The common European asylum system and the rights of the child: an exploration of meaning and compliance

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4 The right of the child to be heard

4.1 INTRODUCTION

Chapter 3 set out the right of the child to seek and qualify for international protection. But even assuming that the child is given access to the procedure and that the eligibility concepts are child-rights sensitive, there is still a problem: the typical asylum *procedure* is not designed for children. The adult-orientation is apparent in the central feature of the asylum process – an individual status determination procedure based usually on an interview. Asylum officers are required to elicit information from the applicant, who, in turn, is required to render an accurate and nuanced account, communicated verbally and often through the medium of a translator, of his/her reasons for not being able to return to her country of origin. The burden of proof rests principally on the applicant. This process implies that the applicant possesses relatively sophisticated communication skills and the ability to understand and analyse his/her predicament. However, it is clear, even from a superficial knowledge of the stages of child development, that depending on their age and maturity (not to mention the possible traumatic nature of their experience) children may not be able to communicate their story in this way. Since children are unlikely to meet the requirements of the procedure they risk not being interviewed at all.

So the question arises: what rights do children have that could make the adult-oriented asylum procedure more sensitive and amenable to children? The key right of the child in this regard is the right of the child to be heard in Article 12 CRC. This chapter is devoted to an exploration of the meaning of this right, its implications in the asylum context and whether or not the relevant provisions of the CEAS instruments comply with it. The format of the chapter is similar to previous chapters. The first substantive section (4.2) is devoted to an elucidation of the meaning of the right. For ease of analysis, the right is explored along three lines: the right to a hearing (4.2.1); the conduct of the hearing (4.2.2); and the evaluation of the child's views (4.2.3). The next section (4.3) scrutinises the extent to which the CEAS instruments are compliant with the three dimensions of right of the child to be heard. The final section (4.4) examines the prospects for enhanced compliance in Phase Two. In terms of which CEAS instruments are implicated by the right of the child to be heard, as might be expected, the APD is the critical instrument.

4.2 THE RIGHT OF THE CHILD TO BE HEARD

Article 12 CRC provides:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

The right of the child to be heard in Article 12, sometimes called the right of the child to participate, is interpreted by the Committee RC as a general principle of relevance to the interpretation and implementation of all the rights in the CRC.[1] This right was *sui generis* in international human rights law at the time of the drafting of the Convention but it has since been restated in Article 24 of the EU Charter of Fundamental Rights.[2] Despite its originality, Article 12 CRC cannot be considered in isolation. It bears a relationship to a cluster of rights in general (i.e. non child-specific) human rights law which can be broadly categorised under the heading of the right to a fair hearing.[3] This relationship is evolving.

Thus, at the time of the drafting of the Convention, Article 12 CRC was conceived as an *alternative* to the procedural rights associated with a fair hearing. Under domestic law, children were typically precluded from enjoying the same procedural rights as adults because of a perceived lack of intellectual/emotional capacity and a resulting lack of legal capacity.[4] The presumption of a lack of capacity was also evident in international law. Thus the CRC contains no right of legal personality and consequently no right of access to the courts, to a fair hearing or to an effective remedy. For the same reason, it contained no individual complaints procedure. This presumption was also

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1 Committee RC, General Comment No. 5, 'General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6)', U.N. Doc. CRC/GC/2003/5 (2003).

2 Article 24(1) CFR provides, *inter alia*: '[Children] may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.'

3 The right to a fair hearing is established in Article 14 ICCPR, Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights. The associated right to an effective remedy is established in Article 2 ICCPR, Article 13 ECHR and is part of Article 47 of the EU Charter. The right to a fair hearing may be implicit in other substantive rights which involve a strong evaluative element, such as the prohibition of torture and lesser forms of ill-treatment. See *infra* § 4.2.1 for a more thorough discussion.

