

A short course on EU asylum law. V.

**PROCEDURES DIRECTIVE AND THE RETURN
DIRECTIVE**

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PROCEDURES DIRECTIVE

**DIRECTIVE 2013/32/EU OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL**

of 26 June 2013

on **common procedures for granting and withdrawing
international protection (recast)**

(OJ L 180/60 of 29. 6. 2013)

Replacing

Council Directive 2005/85/EC of 1 December 2005 on **minimum standards on
procedures** in Member States for granting and withdrawing refugee status
(OJ L 326/13 of 13.12.2005)

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Cathryn Costello: the dual vision behind the norms some based on the image of **the abusive asylum** seeker and others on **the vulnerable a.s.**

Purpose: common procedures on recognizing and withdrawing refugee status and subsidiary protection

Scope:

„all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States” (not on high seas or extraterritorially but within jurisdiction!)

More favourable provisions: MS may maintain or introduce „insofar” as are compatible with this directive (5 §)

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GUARANTEES

- **Access** to procedure - each adult has the right. Registration within 3 days
- **Right to stay** - until first instance decision (exception: subsequent application and European Arrest Warrant + int'l criminal courts)
- **Counselling in detention and border zones** Organisations and persons „providing counselling and advice” must have access (Hungarian Helsinki Committee ground-breaking)
- **Sequence** of examination: refugee - if not – subsidiary protection
- Procedural requirements: **appropriate examination**:
 - = individual, objective, impartial,
 - = up to date country of origin and transit info
 - = personnel knowledgeable about asylum law
 - = Personnel is entitled to seek expert advice (medical, cultural, gender, child-related)
 - = appeal authorities also informed about country of origin and transit
- **Decision: in writing**, justification if negative (!)

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GUARANTEES

Information on procedure and consequences (in a language the applicants „„understand or are reasonably supposed to understand” (§12 (1) a)

Interpreter „whenever necessary”

Access to Country of Origin (COI) and expert information

Access to **UNHCR** or an agency working on its behalf

Notice of the decision **on time** in a language supposed to be understood – if not assisted by lawyer

On appeal: interpreter, access to info, access to UNHCR, timely notification

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GUARANTEES

Obligations of the applicant: MS shall impose the duty to co-operate with the authorities.

Report to authorities, hand over documents, report place of residence, allow search, by same sex person, photograph and record statement

Interview: Compulsory, with exceptions

Preferably same sex interviewer

Requirements:

- Substantive interview to be made by the **competent authority**
- „Steps” to ensure **comprehensive account**
- **Interviewer „sufficiently competent”**, (to take account of applicant’s **cultural origin** and vulnerability **gender, sexual orientation, gender identity**)

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GUARANTEES

- **Interpreter** to ensure „appropriate communication”, not necessarily in language preferred by applicant.
- During interview **opportunity to eliminate contradictions**, add new clarifying elements (to initial interview, or written application)
- Extended rules on reporting „thorough and factual report” or transcript or recording. Applicant has the right to comment ; Lawyer also has access to the report or the transcript
- **Access to written report or recording**: before the decision, approval of applicant not necessary! .

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GUARANTEES

Medical examination for signs of past persecution or harm (victims).

To be assessed „with the other elements of the application” – not decisive

Legal and procedural information Free of charge, upon request

Legal assistance:

- Applicant must have **access to lawyer** (at her cost)

Lawyers access to closed areas may be curtailed but not rendered impossible

- States shall permit the **presence of lawyer** at the interview
- The interview **may take place without** a lawyer present
- Extended rules on legal assistance **In case of sensitive info** (national security, etc.) national rules must assure applicant's „right of defence” e.g. by access to the info by security checked lawyer

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GUARANTEES

Free legal assistance/representation:

MS „shall ensure” *after negative decision* on conditions as to nationals + further grounds for not offering:

Ms may set time or financial limits on assistance and not disclose sensible info

Unaccompanied minors:

must have representative before interview -not just legal but overall („guardian”)

interviewer and decision maker has specialized knowledge

MS may check age with medical examination

Applicants in need of special procedural guarantees

To be identified within reasonable time

To be provided with adequate support

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GUARANTEES

Detention:

„shall not hold in detention for the sole reason that he/she is an applicant” Cross reference to Reception conditions directive
Condition, duration: not fixed, „speedy judicial review required”

