

9th IARJL World Conference: Bled 7 – 9 September 2011

The Asylum Seeker's Right to Free Legal Assistance and/or Representation in EU Law

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Introduction

Legal assistance for asylum seekers affects multiple aspects of national asylum systems and has many consequences. For national judges, legal assistance and representation which permits the representation of asylum seekers who are appealing against refusal of their asylum application (appellants) or whose matters come before the national judge for a first instance decision, transforms the proceedings. Good legal representation of asylum seekers results in better prepared and documented applications. Fewer applications are rejected on formal grounds related to the inadequacy of the documentation, where the application is refused on substantive grounds, if legal representatives have been involved in the preparation of claims. In such cases, the outstanding issues between the authorities and the applicants are usually more limited and better defined. As every judge is aware, un-represented appellants present very substantial challenges to procedural rules (of which they are usually unaware) and require all those participating in the appeal to take on obligations and duties which are different from those which apply when counsel is representing the individual.¹

The capacity to deliver a fair procedure and outcome, which is at the core of every judge's judicial duties, is enhanced when competent counsel is in court and both parties to the appeal are represented. Compensating for the inequality of arms which results from the lack of legal representation for one of the parties presents most unwelcome issues and problems for judges. Free legal assistance and representation for those appellants who have insufficient resources to pay themselves does not change the arguments which mitigate in favour of legal assistance and/or representation. However, it does raise questions about the allocation of state resources which, while not of primary concern to judges, often trouble administrative authorities.

¹ In a number of jurisdictions there is a prohibition on unrepresented appellants.

There are five main stages in the life of an asylum application where legal assistance and/or representation (whether free or not) is relevant:

- In the preparation and submission of the asylum claim;
In the event of rejection of the claim:
- In the preparation and submission of an appeal procedure;
- In the representation of the appellant at the appeal hearing (if there is one) or submissions for appeals which do not include an oral hearing;
In the event of a negative court decision:
- In advising the appellant after the appeal's determination and on any further appeal avenues;
- In assistance regarding any expulsion decision which may be taken by the authorities.

Each of these stages may be broken down into more constituent parts but for my purposes these suffice. In many jurisdictions around the world, there are arguments about the necessity and role of legal assistance and representation at each of the stages. Depending on the procedures applicable, these arguments may have greater or lesser force depending on what is at stake at each stage. These are not issues exclusively of interest in developed asylum procedure systems. The Southern Refugee Legal Aid Network has identified similar problems in respect of system for the delivery of international protection in the Global South.² Where states have delegated to UNHCR asylum determination, many of the questions which arise in this paper are even more pressing.

In this presentation I will examine the questions and issues which surround free legal assistance and/or representation for asylum seekers in the European Union (EU). A number of legal developments make this presentation possible. First, the EU, as part of the development of a Common European Asylum System (CEAS) which commenced in 1999, has a body of asylum law now which covers most substantive and procedural aspects of an asylum claims (see Annex 1). The transposition dates for the incorporation of all the EU asylum measures (except the last one) have passed. All 27 Member States of the EU are obliged to have ensured that their national law is compatible with the EU measures. The interpretation of the EU asylum measures rests not only with the national judge who has jurisdiction for asylum appeals. That judge also has the possibility to ask the Court of Justice

² http://www.srlan.org/beta/index.php?option=com_content&view=article&id=95&Itemid=107 visited 16 August 2011.

of the European Union (CJEU) for a definitive interpretation of any part of the EU measures where this is necessary for him or her to reach a final decision on the case before him or her. Further, the EU Member States are all bound by the European Convention on Human Rights and the jurisdiction of the European Court of Human Rights which provide an extra-EU human rights framework for asylum procedures.

As a number of previous speakers have mentioned, the CJEU has already been asked, on a number of occasions so far, to provide definitive interpretations of various aspects of the CEAS and a number of issues are pending before it (see Annex 2). As yet, no question has been asked of the CJEU about free legal assistance and representation, though in light of the centrality which this has for many actors in the asylum system there may well be the need for clarification before long.

In this presentation I will examine the following:

- The EU Charter of Fundamental Rights and the legal framework within which the CEAS operates;
- The sources of a free legal assistance and/or representation obligation in the CEAS;
- The state of implementation of the free legal assistance obligation among the Member States;
- The issues identified by UNHCR regarding free legal assistance in the CEAS;
- The research of the EU's Fundamental Rights Agency on legal assistance and/or representation in the asylum system;
- The questions raised by non-governmental organisations regarding free legal assistance in the CEAS;
- The European Court of Human Rights and free legal assistance for asylum seekers;
- The CJEU on free legal assistance as a Charter right.

The EU Charter of Fundamental Rights and the legal framework within which the CEAS operates

On 1 December 2009, the Lisbon Treaty came into force. It introduced into EU law Article 6(1) Treaty on European Union which provides that the EU Charter of Fundamental Rights³

³ OJ 2010 C 83/389.

will have the same legal value as the Treaties themselves.⁴ The background of the Charter is somewhat checkered. It was solemnly declared by the European Parliament, the Council and the Commission on 18 December 2000 at the Nice Summit. However, as a result of disagreement among the Member States the Charter was not, at that time, given legally binding effect within the EU order. It was subsequently introduced as a ‘bill of rights’ into the draft Constitutional Treaty which was proposed to the Member States for ratification in 2004 but that treaty proposal failed to garner sufficient popular support in two Member States (France and the Netherlands).

Now, the Charter is binding and has the same overarching legal position in the EU hierarchy of norms as the EU treaties themselves. Article 6(1) TEU which creates this legal effect also provides that the Charter cannot extend, in any way the competences of the EU and further states that the provisions of the Charter shall be interpreted in accordance with the general provisions of the Charter contained in its Chapter VII and with due regard to the explanations⁵ referred to in the Charter that set out the sources of the provisions contained in it. Article 6(3) TEU provides that fundamental rights as guaranteed by the European Convention on Human Rights (ECHR) and as they result from the constitutional traditions of the Member States constitute general principles of Union law. In this way the Charter is firmly tied to the Council of Europe’s ECHR, thus limiting the possibility for divergence detrimental to individual rights between the two regimes of fundamental rights and to the Member States’ constitutions.