4 See, for example, Carole Smith, 'Children's Rights: Judicial Ambivalence and Social Resistance', *International Journal of Law, Policy and the Family* 11 (1997): 103-139.

discernible in the case-law of the ECtHR[5] and in EU law.[6] The original rationale for Article 12 must be understood in this context. Article 12 was inserted into the CRC as a substitute for the procedural rights normally associated with a fair hearing, its function to give the child a voice and (modestly) challenge the image of the child as a passive object of other people's decisions.

However, in the intervening years, the traditional resistance to the idea of children as having the capacity to enforce their rights has been steadily eroded. Thus, an optional protocol to the CRC allowing for an individual complaints mechanism was adopted by the General Assembly in 2011, and the Committee RC considers the right to an effective remedy to be implicit in the CRC,[7] including in Article 12 itself.[8] In 2009, the Committee RC produced a General Comment (No. 12) on the right of the child to be heard which gives it a dynamic, contemporary interpretation.[9] There are indications in the case-law of the ECtHR[10] and the CJEU[11] that the European courts, too, are revising

5 See, for example, ECtHR, *Golder v UK*, Appl. No. 4451/70, Judgment (Plenary Court) of 21 February 1975, in which it was held to be lawful to impose restrictions on access to the courts by minors.

6 Until relatively recently, it was doubted by commentators whether children were subjects of EU law in their own right (as opposed to being beneficiaries of rights derived from their parents). See Helen Stalford, 'Constitutionalising Equality in the EU: A Children's Rights Perspective' *International Journal of Discrimination and the Law* 8, nos. 1-2 (2005): 53-73; and Helen Stalford and Eleanor Drywood, 'Coming of Age?: Children's Rights in the European Union', *Common Market Law Review* 46 (2009):143-172.

7 Committee RC, General Comment No. 5, *supra* n. 1, para. 24: 'For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children's special and dependent status created real difficulties for them in pursing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives.' Similarly, the Human Rights Committee has stated that remedies for violations of rights in the ICCPR 'should be appropriately adapted so as to take account of the special vulnerabilities of certain categories of person, including in particular children.' Human Rights Committee, General Comment No. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', U.N. Doc CCPR/C/21/Rev.1/Add.13 (2004), para. 15.

8 According to the Committee RC, Article 12 implies a right to an effective remedy if the child is not given the opportunity to be heard or his/her views are not given due weight: Committee RC, General Comment No. 12, 'The right of the child to be heard', U.N. Doc. CRC/C/GC/12 (2009), para. 46.

9 *Ibid.*

10 The right of the child to participate has become an established element of the jurisprudence of the ECtHR relating to Article 6 ECHR on the right to a fair trial. See, for example, ECtHR, *T. v The United Kingdom*, Appl. No. 24724/94, Judgment of 16 December 1999 and ECtHR, *S.C. v The United Kingdom*, Appl. No. 60958/00, Judgment of 15 June 2004, discussed *infra* at § *4.2.2.2*.

11 For example in *Chen*, the Court rejected the proposition that a young child cannot activate free movement and residence rights, holding that 'a young child can take advantage of the rights of free movement and residence guaranteed by Community law. The capacity of a national of a Member State to be the holder of rights guaranteed by the Treaty and

their attitudes to the issue of children's (lack of) capacity. Indeed the Committee of Ministers of the Council of Europe has noted that:

> [A]s guaranteed under the ECHR and in line with the case law of the European Court of Human Rights, the right of any person to have access to justice and to a fair trial – in all its components (including in particular the right to be informed, the right to be heard, the right to a legal defence, and the right to be represented) – is necessary in a democratic society and *applies equally* to children, taking however into account their capacity to form their own views.[12]

Ironically, now that children are increasingly recognized as possessing the same procedural rights as adults, the right to be heard in Article 12 CRC may constitute an additional, rather than an alternative, set of guarantees. The following subsections outline the key aspects of the right of the child to be heard: the right to a hearing, the conduct of the hearing and the evaluation of the child's views.[13] Attention is paid throughout to the implications of the right in the asylum context.

