Legal aid for asylum seekers in times of austerity

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1. Introduction

On 15 and 16 October 1999 the European Council (EC) held a special meeting in Tampere on the "creation of an area of freedom, security and justice in the European Union". One of the issues under debate was the creation of a common migration and asylum policy. Such policy was deemed necessary because "in a Europe with no internal borders, conditions for asylum seekers and refugees should be the same in all countries". Part and parcel of this policy was the establishment of a Common European Asylum System (CEAS), "based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement." The first phase of the CEAS, between 1999 and 2005, aimed to achieve "a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status". This would be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. In the longer term (second phase), "Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union."[1]

During this first phase a number of key legislative measures were taken, the four most important being the Reception Condition Directive (2003), the Qualification Directive (2004), the Asylum Procedures Directive (2005)[2] and the Dublin regulation

1 Source: http://www.europarl.europa.eu/summits/tam_en.htm, II. A Common European Asylum System, nos 14 and 15.

2 Council Directive 2003/9/EC of 27 Januari 2003 on minimum standards on the reception of applicants for asylum in Member States. 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

determining which Member State is responsible for examining an asylum application (2003).[3] Also important in this respect are the Temporary Protection Directive (2001)[4], the Returns Directive (2010)5 and the establishment of a European Refugee Fund in order to create solidarity between member states in this area.

Central to this paper is the right to legal aid, as enshrined in the Asylum Procedures Directive (APD). Specifically, we concentrate upon the question of what this measure has contributed towards that right for persons who request asylum in one of the EU member states. Has it added anything to that right? Has it merely confirmed an existing status quo? Or, more negatively, was it intended primarily to restrict access to legal aid and so limit the influx of asylum seekers from outside the EU? That, at any rate, was what many asylum lawyers feared.[6] Also, how have different member states translated the APD guidelines concerning legal aid into national law and practice? In short, has the Directive improved or worsened rights to legal aid, or left them unchanged?

For the initial survey which is the purpose of this paper, the above questions go too far. Instead, we confine ourselves to a description of the "right to legal aid" for asylum seekers – a term that we place deliberately between inverted commas for as long as its substance remains unexplored – before and after the first phase of the CEAS, and to identification of the complicating factors surrounding that right. In this respect we

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as persons who otherwise need international protection. Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

3 Council Regulation (EC) no. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

4 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of 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.

5 Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

6 Leimsidor (2009): "Refugee advocates immediately suspected… that such an attempt at harmonization would result in a search for the lowest, or most restrictive, common denominator in asylum policy and that little if any attention would be given to assuring access to asylum and a functional level of protection throughout Europe".

have adopted a broad interpretation of “legal aid”. This encompasses both legal assistance (consultation, advice) and representation and/or aid to present one’s case.

The rest of our paper is organised as follows. We begin with a brief description of the socio-economic and political context of the theme “access to justice”, as it relates to the initial application for asylum. This culminates with an assessment explaining why this combination is so explosive – and hence makes such an interesting amalgam. After that, section 3 is devoted to the judicial status quo in respect of legal aid for asylum seekers prior to the enactment of the CEAS directives. In section 4 we examine the impact of these directives, and the APD in particular, upon the “right” to legal aid in asylum cases. In so doing, we confine ourselves to the initial application for asylum and to known judicial reality. Since it would require a separate study, we are unable to go into the – perhaps even more interesting – issue of how the rules are implemented in practice. In section 5 we turn our attention to the reforms proposed for the second phase of the CEAS. Finally, we end by returning to our central question and answering it as best we can.

