 31(8)(c).

¹⁹⁸ Recast APD, Art. 31(8)(d).

¹⁹⁹ Case C-481/13 *Qurbani* [2014] OJ C 315/24.

²⁰⁰ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders OJ L105/1, 13 April 2006 (Schengen Borders Code), Arts. 3 and 13.

²⁰¹ APD, Art. 23(4)(j); Recast APD, Art. 31(8)(g).

²⁰² APD, Art. 23(4)(l); Recast APD, Art. 31(8)(h).

²⁰³ *ME v France* (n 29) para. 66.

²⁰⁴ *Ibid*, para. 68.

procedure.²⁰⁵ In contrast, and more typically, *IM v France* and *AC v Spain* cast doubts on any accelerated procedure which fails to permit sufficient time to prepare an application properly.²⁰⁶ In both these cases, the abuser is evoked, using procedures to prevent the effectuation of removal or failing to claim asylum when they allegedly ought to have known better.

The ninth ground for acceleration covers the situation where the applicant refuses to be fingerprinted,²⁰⁷ now in accordance with the requirements in the Recast Eurodac Regulation. As we know, refusing to be fingerprinted, including taking more extreme self-mutilation measures such as burning off ones fingertips, is a strategy used to avoid Dublin deportations,²⁰⁸ and secure access to asylum in countries with suitable reception conditions and well-functioning asylum system.²⁰⁹ Applying accelerated procedures to those who refuse to be fingerprinted reflects the punitive character of accelerated procedures. For instance, in France, the Conseil d'Etat ruled that if damage done to fingerprints means they cannot be recorded after several attempts, 'this constitutes conclusive evidence that the asylum seeker is not meeting his/her obligation to co-operate and submit their identity to the Eurodac system and accordingly such applicants have no right to accommodation.'²¹⁰

The tenth ground for acceleration is where the applicant is a danger to the national security or public order of the Member State, or has been forcibly expelled for serious reasons of public security or public order under national law.²¹¹ According to the Preamble, this may cover a conviction for committing a serious crime.²¹² If such matters arise, it may well be that exclusion from RS will be part of the analysis. Given the complexity of the law on exclusion, and the important EU principles which now surround it,²¹³ accelerated procedures may not be appropriate here.

The original APD contained further grounds for accelerating procedures than are contain in the Recast. These were where the applicant clearly did not qualify as a refugee or for refugee;²¹⁴ where the applicant had filed another application for asylum with different personal data;²¹⁵ where the applicant did not make the application earlier, having had opportunity to do so and without reasonable cause;²¹⁶ where the applicant did not comply with the obligations to provide information and documentation,²¹⁷ or to report to the authorities

²⁰⁵ Ibid, para. 68.

²⁰⁶ *IM v France* (n 29) para. 147; *AC v Spain* (n 29) para. 100.

²⁰⁷ APD, Art. 23(4)(n); Recast APD, Art. 31(8)(i).

²⁰⁸ C. Jones, 'Analysis: 11 Years of Eurodac', *Statewatch* (January 2014) 5.

²⁰⁹ In 2014, for instance, many asylum seekers entering through Italy declined to be fingerprinted, while Italy did not have the legal or practical means to compel them to provide them involuntarily. See Italian Refugee Council, *AIDA Country Report: Italy* (2014) April 2014 26-27 <http://www.asylumineurope.org/files/reportdownload/aida_nationalreport_italy_second_update_final_0.pdf> accessed 25 January 2015.

²¹⁰ Conseil d'Etat, section du contentieux, juge des référés, Case No. 332890 *Minister of Immigration, Integration, National Identity and supportive development v. Mrs Selamawit*, Case No. 332890, 2 November 2009 referred to in ECRE, *Dublin II Regulation: Lives on hold, European Comparative Report*, February 2013, 13.

²¹¹ APD, Art. 23(4)(m); Recast APD, Art. 31(8)(j).

²¹² Recast APD, Preamble, Recital 24.

²¹³ In Joined Cases C-57/09 and C-101/09, *B & D v Germany* [2010] ECR I-10979, para. 99, the CJEU states that exclusion must stem from 'an assessment on a case-by-case basis of the specific facts...'

²¹⁴ APD, Art. 23(4)(b).

²¹⁵ APD, Art. 23(4)(e).

²¹⁶ APD, Art. 23(4)(i).

QD, Art. 4(1) and (2): '1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity,

without good reason;²¹⁸ and where the application was made by an unmarried minor after their parents' application has been rejected and without raising any new relevant new elements.²¹⁹ Where there was a STC for the applicant was also grounds for an accelerated procedure,²²⁰ whereas it is now grounds for not examining the application under Article 38 of the Recast APD.

These grounds for acceleration are exhaustive. The grounds for acceleration in the original APD were interpreted by the CJEU in *HID* as indicative and non-exhaustive.²²¹ Peers notes that the Recast APD leaves the 'the important question of whether the list of accelerated proceedings is exhaustive or not... not clearly answered'.²²² We share the interpretation proposed by Garlick, that the list is better regarded as exhaustive.²²³ Article 31(8) of the Recast APD states that 'Member States may provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be accelerated and/or conducted at the border or in transit zones in accordance with Article 43 if' one of ten grounds are satisfied. The original APD, on the other hand, stated that 'Member States may prioritise or accelerate any examination... including where the application is likely to be well-founded or where the applicant has special needs' and then that 'Member States may also provide that an examination procedure... be prioritised or accelerated if' one of a number of grounds was met.²²⁴

Accelerated procedures may, following the recast, only be applied to unaccompanied minors in specific circumstances. These are when the minor comes who from a country classified as a SCO, when the application is an admissible subsequent application, when the minor may be considered a danger to national security or public order or when the applicant has been forcibly expelled for serious reasons of public security or public order.²²⁵

The nature of an accelerated procedure is left to the discretion of the Member States, however the basic principles and guarantees set out above must be respected and there must be 'reasonable' time limits.²²⁶ Recital 20 of the Preamble reiterated that an accelerated procedure should be 'without prejudice to an adequate and complete examination being carried out'. The CJEU has also noted that the accelerated procedure must not deprive applicants of the guarantees applying to all forms of procedure and or of their rights under the APD.²²⁷ In particular, the applicants must enjoy a sufficient period of time within which to gather and present the necessary material in support of their application, thus allowing the determining authority to carry out a fair and comprehensive examination of those applications and to ensure that the applicants are not exposed to any dangers in their country of origin.²²⁸ Accelerated procedures are not to be applied to applicants in need of special procedural guarantees if adequate support cannot be provided.²²⁹ The vulnerable are deemed insufficiently robust to put the claims in the accelerated context, is presumably the assumption. However, for all asylum seekers, gathering information and recuperating from traumatic journeys may make accelerated procedures unsuitable.

nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.'

²¹⁸ APD Art. 23(4)(k).

²¹⁹ APD Art. 23(4)(o).

²²⁰ APD Art. 23(4)(c)(ii).

²²¹ *HID* (n 27) para. 70.

²²² Peers (n 40) 15.

²²³ Garlick (n 64) 241.

²²⁴ APD, Art. 23(3) and (4).

²²⁵ Recast APD, Art. 25(6)(a).

²²⁶ Recast APD, Art. 31(9).

²²⁷ *HID* (n 27) para. 74.

²²⁸ *Ibid*, para. 75.

²²⁹ Recast APD, Art. 24(3).