The transformation of the Charter from a document with persuasive authority regarding the implementation of fundamental rights for individuals in the European Union to a binding one is key. It has often been noted that the EU has no other provision which guarantees the fundamental rights of individuals. Indeed, the EU, founded as it was for the purpose of economic convergence only arrived fairly late to the issue of fundamental rights.⁶ However one of the key challenges has been how to make the Charter a living document for those whose lives are touched by EU law.⁷

⁴ Protocol 30, TEU limits the accessibility of the Charter for judges in Poland and the UK.

⁵ OJ 2007 C 303/17,

⁶ From a huge literature on human rights as general principles of EU law, see B de Witte, ‘Past and Future Role of the European Court of Justice in the Protection of Human Rights’ in P Alston (ed) *The EU and Human Rights* (Oxford, OUP, 1999), and T Tridimas, *The General Principles of EU Law*, 2nd ed, (Oxford, OUP, 2006), with further references.

⁷ On account of protocols to the TEU, both Poland and the UK have limited the power of their courts to interpret provisions of the Charter vis-à-vis national law.

The starting point for this examination of legal assistance and representation is Article 18 Charter:

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’).”

What is important to this discussion is the fact that the Charter sets out a ‘right to asylum’, a form of words which recalls the Universal Declaration of Human Rights’ right to seek asylum⁸ though does not repeat it. In EU law (and ECHR law), where a right exists procedural obligations regarding the protection of that right are inherent. The right to an effective remedy contained in Article 47 Charter comes into play.

The explanations to the Charter on Article 18 state

“The text of the Article has been based on TEC [Treaty of the European Community] Article 63, now replaced by Article 78 of the Treaty on the Function of the European Union, which requires the Union to respect the Geneva Convention on refugees...”⁹ Article 47 Charter states “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

⁸ Article 14(1) “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

⁹ Article 78 TFEU:

(ex Articles 63, points 1 and 2, and 64(2) TEC)

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:
 - (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
 - (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
 - (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
 - (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
 - (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
 - (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
 - (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.
3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Assuming Article 18 must be taken seriously and means what it says, that there is a right to asylum in EU law, what do the explanations add for interpretative purposes? I would venture to suggest not a lot. The Charter has the same legal value as Article 78 TFEU. Asylum is clearly within the scope of EU law and the formulation of a right to asylum in the Charter is consistent with Article 78 TFEU as a central element in developing a common asylum policy. Thus the clear acknowledgement of a right to asylum in the Charter requires the provision of full procedural guarantees which are necessary for the protection of any and all of the rights in the Charter. This brings the right to asylum within the scope of Article 47 Charter.

The explanations to Article 47 Charter state: “the first paragraph is based on Article 13 of the ECHR: ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’

“However, in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court...In Union law, the right to a fair hearing is not confined to disputes relating to the civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, *Les Verts* v *European Parliament* (judgment of 23 April 1986 [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

“With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, *Airey*, Series A, Volume 32, p 11). There is also a system of legal assistance for cases before the Court of Justice of the European Union.”

The important point regarding Article 47 Charter in this context, is first, although it mirrors Article 13 ECHR, its scope is wider. Further, the Member States agreed in the explanations

(adopted by unanimity) that the jurisprudence of the ECtHR on legal aid is applicable to Article 47 Charter. The explanations clarify that the right to an effective remedy under the Charter applies to all rights contained in it. Accordingly, the provision of legal aid where necessary to ensure effective access to justice applies to the right to asylum set out in Article 18 Charter.

As the Charter has the same legal status as the Treaties themselves, its legal authority is the same as Article 78 TFEU which provides the power to adopt legislation on asylum. Therefore, as regards the secondary legislation adopted under Article 78 TFEU (see Annex 1) the Charter takes priority in accordance with the EU doctrine of hierarchy of norms. No provision of EU secondary legislation can interfere with a Treaty right (which includes the Charter). Thus when having regard to the CEAS, as it is secondary legislation, it is subject to and must conform with (or be interpreted in conformity with) the Charter.

The right to free legal assistance and representation for asylum seekers in the EU depends on the extent to which this necessary to ensure access to an effective remedy. I will return to this point at the end of this presentation in light of the CJEU's judgment of 22 December 2010 on the provision of legal aid as a component of access to justice.¹⁰

The sources of a free legal assistance and/or representation obligation in the CEAS

Between 1999 and 2011, the EU has adopted 11 measures as part of the CEAS (see Annex 1). For my purposes, it is the Asylum Procedures Directive (Directive 2005/85) which is the most important as it contains the main provisions on legal assistance and representation. The Directive was adopted on 1 December 2005. It had to be transposed into national law by 1 December 2007 except for the legal assistance provision (Article 15) where the Member States were given one further year, until 1 December 2008. Denmark does not participate in the Directive on account of its protocol TEU; Ireland and the UK also had the option of remaining outside the CEAS but opted into the Directive. There are currently on-going negotiations in the EU institutions regarding amendments to the Directive in keeping with the EU's obligation to develop the second stage of the CEAS which must lead to closer harmonisation of asylum law among the Member States. Article 15 on the right to legal

¹⁰C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* 22 December 2010.

assistance and/or representation is one of the provisions which is under consideration in these discussions (see Annex 1).¹¹

The Directive sets out the minimum standards which all Member States (except Denmark) must apply to asylum procedures. The Member States remain free to apply higher standards (ie standards more favourable to the asylum seeker) but national standards must not fall below those set out in the Directive. The current negotiations are intended to lead to common standards rather than minimum ones. This raises new issues as regards the compatibility of those standards with the Member States' human rights obligations and the Charter. As regards interpretation of such minimum standards, the European Parliament challenged before the CJEU a directive on family reunification on the basis that the minimum standards there fell below those to which the Member States were bound by reasons of the UN Convention on the Rights of the Child 1990 and the ECHR.¹² In a rather roundabout judgment, the CJEU found that it was for the national judge to determine whether national implementation of a directive containing only minimum standards was compatible with that Member State's human rights obligations. Such approach is not possible where standards are common.