4.2.1 The right to a hearing

Article 12 CRC establishes the right of the child to be heard, but does this right extend to the asylum context and, if so, what child is entitled to a hearing? In other words, what is the scope *ratione materiae* and *personae* of the right of the child to be heard?

On the first question, two main arguments can be adduced in favour of the proposition that the right of the child to be heard applies to the asylum context. The first relates to the broader context within which Article 12 CRC must be interpreted. The second relates to the wording and drafting history of Article 12 itself.

As to the first argument, as previously mentioned, there is a close connection between Article 12 CRC and the cluster of rights in general (i.e. non

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by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally.' ECJ, *Chen v Secretary of State for the Home Department*, Case C-200/02, Judgment of 19 October 2004, para. 20.

12 'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice', adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, preamble. Hereinafter, 'Council of Europe Guidelines 2010'.

13 The approach is necessarily selective: there are many rights that are corollary to the right of the child to be heard relating, for example, to free legal assistance or representation, to adequate time to prepare one's case and to an effective remedy. But in so far as these rights have no particular child-specific implications, it is submitted that there is little value to be added here to existing commentaries on the content and application of such rights in the context of the CEAS. See footnotes *infra* for citations of such commentaries.

child-specific) human rights law which can be broadly categorized under the heading of the right to a fair hearing. It is worth briefly digressing to establishing whether there is a general right to be heard in the asylum context. For reasons of space, attention will be confined to the European context.

As regards the ECHR, the most promising article in the ECHR relating to the right to be heard is the right to a fair trial in Article 6. But this right is expressly limited to the determination of civil rights and obligations, understood in the private-law sense. As immigration and asylum matters do not implicate civil rights and obligations, they fall outside the scope of Article 6.[14] However, procedural rights relevant to the asylum context have been developed jurisprudentially under the rubric of Article 3 (prohibition of torture and inhuman and degrading treatment or punishment), Article 13 (right to an effective remedy) and Protocol 4, Article 4 (prohibition of collective expulsion of aliens). The Court's case-law strongly implies a right to be heard.

Thus, the Court regularly reiterates the need for rigorous and close scrutiny of claims of a violation of Article 3 in the context of expulsion, involving an assessment, not only of the general situation, but also of the personal circumstances of the applicant.[15] This suggests a hearing. In a host of Article 3 cases involving Turkey, the Court has attached significant weight to UNHCR's assessment of the applicant's claim because, unlike the respondent state, UNHCR actually interviewed the applicant.[16] Similarly, in *E.G. v The United Kingdom*, in which the Secretary of State, in deciding on a subsequent application for asylum, disregarded key findings of fact of the asylum adjudicator, the Court held that, '[i]t is unfortunate, in the Court's view, that the Secretary of State did not consider the finding of the Adjudicator who had had the opportunity to *see the applicant give evidence in person*.'[17] Likewise, in *R.C. v Sweden*, the Court accepted that 'as a general principle, the national authorities are best placed to assess not just the facts [relating to an alleged risk of an Article 3 violation] but, more particularly, the credibility of witnesses, since it is they who have had an opportunity to *see, hear and assess* the demeanor of the individual concerned.'[18] As regards the right to an effective remedy, the Court

14 ECtHR, *Maaouia v France*, Appl. No. 39652/98, Judgment of 5 October 2000.

15 See for example, ECtHR, *Saadi v Italy*, Appl. No. 37201/06, Judgment of 28 February 2008 and ECtHR, *Baysakov and Others v Ukraine*, Appl. No. 54131/08, Judgment of 18 February 2010.

16 See ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, Judgment of 11 July 2000, paras. 40 & 41; ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009, paras. 82 &113; ECtHR, *Charahili v Turkey,* Appl. No. 46605/07, Judgment of 13 April 2010, paras. 57 and 59; ECtHR, *M.B. and others v Turkey*, Appl. No. 36009/08, Judgment of 15 June 2010, para. 33; and ECtHR, *Ahmadpour v Turkey*, Appl. No. 12717/08, Judgment of 15 June 2010, para 39.

