

Providing Protection

Access to early legal advice for asylum seekers



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Preface

We are witnessing the biggest refugee crisis in 20 years and the biggest displacement of people since the Second World War. In the first six months of 2014, the southern states of the EU have received five times more people who have faced the dangers of crossing the Mediterranean than in the whole of 2013, many of them fleeing violence and repression in their countries of origin. Whilst many of these people would be described as refugees by governments and the media when they remain in countries closer to home, they can be viewed with suspicion and their stories treated with scepticism when they present themselves to claim asylum in the EU.

Part of the refugee experience can mean subjecting yourself to an asylum process with close investigation in a strange environment, telling your account when you do not have a clear understanding of what you are meant to disclose and whether it will be treated with respect and held in confidence.

“It is an alien and all too often a debilitating experience that can exacerbate the trauma of being a refugee”

Whilst the greatest impact is on those who are seeking refuge, the responsibility of those tasked with deciding claims for international protection can be made harder by the strictures of systems that require clarity where it is lacking. Suspicion can build up and lead to the process becoming more adversarial and hostile towards those seeking asylum.

Early legal advice is intended to assist the process by trying to ensure that the experience of claiming asylum and the task of the decision maker are not made harder by misunderstandings, mistrust and an inability or unwillingness to engage in what can be a very intrusive process. At its best, it enables the asylum seeker to participate in the system in a way that gives them trust and the decision maker confidence.

The intention in this research was to gather together the understanding of early legal advice in three different EU member states and the court decisions, statements and obligations which informed it an EU level. This was in order to ascertain what understandings of early legal advice existed and what level of commitment there was to provide quality legal advice at the beginning of the asylum process. The results are varied and perspectives differ even within the individual countries which were examined for the national reports. But the overriding view was that early legal advice can assist in ensuring that the right decisions are made at the earliest opportunity.

The EU is at a stage where most states are committed to bringing in some form of ‘frontloading’ by July 2015. This report is a contribution to the commitment that many are engaged in to not only comply with an EU directive but to ensure that those in the greatest need of protection receive it and are therefore able to begin the process of rebuilding their lives and making a contribution to their host countries as soon as possible.

Glossary

Applicants

People applying for either refugee status or subsidiary protection.

Asylum Procedures Directive

A component of the Common European Asylum System. It sets out procedures in the EU for determining applications for international protection. The original directive, which continues to apply until July 2015 (and will still apply after that date in the UK and the Republic of Ireland), was introduced in 2005. The full title of the recast directive is 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). It will come into force on 21 July 2015. The recast directive contains a reference to frontloading.

Asylum seeker

A person who has applied for either refugee status or subsidiary protection (or both) and is awaiting the outcome of their application or appeal against a negative decision.

CEAS

The Common European Asylum System (CEAS) is a series of legislative measures at an EU level which were introduced to bring in common and minimum standards to the consideration and determination of claims for international protection. The main directives are the Asylum Procedures Directive, the Qualification Directive and the Reception Conditions Directive. There is one regulation which is the Dublin III Regulation (previously the Dublin Convention and Dublin II Regulation).

Dublin Regulation

A component of the Common European Asylum System. Originally the Dublin Convention 1990, it establishes responsibility for determination of an application for international protection. The Convention was replaced by the Dublin II Regulation and, from 1 January 2014, this has now been replaced by the Dublin III Regulation. The full title is REGULATION No. 604/2013 of THE EUROPEAN PARLIAMENT AND OF THE EUROPEAN 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 a stateless person (recast).

Early Legal Advice

A form of frontloading (see below) which can also include the provision of legal advice before an application for international protection is made.

Frontloading

The provision of legal aid at an early stage in an application for international protection.

International Protection

The provision of support by a country other than a person's country of nationality or origin in circumstances where the person's own country cannot or will not provide protection. There are two such systems in existence in the EU. The first and main one is under the Refugee Convention and the second is under the Qualification Directive.

Legal Advice

Advice given by or under the supervision of a qualified lawyer. In the asylum field, it would include advice about the law, international, European and domestic, as well as the person's individual claim in relation to the law.

Legal Advisor

A generic term for the person who provides legal advice. The advisor may not be a qualified lawyer but they act under the supervision of a lawyer who is ultimately responsible for the advice given.

Legal Aid

Legal advice, assistance and representation paid for by the state in circumstances where the person in need of legal advice cannot afford to pay for it themselves. It is usually but not always free. A person in receipt of legal aid may nevertheless be required to make a contribution towards the cost. The availability of legal aid may not extend to all areas of law affecting an individual.

Legal Information

Information about a process within a legal system. In the asylum field, it would include information about how to apply for asylum or subsidiary protection but not advice about the merits of an application or assistance with submission of an application.

Legal Representatives

A person acting in an official capacity on behalf of another person in relation to a legal matter and responsible for assisting with the legal issues in their case. They are usually but not necessarily a qualified lawyer but would be expected to act under the supervision of a qualified lawyer.

Qualification Directive

A component of the Common European Asylum System. It establishes common grounds to grant international protection and therefore refers to both refugee status and subsidiary protection. The original directive of 2004 was transposed into domestic law by 2006 and it continues to apply in the UK and the Republic of Ireland. It was recast and replaced in 2011 and the new directive is in force from 21 December 2013 in those countries to which it applies including Estonia. The full title is 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).

Qualified Lawyers

Professionals who have been accredited according to the national procedures laid down in a country and who have therefore passed examinations and completed training under the auspices of a professional body.

Recast Directive/Regulation

A recast directive is a directive or regulation which has been revised in the light of experience. The recast directive replaces the original directive (the latter only remains on force in relation to an EU member state which opted in to the original but not the recast directive).

Reception Conditions Directive

A component of the Common European Asylum System which establishes common standards for the living conditions of asylum seekers. The full title is the COUNCIL DIRECTIVE 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. It has now been replaced by the 2011 recast directive but the 2003 directive will continue to apply until 21 July 2015.

Refugee

A person outside their country of origin/nationality who has a well-founded fear of persecution for reasons of their race, religion, nationality, political opinion or membership of a particular social group. The definition is found in the Refugee Convention 1951 as amended.

Refugee Convention

The full title is the Refugee Convention Relating to the Status of Refugees. It was passed in 1951 and amended by a Protocol in 1967. It is the overriding document establishing the rights of refugees.

Subsidiary Protection

Protection given to people who are at risk of “serious harm” in their own countries but who do not meet the definition of a refugee. It is a status that derives from the Qualification Directive.

1. Introduction

1.1 Purpose of the project

Good quality early legal advice critically shapes people's experiences of claiming asylum. For those often highly traumatized and vulnerable people who obtain protection, it helps to minimize what can potentially be years of emotionally exhausting uncertainty. It can also discourage those who are not suitable candidates for protection from pushing ahead with a costly and exhausting process. In this way it benefits both those seeking asylum, but also the individuals or bodies tasked with the responsibility of deciding if a person is at risk of persecution under the Refugee Convention¹ or of serious harm as defined in the Qualification Directive². The European Union recast Procedures Directive is clear that 'frontloading' is beneficial.

The 'Early Legal Advice' research project was undertaken to examine the provision of legal advice to people seeking international protection in three EU Member States: Estonia, the Republic of Ireland and the United Kingdom. We hope that this report will be useful to those required to implement the Procedures Directive, as well as those who want to advocate for early legal advice. By examining what early legal advice means in very different EU member states, with variations in terms of numbers seeking asylum, the countries from which asylum seekers come and different administrative systems for the determination of asylum claims, this report will demonstrate that 'early legal advice' is not only beneficial but also adaptable to a wide range of contexts.

1.2 Project Partners and Funders

The project was overseen by the Irish Refugee Council which also had the responsibility for conducting the research in Ireland. The other two national partners were Asylum Aid in the UK and the Estonian Human Rights Centre. The research partner was the Centre on Migration, Policy and Society (COMPAS) at Oxford University.

The project was funded by the European Programme for Integration and Migration (EPIM) of the Network of European Foundations, under its 2012-2015 programme.

1.3 Methodology

We believe that a fair asylum system is to the benefit of both asylum seekers and host societies, and we are interested in encouraging collaboration between legal advisers, decision makers, civil society and asylum seekers, and to move away from current, often adversarial, models. This report therefore does not claim to be 'objective' but rather starts from the position that early legal advice is effective, fair and efficient, and that it has the possibility of being to the advantage of all parties in protection claims. The research was commissioned with a view to being used for the purpose of advocacy and was principally concerned with evidence gathering.

The three selected countries, Estonia, Ireland and the UK, are all states where there were legal support organisations with an active interest in ELA. They were selected to reflect differing experiences and understandings of early legal advice. All three countries have quite different experiences of dealing with asylum seekers and different ways of processing applications and dealing with people during the asylum process.

We began the project with a two day workshop on the asylum process and the legal context in each state. In these discussions we developed four arguments in favour of ELA that we wanted to explore with asylum seekers, refugees and other stakeholders:

- ELA means better decisions, resulting in a reduction in the volume of appeals and reduction in expenditure;
- ELA encourages trust in the system on the part of asylum seekers, meaning more engagement, and reduced likelihood of absconding;
- Late or no legal advice means poor decisions, creates problems for genuine claimants, increases complex appeals;
- ELA facilitates co-operation between different stakeholders, including NGOs, legal representatives and decision makers.

In this initial workshop we also considered arguments that might be used against ELA. We thought that these might include: set up costs; running costs; vexatious claims; acting as a 'pull factor'; and the possibilities of the promotion of poor quality advice. The outcomes of the workshop were used to design the interview schedules. Separate schedules were designed for asylum seekers and for stakeholders. In total, we interviewed 19 people, seven of whom were asylum seekers or refugees, three were from NGOs and nine were in some way involved or had an interest in the decision making process, for example as providers of legal aid or with oversight of decisions at the first level. All of the individuals were already known to the organisations at a national level through their own practice.

We originally intended interviews to be supplemented by analysis of case files. However, given that the researchers were all legal practitioners conducting this project alongside their own advice work, this was considered to not be necessary given their extensive knowledge of the area.

The evidence for this report was gathered between September 2012 and May 2013. Interviewees were accessed and interviewed by project partners all of whom worked in legal advice provision in the asylum sector. All interviewees were given information about the project and signed consent forms. Interviews in the UK and Ireland were taped and transcribed; those in Estonia were noted. In the UK, time constraints meant that it was not possible to interview asylum seekers, but stakeholder interviews have been supplemented by an analysis of the evaluation of the Early Legal Advice Project. As agreed with interviewees, they have been anonymised and any identifying information has been removed. Interviewees are identified by the country where they reside (I=Ireland, UK=UK, E=Estonia), whether they are an asylum seeker/refugee or other stakeholder (R=Asylum seeker/refugee, S=Stakeholder), and then a distinguishing numerical descriptor. Thus IS3 means number 3 of the stakeholders interviewed in Ireland.

1.4 Definitions

1.4.1. Refugee status and subsidiary protection

A person is a refugee if they have left their country and have a well-founded fear of persecution in their country of nationality or habitual residence and if that fear is because of their race, religion, nationality, political opinion or membership of a particular social group. In addition to refugee status, EU countries have a separate form of protection known as Subsidiary Protection which is given to those who do not qualify as refugees but are in need of protection from “serious harm”. Asylum seekers are people who have applied for refugee status, subsidiary protection or both but have not had a decision on their application or are challenging a negative decision through the courts.

1.4.2. Early Legal Advice

At the original project workshop, we discussed how to define Early Legal Advice (ELA). The differing country contexts meant we had to be flexible in our approach, so rather than instrumentalising a cross country definition, we set the following parameters:

‘Early’ means any stage in the process up to a first instance decision. It can include

- Referral into the asylum process
- The first submission of evidence to a first instance decision maker (e.g. including a statement of claim)
- Attendance at substantive asylum interviews
- Post-interview submissions (e.g. clarification on points of dispute following initial interviews or submitting further supporting evidence such as medico-legal reports)

‘Legal Advice’ is either given by or overseen by a qualified lawyer. However, whatever the training of the person responsible for the legal advice, we understand that this advice would be competent. Therefore, the mere fact that someone is a qualified lawyer is not sufficient. A certain level of expertise in international protection law is required³. All interviewees and interviewers used these parameters to analyse early legal advice.

In the course of the project it became evident that the distinction between advice and information was crucial, although stakeholders sometimes use the two interchangeably. We distinguish between information, which is an explanation of the requirements of the asylum process and could also include referral to other organisations, and advice which equips the person seeking asylum with the knowledge and support that they need to put forward and substantiate their claim to be a person in need of international protection. Explaining to an asylum seeker that they will, for example, be interviewed and their fingerprints taken is important information but does not constitute advice.

Distinguishing between information provision and legal advice is crucial precisely because, in practice, information can slip into advice and advice on the process of claiming asylum can quickly turn into advice on the substance of a claim. If the advisor is not qualified or experienced and does

not understand the full implications of the information that they are providing, it can negatively impact on the asylum seeker’s claim. It is important that a person providing information understands the consequences of the information/opinion they are providing. This can influence how cases are progressed and ultimately determined. Advice on the process of claiming asylum given by very well-meaning people can have an adverse impact on asylum claims if they do not fully understand the implications of their counsel.

1.4.3 Legal Aid

It is necessary to distinguish between legal advice/assistance and legal aid/free legal assistance. Asylum seekers who have access to financial resources may obtain legal advice from a range of organisations, charities and individuals, both publicly and privately funded. The regulation of these legal advisers will vary between states and depend also on the type of adviser they are. Those asylum seekers who do not have access to resources (the majority) require free legal assistance/legal aid. This is funded by the state either using their own resources or using funds made available by the European Commission. For the purposes of clarity and to distinguish between assistance with a claim and assistance with the cost of a claim we use the term ‘legal aid’ which is a term usually used in the UK and Ireland rather than ‘free legal assistance’. However we are not restricting its meaning to the UK/Irish arrangements, but use the term to refer to the full range of arrangements used by states to pay for asylum seekers’ legal advice when the asylum seekers cannot afford to pay for it themselves.

1.5 Structure of the Report

Section 2 of this report addresses the context for the research. In particular we look at the issue of procedural justice and the concepts of fairness and compliance with the law, drawing on research in other fields. We then examine the Common European Asylum System, its contents and purpose which is the framework for this project. That section also examines the separate but related issue of legal aid and, finally, the particular issues surrounding the detention of asylum seekers.

Sections 3, 4 and 5 then go into detail about the three jurisdictions of the UK, the Republic of Ireland and Estonia. Each one sets out the background to the asylum systems, details the procedures which exist in each jurisdiction and addresses the specifics of legal and early legal advice as they are understood or have been experienced in each region. Finally, each national section draws upon the interviews conducted for this research and the issues that they raised⁴.

Section 6 set out the conclusions arising from the research at a national level, drawing upon the information and evidence available at a wider EU level as set out in Appendix One which also informed the research.

Finally section 7 sets out the recommendations arising from the research.

2. Understanding the Context of Early Legal Advice

In this section we first discuss the question of early legal advice and understandings of procedural justice, drawing on a broader literature on fairness and compliance with the law. We then move to outline the policy and practice context in terms of the Common European Asylum System, Legal Aid, and questions of detention.

2.1 Procedural Justice and early legal advice

This project assumes the need to work towards a common goal of compliance with an effective asylum policy, where this effectiveness is judged in terms of the fairness of the final decision and the smoothness of the process in arriving at that decision. Thus at the same time that asylum seekers have a responsibility to comply, decision makers have a responsibility to be fair and responsive. Early legal advice, this report argues, is crucial to both these sets of responsibilities: properly dispensed it means better decisions, reduces adversarial tensions, and encourages trust and compliance on the part of asylum seekers. It can also help increase public confidence in the asylum system more generally by making it ‘fit for purpose’.

Before considering the specificities of this with reference to compliance with asylum law and procedures, it is worth remembering that there is a considerable body of regulatory research examining what motivates compliance with the law, and how regulators can encourage this. While little has been written about this as applied to immigration and asylum (however, see Braithwaite, 2010⁵), it is worth reminding ourselves of some of the principles of this work. There are particular issues that arise in the field of migration but the question of how to encourage voluntary compliance with the law has broad ramifications. Criminologists and legal theorists are generally sceptical of the extent to which compliance can be elicited through the implementation of harsh penalties (the deterrence view) or even through appeals to self-interest, preferring instead to emphasise the role of procedural justice. Justice must not only be done, but it must be seen to be done.

“Research into the effects of procedural justice has consistently found that people and organizations are much more likely to obey the law and accept decisions made by authorities when they feel that the decision-making procedures are fair, respectful and impartial” (Murphy et al. 2009⁶: 2)

Asylum seekers who cannot engage with the process of their claim will not feel that it is fair (“when we don’t know something we can’t trust it easily” as one asylum seeker in Ireland put it). Given their difficult situations, lack of knowledge of the law and of the country where they are claiming asylum, and often limited language knowledge, asylum seekers need legal advice to enable such engagement. Furthermore, Braithwaite (2010) argues that the three elements that are necessary to facilitate compliance are a) ensuring asylum seekers know and understand what is required; b) ensuring they have the capacity and resources to comply; c) ensuring that they are willing (if not committed) to comply. If the system does not elicit these elements, and if it is felt that asylum seekers are not treated with procedural justice, this undermines co-operation with the

authorities, not only on the part of asylum seekers, but on the part of their communities and supporters.

Knowing and understanding what is required in order to comply with the system is particularly challenging for asylum seekers. In addition to not knowing the law, they may often not speak the language of their country of reception, be unfamiliar with its culture and bureaucracy, have extremely limited resources, and a fear of return. Thus Braithwaite’s first condition, knowing and understanding requirements, is a critical hurdle, and one that requires early legal advice: people must learn how to comply, particularly when the law is complicated. ‘Complexity creates conditions that are not conducive to generating compliance’ (Braithwaite, 2010: 41). Early legal advice is also an important element in generating a sense of procedural justice. It is not only about ensuring an asylum seeker understands and engages with the process, but also that all parties can work together with the goal of their fair treatment.

“Interpersonal relationships and fair treatment by a regulator are more important in nurturing voluntary compliance and deference to rules than a relationship that relies on an instrumental tit-for-tat strategy” (Murphy et al, 2009: 2).

This suggests that ELA should be seen in the context of a process that is respectful towards asylum seekers, and an intensely adversarial process may militate against deference to rules.

Procedural justice concerns the perceived fairness of the procedures involved in decision-making and the perceived treatment one receives from the decision-maker. According to Murphy et al’s (2009) study on procedural justice⁷, people’s compliance with the law is strongly linked to their views about justice and injustice. They argue that perceived procedural justice plays an important role in people’s decisions to comply with rules and regulations and nurtures long-term voluntary compliance with laws and decisions, even when the legitimacy of those laws and decisions is called into question.

Applying these arguments to asylum seekers suggests that early legal advice could not only prevent them from the stress of lengthy procedures, but also enable them to view the system as efficient and thereby increase the likelihood of compliance and decrease the possibility of absconding. If the legal system of a country is seen to reflect the values of justice, its moral standing is increased and therefore this facilitates greater compliance. In contrast, if the system is not seen to be just, and particularly if it does not give asylum seekers a proper opportunity to make their case, if it is complex and people find it difficult to represent themselves from an early stage, then the chances of non-compliance and dropping out of the system increase. It could also lead to the possibility that they will avail themselves of any means to challenge a decision they feel is flawed for lack of fairness. Conversely a review report by UNHCR on engagement with Assisted Voluntary Return (AVR) programmes in 2013⁸ suggested that frontloading support might also increase uptake of AVR by refused asylum seekers.

2.2 The Common European Asylum System (CEAS)

Asylum and international protection are considered extremely important for the European Union. Article 18 of the EU Charter of Fundamental Rights guarantees the right to asylum and a series of legislative measures have been adopted with the aim of defining the minimum standards to be applied by member states regarding the reception of asylum seekers, recognition criteria and procedures to be followed during the asylum examination. EU member states undertook to establish a Common European Asylum System (CEAS) by 2012 with the goal of achieving minimum and common standards of protection, fairness, effectiveness and a system that is resilient when in the face of abuse.

Between 1999 and 2005 the first phase of the establishment of the CEAS saw a range of legislative measures adopted to establish common minimum standards⁹. These measures included

- The Reception Conditions Directive
- The Qualifications Directive
- The Asylum Procedures Directive
- The Dublin Regulation

The second phase initiated a public consultation, and, together with an evaluation of existing instruments, this formed the basis for the 2008 European Commission Policy Plan on Asylum.

