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# Appeal in the Externalised Processing of Asylum Claims

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# Summary

This thesis approaches a field in refugee law, which is rather untouched by the researching community so far. The specific procedure scrutinised is the procedure allowing for asylum applications to be submitted at EU Member States' diplomatic and consular representations abroad. In the thesis this procedure goes under the name externalised processing. The specific aspect focused on is the possibility to appeal asylum applications, when the initial application was submitted at a representation abroad.

A legal analysis is undertaken in regard to whether persons in need of protection in fact have a legal right to apply for asylum at foreign diplomatic representations. Article 3 of the European Convention for Human Rights is accentuated as obliging states to issue entry visas for persons who otherwise would be tortured, as persons requesting an entry visa or asylum at an embassy is in fact subjected to the embassy state's jurisdiction. This conclusion may be drawn, as Article 1 obliges State Parties to grant everyone within their jurisdiction the rights and freedoms as defined in Section I of the Convention.

Moreover, if Article 13 is read together with Article 1 and 3, the conclusion may be drawn that this combination obliges State Parties to provide for an effective remedy to an applicant who is refused an entry visa and as a consequence risks to be subjected to torture. The State Parties may, however, to a great extent use their margin of discretion to decide what constitutes an effective remedy. Therefore such a remedy does not have to be appeal, but could be e.g. reassessment of the application, provided that it is effective.

Two models are outlined for externalised processing of asylum claims: the one-step model where the applicant will await the decision in the country where the application was submitted, and the two-step model where an initial visa decision will be taken, which if positive, allows the applicant to travel to the country of destination before the actual decision on her application has been taken. A number of pages with comparative material, comparing the appeal procedures for visa and territorial asylum appeals with appeals in externalised processing, allows for the conclusion that it is always possible to lodge an appeal against a negative decision on the actual asylum claim. However, four of the six states under scrutiny apply the two-step model, meaning that an initial decision will be made. For reaching a decision in the initial step the decision-taking authority will assess whether it is likely that the applicant will be granted asylum if she is admitted. Therefore, this initial phase has more in common with the territorial asylum procedure than with the visa procedure, but still all four countries apply rules similar to the visa procedure for appeals of this initial visa decision.

# Preface

As I have been involved in a study carried out by the Danish Centre for Human Rights (DCHR) on Positive Interception (working title), and as I am at the moment involved in an in-depth study for the European Commission on Externalised Processing, I have had the opportunity to learn a lot about different country practices in regard to the possibility to lodge asylum applications at diplomatic representations abroad. The procedural aspects of this procedure were, however, relatively unfamiliar to me. While I thought I would have some use of the knowledge I had already gathered in the field of externalised processing, and as I hoped that this thesis would be useful for the study I am currently involved in at the DCHR for the European Commission, I have settled for the subject appeal in the externalised processing of asylum claims.

I would like to thank all those who have contributed with information to this thesis, in particular the UNHCR Branch and Regional Offices and the Danish Immigration Service. A special thanks goes to Dr. Gregor Noll and Dr. Kim U. Kjær, the first one for inspiring me to write about this subject as well as for pushing me to finalise it, and the second one for sharing information with me. I also wish to thank Professor Göran Melander for being my supervisor. Moreover, I would like to thank the Raoul Wallenberg Institute for Human Rights for the opportunity to specialize in human rights law, the Norwegian Institute for Human Rights for providing me with a desk and computer, and finally the Danish Centre for Human Rights for the excellent working environment.

Finally, I wish to thank Anders for encouraging and morally supporting me, as well as my family for always believing in me.

# Abbreviations

BO	Branch Office
DCHR	Danish Centre for Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant for Civil and Political Rights
INS	Immigration and Naturalisation Service
NGO	Non-Governmental Organisation
OAR	Office for Asylum and Refuge
OFPRA	French Protection Office for Refugees and Stateless Persons
RO	Regional Office
UNHCR	United Nations High Commissioner for Refugees

# 1 Introduction

## 1.1 Background

As we are closing the borders of fortress Europe, trying to keep out what is publicly conceived as “illegal immigrants”, through restrictive immigration and asylum policies, we are slowly beginning to comprehend the effects of these policies on people with a genuine need for protection. The restrictive policies being adopted have introduced a number of measures, such as visa restrictions and carrier sanctions, aiming at restricting the number of immigrants reaching the territory of the European Union. These measures affect refugees and asylum seekers as hard as anyone else, if not even harder. Persons with a genuine need for protection do not have a legal possibility to enter the territory of the European Union, their only option for reaching safety being to turn to illegal means and methods, such as using forged documents and turning to human traffickers.

At the same time as the European Union through their restrictive policies force people in need of protection to make use of forged documents and human traffickers, it considers the use of these means and methods as augmenting problems given more and more attention. In order to come to terms with these problems, and to find a balance between the need to restrict immigration and the obligation to protect people fleeing from persecution, alternative solutions for refugees and asylum seekers are being scrutinised.

As immigration control has moved to the territories of third countries it would be quite logical to move the asylum procedure there as well, i.e. it should be possible for a person in need of protection to lodge an asylum application at a European diplomatic or consular representation in the applicant’s country of departure, be it her<sup>1</sup> country of origin or a third country (henceforth this procedure will be referred to as externalised processing).<sup>2</sup> In fact, a few Member States of the European Union have already introduced such procedures.

A possibility to apply for asylum at a representation abroad might, however, be meaningless if the legal safeguards guaranteeing the consistency and fairness of the procedure are not present, one such safeguard being the possibility to have a rejected application reviewed. To be able to lodge an

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<sup>1</sup> The female gender is used throughout the thesis, but should be understood as referring to both women and men.

<sup>2</sup> Currently there is no term defining the procedure allowing for asylum applications to be submitted at diplomatic and consular representations abroad. *Positive interception* is one term that has been used as a working title throughout the Danish Centre for Human Rights/UNHCR study in this regard. The European Commission on the other hand seems to favour the term *external processing*. As this thesis is focussing on the practice in EU Member States I have decided to apply the term external processing throughout this thesis.



appeal in case of a rejection contributes to the consistency and fairness, but in particular to the credibility of the whole procedure.

## **1.2 Objective**

There is not much knowledge about different country practices in regard to the possibility to lodge asylum applications at representations abroad, and even less knowledge about the possibility to lodge an appeal when such an application has been rejected. Hence, this thesis aims at exploring the procedural aspects in regard to appeals in externalised processing. The main objective being to outline the structures and compare differences and similarities of the externalised processing procedure and the two related procedures – the territorial asylum procedure and the visa procedure – with the aim to identify the appeal procedure that I find would be the most beneficial, from both the perspective of the asylum seeker as well as from the perspective of the destination state.

A preliminary objective of the thesis is to find out whether an asylum seeker in fact has a legal right to lodge an appeal against a rejection of her asylum application when this application was first lodged at a diplomatic or consular representation abroad. Furthermore the thesis seeks to explore whether the legal safeguards, the most important here being the possibility to appeal, are weaker for persons choosing to make use of the option to apply for asylum at a representation abroad than for persons taking the risk inherent in the use of illegal means and methods in order to reach the destination state.

In addition to this, the thesis aspires to inform the reader about the externalised processing option in general, and give some aspects of how diverse the procedures are, depending on which country's procedure is in focus. I hope this thesis will allow the reader to get a view of whether externalised processing offers a fair alternative for persons who would otherwise have to turn to illegal means and methods in order to reach safety.

## **1.3 Delimitation**

As externalised processing of asylum claims is only practiced by a few EU Member States I have accordingly chosen to limit the geographical scope of the descriptive material to these six states. These states, operating some form of externalised processing, which are under scrutiny in this thesis, are Austria, Denmark, France, the Netherlands, Spain and the United Kingdom.

As I wish not to make the descriptive part unnecessarily heavy I have limited the different types of appeal procedures compared to the three procedures specified above which I consider to be closely related, i.e. appeal in the territorial asylum procedure, appeal in the administrative procedure in

regard to visa applications, as well as appeal in the externalised processing procedure. Hence, the possibility to lodge an appeal against a rejected residence or work permit application will not fall within the scope of this thesis, even though these issues are often connected to visa issues.

In respect to the legal analysis of applicable provisions in international law in regard to externalised processing and appeals in this procedure I am limiting myself to international instruments applicable in the states concerned, including regional instruments focussing on the European region. I will not seek to find out whether this procedure, including the possibility to appeal, finds its legal justification in the national constitutions of the states under scrutiny.

## **1.4 Methodology**

In order to fulfil the aspirations as outlined above I have scrutinised a number of different sources. I started out with the descriptive report from May 2000 on *“Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries”* based on a study undertaken by the Danish Refugee Council. As a complement in this first phase I consulted the somewhat older *“Report on Asylum Procedures”* by IGC from September 1997. For supplementary information where those two reports were not sufficient in regard to the descriptive part on the asylum procedure, and for verifying the accuracy of that information, I have consulted other sources, mainly national aliens and asylum law, official websites of governments and NGOs, as well as information provided through a questionnaire responded to by relevant UNHCR regional and branch offices. For the information contained in the chapter on visa appeals I have mainly consulted official websites of governmental entities, in particular websites of the Ministries of Foreign Affairs.

For the legal parts on the right to seek asylum and the right to appeal I am basing my analysis on legal doctrine in international and refugee law. Moreover, I have scrutinised documents by in particular UNHCR, European Council on Refugees and Exiles (ECRE) and the Council of Europe. The use of case law is fairly sparse due to the nature of the asylum and visa procedures. However, a few judgements from the European Court of Human Rights (ECtHR) will be mentioned.

## **1.5 Disposition**

The thesis is divided into three main parts. Chapter 2, 3 and 4 serve as a background, while Chapter 5, 6 and 7 outline the descriptive material. The analytical part, including conclusions, is presented in the last chapter.



As the main focus of the thesis is appeal in externalised processing of asylum claims, I will start the thesis by visualising the need for externalised processing in the asylum field. Hence, Chapter 2 is focussing on the right to seek asylum and access to territory. The main issue being whether the European practice of restricting the access of potential asylum seekers to the territory of the European Union is undermining the right to seek asylum as outlined in international law. I will in particular concentrate on Article 14 of the Universal Declaration for Human Rights (UDHR) and the prohibition of refoulement. Furthermore, I will scrutinize measures taken by Member States in order to limit the access to the European Union, such as visa restrictions, carrier sanctions and pre-frontier training and assistance of document-checking officials.

Chapter 3 looks into the problematic of the right to appeal. Does such a right exist in the first hand, and if it exists does it also apply to asylum law and to externalised processing of asylum claims? While no explicit provision on the right to asylum has been included in the international conventions under scrutiny in this thesis, I will focus on the right to a fair trial and the right to an effective remedy in order to find out whether they imply a right to appeal. Moreover, the harmonization of the asylum procedure within the European Union deserves a closer look in regard to the impact it might have on the right to appeal in asylum cases.

Externalised processing of asylum claims is currently an exceptional measure, practiced by a few countries only, and quite unknown to the broad public. Hence, I allow myself to briefly describe this procedure in Chapter 4. The outline of the procedure will reflect the fact that there are no uniform rules governing the procedure. In fact there are as many different externalised processing procedures as there are states allowing for asylum applications to be submitted at their diplomatic and consular representations abroad. In order to visualise to what extent this procedure is practiced I am including a sub-chapter on the degree to which externalised processing is being used. At this stage I find it to be a good idea to include a part outlining the benefits and drawbacks of externalised processing as well.

In order to make possible a comprehensive analysis of the appeal procedure in externalised processing, as well as a meaningful comparison with the appeal possibility in other related areas, this thesis contains a number of pages with descriptive material. In Chapter 5 an outline of the appeal process in the territorial asylum procedure of six European Union Member States is presented. The possibility to appeal a rejection of a visa application in the same Member States is presented in Chapter 6. Chapter 7 finally offers an overview of the possibility to appeal a rejected asylum application in the externalised processing of asylum claims under the provisions of the same states as in Chapter 5 and 6. The comparative summary, at the end of Chapter 5, 6 and 7, has been included with a view to facilitate the smooth comprehension of the thesis. Those wishing to more thoroughly study the

appeal process in each country will find more details under each country section.

Finally I will conclude the thesis with an analytical part, where I will include my own suggestions for the optimal features of the appeal procedure in externalised processing.

## 2 Right to Seek Asylum and Access to Territory

The Member States of the European Union have been showing an increasing unwillingness to let potential asylum seekers reach their territory, by adhering to more restrictive practices trying to prevent all undocumented travellers from arriving in Europe. The effects of these restrictive practices are best visualised by comparing the numbers of asylum seekers arriving in Western Europe, a number that decreased from 692 000 in 1992 to 249 980 in 1997.<sup>3</sup>

In this Chapter I will scrutinize whether the European practice of restricting the access of potential asylum seekers to the territory of the European Union is undermining the right to seek asylum as outlined in international law. In the first part I will scrutinise international law in order to delineate the legal obligations of states in regard to admitting asylum seekers. In the second part I will outline the practices adhered to by the European states in order to prevent asylum seekers to reach the territory of the European Union.

### 2.1 Right to Seek Asylum

The Universal Declaration of Human Rights<sup>4</sup> (UDHR) states in its article 14 the right of everyone to seek asylum. This right to seek asylum does, however, not imply an obligation to grant asylum, nor does it imply a right to seek asylum in a state, on which territory the person in need of protection is not staying at the moment.

The European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>5</sup> (ECHR) does not contain a provision on the right to asylum, but in its Article 3 the principle of non-refoulement has been expressed. The Parliamentary Assembly of the Council of Europe has recommended that the right of asylum be incorporated into the ECHR. It has also stated the need for states to refrain from applying practices preventing a fair implementation of the right to asylum.<sup>6</sup>

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<sup>3</sup> Alfredsson, Gudmundur and Eide, Asbjørn (eds): *The Universal Declaration of Human Rights*, The Hague 1999, p. 288.

<sup>4</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

<sup>5</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

<sup>6</sup> Council of Europe: *Restrictions on asylum in the member states of the Council of Europe and the European Union*, Doc. 8598, 21 December 1999, p. 3.

While the ECHR and furthermore also the International Covenant for Civil and Political Rights<sup>7</sup> (ICCPR) do not contain a provision granting the right to seek asylum, the American Convention on Human Rights<sup>8</sup> and the African Charter on Human and Peoples' Rights<sup>9</sup> both realise the right to seek asylum, as well as the right to be granted asylum. The provision is weakened, though, in both Conventions by a reference to national law, allowing for states to disregard the provision through national legislation.

The 1951 Convention relating to the Status of Refugees<sup>10</sup> (Refugee Convention) does not contain a right to seek asylum. This right should, however, be considered to be implied, while the convention presupposes that the State Parties will offer protection to those who meet the refugee definition.<sup>11</sup>

As Article 14 of the UDHR and the non-refoulement principle, in particular as it is laid down in Article 3 of the ECHR, might have an impact on the European states and their asylum policies, these will be closer looked at below.

### **2.1.1 Article 14 of the Universal Declaration of Human Rights**

Article 14 of the Universal Declaration of Human Rights comprises the right to seek asylum. It states in its first paragraph that “[everyone] has the right to seek and to enjoy in other countries asylum from persecution.” The article does not entail an obligation to grant asylum, while this remains the exclusive privilege of states. One should understand the word ‘enjoy’ in the sense that one may enjoy asylum ones that right has been acquired.<sup>12</sup> Nothing more should be put into this provision, in particular not into the meaning of the word ‘enjoy’.

The article includes the right of any person to enter another territory in order to apply for asylum.<sup>13</sup> To interpret Article 14 as requiring the admittance of

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<sup>7</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>8</sup> Article 22 (7) of the American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 *entered into force* July 18, 1978.

<sup>9</sup> Article 12 (3) of the African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

<sup>10</sup> Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954.

<sup>11</sup> Summary records of the Third Committee of the third session of the General Assembly, UN doc. A/C.3/SR.109 and 110, 1948, pp. 335-6.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Supra*, p. 337.

someone who is situated outside the territory of that state to its asylum procedure would however be to push it too far.<sup>14</sup>

Even if Article 14 would include a requirement for states to admit persons situated abroad to enter the country's asylum procedure, it should be noted that the UDHR as such is not legally binding. While some provisions in it may have acquired status as customary law, and binding in that regard, the right to seek asylum is not considered to have acquired such status yet.<sup>15</sup>

Consequently, Article 14 is of no assistance when trying to define a right for persons in need of protection to submit asylum applications at diplomatic representations, and have them assessed by the state of the representation.

### 2.1.2 Prohibition of Refoulement

The principle of non-refoulement is considered a general obligation of all states while it has become part of customary international law.<sup>16</sup> Therefore, all states are obliged not to return a refugee to any country where she "is likely to face persecution or torture".<sup>17</sup>

According to article 33 of the Refugee Convention, expressing the prohibition of refoulement, the expulsion or return of "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened [...]" is prohibited. Rejection at the border might have as a consequence that the refugee ends up in her country of origin again. Even though the rejecting country does not send the person back to her country of origin, the rejection may lead to a series of events through which the refugee is rejected further on, and finally finds herself in her country of origin. It has been stressed by Morten Kjærum writing about article 14 of the UDHR that "[In] the light of the Vienna Convention [on the Law of Treaties], it seems clear that countries are violating the non-refoulement principle when a refugee at the border is denied entry against his/her will".<sup>18</sup>

A refugee, who has not even reached the borders, while she is not able to receive a visa from a country where she may find protection, will not benefit from the interpretation of the non-refoulement provision in the light of the Vienna Convention. In such a case the refugee cannot be denied entry at the border, while she in fact has not reached the border.

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<sup>14</sup> Council of Europe, supra note 6, p. 8.

<sup>15</sup> P. R. Ghandi: *The Universal Declaration of Human Rights at Fifty Years: Its Origins, Significance and Impact*, (1998) 41 German Yearbook of International Law 206, pp. 234-250. P.R. Ghandi provides an overview of the different approaches in regard to the status of the UDHR.