Articles 15(1) and (2) of the Asylum Procedures Directive (the Directive) sets the general rule for the provision of legal assistance and/or representation against which the subsequent subsections provide exceptions. In accordance with the EU rules of interpretation, this means that the principle takes priority over the exceptions which must be interpreted restrictively.¹³ Article 15(2) states:

“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.”

Article 15(2) requires the state ensure free legal assistance and/or representation to be granted on request in the event of a negative decision by the determining authority.¹⁴ The right to

¹¹ The UK has indicated that it will not opt in to the revised Asylum Procedures Directive but accepts that it will continue to be bound by the existing one.

¹² C-540/03 *European Parliament v Council* 27 June 2006 – regarding Directive 2003/86 on family reunification.

¹³ 41/74 *Van Duyn* [1974] ECR 1337.

¹⁴ “In the event of a negative decision by a determining authority, Member States shall ensure that free legal assistance and/or representation be granted on request, subject to the provisions of paragraph 3.”

legal assistance is very wide, clearly covering all aspects of an asylum claim. However, Article 15(1) does not obligate Member States to pay for this, only to permit provision. Article 15(2) requires Member States to provide free legal assistance and/or representation where the application is refused.

There are four limitations which can be applied by Member States (though they are not obliged to do so) to the provision of free legal assistance and/or representation:

- A limitation to procedures before a court or tribunal (as provided elsewhere in the Directive) and not for any onward appeals or reviews provided under national law including re-hearings;
- Availability only to those who lack sufficient resources;
- Member States can designate under national law the legal advisers or other counsellors to whom the right is applicable;
- Free legal assistance or representation can be limited on a merits test (ie is the appeal likely to succeed);¹⁵

However, in applying any or all of the possible limitations Member States must ensure that legal assistance and/or representation is not arbitrarily restricted (Article 15(3)). National rules for filing and processing legal aid requests are to be determined by national law (Article 15(4)). Member States are also permitted two further mechanisms of limitation by Article 15(5):

- monetary and/or time-limits on the provision of free legal assistance and/or representation may be applied so long as they do not arbitrarily restrict access to legal assistance and/or representation;

¹⁵ “Member States may provide in their national legislation that free legal assistance and/or representation is granted: (a) only for procedures before a court or tribunal in accordance with Chapter V and not for any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review; and/or (b) only to those who lack sufficient resources; and/or (c) only to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum; and/or (d) only if the appeal or review is likely to succeed. Member States shall ensure that legal assistance and/or representation granted under point (d) is not arbitrarily restricted.”

- Treatment of asylum applicants shall not be more favourable than that generally accorded to nationals as regards fees and other costs.¹⁶

Finally, Article 15(6) provides that Member States may demand reimbursement of any expenses if the applicant's financial situation improves considerably or the application was based on false information. Article 16 deals with the scope of legal assistance, which falls outside my examination here.

A variety of issues arise regarding the relationship of the right to legal assistance and/or representation in Article 15(1) and (2) and the limitations which are permitted. One of the key issues for judges in jurisdictions where the limitations are used is the extent to which those limitations result in an arbitrary restriction of the right (prohibited under Article 15(3) last indent) or Article 47 Charter. However, there is also a more fundamental issue at stake: is Article 15 in its entirety consistent with Articles 18 and 47 Charter? If an asylum seeker is entitled to legal assistance and/or representation though all the states of the asylum procedure if he or she has the money to pay for it, is it arbitrary to refuse such assistance to those who cannot pay? The core question is whether legal assistance at all stages of the asylum procedure is necessary to give full effect to the right to asylum. The practices of the Member States may be helpful here.

The state of implementation of the free legal assistance obligation among the Member States

Article 42 of the Directive required the European Commission to report to the European Parliament and the Council on the application of the Directive in the Member States by 1 December 2009. As a result of all sorts of problems, the Commission only submitted its report on 8 September 2010.¹⁷ After the end of the transposition period (1 December 2008 for the legal assistance provision) the Commission was obliged to send letters of formal notice regarding the failure to transpose the Directive to 17 Member States. This did have the good effect of speeding up some of the lagging Member States in their transposition duties. When the Commission finally reported in 2010 only two Member States had still not succeeded in transposing the Directive (Belgium and Ireland).

¹⁶ "Member States may also: (a) impose monetary and/or time-limits on the provision of free legal assistance and/or representation, provided that such limits do not arbitrarily restrict access to legal assistance and/or representation; (b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance."

¹⁷ COM(2010)465 final.

The Commission notes that over the period 1 January 2008 and 31 December 2009, there were 492,995 asylum applications registered in the 26 Member States bound by the Directive; 444,165 decisions made and 125,785 appeal decisions reached (see annex to the Commission's Report). This is not a particularly overwhelming number of appeal decisions considering the size of the EU.