2. Economic and Political Context

Legal aid in times of austerity

The theme of this event, “legal aid in times of austerity”, is reminiscent of that of an ILAG conference held almost fifteen years ago: “How much justice can we afford?” In the Netherlands, with its relatively generous system of publicly funded legal aid, that question has now expanded to cover what is sometimes referred to as the “judicial chain” (chain theory; see Barendrecht and Van den Biggelaar, 2009). It is under this heading that various instruments are being applied in an effort to keep down the cost of judicial proceedings and legal aid. They include conflict prevention, with good public information and the legal empowerment of the citizen. The courts, too, are being given procedural tools to shorten the lapse of time between the start of a trial and the final verdict. And an experiment with proactive justice has been launched, whereby a member of the public initiating legal proceedings is invited immediately to a hearing at which the respondent institution is given the opportunity to rectify

whatever lapse has given rise to the suit. Public administrative bodies have been instructed to invest in clarity, customer-friendliness and open communications in order to prevent their contacts with members of the public descending unnecessarily into legal disputes. Conversely, all manner of channels are being used to remind the public that justice is an expensive commodity, to which they should not resort without good reason.

The latest move is a proposal to make court fees – the price of admission to the legal system – cover the actual costs involved. If this is indeed done, it would result in a multiplication of the current charges. Although this is an idea that has already attracted a lot of criticism (see Bauw, Van Dijk and Van Tulder, 2010), it is not yet known exactly how the revised system would work. However, the government has let it be known that there would a compensation scheme for people of limited means and that the arrangement would be designed to cover costs at the systemic level. After all, to seek to do so at the individual case level would result in certain categories of legal action becoming exorbitantly expensive – which is not the intended purpose of the proposed change. Nonetheless, any such measure is expected to reduce the overall caseload by about 10 per cent.[7] In criminal law, the Salduz ruling[8] has already resulted in a halving of the remuneration for legal aid at the police station. As the Dutch State Secretary of Security and Justice has pointed out in a commentary on the proposed measure, legal aid costs have to be found somewhere.[9] There is much more to be said on these topics than we can report within the scope of this paper, since we are focusing upon an area of the law in which – at first sight, at any rate – there seem to be few efficiency gains to be made.

The asylum issue, legal aid and times of austerity

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7 *Kamerstukken II* 2010/2011, 32609 VI, no. 3. (Dutch parliamentary papers)

8 The judgment in Salduz v. Turkey (ECHR 27/11/2008, app. no. 36391/02) was the first to establish the right to legal assistance during an initial police interview. Originally, there was some uncertainty concerning the exact scope of this ruling, but the (Dutch) government now appears to have accepted that suspects will indeed be provided with legal aid at this early stage.

9 Plenary debate with the Minister and State Secretary of Security and Justice, 11 April 2011, *Kamerstukken II* 2010/2011, 31753, no. 35, p. 32. (Dutch parliamentary papers.)

When it comes to applications for asylum, there is little apparent scope for mediation or conflict prevention. For both sides, it is all or nothing. Amongst politicians, this results in the assumption that asylum seekers are determined to carry on until the bitter end, doing all they can to prolong the proceedings for as long as possible so that they can sit them out in the country of first asylum. Whether or not that assumption is correct is not for us to answer; that is a question for another study. What we are able to state is that a more pragmatic approach to applying the procedural rules can be observed on the part of the courts, lower and higher, with shorter completion times as a result. But, as those noticing this trend also point out, that pragmatism generally works in favour of the government. The same applies to the matter of who should be afforded the benefit of the doubt in the event that details submitted are not 100 per cent certain. In this respect, the Dutch courts do not follow the same course as the European Court of Human Rights, which often gives the asylum seeker the benefit of the doubt in cases pertaining to Article 3 ECHR.[10]

None of this detracts from the fact that the legal aid costs associated with asylum law are difficult to keep under control. The number of cases pending at any one time is dependent largely upon circumstances over which the government here has little control, such as wars, civil conflicts and coups d'état. From an economic perspective, that makes legal aid vulnerable. For the person seeking justice, that vulnerability lies in the importance to them of receiving a fair hearing. Which, to put it dramatically, can be a matter of life or death. Moreover, unfamiliarity with the legal system here makes it difficult for an applicant even to realise that there may be shortcomings in the legal aid they are being offered, let alone to protest against the deficiencies. They are thus easy prey for charlatans and profiteers.[11] For the government, which pays for legal aid, that fact provides an additional incentive to ensure that its money is not being wasted. It is for this reason that asylum lawyers must comply with certain quality standards and that a limit has been placed upon the number of asylum cases any