<sup>16</sup> Goodwin-Gill, Guy: *The Refugee in International Law*, Second Edition, Oxford 1996, p. 167.

<sup>17</sup> Supra, p. 117.

<sup>18</sup> Alfredsson and Eide, supra note 3, p. 294.

### **2.1.3 Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms**

A right to leave any country including ones own is an established principle defined in a number of international conventions.<sup>19</sup> No corresponding right of entry into states, not even for humanitarian reasons is however to be found in international law. The only occasion when a person possibly could claim such a right is, in accordance with Article 3 of the ECHR and Article 7 of the International Covenant for Civil and Political Rights (ICCPR), when she risks to be tortured if she is not admitted into another country.<sup>20</sup>

As the obligations of the ICCPR has been restricted to persons within the State Party's territory and subject to that states jurisdiction, Article 7 cannot be used by a person to claim a right to be issued an entry visa in case this person approaches the representation under threat of being tortured.

According to Article 1 of the ECHR the State Parties to the Convention "shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention." The European Commission has closer defined the meaning of this article, and stated that the passage "within their jurisdiction" shall not be interpreted as being limited to the national territory of the State Party concerned. Rather it should be interpreted as securing "the said rights and freedoms to all persons under their actual authority and responsibility".<sup>21</sup> Furthermore the Commission withheld that "authorised agents of the State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property."<sup>22</sup> When the staff at a representation issues or denies the issuance of an entry visa they are in fact exercising authority on behalf of their state. Consequently, a person requesting an entry visa at a European representation shall be subjected to all rights and freedoms as defined in Section I of the ECHR.

Article 3 of the ECHR is yet another expression of the non-refoulement principle. It states in its article 3 that "[no] one shall be subjected to torture or to inhuman or degrading treatment or punishment." This article falls within section I of the ECHR and therefore a State Part shall have a duty to secure that a person who requests an entry visa at its diplomatic

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<sup>19</sup> Article 2(2) of Protocol 4 to the ECHR; Article 12(2) of the ICCPR; Article 22(2) of the American Convention on Human Rights; Article 12(2) of the African Charter of Human and Peoples' Rights; Article 13(2) of the Universal Declaration of Human Rights (non-binding).

<sup>20</sup> Noll, Gregor: *Negotiating asylum: the EU acquis, extraterritorial protection and the common market of deflection*, The Hague 2000, p. 390.

<sup>21</sup> *W v. Ireland*, D&R 32 (28 February 1983), Application no. 9360/81, p. 211 (214-216), para 14.

<sup>22</sup> *Ibid.*; The definition of the term 'within the jurisdiction' has been further elaborated in ECtHR, Grand Chamber Decision as to the Admissibility of Application no. 52207/99 *Banković and Others v. Belgium and Others* (12 December 2001).



representation and who therefore falls under the State Party's jurisdiction will not in case of a denial be subject to torture or to inhuman or degrading treatment or punishment.<sup>23</sup>

In his doctoral dissertation "Negotiating Asylum", Gregor Noll visualises this conclusion with the example of a person under the threat of being tortured in her home country, who approaches the Swedish Embassy with the request for an entry visa to Sweden. In case a denial of entry visa for this person "has the direct consequence of exposing that person to torture" the Swedish Embassy must issue an entry visa for her in order to avoid a Swedish violation of Article 3 of the ECHR.<sup>24</sup> This view expands the scope of the non-refoulement principle.

The argumentation above should therefore force states to issue entry visas to persons fleeing torture who approach their representations with an asylum request. I doubt however, that many states would accept this interpretation of their legal obligation under Article 3 of the ECHR, in particular as it would expand their legal obligations to accept applications submitted outside their territory as well.

While there is no positive obligation within the EU *acquis* to issue entry visas for persons in need of protection from torture, there is, however, an opening allowing states to deviate from the common visa requirements as set out in the Schengen Common Consular Instructions and the Visa Regulations, for humanitarian reasons, in the national interest or because of international obligations.<sup>25</sup> Therefore, the above outlined interpretation of Article 3 may be complied with without breaking the Schengen Agreement. According to Gregor Noll "a Contracting Party *must* allow entry" in case international obligations are at hand requiring the state to admit a person on protection related grounds.<sup>26</sup> Furthermore, the European Council has in its Presidency Conclusions from the Tampere meeting in October 1999 emphasised that the Common European Asylum System being established should be "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"<sup>27</sup>.

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<sup>23</sup> I base my argumentation on a not yet published report by the Danish Centre for Human Rights (working title: *Positive Interception*) on the possibility to submit asylum claims at representations abroad.

<sup>24</sup> Noll, *supra* note 20, pp. 476-7.

<sup>25</sup> See Article 15 of the Convention implementing the Schengen Agreement of 14 June 1985, signed at Schengen on 19 June 1990, OJ L 239, 22.9.2000, p.1 [Schengen Convention], and Article 4 (1) of the Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, Official Journal of the European Communities, 21.3.2001, L 81/1 [Visa Regulation].

<sup>26</sup> Noll, *supra* note 20, p. 174.

<sup>27</sup> Tampere European Council, 15-16 October 1999: *Presidency Conclusions*, available on [http://europa.eu.int/council/off/conclu/oct99/oct99\\_en.htm#asylum](http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm#asylum), accessed on 4 January 2001.

## 2.2 Access to Territory

It is difficult to estimate how many asylum seekers that are prevented from submitting an asylum application in one of the EU Member States while they are denied a visa or not admitted to board a plane, as the crew fear a large fine for the airline company for carrying undocumented passengers. The only possible way for an asylum seeker to get to the territory of the European Union today seems to be by illegal means or methods.

In order for a person in need of protection to benefit from the regular asylum procedure and to be able to apply for asylum in accordance with this procedure, the person has to be able to present herself either in front of the authorities concerned with asylum questions within the country of destination or at the borders of this country. The possibility for a person in need of protection to access the territory of a Member State has in the last decades gradually been reduced. While leaving the practical problems that may arise aside, i.e. finding the means to finance a visa and the journey, and the possibility to leave the country, I will in this Chapter focus on those pre-entry measures effectuated by the EU and its Member States that impede the possibility for persons in need of protection to access the territory of the EU Member States.

Visa policies and carrier sanctions are two general policies practised in the member states of the European Union, and in particular regulated within the Schengen acquis. Furthermore, the pre-frontier training and assistance of officers involved in checking passenger documents contribute to the success of the European visa policies. These measures cause the exclusion of asylum seekers from the territory of the European Union/Schengen Countries and leave the only way remaining in order to reach this territory to make use of forged documents or human smugglers.

The UNHCR has underlined that admission is the first step required in order for a refugee “to enjoy and exercise fundamental rights and freedoms”. Furthermore, it has stated that “[this] suggests that the appropriate interpretation of provisions in the 1951 Convention dealing with non-refoulement, non-expulsion and non-penalization for illegal entry, is that the asylum seeker has to be admitted”.<sup>28</sup> The European policies tend not to take this into consideration as the restrictive practices of the European states aim at preventing undocumented travellers from entering the territory of Europe regardless of whether they may have a legal claim to refugee status.<sup>29</sup> These practices reflect the intensified efforts to harmonise the immigration and asylum practices on a European Union level.<sup>30</sup>

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<sup>28</sup> UNHCR Note on International Protection, Executive Committee of the High Commissioners Programme, Fortieth Session, A/AC.96/728, 2 August 1989.

<sup>29</sup> Council of Europe, *supra* note 6, p. 2.

<sup>30</sup> *Supra*, p. 4.

The visa restrictions, the carrier sanctions and the pre-frontier training and assistance undertaken by the EU/Schengen states will be explained in the following sub-chapters.

### 2.2.1 Visa Restrictions

New visa requirements have been introduced for nationals of refugee producing countries. In the past it was a less frequent requirement that nationals from a certain country had to show a visa issued by the country of destination in order to enter the territory of that country. Today visa is required of nationals from a number of countries, out of which many are sources of refugees.

A number of requirements make it extremely difficult for a person from a refugee producing country to be issued a visa.<sup>31</sup> First, she must have or be able to obtain a valid and genuine passport from the authorities in her home country. Second, a diplomatic representation of the country to which the person wishes to flee must be situated in the home country of this person. Third, the person must freely and without great danger be able to approach the representation. Fourth, she must also be able to await a decision on the visa application often for a considerable period of time. Fifth, the authorities in the country of destination must be willing to issue a visa to a person who is in danger of being persecuted in her home country. Finally, the authorities in the country of destination must be willing to accept that the person in question is not a refugee in the context of the Refugee Convention, while she is still within the territory of her country of origin.

Due to the effects on access to the Schengen territory, the general provisions of the Schengen acquis are of great importance for the asylum procedure. The representations of the Schengen countries are often instructed by the authorities in their home country not to issue a visa to a person for reasons other than those stated in the Schengen Common Consular Instructions. This excludes persons applying for reasons of persecution from receiving a visa.<sup>32</sup> While a person normally has to be situated at the border or within the country in order to have access to the asylum procedure, she will find it quite impossible to access this procedure in a legal way as visas are refused to all potential asylum seekers.<sup>33</sup>

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<sup>31</sup> Swart, A.: *The law of asylum and refugees: Present tendencies and future perspectives*, Council of Europe 1987, p. 9.

<sup>32</sup> See i.e. the Norwegian Ministry of Justice, which writes "[if] a visa is applied for reasons of persecution, such grounds fall outside the scope of a visitor's visa. Asylum applicants do not have a right to be granted a visa, since the right to asylum is limited to those applicants who are already situated in the country[...]"; Norwegian Ministry of Justice, Ot.prp.No.46 (1986-87), p. 116.

<sup>33</sup> Puntervold Bø, Bente: *The European Asylum Policies: The Right to Asylum is undermined by the Visa Policies*, paper presented at the Conference on Higher Education

Bente Puntervold Bø speaking on the Conference on Higher Education for Peace in Tromsø, Norway, shared her concern that the duty of states to respect the right to seek asylum is not met when asylum seekers are prevented in accordance with the current visa policies from entering the asylum procedure.<sup>34</sup>

### 2.2.2 Carrier Sanctions

Visa restrictions will by themselves not make a difference in the number of asylum applicants arriving in the member states of the European Union, but combined with carrier sanctions they are very efficient. Carrier sanctions, i.e. penalising the transportation of individuals travelling without the required documentation, has led to the careful scrutiny of passengers before boarding the plane or the ship, as the airline companies and ship-owners want to avoid the responsibility to return the undocumented passengers and in particular the large fines imposed for carrying these persons. All signatories of the Schengen Agreement are obliged to enact legislation imposing fines on carriers transporting undocumented passengers.<sup>35</sup> This makes it extremely difficult to arrive in any of the Schengen states without turning to illegal means and methods.

A controversy in this regard is what has been conceived as the privatisation of border controls, a function that should be the responsibility of the state.<sup>36</sup> The tasks of the passport and visa control carried out by the border police in the country of destination, is now performed by private companies, governed by economic winning and most likely less experienced in this task than the authorities. It is the staff of the airline company that, according to the prevailing order, decides whether someone has the required documents, as well as whether these documents are genuine. In case of doubt, the option not to admit the person on board the plane will be the best from an economical aspect.

UNHCR has criticised the carrier sanctions as shifting “the burden of determining the need for protection to those whose motivation is to avoid monetary penalties on their corporate employer, rather than to provide protection to individuals. In so doing, it contributes to placing this very important responsibility in the hands of those (a) unauthorized to make asylum determinations on behalf of States (b) thoroughly untrained in the nuances and procedures of refugee and asylum principles, and (c) motivated by economic rather than humanitarian considerations.”<sup>37</sup>

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for Peace in Tromsø, 4-6 May 2000, available at <http://www.peace.uit.no>, accessed on 4 January 2002.

<sup>34</sup> Ibid.

<sup>35</sup> See Article 26 of the Schengen Convention.

<sup>36</sup> Alfredsson and Eide, *supra* note 3, p. 289.

<sup>37</sup> UNHCR: *UNHCR, Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions)*, Geneva, 16 August 1991.

### 2.2.3 Pre-frontier Training and Assistance

Pre-frontier training and assistance programmes are other tools aiming at reducing the number of asylum seekers reaching the territories of the EU states. Such training will contribute to the detection of false visas and other travel documents. The training of officials is furthermore facilitated by the standardisation of the visa format on EU level, which has been brought about.<sup>38</sup>

The EU Council has adopted a non-binding instrument, a Joint Position<sup>39</sup> on pre-frontier assistance and training assignments, for the purpose of strengthening the pre-frontier assistance and training and make it more effective. Officers responsible for the document control of passengers travelling towards a EU destination, both officers from local authorities and officers representing the airline companies, will receive training and assistance in order to learn how to separate forged travel documents from genuine ones. Specialist officers from the Member States are sent to third countries to carry out this assistance and training. The costs of the training will be covered by the receiving states, the airline companies and/or the Member States.

The Schengen acquis has its own regulation complementing the EU Council's Joint Position. In a decision of the Schengen Executive Committee from October 1998<sup>40</sup> the need to post "liaison officers from the Schengen States" in third states in order to prevent and to fight the illegal immigration into the Schengen territory was defined. In the following decision of the Executive Committee from December the same year<sup>41</sup> the task of the Schengen Member States was outlined as appointing document advisers to be sent to third countries for the purpose of training officers of airline and shipping companies, consular representations of Schengen States, as well as border and immigration authorities at airports or seaports of states of departure, in forged documentation and in pre-boarding controls at airports and ports of exit.<sup>42</sup>

35 countries, and within them 46 locations, has been singled out as suitable places for posting of document advisers according to the decisions of the

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<sup>38</sup> Noll, supra note 20, p. 169.

<sup>39</sup> Joint Position of 25 October 1996 defined by the Council on the basis of Article K.3 (2) (a) of the Treaty on European Union, on pre-frontier assistance and training assignments. See Articles 1-3.

<sup>40</sup> Schengen Executive Committee: *Decision of the Executive Committee of 27 October 1998 on the adoption of measures to fight illegal immigration*, 27 October 1998.

<sup>41</sup> Schengen Executive Committee: *Decision of the Executive Committee of 16 December 1998 on coordinated deployment of document advisers*, 16 December 1998.

<sup>42</sup> Paragraph 1(a) of the Implementation Principles attached to the Decision of the Executive Committee of 16 December 1998 on coordinated deployment of document advisers. See also, Noll, supra note 20 p. 180.

Executive Committee. Gregor Noll has in 'Negotiating Asylum' observed that among these countries "we find the worldwide elite of refugee-producing countries".<sup>43</sup> While the Schengen decisions do not give any guidelines on how officials are to be instructed to react in cases when a person may be in need of protection, Gregor Noll finds an impending risk that these persons simply may be looked upon as undocumented migrants to be refused admission.<sup>44</sup>

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<sup>43</sup> Noll, *supra* note 20, p. 180. He goes on by stating that "[of] the 22 top refugee-producing countries of origin listed in the UNHCR 1998 statistics, six are represented on the list of locations: Democratic Republic of Congo, Pakistan, Sri Lanka, Tunisia, Turkey and Vietnam."

<sup>44</sup> *Ibid.*

### 3 The Right to Appeal

The increasing number of asylum seekers has in many states led to the abolishment of the appeal procedure for asylum cases, or a decrease in the number of levels of appeal, while other states has confined appeals to only consider legal issues, consequently abandoned the possibility to have the material facts of the case reviewed.<sup>45</sup>

There are few rules regulating the asylum procedure in international law. Therefore, the procedures applied in states vary to a great extent depending on the legal culture and due process traditions in the different states.<sup>46</sup> The only international instrument of importance, which emphasises everyone's right to seek asylum, is the UDHR, which, however, is not binding and says nothing about the procedure in asylum cases.

Neither the Refugee Convention, nor its Protocol contains any procedural requirements. However, an effective implementation of these instruments, which aim to protect and assure, without discrimination, fundamental rights and freedoms for refugees, implies the establishment of some kind of effective internal procedures.<sup>47</sup> Furthermore, UNHCR Executive Committee has recommended that the asylum seeker whose application has been rejected should be offered a reasonable time to "appeal for formal reconsideration" of a negative decision "either to the same or a different authority, whether administrative or judicial, according to the prevailing system".<sup>48</sup> Moreover, the applicant should be allowed to remain in the country pending the decision, and an appeal should entail suspensive effect. These are only recommendations and in no way binding for states. No requirements or recommendations were formulated about the identity and composition of the body to whom the decision could be appealed. Nor did the Committee say anything about the administrative or judicial nature of the appeal process.

Generally international law favours that asylum procedures permit appeals or petitions for review. Appeal or review is the best way of ensuring consistency in the determination, as well as a good way to correct wrongful decisions. In particular in fields such as those under the Dublin and Schengen schemes, where regional harmonization is aspired, the application of international rules will require some sort of appeals mechanism in order to ensure democratic and judicial control, as well as consistency in the

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<sup>45</sup> Goodwin-Gill, *supra* note 16, p. 332.

<sup>46</sup> *Supra*, p. 329.

<sup>47</sup> *Supra*, p. 326.

<sup>48</sup> Executive Committee Conclusion No. 8 (1977), Report of the 28<sup>th</sup> Session: UN doc. A/AC.96/549, para. 36. Compare with Council of Europe Recommendation no. R(81) 16 on the harmonization of national procedures relating to asylum, adopted by the Committee of Ministers on 5 Nov. 1981.

interpretations over the whole Dublin/Schengen territory. Not only the judicial aspects should be subject to appeal or review, but also the facts of the case. For this purpose Groendijk underlines the need for a regional mechanism for the Schengen and Dublin area.<sup>49</sup> It is not difficult to draw parallels to the national procedure, as a national asylum procedure not offering a possibility to appeal or have the asylum application reviewed will bring about poor democratic and judicial control, as well as no guarantees for consistency.