As regards the implementation of Article 15, the Commission notes that in general the right to consult a legal advisor or counsellor is formally recognised across the EU. However, there are differences among the Member States regarding the provision of free legal assistance. Twelve Member States make such assistance available only at the stage of an appeal.¹⁸ Fourteen Member States grant either legal aid or free legal advice in the first instance procedures.¹⁹ In Austria and the Czech Republic this is in the form of free legal advice rather than legal aid per se (Report 5.1.5). Most Member States grant legal aid for both first instance appeals and onward appeals irrespective of the appeal stage. However, Austria and Cyprus make legal aid for representation available only in proceedings before higher courts. Nine Member States do not apply a merits test to the grant of legal aid.²⁰ Other Member State do so but there is very substantial variation among the Member States regarding how this is applied, for what appeal stages and which authorities are in charge. Most Member States apply a resources test to the availability of free legal assistance and/or representation, however, this is not the case in Belgium, the Czech Republic or Romania.

Among the interesting aspects of this information regarding transposition by the Member States is that it is by no means evident that the richer Member States are more generous than those with lower GDPs. Indeed, the most generous provision of legal assistance and representation for asylum seekers is often in 2004 and 2007 Member States. The Commission does not comment in its report on any question regarding the relationship of the Directive and its implementation by the Member States with the Charter.

Regarding the question of free legal assistance throughout the asylum procedure, more than half the Member States have such provision even though not required by the Directive to do so. This would appear to indicate that these Member States consider such provision of free legal assistance necessary to the conduct of an asylum claim.

¹⁸ Cyprus, Estonia, Greece, France, Germany, Italy, Latvia, Malta, Poland, Romania, Slovakia and Slovenia.

¹⁹ Austria, Belgium, the Czech Republic, Spain, Bulgaria, Finland, Hungary, Ireland, the Netherlands, Lithuania, Luxembourg, Sweden, Portugal and the UK.

²⁰ Belgium, Bulgaria, the Czech Republic, Finland, Hungary, Lithuania, Romania, Slovenia and Sweden.

The issues identified by UNHCR regarding free legal assistance in the CEAS

UNHCR has followed the development of the CEAS closely since its inception. In March 2010 it published a report entitled *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*.²¹ UNHCR notes that it welcomed the Directive on its adoption by the EU but at that time expressed concerns that some of the provisions might lead to breaches of international refugee law if implemented at the level of the minimum standards permitted by the Directive. It noted that many commentators were concerned that the wide margin of discretion, exceptions and qualifications of the Directive might lead to divergence contrary to the objective of the CEAS.

UNHCR has guidance from its Executive Committee regarding the importance of fair and efficient asylum procedures, including regarding the role of legal assistance. The Executive Committee adopted Conclusion 8 which identifies the basic requirements for asylum procedures including a fair hearing with “a full interview and examination of the asylum claim by a specialized authority, and appropriate legal assistance.” In UNHCR’s Global Consultations 2001, it confirmed that among the basis guiding principles for effective and fair asylum procedures is access to legal counsel at all stages of the procedure including free legal aid where that is available.²²

UNHCR undertook the comparative analysis of key provisions of the Directive in a selection of Member States in its supervisory role under Article 35 of the Refugee Convention.²³ Article 15 was among the provisions examined in the study. From the perspective of UNHCR, legal assistance and representation are an intrinsic part of access to an effective remedy. Its concern is not only whether there is a remedy in legal terms but also in practice. Thus the study examines in depth the existence or not of impediments which may combine to render a right of appeal ineffective in practice.

According to the UNHCR research, in some Member States, lengthy processes for approving the grant of legal assistance could negate the usefulness of legal aid schemes in appeal processes with short deadlines. The research revealed that in some contexts applicants faced

²¹ <http://www.unhcr.org/refworld/docid/4bab55752.html> visited 13 August 2011.

²² UNHCR, Global Consultations on International Protection, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001.

²³ Belgium, the Czech Republic, France, Germany, Greece, Italy, the Netherlands, Slovenia, Spain, Finland and the UK.

procedures or requirements that were difficult or impossible to fulfil in practice. The most common concerns UNHCR received from experts in the countries considered were:

- Unduly complicated legal aid systems lacking accommodation for asylum applicants and thus inaccessible;²⁴
- Financial remuneration provided by legal aid schemes insufficient to cover legal adviser's costs;²⁵
- Shortage or lack of legal advisors with necessary knowledge and competence;
- Particular problems relating to applicants who are detained and subject to accelerated procedures with shortened time limits.²⁶

In the opinion of UNHCR, for a remedy to be effective in practice “it is essential that free legal assistance is available to appellants at all stages of the appeal procedure, including for assistance with the submission of grounds of appeal, and all other necessary preparation prior to the appeal hearing.”²⁷ UNHCR particularly noted that general publicly-funded legal assistance schemes need to cater adequately for the particular needs and circumstances of international protection claimants. Decisions need to be taken promptly specifically to ensure that time limits which applicants are subject to regarding submitting appeals are not exceeded. Special concern exists regarding applicants who are in detention.

For my purposes, there is a certain timidity in the UNHCR report regarding the scope of the free legal assistance requirement. It is not clear that UNHCR considers this an inherent part of a fair procedure throughout the whole process. UNHCR is unambiguous in its opinion that such free legal assistance and/or representation is necessary at appeal stages. In terms of the practices examined and criticized by UNHCR, many of them would be resolved if free legal assistance was granted as a matter of course as soon as an individual sought to make an asylum claim. Undoubtedly this would assist to encourage legal advisers to gain the specialist knowledge needed. Detained asylum seekers in truncated procedures remain the most difficult group to reach. The extensive criticism which multiple actors include the UN

²⁴ Time limits in Bulgaria were cited here as an example; in Italy variations among Bar Councils to which certain powers are allocated was cited. The complexity of Spanish forms to seek legal air were referred to. The application of the merits test in the UK was also subject to adverse comment.

²⁵ Problems relating to reimbursement of advisers' costs in France were mentioned.

²⁶ Here the Netherlands was cited.

²⁷ Report, *ibid* p 87.

Committee against Torture, the UN Special Rapporteur against Arbitrary Detention, the Council of Europe's Commissioner of Human Rights and the ECtHR regarding the detention of asylum seekers in various Member States needs to be taken very seriously by national judges.