10 Geertsema et al. (2010): "At the heart of the Dutch system is the notion that if the State Secretary produces reasonable grounds for believing that the story supporting the claim is unreliable and the asylum seeker presents plausible reasons why his story should be believed, then the State Secretary wins. In cases of doubt, the administration prevails. This is directly at odds with the Strasbourg approach, in which the asylum seeker is given the benefit of the doubt."

11 For a striking case in the field of immigration law in the US, see Abel (2008), chapter 3: Practicing Immigration Law In Filene's Basement.

one lawyer can take on in a given year.[12] Underlying the combination of legal aid and asylum law, then, are two conflicting issues. On the one hand there is the government's duty to offer asylum to those with a reasonable fear of persecution or torture, and to give them a fair chance to state their case. On the other there is the unavoidable fact that discharging that duty only becomes more complicated as the number of conflict and danger zones around the world increases. That complexity is now being further exacerbated by the political climate in much of Europe, where populist parties are increasingly shaping the agenda. In this respect, the European Council on Refugees and Exiles (ECRE) has written of "a growing public hostility towards asylum seekers, fuelled by hostile and inflammatory media coverage and a lack of political leadership on asylum in Europe".[13]

Even the traditionally highly regarded judiciary has come under fire. In the Netherlands, the tone was set by the PhD student Thierry Baudet, who wrote in a newspaper article about an "undemocratic" European Court of Human Rights that was extending its own powers in direct opposition to the wishes of national parliaments (read: the majority of the people). According to Baudet, that tribunal should instead be confining itself to its core tasks. By which it was clear from his piece that he meant condemning manifest violations of human rights, such as torture and political persecution (Baudet, 2010). This analysis prompted a variety of responses, both for and against Baudet's position, including several from Dutch MPs.[14] Subsequently, a motion was tabled in the Senate, and adopted almost unanimously, calling upon the government to continue its efforts to promote human

12 Conditions of Registration for Legal Aid Lawyers (*Inschrijvingsvoorwaarden advocatuur krachtens de Wet op de Rechtsbijstand*). Despite the existence of this regime, last year the Dutch Bar Association was compelled to disbar a lawyer who had claimed fees for a large number of asylum cases on which he had done little or no work. The Legal Aid Board, the regulatory body responsible for ensuring that legal aid funds are spent correctly, is now pressing fraud charges in this case and attempting to recover its money.

13 ECRE (2004). The tone of this report is summed up by its title: *Broken promises, forgotten principles*.

14 For: Dimitrov (2010), Murray (2010), Blok and Dijkhof (2011; these authors are VVD/Liberal MPs). Against: De Winter (2010), De Werd (2011), Recourt (2011; this author is a PvdA/Labour MP) and – in an attempt to widen the debate – Gerards (2011).

rights in accordance with its obligations under the ECHR and the jurisprudence of the European Court of Human Rights.[15]

Conclusion

Bound up within the theme of legal aid for asylum seekers are two paradoxes. The first concerns legal aid in general, as discussed earlier: when the economy is in poor shape, rising unemployment and more compulsory redundancies, problematic debts, bankruptcies, evictions and so on increase the pressure on the so-called “judicial chain”. In other words, there is a greater demand for legal aid precisely when there are fewer resources available to fund it. The second paradox, as alluded to by the ECRE, concerns the recipients of that aid. Times of austerity fuel public fear of, if not outright hostility towards, outsiders: eastern Europeans “taking our jobs”; asylum seekers supposedly being given priority in the allocation of social housing; immigrants flooding in to feed off “our” prosperity (Terlouw, 2010). Global recession, wars and other disasters spark migration flows that only serve to increase the pressure. This is the asylum paradox: when the demand for safe refuge is low, there is a greater readiness to provide it. But once hundreds or even thousands of displaced persons arrive asking for help, the welcome quickly evaporates.