Nicholson and Twomey underline the need for uniformity in the refugee determination procedure as well as “in judicial remedies with a supervisory appellate structure to ensure consistency across the member states” in order to fulfil international obligations in regard to the non-refoulement provision. Furthermore they mean that as long as the legal protection of asylum seekers and the possibilities to appeal a negative asylum decision varies amongst Member States, the system where rejected asylum seekers are returned to the first safe country they reached while fleeing persecution may weaken their chances of ever finding protection from persecution.<sup>50</sup>

As there are no provisions in any international instrument stating the right of asylum seekers to appeal a rejection of their asylum application, it is necessary to have a closer look at other provisions in international law that might be of relevance. After a look through the international instruments I have come to the conclusion that the provisions stipulating a right to a fair trial and a right to an effective remedy are the only provisions, which might include the right to appeal. Therefore I will scrutinise these two rights below in order to find out whether they include a right to appeal, and whether this right is prevailing also in asylum cases. Moreover I will have a closer look at the EU harmonisation procedure for finding out its position in regard to asylum appeals. The ultimate objective of this chapter is to find out whether a right to appeal also prevails in cases where the asylum application was submitted at a representation abroad.

### **3.1 Right to a fair trial**

In this section a closer look will be taken at the provisions in the international instruments of relevance in order to find out whether the right to a fair trial includes a right to appeal, and if this right in case it exists also is at hands in asylum cases.

Article 10 of the UDHR states that “[everyone] is entitled in full equality to a fair, and public hearing by an independent and impartial tribunal, in the determination of her rights and obligations and of any criminal charge

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<sup>49</sup> Groendijk, C. A.: *The Competence of the EC Court of Justice with respect to inter-governmental Treaties on Immigration and Asylum*, 4 IJRL 531 (1992).

<sup>50</sup> Nicholson, Frances and Twomey, Patrick (eds.): *Refugee Rights and Realities. Evolving International Concepts and Regimes*, Cambridge 1999, p. 321.



against him”. It is not possible to read out from the provision whether the right to appeal should be implied, nor is there any case law in regard to the UDHR that would be helpful in this regard. By looking at other instruments of a binding character some conclusions may be drawn.

Article 14 of the ICCPR states that “everyone shall be entitled to a fair and public hearing” both in criminal charges and in suits at law determining the individual’s rights and obligations. The Human Rights Committee has in its General Comment 13 emphasised that this article has a wider scope than only criminal law, while it applies “also to procedures to determine their [individual’s] rights and obligations in a suit at law.”<sup>51</sup> However, Article 14(5) stating the right to have a case reviewed by a higher tribunal, expressly only applies in criminal cases.<sup>52</sup> The Human Rights Committee has indicated in the case *I.P. v Finland* (450/91)<sup>53</sup> that the right to appeal does not apply in civil matters. In that case the applicant complained while there was no way available to him to appeal a decision by an administrative tribunal on the tax assessment. The Human Rights Committee stated that “even were these matters to fall within the scope *ratione materiae* of article 14, the right to appeal relates to a criminal charge, which is not here at issue.” By analogy one may draw the conclusion that article 14(5) does not imply a right to appeal in asylum cases either, while these are of an administrative and not criminal character.

Article 6(1) of the ECHR states that “[in] the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing.” In the *Golder* judgement the European Court of Human Rights outlined the character of Article 6(1), explaining the right to a fair trial as a set of distinct rights which stem from the same basic idea and “which, taken together, make up a single right not specifically defined.”<sup>54</sup> There are two aspects of this right: one concerning the judicial procedure, requiring fair and public hearings, and one concerning the organization of the judiciary, requiring independent and impartial tribunals.<sup>55</sup> Article 6(1) does, however, not indicate a right of appeal. The European Court of Human Rights has stated that a right of appeal is not laid down and shall not be implied in Article 6.<sup>56</sup> The right to a fair and public hearing cannot therefore be said to include a right to appeal. However, in case appeal is provided for, the appeal

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<sup>51</sup> Human Rights Committee: General Comment 13 on Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc HRI\GEN\1\Rev.1 at 14 (1994), 2.

<sup>52</sup> “Everyone convicted of a *crime* shall have the right to his conviction and sentence being reviewed by a higher tribunal.”

<sup>53</sup> *I.P. v Finland*, Human Rights Committee Communication No 450/1991: Finland. 26/07/93. CCPR/C/48/D/450/1991.

<sup>54</sup> *Golder v. UK*, Judgement of 21 February 1975, Application no. 4451/70, Series A, no. 18, bullet point 28.

<sup>55</sup> Alfredsson and Eide, *supra* note 3, p. 223.

<sup>56</sup> *Belgian Linguistic Case*, Judgement of 23 July 1968, Application no. 1474/62, Series A, no. 6, p. 33; *Delcourt v. Belgium*, Judgement of 17 January 1970, Application no. 2689/65, Series A, no. 11, p. 14.

procedure must comply with the minimum standards as laid down in Article 6.<sup>57</sup>

Even if Article 6 would include a right of appeal, the argument that “civil rights and obligations” include the right to asylum, would meet opposition, while asylum in fact has been interpreted by the European Court of Human Rights not to include the right to asylum.<sup>58</sup>

The possibility to have a case reviewed by a higher tribunal has been included in Protocol 7 to the ECHR. The right to review is, like in the ICCPR, restricted to criminal offences.<sup>59</sup> Therefore, it does not affect the possibility to appeal in asylum cases.

Even though the UDHR, the ICCPR and the ECHR grants the right to a fair hearing, the provisions including this right has in none of these instruments been interpreted as including a right to appeal in administrative cases. From the outline above I conclude that an asylum seeker cannot base a claim that she has a right to appeal a rejected asylum application on the right to a fair trial. This conclusion consequently excludes the right to appeal for applicants who submitted their application at a diplomatic representation abroad as well. Simply said, an asylum seeker cannot claim a right to appeal based on the right to a fair trial, in case her asylum application has been rejected.

### 3.2 Right to an effective remedy

In this section a will deal closer with provisions in the international instruments of relevance in order to find out whether the right to an effective remedy includes a right to appeal, and if this right, provided it exists, also is at hands in asylum cases.

Article 8 of the UDHR states that “[everyone] has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” This article does not mention whether the possibility to appeal should be regarded as a part of the right to an effective remedy. David Weissbrodt has, however, come to the conclusion after comparing the article with the Spanish/Latin American legal principle *amparo*<sup>60</sup> that “Article 8 would include the right to

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<sup>57</sup> *Delcourt v. Belgium*, supra.

<sup>58</sup> *Maaouia v. France*, ECtHR, Judgement of 5 October 2000, Application no. 39652/98, paras. 35-39.

<sup>59</sup> See Article 2(1) of Protocol 7 stating that “[Everyone] convicted of a *criminal* offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal.”

<sup>60</sup> “The word “amparo” literally means favor, aid, protection, or shelter. Legally the word encompasses elements of several legal actions of the common law tradition: writ of habeas corpus, injunction, error, mandamus, and certiorari. There are five types of “amparo” suits: 1) “amparo” as a defense of individual rights such as life, liberty, and personal dignity; 2)

review of judicial decisions, and to petition against administrative decisions.”<sup>61</sup> There are no indications to be found that such a right to review also covers asylum appeals, but as asylum decisions normally have an administrative character, appeals should consequently be covered as well.

A provision committing State Parties to ensure an effective remedy for “any person whose rights or freedoms as *herein* [my added emphasis] recognized are violated” can be found in the ICCPR Article 2 (3a) The word *herein* restricts the right to an effective remedy to apply only to rights and freedoms which are specified in the Covenant. The ICCPR does not include a right to asylum, only a provision prohibiting torture as well as cruel, inhuman and degrading treatment or punishment.<sup>62</sup> Only in this regard is the right to an effective remedy relevant. As the ICCPR lays an obligation on State Parties to guarantee the rights and freedoms in the Covenant only to persons within their territory<sup>63</sup> this right will only be relevant in cases where an alien is threatened by expulsion measures and would face torture or other cruel, inhuman or degrading treatment or punishment if the expulsion order was effectuated. As a diplomatic representation abroad is on foreign territory, a person approaching the representation with a request for protection against such treatment or punishment cannot refer to the ICCPR as justifying his right to protection by the state of the representation.

Finally, the ECHR also includes a provision on the right to an effective remedy in its Article 13. This article states that “[everyone] whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” Just like the 2 (3a) of the ICCPR, this provision restricts the right to an effective remedy, to the rights and freedoms as set forth in the ECHR. Nor does the ECHR include a right to asylum, only a prohibition of torture and inhuman and degrading treatment or punishment. As earlier stated the rights and freedoms in the ECHR shall be secured to everyone within the State Party’s jurisdiction. In accordance with the interpretation above, an effective

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"amparo" against laws (defending the individual against un-constitutional laws); 3) amparo" in judicial matters (examine the legality of judicial decisions); 4) administrative "amparo" (providing jurisdiction against administrative enactments affecting the individual); 5) "amparo" in agrarian matters (protecting the communal ejidal rights of the peasants). The "amparo" suit may be either direct, initiated in the Supreme Court or collegiate circuit courts, or indirect, initiated in a district court and brought on appeal to the previously mentioned courts.” Francisco A. Avalos: *The Mexican Legal System*, available at [http://www.law.arizona.edu/library/LibraryInternet/library\\_info/library\\_publications/mexican\\_legal\\_sys.htm](http://www.law.arizona.edu/library/LibraryInternet/library_info/library_publications/mexican_legal_sys.htm), accessed on 14 March 2002.

<sup>61</sup> Weissbrodt, David: *The Right to a Fair Trial. Articles 8, 10 and 11 of the Universal Declaration of Human Rights*, The Hague 2001, p. 33.

<sup>62</sup> Article 7 of the ICCPR.

<sup>63</sup> Article 2 (1) of the ICCPR states that “[each] State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant [...]”.

remedy shall therefore also be granted to persons denied an entry visa and who as a consequence risk to be subjected to torture.

Article 13 of the ECHR does not require any particular form of remedy. The State Parties rather have the margin of discretion to decide themselves what is in conformity with their legal obligations under this article.<sup>64</sup>

The question whether an application for judicial review constitutes an effective remedy has been considered by the ECtHR several times, and several times the Court has concluded that judicial review in the case concerned constituted an effective remedy.<sup>65</sup> In the *Chahal* case, however, the Court found that judicial review alone was not enough to constitute an effective remedy. From this one might draw the conclusion that judicial review should be considered as part of the right to an effective remedy. When it comes to administrative review, no case law has been found by the author, and therefore nothing indicating that administrative review has the same status as judicial review, meaning that it would be required in order to constitute an effective remedy. While asylum cases in most states are considered under administrative procedures, the right to an effective remedy in the form of a right to have the rejected asylum application reviewed by another entity is not provided for in the ECHR.

### **3.3 The Harmonization of the Asylum Procedure within the European Union**

Through the Amsterdam Treaty the European Union has opened up for a new approach in the asylum field, which might lead to consistency between its member states in regard to among other things procedural remedies. The Amsterdam Treaty hands over competence to the European Community to adopt measures on minimum standards on procedures in member states for granting or withdrawing refugee status.<sup>66</sup> Such measures should be adopted within five years after the entry into force of the Amsterdam Treaty. The European Court of Justice will be empowered to give guidance to courts of the member states concerning the interpretation of the provisions that will be adopted in this regard. However, this power will be limited, only allowing national courts of final instance to seek guidance from the European Court of Justice.<sup>67</sup>

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<sup>64</sup> Van Dijk, P. And van Hoof, G.J.H.: *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, The Hague 1998, p. 706.

<sup>65</sup> *Soering v. United Kingdom*, Judgement of 7 July 1989, Application no. 14038/88, Series A, no. 161, paras. 116-24; *Vilvarajah and Others v. United Kingdom*, Judgement of 30 October 1991, Application no. 13163/87, Series A, no. 215, paras.123-4.

<sup>66</sup> See Article 73 h of the Amsterdam Treaty.

<sup>67</sup> Nicholson and Twomey, *supra* note 50, pp. 321-2.

The Council of the European Union has in its Resolution on minimum guarantees for asylum procedures<sup>68</sup> from 1995 stated that member states must facilitate appeal or review of a negative asylum decision. The court or authority to which such a decision may be appealed or submitted for review shall give an independent ruling in each individual case. The Resolution advocates suspensive effect of the asylum decision in case an appeal is filed. If suspensive effect due to a national derogation is denied and the applicant will be subjected to expulsion, she should at least have a right to apply for leave to remain while her application is under review, and as long as the application for leave to remain is processed the applicant should have an absolute right to stay in the country.

As a result of the work of the European Union towards a harmonization of the asylum procedure within the Member States of the Union, a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (henceforth Draft Directive) was proposed by the European Commission in September 2000.<sup>69</sup> Article 32 of the Draft Directive states that “[applicants] for asylum have the right to appeal against any decision taken on the admissibility or the substance of their application for asylum.” Such an appeal may concern both facts of the case and points of law. The member states should guarantee two levels of appeal, the first level being a reviewing body, the second an Appellate Court. The reviewing body may be either of an administrative or judicial character. If the reviewing body is a judicial body, the member states may limit the examination of the Appellate Court to merely points of law (Article 38).

Moreover, the Draft Directive states that an appeal normally shall have suspensive effect, however with the right for Member States to derogate from this rule in safe third-country cases, manifestly unfounded cases and in the case of issues of public order and national security. This means in fact that only in the regular asylum procedure is the applicant guaranteed a right to suspensive effect during the appeal.

The proposal that Member States should be free to derogate in the cases mentioned above has been criticized by several organisations of which one is the European Council on Refugees and Exiles (ECRE). ECRE has stated that “[the] risk of removal contrary to Article 3 of the ECHR and Article 33 of the Geneva Convention must be limited by providing the asylum applicant with an effective legal remedy. All applicants for asylum should have the right to appeal, whilst remaining on the territory throughout the appeal procedure, against any decision taken on the admissibility or the

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<sup>68</sup> Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures; Official Journal C 274, 19/09/1996 p. 0013 – 0017.

<sup>69</sup> The directive has not yet been adopted, while undergoing some changes as a consequence of the terrorist attacks on the World Trade Centre and Pentagon on 11 September 2001.

substance of their application.”<sup>70</sup> Furthermore ECRE states that the limitation of the suspensive effect as suggested in the Draft Directive also may be in violation of Article 3 of the UN Convention against Torture as well as the Charter of Fundamental Rights of the European Union, and that it is not in accordance with UNHCR Executive Committee Conclusion No.8, which establishes that an appeal of an asylum decision should entail suspensive effect, save for in clearly abusive cases.<sup>71</sup> UNHCR and Amnesty International are other organizations that have sharply criticised the provision in the Draft allowing for states to circumscribe the suspensive effect when an asylum application is appealed.<sup>72</sup>

In Article 3 of the Draft Directive it is stated that the Directive does *not* apply to requests for diplomatic or territorial asylum submitted at the representations of the Member States. In this regard Member States are free to adopt whatever procedure they prefer, without any minimum standards being imposed upon them. While the procedure allowing for asylum applications to be submitted at representations abroad is considered to be of a voluntary character, and more of an exception than a rule, there has to the knowledge of the author been no criticism against this article, nor any criticism against the fact that appeal is not compulsory in these cases.

At the moment the Draft is being revised due to concerns raised in the aftermath of the September 11<sup>th</sup> terrorist attacks against the World Trade Centre and Pentagon. A revised proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status should be finalized by 30 April 2002.<sup>73</sup> It is not likely that the changes will concern the appeal procedure.

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<sup>70</sup> European Council on Refugees and Exiles: *Summary Comments from ECRE on the proposal on minimum standards on procedures in Member States for granting and withdrawing refugee status*, available on [http://www.ecre.org/eu\\_developments/minstands.shtml](http://www.ecre.org/eu_developments/minstands.shtml), accessed on 20 January 2002.

<sup>71</sup> UNHCR Executive Committee, *supra* note 48.

<sup>72</sup> See UNHCR: *Towards Common Standards on Asylum Procedures: Reflections by UNHCR on some of the issues raised in the Working Document prepared by the European Commission*, available on [http://www.ecre.org/eu\\_developments/procedures.shtml](http://www.ecre.org/eu_developments/procedures.shtml), accessed on 20 January 2002; and Amnesty International: *Comments By Amnesty International on the Commission proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, available at [http://www.ecre.org/eu\\_developments/procedures.shtml](http://www.ecre.org/eu_developments/procedures.shtml), accessed on 20 January 2002.

<sup>73</sup> Information provided by Friso Roscam-Abbing, Principal Administrator at the Unit “Immigration/Asylum” of the European Commission, received on 22 January 2002.

## 4 The Externalised Processing Procedure

Some of the European Union Member States have adopted procedures allowing for asylum applications to be submitted at their diplomatic and consular representations abroad. The externalised processing procedure applied varies greatly from state to state. The same is through for the legal basis of the procedure. Most countries allowing for asylum applications to be submitted at their representations abroad have the procedure manifested in law. For some states, however, the origin of the procedure is to be found in practice only, with no legal provisions at all to be found in written law.

The Refugee Convention does not require that member states admit asylum applications submitted within the country of origin or in a third country. On the other hand, the Convention does not prohibit member states to accept such applications either. Article 3 of the ECHR on non-refoulement can, as stated above, be interpreted as containing an obligation for States Parties to the ECHR to admit an applicant applying for an entry visa at the representation abroad if the applicant falls under this article, i.e. risks to be tortured or treated inhumanly or degrading.