17 ECtHR, *E.G. v The United Kingdom,* Appl. No. 41178/08, Judgment of 31 May 2011, para. 72 (emphasis added).

18 ECtHR, *R.C. v Sweden,* Appl. No. 41827/07, Judgment of 9 March 2010, para. 52 (emphasis added).

has stated that an effective remedy in the context of an arguable claim of an Article 3 violation requires an individualized assessment.[19] Again, an individualized assessment suggests a hearing of the individual. In *I.M. v France*, the Court found a violation of Article 13 and 3 because, *inter alia*, an asylum applicant was only given a brief 30 minute hearing which did not allow for the complexities of his application to be properly communicated or explored.[20] Finally, in Protocol 4, Article 4 cases, the Court has underlined that the expulsion procedure must take the personal circumstances of each person genuinely and individually into account.[21] In sum, the Court's case-law clearly points to a right to be heard in these contexts. Given the overlap with the asylum context, including the risk of *refoulement*, it is reasonable to infer that asylum seekers also have such a right.

As regards EU law, Article 47 of the EU Charter of Fundamental Rights provides for a right to an effective remedy and to a fair trial, codifying existing general principles of EU law which encompass the right to be heard.[22] Thus, the right to be heard has been recognized as a general principle of EU law in contexts ranging from staff cases,[23] to competition law proceedings,[24] to anti-dumping cases.[25] The Court has held that a party to proceedings must generally be able to be exercise the right to be heard before an administrative decision is adopted.[26] Unlike Article 6 ECHR, Article 47 of the Charter is not limited to the determination of civil rights and obligations and therefore applies in principle to the asylum context.[27] Indeed, since the Charter applies to the EU legislative institutions and to the Member States when they are implementing EU law, and the CEAS is a creature of EU law, it is hard to see why the right

19 See ECtHR, *Gebremedhin v France*, Appl. No. 25389/05, Judgment of 26 April 2007, para. 58. See further ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, Judgment of 11 July 2000, para 50.; ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009, para. 108; and ECtHR, *Baysakov and Others v Ukraine*, Appl. No. 54131/08, Judgment of 18 February 2010, para. 71.

20 ECtHR, *I.M. v France*, Appl. No. 9152/09, Judgment of 2 February 2012, particularly para. 155.

21 See ECtHR, *Conka v Belgium*, Appl No. 51564/99, Judgment of 5 February 2002 and ECtHR, *Sultani v France*, Appl. No. 45223/05, Judgment of 20 September 2007.

22 Relevant general principles include the principle of effectiveness and effective judicial protection. See generally, Takis Tridimas, *The General Principles of EU Law*, 2nd ed. (Clarendon: Oxford University Press, 2006), in particular Chapters 8 and 9.

23 ECJ, Case 32/62 *Alvis v Council*, Case 32/62, Judgment of 4 July 1963.

24 ECJ, Case 17/74 *Transocean Marine Paint v Commission*, Case 17/74, Judgment of 23 October 1974.

25 ECJ, Case C-49/88 *Al Jubail Fertilizer v Council*, Case C-49/88, Judgment of 27 June 1991, in which the right to be heard was characterized as a fundamental right.

26 See, for example, ECJ, *Technische Universität München*, Case C-269/90, Judgment of 21 November 1991, para 25, ECJ, *ERG and Others*, Joined Cases C-379/08 and C-380/08, Judgment (GC) of 9 March 2010, para 54-56 and ECJ, *Dokter*, Case C-28/05, Judgment of 15 June 2006, para. 74.

27 Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), Explanation on Article 47, p.29.

to be heard would not apply to the asylum context. However, the CJEU has yet to adjudicate on the matter.