It is in this context that governments have a duty to provide good legal aid, even though they inherently have a greater vested interest in satisfying their own electorate than they do in safeguarding the rights to a fair trial and to equality of arms for those seeking asylum either on their own borders or at the external frontiers of the European Union. Moreover, in the subsequent proceedings those governments are both parties to the individual case and policymakers determining the extent of the legal aid to be made available to applicants. In this situation, it takes exceptional integrity not to succumb to the temptation to be less than scrupulous in ensuring that asylum seekers have access to good legal aid. In the next section we examine the extent to which that integrity has been maintained.

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15 By Marie-Louise Bemelmans-Videc (CDA/Christian Democrat) on 10 May 2011: EK 32.502 / 32.500 V, B. Only the Liberal Party (VVD) voted against.

3. Legal Background: Judicial Instruments outside the CEAS

Legal aid as a precondition for a fair trial

There is a very long-standing realisation that a fair trial, access to the court and to legal aid are inextricably linked and that together they form a human right in and of themselves. It was about 125 years ago that the Dutch PhD student Geert Brouwer defined the basis of "the poor man's law" thus: "For a right that we call our own to have any true value, then we must also be able to enforce it. If we cannot, then that is well-nigh equal to deprivation of the right itself."[16] In 2009 McBride formulated the relationship between access to justice – which embraces the right to legal aid – and what he calls the rule of law as follows: "Without [full achievement of access to justice] the rule of law is undermined because the law concerned favours some over others without any rational and objective justification. Recognition that some sectors of society are particularly disadvantaged and vulnerable is a crucial first step to achieving access to justice for them." (McBride, 2009).

In the ECHR, this notion is enshrined in Article 13 (effective remedy): "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority."[17] "Effective remedy" does not necessarily mean access to the courts or to legal assistance, however. But that guarantee is given in Article 6: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Article 6 also contains a legal aid clause (paragraph 3), but this covers only criminal cases. It was therefore left to the European Court of Human Rights, following more or less the same line of reasoning as Brouwer, to rule that in civil cases, too, the right to a fair trial becomes a dead letter if the ordinary citizen, finding himself embroiled in some complex legal dispute, is unable to seek assistance. This principle was recognised in

16 Brouwer (1885), pp. 2-3. For the origins of the poor man's law, the author goes as far back as the ancient Greeks. But its principal source, he claims, is Rome, where rhetoricians on the Rostra provided advice free of charge in the open air.

17 The same stipulation can be found in Article 7 ICCPR. See also Articles 2 and 14 ICCPR.

the Airey case of 1979, and has since been developed through further jurisprudence. How exactly the right is interpreted and applied remains a matter for the member states, however. They may choose whatever form they like, just as long as the citizen faced by a suit that is "meritorious, but so complex as to be impossible to pursue without professional legal assistance" is not denied that assistance.[18]

The applicability of Article 6 is wide-ranging, the European Court of Human Rights having interpreted the term "civil rights and obligations" very broadly. It includes social rights law,[19] for example, although so far the court has not extended it as far as asylum cases.[20] Whilst there can be no certainty that things will not change, it seems unlikely that that will happen any time soon.[21] Indeed, the whole topic seems to have been rendered obsolete with the adoption of the Charter of Fundamental Rights and its inclusion in EU law upon the enactment of the Lisbon Treaty. As Barkhuysen and Emmerik noted in 2009, before that treaty and hence the Charter had become binding, "Article 47 [of the Charter] is a more modern provision than either Article 6 ECHR or Article 14 ICPPR. Moreover, although not binding, this charter is gaining in importance in the jurisprudence of the Luxembourg judges."[22] The Charter of Fundamental Rights has been a binding instrument since 1 December 2009.[23] For us, its most important provision is Article 47 (effective remedy and fair trial).