This plan has three pillars:

- Bringing more harmonisation to standards of protection by further aligning Member states' asylum legislation;
- Effective and well-supported practical cooperation;
- Increased solidarity and sense of responsibility among EU States and between the EU and non-EU countries.

This approach was confirmed by the Pact on Immigration and Asylum of 2008 and the Stockholm Programme of 2009.

The Dublin III Regulation¹⁰ came in to effect on the 1st January 2014. Considering the possible negative impact on a person's fundamental rights¹¹ that the Regulation can have, good quality early legal advice has always been necessary for a person who is subject to the Regulation. That need remains the same under the Dublin III Regulation but the regulation arguably greater scope for a lawyer to have impact considering that the regulation requires that a person be given a personal interview, it expands the scope of an appeal against a decision to transfer someone under the regulation and makes the appeal suspensive¹².

For the purposes of this report, the key directive is Directive 2005/85, commonly known as the Asylum Procedures Directive. This was adopted by the EU to reduce differences between national asylum systems, while still enabling states to preserve their own procedures. The Directive sets out minimum standards for asylum procedures and contains the main provisions on legal assistance and representation. It had to be transposed into national law by December 2007, with the exception of the legal assistance provision which

was given a further year. The Commission's 2010 evaluation report¹³ of the directive found that legal assistance was one of the areas where differences in asylum legislation and practice persisted. Although the right to consult a legal adviser or counsellor is formally recognized across the EU, member states are divided as regards the provision of free legal assistance. Estonia sticks to the Directive's wording, hence making it available only at the appeal stage, but the UK and Ireland are part of a group of countries who grant legal aid or free legal advice in first instance procedures. However, a lack of sufficient resources is a formal precondition of legal aid in most member states, and in the three member states that are the subject of this report there is a merits test before granting legal aid.

The European Commission's proposal for the recast asylum procedures Directive stated that "Frontloading means putting the adequate resources into the quality of decision making at first instance to make procedures fairer and more efficient. A standard asylum procedure of no more than six months remains a major objective of the proposal." Article 19 of the recast Asylum Procedures Directive states that in first instance procedures Member States shall ensure that, on request, applicants are provided with legal and procedural information free of charge including, at least, information on the procedure¹⁴ in the light of the applicant's particular circumstances.

“In the event of a negative decision on an application at first instance, Member States shall also, on request, provide applicants with information in order to clarify the reasons for such decision and explain how it can be challenged”

It is a requirement that those countries which are bound by the directive must transpose it into their national legal framework by 21 July 2015 and it will replace the original directive from that date.

Both the UK and Ireland secured what are commonly referred to as 'opt-outs' from EU measures introduced in the field of immigration and asylum as they wished to maintain national control of their borders. This followed the move to secure agreement on such matters from the Treaty of Amsterdam 1999 onwards. A protocol to Title IV of the Treaty gave both the UK and Ireland the right to opt-in to any of the measures if they considered it to be appropriate. Both countries chose to opt-in to the original Asylum Procedures Directive which, for example, deals with access to legal advice but only at the appeal stage¹⁵. Neither have opted-in to the recast Procedures Directive which includes a provision for the 'frontloading' of legal advice. Therefore the only country in this study which is signed up to all of the measures in the Common European Asylum System is Estonia. Regardless of the 'opt-out' by the UK and Ireland, both countries are of course free to adopt any measures they consider to be appropriate¹⁶.

2.3. Early Legal Advice and Legal Aid

Legal aid has received considerably more attention than early legal advice. In her article “The Asylum Seeker’s Right to Free Legal Assistance and/or Representation in EU law”, Elspeth Guild analyses the provisions of legal aid (which she terms “free legal assistance”) to asylum seekers within the context of the CEAS, and in particular within the context of the Asylum Procedures Directive¹⁷. Legal aid is highly relevant to ELA because legal assistance is “necessary to give full effect to the right to asylum” (Guild 2011: 10) and in many cases asylum seekers cannot afford to pay. Lack of legal aid at a pre-appeal stage restricts access to ELA, and equally the lack of ELA makes the provision of legal assistance more costly, making it more difficult to argue that it should be free. Moreover, the application for legal aid may in itself require legal advice as the forms are long and complex. Legal advice to obtain legal aid is likely to be even more necessary in the case of a means or merits tests in order to ensure that asylum seekers are not denied legal aid for which they are in fact legally eligible.

Guild notes that there are five main stages where legal assistance is of relevance:

- In the preparation and submission of the asylum claim;
- In the event of rejection of the claim, the preparation and submission of an appeal;
- 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 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.

Guild’s discussion of the 2005 Directive focusses on Article 15. Article 15(1) stipulates that states must permit the provision of legal advice to asylum seekers, but it is explicitly stated that this can be ‘at their (i.e. asylum seekers’) own cost’. Legal aid only has to be given to appeal a negative decision (15(2)). Moreover this right to legal aid is not absolute. It may be restricted to certain types of appeal procedures, and limited to those who lack sufficient resources and/or who pass a merits test. Member states can also designate the legal advisers who may take on this role. These restrictions together militate against early legal advice firstly and most obviously because free legal advice is only available for the appeal stage. Twelve member states (including Estonia) only make assistance available at this stage. This means claimants in those states who cannot afford it are not able to access legal advice when they first submit their claim. In practice asylum seekers generally only look for legal representation after their claim has been refused¹⁸. Secondly, means and merits testing may take time, effectively either delaying the case or delaying access to advice. Thirdly it may be difficult in practice for asylum seekers to access legal advisers who are qualified and willing to provide free legal aid. Thus both the practicalities and the formal procedures for accessing legal assistance can prove serious barriers to obtaining it, and this is particularly problematic when combined with requirements to submit applications or appeals within a certain time frame.

In 2010 the European Union Fundamental Rights Agency (FRA)¹⁹ published a report on asylum procedures as part of a project to assist policy makers in rendering EU asylum legislation more effective²⁰. Its findings suggested that there is a lack of systematic procedures for asylum applicants seeking legal aid. Many of them are not informed clearly about provisions and places to look for legal aid. The FRA report additionally notes that often asylum seekers find it difficult to access legal advisers within strict application time constraints, and it is often particularly difficult when they are housed in rural or remote areas. These findings were supported by a further report produced by the European Council on Refugees & Exiles (ECRE), a pan-European Alliance of refugee-assisting non-governmental organisations. In contrast to the FRA report which examined the asylum system from the applicant’s perspective, the 2010 ECRE report²¹ focusses more on the perspective of NGOs and other stakeholders concerned to support asylum seekers. Nonetheless, both have similar conclusions about how the complexity of the system results in the erosion of the right to “effective judicial protection.” ECRE is especially concerned about the stage at which legal aid is provided.

2.4 Early Legal Advice and Detention

Early legal advice is particularly relevant in cases where asylum seekers are detained. Several of the recommendations in the ECRE report suggest the importance of early legal advice for those who are detained. These include:

1. All detained asylum seekers should automatically be granted a legal aid representative both for the purposes of their asylum application and review of their detention. Such a measure requires the facilitation of early legal advice.
2. Upon arrival, detention centre officials should provide asylum seekers with an information leaflet (translated into relevant languages) on their rights including the right to legal aid. Such a leaflet should also contain a contact list for lawyers and/or legal advisers, thereby giving asylum seekers the possibility of seeking advice at an early stage.
3. States should facilitate ‘legal aid clinics’ on a regular basis within detention centres. The purpose of such clinics would be to provide general legal assistance to all detainees. If further legal representation is required on an individual basis, legal aid providers could then be instructed to represent individual asylum seekers.

One could argue that those who are detained at an early stage in their claim, especially those who are detained on arrival, are particularly accessible for the purposes of giving early legal advice as they are identifiable and the site should be easy for legal advisers to visit. However, in practice the constraints imposed by detention centres mean that provision of adequate legal advice, let alone early legal advice, is rarely achieved. Increased logistical challenges arising from limited access, difficulty in securing competent interpreters and the remote location of many immigration detention centres, not to mention the increased tension that detainees experience as a result of their detention, all make it particularly difficult to provide effective advice and representation to people in detention. Moreover the further damage to vulnerable people’s health and wellbeing that can be caused by detention significantly outweigh any potential benefits derived from early access to legal advice. Alice Edward’s report on ‘Alternatives to Detention Centres’²²

points out that Article 18 of the Asylum Procedures Directive requires Member States to ensure that there is the ‘possibility of speedy judicial review’ of the decision to detain. This suggests the importance of legal aid, not only to assist applicants’ asylum claim but also in challenging detention. However, given the multiple difficulties detainees face accessing legal advice in detention, the ‘possibility of speedy judicial review’ remains purely theoretical.

The experience of certain states provides evidence of how detention can make it more difficult to access effective legal assistance, despite the importance of ELA (especially in the case of fast track decisions). In Ireland the visit times and durations are limited which can be problematic for taking instructions from asylum seekers in detention. In the UK the practice of detaining asylum seekers is widespread, including routine routing into the fast track system and use of prisons for the purpose of immigration detention²³, and detainees have experienced acute difficulties accessing legal advice. With further restrictions to legal aid now being implemented this problem is getting worse.

“While those detained in prisons experience particular difficulties because there is no scheme to facilitate their access to legal aid”

In theory those detained in Immigration Removal Centres²⁴ are supposed to be able to access Legal Aid Agency funded advice surgeries or, if they are routed into the fast track system, a legal representative is appointed for them, meeting at least in part 2 out of the 3 recommendations from the ECRE report discussed above. However there is a growing body of evidence suggesting that the capacity of legal aid providers does not meet demand and that detainees are finding it increasingly difficult to access legal aid. There are also serious concerns over the quality of legal advice and representation provided. For example, fast-track cases are frequently dropped by legal representatives on the grounds that they assess poor prospects of success on appeal following an initial decision to refuse asylum. At this stage, with extremely tight timescales to appeal, it is virtually impossible for people to obtain second opinions or to access further legal representation even where merit has been identified. The organization, Bail for Immigration Detainees, provides regular surveys of legal representation across the UK detention estate²⁵. In their latest survey conducted in May-June 2013²⁶ they reported that 26% of respondents had never had a lawyer while detained and also a drastic fall in the number of detainees they spoke to who had a legal representative, down from 79% to 43% (a third of whom were paying privately) in a six month period.

2.5. Conclusion

A standard asylum procedure of no more than six months remains a major objective of EU frontloading proposals. The recast Asylum Procedures Directive makes a number of clarifications to enable an easier implementation of this concept taking into account the particularities of different Member States. It acknowledges that early access to support to help an applicant understand the procedure is a key aspect of frontloading, and clarifies what constitutes basic support to distinguish it from the free legal assistance available in appeals procedures. Member states are free to find the appropriate modalities to provide the support, including through non-governmental organisations, govern-

ment officials, or specialised services of the state. It simplifies the rules on the training that Member States have to provide to the personnel examining and taking decisions on applications. The provisions for applicants in need of special procedural guarantees are also simplified. The new rules are less prescriptive to give Member States more latitude and flexibility to take into account in the appropriate way the variety of potential specific situations of applicants. These amendments should make the implementation of this key provision more cost-effective and dispel misunderstandings which could lead to conflicts between these rules and the general administrative law of several Member states but, at the same time, the rules continue to provide for a high level of guarantees for these persons.

The Jesuit Refugee Service Europe Report (2011-12)²⁷ confirms the validity of this kind of approach. It recommends that ‘frontloading support’ or early legal advice works well if provided at the outset of a person’s asylum or immigration case with as little delay as possible. When non-citizens are informed of all conditions, procedures and opportunities, and offered holistic social and legal support, they can feel more predisposed to trust the authorities. There have been attempts to explore this possibility, particularly in the UK. As will be discussed in the country reports, the Solihull Pilot (2007-08) and ELAP (2010 -12) were both projects developed to test the hypothesis that “frontloading” the asylum process leads to higher quality, initial decision making. Frontloading gives asylum applicants access to legal representation at the start of the process and enables the legal representative to engage actively with the decision maker. The poor quality of decisions undertaken in the asylum procedures of the UK had led to the UNHCR, several NGOs, the British Parliament and Judiciary to express concerns about the inefficiency of the system.

All of these provisions as discussed with reference to ‘frontloading’ point to the relevance of ELA. The emphasis on quality decisions deliberated over a reasonable time span indicates the importance of Early Legal Advice at the initial stages of the application. Asylum seekers are often subject to multiple formal and informal limitations. Of course each person’s history and circumstance is different, and member states treat asylum seekers in disparate ways: asylum seekers may be detained or have to reside in reception centres for months or even years; they may not be able to work or have severe restrictions placed on their right to work; they may not be entitled to state benefits; they may experience racism and racist and misogynistic violence. Their movements within the host state may be heavily controlled, they may be forcibly dispersed and required to live in areas where they are isolated where the local population may be hostile to them. They may not speak the language of the place where they are staying, they have often endured dangerous and traumatic experiences (including torture) even before coming to or on their way to Europe, and they may be separated from those that they love. Thus while this research is concerned with the legal context, the more general factors that shape asylum seekers’ experiences of the system should not be overlooked as these have an impact on their ability to engage with a decision making process.

Having considered the general research context, we now turn to the findings within the three states that are the focus of our interest. In each case study we lay out the asylum procedure and other features that will enable readers to understand the particularities of each state, before proceeding to our research findings.

3. National Report: the UK

3.1 Background

The United Kingdom has long been a country of immigration, in particular from the Republic of Ireland and from the former colonies and territories of the British Empire such as India, Bangladesh, Pakistan, some islands of the Caribbean, South Africa, Kenya, Nigeria and Hong Kong. In the early 2000s, 4.9 million people (8.3 per cent of the population) were born abroad. In recent years there has been a shift in the countries of origin of new migrants and there has been a marked increase in the proportion of entrants from Central and Eastern Europe.

The number of people seeking asylum in the UK peaked in the early 2000s with 84,130 applications (excluding dependants) in 2003. It has since dropped significantly. In 2010, 17,990 people applied for asylum in the UK. Countries of origin have varied over the years, and recently have included Afghanistan, Eritrea, Libya, Nigeria, China, Sudan and Zimbabwe. In 2011 most asylum seekers in the UK came from Iran, Pakistan and Sri Lanka, countries that have either recently experienced conflict or have well-documented human rights abuses (UNHCR, 2009). In the second quarter of 2011, 4,253 initial decisions were made on asylum claims and 70 per cent were refused. Twenty seven per cent of asylum appeals were accepted in this same time period, “indicating that in these cases the individuals in question were wrongly refused protection when their asylum claims were initially determined.”²⁸ This not only suggests poor quality decision-making, but also considerable state expenditure.

3.2 Asylum Procedure²⁹

An asylum seeker in the UK is defined as a person who has lodged a claim for protection under either the 1951 Refugee Convention or where there is a risk that they will face torture or inhuman or degrading treatment or punishment contrary to Article 3 of the European Convention on Human Rights. Consideration is automatically given to both the refugee claim and the claim to “serious harm” as defined in the Qualification Directive³⁰.

A preliminary interview known as a ‘screening’ interview initiates the first instance proceedings. UK Visas and Immigration³¹ (UKVI) defines a “screening interview” as the interview conducted before allocating a “case-worker”³² to an applicant. The purpose of screening is to record personal details, establish particular needs, detail how the person arrived in the UK and briefly explain their reason for claiming asylum. The screening interview has consequences for decisions relating to accommodation and support including whether to detain under the fast track procedure. It may also be used to check the consistency of any information provided during the substantive interview. The applicant is expected to produce their passport or the document on which they travelled and other identification papers and give biometric physical details. Dependents should accompany the relative applying and they may be subject to separate interviews. The screening interview is taken into account when a first decision is reached and therefore should be considered as part of the first instance proceedings.

Following the screening interview, applicants attend a substantive interview to discuss their asylum claim. Most applicants are not required to submit a written account of the reasons for requesting asylum but as a matter of good

practice some legal representatives do so. The UKVI will provide an interpreter if one is required but applicants who want to rely on documents which are not in English are required to submit a certified translation with the documents. Interviews are tape recorded if requested unless a legal representative is present (which is rare). After the screening interview, an applicant can be subjected to detention. There are 11 immigration removal centres (IRCs) across the UK. In 2012 a total of 28,909 people entered IRCs and short term holding centres (i.e. this number does not include those held under Immigration Act powers in prisons).³³

Asylum applications are examined by civil servants at the Home Office³⁴. If refused, the aim is for all appeals to be heard within two months of the initial decision, although these timescales are much shorter for cases that have been ‘fast-tracked’ in removal centres (sometimes referred to as Detained Fast Track or DFT).

“A 2011 report by the Independent Chief Inspector of the UK Border Agency, John Vine, expressed some concerns both about the costs associated with DFT and relatedly about the expedited process that risked poorer quality of decision-making³⁵”

Not all asylum-seekers have a right of appeal, for example if they come from countries that are presumed by the Home Office to produce ‘clearly unfounded’ asylum claims, or if they have already claimed asylum in a ‘safe third country’. These applicants are usually only allowed to make an appeal after they have been removed from the UK. For those who have the right to appeal, the deadline for giving notice of appeal after a refusal decision is ten working days and two if detained under the fast-track system. Entitlement to publicly funded legal representation (legal aid) is only available if the appellant is deemed to have a 50 per cent or more chance of success. Legal representatives are tasked with assessing the merits of an appeal and the justification for granting funding for an appeal must be evidenced on the case file. Appeals are heard by an Immigration Judge at the First Tier Tribunal Immigration and Asylum Chamber (FTIAC). This judge is not employed by the Home Office. Asylum seekers are allowed to remain in the UK while they await the outcome.

The appeal decision usually arrives within two weeks and if it is rejected it is only possible to make a further appeal on a point of law. Legal advice is necessary to decide whether there are grounds for a further appeal. The timescale for making an application for leave to appeal is very short (usually five working days)³⁶, and funding for submitting an appeal is only granted retrospectively if the application is successful (i.e. this work is done at risk of no funding). The process is complex and lengthy and dealt with by different administrative bodies depending on the nature of the appeal. The Institute for Race Relations has noted the harmful effects of complex appeal procedures, and the fact that because asylum seekers are only entitled to the most limited support (known as ‘section 4’ support) when

applying for or progressing Judicial Review applications, they are often at risk of destitution due to delays in court decisions, which can result in them absconding. Poor decision making also carries with it similar risks, as people continue to maintain that they have a fear of persecution and drop out of the system because of their fears of return. Since asylum seekers are not legally permitted to work in the UK, it also exposes them to multiple forms of exploitation.

3.3 Legal Aid

All practitioners who offer legal advice in the field of immigration and asylum and who are not regulated by professional bodies, whether or not they receive payment for it, must be registered with the Office of the Immigration Services Commissioner (OISC). The OISC is an independent, non-departmental public body set up under the Immigration and Asylum Act 1999. It has regulatory powers and can prosecute for the illegal advertising and provision of unregulated immigration advice, including asylum. In addition, legal advisers who wish to receive public funding in the form of legal aid need to be accredited through the Immigration and Asylum Accreditation Scheme administered by Central Law Training on behalf of the Law Society. Their firm or organisation must also hold a contract with the Legal Aid Agency to give legal advice to asylum seekers (see below). Legal advisers can assist in deciding whether an asylum claim or another form of application is appropriate to their circumstance although, in practice, limitations on legal aid may limit the opportunity for this initial advice and it can be particularly difficult to access initial legal advice or representation when a person claims asylum immediately on arrival at the port. The applicant may also get legal advice to help prepare their application including a statement of claim (although this is no longer a requirement and is not specifically remunerated under legal aid so rarely undertaken by legal reps) and to gather evidence in support of their application. This support, including sourcing country of origin information and commissioning expert reports for submission to the decision maker, is considered to be best practice because it helps both the legal adviser and the decision maker make an informed assessment of the need for international protection.

In theory, legal aid is available to all asylum applicants who meet the financial eligibility criteria. There are different rates of legal aid payments for different areas of law, and rates for providing legal representation to asylum seekers is one of the more complex areas of legal aid funding. This is because there are different rates of payment depending on when the application for asylum was first made and different types of cases can attract different types of payments. For example, while the majority of cases are now paid for on a fixed fee basis, representation for separated children in relation to their asylum claims is paid at hourly rates³⁷. As long as a client's claim for asylum has been assessed by their legal representative as having an above 50% chance of success and this is clearly evidenced on the file, then in theory legal aid is available at all stages of the legal process (making applications for leave to appeal to the Upper Tribunal, is an exception, and in these cases funding is only available once the application is granted leave to appeal). However, eligibility and funding rules become more restrictive when cases progress to the higher courts such as the High Court and the Court of Appeal

3.4 Legal Aid Sentencing and Punishment of Offenders Act (LASPO)

Following the implementation of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) in April 2013, England and Wales have seen restrictions to legal aid imposed across the board. This has resulted in immigration work being removed from the scope of legal aid almost completely³⁸. There have also been significant further restrictions placed on undertaking judicial reviews on immigration matters. These include removal of funding for judicial review application unless the High Court grants permission to proceed (with some exceptions³⁹), and the removal of borderline cases as part of the merits assessment. Providers will now not know at the outset whether they will be paid for bringing a case. LASPO has also introduced a much more stringent means test for both contract and certificated work which acts to further restrict access to legal aid.