In sum, the case-law of the ECtHR indicates a right to be heard in contexts which overlap the asylum context, while there is a right to be heard in EU law which applies in principle to the asylum context. When Article 12 CRC is interpreted in the light of the requirements of regional human rights and supranational law, it becomes clear that the right of the *child* to be heard has an important application in the asylum context.

The second argument for considering that the right of the child to be heard applies to the asylum context relates to the wording and drafting history of Article 12 itself. Article 12(1) establishes the right to express views in 'all matters affecting the child'. The drafters of the Convention resisted inserting a list of matters on which children could express views and rejected limiting the scope of Article 12 to the *rights* of the child, with the result that the right to be heard has a broad subject-matter scope.[28] However, since 'all matters' includes *at least* the rights of the child (as evidenced by the fact that Article 12 is a general principle of the Convention) it is worth drawing a connection to Article 22(1) CRC which establishes the right of the child seeking refugee status to appropriate protection. If the child seeking refugee status has the right to appropriate protection, it follows that all decisions relating to protection, whether relating to admissibility or to the substantive claim, whether taken in a 'regular' or 'exceptional' procedure, whether at first instance or on appeal, are 'matters affecting the child' for the purposes of Article 12(1).

Furthermore, Article 12(2) states that the child shall '*in particular* be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child'.[29] Clearly, asylum procedures can be classified as either judicial or administrative proceedings or both, often depending on the instance. Accordingly, the Committee RC states that Article 12(2) 'applies to all relevant […] proceedings affecting the child, without limitation, including […] unaccompanied children, asylum seeking and refugee children.'[30]

Finally, the last clause of Article 12(2) states that the hearing should be 'in a manner consistent with the procedural rules of national law'. According to the Committee RC, '[t]his clause should not be interpreted as permitting the use of procedural legislation which restricts or prevents enjoyment of this fundamental right. On the contrary, States parties are encouraged to comply

28 On the drafting history of Article 12, see Lother Krappmann, 'The weight of the child's view (Article 12 of the Convention on the Rights of the Child)', *International Journal of Children's Rights* 18 (2010): 501-513.

29 Emphasis added. Similarly, the Council of Europe Guidelines 2010, which advocate the right of the child to be heard and express views, apply to 'all ways in which children are likely to be, for whatever reason and in whatever capacity, brought into contact with all competent bodies and services in implementing criminal, civil or administrative law.' *Supra* n. 12, para. 2.

30 Committee RC, General Comment No. 12, *supra* n. 8, para. 32.

with the basic rules of fair proceedings'. As to what the 'basic rules of fair proceedings' are, it can be observed that, in the asylum context, EU Member States are circumscribed by the requirements of the ECHR and EU law. This leads back to and reinforces the first argument. It follows that the right of the child to be heard in Article 12 CRC applies to the asylum context.

Having established that the material scope of Article 12 CRC extends to the asylum context, the question now arises as to which asylum-seeking children fall within its personal scope. The wording of Article 12(1) makes clear that the right extends to every child who is capable of forming his or her own views. According to the Committee RC:

> This phrase should not be seen as a limitation, but rather as an obligation for States Parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States Parties cannot begin with the assumption that a child is incapable of expressing his or her own views. On the contrary, States Parties should presume that a child has the capacity to form his or her own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.[31]

In view of this presumption of capacity, the Committee considers that the imposition of fixed age thresholds on the right of the child to express his or her views is inappropriate. A presumption of capacity constitutes the point of departure and this can only be rebutted in the individual case.[32] As regards the meaning of capacity, the Committee RC challenges the predominant adult notion of capacity as being equivalent to a complete understanding of the matter at hand and an ability to express oneself clearly through the medium of language. It is enough that the child has sufficient understanding to be able to have a view on the matter and an ability to communicate his or her view by some means. Thus, the Committee provides that 'full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communicating including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding,

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31 *Ibid,* para. 20.