Research of the Fundamental Rights Agency on legal assistance in EU asylum systems

The Fundamental Rights Agency is an EU agency established in 2007 as an advisory body charged to provide assistance and independent expertise relating to fundamental rights, in the domain of Union law. According to the Agency, its' activities serve to promote fundamental rights and to support the EU institutions and Member States in raising the level of protection for everyone in the European Union. The Agency collects data on fundamental rights, conducts research and analysis, provides independent advice to policy-makers, networks with human rights stakeholders and develops communication activities to disseminate the results of its work and to raise awareness of fundamental rights.²⁸

In September 2010 it published two thematic reports on the CEAS as seen from the perspective of asylum seekers themselves.²⁹ Both reports relate primarily to Articles 18 (right to asylum) and 19 (protection in the event of removal, expulsion or extradition) Charter. In the report on the duty to inform applicants about asylum procedures, the FRA noted that according to its research about half the Member States have arrangements with non-governmental organisations to provide information on asylum procedures.³⁰ However, the FRA states that in most cases, the information is provided as part of broader projects in the field of legal and social counselling. It found that information about non-governmental organisations providing legal counselling was not systematically provided across the EU.³¹

In the second report on access to effective remedies, the FRA states that many asylum seekers complained about the paucity of information they received from the authorities on how to access legal assistance, particularly after receiving a negative decision. In half the Member States the FRA found that none of the asylum seekers interviewed had received information

²⁸ Regulation 168/2007.

²⁹ FRA, *The duty to inform applicants about asylum procedures: the asylum-seeker perspective* Vienna, September 2010; FRA *Access to effective remedies: The asylum-seeker perspective* Vienna September 2010.

³⁰ Including: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Finland, France, Greece, Italy, the Netherlands, Romania, Slovakia, Slovenia and the UK. In some of these countries such activities are funded via the European Refugee Fund.

³¹ The FRA notes that in Poland asylum seekers reported lack of information, including regarding NGOs providing legal assistance.

on where to find legal assistance from the authorities after the rejection of their claim. Most asylum seekers received information from sources other than the authorities. The FRA noted that in Belgium and Luxembourg, most asylum seekers interviewed already had a lawyer during the asylum procedure so where there was a refusal of the claim they did not need to search for one. In most Member States applicants only started to search for a lawyer after refusal of their claim. The FRA was advised that only about half the Member States have leaflets or other information on where to access legal advice which is available to asylum seekers.³² In the FRA's opinion, information on where to find legal assistance should be provided at the beginning of the asylum procedure. Negative decisions should be accompanied by information on where to find legal assistance, including contact details of lawyers providing free legal assistance, in a language the asylum seeker understands.

According to the FRA, the majority of the asylum seekers included in their study who had managed to appeal against the refusal of asylum had done so with the assistance of a legal advisor. However, two obstacles to lodging an appeal are highlighted – the limited availability of free legal assistance and time pressure regarding deadlines in the appeals systems. In only four Member States the FRA found a number of asylum seekers had little or no help from lawyers in submitting their appeals.³³ In some countries free legal assistance is difficult to access in rural or remote areas where asylum seekers are hosted.³⁴ Further, in countries where there are legal advisors available, those advisors may refuse to assist all applicants leaving those excluded from legal assistance frustrated.³⁵ In one Member State, the removal of refused asylum seekers immediately on refusal from reception centres to detention centres housing only irregular migrants meant accessing free legal advice in order to submit an appeal against the decision was more difficult.³⁶

The FRA Report finishes with three tables of statistics on recognition rates of asylum seekers from the same countries in different EU Member States. The data used is from the EU's statistical agency, EUROSTAT and relates to decisions taken in 2009. The problem is that the CEAS is not delivering common outcomes. As long as Afghans who apply for international

³² According to the FRA those Member States which do have such information leaflets include Austria, Belgium, the Czech Republic, Denmark, France, Hungary, Ireland, Lithuania, the Netherlands, Poland, Slovenia and the UK.

³³ Austria, Cyprus, France and Hungary.

³⁴ The report notes that in Hungary only one legal advisor was available to assist, free of charge, 500 asylum seekers at a reception centre.

³⁵ The UK was highlighted here.

³⁶ The FRA gives Slovenia as an example of this practice.

protection have a 100% recognition rate in some Member States (eg the Czech Republic, Lithuania, Poland and Slovenia) and a 0% recognition rate in others (eg Cyprus and Latvia) there is a fundamental problem with a system which calls itself common. This problem of divergence is not limited to initial decisions but is also apparent in appeal decisions from different Member States.³⁷

It is clear from the FRA's research that free legal assistance at all stages of the asylum procedure is an important component of a system of fair and efficient asylum procedures. From the perspective of the asylum seeker, legal assistance at all stages is considered critical to the delivery of the right to asylum.

The questions raised by non-governmental organisations regarding free legal assistance in the CEAS

The European Council on Refugees and Exiles (ECRE) is a pan-European alliance of approximately 70 organisations in 30 countries whose work includes the protection and promotion of respect for all individuals seeking asylum in Europe. ECRE provides a voice to its participating agencies at the EU level on policy and practice in asylum. It carries out policy work and research and seeks to encourage new thinking on refugees and asylum in Europe. One of the objectives is to strengthen contacts between refugee-assisting non-governmental organisations in Europe and ensure their experience is shared with the EU institutions and those representing the Member States at the EU level.

In October 2010 ECRE published an extensive study on legal aid for asylum seekers in Europe.³⁸ The objective of the survey is to provide a comparative overview of the provision of legal aid for asylum seekers in 19 countries across Europe based on information from ECRE's participating organisations and expert lawyers and legal advisers.³⁹ The report covers countries which are outside the EU but within the European Economic Area as well as the EU Member State which does not participate in the CEAS. The report notes that asylum claims in Europe are increasingly processed through sophisticated and complex legal procedures which render legal assistance and representation vital to the fairness of the

³⁷ See UNHCR Statistical Yearbook 2009 tables 10 – 12; <http://www.unhcr.org/4ce5327f9.html> visited 14 August 2011.