Legal aid can only be provided by suppliers who are contracted to the Legal Aid Agency (LAA). The LAA was previously a non-departmental public body sponsored by the Ministry of Justice but became an Executive Agency of the Ministry of Justice on 1 April 2013⁴⁰. It commissions and procures legal aid services from providers (private practice and not-for-profit organisations that employ solicitors and/or barristers) that supply legal services. Legal advisers are able to undertake all aspects of legal aid in initial applications and appeals to FTTIAC and the Upper Tribunal if they are suitably accredited and meet regulatory requirements. Advocacy in the High Court, Court of Appeal and the Supreme Court can only be undertaken by barristers or solicitors with higher rights of audience. The cost of interpretation for discussions between the legal adviser and the client and costs related to experts may be covered by legal aid.

While in theory, legal aid is supposed to fund sufficient provision of time and contact with applicants to guarantee a minimum level of quality assured representation, in reality the fixed fee rarely covers the full extent of the work that needs to be carried out. Due to the increased time constraints and added difficulties in accessing appropriate legal advice, this is even more problematic for detained fast track cases, even though these are paid at hourly rates. Furthermore legal aid funding is only exceptionally provided to attend interviews, so while in theory legal advisers may attend all interviews and hearings, in practice this is limited by the non-availability of legal aid. Advisers may make comments at the end of the interview. However, with the exception of the Early Legal Advice Project (see below), legal advisers are not allowed to participate in the interview for example by asking additional questions that will enable their clients to clarify statements.

If an asylum seeker is detained, they should have access to legal aid surgeries and the on-site appointments for legal advice that are usually held twice weekly at every immigration removal centre but not at prisons where some immigration detainees are also held. There is also a fast track duty rota for provision of advice and representation for asylum applicants whose claims are being examined under the detained fast track procedure. Legal advisers who take part in these schemes need a special contract from the Legal Aid Agency.

3.5 ELA in the UK

Limitations on early legal advice in the UK include the following: Firstly, legal aid is not provided for attending the initial screening or substantive interviews (except in exceptional circumstances), which are arguably the most important aspects of the process where representation is most needed. Secondly, the legal aid framework can act as a disincentive to providing early legal advice. For example, where pre-screening advice and representation is provided to asylum seekers, if the person is detained or dispersed and less than five hours work have been undertaken on the case, then the provider must cease representation and can only claim a maximum of £100 for any work undertaken, including disbursements⁴¹. Dispersal makes providers reluctant to take cases on before the screening interview takes place, but also prevents them from taking on the case following decisions to disperse, due to geographical restrictions imposed by the legal aid contract that restricts work to certain areas of the UK. This makes it more difficult for asylum seekers to access advice *pe se*, not to mention early legal advice. There have been two projects designed to explore the potential for ELA within the UK: the Solihull Pilot and the Early Legal Advice Project.⁴²

3.5.1 The Solihull Pilot (2007-2008)⁴³

The Solihull⁴⁴ Pilot was developed to test the hypothesis that ‘frontloading’ the asylum process (i.e. giving asylum applicants access to legal representation at the start of the process) leads to higher quality, initial decision making. The project had its origins in concerns about asylum delays, backlogs and successful appeals and in the move to the so-called ‘New Asylum Model’ (NAM)⁴⁵, under which management of cases was to be given to single UKBA ‘case owners’ and where greater emphasis was placed on the quality of initial decision making. Under NAM the role and importance of legal representation for asylum seekers was acknowledged, but in practice there was no structured integration of legal services, and the relationship between legal representatives and UKBA remained highly adversarial.

The Solihull Pilot provided for early access to competent legal representation⁴⁶, facilitated an interactive and flexible process before, during, and after the asylum interview with greater decision maker/legal representative liaison and NGO/UNHCR involvement in oversight and evaluation. It also allowed for flexible funding for legal work. The evaluation found that the case conclusion rate was significantly higher than the control group, with a higher initial grant rate and a lower allowed appeal rate. It was cost neutral (with some evidence of cost reductions) and there was significant qualitative evidence of cultural change. It seemed to offer evidence for the value of frontloading in terms of efficiency and savings and improved decision maker/legal representative relationships. However, the sample size (450) was small.

3.5.2 Early Legal Advice Project (ELAP) (2010-2012)

As a direct result of the positive findings from Solihull, ELAP extended the Solihull pilot across the whole Midlands and East of England regions with the aim of testing the impact of providing asylum seekers with access to free legal advice early in the process. The objectives were to increase the quality of decisions, to reduce the volume of appeals, to improve the efficiency of the asylum system (including working relationships and confidence in decision making)

and create savings across government. It was available to every asylum case routed to the Midlands and East region, between November 2010 and August 2012 providing they accepted publicly funded legal representation from Legal Service Commission⁴⁷ contract holders (i.e. it was not available to applicants who instructed a privately funded legal representative, or who did not have a legal representative). The design of the ELAP developed lessons learned from the Solihull Pilot. The applicant was referred to a legal representative within 5 days of lodging an application and prior to the substantive interview the legal representative would assist the applicant in the production of a witness statement. They were encouraged to provide all evidence at the earliest possible stage, and an appointment with a legal representative 14 days before their substantive asylum interview was intended to provide the basis for pre-interview engagement with the case owner. While the pre-interview meeting was supposed to take place at least 36 hours before the substantive interview, in over one third of cases it occurred immediately before or on the morning of the substantive interview⁴⁸. In theory the legal adviser was able to attend the substantive interview and to play an active role in it. The ELAP evaluation found that while the majority of asylum seekers found the presence of the legal representative at the interview to be helpful, and their presence improved the system’s credibility, approximately a quarter of legal representatives did not play an active role in the substantive interview⁴⁹. This was followed by a post interview discussion between the legal representative and the case owner. There were also user group meetings between legal reps and case owners to share good practice and improve working relationships.

The evaluation of the project was published in May 2013. It comprised 83 case reviews (including substantive interviews with ELAP and non-ELAP applicants), 1 to 1 interviews with 10 asylum applicants, 1 to 1 interviews with 5 immigration judges, one informal focus group with 9 immigration judges and 1 to 1 interviews with a range of stakeholders. A summary of the ELAP evaluation can be found in Appendix 2.

3.6 Stakeholder interviews

Stakeholder interviews undertaken for this report offered insights into the importance of early legal advice, and into some of the findings of the ELAP project evaluation. There were three common themes: the importance of the relation of ELA to asylum procedures more generally, the need to nuance understanding of efficiency, and the added value ELA can give to improving the personal and professional relations between the different actors (case owners, legal representatives and asylum seekers). Interestingly, one issue that came up in UK interviews but not elsewhere, was the question of whether ELA covers advice given about whether it is appropriate to submit an asylum claim in the first place (which could entail giving advice about making a different kind of immigration application – as a family member for instance). This is an important matter: asylum seekers become asylum seekers when they submit an application, the initial decision to submit the application is a critical element in the process but it is currently overlooked. Moreover, by restricting remuneration under legal aid for pre-screening advice, the legal aid framework acts as a disincentive for providing timely advice on the merits of applying for asylum, which could play an important role in filtering out unmeritorious claims pre application, not to mention the difficulty asylum seekers face accessing good quality legal advice at this stage generally. Unfortunately,

this included ELAP, where according to UKS4, the assumption was that the decision to apply for asylum was a matter of information rather than advice: “When ELAP was being developed there were discussions about pre-screening advice... we thought it [i.e. pre-screening advice] merely an information giving service” (UKS4).

3.6.1 ELA and asylum procedures

Interviewees were clear that early legal advice was a critical component of a high quality system. “Let’s say I could design the perfect system... would ELA be necessary? And my answer is yes” (UKS1). However, they all emphasised that ELA cannot, in itself, solve the profound challenges facing the UK’s asylum system let alone transform a poor system into a good one: ELA is “not a panacea in itself, but we would argue it is an essential characteristic of a fair, just, humane decision making process” (UKS3). Its benefits do, however, need to be seen within the constraints of the current system, and it was felt that it would be an important element of facilitating more sustainable decisions.

One of the key problems facing the UK asylum system was the poor quality of advice that applicants receive. This is compounded by the ‘culture of disbelief’ among decision makers (a phrase used by all stakeholder interviewees), but importantly, as one stakeholder put it, good decisions on the part of the case owners also require that applicants receive sound legal advice, know what evidence to submit and how to best present their case. “Poor legal representation will undermine any attempt to develop an early legal advice initiative as much as poor decision making will” (UKS3). Early legal advice is not the same as good legal advice, and certainly not the same as good legal representation. The quality of the legal advice given was not evaluated by ELAP which is unfortunate as the benefits of ELA need to be assessed in the light of good quality advice. While ELAP advisers were paid at a higher rate than conventional legal aid, this does not mean that all firms provided the same high quality advice (though some undoubtedly did). For example, the Asylum Quality Audit Team (AQAT) found a conflict between frontloading evidence and the inclusion of unnecessary and irrelevant material suggesting that not all of the advisers were offering a high quality service, and that the parameters of the project were not always clear to the legal representatives (notably the UKBA and the LSC had dedicated project managers for ELAP, but the legal representatives did not).

Poor quality legal representation is already a problem within the UK system, and the recent cuts to legal aid as a result of LASPO are anticipated to make this even worse, as reliable firms are pushed out of business or away from complex asylum cases. They are no longer funded to provide advice on immigration aspects of mixed immigration/asylum cases and cannot cross-subsidise their asylum work through immigration practice, which is now out of scope. The relation between ELA and the map of legal provision more generally was apparent in the demise of the Immigration Advisory Service, the largest legal aid provider in the ELAP region, which folded in the course of the project. Stakeholders interviewed anticipated that pressure on legal aid was likely to make early legal advice even more important in order to ensure that cases were correctly classified – e.g. not wrongly put in the detained fast track procedure for instance. So while interviewees generally cautioned against seeing ELA as a ‘quick fix’, they felt that the need for it was becoming more rather than less

urgent, particularly in the light of cuts. UKS2 emphasised the importance of the provision of legal advice early in the asylum process: “you should not make those sort of (LASPO) changes to legal aid until you are fully satisfied that the initial decision making system is the best that can be devised” (UKS2). Legal aid cuts make it imperative that initial decision making is further improved, but also require the structure of the legal funding system to be re-examined. “The existing legal aid pot could be changed to incentivise better provider behaviour in the process that would be of benefit to the decision making system” (UKS3). UKS1 also believed that, with diminishing legal aid, strategic targeting including advice at an early stage was necessary and agreed with UKS3 that one response might be for legal aid to impose a requirement that providers produce witness statements prior to the first interview. This was a practice that the ELAP evaluation found to be very positive: “Witness statements added credibility to the asylum system, ensuring that a minimum level of information/evidence was available at the earliest opportunity for all cases” (ELAP evaluation:7). It is particularly worth noting that the ELAP evaluation found that UKBA case owners found witness statements most useful in the more complex cases. The Asylum Quality Audit Team (AQAT) also found that witness statements were a highly beneficial aspect of the process, though cautioning that they should not be over relied on.

3.6.2 Efficiency

All interviewees also commented on the importance of a temporally sensitive approach to the asylum process. The ELAP project allowed for an extended time frame, with the substantive interview scheduled on days 23-25 after claiming asylum, rather than days 7-10 in the usual national process, although anecdotal evidence suggests that due to a lack of resources following UKVI cutbacks, this time frame is no longer being adhered to and a growing number of applicants are waiting over six months for their substantive interview following initial screening.

The performance indicator of 20% of ELAP cases to be decided within 30 days was set. The evaluation found that early legal advice did not expedite the timescales for decision. It is clear from the stakeholder interviews that there is a limit to the extent to which ELA can influence the overall timeframe of a decision and indeed it may mean that the decision takes longer (as the evaluation in fact found).

“It only lengthens the process if the process is arbitrarily set at a certain length in the first place that’s shorter than the time needed, which is certainly the UK experience. But a reasonable asylum process, even one that strives to be efficient and relatively swift in reaching a decision, needs to allow sufficient time for an applicant to build confidence in the legal rep which ...leads to disclosure of evidence which is critical for the decision maker. So any efficient system would need a reasonable timescale.” (UKS3)

This relates to the point above, that ELA needs to be understood within the context of the specifics of an asylum system. While early legal advice might seem in keeping with the emphasis in the UK system on efficient and speedy procedures, in practice it can have the consequence of slowing down unduly speedy initial times. Stakeholders were clear that this should not be confused with inefficiency,

and that the current system has a problem of “more haste less speed and the insistence on time element can be inimical to the interests of getting a good decision” (UKS2). It is understandable that a more considered decision may take more time, particularly in a context of understaffing.

Interviewees emphasised the importance of understanding the relationship between legal representative and asylum seeker as one that needs to be developed and that often requires a considerable degree of trust. Applicants may have been severely traumatised, and this can have a significant impact on the time it takes to disclose important evidence particularly for torture survivors and victims of gender based violence. There are also practical problems associated with evidence gathering, and one interviewee mentioned that medico-legal reports can take much longer to arrange than is allowed for in the timeframe between a legal representative first meeting a client and the substantive interview – even allowing for ELA. The ELAP evaluation also found that difficulties with interpreter availability were an important reason for cancellation of interviews. This does not detract from the benefit of ELA, but suggests its importance. However, it also suggests that if a truncated timescale is imposed for the substantive interview the benefits of ELA are not maximised – and ELAP found that in these circumstances problems did occur with front loading evidence (i.e. provided at the earliest possible opportunity and before the substantive interview). UKS1 hypothesized that the advantages were more likely to appear at the appeal stage, which is when the evidence gathered would be ready. Presenting officers reported to the ELAP evaluation that they could not distinguish between ELAP and non-ELAP appeals and that they were still hearing appeals based on new evidence, supporting UKS1’s hypothesis. This suggests that the time constraints, even if they are more generous than those currently allowed under the system, might mean that case owners still have limited access to the evidence for the first decision.

Case owners’ complaints that, with the exception of witness statements, too much evidence was presented at a late stage, including post interview, suggest that even with the extended timeframe of ELAP, the rigorous timing was still a problem for the process. Indeed, while the production of witness statements was a highly praised element of ELAP in general, over half were submitted ‘late’ in terms of the ELAP timeframe, and this seems to have been linked in some cases to late dispersal. Similarly pre-interview meetings were often late, with over one third being conducted on the morning of the substantive interview, thereby reducing their effectiveness. Although the cultural behaviour of legal advisors cannot be ruled out as a factor here in terms of the buy-in and understanding of the benefits of front loading as well as increased emphasis on early and improved communication with case owners, it does seem that the time requirements of the project were not flexible enough to permit the full benefits of ELA to become apparent. Furthermore, while a decrease in refusals at initial decision did lead to an overall lower volume of appeals under ELAP, thereby meeting one of the key objectives of the project, the evaluation found that the appeal rate against negative decisions did not decline. This must be seen within the context of the system as a whole which tends to create additional pressures to appeal decisions, as UKS4 indicated: “If he doesn’t appeal his NASS benefits will stop 21 days, I think, after a negative decision. So... the client will still appeal because otherwise he’ll be destitute so there

are other drivers there.” It should be acknowledged that applicants have every right to exercise their appeal right following a refusal, even where legal aid has been withdrawn due to low prospects of success at appeal. Moreover, the evaluation found that ELAP did not have an impact on the rate of legal aid funded appeals which suggests initial decisions to refuse that progressed to appeal were challengeable. However, given these other pressures one might expect that the impact of ELA on appeals is more likely to be apparent in fewer fresh claims⁵⁰ (because legal representatives will be in full possession of the relevant facts) and fewer judicial reviews rather than first appeals but unfortunately the ELAP did not have the scope to explore this.

“The emphasis on time goes along with a concern to save costs. One of the ways in which ELA might be argued to benefit all parties is by saving money through enabling the best case to be put at the earliest stage”

However, as stated previously, ELA in this case is not enough, and the quality of the legal advice and the timing of the process are integral to improving procedures. Furthermore, as the ELAP evaluation makes clear, it depends on how ‘cost’ is defined. The ELAP evaluation found that ELA was more expensive because of the extended time frame and because legal representatives were paid differently to the way they were normally recompensed. However, fewer cases were going to appeal, not because of a decline in the rate of appeals against refusals, but because of the overall fall in the volume of refusals due primarily to the increase in grants of discretionary leave. This resulted in savings by the Ministry for Justice “[b]ut in a world of short term-ism...it is a tough political ask to get Government funding anything on the possibility of making savings. Investing to save is a difficult concept in a time of austerity” (UKS3). Furthermore, there is more to the cost of prolonged and poor asylum claims than the cost of legal aid – the costs of detention, of supporting a person with no right to work or access to the mainstream benefits system, of housing and dispersal and so on.

3.6.3 Benefits to case owners, legal representatives and applicants

There was an interesting distinction drawn between ELA as facilitating more evidence and consideration, and ELA as facilitating a less adversarial system. All interviewees commented on the problem of the ‘culture of disbelief’ compounded by an adversarial rather than an inquisitorial system. The provision of evidence and the possibility of pre-interview collaboration could enable the decision making system to be less adversarial, making it easier for UKBA to reach a sustainable decision. Again, ELA was not felt to be sufficient in enabling this, but it was suggested that it could be helpful. There are also other ways in which case owners and legal representatives are collaborating with each other. One organisation interviewed is facilitating training for immigration officers and has been approached by UKBA staff in reporting centres, all suggesting a less adversarial approach. The ELAP evaluation supports this with both case owners and legal representatives reporting improved relations, and post-interview discussions and user group meetings being held up as extremely useful in

enabling collaboration and greater understanding of each other's perspectives. It should be noted that this benefit was associated with the particularities of the ELAP design, and is not integral to ELA per se, though arguably greater attention to evidence could also enable a "culture of mutual respect between decision makers and representatives" (UKS3). This is an example of the importance of the particular design of the scheme and how it fits into the national asylum process more generally. It also suggests that ELA can have feedback effects and more generalised and diffuse benefits to the asylum process but that are by definition, difficult to capture in statistics, for example:

"Any positive effects from the ELAP process may have impacted on the quality of decisions and interviews conducted under the national asylum process... over time, with an overall increase in quality. This would be a result of the same case personnel working on cases in the ELAP process and under the national asylum process" (ELAP Evaluation: 23)

The importance of consistency in personnel has consequences beyond ELA, and this was a further difficulty with ELAP, where legal representatives and case owners were not always consistent, and the LSC's ELAP file review found that the legal representative who drafted the witness statement was not the same as the one who attended the substantive interview in 30% of cases. There were similar problems with case owners.

ELA was felt to increase asylum seeker confidence (as asylum seeker interviews indicated in Estonia). All interviewees felt that explaining the system to asylum seekers was important and that this should be at an early stage – though one person commented that it could be difficult for people to take on if it ran alongside lots of other information⁵¹. ELA has the potential to help asylum seekers become more active in supporting their claims, not least because they know what they need to do as they have a better understanding of the process:

"it makes the asylum seeker think that they can participate in the system rather than being objects to which the system is doing something" (UKS2)

Thus a more informed applicant can contribute to a better decision. This was confirmed by the ELAP evaluation which found that asylum seekers felt better prepared and more able to explain their circumstances if they had been given ELA (90% of ELAP respondents as compared to 70% of non-ELAP respondents). As in Estonia, stakeholders were clear that this advice did not have to be given by a solicitor – one person referred to the Norwegian system of befriending whereby asylum seekers are allocated a lay person who can explain the system to them. A distinction was drawn between an introduction to the process and going through people's individual claims. However, where there is an emphasis on information provision rather than legal advice at an early stage it should also be noted that early legal advice can play an important role in facilitating the correct routing of claims, and this has the potential to reduce 'speculative claims', as people would understand that their claims may not be suitable for asylum..