4.11.1 Safe Country of Origin - From Unfounded to Accelerated

As mentioned, the final category of accelerated procedures is related to SCO.²³⁰ Under the original APD, SCO was a ground for considering an application unfounded.²³¹ This is no longer so and the Recast merely permits SCO to be used as a basis for accelerated procedures. The country of origin of the applicant was accepted by the CJEU in *HID* as a permissible ground for accelerating procedures²³² so long as procedures allowed for the applicant to gather supporting materials and for the determining authority to carry out a fair and comprehensive examination to ensure that applicants are not exposed to any dangers in their country of origin.²³³ Disappointingly, the CJEU failed to establish limits on when nationality might be used to siphon applicants into different procedures.

A SCO is defined in Articles 36 and 37 of the Recast APD. A third country may be considered a SCO if the applicant has the nationality of that country or is a stateless person formerly habitually resident in that country. This is so long as the applicant:

[H]as not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection in accordance with [the Recast QD].²³⁴

Recital 42 of the Preamble to the recast recognises that the designation of a third country as a SCO cannot establish an absolute guarantee of safety for nationals of that country. Instead, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in that country. For this reason, the importance of not applying the concept once an applicant shows that there are valid reasons to consider the country not to be safe in their particular circumstances is noted.

The Recast APD no longer contemplates a common list of SCOs.²³⁵ A country is instead considered as a SCO where the legal situation, the application of the law within a democratic system and the general political circumstances, demonstrate there is generally and consistently no persecution, no torture or inhuman or degrading treatment, or punishment and no threat of indiscriminate violence due to an international or internal armed conflict. This assessment shall take account of the relevant laws and regulations of the country and their application; whether the rights and freedoms in the ECHR, the International Covenant for Civil and Political Rights (ICCPR) or the Convention against Torture (CAT) are respected, particularly those rights in the ECHR which cannot be derogated from; respect for the principle of *non-refoulement*; and a system of effective remedies against violations of these rights and freedoms.²³⁶ In determining this, reference is to be had to a range of sources including other Member States, EASO, UNHCR, the Council of Europe and other relevant international organizations.

The APD allowed for derogation from the minimum guarantees of what constitutes a SCO in the case of existing national legislation.²³⁷ This was so long as the Member State was satisfied that persons (or that specified group) in the third countries concerned were generally neither subject to persecution or torture or inhuman or degrading treatment or punishment.

²³⁰ Recast APD, Art. 31(8)(b).

²³¹ APD, Art. 31(2).

²³² *HID* (n 27) para. 73.

²³³ *Ibid*, para 75.

²³⁴ Recast APD, Art. 36(1).

²³⁵ Like the common list for SuperSTCs, the CJEU annulled the procedure for agreeing this list. See 4.2.3 above.

²³⁶ APD, Annex II; Recast APD, Annex I.

²³⁷ APD, Art. 30(2).

The Recast APD does not allow for such derogation.

We have a useful snapshot of contemporary SCO practice in ECRE's latest Asylum Information Database (AIDA) report.²³⁸ It illustrates that some States use SCO to place a greater burden of proof on applicants and procedural disadvantages.²³⁹ For instance in Belgium, the applicant's fear of persecution must 'appear clearly' from their declarations.²⁴⁰ Belgium also utilised a restricted appeal procedure for applicants from a SCO as discussed below in Part 4.15.1. The fact that SCO only triggers an accelerated procedure under the Recast APD may cast doubt on the validity of these practices. Only two countries, namely Sweden and Italy, have not introduced any safe country concepts and do not apply these concepts in practice.²⁴¹ All other Member States have introduced legislation either for the SCO concept or for both the SCO concept and the STC concept.²⁴² The Netherlands has introduced a third concept of 'country of earlier residence'. This is supposed to provide protection from *refoulement* but only requires that the applicant has lived there for two weeks. ECRE doubts whether it can be considered 'reasonable' as required by Recital 44 to the preamble of the APD for applicants to be returned to a third country simply because they resided there for two weeks.²⁴³

The designation of countries as safe also varies across the 28 Member States. Bulgaria and Poland made the designation of a country as safe contingent on a minimum common list for the EU as foreseen by the APD.²⁴⁴ ECRE notes that such a list was never adopted due to a failure to reach agreement between the Member States.²⁴⁵ The inability to achieve common ground is still an issue and the survey demonstrates that not one country has been designated as safe by all Member States who have adopted lists.²⁴⁶ ECRE considers that this difference raises 'a number of fundamental questions as regards the utility of the concept and the use of national lists in the context of the CEAS.'²⁴⁷ It further notes that the use of the SCO concept seems to undermine rather than contribute to the objective of convergence of decision-making within the EU and is at odds with the aims of treating similar cases alike. Instead, the concept can lead to differences based upon the EU Member State in which the application is lodged.²⁴⁸

As discussed below in 4.15.2, the most problematic aspect of the Recast APD is that the automatic suspensive effect of appeals does not apply in a straightforward way in SCO cases.²⁴⁹

4.12 Unfounded Applications

An application may be declared as unfounded once the determining authority has established that the applicant does not qualify for international protection.²⁵⁰ Garlick notes that it is unclear how the nature of unfounded applications means they differ from other categories of applications that ought to be rejected 'nor how it can be determined if an applicant does not qualify for protection before a substantive procedure has been undertaken.'²⁵¹

²³⁸ ECRE, *Mind the Gap: An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System – Second AIDA Annual Report* (2014), 4 November 2014.

²³⁹ Ibid, 48.

²⁴⁰ Ibid, 50.

²⁴¹ Ibid, 49.

²⁴² Ibid, 49.

²⁴³ Ibid, 49.

²⁴⁴ Ibid, 49.

²⁴⁵ Ibid, 49.

²⁴⁶ Ibid, 50.

²⁴⁷ Ibid, 53.

²⁴⁸ Ibid, 53.

²⁴⁹ Recast APD, Art. 46(6)(a).

²⁵⁰ APD, Art. 28 (1); Recast APD, Art. 32 (1).

²⁵¹ Garlick (n 64) 259.

Under the original APD, unfounded and inadmissible applications were conflated, as were the grounds for acceleration and unfoundedness. Under the Recast, matters have been tightened up somewhat. The linkage between acceleration and unfoundedness is maintained in one important respect, however: Where circumstances that would allow the Member State to apply an accelerated procedure exist Member States may also consider an application to be manifestly unfounded if it is defined in this way by national legislation.²⁵² In light of this important proviso, it not apparent how an unfounded application differs from a rejected one.

4.13 Other Specific Procedures

The APD gave Member States the possibility of providing for two specific procedures derogating from the basic principles and guarantees normally granted to applicants. First, for a preliminary examination used to process subsequent applications and, secondly, for border procedures. Member States were also given the possibility to derogate under the STC concept.²⁵³ This exception has not been carried across into the Recast.

4.13.1 Border Procedures

Under the APD, Member States were permitted to introduce procedures, in accordance with the basic principles and guarantees of the Directive, for deciding on applications made at their border or transit zones.²⁵⁴ The Recast APD alters the formulation somewhat, but confirms a wide discretion to use border procedures.²⁵⁵

The Recast APD removes a derogation allowing Member States, where they had not provided for any border procedures, to maintain procedures derogating from the basic principles and guarantees in the APD in order to decide at the border or in transit zones whether applicants for asylum may enter their territory.²⁵⁶ These procedures were to ensure, in particular, that the persons concerned could remain at the border or transit zones of the Member State; were immediately informed of their rights and obligations; had access, if necessary, to the services of an interpreter; were given an interview by the competent authority; could consult a legal adviser; and could have a representative appointed in the case of unaccompanied minors.²⁵⁷

Under both the APD and the Recast APD, Member States must ensure that a border decision is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant must be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of the Directive. This requirement is relaxed in the event that a ‘large number’ of asylum seekers at the border or in a transit zone make it impossible in practice to apply border procedures.²⁵⁸ In that case, border procedures may be applied where and for as long as those third-country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone.