For obvious reasons not many states have been willing to admit applications at their diplomatic or consular representations abroad, but the number of states that actually accepts such applications is probably higher than expected. As many as six of the EU member states accept asylum applications submitted abroad. These countries are: Austria, Denmark, France, the Netherlands, Spain and the United Kingdom.<sup>74</sup> Furthermore, some states have discussed adopting an externalised processing procedure.<sup>75</sup> Two of the states under scrutiny in this thesis, Austria and Denmark, have on the other hand discussed the abolishment of the procedure. In the proposal for a new Danish Aliens Act<sup>76</sup> there is no longer a provision allowing for asylum applications to be submitted at its diplomatic and consular representations abroad. In the explanatory note for the proposal the

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<sup>74</sup> Another Western European state allowing for asylum applications to be lodged at representations abroad is Switzerland. As Switzerland is not a Member State of the European Union it is not under scrutiny in this thesis.

<sup>75</sup> In Italy such a procedure has been discussed in Parliament and was at one point included in a draft law, but abandoned in the final version of that law. In Sweden externalised processing has merely been touched upon in an inquiry to the Minister of Development Cooperation, Migration and Asylum Policy.

<sup>76</sup> The draft proposal for a new law abolishing this procedure was introduced 15 February 2002, Regeringen: *Udkast: Forslag til Lov om ændring af udlændingeloven og ægteskabsloven med flere love*, J.nr. 2001/7310-81.

abolishment of the procedure is justified by referring to that Denmark has no obligations in international law to operate such a procedure.<sup>77</sup>

Below the externalised processing procedure will be briefly described. I will present special features in the different country procedures, but avoid going into minor details concerning the individual countries.

## **4.1 Procedure**

### **4.1.1 The Distinction between Asylum Applications submitted in the Country of Origin and in a Third Country**

The Member States of the European Unions that operate a procedure for externalised processing apply different models in regard to where an asylum application may be lodged. The model where an asylum application may be lodged only in a third country, and not in the country of origin, is the most common model. Both legal and political arguments have been emphasised for the support of such an approach. Countries fear that the state where the representation is situated may regard it as interference in its internal affairs if foreign representations allow asylum applications of its nationals to be submitted at a representation within the country's own borders. Spain, for example, refers to the principle of extraterritoriality as the reason why it does not accept applications to be submitted at its representations within the applicant's country of origin.<sup>78</sup> The legal argument mainly used is that the refugee definition in the Refugee Convention explicitly states that the person should be outside her country of nationality or habitual residence.<sup>79</sup>

The Member States offering a possibility to apply for asylum at their representations in third countries only are Denmark, The Netherlands, Spain and United Kingdom, while Austria and France also accepts applications submitted at their representations in the applicant's country of origin.<sup>80</sup>

### **4.1.2 Initial Visa Decision**

No clear-cut model for submitting asylum applications at representations abroad and assessing these applications exists. Every country applies its own model with its own features, even though many similarities can be discovered between the different models. Above the distinction made in regard to where the asylum application can be submitted was outlined. In

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<sup>77</sup> Presentation of the Danish Government concerning a new immigration policy. Regeringen, *En ny udlændingepolitik*, 17 January 2002.

<sup>78</sup> IGC: *Report on Asylum Procedures*, September 1997, pp. 291-2.

<sup>79</sup> Article 1 A(2) of the 1951 Refugee Convention.

<sup>80</sup> Another Western European country allowing for asylum applications to be submitted at its representations abroad is Switzerland, which allows applications to be submitted both in third countries and in the applicants country of origin.



this sub-chapter a differentiation will be made in regard to whether the externalised processing procedure is carried out in one or in two steps.

The first model is a one-step model according to which an entry visa to the country of destination will be issued once the applicant has been granted asylum. Two countries under scrutiny fit under this description, namely Denmark and Spain. The applicant will have to await the decision on her application in the country where she submitted her application. Once a decision has been reached and she has been granted asylum she will be issued with an entry visa for the transfer to the country of destination.

The dominant feature of the second model, which is a two-step model, is that there will be an initial visa decision. The applicant will be issued with an entry visa provided that it is likely that she will be granted asylum. After the applicant has been granted an entry visa in this initial stage, she may enter the country of destination where the asylum procedure will continue. As the asylum procedure is not yet finalised when the entry visa is issued, it means that the applicant cannot be completely sure that she will be granted asylum even though she has been allowed entry into the country of destination. Normally, a granted entry visa will indeed lead to a positive decision on the asylum request. A negative initial visa decision will imply the rejection of the asylum application as well. The countries practicing the two-step model are Austria, France, the Netherlands and United Kingdom.

A benefit with the two-step model is that the authorities processing the application will be able to have direct contact with the applicant. This will make it easier for the decision-makers to find out all the facts of the case and to assess the credibility of the applicant.

The example of the United Kingdom will serve as an illustration of the two-step model. According to the UK model a person in need of protection may apply for an entry clearance *for the purpose of seeking asylum* in the United Kingdom. The application for entry clearance will be processed by the Integrated Casework Directorate (ICD) within the Immigration and Nationality Directorate of the Home Office in the United Kingdom. Only if the application for an entry clearance is accepted and the applicant transferred to the United Kingdom will the asylum procedure as such get involved.<sup>81</sup>

France practices a rather informal procedure, where the applicant, if she is regarded as likely to be granted asylum, will be issued a normal long- or short-term visa and then when she has arrived in France she can decide herself whether to approach the immigration authorities with an asylum request. This means that even though she has been granted an entry visa for

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<sup>81</sup> Immigration & Nationality Directorate: *Asylum Policy Instructions*, chapter 2 section 1, available at <http://www.ind.homeoffice.gov.uk/default.asp?pageid=798>, accessed on 19 June 2001.

the purpose of seeking asylum once in France, it is entirely up to herself to decide whether she will hand in such an application. She has no legal obligation to continue the asylum procedure after arrival in France. If she refrains from submitting an asylum request when she is in France, she will have to obey the rules that apply for persons with the same kind of visa as she has been issued with.<sup>82</sup>

### **4.1.3 Urgent Transfer to the Country of Destination**

Provided that exceptional circumstances are at hands, France<sup>83</sup> and Spain<sup>84</sup> allow the transfer of the applicant to the country of destination before her application has been decided upon. In Spain this is a parallel procedure to the assessment of the asylum application, which will not affect, nor impede the asylum assessment. In case an urgent transfer of the applicant is not considered to be necessary, the applicant will simply have to await the decision on the asylum application in the country where the application was submitted.

The French approach is slightly different, as the possibility of urgent transfer is not formalised as it is for Spain. If an applicant appears to be in an immediate need of protection, the representation will contact the Ministry of Foreign Affairs, which will decide whether an urgent transfer should take place. As France allows applications submitted both in countries of origin and in third countries, the use of the urgent transfer procedure logically should be more frequently used by France than by Spain, which only allows applications to be submitted at its representations in third countries, where the protection need normally is not as urgent as in countries of origin.<sup>85</sup>

### **4.1.4 Allocation of Competence to Process an Asylum Application Lodged at a Representation Abroad**

In the majority of states, practicing externalised processing at their representations abroad, the asylum application will be forwarded by the representation to the authorities within the country of destination. These authorities will assess the application and take a decision based on the application and other relevant information received from the representation. To use the concept ‘externalised processing’ is therefore slightly misleading, as the processing of the asylum request does in fact take place in the country of destination.

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<sup>82</sup> Source: Questionnaire response by the UNHCR Branch Office in Paris, received on 17 September 2001.

<sup>83</sup> Ibid.

<sup>84</sup> Article 16 of the Spanish Royal Decree 203/1995 (February 10) approving the Implementation Regulation of Law 5/1984 (March 26) regulating Refugee Status and the Right to Asylum.

<sup>85</sup> Danish Refugee Council: *Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries*, May 2000, p. 265.

Even if the representation does not have the authority to process the asylum application, it is still involved in the process to some extent. Firstly, it has to provide applicants with application forms and information about the procedure and secondly, a possible interview of the applicant before she has been transferred to the country of destination will be performed by the staff at the representation.

Worthy of note is that Denmark has a provision in its Aliens Act empowering its representations with the authority to immediately reject an application in case it does not *indicate* any close connection between the applicant and Denmark, as a close connection is a precondition for asylum being granted to applicants submitting their asylum request at representations abroad.<sup>86</sup> In case a connection is indicated, the representation will have to forward the application for decision to the Immigration Service in Denmark, which will also assess whether the indicated connection is close enough.

#### **4.1.5 Requirements in Order to be Granted Asylum**

From what is stated above it is possible to draw the conclusion that asylum can be granted or denied either when the applicant is still waiting in her country of origin or in the third country where she submitted her application, or after she has been transferred to the country of destination.

An applicant who has been transferred to the country of destination will most likely be granted asylum, as her protection claim has been assessed in connection with the initial visa decision, and in this procedure it has already been considered that it is likely that she will be granted asylum. This applies for the countries with a two-step procedure, where there consequently will be two assessments of the protection need, one while the applicant is still abroad, and one after the applicant has arrived in the country of destination. For the countries with a one-step procedure, Denmark and Spain, there will only be one assessment of the protection need of the asylum applicant (save for in case of appeal).

In most states practicing externalised processing of asylum claims, the assessment of whether an applicant qualifies for refugee status or other protection-related status when the asylum application was submitted abroad, follows the same procedure as the territorial asylum procedure. Some countries have introduced additional requirements for granting asylum in the externalised processing procedure. The most common requirement in this regard being that the applicant shall have some kind of connection with the country of destination. As stated above, the Danish representation is authorised to refuse an application on the ground that no close connection of

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<sup>86</sup> Article 46 (b) of the Danish Aliens (Consolidation) Act, as modified through Law no. 482 of 24 June 1992.

the applicant with Denmark has been indicated in the application. Denmark has used a rather strict interpretation of the close connection requirement,<sup>87</sup> restricting the procedure to family reunification cases only.<sup>88</sup> According to the UK procedure, the applicant must in addition to show close ties to the United Kingdom, also establish that it is the most appropriate country of refuge for the applicant.<sup>89</sup>

#### **4.1.6 Possibility to Appeal**

All states scrutinised in this thesis allow the applicant to appeal in case her asylum application, which was submitted at a representation, has been rejected. However, this is not always true for the initial visa decision, as Austria does not allow appeals to be lodged against such a decision. The Danish externalised processing procedure, where an initial decision will be made, not on an entry visa, but on whether the asylum application shall be forwarded to the authorities in Denmark for scrutiny, does not accept formal appeals on a rejection by the representation due to lack of close connection between the applicant and Denmark.

The appeals procedure for externalised processing varies greatly between the states. In most cases they follow the same rules as in the territorial asylum procedure, or in case of appeals on initial entry visa decisions they normally follow the rules for appeal in the visa procedure.

The appeal procedure in the externalised processing procedure as practiced by the different countries will be looked at in more detail in Chapter 7.

## **4.2 The Degree to which Externalised Processing is used**

For evaluating the degree to which the externalised processing procedure is made use of, the number of asylum applications submitted, as well as the number of asylum seekers admitted need to be compared. The available statistics concerning this procedure is meagre, making comparisons rather difficult. While the procedure is not considered to be a legal obligation manifested in international law, but rather a result of humanitarian considerations of certain states, these states have apparently not found it advantageous to keep careful statistics on the number of applications submitted abroad, and on the number of applicants accepted and refused. Even more difficult is to find statistics concerning the number of refused applications that have been appealed.

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<sup>87</sup> Jens Vedsted-Hansen: *Retlige rammer og kriterier for afgørelsen af § 7, stk. 4-sager*, (not published paper) November 1989, p. 8.

<sup>88</sup> Information provided by Dr Kim U. Kjær, at the Danish Centre for Human Rights, received on 23 August 2001.

<sup>89</sup> Immigration & Nationality Directorate, *supra* note 81.

From the meagre statistics that I have been provided with, it is difficult to draw any conclusions. The fact that refugees normally not follow any specific pattern when applying for asylum makes the assessment of available statistics difficult as well, without knowing the reasons behind the large or small number of applications, approvals and rejections. I will try to visualise the complexity of this issue in a number of examples below.

A describing example is the sudden rise in applications by Afghans at the Austrian Embassy in Teheran in the beginning of year 2001, as Australia had started a reception program for asylum seekers from Afghanistan and the applicants had mistaken Austria for Australia. Normally Austria has around 250 applications filed at its representations abroad each year. During the first quarter of 2001, 2338 Afghan asylum seekers lodged applications at the Austrian Embassy in Teheran.<sup>90</sup> Although the number of positive decisions for Afghans who apply for asylum in Austria is comparably high (pursuant to the official statistics 49% in the first half of 2001) the Austrian Federal Asylum Office has been alleged to deny granting the applicants in Teheran access to Austria, arguing that they are residing in a safe third country. As no written decisions are issued in the initial part of the Austrian externalised processing procedure, it is rather difficult to verify the truthfulness of this allegation.<sup>91</sup> Furthermore, no statistics are available regarding the total number of asylum seekers turning to Austrian representations abroad, neither regarding the number of applicants accepted after applying at the representations.

The percentage for persons applying for asylum at the Danish representations abroad shows a great variety from year to year, with the lowest percentage 0,8 in 1995 and the highest 8,9 in 1998.<sup>92</sup> One factor to take into consideration here is that the number of applications in 1995 was considerably higher than in 1998.<sup>93</sup> In year 2000, 2658 asylum applications were submitted at Danish representations abroad. Of that number, 2402 applications were lodged by Afghan nationals. The majority of these applications were lodged at the Danish representation in Peshawar in Pakistan. The outcome of the applications were 56 positive decisions and 1864 negative decisions, with the remaining cases pending. From these numbers one can draw the conclusion that the provision in the Danish Aliens Act providing for the possibility to apply for asylum at Danish representations abroad is sparsely made use of and seldom results in positive asylum decisions.<sup>94</sup>

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<sup>90</sup> ECRE: *ECRE Documentation Service*, No. 3, July 2001, p. 7.

<sup>91</sup> Source: Questionnaire response by the UNHCR Regional Office in Vienna, received on 30 August 2001.

<sup>92</sup> Udlændingestyrelsen: *Nøgletal på udlændingeområdet 2000*, available at <http://www.udlst.dk>, accessed on 27 July 2001.

<sup>93</sup> In 1995 almost 5000 applications were submitted at Danish representations abroad, while the number in 1998 was only 380.

<sup>94</sup> Information provided by UNHCR Geneva.

There are no statistics available in regard to the French procedure allowing for asylum applications to be lodged at diplomatic or consular representations abroad. The most probable reason for this is that the entry visas issued in the French externalised processing procedure are given in the form of ordinary long-term or short-term visas. It is therefore difficult to distinguish the visas issued for protection-related purposes.<sup>95</sup>

Not that many asylum applications are lodged at Dutch diplomatic and consular representations abroad.<sup>96</sup> One reason for this might be that the Dutch externalised processing procedure is fairly unknown. The statistics show that only a small percentage of the applicants are granted asylum in the Netherlands. For the years 1998 – 2000, the percentage was 7,4, 5,8 and 3,5 respectively.<sup>97</sup>

From 1998 to 2000 the number of persons who asked for asylum at Spanish diplomatic or consular representations was around 120 per year. Approximately half of these applications were lodged on family reunion basis. The number of applications lodged on family reunion basis in countries of origin is not known, but according to the regional UNHCR office in Madrid some of them were submitted in countries of origin and others in third countries. The other half of the applications, not submitted on family reunion basis, was submitted in third countries. Out of this second half, around eight persons finally received refugee status, which is about 13 percent.<sup>98</sup>

There are no statistics available in regard to the procedure allowing for asylum applications to be submitted at British diplomatic and consular representations abroad. According to the Stonewall Immigration Group such applications are, however, invariably unsuccessful.<sup>99</sup>

From the available information it seems like the procedure allowing for asylum applications to be submitted abroad in practice is not used very often. Normally only a few applications seem to be filed at diplomatic and consular representations each year, at least if compared to the number of spontaneous asylum seekers arriving in these countries. The percentage of asylum seekers granted asylum varies to a great extent, not only from year to year for one country, but also between the countries. Between one and 16 percent appears to be the normal acceptance rate. For most countries the acceptance rate is lower for asylum seekers who submitted their application

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<sup>95</sup> UNHCR BO Paris, supra note 82.

<sup>96</sup> Danish Refugee Council, supra note 85, p. 210.

<sup>97</sup> Source: Questionnaire response by the UNHCR Office in The Hague, received on 27 August 2001. Numbers before 1998 are not available, because at that time the procedure was not registered in the INS-registration system.

<sup>98</sup> UNHCR Geneva, supra note 94.

<sup>99</sup> Stonewall Immigration Group: *Applying for Asylum as a Refugee*, available at <http://www.stonewall-immigration.org.uk/Asylum.htm>, accessed on 24 July 2001.

at a representation abroad. Spain is an exception in this regard, admitting 13 percent after application at a representation abroad, while less than 8 percent after application within Spain or at its borders. The following table has been included in order to visualise the difference in acceptance rates.<sup>100</sup>

Country	Recognition as refugee (90-99)	Granted other status (90-99)	Total refugee + other status	Admitted after applying abroad
Austria	10,62%	1,22%	11,84%	No information
Denmark	11,91%	37,75%	49,66%	4,26% <sup>101</sup>
France	26,21%	-	26,21%	No information
Netherlands	15,75%	25,94%	41,70%	5,57% <sup>102</sup>
Spain	5,53%	2,18%	7,71%	13% <sup>103</sup>
United Kingdom	6,66%	17,25%	23,92%	No information

## 4.3 Benefits and Drawbacks of Externalised Processing

### 4.3.1 Benefits

A procedure allowing for asylum applications to be submitted at diplomatic and consular representations abroad, may bring with it major benefits for both the asylum seekers and for the countries of destination. Such a procedure made known to the public and to potential asylum seekers in third countries or countries of origin, could contribute to reducing the need to turn to human traffickers as the people in need of protection find an alternative to illegal entry. It might as well reduce the need for asylum seekers to make use of false documentation, which again may have a positive effect on the credibility assessment of the applicant. The whole process of finding out the travel route of the applicant, which is time consuming and require some thorough investigation, will loose its importance in a procedure where the applicant is still in her country of origin or in a third country.