Implicit withdrawal: Applicant does not report, absconds, does not appear for an interview, does not provide information

Discontinuation or rejections is the consequence
Reopening of discontinued case within 9 months possible

Explicit withdrawal – MS may reject or discontinue

UNHCR (and organizations acting on its behalf):

access to: applicant, information
right to present its view

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PROCEDURES

- Normal „examination” procedure
- Deadline: 6 months
- Extension: 9 more months if
 - Complex case
 - Large number of applicants
 - Applicant’s fault
- Further extension with 3 months in „duly justified circumstances” (§ 31 (3))
- If uncertain situation in country of origin: further postponement of the decision possible
- Absolute time limit: 21 months

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PROCEDURES

Exceptional procedures/applications



Accelerated procedures

- no relevant issue raised
- safe country of origin
- misled the authorities by presenting false information or documents with respect to his/her identity
- in bad faith destroyed or disposed of an identity or travel document that would have helped establish identity
- the applicant has made clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict verified COI info

Inadmissible applications

- Dublin III applies
- Refugee status in another MS
- Non MS = first country of asylum (already recognized there as refugee)
- „Normal” safe third country applies
- Dependent repeating parents rejected application

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PROCEDURES

Exceptional procedures/applications



Accelerated procedures

- **subsequent** application that is not inadmissible = new elements arouse or presented
- merely in order to **delay or frustrate removal**
- **entered** or prolonged his/her stay **unlawfully** and, without good reason, has either **not presented himself/herself** and/or **did not file an application for asylum as soon as possible**
- applicant ~~is~~ may, for serious reasons, be considered a danger to the **national security or the public order**
- refuses to have his/her **fingerprints** taken

Inadmissible applications

- Identical **subsequent application**
- **European safe third country** (optional)

C-69/10 *Diouf v* Ministre du Travail, de l'Emploi et de l'Immigration (Luxembourg)
decided: 28 July 2011.

No separate appeal against a decision to examine in accelerated procedure, 15 days for appeal are enough, one level court review constitutes effective remedy

Facts: Ireland puts into accelerated procedures ALL Nigerian applicants (on the basis of their nationality)

Is this discrimination or can a class of asylum seekers on the basis of the nationality or country of origin be subjected to accelerated procedures?

Can national law add further grounds of accelerated procedures?

Judgment:

The country of origin matters in many respects (e.g. safe country of origin) so **relying on nationality per se is not** discriminatory as long as all the guarantees are respected

PD was minimum standard, the list of possible accelerated procedures in (earlier) art 23 **was not exhaustive** – states may add their preferred additional grounds

PROCEDURES DIRECTIVE, 2013

PROCEDURES

Border procedures

(keeping persons in transit zones or at entry points)

Guarantees apply !

Limited to

- decision on **admissibility of the applications**,
- to **accelerated procedures**

Maximum: **4 weeks** – then: entry to the country

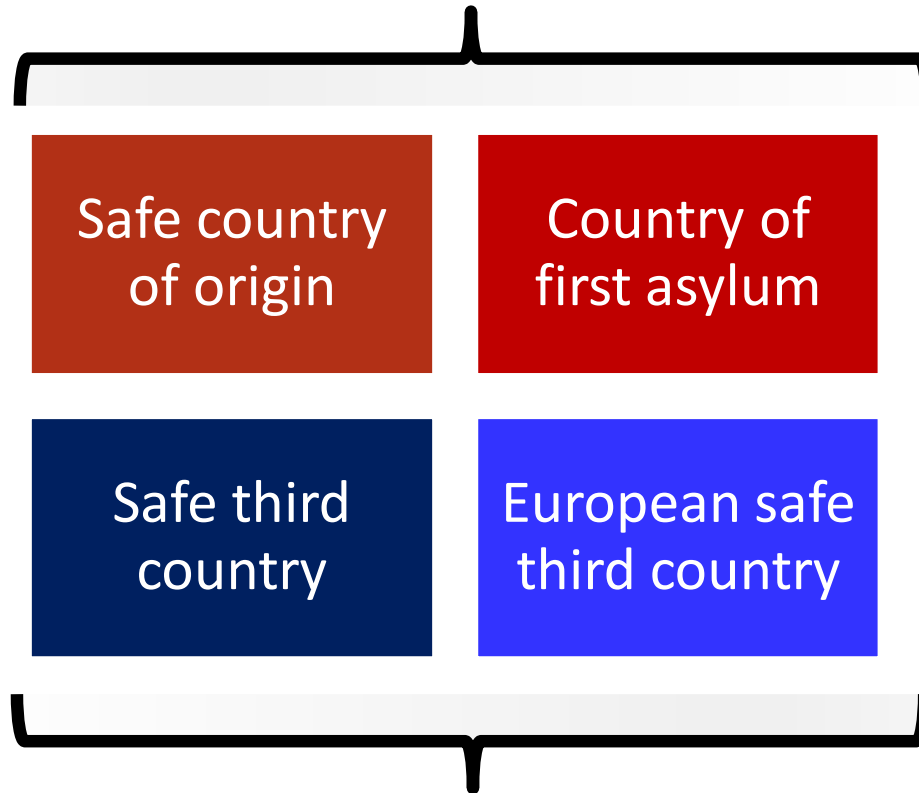
If **large numbers** arrive: border procedures (no entry) even if accommodated „at locations in **proximity of the border** or transit zone” (§ 43 (3))