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18 Airey v. Ireland, judgment of 9 October 1979, Series A, vol. 32. Steel and Morris v. United Kingdom (app. no. 68416/01), 15 February 2005. See also Jacobs et al. (2010), p. 255.

19 Feldbrugge v. The Netherlands, judgment of 29 May 1986, Series A, no.99 (procedure about sickness benefit). For non-contributory benefits: Salesi v. Italy, judgment of 23 February 1993, Series A, no 257-A.

20 See the citations in Maaouia v. France, judgment of 5 October 2000 (2001) 33 *EHRR* 1037, par. 35.

21 This according to Boeles (1997). Jacobs et al. (2010, p. 253) are more pessimistic: "Despite the fact that Protocol 7 to the Convention was adopted only in November 1984 (…) the Court decided that the Protocol, which contains procedural guarantees applicable to the expulsion of aliens, indicated that the Contracting Parties did not regard such proceedings as being governed by Article 6."

22 Barkhuyzen and Emmerik in: Barkhuizen et al. (2009), p. 32.

23 Article 6, paragraph 1, of the Treaty on European Union states that "the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007".

This contains an explicit reference to legal aid: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. (...) Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

This obligation upon the member states implies an individual right. “Legal aid *shall* be made available...” – in other words, it becomes an entitlement – as long as two preconditions are met.

1. A personal criterion: the person seeking justice “lack[s] sufficient resources” to pay for their own legal representation. This implies that means testing is acceptable.
2. A case criterion: the aid must be “necessary to ensure effective access to justice”. In other words, there may be a test of sufficient complexity and/or interest.

A fair asylum procedure as a precondition for the right to asylum

Until very recently there was no recognised right to legal aid in asylum procedures. The EU Charter had not yet been incorporated into the European legal order and, as mentioned earlier, asylum seekers were unable to derive any rights from Article 6 ECHR. On the other hand, various international documents already referred to the obligation on the part of governments to afford asylum. From these, it could be inferred indirectly that any claim for asylum should be handled in accordance with a meticulous procedure. The exact status of these references, though, depends in part upon the nature of the document in which they are found. Obligations under international law may originate either from binding agreements or from a unilateral declaration by a state, which can be understood as an expression of its wishes and/or opinion. The latter may have no force in law, but they do have relevance for the law.

One of the most important non-binding instruments is the Universal Declaration of Human Rights**.** For this paper, its most relevant provisions are Articles 10 and 14.

The latter bestows the right “to seek and to enjoy in other countries asylum from persecution”, whilst Article 10 provides an entitlement “in full equality to a fair and public hearing by an independent and impartial tribunal”. As in the ECHR, this right is confined to “the determination of his rights and obligations and of any criminal charge against him”. According to Boeles, Article 10 is fully applicable in immigration procedures.[24] But he seems to have very few supporters on this point.

The UN Refugee Convention contains no provisions concerning an asylum procedure, stating only that a refugee may not be returned to a country where he has a well-founded fear of being persecuted (“refoulement”). It can be inferred from this that that an asylum seeker may only be returned after a fair procedure has determined that there is no risk of persecution. The obligation to have an asylum procedure was originally deduced from this prohibition of refoulement.

In fact, Article 9 of the Convention presupposes the existence of such a procedure “pending a determination by the Contracting State that the person in fact is a refugee…”. But this is all. Article 16, paragraph 1, affords refugees “free access to the courts of law”. Beware, though: it is under discussion if this is a procedural right only for *recognised* refugees (Battjes) or also for asylum seekers (Fernhout, Spijkerboer and Vermeulen, Boeles, Hathaway and Wouters).25

The so-called ExCom Conclusions issued by the Executive Committee of the UNHCR provide a more substantive interpretation of the bare provisions of the Refugee Convention. With regard to the procedure for the determination of refugee status, Conclusions 8 and 30 are particularly relevant.

The ExCom Conclusions have lost much of their direct significance in Europe since enforcement of the Asylum Procedures Directive; but we should not forget that such directives are applicable only within the EU, whereas ExCom Conclusions are important in all countries that have signed the Refugee Convention. The same can

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24 Boeles (1997), pp. 58-59.