A procedure where applications may be submitted at the representations abroad, in particular at representations in the country of origin, is likely to be fairer with respect to the applicants. Normally, only persons with substantial financial resources and/or good contacts have a possibility to travel to the European Union in order to apply for asylum, either legally or by using illegal means and methods. The need for financial resources and contacts is reduced to a minimum if the procedure can be initiated in the country where the applicant lives. However, asylum seekers in third countries might as well

<sup>100</sup> The information behind these numbers can be found under Annual Statistics on the homepage of UNHCR: <http://www.unhcr.ch>, accessed on 10 January 2002.

<sup>101</sup> This number is an average for the years 1994 – 2000. The percentage varies greatly from year to year, between 0,8% and 8,9%.

<sup>102</sup> This number is an average for the years 1998 – 2000. The actual percentage was for respective year 7,4, 5,8 and 3,5.

<sup>103</sup> This is an approximate number based on vague statistical numbers.

be at risk, and consequently there is a need even for them to have a possibility to apply for asylum while they are staying in this third country. The need to apply for asylum in a third country may for instance arise for persons, belonging to an ethnic group, who has fled their home country, and who are not accepted in the country where they are currently staying either.

A positive aspect of the Spanish procedure is the possibility to be transferred to Spain in advance if the applicant is at risk where she is staying.<sup>104</sup> France has adopted a different approach where normal long or short-term visas are issued for persons in need of protection.<sup>105</sup> Once these persons have reached French territory, they may apply for asylum. This approach reduces the risk for the applicants to be vulnerable to the authorities in the country of origin.

From what is stated above it should be possible to draw the conclusion that the procedure brings with it financial benefits both for the asylum seeker and the country of destination. The asylum seeker will not have to invest all her money in travel costs and documentation while facing the risk of being returned to her country of origin. From the governments' point of view financial means can be saved when the application is processed while the applicant is still in her country of origin. There is no need to invest in accommodation and other costs of the applicant while she is awaiting the decision. Moreover, once this person is admitted, the integration process can get started immediately as she arrives in the destination state, without her being a financial burden for many years as asylum applicants are today for example in Sweden.

### **4.3.2 Drawbacks**

The major drawback of the procedure as it is modelled in several countries<sup>106</sup> is the fact that the possibility to apply for asylum at a representation is restricted to third countries only, leaving persons in need of protection still within their country of origin without a possibility to apply for asylum. This approach has to be reconsidered, while it normally is the ones still within their country of origin who have the most urgent need of protection. At the same time this is a politically very sensible issue.

In some countries, providing for a legal possibility to apply for asylum at their representations abroad, this procedure has turned out to be nothing more than family reunification. This is the case with the Austrian and Danish externalised processing procedures. Both countries have a very sophisticated legislation concerning the procedure, and nothing in the concerned provisions restrict the procedure to merely family related applications. However, practice has restricted the use of the procedure to the

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<sup>104</sup> See Chapter 4.1.3.

<sup>105</sup> See Chapter 4.1.2.

<sup>106</sup> Denmark, Spain and the United Kingdom. In practice, Austria also joins this group of countries.



detriment of people without any family connections in the country concerned.

Some states apply different standards for applications that have been submitted at their representations abroad. Legal assistance and interpretation is not provided by all states. Hearings of applicants are seldom conducted while the applicant is still abroad. While the differentiation is understandable to some degree, states that wish to make the externalised processing procedure the rule rather than the exception, have to consider that the differentiation might impact on the protection seeker's approach – whether she will approach the diplomatic representation or try her success as a spontaneous asylum seeker.

The externalised processing procedure is fairly unknown, resulting in an acceptable number of applications being submitted at the representations abroad. As instructing asylum applicants does not belong to the normal tasks of the staff at the representation, they are quite vulnerable to sudden and significant increases in the number of applications. As a result of the sudden and significant rise in the number of asylum applications submitted by Afghans at the Austrian representations abroad in 2001, the abolishment of the whole externalised processing procedure was put on the political agenda.<sup>107</sup> The risk is therefore that if the procedure becomes well known, the representations will be overburdened with applications, and the procedure will eventually be abolished.

One problem with the externalised processing procedure is that it seems not to be that well-established at all the representations, which apparently has led to it being less respected than the territorial asylum procedure. The Austrian procedure may serve as an example here, as some of its representations appear to have taken the decision in their own hands, rather than forwarding applications to the authorities in Austria or abiding by their decisions concerning the issuing of visas for the asylum seekers. There also appears to be a big discrepancy between the different Austrian representations in regard to the willingness to accept applications. Some are more committed while others more reluctant in accepting asylum applications.<sup>108</sup>

Another issue worth discussing is that the procedure is often time consuming, something that might be very harmful for the applicant, who often needs a fast escape. It seems like the Spanish approach with the urgent transfer in case of need could be a valuable solution to this problem.

A more complicated issue is the risk the applicant might face when turning to a foreign representation. Not only can she be physically hindered to leave

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<sup>107</sup> Source: Information provided by the UNHCR Regional Office in Vienna, received on 6 February 2002.

<sup>108</sup> Ibid.

the country, but also harassed in other ways, as well as her approach to the representation may confirm suspicions of the authorities. Finally, it will be extremely difficult to get an applicant who has been granted asylum out of a country, in case the authorities of that country has decided not to allow the person to leave.

# 5 Appeal in the territorial asylum procedure

In the first part of this Chapter I will briefly outline the appeal procedure in the territorial asylum procedure for the six EU Member States under scrutiny in this thesis. In the second part a comparison between the different country practices in regard to appeal will be made, outlining the most prominent features and discrepancies of the different country practices.

## 5.1 Appeal in EU Member States

### 5.1.1 Austria

A negative decision by the Federal Asylum Agency in the *regular asylum procedure* in Austria may be appealed to the Independent Federal Asylum Review Board (henceforth Asylum Review Board).<sup>109</sup> Such an appeal, which has suspensive effect, shall be made within two weeks after the applicant was notified of the decision. The appeal shall be made in German or one of the official languages of the United Nations.<sup>110</sup> In case an appeal is not filed within the proscribed time limit, and the reason for this is something unforeseeable and unavoidable beyond the applicant's control, she may file an appeal for reinstatement.<sup>111</sup>

The Asylum Review Board normally is represented by one member when reaching decisions on asylum appeals.<sup>112</sup> Only decisions that may be of significance for the jurisprudence will be referred to a review panel consisting of three members of the Board.<sup>113</sup> The decision of the Board shall be taken within six months, and it shall be accompanied with reasons, regardless whether it is positive or negative.<sup>114</sup>

If further investigation is deemed necessary the Asylum Review Board may conduct a hearing. This could be the case if circumstances have changed since the first decision was reached, if new evidence is available or if the investigation conducted by the Federal Asylum Agency is considered insufficient. The applicant does not have a right to free legal aid before the

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<sup>109</sup> Article 33 of the 1997 Asylum Act.

<sup>110</sup> Article 24 (2) of the 1997 Asylum Act.

<sup>111</sup> Danish Refugee Council, *supra* note 85, p. 14.

<sup>112</sup> Article 38 (6) of the 1997 Asylum Act.

<sup>113</sup> Article 38 (7) of the 1997 Asylum Act.

<sup>114</sup> Section 73 of the General Administrative Procedures Act. See also Danish Refugee Council: *supra* note 85, p. 14.

Board. Though, she may be offered assistance by legal counsellors from different refugee assisting organisations.<sup>115</sup>

A negative decision by the Asylum Review Board may be appealed within six weeks by the applicant to the Administrative Court. Both positive and negative decisions by the Board may be appealed to the same Court by the Federal Ministry for Interior.<sup>116</sup> Appeal to the Administrative Court is regarded as an extraordinary legal remedy, and will lead to upheaval of the appealed decision and referral back to the Asylum Review Board for reconsideration. Before the Administrative Court free legal aid will be awarded to an applicant without financial resources to cover these costs herself.<sup>117</sup>

An appeal to the Administrative Court does not have automatic suspensive effect. Suspensive effect may, however, be granted if it would not be in contradiction with urgent public interests and if the applicant could be affected by a disproportionate disadvantageous outcome if suspensive effect was denied.<sup>118</sup>

Decisions of the Federal Asylum Agency, through which an asylum application is considered to be *manifestly unfounded* or inadmissible in accordance with the Dublin Convention or due to "safe third country" reasons, may also be appealed to the Asylum Review Board. If the decision is overruled by the Board, the case will be returned to the Federal Asylum Agency, which will reach a new decision on the admissibility of the case or whether the case is manifestly unfounded.<sup>119</sup>

An appeal in the manifestly unfounded procedure has to be submitted within ten days from notification of the decision of the Federal Asylum Agency. The Asylum Review Board also has ten days to render its decision. However, this time may be extended with ten more days, if necessary for the establishment of the material facts of the case. In reality the procedure often requires more time than ten plus ten days.<sup>120</sup>

First after the ten-day period has expired, within which an appeal to the Asylum Review Board may be submitted, the appeal will have suspensive effect. This means that a decision on removal or deportation of the applicant can be enforced during these ten days, even though the applicant intends to appeal the rejection of the asylum application. However, after these ten days, the applicant may not be removed if she has appealed the rejection. Worthy

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<sup>115</sup> Danish Refugee Council, supra note 85, pp. 14-15.

<sup>116</sup> Article 38 (5) of the 1997 Asylum Act.

<sup>117</sup> Danish Refugee Council, supra note 85, p. 14.

<sup>118</sup> Danish Refugee Council, supra, p. 15.

<sup>119</sup> Article 32 (2) of the 1997 Asylum Act.

<sup>120</sup> Article 32 (1) and (3) of the 1997 Asylum Act.

of note is that a decision on removal or deportation attracts a separate right of appeal.<sup>121</sup>

### 5.1.2 Denmark

The first instance in the asylum procedure in Denmark is the Danish Immigration Service.<sup>122</sup> A negative decision by the Immigration Service on the asylum request will be appealed to the Refugee Appeals Board without further action by the applicant.<sup>123</sup> This procedure of automatic appeal was established in order to make the asylum procedure more efficient. While most negative decisions were appealed, it was felt that time and administrative work could be saved by making the appeal procedure automatic.<sup>124</sup>

The Refugee Appeals Board is an independent administrative organ. It is composed of one chairman and four board members when deciding upon an application.<sup>125</sup> The chairman is a professional judge and the other members of the Board are nominated by the Danish Refugee Council<sup>126</sup>, the Danish Bar Association, the Ministry of Foreign Affairs and the Ministry of Interior.<sup>127</sup> In cases where "the conditions for being granted asylum must be deemed evidently to be satisfied", the chairman or one of her deputies may consider the asylum request alone.<sup>128</sup>

An appeal to the Board in the territorial asylum procedure entails suspensive effect.<sup>129</sup> A lawyer, paid for by the Danish state, will support the applicant in her appeal if the Danish Refugee Board finds it necessary.<sup>130</sup> An interpreter will also be provided for, if necessary. The refugee Board will decide whether an oral hearing shall be held, and in case the applicant or her representative requests, the applicant shall have a right to be heard before the Board.<sup>131</sup> The applicant and her lawyer have to be present at the hearing before the Board, a hearing that is not public.<sup>132</sup> The decision reached by the Danish Refugee Board shall include reasons on which the decision is

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<sup>121</sup> Article 32 (3) of the 1997 Asylum Act.

<sup>122</sup> Paragraph 46 (1) of the Consolidation Act No. 711 of 1 August 2001 of the Danish Ministry of Interior [henceforth the Aliens (Consolidation) Act 2001].

<sup>123</sup> Paragraph 53a (1) and (2) of the Aliens (Consolidation) Act 2001.

<sup>124</sup> Kim U. Kjær, *supra* note 88.

<sup>125</sup> Paragraph 53 (1) of the Aliens (Consolidation) Act 1999. See also Danish Refugee Board: *Organisation*, available at <http://www.fln.dk>, accessed on 9 October 2001.

<sup>126</sup> The Danish Refugee Council is an NGO assisting refugees arriving in Denmark. The Council has through legislation been accorded some influence in the asylum procedure.

<sup>127</sup> Paragraph 53 (2) of the Aliens (Consolidation) Act 1999.

<sup>128</sup> Paragraph 53 (5) of the Aliens (Consolidation) Act.

<sup>129</sup> Paragraph 53 a (2) of the Aliens (Consolidation) Act.

<sup>130</sup> Paragraph 55 (1) and 58 of the Aliens (Consolidation) Act.

<sup>131</sup> Paragraph 56 (2) of the Aliens (Consolidation) Act.

<sup>132</sup> Danish Refugee Council, *supra* note 85, p. 48.

based.<sup>133</sup> As the decision of the Board is final, no further possibility to appeal exists.<sup>134</sup>

Besides the normal procedure for asylum requests, Danish law provides for a faster procedure in case the application is considered by the Danish Immigration Service to be *manifestly unfounded*. An application found to be manifestly unfounded is sent to the Danish Refugee Council for scrutiny. The Council has a right to veto the decision by the Immigration Service, i.e. if the Council considers the application not to be manifestly unfounded it shall be treated as a rejection by the Immigration Service and consequently automatically appealed to the Danish Refugee Board.<sup>135</sup> In 17 % of the cases considered to be manifestly unfounded in 1999, the Danish Refugee Council used its veto and the case was appealed to the Refugee Board.<sup>136</sup> However, in case the Refugee Council agrees with the Immigration Service that the application is manifestly unfounded, the rejection of the asylum application by the Immigration Service will not be subject to appeal.

Finally it is also possible to appeal a decision through which the applicant is rejected at the border, if the applicant claims that she is in need of protection. Such a decision will be taken by the Immigration Service in case the applicant has arrived at the Danish border through a State Party to the Dublin Convention, or through another country considered to be safe (“safe third country”). The decision taken by the Immigration Service may be appealed to the Minister of Interior.<sup>137</sup> The applicant does, however, not have a right to stay in Denmark while her appeal is being considered.<sup>138</sup>

### 5.1.3 France

The French asylum procedure offers a possibility to appeal a negative decision on the initial asylum request to the Appeal Board for Refugees. The appeal has to be made within one month after the applicant was notified of the initial decision.<sup>139</sup>

The Appeal Board is composed of a panel with three members when taking decisions. One member is from the Council of State, the Court of Auditors, the Court of Public Administration, an Administrative Appeal Court or an Administrative Tribunal. A second member is from the French Protection

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<sup>133</sup> Paragraph 56 (6) of the Aliens (Consolidation) Act 1999

<sup>134</sup> Paragraph 56 (7) of the Aliens (Consolidation) Act 1999.

<sup>135</sup> Paragraph 53 a (3) and 53 b of the Aliens (Consolidation) Act. See also Danish Refugee Council: *Asyl i Danmark. En asylansøgers vej gennem systemet*, available at <http://www.drc.dk>, accessed on 9 October 2001.

<sup>136</sup> Danish Refugee Council, *supra* note 85, p. 47.

<sup>137</sup> Paragraph 46 (2) of the Aliens (Consolidation) Act 1999.

<sup>138</sup> See Article 48 d of the Danish (Consolidation) Aliens Act.

<sup>139</sup> Danish Refugee Council, *supra* note 85, p. 89.

Office for Refugees and Stateless Persons (OFPRA)<sup>140</sup>, and a third and final member is from the UNHCR.<sup>141</sup>

Appeals in this procedure have suspensive effect. This enables hearings in person of the asylum seekers, which is the practice since 1995. These hearings are public and the applicant has the right to be assisted by a lawyer. Free legal aid may be offered to the applicant provided that she meets some requirements, such as she has legally entered France,<sup>142</sup> the application is not considered to be manifestly unfounded and she does not have sufficient financial means. The applicant will be provided with an interpreter if needed, as the hearing will be conducted in French.<sup>143</sup>

Decisions by the Appeal Board for Refugees are not final. Within two months of notification by the Appeal Board, the decision can be further appealed to the Council of State, which will consider legality issues of the appealed decision, but not the factual circumstances of the case. The decision of the Appeal Board does not have suspensive effect, and therefore the applicant can be expelled while the Council of State is still considering the appeal.<sup>144</sup>

If there are some new circumstances in the case supporting the asylum application, the applicant may after a rejection by the Appeal Board for Refugees ask for the case to be reopened by the OFPRA. Such a request to reopen the case does not have suspensive effect. Since 1997 applications to reopen a case shall be lodged with the Prefecture.<sup>145</sup> This has had a strongly deterrent effect decreasing the number of reopened cases from 1 221 in 1997 to only 615 cases reopened in 1998. A refusal to reopen a case may be appealed to the Appeal Board for Refugees.<sup>146</sup>

#### **5.1.4 The Netherlands**

An application for review in case of a negative decision on the asylum request by the Dutch Immigration and Naturalisation Service (INS) may be filed with the Aliens Chamber of the District Court in The Hague, the only court designated to review immigration and asylum applications after rejection by the INS.<sup>147</sup> For practical reasons a number of ancillary courts<sup>148</sup> has been appointed to deal with this kind of reviews as well. An application

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<sup>140</sup> OFPRA is the first instance deciding on asylum applications.

<sup>141</sup> Danish Refugee Council, *supra* note 85, p. 89.

<sup>142</sup> An appellant who has been issued a "safe conduct" pass by the border police, permitting her to enter the territory of France, is also considered to be a legal entrant.

<sup>143</sup> Danish Refugee Council, *supra* note 85, pp. 89-90.

<sup>144</sup> Danish Refugee Council, *supra*, p. 89.

<sup>145</sup> The Prefecture is the local representative of the Minister of Interior.

<sup>146</sup> Danish Refugee Council, *supra* note 85, p. 89.

<sup>147</sup> Section 69 of the Dutch Aliens Act 2000.