PROCEDURES DIRECTIVE, 2013

KEY TERMS

Presumption: person **not in need of protection**, because

- not threatened or:
- protected elsewhere



Presumption: **another state should determine** if the person needs protection

No judgment on the presence of threat of persecution or harm

SAFE COUNTRY OF ORIGIN

it can be shown that there is **generally and consistently no persecution** and no torture or inhuman or degrading treatment or punishment; and no threat by reason of indiscriminate violence in situations of international or internal armed conflict

This is proved by **the legal situation**, the **application of the law** within a democratic system and the **general political circumstances**.

Account shall be taken of the extent to which **protection** is provided **against persecution or mistreatment** through:

the relevant **laws and their application**;

observance of the **European Convention of Human Rights** and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture,

respect of the **non-refoulement** principle

provision for a system of **effective remedies**

FIRST COUNTRY OF ASYLUM

First country of asylum (§ 35) the a.s. has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection,

or

he/she enjoys otherwise sufficient protection in that country, including benefiting from the principle of non-refoulement,

provided

that he/she will be re-admitted to that country.

Applicant may challenge FCA

SAFE THIRD COUNTRY

„Normal” **safe third country** (defined nationally) (§ 27)

- **life and liberty are not threatened** on account of 5 Geneva Convention grounds; and no risk of serious harm
- the principle of **non-refoulement** is respected; and
- the prohibition on removal in breach of the right to freedom from **torture and cruel, inhuman or degrading treatment** as laid down in international law is respected; and
- the **possibility exists to request refugee status** and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

SAFE THIRD CONT'D

Minimum requirements concerning national rules on determining that a state is safe for a particular applicant:

meaningful link between applicant and s.t.c.

investigation if a particular country is safe for the particular a.s.(or national designation of s.t.c.)

a right of the asylum seeker to challenge the safety

If application inadmissible because of s.t.c. :

- inform asylum seeker accordingly,
- provide asylum seeker with document informing the s.t.c. that the application has not been examined in substance

EUROPEAN SAFE THIRD COUNTRY

Member states may designate European countries as European Safe Countries

Conditions

A **Non-EU member European** country

„has ratified and observes the provisions of the **Geneva Convention** without any geographical limitations;

it has in place **an asylum procedure prescribed by law**; and

it has ratified the **European Convention for the Protection of Human Rights and Fundamental Freedoms** and **observes its provisions**, including the standards relating to effective remedies.”

Consequence

No examination of the application or **no full examination**+no right to stay during appeal

Applicant has **right to challenge**

If returned there: **info that no examination „in substance”** took place

PROCEDURES DIRECTIVE, 2013

Withdrawal of status

MS **must act** if indications to „reconsider the validity” of the status.