25 Battjes (2006), p. 319, Fernhout (1990), p. 192 and 234-240; Spijkerboer and Vermeulen (1995), p. 379-384; Boeles (1997), p. 71-77; Hathaway (2005), p. 644-647 and Wouters, (2009), p.174.

be said of the *UNHCR Handbook*. This was the first, and at one time was the only, document to set out the criteria to be met by an asylum procedure – although it has to be pointed out that this publication makes no mention at all of legal aid.

Also interesting with regard to the right to an asylum procedure is Article 3 of the Dublin Convention: “Member States undertake to examine the application of any alien who applies at the border or in their territory to any one of them for asylum.” This may seem superfluous with the APD now in force, but it was the first legal provision explicitly to afford the right of access to an asylum procedure.

4. Legal Background: The APD and a Fair Asylum Procedure

General contents

As mentioned earlier, the Asylum Procedures Directive became part of the European legal order at the end of 2005. It divides asylum procedures in two categories: normal and special. Under the former, no derogation from procedural standards is allowed. Special procedures, however, do incorporate scope for derogation. One highly relevant question with regard to appeals procedures is whether they have suspensive effect. Remarkably, though, the APD leaves the issue open. It is up to the member states to decide on this point, in accordance with their international obligations (Article 39, 3a).

Moreover, this particular instrument is neither a framework directive nor or a more injunctive measure, but something in between. In some respects it allows the member states considerable discretion, whilst other provisions contain strict rulings such as the obligation to make use of certain grounds for rejection. Furthermore, several clauses are the result of compromise and on some subjects, suspensive effect amongst them, no compromise could be reached.

Procedural rights and the “right” to legal aid

The main standards in the Directive are the procedural rights mentioned in Articles 6-10 and, especially relevant for our subject, the limited right to legal assistance and representation described in Articles 15-17.

Article 15 (right to legal assistance and representation) imposes an obligation on the part of member states to provide legal aid, but leaves them free to organise various aspects of the modalities as they see fit. Article 16 (scope of legal assistance and representation) lists several supplementary conditions for that aid, but with some worded as obligatory and others as optional. Article 17 provides additional guarantees for unaccompanied minors seeking asylum.

This makes Article 15 APD the key provision governing the right to legal aid. For this reason, and to avoid any confusion, it is reproduced in full below.

Article 15 APD

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 that free legal assistance and/or representation is granted:
   (a) only for procedures before a court or tribunal in accordance with Chapter V [initial appeals procedures] 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 [means test]; and/or
   (c) only to legal advisers or other counsellors specifically designated by national law to assist and/or represent applicants for asylum [quality test]; 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.

Careful examination of these provisions reveals that a member state's obligation to carry on providing free legal aid (here: assistance and/or representation) following rejection on an initial asylum claim (the "negative decision") – or, viewed from the applicant's point of view, their right to guaranteed continuance of that assistance – is substantially limited by the preconditions listed in paragraph 3. In the context of the right to legal aid "which is necessary to ensure effective access to justice" (Article 47 EU Charter), the restrictions imposed by points b (read: only to those who pass the means test) and c (read: only by service providers who pass the quality test) are defensible. But what should we make of the right to limit further assistance only to initial appeals procedures? And how acceptable is the condition that "the appeal or review is likely to succeed"? The opportunity to impose a financial ceiling or time limit on legal aid would also seem to be contestable. In both cases it is stated that application of these conditions must not result in access to assistance or representation being "arbitrarily restricted", but it has to be questionable whether this stipulation is sufficient. Such questions can only be answered, though, in the light of

how the two clauses are actually put into practice. As in so many cases, the proof of the pudding is in the eating.