As with other decisions, those made at the border or in transit zones must be made in writing and, where an application is rejected, the reasons in fact and in law must be stated.²⁵⁹ Furthermore, where an application is rejected, both Directives require that applicants be given

²⁵² APD, Art. 28(2); Recast APD, Art. 32(2).

²⁵³ APD, Art. 24.

²⁵⁴ APD, Article 35(1).

²⁵⁵ Recast APD, Art. 43(1) states that Member States may provide for procedures at the border or transit zones for deciding on the admissibility of an applicant (pursuant to Art. 33 i.e. whether there is a FCA or a STC) or the substance of an application in a procedure where the circumstances exist for using an accelerated procedure.

²⁵⁶ APD, Art. 35(2).

²⁵⁷ APD, Art. 35(3).

²⁵⁸ APD, Art 35(5); Recast APD, Art. 43(3).

²⁵⁹ APD, Art. 9; Recast APD, Art. 11.

information on how to challenge a negative decision, unless this has been given previously.

When application was made on behalf of a number of dependants and based on the same grounds, Member States were entitled under the APD to take one single decision covering all dependants.²⁶⁰ The Recast maintains this option, but includes the caveat precluding this if:

[T]o do so would lead to the disclosure of particular circumstances of an applicant which could jeopardise his or her interests, in particular in cases involving gender, sexual orientation, gender identity and/or age-based persecution. In such cases, a separate decision shall be issued to the person concerned.²⁶¹

According to the Recast APD, border procedures may only be applied to unaccompanied minors in particular circumstances. These are, if the applicant is coming country classed as a SCO, if they make a subsequent application, if they may be considered a danger to the national security or public order of the Member State, if they have been forcibly expelled for serious reasons of public security or public order under national law, if there are reasonable grounds to consider there is a STC for them, if they have misled the authorities by presenting false documents, or if they have, in bad faith, destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality. The latter two may only be applied in individual cases where there are serious grounds for considering the applicant is trying to conceal aspects of their identity likely to lead to a negative decision.²⁶²

4.14 Deemed Withdrawn and Subsequent Applications

Governments are keen to maintain the discretion to deem applications as abandoned. Sometimes relatedly, subsequent applications are also common across the EU. This section will try to understand what underlies the approaches to these phenomena in the Recast APD. Why are both practices so prevalent and so problematic in Europe? As the Commission's public statement illustrates, subsequent applications have become an example of assumed 'abuse' of asylum systems.²⁶³

4.14.1 Implicit Withdrawal

The provisions deeming applications to be withdrawn are also relevant to this phenomenon. Evidently, asylum seekers are entitled to withdraw their applications for international protection explicitly. In this scenario, Member States are to provide that the determining authority either discontinues the examination or rejects the application.²⁶⁴ Member States may also decide that the decision to discontinue the examination is made without taking a decision and a notice is to be entered accordingly in the applicant's file.²⁶⁵

An application may also be implicitly withdrawn.²⁶⁶ The circumstances under which an applicant will be considered to have implicitly withdrawn or abandoned their application are the same across both Directives.²⁶⁷ First, an application may be deemed implicitly withdrawn or abandoned if the applicant fails to respond to requests for information essential to his or her application or does not appear for a personal interview.²⁶⁸ Secondly, it will be so

²⁶⁰ APD, Art. 9(3).

²⁶¹ Recast APD, Art. 11(3).

²⁶² Recast APD, Art. 25(6)(b). For a critique, see ECRE (n 184) 33.

²⁶³ European Commission, *Asylum Procedures* <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/common-procedures/index_en.htm> accessed 25 January 2015.

²⁶⁴ APD, Art. 19(1); Recast APD, Art. 27(1).

²⁶⁵ APD, Art. 19(2) and the Recast APD, Art. 27(2).

²⁶⁶ APD, Art. 20; Recast APD, Art. 28.

²⁶⁷ APD, Art. 20(1); Recast APD, Art. 28(1).

²⁶⁸ APD, Art. 20(1)(a); Recast APD, Art. 28(1)(a).

deemed if the applicant absconds or leaves their place of residence without authorisation and without contacting the competent authority within a reasonable time, or fails to comply with reporting duties or other obligations to communicate.²⁶⁹ The Recast APD grants the applicant the possibility of demonstrating this was due to circumstances beyond his or her control in both circumstances, whereas the original APD left no opportunity for this in the case of absconding. If an application is implicitly abandoned or withdrawn, the determining authority may decide to discontinue examination or to reject it,²⁷⁰ however following the Recast adds rejection must follow an adequate examination.

An applicant who reports again to the determining authority after a decision to discontinue is entitled to request their case is reopened or to make a new application. Under the APD this might have been treated as a subsequent application but this is no longer a possibility.²⁷¹ Both Directives grant Member States the possibility to set a time limit after which the case cannot be reopened, but following the Recast this must be at least nine months.²⁷² After this point, the applicant's case can no longer be reopened or the new application may be treated as a subsequent application. Member States may also provide that the applicant's case may be reopened only once. Overall, this is a significant improvement.

4.14.2 Subsequent Applications

A subsequent application is 'a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal'.²⁷³ An application may also be treated as a subsequent application when a dependant lodges an application after having consented to their case being dealt with as part of an application lodged on their behalf or where an unmarried minor lodges an application after an application has been lodged on their behalf.²⁷⁴ The original APD authorised Member States to use the procedure for subsequent applications where an applicant either intentionally or due to gross negligence failed to go to a reception centre or appear before the competent authorities at a specified time,²⁷⁵ however this exception was not contained across the Recast APD.

Any further representations regarding an application or a subsequent application are to be examined in the framework of the previous application or in the framework of the examination of the decision under review or appeal.²⁷⁶ This is only so long as the all elements underlying the further representations or subsequent application can be taken into account.²⁷⁷ The procedure to be followed in the case of a subsequent application is as follows: Member States are to first carry out a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant.²⁷⁸ In the case of dependents or unmarried minors this will consist of examining whether there are facts justifying a separate application. Where an application is subject to a preliminary examination, the applicant still enjoys the same guarantees.²⁷⁹

²⁶⁹ APD, Art. 20(1)(b); Recast APD, Art. 28(1)(b).

²⁷⁰ APD, Art. 20(1); Recast APD, Art. 28(1).

²⁷¹ Recast APD, Art. 28(2).

²⁷² APD Art. 20(2); Recast APD Art. 28(2).

²⁷³ Recast APD, Art. 2(q).

²⁷⁴ APD, Art. 32(7); Recast APD, Art. 40(6).

²⁷⁵ APD, Art. 33.

²⁷⁶ APD, Art. 32(1); Recast APD, Art. 40(1).

²⁷⁷ APD, Art. 32(1); Recast APD, Art. 40(1).

²⁷⁸ APD, Art. 32(3); Recast APD, Art. 40(2).

²⁷⁹ APD, Art. 34(1); Recast APD, Art. 42(1).