³⁸ ECRE *Survey on Legal Aid for Asylum Seekers in Europe*, Brussels, October 2010. The report also uses information published by the European Migration Network, *Ad Hoc Inquiry on the Legal Aid in International Protection Procedures* Brussels, 22 October 2009.

³⁹ Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Norway, Romania, Slovenia, Spain, Switzerland, the Netherlands and the UK.

proceedings. The role of free legal aid is central to ensuring fair outcomes as so many asylum seekers are without resources to pay for legal help. The findings of the study are consistent with many of those of the FRA, though from different sources. Among the obstacles for asylum seekers in accessing legal aid are:

- Inadequate capacity when the individual is in detention;
- The speed of procedures particularly when the individual is subject to a transfer decision from one Member State to another (a so-called Dublin II procedure) or other border procedures;
- Restrictive merits and means testing in the granting of legal aid which can leave individuals in need to assistance without it on the basis of mere procedural formality;
- The restriction of free legal aid to the appeals stage in some countries.

The study takes a wide definition of legal aid which encompasses legal information, advice, assistance and representation. It also examines the variety of ways in which legal services are provided, whether by private lawyers, caseworkers or legal advisors. The report emphasises throughout that the key feature of EU and international law to which the provision of free legal aid (assistance and representation) corresponds is the right to effective judicial protection.

The report finds that legal aid for asylum seekers was part of general national systems of legal aid in most countries (though in Ireland and the UK specialised bodies administer it). In a number of countries limitations are placed on legal advisors who can only provide assistance not representation. As seen elsewhere, the study finds that there are problems regarding availability of legal advisors and lawyers to meet the legal needs of asylum seekers in a number of countries.⁴⁰ Means testing raises problems, according to the report particularly as there are substantial variations in how it is applied in different countries. As regards merits tests, while these are less common, where they do exist, for instance in Italy, assessments of very similar cases differ even from town to town in the same region.

ECRE is particularly concerned about the stage at which legal aid becomes available to an asylum seeker. As noted in other reports, it is available at all stages in some countries,⁴¹ but others only make it available at appeal stages. While asylum seekers may received some assistance before the appeal stage in the administrative procedure this may be provided by different legal advisors. The report contains very detailed information about the structure of

⁴⁰ Singled out in the report are the Czech Republic, Greece, Hungary, France and Slovenia.

⁴¹ Belgium, Finland, Hungary, Spain, the Netherlands and the UK. Low cost legal aid is also available in Ireland at all stages.

asylum procedures and access to justice in the countries under consideration including a detailed list of 36 recommendations to both national and EU authorities.

From the myriad of detail, what is most impressive is the complexity and diversity of the free legal assistance and representation procedures in the countries surveyed. Leaving aside the complexity of asylum procedures themselves, the mechanisms for accessing free legal advice also require expert assistance for asylum seekers. The variety of forms, the information required and the terms under which certain types of information (such as regarding bank accounts which asylum seekers generally will not have) can be dispensed with, reveal the full spectrum of administrative imagination in Europe.

The European Court of Human Rights and free legal assistance for asylum seekers

The European Court of Human Rights (ECtHR) is charged with the correct application of the European Convention on Human Rights (ECHR). All 47 countries in the Council of Europe⁴² are parties to the ECHR and required to accept the jurisdiction of the ECtHR. Two provisions of the ECHR relate to procedures (Article 6 which relates to civil and criminal procedures) and Article 13 which requires an effective remedy for everyone whose rights or freedoms as set out in the ECHR are violated.⁴³ The ECtHR has so far resisted arguments that immigration and asylum matters should be covered by the procedural rights contained in Article 6. This position is strengthened by the existence of a separate Protocol (Number 7) which includes procedural rights regarding the expulsion of aliens. Asylum procedures must, however, fulfil the procedural requirements of Article 13 in so far as an ECHR right, most commonly but not exclusively the right to protection from torture, inhuman or degrading treatment or punishment (Article 3 ECHR) is at issue.

On the issue of access to free legal aid, the ECtHR has a constant jurisprudence under Article 6 regarding the provision of legal aid where this is necessary for effective access to a court either because of the mandatory provisions of court proceedings or the complexity of the proceedings.⁴⁴ In a case against Turkey the ECtHR found that there had been a violation of Article 13 in respect of asylum procedures taking into account, though not exclusively on the basis of, the state's failure to provide access to legal assistance to the applicant.⁴⁵ In a 2010 decision against Greece on the detention of an asylum seeker, the lack of access to free legal

⁴² Which includes all 27 EU Member States.

⁴³ "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

⁴⁴ *Airey v Ireland* Application No 6289/73, 9 October 1979.

⁴⁵ *Abdolkhani and Karimnia v Turkey* Application number 30471/08, 22 September 2009.

advice and assistance made his access to a remedy purely theoretical and therefore a breach, in that case, of Article 5 ECHR.⁴⁶

As asylum procedures become more complex and detention of asylum seekers during the procedure more common, the ECtHR has engaged ever more directly with the question of access to free legal assistance and representation. The contention that a fair asylum procedure requires that the applicant have access to free legal assistance and representation is increasingly established as a principle of European human rights law. As the Turkey and Greece cases indicate, the ECtHR is increasingly concerned about access to free legal assistance for asylum seekers throughout the asylum procedure and specifically when they are detained. As These practices increase across Europe and procedures become more complex, the ECtHR's jurisprudence has begun to crystallize on the necessity of free legal assistance.