"a client who may have begun the interview very defensively, very aggressively... would soften as you gave them the opportunity to... explore all the facts. And then when you explained to them that, notwithstanding what they are saying, the simple fact is that a judge is not going to believe the sequence of events they are outlining, or they simply wouldn't fit into the refugee and human rights conventions, once that was explained to them, their level of resistance dropped and the level of acceptance greatly increased" (UKS1)

However, for this to be done effectively, it is vital that the distinction between information provision and legal advice is clear as discussed in the introduction to this report. The danger is that without good quality legal advice at this stage, people are "merited out" incorrectly or, conversely, led to believe that they have a meritorious claim when they do not. Well-meaning people can have an adverse impact on asylum claims if they do not fully understand the consequences of the information/opinion they are providing (such as accepting a grant of Discretionary Leave when it might be better to progress with an upgrade appeal against the refusal of asylum/humanitarian protection).

The above quote provides a clear example of the benefits of early legal advice while also dealing with procedural aspects of how the system works, thus demonstrating the overlapping nature of these two important aspects of the process. Unfortunately ELAP was designed in such a way that asylum seekers were referred to legal advice after putting in their claims so the benefits of providing legal advice at this stage were not tested. Nevertheless the most important finding was that ELA did not have an impact on the asylum grant rate, or on the grant rate for humanitarian protection, but it did lead to a significant increase in the grant rate for Discretionary Leave (DL).⁵² This may be a consequence of a failure on the part of the legal representative to progress the case to appeal, leaving a grant of DL as the only option remaining, or there may have been evidence at an earlier stage that DL was appropriate. Unfortunately the ELAP evaluation does not explore this.

In the final analysis, the example of delivering ELA in the UK demonstrates how ELA helps to produce more considered decisions, and that if asylum seekers have been engaged in the process they can at least understand why it is that they have been refused. It reduces arbitrariness, which is beneficial overall because arbitrariness incentivises people to try their luck. As one interviewee put it, there is a distinction between trust in an adviser or a legal representative and understanding the system. The ELAP evaluation found no impact on decision quality, but importantly this was in a context where quality of decision making had been intensively monitored, as the UNHCR had a team working with UKBA to improve the quality of decision making at the same time as the ELAP project. Furthermore, the evaluation did find an improvement in decision making for complex cases. Importantly, it was not only asylum seekers who felt more confident, but case owners reported having greater confidence in their initial asylum decisions as a result of ELAP, with over half saying that the process had improved their confidence in making correct decisions/handling the more complex cases.

4. National Report: The Republic of Ireland

4.1 Background

Before the early 1990s Ireland was a country of net emigration. However, the economic boom resulted in increasing immigration from the mid-1990s onwards. At first this was driven by returning Irish nationals, but from 2001 to 2004 non-EU immigration and asylum applications increased significantly. Among the categories of non-EU nationals coming to Ireland in the last decade, the majority have been workers (about 280,000 work permits were issued during from 1998 to 2008), followed by asylum seekers (74,000 applications made from 1998 to 2008), students and dependants.⁵³ Post EU Enlargement in 2004, there was a marked shift from non-EU immigration flows to EU flows, though this began to drop with the economic crisis.

In 2013 ORAC made 878 substantive decisions⁵³ on refugee applications (excluding deemed withdrawal decisions), 128 were recommended for a grant of refugee status, a recognition rate of 15%. The largest numbers of applicants in 2013 came from Nigeria (14%), Pakistan (10%), Democratic Republic of Congo (8%), Zimbabwe (7%) and Malawi (6%).

Key factors shaping Irish immigration and refugee policy include the policy of free movement between Ireland and the UK and Ireland's membership of the EU. Like the UK, and unlike Estonia, Ireland is not part of the Schengen zone.

4.2 Asylum Procedure

Ireland became a signatory to the Refugee Convention in 1956 and incorporated the definition of a refugee from Article 1A into Irish law in section 2 of the Refugee Act 1996. This came into force in November 2000 following further amendments. The Act established two independent bodies, the Office of the Refugee Applications Commissioner (ORAC) and the Refugee Appeals Tribunal (RAT). Applicants for asylum are required, under the provisions of the Act, to cooperate with the asylum process. 'Cooperation' here means comply with the requirements of the procedure for asylum including fingerprinting and attending for interview when required. In 2013, a total of 135 applicants, (12% of all applications) failed in their duty to co-operate meaning that their applications were consequently deemed withdrawn under the provisions of the 1996 Act.

Refugee and subsidiary protection applications are not considered simultaneously. A person must first apply for asylum, and can only apply for subsidiary protection after the asylum process has been completely exhausted.⁵⁴ From 14 November 2013 subsidiary protection applications have been decided by ORAC (they were previously decided by the Department of Justice). As part of ORAC's investigation of the subsidiary protection application, a person has an oral interview which they previously did not have. In addition, a person receiving a negative decision on a subsidiary application has the right of appeal to the Refugee Appeals Tribunal (RAT). If the person is unsuccessful in their subsidiary protection application, the Minister writes to them notifying them of the intention to make a deportation order under section 3 of the Immigration Act 1999 requiring them to leave the State. The person then has the option of making representations to the Minister within 15 days and set out the grounds upon which they should be granted Leave to Remain. A person's period of period of entitlement to remain in the State also expires.

Regardless of where the application for asylum is made – at the port or after entry to Ireland, whilst detained, after detection for illegal entry in the country – the responsibility for consideration of asylum claims rests, in the first instance, with ORAC. Applications are made in person to the ORAC office in Dublin unless the person is detained in which case the Governor of the relevant prison notifies ORAC that the person wishes to claim asylum. Although in theory it is an option for any individual to apply for asylum, the practice in Ireland is that if one member of a family applies, all adult members must make their own applications. Children have the right to apply independently but, if they are accompanied by a parent, they can be considered dependent on their parent's claim. Children born in Ireland after an asylum claim has been made by their mother are required to apply for asylum or she risks losing financial support and accommodation for them.

Applicants formally confirm their decision to seek a declaration that they are a refugee at the first interview. This interview establishes identity, details of the journey taken to Ireland (including countries that they passed through and may have claimed asylum in), any assistance given with their journey, the method of entry (including legally or otherwise) and brief details about why they have claimed asylum. It is also used to identify what language(s) the person speaks or prefers to be interviewed in. Fingerprints are taken from all those over 14 years of age. The interview normally takes place on the day that the person attends ORAC to apply for asylum. The person or family will also be informed that, if they cannot provide for themselves, they can register with the Reception and Integration Agency (RIA), part of the Department of Justice. If they register with RIA, they will be accommodated in a reception centre in Dublin before being dispersed to another centre elsewhere in the country. In addition to this full board accommodation, they are given an allowance of €19.10 per adult per week and €9.60 per week for each child. They will also be given a Refugee Legal Service information leaflet and advised to register with them. At the end of the interview, the person will be given detailed information about the asylum process and a questionnaire to complete and submit within a specified time limit. This is usually ten working days but can be shorter⁵⁵.

The questionnaire is available in 24 languages. The notes which accompany the questionnaire state:

“The questionnaire seeks relevant information from you as an applicant for a declaration as a refugee in Ireland. This information will form the basis of the investigation at your interview.”

It is usually completed by the person without any assistance and, in particular, without any legal advice even if they are registered with the Refugee Legal Service (RLS – see below). After submission of the questionnaire, the applicant will attend an interview at the ORAC office in Dublin. The interview is a crucial part of the examination process. After the interview ORAC make a recommendation as to whether that person should or should not receive a declaration that they are a refugee. Interpreters' presence can be vital for assessing asylum claims, but while interpreters are trained on the refugee status determination process in association

with the UNHCR, there is no formal qualification for public service interpreters in Ireland. There are no guidelines or minimum standards for interpreting and in practice the quality of interpreting available is variable and can be poor. The officer conducting the interview will make a record that is read back to the person being interviewed before the interview is concluded. There is no system for independent recording of the interviews, even when a legal representative is not present. The official record of the interview remains the possession of ORAC and a copy is not given to the person interviewed or their legal representative (if one is on record) unless and until the person is refused by ORAC and appeals against that decision.

Following the interview and within a relatively short period, the person will receive ORAC's decision which will inform them either that ORAC is recommending that they should be issued with a declaration that they are a refugee or that their recommendation is against such a declaration being issued. This is called a section 13 recommendation. A negative decision normally refers back to the documents that the decision maker has considered including statements made by the person in the questionnaire or at interviews. A negative decision attracts a right of appeal. The deadline for submission of the appeal varies. If it is an unrestricted appeal, the deadline will be 15 working days to submit the appeal to the Tribunal. Depending on ORAC's categorisation of the claim, it is either a full oral hearing or on the papers only. There are no limits on the period, after submission of the appeal, before the hearing must take place before the Tribunal.

The RAT or Tribunal is comprised of a Chairperson and part-time Tribunal Members appointed by the Minister for Justice. The Chairperson is appointed through an open competition per the Civil Service Commissioners Act 1956, for a term of five years that may be renewable for a second or subsequent term. Tribunal Members are practising barristers or solicitors with not less than 5 years' experience before his or her appointment. There is no requirement to have expertise in refugee law. The appeal takes place in private. The applicant is usually represented, either directly by a solicitor with the RLS, a solicitor or barrister instructed by the RLS (from their panel of private practitioners) or a private solicitor instructed by the person themselves. With the exception of the consultation with the solicitor or barrister before the appeal is submitted, the opportunity for meeting the person who will represent them at the appeal is often only on the day of the hearing itself. In practice the quality of representation before the Tribunal varies considerably. The Refugee Applications Commissioner is also represented by a Presenting Officer.

The Tribunal Member has responsibility to determine whether he or she will approve ORAC's recommendation to the Minister that refugee status should not be granted or overturn that decision and issue their own positive recommendation. The decision will be sent by the RAT administration to the applicant and their legal representative. There is no statutory obligation to issue a determination within a specified period after the hearing has taken place. In 2013 the median processing time of an asylum application, from initial application to final decision on appeal was 36 weeks⁵⁶.

In the event that the appeal is dismissed by the Tribunal Member, the only way to challenge that decision is by way of an application for Judicial Review in the High Court. An application for Judicial Review must be submitted within 14 days of the Tribunal's decision being issued⁵⁷. In Judicial Review applications in asylum claims, solicitors representing the state must be put on notice and any application, even at the 'leave' or 'permission' stage, must be a hearing with both sides represented⁵⁸. The Courts Service state that in asylum matters the average waiting time for a pre-leave application to seek judicial review in asylum-related cases is 33 months. Waiting time for final hearing is 3 months⁵⁹.

It should be noted that in the course of writing this report there have been some adjustments to the Irish system, partly as a result of training arising from the CREDO project and the UNHCR report 'Beyond Proof: Credibility Assessment in EU asylum system'⁶⁰. This project aimed to contribute to better structured, objective, high-quality, and protection-oriented credibility assessment practices in asylum procedures conducted by EU Member States. As well as a report, it produced judicial guidance and a training manual on credibility assessment for practitioners. ORAC and RAT were trained in accordance with these principles in 2013. There has been a tenfold increase in first instance recognition rate from 1.3% in 2010 to 15% in 2013 and the training associated with CREDO will have been a contributory factor.

4.3 Legal Advice

A person applying for asylum can register with the Refugee Legal Service (RLS), a specialist part of the Legal Aid Board, an independent body. All applicants are assigned a solicitor and a caseworker. At first instance, however, an applicant does not normally meet the solicitor but is given legal information about the process by a caseworker under the supervision of a solicitor. It does not usually include advice on the facts of the case or assistance in completing the questionnaire, unless the applicant is particularly vulnerable (e.g. a minor or a person who cannot read or write).

Under the Civil Legal Aid Act, legal advice is advice which is given by a solicitor/barrister. Unless the applicant is a child or a particularly vulnerable person (e.g. a victim of trafficking), a legal advice appointment with a solicitor, where advice is offered on the particular facts of the case, is not normally offered until the appeal stage, when both advice and representation before the Tribunal will be provided.

If they register, they will be allocated a solicitor and a caseworker. Although legal advisers are permitted to attend the preliminary and main interviews this rarely happens. Due to financial restrictions on the service, the RLS normally limits its legal advice and assistance to the appeals stage, that is, after a person has been refused by ORAC⁶¹. The person will however be seen by a caseworker during the ORAC stage who will provide legal information which complements the information that they are given by ORAC in the information leaflet. It is generally not the practice for a statement to be prepared from interviews by a lawyer with the asylum seeker, either at the initial stage or for the appeal hearing. Therefore, the High Court application is often the first time that a statement in the applicant's name will be prepared in the form of an affidavit. But affidavits are usually prepared

by barristers simply from documents without having taken a statement from the asylum seeker themselves. Severe restrictions on civil legal aid funding means that it is difficult to fund all competing demands in a timely fashion and if a person seeks to challenge a decision on their asylum claim in the High Court or above, they will not be eligible for legal aid if they can get legal representation without it⁶². In practice this means that the RLS requires applicants to attempt to obtain the services of a private solicitor and only if they are unable to do so, will they then consider the merits of the case and make an application for funding if there is considered to be merit.

4.4 ELA in Ireland

In the Irish context, there has been no state service which could be considered 'early legal advice' with the exception of children's applications where they are unaccompanied⁶³. A 'frontloading' service was piloted between the RLS and ORAC but the final evaluation was never completed or made public. The only form of 'early legal advice - meaning advice given at any stage, including referral into the process up to and including the response to the ORAC first decision - has come from the Irish Refugee Council Independent Law Centre which commenced its service in November 2011.

There are particularities in Ireland that potentially make ELA particularly beneficial, most obviously, a significant number of asylum claimants in Ireland are sent to other EU states under the Dublin II Regulation. Under the Dublin II Regulation there was no right of appeal before transfer (carried out by the Irish Naturalisation and Immigration Service of the Department of Justice) and it was not unusual for asylum seekers to only learn of the decision to transfer them immediately prior to their being transferred, meaning they had little if any time to contact a lawyer to lodge an appeal⁶⁴ against this decision. The Dublin III Regulation, in effect since the 1st January 2014, requires that a person can request an appeal against a decision to transfer and that the appeal should be suspensive of transfer. It is arguable that ELA would ensure a more efficient and just implementation of the Dublin Regulation, whether or not the claim is considered in Ireland. This is on the understanding that if a person has had the opportunity to sit with a lawyer and talked through their claim, then they will be better prepared to go through the decision making process in the country to which they are transferred.

In 2011 the Irish Refugee Council established an Independent Law Centre with four staff, two of whom were solicitors, to support asylum seekers. One of its main priorities has been to provide legal advice and assistance to people at the earliest stage of the asylum process, including preparation of a detailed statement, collation of evidence in support of their claim including medico-legal reports and country evidence and attendance at the interview. Asylum seekers are given two hours of free advice but as a small organisation with only two solicitors the service is limited by the capacity of its staff. However, the Law Centre gives full early legal advice and representation if the individual is particularly vulnerable and has difficulties in otherwise accessing legal services. In addition it will represent a case if it is of strategic benefit to asylum seekers and refugees. Those cases that are not ELA-appropriate are usually forwarded to the Refugee Legal Service to be dealt with under the normal procedure.

This 'frontloading' process is different from the way in which frontloading is generally imagined in Ireland, where it tends to be seen as the lawyer getting 'an idea' of the case often

following just one discussion. She/he may help in a few submissions, but that is not obligatory.

For the purpose of the interviews below, 'early legal advice' was taken to mean advice given at the earliest stage of the asylum process as implemented by the Irish Refugee Council. This involves an initial interview with a solicitor followed by a detailed statement of claim being prepared, often over several appointments and with an interpreter where needed, and the statement with available evidence and submissions being made prior to interview and sometimes in the light of the issues raised at the interview.

4.5 Interviews

It is clear from the interviews with both stakeholders and asylum seekers, that the benefits of early legal advice in Ireland need to be understood in the context of a system that most of the interviewees were highly critical of. According to them the process was felt to be "unsympathetic, strict and unaccommodating" and not focused on core protection issues (IS4). The nature of the process has been experienced by some as adversarial even if the intention was to be inquisitorial which can result in inefficiency from the point of view of some stakeholders and an experience of lack of 'humanity' by asylum seekers. The lack of a separate route to subsidiary protection was also frequently mentioned as a problem that indicated the 'rear-ended' (IS3) nature of the current process⁶⁵. "The pyramid is upside [down] and it should be inverted" (IS4). It was felt that ELA combined with a separate route had the potential to introduce some significant cost savings, making the system more efficient overall and easing stress for claimants.

There were two broad reasons for giving early legal advice according to interviewees: trust and efficiency. It was also felt it had the potential to move the system away from an adversarial stance and towards a greater inquisitorial and collaborative process.

4.5.1 "A Question of Trust: "When we don't know something, we can't trust it easily"⁶⁶

Both stakeholders and asylum seekers claimed that currently in Ireland asylum seekers' understanding of the legal process is extremely poor. They can be detained (though this is a relatively rare occurrence), have their fingerprints taken and questioned without having the first idea of what is happening. IR3 described it as being like taking a bus:

"I have to pass four stops to get to my destination... if you plan your journey, you pass easier, you get the best way. When I don't know my destination, then I have to say, stop by stop, and I don't know what it is going to be or how I will pass these stops... I don't know what is the end of it..."

This ignorance can mean that people do not know what they are and are not permitted to do, and also are not aware of the importance of legal representation until it is too late "you already have a big shock of adjustment and everything develops so fast... you are stepping into an unknown" (IR2). However, even a person who wanted to find a legal representative found that they could not get legal advice before filling in the questionnaire. Asylum seekers complained of not being able to see a lawyer, even if they had one - "I only see her name on letters ... I never met her. I never had even

once spoken on the phone once, and she never even spoke with me” (IR1); “I haven’t seen my lawyer... I went there once. He couldn’t come down to speak to clarify, what does this letter mean” (IR3), and described their sense of desperation, frustration, and, critically, of not being treated with respect as receptionists said caseworkers were too busy, and caseworkers similarly protected solicitors. This heightened the sense of not being given anyone’s full attention at a time when, as one interviewee put it: “The most important thing was that the person I am dealing with, the person on the other side of the table, accepted me, believed me, trusted me” (IR2). That is, they often did not feel listened to by anyone involved in the asylum process, and it was possible for them to feel that even their legal representative was not supporting them. One former asylum seeker said that visiting his legal services was like “I’m going to visit some people that never want me to be in this country. The way they treat and the way they deal with it is just to set you up in this process and then you say, alright, I’ll leave it” (IR3). Arguably one reason for this is that the system was designed over a decade ago when “the asylum landscape was very different” (IS2), and resources and the services of the Refugee Legal Service were deliberately concentrated on the appeal stage, an arrangement that no longer fits the needs of asylum applicants. That is, while perceived by clients as deriving from unsympathetic and unhelpful legal representatives, it is also a structural matter that results in people not meeting their solicitors until their appeal.

Given this, it is hardly surprising that claimants can fall back on asking other asylum seekers what to do. Because they are largely housed in reception centres, these can become sites where information is shared. However, although it might be given in good faith, this information is not necessarily well understood. As one stakeholder put it:

“You often find someone who is at the end of the process who comes clean before they are put on a plane, and you learn of their true situation and you realise that this is a better claim than the fabricated nonsense... you stuck by for the last five years.”

Unsure who to trust and feeling insecure, (“you don’t feel comfortable, safe to speak about your problems” IR3), some people can hide details of their past or give false names and nationalities resulting in unnecessary confusion, delays and complications. The danger then is, as one interviewee put it, that asylum seekers “run away from the system”, when there is no running away from it. Under the current arrangement, people who have been living underground, sometimes for considerable periods, find they are unable to access help and resist coming forward, because by the time they are advised to do so they are completely distrusting of the system. Trust is a two way process, and an asylum seekers’ mistrust of the system can in turn fuel mistrust of their claim. This has been a critical problem in Ireland because of the focus on credibility in decision making and decisions relying almost exclusively on ‘credibility’ have continued to be brought before the courts and asylum applicants left waiting in the system for many years without a final determination⁶⁷. Section 11B of the Refugee Act 1996 requires the consideration of credibility in assessing asylum claims. As discussed above there does seem to have been some recent change in how this is implemented, but it should also be noted that there continue to be significant problems for some people arising from previous poor decisions.

“The approach to decision making which has developed here which as a matter of policy is focused on credibility...I have very rarely seen a refusal of refugee status that does not include adverse credibility findings. This is not realistic. Because of the credibility monster that has developed in Ireland it is so important to have good early advice to try and ensure that good practice is being followed on the issue of credibility. You are going to need all the help you can get to counteract some of these credibility findings” (IS4).

This particular stakeholder claimed that their audit of case files suggest that there is a very real difference when claimants have received early legal advice and support in pre-empting credibility issues. This is likely to be of more importance because of the MM decision⁶⁸ which says that an applicant should have the right to be heard before the adoption of a decision on their protection claim.