The Recast is based on the premise that subsequent applications are likely to be abusive, and permits Member States to truncate procedures for a preliminary examination. Member States may oblige the applicant to specify and substantiate the facts justifying a new procedure.²⁸⁰ Furthermore, the preliminary examination may be conducted solely on the basis of written submissions without a personal interview if the applicant is not a minor.²⁸¹ These rules shall not however, render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailment of such access.²⁸² The Recast APD however longer includes the option to require any new information to be submitted within a certain time after it was obtained.²⁸³

If the preliminary examination suggests new elements or findings have either arisen or been presented by the applicant which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection, the application shall be further examined.²⁸⁴ If there are no new elements, the application need not be further examined and is deemed inadmissible.²⁸⁵ Recital 36 in the Preamble to the Recast APD notes that it would be disproportionate in these instances to oblige Member States to carry out a new full examination procedure. Member States may also provide other reasons why a subsequent application should be further examined.²⁸⁶ Member States must ensure that the applicant is informed of the outcome of the preliminary examination and, if the application is not to be further examined, of the reasons why and the possibilities for seeking an appeal or review of the decision.²⁸⁷ Member States also have the possibility to provide that further examination after new elements or findings are identified, or on the basis of other reasons, takes place only if the applicant had been incapable of asserting the information through no fault of their own.²⁸⁸ It is difficult to see how this option is fair: Many applicants may struggle to explain their claims, or be ill-advised about the pertinent aspects of their claims at the outset. Depending on how the proviso is applied, it could be applied to as to avoid the re-examination of strong claims.

A subsequent application may, under the Recast, be exempt from the right to remain in the territory for the duration of the application.²⁸⁹ This applies in two scenarios: First, where a person the preliminary examination concludes the subsequent application ought not be further examined due to it being merely in order to delay or frustrate their imminent removal from the Member State. Secondly, where a person makes another subsequent application in the same Member State following either a final decision finding a prior subsequent application inadmissible or a final decision rejecting that application as unfounded. Member States may make such an exception only where the determining authority considers it will not lead to direct or indirect *refoulement* in violation of that Member State's international and Union obligations. In these situations, Member States may also derogate from the time limits normally applicable in accelerated procedures and admissibility procedures. Member States may also derogate from the right of the applicant to remain in the territory pending the outcome a request to remain on the territory. As Garlick notes, these provisions seem to run counter to the general move in recast to ensure the suspensive effect of appeals.²⁹⁰

²⁸⁰ Recast APD, Art. 42(2)(a).

²⁸¹ Recast APD, Art. 42(2)(b).

²⁸² Recast APD, Art. 42(2).

²⁸³ APD, Art. 34(2)(b).

²⁸⁴ APD, Art. 32(4); Recast APD, Art. 40(3).

²⁸⁵ Recast APD, Art. 40(5).

²⁸⁶ APD, Art. 32(5); Recast APD, Art. 40(3).

²⁸⁷ APD, Art. 34(3)(a); Recast APD, Art. 42(3).

²⁸⁸ APD, Art. 32(6); Recast APD, Art. 40(4)

²⁸⁹ Recast APD, Art. 41(1).

²⁹⁰ Garlick (n 64) 281.

The UNHCR APD Study is revealing about the prevalence of repeat applications. According to its research, the percentage of applications that were subsequent applications in 2008 was 27.1% in Belgium, 17% in France and 36% in the Czech Republic.²⁹¹ It notes that:

UNHCR is not aware of any qualitative research or data which analyses the reasons for subsequent applications. However, to the extent that subsequent applications may be due to deficiencies in first instance procedures or restrictions on appeal, UNHCR's recommendations are aimed at reducing these as causes for subsequent applications.²⁹²

However, rather than investigate and deal with the causes of subsequent applications, the Recast is based on the premise that they are abusive, a dangerous assumption given the reality of accelerated and unreliable first instance procedures in many Member States.

4.15 Right to an Appeal and Effective Judicial Remedy

The right to an effective remedy is a general principle of EU law, reflected in Article 47 EUCFR and Article 13 ECHR. In *HID*, the CJEU noted that 'in accordance with a fundamental principle of European Union law, the decisions taken in relation to an application for asylum and the withdrawal of refugee status must be subject to an effective remedy before a court or tribunal'.²⁹³ The APD and its recast both contain specific provisions on the right to an effective remedy. However, the original APD provision was terse, and left much to be judicially resolved.

The first CJEU rulings on the right to an effective remedy under the original APD were somewhat underwhelming. In *Diouf*, the CJEU stated that this right does not extend to a number of levels of jurisdiction,²⁹⁴ but only to a final decision rejecting the application on the substance, thereby excluding preparatory decisions.²⁹⁵ Thus, it was not necessary that the applicant could challenge the decision to apply an accelerated procedure rules so long as the reasons for the decision to accelerate should be amenable to review when the final decision was challenged.²⁹⁶ The case further outlined that an effective 'the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons.

In *HID*, the CJEU considered the alleged shortcomings of Irish Refugee Appeals Tribunal (RAT) against which several domestic judicial reviews alleging bias within the institution have been brought.²⁹⁷ The CJEU did not consider whether it was contrary to the right to an effective remedy that a Government Minister retained discretion to override a negative decision and that organizational and administrative links between the bodies responsible for first instance determination of applications and the determination of appeals remained. In relation to the former, the CJEU noted that the RAT was the competent tribunal to examine appeals under the Refugee Act and its decisions were only liable to being overridden by the government if an appeal was rejected. In that case, the Minister could still recognize the refugee.²⁹⁸ Furthermore, the CJEU also considered the RAT was sufficiently independent.²⁹⁹

²⁹¹ UNHCR, *APD Study* (n 26) 364. See further UNHCR, *Safe at Last? Law and practice in selected EU Member States with respect to asylum-seekers fleeing indiscriminate violence* (2011) July 2011.

²⁹² *Ibid*, 365.

²⁹³ *HID* (n 27) para. 81.

²⁹⁴ *Diouf* (n 27) para. 69.

²⁹⁵ *Ibid*, paras. 41-43.

²⁹⁶ *Ibid*, para 56.

²⁹⁷ For an insight into the context, see S Conlon 'Political Will Needed for serious asylum reform' *The Irish Times* (1 June 2012).

²⁹⁸ *HID* (n 27) paras 86-87.

²⁹⁹ *Ibid*, paras 94-104.

The part of the ruling of independence fails to grasp the nettle at the heart of the reference. It was alleged *not* that the RAT was not a 'tribunal' in the sense required to be able to make preliminary references in Article 267 TFEU. Instead, it was alleged that it was not 'independent' in the sense of being sufficiently independent of the government against whose decisions it adjudicates appeals. However, the APD Preamble links the criteria for independence to Article 267 TFEU, not independence *qua* fairness.³⁰⁰ The Court noted that the institutional features of the RAT were adequate and that judicial remedies before the Irish courts appeared 'in themselves, to be capable of protecting the RAT against potential temptations to give in to external intervention or pressure liable to jeopardize the independence of its members.'³⁰¹

In *HN*,³⁰² the CJEU discussed Ireland's dual procedures for determining RS and SP. It held that the procedural safeguards in the original APD did not constrain Ireland's separate procedures for determining SP under the QD, and that such guarantees need only apply to SP assessments if RS and SP are examined in a single procedure.³⁰³ The Court held, however, that there was a duty to make decisions in a reasonable time. This was compromised by the Irish procedure, which required applications to apply for RS, wait for rejection and then make a separate application for SP. This right was rooted in the general principles and Article 41 EUCFR, the right to good administration.³⁰⁴

The Recast APD contains more detailed provisions regarding the safeguards afforded to applicants:

Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to [the Recast QD], at least in appeals procedures before a court or tribunal of first instance.

Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy... The time limits shall not render such exercise impossible or excessively difficult.

Member States may also provide for an *ex officio* review of decisions taken pursuant to Article 43.³⁰⁵

We will now examine these requirements in more detail.