Procedure:

- inform refugee in writing,
- **opportunity to contradict** (interview or in writing)
- obtain pertinent info of country of origin
- legal assistance and UNHCR access as in examination
- **reasoned decision** in writing

MS may order by law that the refugee status „lapses” when the refugee re-avails herself of the protection or (re)acquires (new) nationality

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Appeals (Effective remedy)

To: court or tribunal

See H.I.D on the concept of „court or tribunal”

Against: negative determination, inadmissibility decision, denial of reopening after abandonment, „supersafe” STC decision, subsequent application, border procedure – entry denial, withdrawal of status. - appeal against **denial of reopening a procedure** in case of implicit withdrawal, against recognising as eligible for subsid. prot. to be recognised as a refugee (MS optionally may exclude this if rights are the same)

Examination ex nunc of **facts and law** (Not merely review of legality)

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Suspensive effect

Default: a right to stay „pending the outcome of the remedy” (if appeal submitted on time and Dublin III not applicable)

Suspensive effect may be **denied if:**

Unfounded in cases of **accelerated** procedure (except for delayed application= §31/8/h);

Inadmissible: protection in another MS; first country of asylum; subsequent application after preliminary examination;

Implicitly withdrawn application if reopening denied;

European safe third country

In border procedure suspensive effect may only be denied if there was at least a week to challenge removal and review is on fact and law

Deadlines for application: MS may set but „the time limits shall not render such exercise impossible or excessively difficult.” (§ 43/4)

DIRECTIVE ON PROCEDURES

Transposition

Adoption: 26 June 2013

Entry into force: 20 July 2013

Transposition: 20 July 2015, except for **deadlines** of procedure – for **them 20 July 2018**

Applications lodged after 20 July 2015 and withdrawals started thereafter must be assessed according to the new rules

FUNDAMENTAL ELEMENTS OF THE 2016 RECAST PROPOSAL

Aim

A genuinely **common procedure** „which **replaces** the **various procedures** in the member States”

Major features of the proposal

1. Streamlining and simplifying the procedure for international protection
2. Determining more precisely and strictly the rights and obligations of applicants
3. More detailed procedural guarantees and restrictions.
(Mixed bag)
4. Enhanced protection of minors and unaccompanied minors as well as of applicants in need of special procedural guarantees

FUNDAMENTAL ELEMENTS OF THE 2016 RECAST PROPOSAL

Major features of the proposal (cont'd)

5. Compulsory use of accelerated procedures (slightly changed triggers)
6. Tougher rules and short deadlines on (in)admissibility. Safe third country and country of first asylum before Dublin
7. Simpler and clearer procedures for subsequent (repeat) application
8. Safe country (safe country of origin, first asylum, safe third) rules revised. Union-level s.c.o and s.t.c. lists to be adopted – full harmonisation – compulsory to treat them as such
9. Appeal rights better circumscribed (Non-suspensive effect - separate remedy against removal)
10. Withdrawal of protection – personal interview guaranteed

Much clearer and more logical structure (within the chapters)!

I. General provisions – II. Basic principles and guarantees – III. Administrative procedure – IV. Procedures for withdrawal – V. Appeals – VI. final provisions

Return directive

**DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL
of 16 December 2008 on common standards and procedures in Member
States for returning illegally staying third-country nationals**

THE RETURN DIRECTIVE

DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 16 December 2008 **on common standards and procedures in Member States for returning illegally staying third-country nationals**

Personal scope

Obligatory: third-country nationals staying illegally on the territory of a
Member State

Optional:

- those refused at the border or intercepted on land, sea or air
- subject to return as a criminal law sanction

Limits: MS must respect rights of persons entitled to free movement under
community law and the principle of *non-refoulement*

+ „due account of“ best interest of the child, family life, state of health of the
person

Member States may retain more favourable provisions

RETURN DIRECTIVE, 2008

Member states **must** issue the return decision to any illegal stayer (exceptions exist, like right to reside in other MS or humanitarian reasons)

Preferred return: **voluntary return** within 7-30 days

Exceptions:

risk of absconding,

manifestly unfounded or fraudulent application for stay permit

or if the person concerned poses a risk to public policy, public security or national security,

States **must** take all necessary measures to enforce the return decision if the third country national does not depart voluntarily or if the exception to voluntary departure is applicable

Compulsory entry ban (max five years) if no voluntary return within time

Proportionate coercive measure against resisting persons

Detention: max 18 months (if danger of absconding or hampering preparation of return or process of removal)

Strong critique (ECRE, UNHCR, NGO-s)

Thanks!

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