4.5.2 Efficiency and Engagement

It was claimed that this lack of advice at an early stage made for more complicated cases as more and more documents were requested with the applicant not understanding what they were for. That is, the applicant not being fully engaged in their own case meant that it was conducted more inefficiently:

“Because it was asked after each and every interview I would be asked we need this evidence, we need this evidence, and all this complicates everything. If I had it before I would have been aware of what to get ready and what to bring to my hearings” (IR1)

IR3’s first lawyer had, he later realised, very limited experience with asylum procedures, and this was reflected in IR3’s lack of engagement with the asylum procedure. “Say a reason briefly on a page and you sign it and then send it back to ORAC to tell your reasons but I think it was not enough”. He contrasted his experience with his first lawyer with that of the lawyer who assisted him with his second asylum application. The second lawyer used early legal advice techniques such as attending his substantive interview and who was able to pick up on key elements of his case. There was a stark contrast between those asylum seekers who did not have early legal advice, whose first experiences seem to have been chaotic with a sense that it was out of their control, and an asylum applicant who had access to early legal advice. Contrast IR1, who did not have early legal advice, with IR2’s case:

“When a caseworker is getting all the information categorising, presenting it in a nice way to the Court, or having an index, the decision maker can also make a better decision, a less confusing decision.” (IR2)

It is clear from his responses that he valued the sense of order and control that access to early legal advice gave him, but also that he felt it enabled the court to “get the truth out of this complex mess of informations” and that it had a positive impact on his case.

Stakeholders generally agreed that helping asylum seekers to understand the process from the beginning would mean that critical aspects of their case can be highlighted at the ORAC stage. Even a brief consultation and advice to help with completing the initial questionnaire could make a big difference to the outcome. For asylum seekers it seems that this inefficiency and lack of control can lead to a sense of arbitrariness, as people attend multiple interviews whose purpose they don't understand⁶⁹. Misapprehensions that should be easy to resolve are multiplied because of a lack of advice. One interviewee described how, despite his protestations, the caseworker took the nationality on his fake identification as his true country of origin, even though, from the outset, he had informed the authorities that this was not the case. "I submitted almost twenty different pieces of documents, IDs, birth certificate, professional cards, political membership cards and many, many different documents and that has never been processed and never been corrected" (IR1). This has been the source of continuing problems for him, and interestingly he contrasted the difficulties in establishing his identity within the asylum system to the verification of his identity by other state agencies.

"I used a birth certificate to apply for my driving test and that birth certificate used by the department of transport motor tax office, OK, within three days they were able to verify the authenticity of my birth certificate... and they called me back, come we have your birth certificate verification, and I was delivered my driving licence." (IR1)

There were complaints about inefficiencies, with multiple interviews at ORAC, and confusing requests for different documents, which may also be irrelevant to their case. This is compounded by an historic problem with translation: "they ask you bring this, bring this, bring this and you keep bringing til at the end they tell you they are out of funding to translate documents" (IR1). There are also problems with the quality of the work. One interviewee found himself double checking the translation of his interviews thanks to a large dictionary and making many corrections.

The kinds of criticisms directed against the Irish system were, one stakeholder claimed, not peculiar to Ireland, and across Europe the focus is on credibility rather than core protection issues, and this is a reason for encouraging the provision of early legal advice in all European states. There was an interest in developing a less adversarial approach, concerned with identifying the key issues to be explored, or one where the duty is to the court. While costs are difficult to anticipate, the sense was that the High Court is overburdened and so the system neither serves applicants well nor gives value for money.

4.5.3 Other aspects of early legal advice

One stakeholder pointed out that in other areas of law, the value of early legal advice was undisputed, and adversarial proceedings, in family disputes for example, are discouraged and there was something to be gained by taking a similar view with reference to asylum. While interviewees were generally highly positive towards early legal advice, this was not unreserved. Firstly there were concerns, scarcely surprisingly, about the quality of advice as currently delivered, both in matters of substance and style. "Bad representation could be worse than none at all" (IS4).

Generally people felt that the caseworker system⁷⁰, as long as supervised by a lawyer, would be acceptable, though not everyone agreed. From the interviews it was clear that as well as advice about the inquisitorial process, the applicants also needed reassurance and "humanity". Asylum seekers recognised that they were very stressed and wary, so if they felt people were not helping them the relationship could easily become unworkable, but on the other hand, if people who gave support were recognised and deeply appreciated, and the loss of a good caseworker was very upsetting "when that person changed, I felt like all the sky was falling on my head" (IR1). As well as the quality of legal representation, which tended to be emphasised by asylum seekers, stakeholders raised the quality of presenting officers and need to 'raise the bar generally' with quality guidelines and compliance monitoring that would have to run alongside early legal advice. Too much emphasis was placed on outcomes by decision makers, rather than on process.

"We have best practice guidelines and we have file review processes. Are they perfect? No. Are we sufficiently active in pursuing them? Maybe, but we certainly could be better." (IS2)

There is also a need to continue to improve the quality of decision making at first instance and appeal. There was criticism of first decisions but reference was also made to problems with appeals. One stakeholder who had observed many hearings claimed, regarding the standard of proof, which in theory is lower than the balance of probabilities, that "adjudicators are very uncomfortable with doubt" (IS4) and applying the correct standard of proof.

Stakeholders felt that ELA should be structured so as to encourage greater interaction between legal representatives and ORAC as this had the potential to decrease tensions. Initial work at the Irish Refugee Council has found that ELA facilitates a more conducive interaction between lawyers and the applicants, and allows for the recording of statements rather than simply providing only documentary information to the decision maker⁷¹.

It was also acknowledged (as confirmed by the UK study) that some clients might not be able to fully disclose all aspects of their case immediately. That is, even if they have a good legal representative, there might be understandable reasons why they would be reluctant to tell them of certain details within a tight time frame, and sometimes a period of counselling is necessary. Medico-legal reports and documentation from the country of origin might also not be possible within an overly inflexible timeframe (again as confirmed by the UK study). There were indications that early legal advice should not be bound by a strict timetable, and that a front loaded system did not mean that it would necessarily be shorter. A distinction was made between length of time and efficiency – a longer process in itself does not necessarily translate into a more expensive, or a more inefficient process. "Efficiency is about a good quality claim" (IS1). That said, stakeholders felt that the process could be significantly shortened with attention to other mechanisms and that this was long overdue. Asylum seekers too complained about the length of the procedure, and pointed out the kinds of consequences it had for mental health for people in hostel accommodation, who are unable to work or use their abilities. It seems to have detrimental consequences even after status has been granted:

“Six years I was in limbo somehow, living with no hope, no future, and don’t know what’s happening to me tomorrow. I’ve got this status now, but I still feel lost. ... I feel a lot easier, less pressure, but the other side is, what am I going to do again, after six years? What’s my options? ...If you are in the middle of thirty then you won’t be a great football player.” (IR3)

There is the potential for enhancing public credibility and for considerable cost savings, particularly by introducing reforms to the arrangements for applications for subsidiary protection:

“I am conscious of some of the commentary recently in relation to people staying in Direct Provision for very long periods of time...I certainly think there’s room for improvements that could be made. That’s not to be... critical of the ORAC, it’s not to be critical of the RAT. It’s not necessarily to be critical of the Department but... for what is now a relatively small number of people... we have a relatively disparate immigration determination process.” (IS2)

The current arrangement means that, effectively, people who qualify for subsidiary protection, are denied the opportunity to have their application considered in a timely fashion after they have first been refused asylum⁷². The subsidiary protection claim may also be compromised because of the credibility findings of the refugee determination⁷³. Early legal advice, combined with the possibility of applications for subsidiary protection being considered much earlier in a single protection process, could limit inappropriate asylum claims. Furthermore, as one stakeholder pointed out, the cost of early legal advice needs to be calculated

with awareness of the fact that at the appeal stage it takes lawyers time to get to know a case. There is a hidden saving, not only in the presumption that some cases would no longer go to appeal, but also in that lawyers would have a good knowledge of many cases that did go on to appeal and less preparation would be needed at the appeal stage, reducing delays and costs.

While there was general agreement that more resources should be put into earlier stages of the process and that it would be beneficial to cut appeals rates, there was some scepticism about whether early legal advice would, on its own, have this result. The problem is that early legal advice, though facilitating a more thorough and efficient determination, would not necessarily result in a higher success rate, and those who are refused have every incentive to appeal – “If there is a negative decision, the applicant would generally seek to appeal it” (IS1). This was supported by IR2 who made a successful claim first time round, and was clear that he would have appealed had he not succeeded. In this case, however, early legal advice might still have represented a cost saving as he felt that the foundation for the appeal was already apparent.

“Let’s say I was getting a negative outcome, that presentation, that laying down all the information, that advice I got would lay a solid foundation if I was going to the second stage, if I had to take my case to the next stage.” (IR2)

However it might in this regard be helpful to distinguish between different stages i.e. between RAT and judicial review. One stakeholder estimated that the most basic of judicial reviews was at a cost to the state of £20-40K “Think how much early legal advice you can provide with that kind of money” (IS4).

5. National Report: Estonia

5.1 Background

The Republic of Estonia is a Baltic State bordering Latvia and the Russian Federation. It also has a sea border that links to Sweden and Finland. The population of Estonia is estimated to be 1.3 million people. According to the Estonian government's Population and Statistics Department, of these just under 70% are 'ethnic' Estonians, and some 25% are 'ethnic' Russians⁷⁴. Not all of the latter have Estonian citizenship, even if they were born in the state. As of 1 July 2012, 84.3% of Estonia's population held Estonian citizenship, 8.9% were citizens of other countries and 6.8% were of undetermined citizenship⁷⁵. 'Russians' form the majority of the people living in Estonia who are stateless or who have indeterminate citizenship and issues arising from the post-independence citizenship of people associated with the former imperial power, with which Estonia shares a border, have dominated and shaped debates around immigration and citizenship. Relations with the former Soviet Union have therefore been important in shaping the nature of Estonian non-citizen communities, while Estonia's 2004 accession to the European Union (EU) has proved critical in its development of immigration and asylum.

The word "refugee" was first used in the public legislature only in 1997 when Estonia acceded to the UN Refugee Convention and adopted a national refugee law (the Refugees Act). Estonia ratified the 1951 Convention and 1967 Protocol in February 1997. At the same time the Parliament adopted the Refugees Act, which defined the legal status and grounds for residing on the territory of Estonia for persons applying for asylum. In 2006 a new law called Act on Granting International Protection to Aliens was adopted that incorporated all relevant EU Directives (2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, 2003/9/EC laying down minimum standards for the reception of asylum seekers, 2003/86/EC on the right to family reunification and 2004/83/EC 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)⁷⁶.

Between 1997 and 2012 approximately 360 asylum claims were made in Estonia. As of 1st October 2012, 39 of these claimants had been recognised as refugees and 24 persons had been given subsidiary protection. Most asylum applicants are from Georgia, Afghanistan, Russia and African countries including Somalia, Nigeria, Congo, Cameroon and Algeria. There are relatively few single women, though there are some families seeking asylum. The majority of applicants are single men and they usually enter overland from the Russian border.

The numbers of asylum seekers are significantly lower in Estonia than they are in the other countries in our study (UK and Ireland). It is notable that the number of asylum seekers in Estonia did not significantly increase after it joined the EU and became part of the Schengen zone. There are various reasons that might account for this, most particularly (for non-Russian speakers) language but also the likelihood that Estonia is regarded as a transit rather than a destination

country, to be passed through on the way to Sweden and other EU states which have larger migrant communities and labour markets. This means that often asylum seekers returned to Estonia under the Dublin II Regulation, opt to return to their country of origin rather than stay in Estonia and have their asylum application determined.

The number of discoveries of irregular residents has increased since 2004, when the then Citizenship and Migration Board established "migration inspectors," charged with examining the legal basis for stay and work in Estonia. Whereas in 2002, a total of 864 persons were found to be staying in the country illegally, in 2007 the figure was 1,464. Most of those discovered as illegal residents were from Russia.

5.2 Asylum Procedure

According to the UN Refugee Agency⁷⁷ most asylum claims are made at the overland Russian border, but some are made on arrival by air at the capital, Tallinn. For other in-country applications very often asylum seekers must travel to Tallinn depending on the entry point, in order to lodge an application. There is no information available on how they manage to obtain the resources to make this journey. There are anecdotal reports of border guards ignoring asylum claims. The European Commission against Racism and Intolerance (ECRI) reported in March 2010 that it has been "informed that high levels of xenophobic attitudes were noted among border guards during training and that overall, they lack training, experience and appropriate education" (ECRI 2010, p.39). Observers in the UN Human Rights Council (HRC) have criticized the conduct of border guards and their tendency to assume discretionary powers on asylum applications (ECRI 2006, p. 21; HRC 2008, p.17). The extent of this problem is unknown, though the recorded annual number of non-nationals turned back at the border is around 3,000. It seems that in such situations border guards can either refuse entry to asylum applicants (mainly Russians or persons with Russian visas), or detain them for trying to enter the country illegally⁷⁸. In the latter case, if the asylum seeker is able to insist on lodging their application they usually remain in detention for 2 months and then if the Police and Border Guard Board applies for the extension of detention the Administrative Court decides whether to release the person to accommodation centre or extend the detention for another 2 months. The main legal instruments regulating this area in Estonia are the 1951 Refugee Convention and its 1967 Protocol, the Act on Granting International Protection to Aliens (AGIPA) and EU legislation. AGIPA § 361 lists the basis for detention⁴ and says if these basis cease to exist the head of the detention centre shall immediately release the asylum seeker from the detention centre.

Asylum applications are made in person to the Estonian Police and Border Guard Board (PBGB). Asylum seekers have to complete a form that includes questions about the reasons for their claim, route taken, family background, background in country of origin etc. This is available in various languages including Arabic, English, French and Russian. Information gathered from the form is used for conducting interviews, case investigation and for preparing other documents including the case file. Whether the application is made at the border or in Tallinn, asylum

applications are determined by the Police and Border Guard Board's Proceeding Bureau Aliens Division which also conducts follow up interviews within two months of the application, with interpreters usually available if necessary. In the Estonian context ELA means advice given during the asylum process before the PBGB makes its decision.

It takes approximately six months to reach the first decision which is explained very thoroughly in a decision which is often 20 pages in length. Refugee status is given for a maximum of three years and subsidiary protection is given for one year, but both can be extended.

“The main reason for negative decisions is credibility and lack of evidence”

The applicant has only ten days to appeal. They appeal to an Administrative Court – there are no special courts or tribunals in Estonia for dealing with asylum issues specifically and judges have no requirement to have expertise in refugee law. The appeals are open court sessions unless declared otherwise by the judge. The applicant is usually represented by a lawyer provided by the Estonian Human Rights Centre or appointed by the Administrative Court if the person has applied for free state legal aid and the court has accepted the application. The Administrative Court decides whether the PBGB has followed all the procedural rules. If the court finds that the PBGB has not followed all the procedural rules or ignored some evidence the application to be processed again. A further refusal would trigger another right of appeal. If the Administrative Court decides in favour of the PBGB, the applicant can appeal to the District Court. The highest court is the State Court which does not hear all cases but when it does the decision can take years.

An order to leave the territory accompanies the negative protection decision. As a general rule an appeal against a negative decision does not have an automatic suspensive effect and it is important to apply to the court to suspend the execution of the order to leave the country.

5.2.1 Detention of asylum seekers

When someone makes an asylum application at the border, they can be detained for a maximum of 48 hours for initial administrative procedures (AGIPA 2006, §15). As a rule, asylum seekers are not detained in Estonia. There is only one detention centre in Estonia for detaining persons under immigration law, the pre-removal Harku Expulsion Centre. People with no legal grounds to stay in the Schengen area are placed there until their deportation. It is a closed prison like facility under the PBGB. It is possible for persons to submit an application for asylum while they are in the Harku Expulsion centre. The fact that a person's expulsion has been suspended does not release him/her from detention automatically but if the grounds for detention as listed in AGIPA § 361 cease to exist the applicant shall immediately be released from detention.

Those asylum applicants who do not lodge their claim in detention are not detained, but they stay in an open reception/accommodation centre in Vao, Väike Maarja Parish that is about 120 km from Tallinn the capital of

Estonia. This is a remote area, and there are no psychological or medical facilities available on site. The EHRC visits the centre approximately every two months. UNHCR has expressed concern at its isolation: “The isolated location ... has a negative impact on the integration of asylum seekers and refugees into the Estonian culture as the Centre is located in the territory mostly inhabited by the Russian speaking minority population”⁷⁹. Those whose claims are successful are supposed to leave the reception centre, but in practice they often remain there for months because of the difficulty in finding suitable support and accommodation.

In both border and in country claims, detention is for a maximum of 48 hours, but it can be, and is, extended if there is difficulty in gathering initial information or the applicant does not demonstrate the required level of cooperation (AGIPA 2006, §15, 32) including co-operating with fingerprinting and providing identity documents. The extension of detention is ordered by the Administrative Court upon PBGB's request. Detention is now limited to a maximum of 18 months. Observers had previously drawn attention occasions of excessively long detention. In its 2010 ruling in the Mikolenko case, the ECHR found that Estonia had violated Article 5 (the right to liberty and security) of the European Convention on Human Rights in detaining the appellant for almost four years in an expulsion centre (Mikolenko v. Estonia 2010). In December 2004, the Estonian Office of the Legal Chancellor reported that some persons had been held in an expulsion centre for a year and a half (ECRI 2006, p.22).

5.3 Legal Advice

Legal advice is given by an NGO, the Estonian Human Rights Centre (EHRC), an independent non-governmental public interest foundation based in Tallinn. Neither the EHRC or any other legal representative has the legal right to refer a person into the asylum process. The concept of submitting an application in person also means that one must have a personal belief that s/he needs protection. According to some, it is not a process where you need a lawyer to determine whether or not to apply for asylum and as the application must be submitted immediately after entering the country so the possibility of obtaining advice at this stage is remote. The Proceeding Bureau Aliens Division or the reception centre informs the Centre about new asylum seekers who have lodged their application, but the Centre is also proactive and regularly contacts the reception centre to find out about people that need assistance. There are also printed leaflets with EHRC contact details and office hours in the reception centre, at the border points, in the detention centre etc. This information is available in six languages.

There are no separate tribunals or barristers for asylum cases which fall under the domain of administrative courts. The Estonian Human Rights Centre (EHRC), is the principal provider of advice to asylum applicants in Estonia. It is important to note that it receives 25% of its income from the Ministry of Interior but 75% comes directly from the European Commission through the European Refugee Fund which is accessed by way of an annual application. The EHRC works closely with the UNHCR in Stockholm, which provides training and reviews cases upon request.

The Centre is heavily reliant on law students from partner universities working as interns for the EHRC Legal Clinic under the supervision of two legal experts. At any one time there are four to six students who spend unlimited hours on cases. Students cannot act as representatives in court but play an important role as legal advisers and representatives at first instance interviews and processes. They explain the asylum process to the applicant, provide up to date information about the proceedings, gather information about the country of origin, prepare and represent the applicants for their oral asylum interviews, explain the asylum decision and explain appeal procedures. They also make clear to asylum seekers what their rights are and the importance of not absconding. In the case of an appeal to the Administrative Court the student assists the lawyer who represents the applicant in the court and is a main communication link between the applicant and lawyer. EHRC sometimes helps asylum seekers to apply for free state legal aid. This is available for appeals but it is not automatic and is decided by the Administrative Court on the basis of an application form that is available only in Estonian.

“One advantage of this system is that it is helping to build a cohort of newly trained specialist lawyers with experience in handling asylum matters”

This is extremely important because the lawyers appointed via the state legal aid system very often lack experience, training and knowledge in refugee law. Good practices in Estonia include the detailed explanation of first instance decisions made by the PBGB to the applicant and the capacity building of law students. However in recent times there has been a lot of dependence on this non-state funded Legal Clinic, which has become the main source for advising and representing asylum seekers. But this model of provision is not secure and assumes relatively low numbers of applicants. At the moment EHRC can help all the applicants who have turned to them for legal advice and they do not have to select cases. However, as the number of applicants is rising each year, time limits will soon need to be set and criteria must be developed. At the moment there is no other organization giving legal assistance to applicants and very few applicants have the finances to hire an advocate to give them ELA. At this initial stage, free state legal aid is also not available.