32 The resistance to 'bright line' age thresholds can be traced back to the movement for children's liberation in the 1960s and '70s. See, for example, Hilary Rodham, 'Children under the law', *Harvard Education Review* 43, no. 4 (1973): 487-514 and Laurence Houlgate, *The Child and The State: A Normative Theory of Juvenile Rights* (John Hopkins University Press, 1980). Hence it is not a new idea. See further, Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd ed., (UNICEF, 2007) and Marie Françoise Lücker-Babel, 'The Right of the Child to Express Views and Be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child', *International Journal of Children's Rights* 3 (1995): 391-404. It is interesting to note that the version of Article 12 that appears in Article 24 of the EU Charter of Fundamental Rights omits any reference to 'the child who is capable of forming his or her own views'. Article 24(1) simply says that '[children] may express their views freely' i.e. all children, regardless of capacity.

choices and preferences'.[33] The Committee also draws attention to the importance of Article 12 for children who experience difficulties in making their views heard, such as children with disabilities, migrant children and other children who do not speak the majority language. These children must be facilitated in expressing their views. Hence, the *problem* of child participation is reconceived: the problem is not the child; the problem is the adult-oriented nature of the process which excludes the child.

However, a *caveat* must be entered at this point. The reference to expressing views 'freely' in Article 12(1) and to the 'opportunity' to be heard in Article 12(2) indicates, according to the Committee RC, that '[e]xpressing views is a choice for the child, not an obligation.'[34] Consequently, it is for the child to decide whether he or she wishes to exercise or waive the right to be heard: the child cannot be forced to be heard against his/her will. Linked to this, the Committee RC warns that 'a child should not be interviewed more often than is necessary, in particular when harmful events are explored.'[35] This is because the hearing of a child can be a difficult process that can have a traumatic impact on a child. This was confirmed in the only case (to date) to come before the CJEU on the issue of the right of the child to be heard in Article 24 of the EU Charter of Fundamental rights. In *Zarraga v Pelz*, the Court linked the right of the child to be heard in Article 24(1) with the best interests of the child in Article 24(2) noting that 'hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case'.[36]

In sum, the right of the child to be heard is fully applicable to the asylum content and is a right of every child who has the capacity – broadly construed – to form and express his/her own views and who wishes to communicate those views. Finally, it is worth drawing attention to the strength of the legal obligation in Article 12: States Parties 'shall assure' the right of the child to freely express his or her views. According to the Committee RC, this is 'a legal term of special strength, which leaves no leeway for State Parties' discretion. Accordingly, States Parties are under strict obligation to undertake appropriate measures to fully implement this right for all children.'[37]

33 Committee RC, General Comment No. 12, *supra* n. 8, para. 21.
34 *Ibid*, para 16. The same point is made in the Council of Europe Guidelines 2010. *Supra* n. 12, para. 46.
35 *Ibid*, para. 24. In a similar vein, the Council of Europe Guidelines 2010 warn against 'secondary victimisation'. *Supra* n. 12, para. 11.
36 CJEU, *Zarraga v Pelz,* Case C-491/10, Judgment of 22 December 2010, para. 64.
37 *Ibid*, para. 19.

4.2.2 The conduct of the hearing

Article 12(1) establishes the right of the child with the requisite capacity to express views 'freely', while Article 12(2) relating to the right of the child in particular to be heard in any judicial or administrative proceedings provides that this may be done 'either directly, or through a representative or an appropriate body'. These provisions have a number of important implications for the conduct of the hearing.

4.2.2.1 The right to a representative

Once the child has decided to be heard, according to the Committee, he or she will have to decide whether to be heard directly or through a representative. In this regard, the Committee recommends that 'whenever possible, the child must be given the opportunity to be directly heard in any proceedings.'[38] In the case of an accompanied minor, the most obvious representative is the child's parent. The representation of a child by his/her parent is consistent with Article 5 CRC which requires states to respect the right and responsibility of parents to provide direction and guidance to the child in the exercise of his/her Convention rights in accordance with the evolving capacities of the child. However, the Committee draws attention to potential conflicts between the child and his/her most obvious representative and underscores the need in such circumstances for an independent representative.