4.15.1 Full Ex Nunc Examination

The Recast APD provides for a greater level of judicial scrutiny. The original Directive left unspecified what the features of an effective remedy were, although Member States were to, 'where appropriate, provide for rules in accordance with their international obligations.'³⁰⁶ Article 46(3) of the Recast APD is more explicit, providing for a 'full and *ex nunc* examination of both facts and points of law.'³⁰⁷ This reflects a fairly straightforward incorporation of the ECHR standard from *Salah Sheekh v the Netherlands*.³⁰⁸

³⁰⁰ APD, Preamble, Recital 27 states, 'in accordance with a fundamental principle of European Union law, the decisions taken in relation to an application for asylum and the withdrawal of refugee status must be subject to an effective remedy before a court or tribunal within the meaning of Article 267 TFEU.'

³⁰¹ *HID* (n 27) para 103.

³⁰² Case C-604/12 *HN* [2013] OJ C 86/9.

³⁰³ *Ibid*, para. 39.

³⁰⁴ *Ibid*, paras 47, 50, 56.

³⁰⁵ Recast APD, Art. 46(3)-(4).

³⁰⁶ APD, Art. 39(3).

³⁰⁷ Recast APD, Art. 46(3)

³⁰⁸ *Salah Sheekh v the Netherlands* Appl no 1948/04 (ECtHR 11 July 2007), para. 136.

The Belgian Constitutional Court more recently discussed the need for an *ex nunc* assessment in light of the ‘procedure for annulment’ in Belgium for appealing negative decisions on asylum where the applicant is from a safe country of origin. The procedure for annulment only provided for an *ex tunc* procedure, not requiring courts to consider anything new or not known to the decision maker at the time. According to the Belgian Constitutional Court, this violated the ECHR and Belgian law has since been amended to take this into account: There is now a full and *ex nunc* judicial remedy for asylum seekers from SCOs.³⁰⁹

4.15.2 Suspensive Effect

The suspensive effect of appeals has also been a recurring issue before the Strasbourg Court, as litigants sought to challenge various national measures which removed or restricted that right. While the Strasbourg case law is now clear that once there is an arguable case of real risk of Article 3 breach, automatic suspensive effect is required,³¹⁰ to protect the applicant against the irreversible effects of such a breach,³¹¹ the Recast APD contains a complex set of rules on this matter. This section sets them out in their full complexity, and then considers whether they meet the Strasbourg requirements. The basic rule of automatic suspensive effect appears in Article 46(5) of the Recast APD, with suspensive effect both during a ‘reasonable’ time-limit to introduce the appeal and pending the outcome of the appeal.

However, there are four significant exceptions in Article 46(6) relating to manifestly unfounded or unfounded applications (unless this is due to a failure to make an application as soon as possible), inadmissible applications, rejected applications previously implicitly withdrawn or abandoned and applicants from a ‘European safe third country’. As noted above, an unfounded application seems similar to a rejected application in that an application may only be treated as unfounded once the determining authority has established that the applicant does not qualify for international protection.³¹² An application may be treated as manifestly unfounded if the determining authority has established that the applicant does not qualify for international protection and the grounds for using an accelerated procedure exist.³¹³ Inadmissible applications, it will be recalled, are that are inadmissible for any one of five reasons (1) another Member State has granted protection; (2) the FCA concept is applicable; (3) the STC concept is applicable; (4) the application is a subsequent one with no new evidence put forward; or (5) where the applicant had previously consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant’s situation which justify a separate application.³¹⁴

It is difficult to see how in implementation it will not lead to breaches of Article 13 ECHR, especially in the context of accelerated procedures with short time-limits. The ECtHR has developed a clear jurisprudence regarding when the right to an effective remedy in asylum cases requires automatic suspensive effect. If there is a risk the applicant will be removed to a country where he faces a real risk of becoming a victim of treatment contrary to Article 3 ECHR then in order to be effective, the domestic remedy must have suspensive effect. In

³⁰⁹ Law of 10 April 2014 (Belgian Law Gazette [21 May 2014] 40320). See further L. Leboeuf, ‘Le juge, garant ultime de l’équité de la procédure d’asile’ (2014) 2 Administration Publique 221; S. Ganty and M. Baumgärtel, ‘Effective Remedies as Capabilities: Toward a User Perspective to Human Rights of Migrants in Belgium’ (2015) HRILD (Forthcoming).

³¹⁰ *Gebremedhin v France* Appl no 25389/05 (ECtHR 26 April 2007), para. 66; *MSS v Belgium and Greece*, (n 164) para. 393; *MA v Cyprus* Appl no 41872/10 (ECtHR 23 July 2013), para. 135.

³¹¹ *Čonka v Belgium* Appl no 51564/99 (ECtHR 5 February 2002), para. 79; *De Souza Ribeiro v France* Appl no 22689/07 (ECtHR 13 December 2012), paras. 82-83.

³¹² Recast APD, Art. 32 (1).

³¹³ Recast APD, Art. 32(2).

³¹⁴ Recast APD, Art. 33(2).

Gebremedhin v France,³¹⁵ the ECtHR examined the French procedure for finding applications manifestly unfounded. It emphasized that in order to be effective the domestic remedy must have suspensive effect as of right. France attempted to argue that while the remedy did not have automatic suspensive effect, it was sufficient for it to have suspensive effect ‘in practice’. The Court referred to an earlier decision in *Čonka* where a similar argument had been made noting,

In that regard the Court stressed in particular that ‘the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention’³¹⁶

It is only if there is an arguable case that Article 3 (or another substantive right) has been breached, that the requirements of an effective remedy under Article 13 become pertinent. We take the view that the ‘arguability’ threshold in Article 3 cases will be met in most asylum cases so that automatic suspensive effect in all asylum cases is appropriate.³¹⁷ Indeed, even more rights protective is Renemann’s interpretation, based on *Sultani*,³¹⁸ that the Strasbourg caselaw requires suspensive effect once the applicant in an appeal invokes Article 3 ECHR.³¹⁹

According to the ECtHR, automatic suspensive is not only required when there is complaint regarding Article 3. It has also been held necessary to protect rights under Article 2 ECHR³²⁰ and Article 4 of Protocol No. 4.³²¹ In contrast, if a breach of Article 8 ECHR is threatened, an entitlement to request suspension of the order will suffice. In the case *De Souza Ribeiro v France* the ECtHR stated:

[W]here expulsions are challenged on the basis of alleged interference with private and family life, it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect. Nevertheless, in immigration matters, where there is an arguable claim that expulsion threatens to interfere with the alien’s right to respect for his private and family life, Article 13 of the Convention in conjunction with Article 8 requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality...³²²

In the case of each of the above exceptions to the right to remain in the Recast APD, suspensive effect can be requested.³²³ A court may also rule *ex officio* that an applicant is still entitled to remain on the territory of the Member State, even if the appeal is not automatically suspensive. To make these exceptions palatable, Article 46(7) contains a variety of conditions for the exceptions to apply when border procedures are used including the necessary legal and linguistic assistance, one week to prepare the request for suspensive effect and judicial examination of the negative decision on both facts and points of law. Until the proceedings determining whether or not the applicant should be granted the right to remain, the applicant

³¹⁵ *Gebremedhin v France* (n 310).

³¹⁶ *Ibid*, para 66.

³¹⁷ This is an argument developed in T. Spijkerboer, ‘Subsidiarity and “Arguability”: the European Court of Human Rights’ Case Law on Judicial Review in Asylum Cases’ (2009) 21 IJRL 48.

³¹⁸ *Sultani v France* Appl No. 45223/05 (ECtHR (Adm) 20 September 2007) paras. 50–52.

³¹⁹ M. Renemann, *EU Asylum Procedures and the Right to an Effective Remedy* (Hart Publishing 2014) 133.