5.4 Interviews

There seemed to be some agreement between decision makers and other stakeholders interviewed that the asylum system in Estonia has not been severely tested, as numbers are small. Asylum is not a priority for government and is not subject to the kind of high intensity debate that it is in other countries. This leads to an approach that is concerned not to rock the boat, as the current arrangements are only sustainable because of the low numbers of applicants and because of the assistance provided by the European Refugee Fund. One case worker interviewed suggested that this was good, not simply because it saved money but because ‘the state cannot control the expenses and

activities so much’ (ECO2) though they acknowledged that this also posed a continuous risk to stability making it difficult to sustain. Several pointed out that this also made it logistically difficult to expand services: “We have eight border points in Estonia and only one NGO that provides legal assistance and has competence to do it. Have you got the capability? You need to react immediately and if there are many applicants in different border points...” (ES01). This comment reflected a more general resistance to the provision of ELA at the pre-application stage. Case owners were clear that lawyers should not advise applicants to seek asylum, it was felt to be important that this was their personal decision. There was felt to be no need for asylum seekers to have advice at the border ‘only preliminary procedures are done at the border point (finger printing, EURODAC) and the person fills in an asylum application’ (ECO3). It was striking that it was felt that filling in what was, until April 2014, a 16 page application was not something that a legal adviser could, or should, help with.

“It is very technical at this stage and the lawyer does not have a practical role. It would probably disturb the work of border guards if there would be a third person at the border” (ECO4).

In contrast, asylum seeker responses suggested that advice should be available as early as possible – ‘The authorities are waiting for you to make a mistake at the interview... I am a human and every human can make mistakes and not remember every date precisely’ (EAS3). When asked what an asylum seeker should do if she has no legal advice all advised that the first response should be ‘Get a lawyer and ask the lawyer’ (EAS1), ‘It is difficult on your own when you do not know the procedure and people and how to behave’ (EAS4).

There were three reasons decision makers gave in favour of early legal advice – understood as advice post-asylum application completion. Firstly they felt that the legal representative facilitated communication between asylum seekers and the authorities and helped with the explanation of the procedure to the applicant. This legal support encouraged asylum seekers to be more ‘cooperative’ and trusting of the system, (though both the stakeholder and the case owners felt that there was a serious problem with absconding and that this was not something that ELA would help with). Asylum seekers all thought that to have a trusted lawyer was critical to confidence in the asylum procedures. The presence of a legal representative for some meant that they also felt more confident in interviews as well as in the procedure more generally, with their presence making the experience less stressful – ‘Feeling more comfortable if my legal adviser in at the interview with me; I know my rights and what I should and should not do’ (EAS3). That asylum seekers had a level of confidence in the procedure is evident in the emphasis placed on telling the truth, cooperation and behaving in accordance with legal obligations⁸⁰. It should be noted however that there seem to be considerable complaints about the asylum system more generally, with interviewees complaining about detention (‘I am detained and treated like a criminal ... why? Asylum seekers should not be handcuffed. I do not understand why I am here’ EAS1), poor reception conditions, not being able to work, isolation and so on. The level of complaints

suggests that without the legal support, confidence in the system would be negligible and is testament to the work of the legal clinic in this regard. For example, one applicant who had complained to the UNHCR and to the Estonian Ombudsman about the detention centre, attitudes of staff and so on, was nevertheless able to say ‘Yes, the lawyers know the laws and the system. My lawyer comes here very often to explain to me different things about my asylum procedure, court hearings and what’s going to happen. It gives me more confidence when my lawyer is with me during the asylum interview and in the court’ (EAS1).

Secondly it was felt that access to early legal advice, which was what the present system was understood as facilitating, was a necessary part of the current system because of the limited time available to lodge appeals. An appeal has to be submitted ten days after a refusal, and case owners felt that unless applicants had had the opportunity to have discussions with legal representatives beforehand, this was not enough time to prepare a case. This time pressure was exacerbated because of a lack of expertise in asylum amongst trained lawyers – ‘qualified lawyers who provide fee state legal aid have no interest or experience in this field’ (ECO2). While appeal cases might be handed to them, they need to be well briefed by legal advisers with a good knowledge of the asylum system. The stakeholder interviewed, who differed with case owners in that they felt that pre-application advice was ideal, but limited by practicality rather than unnecessary, went so far as to say that ELA would also limit appeals against negative decisions because people would be more likely to feel the decision was fair.

Thirdly, early legal advice was felt to facilitate the work of case owners because of the provision of country information. It was clear from responses that legal advisers play an important role in the obtaining of COI. Interestingly

it seems as if this is another way in which the ERF helps to sustain the Estonian asylum system, as caseowners did not have the time to source up to date country of origin information as there is no separate department to deal with that ‘It is good that legal advisers help the asylum seekers to gather country information that is presented to the case owners as well but we have to do our research and each time we have to start all over again... it takes time and it isn’t efficient’. Two of the three case owners mentioned this point. The role of legal representatives in obtaining evidence, including information about countries of origin, was also mentioned by asylum seekers. Interestingly they also mentioned that having access to a representative with language skills was important, and again case owners too complained about difficulties in obtaining and paying for interpreters. Access to professional interpreters was very difficult if not impossible.

Asylum seekers commented on the time that legal representatives made available to them (‘I trust my lawyer she has time to talk to me and I can tell her everything’ EAS3), and this should be borne in mind when considering implementation of early legal advice, as it is clearly important. Will ELA mean that advisers have more time available because the procedure starts earlier, or less time because it has to be stretched over a longer period?

Early legal advice is of importance in Estonia at the pre-screening stage because of the potential problem of refoulement arising from the discretionary power of border guards, and because of the difficulty in obtaining legal support once in detention. It is vital for a legal adviser to be present at the time of the completion of the application form.

6. Conclusions

Early Legal Advice

Early legal advice can be a vital part of a high quality system of international protection and it should include, where possible, advice for people before they make an application. It should not be seen in isolation but as part of a fair and humane decision making process and therefore as an element of an integrated system. When in place, it increases the confidence of all parties in the decision making process and improves the quality of decisions. It is therefore beneficial for the decision maker as well as the asylum seeker. It can also assist in making the process less adversarial in that it enables all participants to see that they are collaborating in a process that leads to the determination of the need for protection. It does this by placing an emphasis upon the submission of evidence in advance of the first decision, including a detailed statement of claim, which enables the focus of the interview, and therefore the decision, to be upon the core and not peripheral issues. For the decision maker, the provision of a detailed and, where possible, a corroborated account, can reduce the possibility of doubt when deciding if the person is at risk of persecution or serious harm if returned to their country. It can also change what has been identified by many participants in this study as a 'culture of disbelief' into a culture of mutual respect.

However, early legal advice can be undermined by other elements of the asylum system. For example, the practice of dispersal - whereby an asylum seeker is moved away from the location of the legal advisor before the first decision - can make it difficult if not impossible to provide the support that is needed at this crucial stage. This was a particular problem if the provision of legal advice was connected to legal aid which may not continue and the loss of which may act as a disincentive for the legal advisor to engage with the case in the first place. In addition, detention and the use of a 'fast track' system for determining asylum claims undermined the effect of early legal advice as the time needed to properly engage in a case was not available or the restrictions imposed on access to those in detention militated against the quality of legal advice that could be given.

One of the factors which affected the suitability of early legal advice was the time allocated to the submission of a statement and supporting evidence and, in some cases, the delay in being able to obtain some evidence, such as medico-legal reports. It was found that the greater the flexibility in the process, the more likelihood there was of being able to ensure that all the necessary information was available before the decision maker at the initial, rather than simply at the appeal stage.

The legal advisor and the asylum seeker

Trust and confidence between the legal advisor and the asylum seeker were seen an essential component of the process. The advice and support given by the legal advisor reduced the fear of unknown for the asylum seeker and ensured that they were an active participant in the process. For some, there was difficulty in disclosing crucial information and therefore to be able to have a relationship with a legal advisor over a period of time can assist in enabling a fuller account at an earlier stage.

“The confidence of an asylum seeker in their legal advisor can also lead to greater confidence between the asylum seeker and the decision maker”

But a factor which interfered with the development of a relationship between the legal advisor and the asylum seeker was dispersal as the process of starting again with a new advisor can lead to a negative view of the whole asylum process and make it more difficult to engage. Similarly, where an advisor was changed for other reasons, this also undermined the confidence of the asylum seeker and the benefit of early legal advice.

The involvement of a legal advisor throughout a case can also assist in the development of expertise of the advisor with such cases. It also makes them more efficient in their preparation of a case which can assist the efficiency of the process as a whole. In addition, if the case proceeded to appeal, the conclusion was that the legal advisor would have a greater knowledge of the case by that stage and this would reduce the amount of work to be done to present the appeal.

Legal advice and legal information

It was stressed that legal advice per se was not the same as quality legal advice and the latter was more important than the availability of legal advice itself. In fact the view was expressed by some that bad legal advice was worse than no legal advice. Therefore unless the legal advisor was fully conversant with what needed to be determined in an asylum claim, then they did not assist the process. In addition, it was also found that there was a need to distinguish between legal advice and legal information. Information about the process, no matter how detailed and well intentioned, was not the same as a legal advisor using their particular expertise and knowledge to enable the asylum seeker to tell their story in their own words and advise and assist in supporting the application, including at critical stages such as the interview.

Legal advice and legal aid

In the countries examined, early legal advice was not always supported by the availability of legal aid. Where it was, such as in the UK, the criteria and restrictions surrounding legal aid meant that it was not always possible to provide the type of early legal advice which was considered to be the most appropriate. The main factor which impacted upon the availability of legal aid was the cost. One of the issues raised in this report was whether or not the calculation of cost can be limited to the amount spent on legal aid. It was considered by some that the cost of detention and dispersal and the longer term costs associated with challenging a poorly presented and determined decision were also relevant in deciding if the system was fair and efficient.

The benefit of early legal advice to the appeals process

This study has focused on early legal advice and therefore the determination of a claim for international protection at the first stage. It has not therefore directly sought to address the issue of early legal advice in the context of a challenge to an initial negative decision. However, comments were made which indicate the benefit that early legal advice may have even if the case proceeds on appeal. Some of these have been touched upon already. They include the availability of crucial evidence, including a statement of claim, and the focus upon the essential elements of a claim. In addition, there is also the benefit which arises from the greater knowledge of the case by the legal advisor and the confidence and ability of the asylum seeker to articulate their case on appeal because they have been encouraged to be a part of the process at an early stage.

“Therefore, even if early legal advice does not reduce the number of appeals against a first stage refusal, it enables the appeals body to focus on what is central to the case and not to engage too much in speculation or be distracted by peripheral issues”

The overall conclusion was that early legal advice had a positive impact on the outcome of a claim for international protection and that the benefit was for all those who had an interest in the proper determination of applications for refugee status and subsidiary protection.

7. Recommendations

7.1 State funding for early legal advice

Recommendation 1

The provision of independent legal advice should be seen as part of a fair and efficient asylum process and therefore state resources need to be made available to ensure that qualified lawyers, experienced in the law and practice of international protection, are available to those seeking asylum at the earliest opportunity.

Many EU member states are facing such pressure on public funds that legal advice, not just for foreign nationals, is under threat and in some cases has been withdrawn. The biggest barrier therefore to the introduction or development of early legal advice is the availability of funds. But, as many have also experienced, the more individuals are left to fend for themselves in complex legal systems, exacerbated by language and cultural problems in the case of asylum seekers, the longer the process becomes and that itself often ties up valuable state resources.

We started this report by looking at the context for the research and, in particular, addressed the issue of procedural justice and how those subjected to legal procedures can be encouraged or enabled to engage with the system. Part of that is ensuring that they have proper support from the outset which gives them the knowledge, confidence and trust to fully participate in the process and assist the decision maker to reach a decision that focuses on the main issues and is sustainable.

State funding does not necessarily need to be directly from state funds but it does need to be channelled through the state in order to ensure that it is seen as a priority and properly evaluated. There is an issue of quality about which the state also ought to be involved.

7.2 Ensuring the quality of early legal advice

Recommendation 2

Adapt the evaluation mechanisms available in states for the control of public funds to independent lawyers and organisations to ensure that state funding for early legal advice for asylum seekers is going to and properly administered by qualified lawyers with an expertise in the field.

Lawyers, by virtue of their independence, do not readily accept that the quality of their work should be open to scrutiny except, and this is sometimes lacking as well, by those for whom they act and, in line with their ethical professional standards, to their professional bodies. What has been seen in this research is that quality and consistency vary considerably and that impacts upon the asylum seeker and their ability to engage with the system but also upon the decision making process itself. In addition, whilst information about the process is invaluable, that cannot be substituted for legal advice given by a lawyer who has an interest and expertise in this particular area of law.

The systems available in states for ensuring the quality therefore need to be reviewed, including those set up for Continuing Professional Development, to increase the expertise of those who wish to receive public funds and provide advice, assistance and representation to asylum seekers.

Most states have systems in place for the evaluation of projects supported by public funds. The adaptation of those, to enable the provision of legal services to asylum seekers to be evaluated over a period of time, would assist in ensuring that those providing the advice are using public funds in a way that assists the asylum seeker to engage with the process and thereby assist the decision maker.

7.3 Encouraging partnership

Recommendation 3

The establishment of a protocol between the asylum agencies, government departments, UNHCR and relevant bodies including NGOs which have operated in or have a direct interest in early legal advice to establish a best practice model for the operation of early legal advice and its application and evaluation.

Some of the states which were examined in this research have experience of some form of early legal advice and therefore knowledge and expertise which should be drawn upon to set up and evaluate systems for the process of providing early legal advice for asylum seekers.

This research and report has concentrated upon the earlier stages of the decision making process and the role of legal advice and how asylum seekers are enabled to participate more fully in the process or see it as a barrier. In addition, there are others who have a direct interest in the quality of the initial decisions, including those who have responsibility for the determination of appeals or applications to the courts and those tasked with the responsibility of administering public funds. Professional bodies which oversee lawyers will also have an expertise and direct interest in the quality of the delivery of legal services which could inform this process.

The research for this report deliberately chose to obtain the views of those most directly affected by asylum decisions at the earliest stages including asylum seekers. The continued representation of their views is important and needs to be captured as part of the commitment to both partnership and quality.

7.4 Streamlining the procedure

Recommendation 4

Ensure that asylum determination is seen as part of an integrated system and that detention and dispersal does not detract either from the need for asylum seekers to engage confidently with the process or undermine the need for fair and efficient determinations.

It has been noted that the movement of asylum seekers within a country, for example, as part of a policy of dispersal or due to the use of detention, impacts severely upon their ability to engage with the process. It also affects the ability and indeed the willingness of lawyers to take on a case when they may not be able to offer a full service or fail to be paid for work done. Decisions therefore about whether to detain and when to disperse must be part of a streamlined service which recognises the need to protect the integrity of the decision making process. This is particularly pertinent in the UK, given the use of detention in any one of four countries, and dispersal far from original place of residence.

There is also a particular problem in Ireland due to Ireland being the only EU member state which has a split system in which asylum claims are considered and fully determined before the opportunity to apply for subsidiary protection is given. It now has in place a system for the provision of legal advice before interview and decision but that clearly comes after a full examination of the refugee claim and, as this report has shown, the damage is often done at that stage. For early legal advice to be effective, the decision making process needs to be able to address all applications for international protection at the earliest opportunity. That can only be done if they are in tandem with one another and not, as in the Irish case, several years apart.

Appendices

Appendix One

Asylum and legal advice in the EU - Emma Dunlop

1. ECHR Cases

Suso Musa v Malta

(Application No. 42337/12), Judgment, 23 July 2013

The applicant, an alleged Sierra Leone national, entered Malta irregularly by boat in 2011. Upon arrival, the applicant was arrested and given a document containing both a Return Decision and a Removal Order⁸¹. The Return Decision stated that the applicant may apply for a period of voluntary departure, while, the lower half of the same document contained a Removal Order based on the rejection of the applicant's request for voluntary departure⁸². However, the applicant at no point made a request for a voluntary departure period. As the Court noted in the background to the case:

the rejection was [...] automatically presented to him with the information regarding the possibility of making such a request. The applicant was never informed of the considerations leading to this decision or given any opportunity to present information, documentation and/or other evidence in support of a possible request for a voluntary departure period⁸³.

On the basis of the Return Decision and Removal Order, and in accordance with the Immigration Act, the applicant was detained. In December 2011, the applicant's asylum application was rejected by the Office of the Refugee Commissioner. In April 2012, the applicant's appeal against that decision was rejected by the Refugee Appeals Board.

The applicant alleged that his detention was in violation of Article 5§1 of the Convention, and that he had not had an effective means of challenging its lawfulness as provided for in Article 5§4⁸⁴.

After determining that a violation of Article 5§4 had occurred, the Court drew attention to "the apparent lack of a proper system enabling immigration detainees to have access to effective legal aid":

"Indeed, the fact that the Government were able to supply only one example of a detainee under the Immigration Act making use of legal aid – despite the thousands of immigrants who have reached Maltese shores and have subsequently been detained in the past decade and who, as submitted by the Government, have no means of subsistence – appears merely to highlight this deficiency. The Court notes that, although the authorities are not obliged to provide free legal aid in the context of detention proceedings (see *Lebedev v. Russia*, no. 4493/04, § 84, 25 October 2007), the lack thereof, particularly where legal representation is required in the domestic context for the purposes of Article 5 § 4, may raise an issue as to the accessibility of such a remedy (see *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, § 141, 22 September 2009, and *Amuur v. France*, 25 June 1996, § 53 in fine, Reports of Judgments and Decisions 1996-III).⁸⁵"

Aden Ahmed v Malta

(Application No. 55352/12), Judgment, 23 July 2013

The applicant, a Somali national, entered Malta irregularly by boat in February 2009 and was subsequently detained. Her application for refugee status was rejected in May 2009 by the Office of the Refugee Commissioner. Shortly thereafter, the applicant escaped from detention and travelled irregularly to the Netherlands. On her arrival she sought asylum. On 11 February 2011, the applicant was returned to Malta under the Dublin II regulation and again placed in detention.

The applicant complained of a violation of Article 3 of the Convention in respect of her detention in Malta. The applicant further alleged that her detention was not in accordance with Article 5§1, and that she had not had an effective remedy as provided for in Article 5§4 to challenge the lawfulness of her detention⁸⁶.

In the course of its consideration of the alleged violation of Article 3, the Court noted, in terms similar to those applied in *Suso Musa v Malta*:

The Court is struck by the apparent lack of a proper structured system enabling immigration detainees to have concrete access to effective legal aid. Indeed, the fact that the Government were able to supply only one example of an immigration detainee making use of legal aid (moreover, in different and more favourable conditions than those of boat people) despite the hundreds of immigrants who reach the Maltese shores each year and are subsequently detained, and who often have no means of subsistence, only highlights this deficiency⁸⁷.

The Court found, *inter alia*, violations of Article 3 of the Convention in respect of the Applicant's detention, Article 5§1, and Article 5§4.

Hirsi Jamaa and Others v Italy

(Application No. 27765/09), Judgment, Grand Chamber, 23 February 2012

This case concerned the Italian authorities' transfer of eleven Somali nationals and thirteen Eritrean nationals to Libya after their interception 35 nautical miles south of Lampedusa. The applicants alleged that their transfer to Libya was in violation of Article 3 of the Convention and Article 4 of Protocol No. 4, and that they were denied a remedy consistent with Article 13 of the Convention. The Grand Chamber determined that there had been a violation of Article 3 of the Convention on account of the fact that the applicants were exposed to the risk of being subjected to ill-treatment in Libya. The Grand Chamber also found violations of Article 4 of Protocol No. 4, and Article 13 taken together with Article 3 of the Convention and Article 4 of Protocol No. 4.

In his Concurring Opinion, Judge Pinto de Albuquerque remarked:

"For the refugee status determination procedure to be individual, fair and effective, it must necessarily have at least the following features: (1) a reasonable time-limit in which to submit the asylum application, (2) a personal interview with the asylum applicant before the decision

on the application is taken, (3) the opportunity to submit evidence in support of the application and dispute evidence submitted against the application, (4) a fully reasoned written decision by an independent first-instance body, based on the asylum seeker's individual situation and not solely on a general evaluation of his or her country of origin, the asylum seeker having the right to rebut the presumption of safety of any country in his or her regard, (5) a reasonable time-limit in which to appeal against the decision and automatic suspensive effect of an appeal against the first-instance decision, (6) full and speedy judicial review of both the factual and legal grounds of the first-instance decision, and (7) free legal advice and representation and, if necessary, free linguistic assistance at both first and second instance, and unrestricted access to the UNCHR or any other organisation working on behalf of the UNHCR.