The APD and fair trial: commentary by ECRE

The ECRE report quoted earlier was released about six months before the APD entered into force. Its authors were critical of the way in which the new instrument sought to incorporate the fair trial principle into asylum procedures (ECRE, 2009). Their verdict on its procedural guarantees was as follows

> "Some limited safeguards have been provided within the Procedures Directive, such as the fact that decisions on asylum applications are to be taken individually, objectively and impartially, are to be given in writing and state the reasons in fact and in law for a rejection, including information on how to challenge a negative decision. Precise and up-to-date information is to be made available to personnel processing claims, who in turn must have knowledge of relevant standards in the field of asylum and refugee law. In addition, a concept of a general examination procedure is introduced to which all procedural safeguards included in the Directive apply (but which is still not applicable to all asylum seekers).
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> "However, there are many restrictions and exemptions allowed which provide limited rights to asylum seekers while safeguarding Member States' powers to derogate from the exercise of key obligations, meaning the Directive does not guarantee a fair and efficient asylum procedure for all…
>
> "The right to independent legal advice and representation is limited by the inclusion of a negative obligation, merely requesting Member States not to deny claimants the opportunity to communicate with UNHCR and by the absence of an express requirement to ensure the right to legal assistance of all asylum applicants. Member States have a limited obligation to publicly fund legal assistance and representation at appeal level only – an obligation they are nevertheless allowed to restrict to a few categories of cases, including ones where appeal or review is likely to succeed. Member States' obligation to

> inform applicants about the proceedings and the result of the decision by the determining authority extends only to informing them 'in a language (claimants) may reasonably be supposed to understand'. Interpretation services at all phases of the asylum procedure and during all interviews, including those conducted by border officials, have not been guaranteed. The right to a personal interview can be disregarded on a range of grounds, including 'where it is not reasonably practicable'. The right for an appeal to have a suspensive effect is not guaranteed, either. Finally, no grounds are specified setting out limits on Member States in detaining asylum seekers."[26]

Conclusion

There are two ways in which to assess the contents of the APD and the choices they enshrine. One is to count our blessings: the glass is half full, and it could have been a lot emptier. From this point of view, since 2005 there has existed at least a basic foundation for the guarantee of a "fair trial" for asylum seekers. One upon which we can build, in the best traditions of the EU. The other approach is to itemise all those points on which the APD falls short of guaranteeing a "fair trial" and, in that context, access to legal aid for asylum seekers. The first of these standpoints derives from an optimistic expectation that EU rules provide a framework for improvement, whilst the second reflects a more suspicious attitude, as expressed by the asylum lawyers we have quoted: that harmonisation will result in a "race to the bottom" (Leimsidor, 2009; see footnote 6).

The ECRE, which assessed the – then draft – APD on its merits, stated that the measure failed on four of the five minimum guarantees for a fair trial "from which there should *never* be derogation (even in so-called accelerated procedures): access to free legal advice, access to UNHCR/NGOs, a qualified and impartial interpreter, a personal interview and a suspensive right of appeal".[27]

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26 ECRE (2009), pp. 17-18.

27 Ibid.

In our opinion, there is little to be said against this argument. Our focus is not a fair asylum procedure in and of itself, but rather the right to legal aid as a tool in making that procedure fair. In this respect, our provisional conclusion is that the APD represents an important step forward in that for the first time it defines free legal aid as an entitlement in asylum cases. However, the scope of that right remains largely undefined. Whether the relevant provisions of the Directive actually provide a minimum guarantee is going to depend very much upon how the individual member states interpret them. For this reason, further research is required before any definitive statements can be made concerning the extent to which the APD has contributed in practice towards achieving fair trials in asylum procedures.