³²⁰ *MA v Cyprus* (n 311) para. 133.

³²¹ *Čonka v Belgium* (n 310) paras. 81-83; *Hirsi Jamaa* (n 29) para. 206.

³²² *De Souza Ribeiro v France* (n 311) para. 83.

³²³ Recast APD, Art. 46(6).

is allowed to remain in the territory of the Member State.³²⁴ As Renemann explains, the Recast APD translates the right to an effective remedy into a two-system option: either Member States grant the remedy automatic suspensive effect, or grant automatic suspensive effect to the request for interim protection that an applicant may make where the exceptions in Article 46(6) apply.³²⁵ This respects Member States' procedural autonomy,³²⁶ but it is regrettable that this complex approach to suspensive effect was taken.

The ECtHR has previously noted the risks involved in a system where stays of execution must be applied for and are granted on a case-by-case basis.³²⁷ A similar conclusion was reached by the Belgian Constitutional Court in its decision on the 'procedure for annulment', noted above. The possibility existed to ask for a stay of execution when deportation was imminent, but this was time-limited. For this reason, the Belgian Constitutional Court found that the procedure breached the ECHR. The new Belgian law on asylum procedures for applicants from a SCO takes this into account and provides for automatic suspensive effect.

4.15.3 Time Limits

Member States are to provide for reasonable time limits and other necessary rules for the applicant to exercise their right to an effective remedy.³²⁸ The Recast adds that time limits are not to render such exercise 'impossible or excessively difficult', simply rendering explicit the requirement imposed by the general principles of EU law.

What is a reasonable time limit is dependent on the circumstances of the case. In domestic case law, constitutional courts in Austria and the Czech Republic have found deadlines that were two and seven days too short.³²⁹ In *Diouf*, the CJEU held that a 15-day limit for bringing an appeal in an accelerated procedure did 'not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved.'³³⁰ The Court, however, did envisage that the national court should remit the case for re-examination under an ordinary (i.e. non-accelerated) procedure should it prove necessary in individual cases.³³¹ The manner in which the CJEU arrived at its conclusion in *Diouf* that 15 days was an adequate time period reflects some complacency around asylum procedures. The Advocate General cited two Strasbourg cases, of doubtful relevance. *Kudla v Poland*³³² concerned remedies for excessive periods in detention, while *Ryabaykh v Russia*³³³ concerned a violation of Article 6 ECHR when a final judicial decision was quashed on supervisory review. The Court's assessment of the reasonableness of the 15-day limit is largely unmotivated.

This contrasts with *Pontin*, where a 15-day time-limit to bring proceedings was also examined, in a case concerning the enforcement of EU rights to protect pregnant workers. In *Pontin*, the assessment was more contextual,³³⁴ and although the Court left the matter

³²⁴ Recast APD, Art. 46(8).

³²⁵ Renemann, *EU Asylum* (n 319) 142.

³²⁶ *Ibid*, 143.

³²⁷ *MA v Cyprus* (n 310) para. 137.

³²⁸ APD Art. 39(2); Recast APD, Art. 46(4).

³²⁹ Austrian Constitutional Court (Österreichische Verfassungsgerichtshof), decision G31/98, G79/98, G82/98, G108/98 of 24 June 1998; Czech Constitutional Court (Ústavní soud České republiky) Decision No. 9/2010, Coll. which came into effect in January 2010. As cited in EU Fundamental Rights Agency (FRA), *Handbook on European Law relating to asylum, borders and immigration* (Publications Office of the EU 2013) 96.

³³⁰ *Diouf* (n 27) para. 67.

³³¹ *Ibid*, para. 68.

³³² *Kudla v Poland* Appl No 30210/96 (ECtHR, 26 October 2000).

³³³ *Ryabaykh v Russia* Appl No 52854/99 (ECtHR, 24 July 2003).

³³⁴ Case C-63/08 *Pontin* [2009] ECR I-10467, para. 62. The CJEU stated, 'it should be noted in that regard that... the 15-day period for bringing an action for nullity and reinstatement will be regarded as being

ultimately for the national court to assess, it cast doubt on whether such a short time-limit would permit effective enforcement under the circumstances.³³⁵

4.16 Withdrawal of Protection – Procedures for Cancellation, Cessation, Revocation

The APD and Recast APD both deal with procedures for cancellation, cessation and revocation of RS and SP. As noted in the analysis of the Recast QD in this volume, these issues are conflated in EU law, in a way which potentially undermines IRL.³³⁶ According to both Directives:

Member States shall ensure that an examination to withdraw international protection from a particular person may commence when new elements or findings arise indicating that there are reasons to reconsider the validity of his or her international protection.³³⁷

It is unclear whether this is exhaustive.

There are a number of procedural safeguards for the person concerned. The person concerned must be informed of this in writing and given the opportunity of a personal interview to submit reasons as why their international protection should not be withdrawn.³³⁸ Furthermore, the competent authority must be able to obtain precise and up-to-date information from various sources as to the general situation prevailing in the countries of origin of the persons concerned.³³⁹ Where information on an individual case is collected for the purposes of reconsidering international protection, Member States must ensure those accused of persecution or serious harm are not informed of the fact that the person concerned is a beneficiary of international protection whose status is under reconsideration. Member States are also to ensure they do not jeopardize the physical integrity of the person or their dependants, or the liberty and security of their family members still living in the country of origin.

Once a decision is made, Member States must ensure that the decision withdrawing international protection is given in writing with the reasons in fact and in law are stated and that information on how to challenge the decision is given in writing.

Member States may also decide that international protection shall lapse by law where the beneficiary of international protection has unequivocally renounced his or her recognition as such.³⁴⁰ A Member State may also provide that international protection shall lapse by law where the beneficiary of international protection has become a national of that Member State. The Recast APD is narrower than the APD, which allowed for refugee status to lapse automatically whenever any of the grounds for cessation under the QD applied.

4.17 Children

A minor is defined as a third-country national or stateless person below the age of 18 years.³⁴¹ What amounts to being ‘unaccompanied’ is found in Article 2(1) of the Recast QD. The definition of a representative of an unaccompanied minor has been altered, so that such a person is to ‘assist and represent [...] with a view to ensuring the best interests of the child’. Vera Honouskova has prepared the detailed report on the Recast provisions on minors. Accordingly, we only provide a short summary here.³⁴²

particularly short, in view inter alia of the situation in which a woman finds herself at the start of her pregnancy’.

³³⁵ Ibid, para. 67.

³³⁶ Cite Battjes contribution.

³³⁷ APD, Art. 37; Recast APD, Art. 44.

³³⁸ APD, Art. 38(1); Recast APD, Art. 45(1).

³³⁹ APD, Art. 38(1)(c); Recast APD, Art. 45(2).

³⁴⁰ APD, Art. 38(4); Recast APD, Art. 45(5).

³⁴¹ APD, Art. 2(1).

³⁴² Cite Hanouskova chapter.

Under the Recast APD, Member States may use medical examinations to determine the age of unaccompanied minors if the minor consents. Refusal to undergo a medical examination cannot be the sole reason for rejecting an application.³⁴³ Medical age assessment of asylum seekers is scientifically wanting, particularly when one considers the absence of birth registration and reliable basic data in the countries of origin of most refugees, as Noll has argued.³⁴⁴ The error margin is also known to be significant, even if the applicant is being assessed in light of appropriate basic data for the control group.³⁴⁵

Member States are to ensure that minors have the right to make an application for international protection on their own behalf, or through their parents.³⁴⁶ Member States may also make provision for an application to be made on behalf of dependents, although dependent adults must consent to this.³⁴⁷ The Recast APD expands on the consent requirement insisting that it is requested at the time the application is lodged or, at the latest, when the personal interview with the dependent adult is conducted. Before consent is requested, each dependent adult shall be informed in private of the relevant procedural consequences of the lodging of the application on his or her behalf and of his or her right to make a separate application for international protection.