These procedural guarantees apply to all asylum seekers regardless of their legal and factual status, as has been recognized in international refugee law, universal human rights law and regional human rights law.” (footnotes omitted)⁸⁸

M.S.S v Belgium and Greece

(Application No. 30696/09) Judgment, Grand Chamber, 21 January 2011

M.S.S, an Afghan national, entered the European Union through Greece in 2008. The applicant was detained for one week in Greece and then issued with an order to leave the country. He at no point applied for asylum in Greece. The applicant subsequently transited through France and arrived in Belgium, where he applied for asylum. Upon confirming that the applicant had been registered in Greece, the Belgian Aliens Office submitted a request to the Greek authorities to take carriage of his asylum application. In April 2009, UNHCR sent a letter to the Belgian Minister for Migration and Asylum Policy criticising the deficiencies of the asylum procedure and conditions of reception of asylum seekers in Greece, and recommending the suspension of transfers to Greece. In May 2009 the Aliens Office decided not to allow the applicant to stay in Belgium, and issued an order directing him to leave the country on the grounds that Greece, not Belgium, was responsible for examining his asylum application⁸⁹. The applicant was transferred to Greece in June 2009. The applicant alleged that his expulsion to Greece by Belgian authorities was in violation of Articles 2 and 3 of the Convention. He further submitted that he had been subjected to treatment in Greece that was in violation of Article 3, and complained of a lack of remedy under Article 13 which would enable him to have his complaints examined.

In the course of its judgment, the Grand Chamber noted that problems accessing legal aid were one of the hindrances facing asylum seekers attempting to navigate the asylum procedure in Greece. In particular, the Grand Chamber found that the first interview with asylum seekers in Greece “is often held in a language the asylum seeker does not understand”, and that “in the absence of any legal aid [applicants for asylum] cannot afford a legal adviser and are very seldom accompanied by a lawyer⁹⁰.” The Grand Chamber further noted that:

“[a]s to access to the [European Court of Human Rights], although any asylum seeker can, in theory, lodge an application with the Court [...] it appears that the shortcomings mentioned above are so considerable that access to the Court for asylum seekers is almost impossible. This would explain the small number of applications the Court receives from asylum seekers and the small number of requests it receives for interim measures against Greece⁹¹.”

The Grand Chamber referred to reports to the effect that the legal aid system for lodging an appeal with the Supreme Administrative Court in Greece was deficient⁹², and noted as a shortcoming in access to the asylum procedure that “lack of legal aid effectively depriving the asylum seekers of legal counsel⁹³”.

Discussing “whether, as the Government have alleged, an application to the Supreme Administrative Court for judicial review... may be considered as a safety net protecting him against arbitrary refoulement⁹⁴”, the Grand Chamber noted:

“although the applicant clearly lacks the wherewithal to pay a lawyer, he has received no information concerning access to organisations which offer legal advice and guidance. Added to that is the shortage of lawyers on the list drawn up for the legal aid system ... which renders the system ineffective in practice. Contrary to the Government’s submissions, the Court considers that this situation may also be an obstacle hindering access to the remedy and falls within the scope of Article 13, particularly where asylum seekers are concerned⁹⁵.”

The Grand Chamber found, inter alia, a violation by Greece of Article 13 in conjunction with Article 3 of the Convention because of the deficiencies in the asylum procedure followed in the applicant’s case, and the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application and without any access to an effective remedy.

Abdolkhani and Karimnia v Turkey

(Application No. 30471/08), Judgment, 22 September 2009

This case, brought by two Iranian refugees, addressed inter alia legal protections under Article 5§4 of the Convention. Discussing the arrest of the two applicants upon re-entering Turkish territory after a previous deportation, the Court noted:

“the applicants were not given access to legal assistance when they were arrested and charged, despite the fact that they explicitly requested a lawyer. Their inability to have access to a lawyer continued following their placement in the police headquarters in Hasköy⁹⁶.”

In assessing the applicants’ claim that they were not able to challenge the lawfulness of their detention, the Court noted that the applicants did not have access to a remedy through which they could obtain judicial review, as they were not informed of the reason for the deprivation of their liberty and were denied access to legal assistance during their detention⁹⁷. Determining that the Turkish legal system did not provide the applicants with a remedy whereby they could obtain judicial review of the lawfulness of their detention, the Court found a violation of Article 5§4⁹⁸.

2. CJEU Cases

An overview of *C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* (22 December 2010) is not provided here, given Elspeth Guild's extensive discussion in her paper.

We are not aware of any cases to date that directly address the legal representation guarantees in Article 15 of Council Directive 2005/85/EC.

3. Council Directive 2005/85/EC and Directive 2013/32/EU (Recast Directive)

A. Council Directive 2005/85/EC

Council Directive 2005/85/EC of 1 December 2005 addresses minimum standards on procedures in Member States for granting and withdrawing refugee status⁹⁹. This Directive has been repealed with effect from 21 July 2015 by Directive 2013/32/EU of 26 June 2013¹⁰⁰.

The key provisions of Council Directive 2005/85 as regards legal assistance are outlined below.

Preamble, Paragraph 13

[T]he procedure in which an application for asylum is examined should normally provide an applicant at least with: [...] the opportunity to consult a legal adviser or other counsellor, and the right to be informed of his/her legal position at decisive moments in the course of the procedure, in a language he/she can reasonably be supposed to understand.

Article 15

Right to legal assistance and representation

1. 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.

2. 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.

3. 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.

4. Rules concerning the modalities for filing and processing requests for legal assistance and/or representation may be provided by Member States.

5. 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.

6. Member States may demand to be reimbursed wholly or partially for any expenses granted if and when the applicant's financial situation has improved considerably or if the decision to grant such benefits was taken on the basis of false information supplied by the applicant.

B. Directive 2013/32/EU (Recast Directive)

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing of international protection ("Recast Directive") repeals Directive 2005/85/EC with effect from 21 July 2015¹⁰¹. Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the Recast Directive on a two-tiered track¹⁰².

Article 52 of the Recast Directive provides that applications lodged before 20 July 2015 and procedures for the withdrawal of refugee status started before that date shall be governed by the laws, regulations and administrative provisions adopted pursuant to Directive 2005/85/EC. Member States are to apply the laws, regulations and administrative provisions referred to in Article 51(1) of the Recast Directive to applications for international protection lodged and procedures for the withdrawal of international protection started after 20 July 2015 or an earlier date. The laws, regulations and administrative procedures referred to in Article 51(2) of the Recast Directive shall be applied to applications for international protection lodged after 20 July 2018 or an earlier date.

The key provisions of the Recast Directive as regards legal assistance are outlined below.

Preamble, Paragraph 25

[T]he procedure in which an application for international protection is examined should normally provide an applicant at least with: [...] the opportunity to consult a legal adviser or other counsellor, the right to be informed of his or her legal position at decisive moments in the course of the procedure, in a language which he or she understands or its reasonably supposed to understand; and, in the case of a negative decision, the right to an effective remedy before a court or a tribunal.

Article 12

Guarantees for Applicants

1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees:

(c) they shall not be denied the opportunity to communicate with UNHCR or with any other organisation providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned;

Article 19

Provision of legal and procedural information free of charge in procedures at first instance

1. In the procedures at first instance provided for in Chapter III, Member States shall ensure that, on request, applicants are provided with legal and procedural information free of charge, including, at least, information on the procedure in the light of the applicant's particular circumstances. In the event of a negative decision on an application at first instance, Member States shall also, on request, provide applicants with information – in addition to that given in accordance with Article 11(2) and Article 12(1)(f) – in order to clarify the reasons for such decision and explain how it can be challenged.
2. The provision of legal and procedural information free of charge shall be subject to the conditions laid down in Article 21.

Article 20

Free legal assistance and representation in appeals procedures

1. Member States shall ensure that free legal assistance and representation is granted on request in the appeals procedures provided for in Chapter V. It shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.
2. Member States may also provide free legal assistance and/or representation in the procedures at first instance provided for in Chapter III. In such cases, Article 19 shall not apply.
3. Member States may provide that free legal assistance and representation not be granted where the applicant's appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success.

Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority which is not a court or tribunal, Member States shall ensure that the applicant has the right to an effective remedy before a court or tribunal against that decision.

In the application of this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

4. Free legal assistance and representation shall be subject to the conditions laid down in Article 21.

Article 21

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

1. Member States may provide that the legal and procedural information free of charge referred to in Article 19 is provided by non-governmental organisations, or by professionals from government authorities or from specialised services of the State.

The free legal assistance and representation referred to in Article 20 shall be provided by such persons as admitted or permitted under national law.

2. Member States may provide that legal and procedural information free of charge referred to in Article 19 and free legal assistance and representation referred to in Article 20 are granted:

- (a) only to those who lack sufficient resources; and/or
- (b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.

Member States may provide that the free legal assistance and representation referred to in Article 20 is granted only for appeals procedures in accordance with Chapter V before a court or tribunal of first instance and not for any further appeals or reviews provide for under national law, including rehearings or reviews of appeals.

Member States may also provide that the free legal assistance and representation referred to in

Article 20 is not granted to applicants who are no longer present on their territory in application of Article 41(2)(c).

3. Member States may lay down rules concerning the modalities for filing and processing requests for legal and procedural information free of charge under Article 19 and for free legal assistance and representation under Article 20.

4. Member States may also:

- (a) impose monetary and/or time limits on the provision of legal and procedural information free of charge referred to in Article 19 and on the provision of free legal assistance and representation referred to in Article 20, provided that such limits do not arbitrarily restrict access to the provision of legal and procedural information and legal assistance and 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.

5. Member States may demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.

Article 22

Right to legal assistance and representation at all stages of the procedure

1. Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such

under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision.

2. Member States may allow non-governmental organisations to provide legal assistance and/or representation to applicants in the procedures provided for in Chamber III and Chapter V in accordance with national law.

Article 23

Scope of legal assistance and representation

1. Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, who assists or represents an applicant under the terms of national law, shall enjoy access to the information in the applicant's file upon the basis of which a decision is or will be made.

Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the Member States would be compromised. In such cases, Member States shall:

- make access to such information or sources available to the authorities referred to in Chapter V; and
- establish in national law procedures guaranteeing that the applicant's rights of defence are respected.

In respect of point (b), Member States may, in particular, grant access to such information or sources to a legal adviser or other counsellor who has undergone a security check, insofar as the information is relevant for examining the application or for taking a decision to withdraw international protection.

2. Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting that applicant, in accordance with Article 10(4) and Article 18(2)(b) and (c) of Directive 2013/33/EU.

3. Member States shall allow an applicant to bring to the personal interview a legal adviser or other counsellor admitted or permitted as such under national law.

Member States may stipulate that the legal adviser or other counsellor may only intervene at the end of the personal interview.

4. Without prejudice to this Article or to Article 25(1)(b), Member States may provide rules covering the presence of legal advisers or other counsellors at all interviews in the procedure.

Member States may require the presence of the applicant at the personal interview, even if he or she is represented under the terms of national law by a legal adviser or counsellor, and may require the applicant to respond in person to the questions asked.

Without prejudice to Article 25(1)(b), the absence of a legal adviser or other counsellor shall not prevent the competent authority from conducting a personal interview with the applicant.

4. UNHCR Refugee Status Determination Standards

A. UNHCR Procedural Standards

UNHCR's *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* ("Procedural Standards") establish transparent guidelines for UNHCR officers who conduct mandate RSD¹⁰³. The Procedural Standards are non-binding¹⁰⁴. UNHCR has been criticized for not acting in accordance with the Procedural Standards¹⁰⁵.

The Procedural Standards note that "applicants may be accompanied by a legal representative during the RSD interview" (4.3.3), and lay out minimum standards for legal representatives (4.3.3).

B. UNHCR Handbook

UNHCR has also published the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ("Handbook")¹⁰⁶. The Handbook is intended to guide government officials, judges, practitioners, as well as UNHCR staff in applying the refugee definition and conducting status determinations. The Handbook refers specifically to the importance of legal representation for women and children. It notes in particular that "in order to ensure that gender-related claims, of women in particular, are properly considered" in the RSD process, it "should be borne in mind" that "[i]t is essential that women are given information about the status determination process, access to it, as well as legal advice, in a manner and language that she understands"¹⁰⁷. The Handbook notes that children who are the principal applicants in an asylum procedure are also entitled to a legal representative¹⁰⁸.

5. Standards relating to Unaccompanied Minors

A number of instruments address the question of legal advice in the case of unaccompanied minors.

A. ExCom Conclusion on Children at Risk No. 107

The ExCom *Conclusion on Children at Risk* No 107 (LVIII), dated 5 October 2007, recommends that States, UNHCR and other relevant agencies take steps to ensure protection, including the development of "child and gender-sensitive national asylum procedures, where feasible, and UNHCR status determination procedures with adapted procedures including relevant evidentiary requirements, prioritized processing of unaccompanied and separated child asylum-seekers, [and] qualified free legal or other representation for unaccompanied and separated children..."¹⁰⁹.

B. UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum

The UNHCR *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*¹¹⁰ address procedures relating to unaccompanied children at various stages of the asylum process. The Guidelines note

that upon arrival, “a child should be provided with a legal representative”, and that “[t]he claims of unaccompanied children should be examined in a manner which is both fair and age-appropriate”¹¹¹. The Guidelines also note that an asylum seeking child should be represented by an adult who is familiar with the child’s background, and that access should also be given to a qualified legal representative¹¹². This latter principle “should apply to all children, including those between sixteen and eighteen, even where application for refugee status is processed under the normal procedures for adults”¹¹³.

C. UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers

The UNHCR *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers*¹¹⁴ specifically address the issue of unaccompanied minors. Guideline 6, which addresses the detention of persons under the age of 18 years, notes that a legal guardian or adviser should be appointed for unaccompanied minors, and that children who are detained benefit from the same minimum procedural guarantees as adults, as outlined in Guideline 5. Guideline 5 clarifies that the minimum procedural guarantees afforded to asylum-seekers in detention include the being informed of the right to legal counsel, and that “where possible”, asylum-seekers “should receive free legal assistance”.

D. UNHCR Handbook

The UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*¹¹⁵ provides that children who are the principal applicants in an asylum procedure are entitled to a legal representative¹¹⁶.

E. ICRC Inter-agency Guiding Principles on Unaccompanied and Separated Children

The ICRC Inter-agency Guiding Principles on Unaccompanied and Separated Children provide, under the heading “Refugee Status Determination”, that when assessing an individual child’s claim for refugee status, aspects that should be taken into account include: “the appointment of a legal representative as well as a guardian to promote a decision that will be in the child’s best interests”¹¹⁷.

F. Committee on the Rights of the Child, General Comment No 6

The Committee on the Rights of the Child General Comment No. 6, “Treatment of Unaccompanied and Separated Children Outside their Country of Origin”, notes that “in cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation¹¹⁸.” The unaccompanied or separated child should also, “in all cases, be given access, free of charge, to a qualified legal representative, including where the application for refugee status is processed under the normal procedures for adults”¹¹⁹.

G. EC Directive 2005/85/EC

Article 17 of EC Directive 2005/85/EC of 1 December 2005 outlines guarantees for unaccompanied minors. Member States shall “as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application (Article 17(1)(a)). Member States shall also “ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview” (Art 17(1)(b)). Member States may refrain from appointing a representative, *inter alia*, if the minor “can avail himself, free of charge, of a legal adviser or other counsellor, admitted as such under national law” (17(2)(b)).

H. Recast Directive

Article 25 of Directive 2013/32/EU of 26 June 2013 addresses the issue of unaccompanied minors. As regards an unaccompanied minor’s personal interview, Article 25(1)(b) notes that “Member States shall ensure that a representative and/or legal adviser or other counsellor admitted or permitted as such under national law” is present at the personal interview, and has an opportunity “to ask questions or make comments, within the framework set by the person who conducts the interview”. Article 25(4) provides that unaccompanied minors and their representatives shall be provided, free of charge, “with legal and procedural information as referred to in Article 19 and also in the procedures for the withdrawal of international protection provided for in Chapter IV”.

Appendix Two

Findings from UK ELAP - Patrick Jones

Analysis included:

83 Case-reviews following substantive interview made up of 51 applicants in ELAP cases and 32 applicants in non ELAP cases. This also covered interviews with 49 legal reps and 51 case-owners in ELAP cases.

Also:

- 1-1 interviews with 10 asylum applicants
- 1-1 interviews with 5 IJs and 1 informal focus group with 9 IJs
- 1-1 interviews with other stakeholders including LSC and NGOs

Experience of applicants

A higher proportion of ELAP applicants felt they were able to explain the reasons for their claim compared to non-ELAP applicants. This was linked to the availability of free early legal advice and the preparation of a witness statement in ELAP cases, suggesting that applicants felt better prepared as a result. The ELAP process also enabled more comprehensive involvement between applicants and their legal representatives earlier in the process. Improved relationships between case owners and applicants occurred when the applicant reported feeling better prepared for their substantive interview as a result of earlier legal advice. Overall, applicants welcomed the involvement of legal representatives within the substantive interview because they gained confidence and familiarity. There was a higher percentage of ELAP applicants that found having the legal rep present was helpful compared to non ELAP applicants who thought it might be helpful. Legal representatives also welcomed being involved.

The evaluation of ELAP did identify a significant increase in the rate of granting Discretionary Leave as well as a reduction in the refusal rate. Although no statistically significant relationship was found between the number of initial case refusals and number of appeals, fewer ELAP applicants (compared to non ELAP applicants) appealed following a refusal to grant asylum. The rate of refusal decisions associated with ELAP has led to a lower rate of appeals against intake, and therefore a lower overall volume of appeals. This could indicate that early legal advice can contribute to a reduction in the appeal rate against refusals. The lower volume of overall appeals linked to the reduced refusal rate was also associated with a lower volume of funded appeals. Reason include the applicant feeling that they had had a fairer hearing and/or as a result of advice from their Legal Representative. However the evaluation did not find that ELAP led

to fewer applicants appealing refusals of initial decisions, although there was a slight reduction in allowed appeals.

The evaluation found confidence in initial asylum decisions appeared higher in ELAP cases. Applicants, case-owners and legal reps all suggested that the ELAP process increased confidence levels in initial decisions and enabled better quality decisions to be made (particularly for more complex cases). Specifically, 57% of case owners believed that ELAP had improved their confidence in making a decision and enabled more sustainable decisions to be made, particularly for more complex cases. The UKBA's quality audit process also found that a greater proportion of ELAP cases included or appropriately considered evidence submitted in support of the claim. The EAP evaluation (the precursor to ELAP) also noted that case owners and legal representatives identified applicants as being able to put forward their case more fully as a result of being involved throughout the whole process.

Experience of legal representatives and case owners

ELAP increased confidence in the system for legal representatives. Legal representatives reported greater levels of confidence in decision making through ELAP and overall, felt that ELAP increased openness and transparency of decision making. Legal representatives (and case owners) reported that the main reasons for this increased confidence were as a result of their ongoing involvement in the case, the opportunity to communicate with case owners, and the ability to undertake further work if the case owner indicated they were initially minded to refuse. Legal Representatives particularly welcomed the opportunity to collaborate with case owners and referred to cultural change based on greater joint working and familiarity. This provided greater opportunities for collaborative working and the ELAP process certainly seemed to improve working relationships between legal representatives and case owners (with an increase from 21% in the baseline survey to 78% in the February 2012 survey of legal representatives reporting positive relationships with case owners).

The post interview meeting was well-received by the majority of case owners and legal representatives. The post interview stage of ELAP provided an opportunity for case owners and legal representatives to discuss the case and the initial decision and facilitated greater collaborative working. 78 per cent (38) of case owners believed that they had been/would be helpful for discussing the case. This rose to 98 per cent (47) for legal representatives, who placed most value in the post-interview meetings. While the ELAP evaluation did also highlight this as a particular concern raised

by case owners, in that the potential benefits of the pre-interview stage of ELAP had not been maximised, it should also be seen as a positive and necessary element of the ELAP process because it enables the legal representative to respond to the initial thoughts of the case owner following the substantive interview and to iron out any remaining issues pre decision. In this respect, the use of the post interview meeting to clarify issues and obtain documentation prior to decision was seen as positive by both legal representatives and case owners. Legal representatives also commented they were more likely to understand decisions, assisting them in deciding whether to grant funding for appeals or not.

Legal representatives and case owners also suggest that earlier legal advice, better communication and opportunities for contact also improved working relationships with applicants.