In the case of an unaccompanied minor, the role of the representative should be acquitted by a guardian or adviser, which presupposes the formal appointment of such person. In this regard, it is worth quoting at some length from the Committee RC's General Comment No. 6 on the Treatment of unaccompanied and separated children outside their country of origin:

> […] States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or the jurisdiction of the state […] The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings […]. The guardian or adviser should have the necessary expertise in the field of childcare […]. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship.[39]

It should be pointed out, because it is not always well understood, that the representative (*qua* guardian or adviser) is distinct from a *legal* representative.

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38 *Ibid*, para 35.

39 Committee RC, General Comment No. 6, 'Treatment of unaccompanied and separated children outside their country of origin', U.N. Doc CRC/GC/2005/6 (2005) para. 33.

The guardian or adviser, who should be a child-care professional, oversees the child's best interests and speaks for the child where necessary; the legal representative, who is a legal professional, provides the child with legal advice and/or representation. The distinction is clearly made in General Comment No. 6 which provides that '[i]n cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, *in addition to* the appointment of a guardian, be provided with legal representation.'[40]

4.2.2.2 The adaptation of the hearing

In terms of the hearing itself, the right of the child to express views 'freely' requires that the hearing be conducted in an age-appropriate manner. Thus the CJEU stated in *Zarraga v Pelz* that the right of the child to be heard in Article 24 of the Charter 'require[s] the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of [Article 24], and to offer the child *a genuine and effective opportunity to express his or her views*.'[41] Similarly but more concretely the Committee RC observes that:

> A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for his or her age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms [and] clothing of judges and lawyers […].[42]

Indeed, there is a wealth of soft law guidance on how to adapt the status determination interview to the needs of children which ranges from guidance on the lay-out of hearing rooms to child-friendly questioning.[43] On the last

40 *Ibid*, para. 36, emphasis added. The Committee further states at para. 72 that the guardian and legal representative should be present during all interviews.

41 CJEU, *Zarraga v Pelz*, Case C-491/10, Judgment of 22 December 2010, para. 66 (emphasis added).

42 Committee RC, General Comment No. 12, *supra* n. 8, para. 34. The Council of Europe Guidelines 2010 provide similar guidance on 'organisation of the proceedings, child-friendly environment and child-friendly language'. *Supra* n. 12, paras. 54-63.

43 See generally, UNHCR, 'Guidelines on International Protection, Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', HCR/GIP/09/08 (2009); Separated Children in Europe Programme (SCEP), 'Statement of Good Practice', 4th revised ed. (2009).; UNHCR, 'Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum' (1997). More detailed guidance can often be found in administrative guidance or practice instructions to asylum institutions at the national level. See for example, Canadian Immigration and Refugee Board, 'Child Refugee Claimants: Procedural and Evidentiary Issues' (1996); US Department of Justice, Immigration and Naturalisation Service, 'Guidelines for Children's Asylum Claims'

point, the Committee notes that '[e]xperience indicates that the situation should have the format of a talk rather than a one-sided examination',[44] an observation consistent with the findings of research into the interviewing of children for the purposes of refugee status determination.[45] However, a balance must be struck between a 'soft' approach to interviewing children and a comprehensive approach to interviewing children. In other words, the interviewer must enable the child to be heard by using child-friendly interview techniques, including lines and modes of questioning that are appropriate to the child, while facilitating a full ventilation of the claim by giving the child the opportunity to rebut any presumptions and challenge any negative inferences that are likely to be held against him/her when making the decision. After all, the child has a right pursuant to Article 22(1) to 'appropriate protection' – something the child is unlikely to get if the claim is not thoroughly explored.