The CJEU and free legal assistance as a Charter Rights

In the first section of this presentation, I set out the EU legal framework for the provision of free legal assistance and representation. I insisted on the link between the right to asylum in Article 18 Charter and the right to an effective remedy in Article 47 Charter. I then examined the provisions of EU secondary legislation (the Asylum Procedures Directive) which specify the obligations on EU Member states to provide free legal assistance and/or representation to asylum seekers. Regarding the obligations, exceptions and limitations which states are permitted to apply, I examined a series of reports and studies on the application of the provisions on free legal assistance and/or representation from official and non-governmental bodies in the Member States, all of which reveal the state of play regarding access to free legal assistance and/or representation for asylum seekers.

In this final section I will turn to an issue which may arise before judges in EU jurisdictions: when does the lack of free legal assistance and/or representation constitute a breach of Article 47 Charter and the individual can no longer be considered to have had effective access to justice or to an effective remedy? The problem is one wider than the EU not least as the right to effective access to justice/access to an effective remedy is enshrined in numerous international human rights agreements. However, the specificity of the obligations in EU law coupled with the number of asylum appeals which come before judges in the EU and the documented shortcomings in many Member States regarding the provision of free legal

⁴⁶ A. A. *c Grèce* Application number 12186/08, 22 July 2010.

assistance and/or representation gives a particular urgency to the question. The well developed appeal structures of the Member States facilitate the arrival of this kind of legal question before national jurisdictions.

The CJEU together with the ECtHR will have the final word on what free legal assistance and/or representation is necessary for an asylum seeker to comply with Article 47 Charter. However, a CJEU decision of 22 December 2010 provides some guidance on the relationship of access to legal aid and Article 47 Charter albeit in a field outside asylum.⁴⁷ Directive 2003/8 was adopted by the EU to improve access to justice in cross border disputes and establishing minimum common rules relating to legal aid. It does not apply to legal aid for asylum procedures. The personal scope of the entitlement to legal aid under the Directive is limited to natural persons. In the case in question a company applied for legal aid in order to bring a case against the German state for liability under EU law. The company had no income or assets and was unable to make the necessary advance payment of court costs required under German national procedural rules. Nor could the company pay its lawyer to represent it (a compulsory requirement of the relevant court rules). The national court was uncertain whether the principle of effectiveness contained in Article 47 Charter required the waiving of the advance payment and the grant of legal aid to the company. It asked the CJEU for clarification.

The CJEU commenced with a short review of its jurisprudence from the 1970s onwards where it consistently holds that the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (para 28). This line of jurisprudence long predates the Asylum Procedures Directive (as well as the Directive under consideration in the specific case). It also predates the Charter. The CJEU confirmed that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 ECHR (para 29). It confirmed that following the entry into force of the Lisbon Treaty, the Charter has the same legal effect as the Treaties. It had regard to Article 47, third paragraph Charter and the right to legal aid where necessary to ensure effective access to justice and to the explanations relevant to the provision (see section 1). The CJEU noted that the Article is

⁴⁷ C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* 22 December 2010.

found in Title VI Charter which relates to justice rather than in Title IV relating to solidarity (para 40 and 41). According the CJEU found that the right to legal aid is not conceived primarily as social assistance in which case the provision should have been found in Title IV but to procedural principles in Title VI. This means that the assessment of the need to grant legal aid must be made on the basis of the right of the actual person whose rights and freedoms as guaranteed by EU law have been violated, rather than on the basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid (para 42). For the purposes of the asylum seeker, this means that the grant of legal aid must not be subject to arguments about state expenditure in the field of asylum even if public interest can be one criterion for assessing the need for the aid.

The CJEU reviewed in some depth the jurisprudence of the ECtHR on legal aid, confirming the importance of the interpretation of similar provisions in the ECHR to those in the Charter. It considered submissions regarding the dual function of the state refusing legal aid in that this was the same state which was the defendant in the proceedings. The CJEU stated that it does not preclude Member States from simultaneously exercising legislative, administrative and judicial functions provided that those functions are exercised in compliance with the principle of separation of powers which characterise, according to the Court the operation of the rule of law (para 58). The CJEU found that the principle of effective judicial protection as found in Article 47 Charter must be interpreted as meaning that anyone (in the case including legal persons) may rely on the principle and that the grant of legal aid pursuant to the principle may cover all the aspects of the case concerned (costs of the lawyer, court fees etc).

It is, however, for the national court to determined whether the conditions for granting legal aid constitute:

- A limitation on the right of access to the courts which undermines the very core of the right;
- Whether they pursue a legitimate aim and
- Whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which is sought (para 60).

The CJEU requires the national court when making that three fold assessment on whether the grant of legal aid is necessary to the respect the principle of effective judicial protection to take into consideration the following factors:

- The subject matter of the litigation;
- Whether the applicant has a reasonable prospect of success;
- The importance of what is at stake for the applicant in the proceedings;
- The complexity of the applicable law and procedure;
- The applicant's capacity to represent him or herself effectively (para 61).

In the assessment of the proportionality of the grant of legal aid, the national court may take into account whether the costs involved might represent an insurmountable obstacle to access to the courts.

Applying the reasoning of the CJEU in this case to the question of effective judicial protection for asylum seekers, there are four key aspects. First, Article 15 Asylum Procedures Directive is not the final word on access to free legal assistance and/or representation for asylum seekers. It is subject to and must be interpreted in accordance with the general principle of EU law of effective judicial protection. Secondly, the EU principle is enshrined not only in Article 47 Charter but flows from the constitutional traditions common to the Member States which are directly applicable to the case. Thirdly, the EU principle of effective judicial protection itself is not self standing but must be interpreted consistently with the jurisprudence of the ECtHR on both Articles 6 and 13 ECHR regarding access to legal aid. Finally, a common set of criteria are set out to help the national judge to make the assessment in any particular case. Of those criteria, any asylum seeker satisfies all but one of them without further question. Clearly the subject matter of any asylum claim may be one of life and death, thus of obvious importance for the individual. The complexity of the relevant law has been underlined again and again in the relevant reports about the CEAS. The applicant's capacity to represent him or herself where the applicant is an asylum seeker is usually very limited not least because of language issues. The final question which the judge may have to ask him or herself in the assessment is whether the asylum seeker has a reasonable prospect of success – the merits test incorporated into Article 15 Asylum Procedures Directive. As apparent from the Commission's report, few Member States consider a merits test appropriate to the decision to grant free legal assistance and/or representation to asylum seekers.