5. CEAS: Proposals for the Second Phase

In June 2007, the European Commission issued a green paper on the second phase of the CEAS.[28] In addition, a study looking at how the provisions of the APD were being incorporated into national regulations began almost as soon as the directive entered into force. The resulting report paints a disparate picture. “Some Member States stick to the Directive’s wording, hence making legal aid available only at the appeal stage. Others go beyond this standard, granting either legal aid or free legal advice in first instance procedures. While some countries do not apply a merits test before granting legal aid, other Member States do this and national systems vary considerably as regards the applicable threshold, appeal stages and authorities in charge. In most Member States a lack of sufficient resources is a formal precondition for benefiting from legal aid.”[29]

For the Commission, one major obstacle to achieving the much-desired “level playing field with respect to fair and efficient asylum procedures” is the fact that not every part of the APD is arranged clearly and consistently. “Some of the Directive’s optional provisions and derogation clauses have contributed to the proliferation of divergent

28 Commission of the European Communities, *Green Paper on the Future CEAS*, Brussels, 06/06/2007 COM (2007) 301 (final).
29 *Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC of 1 December 2005*. Brussels, 08/09/2010 COM (2010) 465, p. 15. This proposal was adopted on 21 October 2009.

arrangements across the EU. This is notably the case with… legal assistance and access to an effective remedy". The Commission concludes that "procedural divergences caused by often vague and ambiguous standards can only be addressed by legislative amendment."[30]

Accordingly, and based upon a thorough evaluation of its implementation, a proposal to recast the Directive was adopted in order to remedy the deficiencies identified. This is now awaiting the approval of the individual member states. Whilst it is not yet known how they will respond, it seems highly likely that various countries will seek to retain particular exemptions which they regard as essential within the context of their own specific legal aid systems.

6 Conclusion: Do Asylum Seekers benefit from the Legal Aid Provisions in the Procedures Directive?

We could have ended this paper with the above conclusion from the European Commission on the first phase of the CEAS. The overall verdict is that the net impact of the APD has been negative, even – and perhaps especially – as regards its legal aid provisions. Yet that is not the whole story, nor does it answer the question with which we began this paper: have asylum seekers in the 27 member states of the European Union gained anything at all from the APD's legal aid provisions? To answer this, we really need to know more about the actual status quo before and after implementation of the CEAS. Legal aid lawyers in countries that already had a reasonably well-developed system may be justified in complaining about the new regime, or in fearing a "race to the bottom". But it is not inconceivable that the "APD debate" could have shaken up the procedural situation in jurisdictions where previously there were few, if any, formal arrangements.

Moreover, the fact that one of the bodies to have observed that not all is well with legal aid in the EU happens to be the European Commission itself – and that that observation has prompted action – is a hopeful sign. Less hopeful, though, are some

30 Ibid.

of the noises being heard from behind the scenes concerning certain member states' attitude towards the proposed improvements. There is a lot at stake for all concerned, in terms of both substantive policy ("How many more asylum seekers can my country take?") and the financial impact, and there seems to be no let up in the resistance to surrendering hard-won established exemptions. Generally, it is the countries on the outer edges of the EU which have the most to fear from overgenerous legal aid provisions. After all, it is far easier to organise a self-supporting legal aid system for a thousand asylum seekers a year than for ten thousand or more.

On the other hand, European lawmakers cannot allow themselves the luxury of indefinitely postponing consideration of an issue that involves possible shortcomings from the perspective of human rights. To put it bluntly, if the legislature waits too long then there is a good chance that the courts will take it upon themselves to grant asylum seekers the rights they are demanding, pursuant to Article 47 EU Charter. Those with a good memory for the history of labour law will recall the Barber case of the 1990s. After the member states of the then European Economic Community had agreed that 1989 would be quite early enough to implement gender equality in the field of occupational pensions, Mr Barber decided to submit his grievance on the matter to the European Court of Justice. In this controversial case, which subsequently gave rise to a special "Barber Directive", the judges in Strasbourg ruled that equal treatment should have come into effect long ago, under Article 141 EC Treaty.[31] As one author wrote at the time, this was a typical case of the court "scalping the EU legislator" (Curtin, 1990). It is to be hoped that this time the European Commission – and the EU member states – do not let things go that far. That they accept their responsibility for this issue, and act in time.

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31 Barber v. Guardian Royal Exchange Assurance Group, ICR 616, ECJ Case 262/88, 17 May 1990.

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