<sup>148</sup> These are the courts in Amsterdam, Arnhem, Assen, Dordrecht, Groningen, Haarlem (and Haarlemmermeer), 's-Hertogenbosch, Utrecht and Zwolle.

for review shall be submitted to the court within four weeks after the applicant was informed of the decision of the INS.<sup>149</sup>

There is normally automatic suspension of the negative decision reached by the Immigration and Naturalisation Service when this decision is appealed. However, in those cases, which do not entail automatic suspensive effect,<sup>150</sup> the applicant may ask the court for a provisional ruling in order to be able to stay as long as the appeal is being processed.<sup>151</sup>

Before the District Court, the applicant is represented by her lawyer. The applicant herself has the right to be present at the hearing and to intervene in the matter. The decision of the District Court shall be made within six weeks from the time the appeal was submitted.<sup>152</sup> If the District Court rejects the application, reasons shall be included in the decision. A decision, through which the application is approved, does not contain the reasons.<sup>153</sup>

A rejection by the District Court may be appealed to the Administrative Law Division of the Council of State.<sup>154</sup> This further appeal does not have automatic suspensive effect, but the applicant may request a provisional ruling in order to stay in the Netherlands until the appeal has been decided upon.<sup>155</sup> The proceedings shall be carried out in an expedite manner<sup>156</sup> and the decision by the Council of State shall be taken no later than twenty-three weeks after the notice of appeal was submitted, and it shall include reasons if it is negative.<sup>157</sup>

In case the INS has not reached a decision on the asylum application within six months from submission of the application, the applicant may file a petition for review to the State Secretary of Justice. There is no time limit within which such an appeal has to be submitted. A negative decision on the petition to review the asylum application may be appealed to the Aliens Chamber of the District Court in The Hague. There is no automatic suspensive effect in case a petition for review is appealed to the District Court, but the applicant may ask the Court for a provisional ruling in order to be allowed to stay in The Netherlands until a decision on the petition for

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<sup>149</sup> Section 67 (1) of the Dutch Aliens Act 2000.

<sup>150</sup> I.e. cases considered to be manifestly unfounded.

<sup>151</sup> Immigration and Naturalisation Service: *The Asylum Procedure in the Netherlands*, COA/IND April 2001, available at <http://www.immigratiedienst.nl>, accessed on 15 January 2002, p. 7.

<sup>152</sup> Immigration and Naturalisation Service: *Fighting Decisions: Petitions and Appeals*, available at <http://www.immigratiedienst.nl>, accessed on 15 January 2002, p. 6.

<sup>153</sup> Section 40 (2) of the Dutch Aliens Act 2000.

<sup>154</sup> Section 82 of the Aliens Act 2000.

<sup>155</sup> Section 80 of the Dutch Aliens Act 2000; See also Dutch Refugee Council, *Refugees in The Netherlands*, available at <http://www.vluchtelingenwerk.nl>, accessed on 8 March 2002.

<sup>156</sup> Section 87 (1) of the Aliens Act 2000 and Part 8.2.3 of the Dutch General Administrative Law.

<sup>157</sup> Section 87 (2) and Section 40 (2) of the Dutch Aliens Act 2000.



review has been reached. A request for a provisional ruling must be made before the date when the applicant has been ordered to leave.<sup>158</sup>

An interview may be held with the applicant, and witnesses and experts may be heard if it is regarded as necessary. The State Secretary of Justice shall reach a decision within six weeks after the petition for review was submitted, however, with a possibility to postpone the decision for four weeks. If the State Secretary of Justice turns to the Aliens Affairs Advisory Committee<sup>159</sup> for advice in the case, the decision may be further postponed for four weeks.<sup>160</sup>

### 5.1.5 Spain

In the Spanish asylum procedure a negative decision on the asylum request may be appealed to a contentious-administrative Court.<sup>161</sup> The appeal must be lodged within two months after notification of the rejection of the asylum application by the Office for Asylum and Refuge (OAR). Removal may be suspended upon request to the Court. There is, however, no automatic suspension.<sup>162</sup>

Normally it takes between 19 months and two years for the Court to process the appeal. A negative decision on the appeal may be further appealed to the Supreme Court. The Supreme Court does, however, only consider questions on legality of the decision. Also in front of the Supreme Court, suspension must be requested, as it is not automatic.<sup>163</sup>

It is also possible to apply for re-examination of the asylum application after it has been rejected in the regular asylum procedure, in case of changed circumstances or new evidence supporting the application. The request for re-examination shall be directed to the OAR within the Ministry of the Interior and it may be asked for at any time. The re-examination of the asylum application will follow the regular asylum procedure. If the OAR

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<sup>158</sup> Section 8:81 of the Dutch General Administrative Law Act; See also Immigration and Naturalisation Service, supra note 152, pp. 4-5.

<sup>159</sup> The Advice Committee is an independent committee composed of members such as lawyers, judges and other persons connected with humanitarian organizations, which gives advice to the State Secretary of Justice. It is also the Committee that conducts interviews with the applicant if an interview is deemed to be necessary.

<sup>160</sup> Immigration and Naturalisation Service, supra note 152, p. 5.

<sup>161</sup> Article 39 (1) of the Royal Decree 203/1995 (February 10) approving the Implementation Regulation of Law 5/1984 (March 26) regulating Refugee Status and the Right to Asylum.

<sup>162</sup> Article 21 (2) of Law 5/1984 (March 26) regulating Refugee Status and the Right to Asylum, and Article 39 (2) of the Royal Decree 203/1995 (February 10) approving the Implementation Regulation of Law 5/1984 (March 26) regulating Refugee Status and the Right to Asylum.

<sup>163</sup> Danish Refugee Council, supra note 85, p. 261.

rejects the request for re-examination, an appeal against this decision may be filed with the State Secretary of the Interior within one month.<sup>164</sup>

Two other remedies are provided for in Spanish administrative law in order to get an asylum application reconsidered. The first one is a demand for reconsideration directed to the organ that issued the decision. This request for reconsideration must be lodged within one month after notification of the decision. Such a request does not affect the possibility to appeal in case the decision is not changed. This remedy can be useful in cases where some obvious errors have been made in the assessment of the facts of the case. This procedure is faster and less expensive than a formal appeal.<sup>165</sup>

The second remedy is extraordinary administrative review, which might be used in case of administrative errors. There is a requirement of documentary evidence in order to access this procedure. This remedy is rarely used in the regular determination procedure, but may be of use in inadmissibility cases when new evidence has appeared and the deadline for filing an appeal has already expired.<sup>166</sup>

### 5.1.6 United Kingdom

According to the British asylum procedure it is possible to appeal negative decisions on asylum applications to the Immigration Appellate Authorities. The appeal has to be submitted within ten days after the applicant was notified of the decision of the immigration authorities.<sup>167</sup> The appeal has suspensive effect, save for the case when an applicant is removed to a “designated third country”.<sup>168</sup>

The appeal is heard and decided upon by the special adjudicator appointed by the Lord Chancellor.<sup>169</sup> Normally a hearing is conducted, though special circumstances, such as the applicant being outside of the United Kingdom or the adjudicator deciding that the appeal will be allowed, may allow for exceptions.<sup>170</sup> Legal aid is partly available for the applicant, i.e. during the application stage, as well as before and after the hearing. During the hearing

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<sup>164</sup> Article 9 of the Law 5/1984 (March 26) regulating Refugee Status and the Right to Asylum and Article 38 of the Royal Decree 203/1995 (February 10) approving the Implementation Regulation of Law 5/1984 (March 26) regulating Refugee Status and the Right to Asylum.

<sup>165</sup> Danish Refugee Council, *supra* note 85, p. 262.

<sup>166</sup> Danish Refugee Council, *supra*, p. 262.

<sup>167</sup> Paragraph 6 (1) of the Immigration and Asylum Appeals (Procedure) Rules 2000, Statutory Instrument 2000 No.2333 (L. 21) [henceforth Immigration and Asylum Appeals Rules].

<sup>168</sup> Section 11 and 12 of the Immigration and Asylum Act. See also Immigration Appellate Authority: *Asylum Appeals Procedure*, available at <http://www.iaa.gov.uk/GenInfo/IAA-Appealpro.htm>, accessed on 15 January 2002.

<sup>169</sup> Paragraph 69 (1) and Schedule 3 paragraph 1 (2) of the Immigration and Asylum Act, Statutory Instrument 2000 No 2444 (C. 69) [henceforth Immigration and Asylum Act].

<sup>170</sup> Section 14, 43 and 44 of the Immigration and Asylum Appeals Rules.

legal aid will not be provided, but the applicant can ask for free assistance from a number of organisations.<sup>171</sup> The UNHCR may intervene in order to assist the appellant. However, this seldom happens, and when it does it is usually because an interpretation issue of interest has been raised.<sup>172</sup>

No time limit for giving notice of the decision by the adjudicator is to be found in the present Immigration and Asylum Appeals (Procedure) Rules. Until these rules came into force in October 2000 the adjudicator should deliver her decision within 42 days after receiving the appeal documents, with a possibility for the adjudicator to extend this time limit if necessary.<sup>173</sup> Now the time limit to be applied for decisions by the adjudicator will be decided by the adjudicator herself.<sup>174</sup> In any case, written notice of the decision shall be given and it shall include reasons for the decision.<sup>175</sup>

An applicant may in case of a negative decision by the adjudicator appeal to the Immigration Appeal Tribunal (henceforth the Tribunal) within ten working days after notification of the decision, if it is not considered necessary to extend this time limit.<sup>176</sup> The Tribunal will decide whether leave to appeal shall be granted. Leave to appeal will be granted provided that the appeal has real prospects of success or there are other compelling circumstances for such appeal.<sup>177</sup> If leave to appeal is refused, the applicant may within ten days from notification of the decision, apply to the Tribunal for review of the decision denying leave to appeal.<sup>178</sup> The review decision shall be accompanied with reasons and be taken within time limits decided by the Tribunal itself.<sup>179</sup>

If leave to appeal is granted, the appeal will be heard and decided upon by such number of members of the Tribunal that the President of the Tribunal may decide.<sup>180</sup> Only if it is necessary in the interest of justice or if it would save time and avoid expenses, the Tribunal may refer the appeal back to the same or to another adjudicator for a new decision.<sup>181</sup> A hearing shall normally be conducted in front of the Tribunal, save for in case of exceptional circumstances which are the same as before the adjudicator.<sup>182</sup> The applicant has the right to representation and legal aid in accordance with the same rules as are applicable before the adjudicator.<sup>183</sup> A written notice of

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<sup>171</sup> Immigration Appellate Authority, *supra* note 168.

<sup>172</sup> Paragraph 29 (2) of the Immigration and Asylum Appeals Rules.

<sup>173</sup> Paragraph 9 (1) of the Asylum Appeals (Procedure) Rules 1996, Statutory Instrument 1996 No. 2070 (L.5).

<sup>174</sup> Paragraph 30 (1) and (4) of the Immigration and Asylum Appeals Rules.

<sup>175</sup> Paragraph 2 (1) and Section 15 of the Immigration and Asylum Appeals Rules.

<sup>176</sup> Paragraph 18 (2) and (3) of the Immigration and Asylum Appeals Rules.

<sup>177</sup> Paragraph 18 (7) of the Immigration and Asylum Appeals Rules.

<sup>178</sup> Paragraph 19 (1) and (2) of the Immigration and Asylum Appeals Rules.

<sup>179</sup> Paragraph 19 (6) of the Immigration and Asylum Appeals Rules; *Supra* note 174.

<sup>180</sup> Paragraph 6 (3) of the Immigration and Asylum Act.

<sup>181</sup> Section 23 of the Immigration and Asylum Appeals Rules.

<sup>182</sup> Paragraph 24 (1) of the Immigration and Asylum Appeals Rules.

<sup>183</sup> Immigration Appellate Authority, *supra* note 168.

the Tribunal's decision, including the reasons for the decision, shall be sent to the applicant.<sup>184</sup>

There is a further possibility to appeal questions of law in regard to the asylum application to the Court of Appeal (in Scotland such appeal shall be filed with the Court of Session), in case the decision of the Tribunal is negative. An application for leave to appeal to the Court shall be made to the Tribunal within 10 days after notification of the Tribunal's decision.<sup>185</sup> Just as in front of the other instances the applicant has the right to representation and legal aid.<sup>186</sup>

Since the end of 2000 it is possible to appeal a rejection on an asylum application directly on grounds referable to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such appeal may be submitted either in conjunction with or separately from the asylum appeal. It is furthermore also possible to appeal an asylum application on grounds of unlawful discrimination by an officer on grounds of race.<sup>187</sup>

In case the Secretary of State claims that grounds of national security justifies the rejection of the application, the normal appeals procedure does not apply. In this case the appeal shall be made to the Special Immigration Appeals Commission. This special procedure is provided for in order to be able to withhold evidence from the appellant in case necessary. If evidence is withheld, this evidence shall, however, be considered by an independent advisor instead. This procedure is rarely applied.<sup>188</sup>

## 5.2 Comparative Summary

The outline above visualises the wide range of appeal procedures offered by the six countries. No standard appeal procedure seems to exist, while a number of common denominators are to be found. In this comparative summary I will outline the special features to be found in the different procedure, but in particular emphasise the features they have in common. I will leave out of this summary those special procedures that do not fall under either the regular asylum procedure or the manifestly unfounded procedure.

Common for the six countries in regard to the appeal procedure for territorial asylum applications is that they all provide for at least one instance of appeal. In fact, the only country offering only one appeal

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<sup>184</sup> Paragraph 2 (1) and Section 25 of the Immigration and Asylum Appeals Rules.

<sup>185</sup> Section 26 and paragraph 27 (1) of the Immigration and Asylum Appeals Rules.

<sup>186</sup> Immigration Appellate Authority, *supra* note 168.

<sup>187</sup> Immigration & Nationality Directorate: *Making an appeal: asylum and human rights grounds*, available at <http://194.203.40.90/default.asp?pageid=1178>, accessed on 15 January 2002.

<sup>188</sup> *Ibid.*

instance is Denmark. The other five countries under scrutiny offers two appeal instances, save for UK, which actually provides for three instances. Those countries with several appeal instances, normally assign the last instance to consider points of law only, and not the merits of the case.

Normally all rejected asylum applications may be appealed. Depending on where the asylum application was submitted or if it is considered to be manifestly unfounded, the appeal procedure often differs from the regular appeal procedure. The Danish appeal procedure is, however, not available for all cases, as cases considered manifestly unfounded has to be vetoed by the Danish Refugee Council in order to be considered by the appeal instance, the Danish Refugee Board.

One rare feature introduced by the Danish procedure is that appeals, which are not considered manifestly unfounded, are always automatically appealed to the Board. None of the other five countries provides for automatic appeal. Instead the applicant will have to appeal herself, as well as comply with the strict and often quite short time limits. The time limits varies between the countries and between the different instances, with the UK on the one hand requiring an appeal to be submitted at any of its appeal instances within ten days, and France (second instance appeals) and Spain (first instance appeals) on the other hand being the most generous in this regard, offering 2 months.

Most countries provide legal aid in one form or another, at least if the appellants does not have sufficient financial resources herself. As many different types of appeal exist also within the same country, free legal aid is not always provided in all instances. One of the conditions in France in order to be provided free legal aid is that the applicant entered France legally. While it is very difficult today to arrive in one of the Member States as an asylum seeker in a legal way, I find this provision to be outdated and not corresponding to the factual situation of today's asylum seekers. If the government does not offer legal aid it is usually possible to get free counsel from an NGO interested in asylum and refugee matters.

Suspensive effect is normally granted at least during the appeal procedure in the first appeal instance. Many times the suspensive effect is automatic, while other times it has to be requested from the court. Austria offers a strange procedure in this regard, as appeal in the manifestly unfounded procedure also attracts a right to appeal to the Asylum Review Board, but suspensive effect is only granted after the ten-day period within which such an appeal has to be submitted has passed. The consequence of this is that an applicant may be expelled within these ten days even though she intends to appeal. If she has not been expelled, an appeal will entail suspensive effect after this time.

A condition for an appeal to have any prospects of success is that the decision, which is appealed, contains reasons for the rejection. Without those reasons it will be extremely difficult for the applicant to know why her

application was rejected and what circumstances she should try to rebut or prove. I have found no indication that any of the scrutinised countries would not provide for reasons in asylum decisions. The Netherlands does however only include reasons when the decision is negative. An applicant whose application is approved will therefore never know why her application was approved, a circumstance which makes it difficult to assess the consistency of the practice.

# 6 Appeal in the Visa Procedure

Precisely as in Chapter 5 I will outline the appeal possibilities for rejected visa decisions in each of the six countries under scrutiny in the first part of the chapter. The second part will likewise be dedicated to a comparative summary, where a comparison between the different procedures will be made and specific features of the procedures will be highlighted.

## 6.1 Appeal in EU Member States

### 6.1.1 Austria

Article 94 of the Austrian Aliens Act<sup>189</sup> regulates the possibility to appeal residence and work permit decisions, as well as visa decisions. According to this article it is not possible to appeal visa decisions. Only in case the applicant has already been issued a residence permit, but her visa application is still rejected, she has a legitimate right to appeal this decision to the Minister of Interior.

### 6.1.2 Denmark

Visa applications can be filed at Danish diplomatic representations and at some consular representations abroad. The application will be decided upon by the Danish Immigration Service. A negative decision on the visa application may be appealed to the Danish Ministry of Interior by the applicant herself or by someone in position of a power of attorney approved by the applicant.<sup>190</sup> Persons that may represent the applicant in the appeals procedure without presenting a power of attorney are parents, children, husband or wife, cohabitant, brothers and sisters, or brothers- and sisters-in-law<sup>191</sup> of the applicant who she wishes to visit.<sup>192</sup>

The appeal may be submitted to a Danish diplomatic or consular representation abroad or it may be sent directly to the Ministry of Interior or to the Danish Immigration Service by post. In case a relative or someone in possession of a power of attorney is representing the applicant, the appeal may also be handed in personally to the Ministry of Interior.<sup>193</sup>

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<sup>189</sup> Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden; BGBl. I Nr. 75/1997 idF BGBl. I Nr. 134/2000.