Among the questions for the national judge is whether the individual has had legal assistance in the preparation of the claim. If this has not been available and in light of the complexity of EU asylum law, the prospect of success for the individual may only become apparent once

legal aid has been granted and the individual's claim to international protection has been properly prepared and presented to the court.

Conclusions

The importance of free legal assistance and representation for asylum seekers to the successful and timely resolution of their claims for international protection cannot be stressed sufficiently. It is a core element in any complex asylum determination procedure. The earlier and the more comprehensive legal assistance and representation is made available to the asylum seeker, the easier the job for the administration and the judge. A well prepared and presented asylum claim is much less likely to be rejected. Where it is refused, the issues of contention between the parties will be clearer on appeal. The judge's job will be simplified as there will be nearer equality of arms among the parties.

Further, access to justice is a human right incorporated into international and European human rights and EU Charter rights. Access to justice can require the grant of free legal assistance and representation depending on the importance of the issues at stake for the individual according to both the ECtHR and the CJEU. The role of judges in ensuring that impecunious asylum seekers actually receive free legal assistance and representation as early as possible in the proceedings is not simply based on self interest. It is an obligation arising from both EU and ECHR. It is for the EU national judges to ensure this important human right is respected in accordance with the guidance which they have been given by their supranational courts.

Annex I
EU Asylum Measures

Adopted measures (UK opt in to all; Ireland opt in to all except 4).

1. Decision 2000/596/EC on European refugee fund (OJ 2000 L 252/12)
2. Regulation 2725/2000 on Eurodac (OJ 2000 L 316/1): applied from 15.1.03
3. Directive 2001/55 on temporary protection (OJ 2001 L 212/12)
 Regulation 407/2002 implementing Eurodac Regulation (OJ 2002 L 62/1)
4. Directive 2003/9 on reception conditions (OJ 2003 L 31/18): deadline Feb. 2005
5. Dublin II Regulation 343/2003 (OJ 2003 L 50/1): in force 1.9.03
 Commission Reg. 1560/2003 implementing Dublin II (OJ 2003 L 222/3)
6. Directive 2004/83 on refugee/subsidiary protection definition and content (OJ 2004 L 304/12): deadline 10 October 2006
7. Decision on second European Refugee Fund (OJ 2004 L 2004 L 252/12)
8. Directive 2005/85 on asylum procedures (OJ 2005 L 326/13)—deadline 1.12.2007
9. European Refugee Fund (OJ 2007 L 144/1)
10. Reg 439/2010 on European Asylum Support Office (OJ 2010 L 132/11), parallel amendment to Refugee Fund Decision (OJ 2010 L 129/1)
11. Directive on long-term resident status for refugees and persons with subsidiary protection: (OJ 2011 L ???)

Proposals

- proposed amendments to Dublin II, Eurodac and reception Directive (COM (2008) 815, 820 and 825, Dec. 2008) – under discussion; UK and Irish opt-in to Dublin II and Eurodac; EP first-reading vote, May 2009; discussed at JHA Council, 4 June 2009; discussion on Dublin II amendments restarted under Belgian Presidency; new version of Eurodac proposal (COM (2010) 555) proposed Oct. 2010; new version of proposal for reception directive: 1 June 2011

- proposed amendment of Refugee Fund, as regards EU resettlement programme: COM (2009) 456, 2 Sep. 2009; UK opt in; EP first-reading vote, May 2010

- proposed recast of qualification Directive - COM (2009) 551, Oct. 2009; UK opt out; Ireland position not yet known; EP and Council discussions underway; Council and EP adopted negotiation positions, Mar. 2011

- proposed recast of procedures Directive - COM (2009) 554, Oct. 2009; UK opt out; Ireland position not yet known; EP and Council discussions underway; new version of proposal: 1 June 2011

Annex 2: CJEU Decisions

Asylum

Decided references from national courts:

C-19/08 *Petrosian* (interpretation of Dublin II, 29 Jan. 2009)

Case C-465/07 *Elgafaji* (interpretation of Directive 2004/83 on qualification of refugees, 17 Feb. 2009)

Cases C-175/08 to C-179/08 *Abdulla and others* – cessation – judgment 2 March 2010

Case C-31/09 *Bolbol* – exclusion of Palestinians (Article 1.D, Geneva Convention on refugee status) – judgment 17 June 2010

Cases C-57/09 and C-101/09 *B and D* – exclusion and terrorism – judgment 9 Nov. 2010: interpretation of Directive 2004/83

Case C-431/10 *Commission v Ireland* - non-transposition of Directive 2005/85 – judgment 7 April 2011

Case C-69/10 *Samba Diouf*: interpretation of Directive 2005/85 on asylum procedures - judgment 28 July 2011.

Pending cases:

- Case C-411/10 *NS* - reference from Court of Appeal (England and Wales) concerning Dublin II Regulation

Case C-493/10 *M.E and others* - Irish reference on Dublin II Regulation

Case C-620/10 *Kastrati* - Swedish reference on Dublin II Regulation

Case C-4/11 *Puid* - German reference on Dublin II Regulation

Joined Cases C-71/11 *Y* and C-99/11 *Z* - German references on qualification directive.

C-277/11 *MM* – asylum – where refugee protection is refused, do the authorities have to give reasons so that the individual can address the issues in a subsidiary protection application?