Legal representatives and case owners believed that funded appeals should reduce as a result of early legal advice. This is because they are involved throughout the whole case and therefore are more able to produce all evidence and arguments prior to the decision. However both also suggested that there was a need for more evidence to be front loaded, particularly at the pre-substantive interview stage which the evaluation found to be one of the weakest elements of the ELAP process. The evaluation suggested the need for clearer communication between legal representatives and applicants prior to the substantive interview, indicating that case owners were somewhat negative regarding the lack of evidence and discussion pre-interview, stating that it reduced the potential for shorter more focused interviews and increased decision making time after the substantive interview. Legal representatives (68%, 31 respondents) found the pre interview stage more useful than case owners (46%, 21 respondents), but still found the post interview stage more useful as it provided an opportunity to respond to initial thoughts of the case owner, including producing additional evidence to counter any identified reasons case owners might be looking to use to refuse applicants. The evaluation suggested the need for clearer communication between legal representatives and applicants pre interview and suggested encouraging witness statements to be completed within the ELAP timescale (at least 72 hours before the substantive asylum interview) to maximise the potential for more preparatory benefits to be realised. The LSC's file reviews found that where legal representatives did not front load evidence they often resorted to granting funding for an appeal to argue issues that could have been explored more fully earlier in the case, providing further evidence of the benefits of front-loading evidence and the need for the LSC

to encourage a funding regime that front-loads evidence. The evaluation also acknowledged that the pre interview stage might realise greater benefits in more complex cases, (where straightforward cases were identified as those where grants would be the norm based on clear country specific guidance), and therefore the need to build some flexibility into the system.

The importance of witness statements

Applicants, their legal representatives, case owners and wider stakeholders identified the benefits of witness statements as a key success of the process. The results of an online survey conducted as part of the evaluation process found that in 96% of cases (160 cases) that were granted public funding, case owners indicated that witness statements assisted their preparation for the substantive asylum interview, while non ELAP case owners also referred to the potential benefits that a witness statement would have provided. On a scale of 1–5, with 1 being the most beneficial, 66 per cent (105) of legal representatives and 65 per cent (89) of case owners ranked witness statements number 1 in terms of their benefits. The UKBA's own internal quality audit review of ELAP cases also referred to witness statements as the most beneficial aspect of the process. Witness statements added credibility to the asylum system, ensuring a minimum level of information/evidence was available at the earliest opportunity for all cases. The evaluation of the precursor pilot (EAP) to ELAP also reported that witness statements helped case owners to make well-reasoned decisions.

Most case owners and legal representatives interviewed through 1-1 interviews and focus groups commented that a good quality witness statement contributed to:

- a more focused substantive interview;
- the availability of more evidence; and
- a shorter decision time.

The substantive interview

Feedback obtained through the evaluation process indicated that credibility was improved by having the legal representative present at the substantive interview.

In the online survey, case owners reported that for 79 per cent (81 cases) they found legal representative's questions to be helpful.

Endnotes

- ¹ Article 1A of the UN Convention on Refugees defines a refugee. <http://www.unhcr.org/3b66c2aa10.html>
- ² 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. “Serious harm” is defined in Regulation 15 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>
- ³ In the UK Early Legal Advice Project, advisers were required to have accreditation at Level 2 (Senior Adviser) of the Immigration and Asylum Accreditation Scheme administered by Central Law Training on behalf of the Law Society
- ⁴ Interviews were concluded in May 2013 and therefore reflect opinions and experience at that time.
- ⁵ Braithwaite V. (2010) “Compliance with Migration Law” a Report for the Department of Immigration and Citizenship of Australia, July 2010. Available from http://www.immi.gov.au/media/publications/research/_pdf/compliance-migration-law.pdf
- ⁶ Curtis, Tyler, Murphy (2009) Nurturing regulatory compliance: Is procedural justice effective when people question the legitimacy of the law?
- ⁷ Murphy, Tyler, Curtis (2009) Nurturing regulatory compliance: Is procedural justice effective when people question the legitimacy of the law?
- ⁸ Morris, H. and Salomons, N. (2013) Difficult Decisions: a review of UNHCR’s engagement with Assisted Voluntary Return Programmes available from <http://www.unhcr.org/51f924209.html>
- ⁹ See http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm
- ¹⁰ 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 a stateless person (recast)
- ¹¹ Dublin II Regulation, Lives on Hold, A Comparative Report
- ¹² Meaning that the transfer cannot take place until the appeal has been determined and only if the decision to transfer still stands after the appeal has been concluded
- ¹³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0465:FIN:EN:PDF>
- ¹⁴ However, as will be seen from section 4 on Ireland, in practice legal advice is not given until the appeal stage in Ireland
- ¹⁵ Ireland failed to transpose the directive into Irish law within the required two years and was therefore referred by the European Commission to the European Court of Justice leading to Ireland finally introducing regulations transposing the directive in 2011.
- ¹⁶ The Early Legal Advice Pilot and the subsequent Project are examples of a country at least experimenting with measures which were more favourable than those under CEAS.
- ¹⁷ Guild E (2011) The Asylum Seeker’s Right to Free Legal Assistance and/or Representation in EU Law paper for the 9th International Association of Refugee Law Judges (IARLJ) World Conference, Bled, Slovenia 9-11th September
- ¹⁸ <http://fra.europa.eu/en/project/2012/asylum-seeker-perspective-access-information-and-effective-remedies>
- ¹⁹ FRA was established by Council Regulation (EC) No 168/2007 of 15 February 2007 as the successor to the European Monitoring Centre on Racism and Xenophobia (EUMC).
- ²⁰ FRA report
- ²¹ ECRE/ELENA Report on ‘Survey on Legal Aid for Asylum Seekers in Europe,’ 2010.
- ²² Edwards, A (2011) Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants
- ²³ May 2014: Court of Justice of the EU has opined, according to Advocate General Bot, a Member State may not, except in exceptional circumstances, rely on the lack of specialised centres in part of its territory in order to detain in prison a third-country national awaiting his removal, even with the consent of that third-country national – Joined Cases C-473/13 and C-514/13 and in Case C-474/13
- ²⁴ Immigration Removal Centres were previously known as Immigration Detention Centres. The name was changed to emphasise that detention is used as a means to removal although the length of detention can vary and removal may not be the final outcome.
- ²⁵ Collectively the network of Immigration Removal and holding centres (which are used to accommodate people for no more than seven days) are known as the ‘Detention Estate’.
- ²⁶ <http://www.biduk.org/162/bid-research-reports/bid-research-reports.html>
- ²⁷ Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants
- ²⁸ Institute for Race Relations <http://www.irr.org.uk/research/statistics/asylum/>
- ²⁹ Source for this section: ECRE Report – Survey on Legal Aid across Europe, October 2010. Updates may be required for changes taken place since that date.
- ³⁰ If the person is deemed not to be a refugee but is considered to be at risk of serious harm, they are granted humanitarian protection.
- ³¹ Formerly the UK Border Agency (UKBA)
- ³² UKBA used the term ‘case owner’ to define UKBA decision makers under the New Asylum Model whereby they would retain ownership of the case from initial application through to removal in an end-to-end process. UKVI have now abolished the NAM end-to-end determination system. There is no longer anyone within UKVI who retains ownership of cases and as a result ‘case owner’ terminology has been replaced with ‘case worker.’ For the purposes of this section, when documenting ELAP the term ‘case owner’ continues to be used as this was what was in place at the time. When discussing non ELAP processes the term ‘decision maker’ is used for UKVI staff responsible for making first instance decisions.
- ³³ <http://detentionforum.wordpress.com/2013/03/19/uks-scale-of-immigration-detention-2010-2012/>
- ³⁴ The relation between the Home Office and the implementation of immigration has been troubled. In 2008 the UK Border Agency (UKBA) was established as an executive agency of the Home Office as a single border control organisation with responsibility for visas, settlement and enforcement. Unlike many other executive

agencies as well as being responsible for delivering services it retained policy-making power and continued to be responsible for proposing legislation and guiding it through Parliament. From March 2012 enforcement was designated the responsibility of UK Border Force which was split from UKBA and answerable directly to ministers, but UKBA continued to have responsibility for in-country enforcement and have oversight of detention. In 2013 UKBA was abolished and its executive agency status removed and its work was returned to the Home Office and divided into two units: UK Visas and Immigration, and Immigration Enforcement.

³⁵ http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/Asylum_A-thematic-inspection-of-Detained-Fast-Track.pdf

³⁶ http://www.asylumaid.org.uk/pages/the_asylum_process_made_simple.html#Appeal

³⁷ Under LASPO legal aid is no longer available for representing separated children in their further leave to remain applications following a grant of discretionary leave if the application only engages A8 issues

³⁸ Exceptions include certain domestic violence applications, proceedings before the Special Immigration Appeals Commission and certain immigration applications for leave to enter or remain in the UK by victims of human trafficking

³⁹ Legal Aid Agency (LAA) has introduced some discretion to make payment in cases where permission is refused but the additional bureaucracy, restrictions and added risk will not alleviate the impact of this measure which is designed to act as a disincentive for undertaking judicial review work.

⁴⁰ <http://www.justice.gov.uk/about/laa>

⁴¹ For example, the cost of an interpreter

⁴² From April 2014, the Legal Aid Agency have also rolled out nationally a Voluntary Appointment System that can be used by UKVI screening staff and Migrant Help employees at initial accommodation to book legal appointments with legal aid providers that have registered with the scheme as a means to facilitate access to early legal advice.

⁴³ This section and the section on ELAP based on a presentation by Asylum Aid

⁴⁴ Solihull is a Borough close to Birmingham in the West Midlands

⁴⁵ NAM was first introduced as a pilot in May 2005 and rolled out across the UK in March 2007. It has subsequently been replaced.

⁴⁶ Only named advisers, accredited at Level 2 of the IAAS scheme, could participate.

⁴⁷ The LSC has since been replaced by the Legal Aid Agency

⁴⁸ ELAP evaluation page 44

⁴⁹ ELAP evaluation final report page 47.

⁵⁰ 'Fresh claims' are second or subsequent applications for asylum which can occur most often because the first claim was not properly considered or evidence not available. They are most likely to be the result of very severe time constraints which are unrealistic if evidence needs to be gathered from countries asylum seekers have had to leave quickly due to the specific danger they were, general turmoil or where contact with family members has broken down. Fresh claims are also the result of poor quality legal representation and decision making, sur place activities, changes in countries of origin and as a result of late disclosure e.g. a victim of torture being unable to engage with the process shortly after arrival in the UK.

⁵¹ ELAP evaluators found that offering early legal advice to applicants at an early stage could be difficult because 'the applicant can be confused and subject to 'information overload' (for example, having seen to their immediate priorities of obtaining information relating to accommodation and finance as well as explaining the specifics of their claim' (ELAP evaluation p. 37)

⁵² As the title suggests, discretionary leave is given at the discretion of the UKVI but under guidelines in order to try to ensure consistency in decision making.

⁵³ <http://www.migrationinformation.org/Feature/display.cfm?ID=740>

⁵⁴ ORAC in fact makes 'recommendations' to the Minister for Justice rather than 'decisions'. It is for the Minister to decide whether to follow the recommendation and issue the decision to refuse or grant refugee status. The Minister has not been known to have refused to follow a recommendation. We have used the terminology of 'decision' for the purpose of stylistic consistency.

⁵⁵ There has been draft legislation known as the Immigration, Residence and Protection (IRP) Bill, which has been before the Oireachtas (parliament) in different formats for more than ten years which contained the framework for a 'single protection procedure' whereby asylum and subsidiary protection claims will be considered together at the outset of the procedure. Whilst this report was being prepared, the Court of Justice of the EU (CJEU) issued a decision, following a referral from the Supreme Court of Ireland, regarding the 'split procedure' in Ireland. The judgment of the CJEU in Case C-604/12 H.N. will lead to a single procedure, probably by way of separate legislation before the end of 2014.

⁵⁶ Section 12 of the Refugee Act 1996 gives the Minister the because, on the face of it, the application is "manifestly unfounded". Prioritisation means that an application and any subsequent appeal is subject to shorter time constraints and the appeal will be decided without an oral hearing but there is an appeal on the papers.

⁵⁷ AIDA, the Asylum Information Database, run by the European Council on Refugees and Exiles (ECRE), contains up to date information about the asylum systems across the EU. Information about the general procedure and time limits for Ireland in 2013 can be found here <http://www.asylumineurope.org/reports/country/republic-ireland/regular-procedure#General>

⁵⁸ Or currently 3 months if it is in relation to a decision on subsidiary protection

⁵⁹ Leave applications for Judicial Review in all other areas of law are 'ex parte' meaning that they proceed with only the applicant being represented whose task is to persuade the judge that there is an arguable case that should be allowed to proceed to a full hearing.

⁶⁰ See the AIDA database <http://www.asylumineurope.org/reports/country/republic-ireland/regular-procedure#General>

⁶¹ http://www.unhcr.ie/images/uploads/news/Beyond%20Proof_Credibility%20Assessment%20in%20EU%20Asylum%20Systems_FULL.pdf

⁶² There are exceptions, for example, separated children.

⁶³ Civil Legal Aid Act (section 28(4)(a)).

⁶⁴ A service for the provision of advice in advance of a subsidiary protection interview was introduced through the RLS private practitioner scheme at the end of 2013. It has not yet been assessed. However, this does not fall into ELA as understood by this report.

⁶⁵ ECRE/ELENA Report on 'Survey on Legal Aid for Asylum Seekers in Europe,' 2010.

⁶⁶ The CJEU in Case C-604/12 H.N. expressed the view that applications for asylum and subsidiary protection must be capable of submission at the same time but that refugee status must be determined first. This is in line with the Qualification Directive which only allows for the grant of subsidiary protection if the person does not qualify as a refugee.

⁶⁷ IR3

⁶⁸ The IRC published a report, *Difficult to Believe*, in October 2012 based on an examination of decisions making by ORAC and the RAT in 86 asylum claims, which illustrates some of the historical problems with refugee status determination in Ireland, many of which are still awaiting a final determination of the need for protection. <http://www.irishrefugeecouncil.ie/wp-content/uploads/2011/08/Difficult-to-Believe-The-assessment-of-asylum-claims-in-Ireland.pdf> ORAC and the RAT have adopted the principles of the 2013 CREDO report and s.11B style provisions have been omitted from the 2013 Subsidiary Protection regulations.

⁶⁹ Court of Justice of the European Union, *M.M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General, C-277/11*, 22 November 2012. The case concerned the subsidiary protection process in Ireland, not the application for refugee status.

⁷⁰ One interviewee also complained of rudeness from a particular judge, to the extent that he requested he not hear his case.

⁷¹ This is a system where a person who is not a qualified lawyer works on the case and is often the main point of contact with the asylum seeker.

⁷² A preliminary analysis of IRC ELA files has been undertaken. The final results have not yet been published.

⁷³ The delay between an asylum claim and an application for subsidiary protection was considered by the CJEU in Case C-604/12 H.N. The case has now been referred back to the Supreme Court of Ireland which will determine what the delay should be between a refugee claim and consideration of an application for subsidiary protection.

⁷⁴ Although the Subsidiary Protection process in place since 14 November 2013 requires a fresh determination of the protection claim and not automatic reliance on the reasons for refusing refugee status, that does not mean that the original doubts cast against the asylum claim are ignored.

⁷⁵ http://pub.stat.ee/px-web.2001/Dialog/varval.asp?ma=PO0222&ti=POPULATION+BY+SEX%2C+ETHNIC+NATIONALITY+AND+COUNTY%2C+1+JANUARY&path=../_Databas/Population/01Population_indicators_and_composition/04Population_figure_and_composition/&lang=1

⁷⁶ <http://estonia.eu/about-estonia/society/citizenship.html>

⁷⁷ Act on Granting International Protection to Aliens, entered into force 01.07.2006, Art.88

⁷⁸ http://www.facebook.com/groups/240310752688901/437620436291264/?notif_t=group_activity

⁷⁹ <http://www.globaldetentionproject.org/countries/europe/estonia/introduction.html>

⁸⁰ Submission by the UNHCR for the Universal Periodic Review Estonia, July 2010

⁸¹ However, it should be noted that of the four asylum seekers interviewed, one had been given asylum and the other 3 were in process, i.e. there were no failed asylum seekers. As one person put it 'My application is still in the process and if I received a negative decision I would feel that it is unfair' (EAS3).

⁸² *Suso Musa v Malta*, App. No. 42337/12, Judgment, 23 July 2013, para. 7.

⁸³ *ibid.*

⁸⁴ *ibid.*, para. 8.

⁸⁵ *ibid.*, para. 3.

⁸⁶ *ibid.*, para. 61.

⁸⁷ *Aden Ahmed v Malta*, App. No. 55352/12, Judgment, 23 July 2013, para. 3.

⁸⁸ *ibid.*, para. 66.

⁸⁹ *Hirsi Jamaa and Others v Italy*, App. No. 27765/09, Judgment (Grand Chamber), 23 February 2012, p. 75.

⁹⁰ The Aliens Appeals Board in two judgments rejected applications by the applicant for the order to be set aside in September 2009. See *M.S.S v. Belgium and Greece*, App. No. 30696/09, Judgment (Grand Chamber), 21 July 2011, para. 29.

⁹¹ *ibid.*, para. 181.

⁹² *ibid.*, para. 182.

⁹³ *ibid.*, para. 191.

⁹⁴ *ibid.*, para. 301.

⁹⁵ *ibid.*, para. 316.

⁹⁶ *ibid.*, para. 319.

⁹⁷ *Abdolkhani and Karimnia v Turkey*, App. No. 30471/08, Judgment, 22 September 2009, para. 114.

⁹⁸ *ibid.*, para. 141.

⁹⁹ *ibid.*, para. 142.

¹⁰⁰ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal of the European Union L 326/13. See <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>>, accessed 21 October 2013.

¹⁰¹ 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), Official Journal of the European Union L180/60, Article 53.

¹⁰² 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), Official Journal of the European Union L180/60, Article 53.

¹⁰³ Article 51(1) of the Recast Directive provides that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 1 to 30, Article 31(1), (2) and (6) to (9), Articles 32 to 46, Articles 49 and 50 and Annex I by 20 July 2015 at the latest. Article 51(2) provides that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Article 31(3), (4) and (5) of the Recast Directive by 20 July 2018. Member States are required to forthwith communicate the text of all such measures to the Commission.

¹⁰⁴ UNHCR, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate' (2003) <<http://www.unhcr.org/refworld/pdfid/42d66dd84.pdf>> accessed 18 October 2013.

¹⁰⁵ UNHCR notes that the Procedural Standards “should be implemented in all operations where UNHCR has responsibility to conduct RSD pursuant to its mandate” (emphasis added); *ibid*, Unit 1-4.

¹⁰⁶ See eg M. Smrkolj, “International Institutions and Individualized Decision-Making: An Example of UNHCR’s Refugee Status Determination” 9 *German Law Journal* 1779 (2008); “Document Re: Fairness in UNHCR RSD Procedures: Open Letter”, 19 *International Journal of Refugee Law* 161 (2007); Michael Kagan, “UNHCR’s Bangkok Office Defies the Right to Counsel” (RSD Watch, 19 February 2013), <<http://rsdwatch.wordpress.com/2013/02/19/unhcrs-bangkok-office-defies-the-right-to-counsel/>> , accessed 18 October 2013.

¹⁰⁷ UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ Geneva, 1979, reissued December 2011), <<http://www.unhcr.org/refworld/pdfid/4f33c8d92.pdf>> accessed 18 October 2013.

¹⁰⁸ *ibid*, p. 87.

¹⁰⁹ *ibid*, p. 168.

¹¹⁰ ExCom, Conclusion on Children at Risk No 107 (LVIII) (5 October 2007), (g), viii.

¹¹¹ UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (Geneva, 1997) <<http://www.unhcr.org/refworld/pdfid/3ae6b3360.pdf>> accessed 18 October 2013.

¹¹² *ibid*, 4.2.

¹¹³ *ibid*, 8.3.

¹¹⁴ *ibid*.

¹¹⁵ UNHCR, “UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, February 1999. Accessed via <<http://www.unhcr.org.au/pdfs/detention-guidelines.pdf>>, 21 October 2013.

¹¹⁶ UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ Geneva, 1979, reissued December 2011), <<http://www.unhcr.org/refworld/pdfid/4f33c8d92.pdf>> accessed 18 October 2013.

¹¹⁷ *Ibid*, p 168.

¹¹⁸ ICRC, Inter-agency Guiding Principles on Unaccompanied and Separated Children, January 2004, p. 60. Accessed via <http://www.icrc.org/eng/assets/files/other/icrc_002_1011.pdf>, 21 October 2013.

¹¹⁹ Committee on the Rights of the Child, General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children outside their Country of Origin, Section V(b), Appointment of a guardian or adviser and legal representative (arts. 18 2(2) and 20(1)), para. 36.

¹²⁰ *Ibid*, Section VI (c), Procedural Safeguards and support measures (art 3(3)), para. 69.