<sup>190</sup> Paragraph 46 (2) of the Aliens (Consolidation) Act 1999.

<sup>191</sup> Brothers- or sisters-in-law only have the right to represent the applicant if this brother- or sister-in-law is empowered by the applicant's sister or brother to represent the applicant on behalf of this sister or brother.

<sup>192</sup> Danish Ministry of the Interior: *Visum*, available at <http://www.inm.dk>, accessed on 9 October 2001.

<sup>193</sup> *Ibid.*

The Third Aliens Office of the Immigration Department within the Ministry of Interior handles appeals on visa applications. The Immigration Service will be requested to give its opinion on the appeal. A hearing of the applicant or more likely of her representative may be conducted with regard to the opinion of the Immigration Service. The final decision on the visa application will be delivered in the name of the Ministry of Interior. While this final decision may not be appealed, it is always possible to submit a new visa application. Success with this new application is, however, not likely if no changes in the circumstances have occurred.<sup>194</sup>

### 6.1.3 France

According to the French procedure it is possible to challenge a negative visa decision through three different approaches. Firstly, it is possible to ask the officer who decided to refuse the visa application to reconsider her decision. The second possibility is to turn to the Minister of Foreign Affairs in writing with a request to change the decision. Finally, a person who has been refused an entry visa may appeal to the “Commission de Recours contre les Refus de Visa” (henceforth the Commission).<sup>195</sup>

The composition of the Commission and its competences are regulated in Decree n° 2000-1093 of 10 November 2000<sup>196</sup> and in a Statement of 16 November 2000.<sup>197</sup> The Commission is an organ under the Ministry of Foreign Affairs. An appeal should be submitted within two months from the time when the applicant was notified of the rejection of her visa application. The chairman of the Commission is chosen among former heads of diplomatic and consular representations. Furthermore, the Commission is composed of one member with a judicial background, one member representing the Minister of Foreign Affairs, and one member representing the Minister in charge of issues of population and migration. All the members are chosen for a time of three years. The diplomatic and consular representations, as well as the Ministry of Foreign Affairs, are obliged upon request to provide the Commission with all the information necessary in order to reach a decision on the appealed application. The Commission may either reject the appeal or recommend to the Minister of Foreign Affairs that the visa applied for should be issued.<sup>198</sup>

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<sup>194</sup> Danish Ministry of the Interior: *Udlaendingeaftdelingen*, available at <http://www.inm.dk>, accessed on 9 October 2001.

<sup>195</sup> Information provided by the French Ministry of Foreign Affairs, received on 23 October 2001.

<sup>196</sup> Décret N° 2000-1093 du 10 novembre 2000, Journal Officiel de la République Française du 11 novembre 2000.

<sup>197</sup> Arrête du 16 novembre 2000, Journal Officiel de la République Française du 19 novembre 2000.

<sup>198</sup> Supra note 196.



It is possible to appeal a negative decision by the Commission to the Council of State.<sup>199</sup> The appeal has to be made within two months from the time when the applicant was notified of the decision. In case no decision has been made by the administration regarding the visa application within two months from the time the application was submitted, it may also be appealed to the State Council.<sup>200</sup>

In principle, the representations do not have an obligation to state the reasons for the rejection of a visa application. A number of exceptions to this non-obligation make the tourists the most vulnerable group, to which the representations have no obligation to state any reasons for rejection. Furthermore the Commission never states the reasons for its decisions.<sup>201</sup>

#### 6.1.4 The Netherlands

The Netherlands provides an opportunity for the applicant whose visa application has been rejected to send a petition for review to the Minister of Foreign Affairs. Such a petition for review shall be submitted within four weeks from the time when the applicant was notified of the rejection of her visa application. The applicant or most likely a representative of her, as well as witnesses and experts, may be heard in regard to the visa application. The Minister of Foreign Affairs shall reach a decision on the petition within six weeks after the petition was received, however, some possibilities to extend this time limit exist.<sup>202</sup>

A petition for review may also be submitted in case no decision has been reached on the visa application within eight weeks from the time the application was submitted, save for situations when the applicant has been informed that this time limit has been extended to three months in her case.<sup>203</sup>

A negative decision by the Minister of Foreign Affairs on the petition for review may be appealed to the Aliens Bench of the District Court in The Hague.<sup>204</sup> An appeal to the Court should be made within four weeks from notification of the negative decision. However, in case no decision has been reached on the application within six months after submission of it to the Minister of Foreign Affairs, there will be no time limit for submitting an appeal.

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<sup>199</sup> French Ministry of Foreign Affairs, *supra* note 195.

<sup>200</sup> SOS-Net: *Les visas: recours en cas de refus*; available at <http://sos-net.eu.org/etrangers/indexetr.htm>, accessed on 15 January 2002.

<sup>201</sup> *Ibid.*

<sup>202</sup> Immigration and Naturalisation Service, *supra* note 152, pp. 3-5.

<sup>203</sup> Immigration and Naturalisation Service, *supra*, p. 3.

<sup>204</sup> Section 69 and 70 (2) of the Dutch Aliens Act 2000.

The Court may require a hearing of the applicant or her representative, or information submitted in writing. A decision on the appealed visa application should be delivered within six weeks after the hearing.<sup>205</sup>

### **6.1.5 Spain**

It is not possible to appeal a negative decision by the Spanish authorities on a visa application. While a rejected visa application does not contain any reasons for the rejection, an appeal would be quite impossible. On the other hand, it is always possible to hand in a new application.<sup>206</sup>

### **6.1.6 United Kingdom**

It is not possible to appeal a negative visa decision in case visa is sought for the purpose of studying in or visiting the United Kingdom for maximum six months or if it is sought for entering the United Kingdom in order to arrange the studies while there ('prospective student'). This does, however, not apply to cases where the visa application has been submitted for the purpose of visiting family in the United Kingdom or where the applicant seeks an entry visa for a period longer than six months.<sup>207</sup>

A refusal to issue a visa for a family visit or for a period of six months or more entails a right to appeal to the Immigration Appellate Authorities where the appeal will be decided upon by an adjudicator.<sup>208</sup> The appeal procedure is almost identical with the appeal procedure applied in territorial asylum cases. A notice of appeal will be attached to the refusal of the visa application in case there is a right to appeal. The appeal should be sent by post or fax, or delivered in person to the diplomatic or consular representation where the initial visa application was made. The representation should receive the appeal within 28 days after notice of the decision.<sup>209</sup> The representation will then forward the appeal to the adjudicator in the United Kingdom that will consider the appeal. The applicant may be provided with free legal assistance by the Immigration Advisory Service.<sup>210</sup>

The appeal proceedings will take place in the United Kingdom. A hearing may be conducted upon request, where witnesses may be heard. The

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<sup>205</sup> Immigration and Naturalisation Service, *supra* note 152, p. 6.

<sup>206</sup> Information provided by the Spanish Embassy in Oslo, received on 16 January 2002.

<sup>207</sup> Paragraph 60 (4) and (5) of the Immigration and Asylum Act.

<sup>208</sup> Section 59 of the Immigration and Asylum Act.

<sup>209</sup> Paragraph 6 (2) (b) of the Immigration and Asylum Appeals Act.

<sup>210</sup> Section 14 and 43 of the Immigration and Asylum Appeals Rules. See also Immigration Appellate Authority: *Guide to the Appeals Procedure*, available at <http://www.ein.org.uk/iaa/GUIDE.htm>, accessed on 2 March 2002. The Immigration Advisory Service is an independent organisation providing legal assistance to person applying for entry visas to the United Kingdom.

applicant who is still overseas will not be heard. A hearing is however not necessary for the adjudicator to reach a decision.<sup>211</sup> The decision reached by the adjudicator shall include the reasons on which the decision is based.<sup>212</sup>

A dismissal by the adjudicator of an appeal may be appealed to the Immigration Appeal Tribunal. Such an appeal shall be made within 28 days from receiving the decision. The Tribunal will then decide whether leave to appeal will be granted.<sup>213</sup> If leave to appeal is granted the procedure followed will be the same as in the territorial asylum procedure, save for the fact that the applicant cannot be heard, as she is overseas.<sup>214</sup> A decision of the Tribunal shall be accompanied with reasons.<sup>215</sup>

In case of a dismissal by the Tribunal the applicant may ask the Tribunal for leave to appeal to the Court of Appeal. Such an appeal shall be made within ten days after the applicant was notified of the decision of the Tribunal, and the Tribunal will only consider questions of law.<sup>216</sup> The applicant has a right to representation and legal assistance.<sup>217</sup>

## 6.2 Comparative Summary

The administrative law governing visa applications have shown to be somewhat complicated to scrutinise. A major reason being the unavailability of information in English, and in particular the complexity of the laws governing these issues. For those countries governing similar appeal procedures for visa appeals and asylum appeals, information has been more accessible.

Austria and Spain do not provide for a possibility to appeal rejected visa applications. It is however always possible to hand in a new visa application. The prospects for success in case a new application is submitted is, however, limited if no new circumstances are at hands.

UK does normally not allow for rejected visa applications to be appealed. However, in case the visa was sought for a period exceeding six months or for a family visit, a rejection may be appealed, and the appeal procedure to be followed will at large be the same as for the territorial asylum procedure. Consequently three appeal instances are available, with the last one, the Court of Appeal, only considering points of law. Free legal aid will be provided and reasons in the decision shall be included. The major difference being that the applicant cannot be heard in person and that the time limit is

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<sup>211</sup> Immigration Appellate Authority, *supra*.

<sup>212</sup> Paragraph 2 (1) and Section 15 of the Immigration and Asylum Appeals Rules.

<sup>213</sup> Paragraph 18 (1), (2) and (7) of the Immigration and Asylum Appeals Rules.

<sup>214</sup> See Chapter 5.1.6.

<sup>215</sup> Paragraph 2 (1) and Section 25 of the Immigration and Asylum Appeals Rules.

<sup>216</sup> Section 26 and paragraph 27 (1) of the Immigration and Asylum Appeals Rules.

<sup>217</sup> Immigration Appellate Authority, *supra* note 168.

slightly longer, 28 days, as the appeal has to be submitted from abroad. Save for in the case of tourist visas and similar short-term visas, the UK provides for the most sophisticated mechanism for visa appeals.

Denmark, France and the Netherlands all provide for the possibility to appeal a rejected visa application. Denmark has one appeal instance, while the other two countries have two. The last instance in France, the Council of State, does however only consider points of law. It has been complicated to find out whether legal aid will be provided for the applicants, but I would find it quite logical that this would not be the case, as the applicant is abroad and there is no legal obligation for the country of destination to accept non-nationals to enter there territory on tourist-, student-, or work-related grounds.

France does not provide reasons in its visa decisions. For the other countries it has been difficult to find out whether reasons for the decision on the visa application are included. It makes an appeal extremely complicated, when one does not know the reasons why the application was rejected.

Worthy of note is that the Ministries of Foreign Affairs (in Denmark the Ministry of Interior) are involved in the appeals of visas as the first instance, save for in the case of the UK. This is quite natural as visa issues belong to the sphere of these Ministries.

The applicant may of course always submit a new application in case the first one is rejected. As stated above, a new application is unlikely to be successful if no new circumstances are at hands.

# 7 Appeal in the Externalised Processing Procedure

In the first part of this Chapter the possibility to appeal a rejected asylum application when the application was first submitted at a diplomatic or consular representation abroad will be scrutinised for each of the six countries. As many of the countries practicing externalised processing provide for a two-step procedure, i.e. a first step regarding the initial visa decision and a second step regarding the actual asylum claim, the possibility to appeal both steps will be scrutinised. For each country I will draw parallels to the visa and/or territorial asylum procedure practiced in that country. The second part of this Chapter will briefly compare the different procedures and outline the key features. The more comprehensive assessment of the externalised processing procedure in light of international law will be saved for the last Chapter.

## 7.1 Appeal in EU Member States

### 7.1.1 Austria

Austria practices a two-step externalised processing procedure, where an initial visa decision will be made and the applicant issued with an entry visa if it is considered ‘likely’ by the Austrian Federal Asylum Agency that she will be granted asylum.<sup>218</sup> If the applicant is denied an entry visa in this first part of the procedure, the Austrian law does not provide for a possibility to appeal the negative decision.<sup>219</sup> While an entry visa is a condition for the continued assessment of the asylum application, the denial will entail that the application will not be processed any further. This complies with the rules for the visa procedure, where appeals are not allowed either. While this is the crucial stage for the asylum applicant, it is quite remarkable that appeals are not allowed.

As a decision on the asylum application is only taken if the applicant has been granted entry, which requires the positive assessment that the granting of asylum is likely, there will hardly be any negative decisions on asylum applications once the applicants have been granted admission to Austria.<sup>220</sup> However, if asylum would be denied after the applicant has been admitted to

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<sup>218</sup> Danish Refugee Council, *supra* note 85, p. 16.

<sup>219</sup> Article 94 of the Austrian 1997 Aliens Act.

<sup>220</sup> UNHCR RO Vienna, *supra* note 91.

Austria, her appeal will be processed in accordance with the rules governing appeals in the territorial asylum procedure.<sup>221</sup>

### 7.1.2 Denmark

There is no formal procedure provided for in the Danish law to appeal a decision through which the diplomatic representation<sup>222</sup> has rejected an asylum application.<sup>223</sup> However, the representation does always in its decision to reject an application due to lacking close connection state the reason why the application was rejected. This makes it possible for the applicant, in case she feels that her application should not have been rejected, to approach the representation again in order to substantiate that she fulfils the close connection condition. A second possibility to challenge the decision of the representation to reject the application is to address the Ministry of Foreign Affairs. There is no special form or procedure in regard to such approach.<sup>224</sup>

If the representation has forwarded the application to the Danish authorities, and the Danish Immigration Service thereafter dismisses the asylum application, the dismissal may in some cases attract a right of appeal.<sup>225</sup> If the application is dismissed in the regular asylum procedure, it is possible to appeal to the Refugee Board. The appeal is not automatic, as in the territorial asylum procedure.<sup>226</sup> If the application is rejected in the manifestly unfounded procedure, and the Danish Refugee Council<sup>227</sup> accepts that the application is manifestly unfounded, the decision cannot be appealed. On the other hand, if the Council disagrees with the Immigration Service about the unfoundedness of the application, the rejection may be appealed.<sup>228</sup>

The procedure followed when a decision is appealed is outlined in Paragraph 56 (4) (iii) and 53 (4) of the Danish Aliens (Consolidation) Act. The latter article states that if the connection with Denmark is not sufficient, the chairman of the Refugee Board can decide upon the application alone. Otherwise, the decision will be taken, as in the territorial asylum procedure, by a Board consisting of the chairman or one of her deputies and four other members appointed or nominated by the Minister of the Interior, the Danish

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<sup>221</sup> Ibid. As I wish not to repeat myself in regard to outlining the procedures I refer the reader back to the relevant Chapter, which in the case of Austrian asylum appeals is Chapter 5.1.1.

<sup>222</sup> As stated above (Chapter 4.1.4) an application may be rejected by the representation in case it does not show that the applicant has any close connection with Denmark.

<sup>223</sup> Section 46 b (2) of the Danish Aliens (Consolidation) Act 2001.

<sup>224</sup> Source: Questionnaire response by the Danish Immigration Service, received on 17 October 2001.

<sup>225</sup> Paragraph 53 (a) of the Danish Aliens (Consolidation) Act.

<sup>226</sup> This is implied in Section 53 a (2) of the Danish Aliens (Consolidation) Act, considering decisions that are automatically appealed, which only talks about aliens “staying in Denmark”.

<sup>227</sup> See supra footnote 126.

<sup>228</sup> Paragraph 53 a (1) (i) and (3) of the Danish Aliens (Consolidation) Act.

Refugee Council, the General Council of the Bar and Law Society and the Minister of Foreign Affairs.<sup>229</sup>

While it is not possible for the Refugee Board to call in the applicant for an interview, it sometimes conducts hearings with references, referred to by the applicant, who are living in Denmark.<sup>230</sup> Paragraph 56 (4) (iii) authorises the chairman of the Refugee Board or a person authorised by the chairman to refer a case to be decided by the Board, in its larger composition, on the basis of written proceedings only.

In most of the cases that are appealed to the Refugee Board, the Immigration Service has reached a negative decision on the ground that the connection between the applicant and Denmark is too weak. If the Refugee Board revokes this decision and considers that the connection is strong enough, the case will be referred back to the Immigration Service in order for it to decide whether the applicant fulfils the criteria for being a refugee and the applicant therefore should be issued a residence permit. However, if it is manifest that the applicant fulfils the definition of a refugee or person otherwise in need of protection as outlined in Paragraph 7 (1) or (2) of the Danish Aliens (Consolidation) Act, the Refugee Board will decide upon the case itself without referring it back to the Immigration Service.<sup>231</sup>

The Danish appeal procedure as practiced in externalised processing has more in common with appeals in the territorial asylum procedure than with appeals in the visa procedure. The major differences from the territorial asylum procedure being that the appeal is not automatic and that the applicant is not heard.

### 7.1.3 France

The French externalised processing procedure is a two-step procedure where the first part has obvious connections with the visa procedure. As, in fact, ordinary long-term or short-term visas are issued for applicants who pass the first part, appeal will accordingly follow the same rules as in the regular visa procedure. This means that the appeal procedure is regulated by Decree No 2000-1093 of 10 November 2000, which established an appeals commission handling refusals of any kind of visas to enter France. The fact that a negative visa decision is normally not motivated makes an appeal complicated though.<sup>232</sup>

The second part of the procedure is identical with the territorial asylum procedure, as the applicant in fact makes the formal asylum application first

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<sup>229</sup> Paragraph 53 (2) of Aliens (Consolidation) Act.

<sup>230</sup> Danish Immigration Service, supra note 224 received on 17 October 2001.

<sup>231</sup> Flygtningenævnet: *Formandskabet – 8. beretning 1999*, Stougaard Jensen/Scantryk A/S, Copenhagen 2000, p. 196.