There are also a number of specific guarantees for unaccompanied minors. According to Recital 33 of the Preamble to the Recast APD, the best interests of the child should be a primary consideration when making a decision. In assessing what is in the best interests of a minor, Member States should take account of the minor's well-being and social development including their background. Member States are to ensure that a representative is appointed to represent and assist the unaccompanied minor with their application.³⁴⁸ The Recast APD adds a number of additional guarantees such as requiring the minor is informed immediately of the appointment of the representative, requiring that the representative acts and has expertise in securing the best interests of the child and preventing organisations or individuals with conflicting interests from acting as representatives.³⁴⁹ The APD allowed Member States not to appoint a representative in a number of circumstances, namely where the unaccompanied minor is likely to reach the age of maturity before a decision at first instance is taken, where the minor can avail themselves, free of charge, of a legal adviser or where the minor is married or has been married.³⁵⁰ Member States were also able not to appoint a representative where the unaccompanied minor was 16 years old or over, unless they could not otherwise do so.³⁵¹ The Recast APD reduces these exceptions, allowing a Member State not to appoint a representative where the unaccompanied minor will reach 18 before a first instance decision is made.

As regards the personal interview, the representative must have the chance to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and about any possible preparation. Member States may require the minor to be present at the interview although the representative or another legal adviser are also to be

³⁴³ APD, Art. 17(5); Recast APD, Art. 25(5).

³⁴⁴ G. Noll, 'Junk Science? Four Arguments Against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum' (2015) Lund Uni. Working Paper, 7 January 2015.

³⁴⁵ A. Schmeling, G. Geserick, W. Reisinger and A. Olze, 'Age estimation' (2007) 165(2-3) *Forensic Sci Int* 178. On the dubious accuracy of dental ageing more specifically, see *Y v Hillingdon* [2011] EWHC 1477 (Admin), *per* Keith J, paras. 28-32.

³⁴⁶ Recast APD, Art. 7(3).

³⁴⁷ APD, Art. 6(3) Recast APD, Art. 7(2).

³⁴⁸ APD, Art. 17(1)(a); Recast APD, Art. 25(1)(a).

³⁴⁹ Recast APD, Art. 25(1)(a).

³⁵⁰ APD, Art. 17(2).

³⁵¹ APD, Art. 17(3).

present and given the opportunity to ask questions or make comments.³⁵² Persons with knowledge of the special needs of minors must also carry out the personal interview itself and prepare the decision by the determining authority.³⁵³ The Recast APD also adds the requirement for Member States to ensure that interviews with minors are conducted in a child- appropriate manner.³⁵⁴

5. Appraisal: Two Stereotypes (or ‘Ideal Types’)? The Abusive Asylum Seeker vs. the Vulnerable Asylum Seeker

Having thus provided a detailed assessment of the Directive, we suggest a useful perspective through which to understand the ambivalent legislative outcome. The complexity of the Directive is readily explained by considering it aims to cater for both ‘abusive applicants’ and ‘vulnerable applicants’ (or applicants in need of special procedures). Both concepts invite us to imagine two contrasting stereotypes of the asylum seeker. Despite their evident differences, both notions suggest that prior to the RSD itself some assessment of asylum claimants should take place in order to determine which procedures to apply. At best, this signals an added layer of complexity. At worst, it suggests that asylum claimants may be judged before their asylum claims are, and a determination of the procedures applicable made on the basis of cursory examination. Many of the issues which are relevant to a vulnerability assessment (such as whether the applicant has suffered trauma from sexual violence) are difficult enough to assess in an asylum process where the applicant is well supported and trusts the authorities. The central premise here is that this approach of devising different procedures, based on some sort of pre-assessment of whether the applicant is a ‘good’ or ‘bad’ asylum seeker, is liable to undermine the fairness, reliability and efficiency of asylum determinations. As long as we insist on doing individualized RSD, rather than protecting refugees on a group basis, an approach that attempts to siphon applicants into different categories and develop diverse procedures to cater for them *before* their claims are assessed, looks deeply counterproductive.

5.1 Vulnerability and Special Needs

While the ‘abusive asylum seeker’ merely haunts the Directive’s provisions, undefined, the applicant with special needs is legislatively defined, not only in the Recast APD, but also in other guises in other EU measures. Article 2(d) of the Recast APD introduces the concept of an ‘applicant in need of special procedural guarantees’. This is defined as ‘an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances’. Garlick notes this definition is ‘broad and somewhat circular.’³⁵⁵ Recital 29, however indicates factors to be taken into account include age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence.

Member States are required to assess vulnerability within a reasonable time following an application for international protection.³⁵⁶ However, in some instances, the sources of vulnerability may relate to questions of fact contested within the RSD process. Although RSD is concerned with a forward-looking assessment of the well-foundedness of fear and/or real risk of particular harms, past persecution may be relevant. So for instance, whether someone has been tortured may be an element of both the RSD assessment and the vulnerability assessment. The vulnerability assessment may be integrated into existing national procedures,

³⁵² APD, Art. 17(1)(b); Recast APD, Art. 25(1)(b).

³⁵³ Recast APD, Art. 25(3).

³⁵⁴ Recast APD, Art. 15(3)(e).

³⁵⁵ Garlick (n 50) 221.

³⁵⁶ Recast APD, Art. 24(1).

or into the assessment of the special reception needs of vulnerable persons under the Recast RCD,³⁵⁷ and need not take the form of an administrative procedure.³⁵⁸

The Recast RCD contains a somewhat different concept of vulnerability. It requires Member States to:

[T]ake into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.³⁵⁹

Vulnerable asylum seekers are also defined as ‘applicant[s] with special reception needs’, who require special reception guarantees.³⁶⁰ Although non-exhaustive, the list of persons in need of special procedural guarantees under the Recast APD does not mirror Article 21 of the Recast RCD,³⁶¹ suggesting that ‘special reception guarantees’ and ‘special procedural guarantees’ may apply to different categories of protection seekers, even though their assessment may be integrated into a single procedure.

The notion of vulnerability invariably begs the question: Vulnerable to what? All human beings are vulnerable to illness, injury, aging, heartache, for instance. In the Recast APD, the approach is to link to the idea that some asylum seekers will be in need of extra support in the asylum process, and that some forms of procedures (designed for the abusers) are not suitable for them. According to Article 24(4), Member States shall ensure that the need for special procedural guarantees is also addressed, in accordance with the Recast APD, where such a need becomes apparent at a later stage of the procedure, without necessarily restarting the procedure.

Once an applicant has been identified as in need of special procedural guarantees, they are to be provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of the Directive.³⁶² Accelerated or border and transit zone procedures are not to be applied where such adequate support cannot be provided within the framework they set out,³⁶³ in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence.³⁶⁴ If, in these circumstances, the application was rejected and automatic suspensive effect was not granted to the applicant, the Member State must apply the extra procedural guarantees set out in Recast APD Article 46(7). These require that the applicant has the necessary interpretation and legal assistance, at least one week to prepare and submit arguments and for any negative decision to be reviewed in terms of fact and law. Otherwise, Member States ought to grant suspensive effect until the time limit for appeal has expired or, once submitted, pending the outcome of the remedy.³⁶⁵

The notion of the ‘special needs’ of some asylum seekers contrasts with the approach to ‘vulnerability’ in Strasbourg jurisprudence. We should note a different notion of vulnerability of asylum seekers in the case law of the ECtHR. In *MSS*, the Court speaks of an applicant’s ‘vulnerability inherent in his situation as an asylum seeker.’³⁶⁶ Asylum seekers are

³⁵⁷ Recast RCD, Art. 22.