<sup>232</sup> UNHCR BO Paris, supra note 82.

once she has arrived in France. Therefore the appeal procedure will be the same as in the territorial asylum procedure.<sup>233</sup>

#### **7.1.4 The Netherlands**

The Netherlands also practices a two-step procedure where a denial in either step is subject to appeal. It is therefore possible to appeal a negative decision by the INS both on the initial decision on entry visa and on the asylum request. The appeal on the initial decision shall be made to the Minister of Foreign Affairs within four weeks after the decision was made by the INS. If the decision has formal faults in the appearance, for instance if a translation is missing, the asylum seeker shall be informed of this. The Minister of Foreign Affairs will offer the applicant some time, usually two weeks, to repair the faults. After that the Minister will decide upon the appeal. The decision of the Minister of Foreign Affairs may be appealed to the Aliens Chamber at the District Court in The Hague.<sup>234</sup> The first step of the procedure therefore follows the same pattern as the Dutch procedure applicable for visa appeals.

Once the applicant has been admitted to the Netherlands, the procedure will follow the same rules as for the territorial asylum procedure. The appeal procedure, in case the asylum application is rejected after arrival in the Netherlands, will consequently also be identical with the procedure for appeal in the territorial asylum procedure.<sup>235</sup>

#### **7.1.5 Spain**

Spain practices a one-step procedure, with an extraordinary possibility of transfer in advance to Spain in case the applicant is in a risk situation. A separate decision is taken on the question “transfer in advance”, and this decision does not affect the parallel assessment of the asylum request.

It is possible for the applicant to appeal the decision of the OAR or the Interministerial Eligibility Commission on Asylum and Refuge concerning the right to be transferred to Spain in case of a risk situation,<sup>236</sup> while the asylum application is still being processed. The general regulations governing the Spanish Administrative Procedure Law<sup>237</sup> will apply for such appeals, as it is an administrative decision, for which the possibility to appeal is not specifically regulated through the Asylum Law.

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<sup>233</sup> UNHCR BO Paris, supra note 82. For details about the procedure, see Chapter 5.1.3.

<sup>234</sup> UNHCR The Hague, supra note 97.

<sup>235</sup> Ibid. For details about the procedure, see Chapter 5.1.4

<sup>236</sup> This possibility is outlined above in Chapter 4.1.3.

<sup>237</sup> Law 30/1992 on the Legal System of the Public Administration and common Administrative Procedure.



Appeals can also be lodged at a Spanish diplomatic or consular representation in case a negative decision has been reached on the asylum request. The same procedure as for the regular asylum procedure will apply when the appeal is filed abroad.<sup>238</sup> This possibility to appeal from abroad was introduced as a safeguard in order to ensure that persons under the accelerated asylum procedure (border or in-country) have the right to appeal or to be communicated results of their proceedings even after expulsion.<sup>239</sup>

### **7.1.6 United Kingdom**

The United Kingdom is still another country practicing a two-step externalised processing procedure. Both a rejection of the application in the initial phase for the issuance of an entry visa, and a rejection of the actual asylum request after the applicant's arrival in the United Kingdom may be appealed. The decision by the British Integrated Casework Directorate to refuse an entry clearance for the purpose of seeking asylum in the United Kingdom may therefore be appealed. This possibility is outlined in the Immigration and Asylum Act 1999 paragraph 59(2), which states that "[a] person who, on an application duly made, is refused a certificate of entitlement or an entry clearance may appeal to an adjudicator against the refusal." This right of appeal may be exercised from abroad to the independent Immigration Appellate Authorities, where an adjudicator will consider the case. As a person applying for asylum at a British representation abroad in fact applies for an entry visa for the purpose of applying for asylum once in the United Kingdom, the appeal procedure to be applied in this case is identical with the procedure for regular visa appeals.<sup>240</sup>

Once the applicant has entered the United Kingdom and her asylum request is further processed, she will have the same possibility to appeal a rejection of her asylum application as applicants who initially applied for asylum in the territorial asylum procedure.<sup>241</sup>

Worthy of note is that the appeal procedures are almost identical for all three procedures, i.e. for territorial asylum appeals, for visa appeals and for appeals in the externalised processing procedure.

## **7.2 Comparative Summary**

One determining factor for how the appeal procedure has been modelled in externalised processing in the six states under scrutiny is whether

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<sup>238</sup> For more details about the procedure, see Chapter 5.1.5

<sup>239</sup> IGC, *supra* note 78, pp. 291-2.

<sup>240</sup> Source: Questionnaire response by the UNHCR Branch Office in London, received on 27 August 2001. For details about the procedure, see Chapter 6.1.6.

<sup>241</sup> UNHCR BO London, *supra*. For more details about the procedure, see Chapter 5.1.6

externalised processing follows the one-step or two-step procedure. The one-step procedure implies that a visa will be issued once asylum has been granted. In the two-step procedure an initial assessment will be made which results in the issuance of an entry visa in case of a positive decision. After the initial step, i.e. after the applicant has been issued a visa and arrived in the country of destination, the assessment of the asylum application will be finalised.

Denmark and Spain are one-step procedure countries. The procedure for appeals in both the Danish and the Spanish externalised processing procedure follows to a great extent the rules for the territorial asylum procedure, with a few minor exceptions. One such exception in the Danish procedure is that an appeal is not automatic. Other logical exceptions are that the applicant cannot be heard by the appeal instance and that legal aid is not granted. Worthy of note is also that an asylum application that is rejected already at the Danish representation, due to a lack of connection between the applicant and Denmark, does not attract a right of appeal. On the other hand, the possibility to request transfer in advance due to a risk situation when the application was submitted at a Spanish representation attracts a separate right of appeal, which follows the rules for the regular Spanish administrative procedure.

The other four countries, Austria, France, The Netherlands and the United Kingdom, all practice a two-step procedure. France is the country with the most informal externalised processing procedure, where the asylum applicant in fact is issued with an ordinary long-term or short-term visa. Consequently an appeal due to a rejection of a visa in the French externalised processing procedure follows the same rules as in the regular visa procedure. The same is through for the other three countries in regard to the initial visa decision. They all apply the same rules for an appeal of a rejected entry visa in the externalised processing procedure as for a rejection of a regular entry visa. For applicants applying for asylum at an Austrian diplomatic or consular representation, this means that a negative outcome of the initial visa decision is not subject to appeal.

Once an applicant has been issued with an entry visa and arrived in the territory of the destination state, all four “two-step procedure”-countries apply the rules for the territorial asylum procedure to the asylum request. This means that an appeal also will follow the same procedure as for territorial asylum claims.

This clearly shows the distinction that is made and withheld between the initial visa decision and the decision on the actual asylum request. An appeal on one of these decisions in the externalised processing procedure will follow the rules for appeal belonging to the procedure most closely related with the specific decision. Therefore appeals on negative initial visa decisions will comply with the rules for regular visa appeals and appeals on

the actual asylum request will follow the procedure for territorial asylum appeals.

From the outline in this chapter it appears that the countries with a one-step procedure offer a fairer procedure for appeal than those countries with a two-step procedure. This is most likely due to the fact that the procedure for asylum appeals is normally better thought out and has to comply with the international obligations of the state. In regard to visa appeals, few international rules, if any, apply.

## 8 Analysis

In this final chapter I will analyse the legal obligation that states may have to allow asylum applicants, who have submitted their asylum application abroad, to lodge an appeal against a rejected asylum application. In doing this I will first have to take a stand in regard to whether states in fact are obliged to allow asylum applications to be submitted at their diplomatic and consular representations abroad.

Moreover, I will analyse the different appeal procedures, with the intention to find out whether the appeal possibility generally is weaker formulated in the externalised processing procedure than in the territorial asylum procedure and in the visa procedure.

Finally, I will try to identify the features that I believe should be prevailing for appeals in the externalised processing procedure, and which I believe would be beneficial from both the perspective of the asylum seeker as well as from the perspective of the destination state.

### **8.1 Obligation to allow asylum applications to be submitted at diplomatic and consular representations abroad**

The only provision in international law that may be interpreted as obliging states to consider a request for entry into that state is Article 3, in combination with Article 1, of the ECHR. When read together with Article 1 of the Convention, this article obliges the State Parties to guarantee that no one within the state's jurisdiction is subjected to torture or to inhuman or degrading treatment or punishment. An officer at a diplomatic representation dealing with entry visa and asylum issues is exercising authority over persons applying for entry visas or asylum. These persons will consequently fall under the jurisdiction of the state of the representation. Therefore, if a person is denied an entry visa or asylum, and this decision will get as a consequence that the person is subjected to torture or to inhuman or degrading treatment or punishment, the state denying entry has not complied with its obligation as described in Article 1 to secure to everyone within its jurisdiction the rights and freedoms as defined in the Convention. In line with this argumentation there is an obligation in accordance with Article 3 for State Parties to issue entry visas to persons who otherwise might be subjected to torture or to inhuman or degrading treatment or punishment. One way of facilitating the compliance with this obligation is to allow asylum applications to be submitted at the diplomatic and consular representations abroad.

## **8.2 Obligation to allow appeals in the externalised processing procedure**

The conclusion from Chapter 3 on the right to appeal is that no international instrument obliges State Parties to guarantee the right to lodge an appeal in asylum cases. Neither the right to a fair trial, nor the right to an effective remedy has been interpreted as implying such a right. Through the harmonisation procedure within the asylum field, the European Union Member States will, however, through a directive soon be obliged to provide asylum seekers with an appeal possibility. Furthermore, the UNHCR Executive Committee has recommended that asylum seekers should have the right to lodge an appeal against a rejection of their asylum claim. While the EU Draft Directive will not apply in the externalised processing procedure, there are no indications that the UNHCR recommendations should not extend to that procedure. If a state wants to comply with the UNHCR recommendations, it should therefore allow appeals on asylum applications that have been submitted abroad.

By reiterating that Article 1 of the ECHR obliges states to secure to everyone within their jurisdiction the rights and freedoms as laid down in Section I of the Convention, I would like to point at Article 13 of the same Convention guaranteeing an effective remedy. The two articles will in combination with Article 3 oblige State Parties to provide for an effective remedy before a national authority in case a person within the state's jurisdiction risks to be subjected to torture, and this torture would be the result of authority exercised by that state (e.g. denial of an entry visa). As Article 13 does not require any particular form of remedy, such as a possibility to appeal, the state may choose to only provide for a possibility to have the rejected application reviewed by the same authority, if it regards this to be effective. The State Party might indeed consider this effective, but I doubt that it would be seen as effective from the perspective of the applicant.

## **8.3 A weakened possibility to appeal in the externalised processing procedure**

This section I will devote to analysing the different appeal procedures, with the aim to find out whether the appeal possibility is weaker formulated in the externalised processing procedure if compared with the territorial asylum procedure and the visa procedure.

As the appeal procedures are designed in the six countries under scrutiny in this thesis, all six states allow appeals on the actual asylum application in the externalised processing procedure. This appeal complies, to a great extent, with the rules for appeals in the territorial asylum procedures. Four of these states apply the two-step model, meaning that an initial visa

decision will be made before the applicant is allowed entry into the destination state. The procedure for appeal of this initial decision is consequently formed after the rules for appeal in the regular visa procedure.

This seems to be a quite logical solution. The appeal follows the rules for the procedure most closely related. However, one should keep in mind that the initial visa decision always involves assessment of the applicant's asylum claim, and that this initial decision is vital for the applicant. In case the decision is rejected the consequences can be fatal for her. If comparing with an ordinary tourist whose visa application is rejected, who might lose an opportunity to see the world, but who still can keep living a normal life in her home country, it seems rather unfair that this visa applicant and the asylum applicant shall be put on an equal footing when it comes to appeal.

The fact that very few applicants who have been granted an entry visa and arrived in the country of destination are denied asylum, indicates that a lot of emphasis is put into the assessment of the applicant already during the first step of the procedure. The second step seems sometimes to be only a formality. This is yet another argument why appeals of the initial visa decision should follow the rules for territorial asylum appeals.

As the visa procedure normally offers less safeguards for the applicant than the territorial asylum procedure, and consequently also lays down less obligations on the destination state, this might be a favourable approach by the states offering the possibility to apply for asylum in the externalised processing procedure. By offering asylum applicants the possibility to appeal in accordance with rules similar to the visa appeals procedure, it appears to me as if the states are downgrading their responsibility in regard to the applicants.

One disadvantage for the applicant when the appeal follows the rules for appeals in the visa procedure is that not all countries provide reasons in the decisions. If reasons are included, they are most likely rather short and not much elaborated. This makes it impossible for the applicant to rebut arguments of the deciding organ and to know whether any important information was missing in her initial application. An appeal will therefore be complicated and without prospects for success. Referring back to the provision requiring states to guarantee an effective remedy, I would strongly argue that states, which do not include reasons in their decisions, have a long way to go before they comply with the provision on the right to an effective remedy.

It has to be kept in mind that it might not always be that easy for an asylum applicant in the externalised processing procedure to lodge an appeal against a negative decision. The applicant might not be aware of the possibility to appeal, or due to circumstances within her country she might not have access to the representation anymore (she might for example be internally displaced or have fled to a neighbouring country). These reasons argue for a

stronger appeal procedure for applicants who submitted their applications at a representation abroad. A stronger appeal procedure would share features to the extent possible with the appeal procedure in the territorial asylum procedure. While not being perfect, the territorial asylum procedure has many features that could be used with benefit also in the externalised processing procedure.

## **8.4 Most beneficial appeal procedure**

In this sub-chapter I will outline some features that I believe should be prevailing in the appeal procedure for externalised processing, both from the applicant's and from the state's perspective.

First and foremost, the possibility to appeal a rejected asylum application should be clearly explained to the applicant already the first time she approaches the representation and requests asylum, as she might not be able to approach the representation a second time. She should furthermore have a right to submit her notice of appeal or any other documentation necessary for the appeal by mail or fax, or by proxy. Her application should be treated expeditiously, both by the representation and the authorities deciding upon the application.

In line with my argumentation above, I would propose an appeal procedure formed after the territorial asylum procedure, rather than in line with the visa procedure. The safeguards for the territorial procedure are normally stronger, and this is a feature I want to include in the externalised processing procedure. Other features that I favour in the territorial asylum procedure and which I would like to import to the externalised processing procedure are decisions that include elaborated reasons, free legal aid and interpretation, as well as a hearing of the applicant.

These features do not seem to be that favourable from the perspective of the destination states. However, as the decisions are normally taken by the same authority as decides as a first instance in the territorial asylum procedure, it seems rather complicated to apply different standards for the decisions in the two procedures. Moreover, elaborate reasons will clarify for the applicant why she did not fulfil the requirements for being granted asylum. She might then herself comprehend that further action will not lead to a reversed decision, and this might stop her from appealing further or handing in a new application. That it would be financially burdensome to include reasons in the decision is an argument, which does not seem supportable today while only few people apply for asylum at the representations, in particular if compared to the number of spontaneous asylum seekers.

Free legal aid and interpretation will meet in particular two arguments. First, it will cost too much money, and second, it will practically not be feasible. How could a person somewhere in Africa approach a lawyer in a European

country with the limited possibilities for contact that the distance and the rather undeveloped communication techniques in the third world offer? To rebut the financial argument, the same is true as for why reasons should be included in the decision. With the limited number of asylum applications filed at representations, the increase in cost will be marginal. The second argument, that it is not practically feasible to provide the applicant with a lawyer, I counter by claiming that the lawyer and the applicant does not necessarily have to be particularly in contact with each other. What the applicant needs is someone who puts forward her claim before the appeal authorities and who can legally argue for her right to asylum. If the representation is doing a good work in helping the applicant in understanding and filling out the application, it might not be necessary for the lawyer and the applicant to be in personal contact if that is not possible.

To provide an interpreter might be a more delicate task, in particular if the interpreter is brought from the applicant's country of origin, as one might not be sure of the connections of this interpreter with e.g. the authorities that the applicant is escaping. The best solution would therefore be that the applicant chooses her interpreter herself. Financially, the same applies as above.

An interview with the applicant might not be as efficient when it is conducted at a representation abroad, while the staff at the representation most likely is not trained for conducting asylum interviews. Even without such training I believe that the staff would be competent enough to ask the applicant additional questions that are not answered in her application, after it has been pointed out by the appeal authorities in the destination state what information needs to be asked for. A close cooperation between the appeal authorities and the representation would benefit such an approach.

Suspensive effect of a decision during an appeal is not the first thing one reflects on when scrutinising the externalised processing procedure, as the applicant in fact is not in the country of destination yet, she simply cannot be deported from that country. Suspensive effect may, however, have a function in case an application has been lodged at a representation in a third country. An agreement between that third country and the country of destination could be concluded with the aim to allow persons, who have submitted their applications for asylum at a representation (of the destination country), which is situated in the third country, to stay in this country until her application has been finally decided upon. For applications lodged at a representation in the applicant's country of origin there is naturally no need for suspensive effect to be granted, while the applicant cannot be expelled to a country where she is actually already staying. On the other hand, it might be beneficial to provide for a possibility to transfer the applicant in advance out of her country of origin before her application has been finally decided upon, in case she is in an apparent risk situation.



The number of instances is not a question of great importance in my opinion. As long as the appeal instance assesses both the merits and legality issues of the case, in a qualitative way, there need not to be an abundance of instances or different kinds of appeal possibilities. The simpler the better, both for the applicant and those deciding upon the appealed asylum application.

My concluding observation is that an appeal procedure, as the one I have outlined above, with many similarities with the territorial asylum procedure, would be the procedure guaranteeing consistency and fairness to a greater degree than the visa procedure, which currently is applied in the majority of states under scrutiny in this thesis for applicants who are still abroad. A state, that wishes to comply with the obligations as laid down in Article 1, 3 and 13 of the ECHR, should consider adapting its appeal procedure in the externalised processing procedure in line with the rules for the territorial asylum procedure.

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