³⁵⁸ Recast APD, Art. 24(2).

³⁵⁹ Recast RCD, Art. 21.

³⁶⁰ Recast RCD, Art. 2(k).

³⁶¹ Recast APD, Recital 29. Compare, Recast RCD, Art. 21.

³⁶² Recast APD Art. 24(3).

³⁶³ As set out in Art. 31(8) and Art. 43 of the Recast APD.

³⁶⁴ Recast APD Art. 24(3), second subpara.

³⁶⁵ Recast APD, Art. 46(7).

³⁶⁶ *MSS v Belgium and Greece* (n 164) para. 233.

interpreted ‘as such, [members] of a particularly underprivileged and vulnerable population group in need of special protection in the form of basic reception facilities.’³⁶⁷ In the eyes of the ECtHR, the asylum seekers are a vulnerable category for legal reasons: they lack effective rights to work, and their right to stay in the territory is by definition precarious, and their status requires recognition. As the host state places them in this particular condition, it has positive duties toward them to take measure to ensure their living conditions are not inhumane and degrading. This legal notion of ‘vulnerability’ embraces all asylum seekers. They are vulnerable as a matter of legal status, not particular identity or history. The State has particular positive legal duties to all asylum seekers, as they migration control prerogatives place them in a legally vulnerable position. That as a matter of fact this population also includes many individuals with particular health and psychosocial needs should be borne in mind when deciding how to meet those duties. But the particular, additional needs of some, should not obscure the vulnerability of all as a category.

These different approaches to vulnerability reflect a deep tension in the Recast APD. While the list of sources of vulnerability potentially covers all asylum seekers, the concept is built around a notion of selectivity. Only *some* asylum seekers have special needs in the process. Those who do not have these needs are assumed able to navigate even accelerated procedures effectively. But if they are too wily, and exploit their procedural entitlements too much, their actions may lead them to be regarded as ‘abusers’ of the system.

5.2 The Abusive Asylum Seeker

If notion of the asylum seeker with particular needs suggests a depiction of a passive victim, who needs to be guided through the process, by contrast, the abusive asylum seeker is wily, and his or her tendency to exploit procedural entitlements must be met with additional procedural powers. Thus, the Commission’s public statement singles out repetitive applications by the same person as an example of ‘abuse’, where the asylum system is used to ‘prevent removal indefinitely by continuously making new asylum applications.’³⁶⁸ The possibility that those who have experienced ‘torture, rape or other serious forms of psychological, physical or sexual violence’ might precisely be the ones to resist removal using all means available is implicitly rejected by framing the discourse around the binary stereotypes.

The abusive claimant, it may be inferred from the Recast APD, may variously use false identity documents, or destroy them; seek to evade the Dublin system; or make multiple asylum applications, in particular in order to seek to evade deportation. We know that refugees frequently come from countries where identity documents are not the norm; and that to get to the EU, smugglers are usually involved. We also know that smugglers often advise their clients to destroy their identity papers. Subsequent applications, it would seem, at least sometimes follow-on from faulty accelerated first-instance procedures.³⁶⁹ And many evade Dublin for good reasons too, leaving illegal detention and dire reception conditions, to seek asylum elsewhere in Europe. This is not to respond to one stereotype with another, but to simply point out that those with strong protection needs may often engage in behaviour that the Recast APD seems to assume is ‘abusive’.

In many other fields, EU law has developed sophisticated notions of ‘abuse of rights’, to ensure that straightforward reliance on legal norms and entitlements is protected behaviour, and only in rare cases is behaviour which undermines the purpose of the rules in a well-

³⁶⁷ Ibid, para. 251; *Hassan v Netherlands and Italy*, Appl no 40524/10 (ECtHR 27 August 2013), para. 179.

³⁶⁸ European Commission, *Asylum Procedures* (n 263).

³⁶⁹ See 4.14 above.

defined manner is singled out as ‘abusive’.³⁷⁰ In contrast here, the notion of ‘abuse’ is ill-defined and used to close off certain procedural avenues at the discretion of the State.

6. Conclusion

To conclude, we suggest that our ambivalent assessment of the Recast APD may be understood when its attempt to legislate for the good (i.e. vulnerable) and bad (i.e. abusive) asylum seeker is borne in mind. As our detailed analysis has shown, while the Directive enhances some procedural protections, it facilitates some practices that seem liable to undermine the procedural integrity of the asylum process further. As stated at the outset, the Recast APD contains many improvements over its predecessor. However, it is underwhelming, and reflects the legacy of its predecessor’s tendency to institutionalise special procedures, in particular in that it permits siphoning different asylum seekers into different procedures at the outset, before their claims are fully examined. Experience has demonstrated that attempts to truncate procedures and reject claims without a full examination are likely to lead to more appeals, judicial reviews and applications to the ECtHR. While the Recast APD does limit the grounds for accelerated and unfounded procedures, and insists that accelerated procedures adhere to the basic procedural guarantees at first instance, it maintains the institutional practice of siphoning different claims into different processes at the outset. The recast, if anything, may increase use of border procedures, and in its approach to ‘applicants with special procedural needs’ sets up a further layer of complexity.

Many of the exceptions in the APD have been removed or narrowed. Moreover, there are strong general guarantees as regards the interview, training and the full and *ex nunc* nature of appeals (in line with *Salah Sheekh*). However, several guarantees are subject to the ‘large number[s]...’ caveat, which lacks clarity. While we have suggested this ambiguous term may be amenable to judicial clarification, meanwhile, it is liable to undermine protection.

The provisions of the Recast APD are certainly detailed. Some of that detail has not contributed to clarity. In particular, on applicants with special needs, unaccompanied minors, legal aid and the suspensive effect of appeals, detail may be equated with some degree of obfuscation. This is all the more regrettable, as legal aid and automatic suspensive effect are now the subject of relatively clear jurisprudence of the ECtHR. The failure to translate these principles into bright line rules in the Recast APD means that Member States are likely to continue to run systems that fail to vindicate the rights of asylum seekers.

We suggest that this may be understood in terms of the two stereotypical views of asylum seekers that informed the legislative process. The vulnerable asylum seeker with special needs seems to have been the vision of the EP.³⁷¹ Yet, special procedural needs must be demonstrated, and usually there is discretion when applicants seek to escape the harsher procedures designed for the abusers. The vulnerable asylum seeker may be seen as the exception to the harsher rules in the Directive for the assumed to be abusive applicants. Indeed, the exceptional provisions seem to aim to legitimise harsh procedures: Over and again in the Recast, when procedural mechanisms are devised, exceptions are created for the vulnerable. However, to trigger the exception, some procedure is envisaged, often one that will demand procedural dexterity and proof from the asylum seeker envisaged as less capable of navigating the process than others. The special needs approach seems liable to be ineffective, giving the appearance but not the reality of procedures adapted to real needs. The notion of abuse too remains vague and liable to undermine protection. Not only can we question the utility and efficacy of the resultant procedural proliferation, but we can also

³⁷⁰ R. de la Feria and S. Vogenauer (eds), *Prohibition of Abuse of Law: A New General Principle of EU Law?* (Hart Publishing 2011).

³⁷¹ See for example, European Parliament (n 34) Amendments 13, 16, 56, 74.

doubt whether procedures based on stereotypes assist in identifying those who are in need of international protection. The asylum seeker *qua* presumptive refugee remains elusive.