In this regard, valuable guidance can be gleaned from the adaptation of the criminal procedure for minors, a question on which the ECtHR has pronounced in the context of the right to a fair trial in Article 6(1) ECHR. For example, in *S.C. v The United Kingdom*, while the Court accepted that a child defendant does not need to understand every point of law or evidential detail for the purposes of Article 6(1), it did hold that the child should be able to participate effectively in the proceedings:

> [E]ffective participation' in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.[46]

(1998) ; Finnish Migration Board, Directorate of Immigration, 'Guidelines for Interviewing (Separated) Minors' (2002). For academic commentary on the importance of such guidance see Jacqueline Bhabha and Wendy Young, 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines', *International Journal of Refugee Law* 11, no. 1 (1999): 84-125.

44 Committee RC, General Comment No. 12, *supra* n. 8, para. 43.

45 For example, Olga Keselman et al., 'Mediated Communication with Minors in Asylum Seeking Hearings', *Journal of Refugee Studies* 21, no. 1 (2008): 103-116; and more generally, Gregory Smith, 'Considerations When Interviewing Children', *Children's Legal Rights. Journal* 12, no. 2 (1991): Special Report 1-7.

46 ECtHR, *S.C. v United Kingdom*, Appl. No. 60958/00, Judgment of 15 June 2004, para. 29. Reiterated most recently in ECtHR, *Güveç v Turkey*, Appl. No. 70337/01, Judgment of 20 January 2009, para 124. See further ECtHR, *T. v United Kingdom*, Appl. No. 24724/94, Judgment of 16 December 1999, in which the Court held that 'it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level

It is submitted that the need for 'effective participation' in the international protection context, where *refoulement* is potentially at stake, is no less important than in the criminal context, where deprivation of liberty is potentially at stake. Consequently, a delicate balance must be struck between a 'soft' interviewing style and the need to address 'hard' issues relating to the core of the claim: properly handled, the two are not mutually exclusive.

In order that the hearing be conducted in an age-appropriate manner, staff involved in the hearing must be trained and competent to work with children. By now, it should be apparent just how difficult it is to sensitively but thoroughly interview children for the purposes of status determination. It is not something that can be done in the absence of specialized training.[47] The need for training is especially pronounced in the case of children who, because of their age, stage of development, disability or psychological state, cannot express themselves easily. Indeed, it is quite likely that in respect of such children the intervention of specialists will be required.[48] Thus, in its General Comment No. 12, the Committee RC notes that it is incumbent on States Parties to provide training on Article 12 and its application in practice to all professionals working with, and for, children including lawyers, judges, police, social workers, psychologists, caregivers, residential and prison officers, civil servants, public officials and asylum officers. In the asylum context, interpreters could usefully be added to this list, since they constitute the medium through which the child is heard. The obligation of staff training also derives from Article 3(3) CRC, which provides: 'States Parties shall ensure that the institutions, services and facilities responsible for the care or *protection* of children shall conform with the standards established by competent authorities, par-

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of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.' Para. 84.

47 The need for specialized training for eligibility officers working with children has been stressed by the Committee RC in a number of concluding observations. For example, in its Concluding Observations to Austria in 2005, the Committee recommended that Austria 'ensure that all interviews with unaccompanied and separated asylum seeking children are carried out by professionally qualified and trained personnel.' UN Doc. CRC/C/15/Add.251 (2005), para. 48. Similarly, in its Concluding Observations to Finland in 2000, the Committee recommended 'that the State party ensure adequate resources for the training of the officials who receive refugee children, in particular in child interviewing techniques.' U.N. Doc. CRC/C/15/Add.132, para. 52. Training materials on interviewing asylum seeking children have been developed in a number of different fora. For example, the *European Asylum Curriculum*, a training project supported by the European Union, has a section on interviewing children. Available on http://www.gdisc.org/uploads/tx_gdiscdb/final_curriculum_EAC.pdf. See further, Separated Children in Europe Programme (SCEP), 'Training Guide' (UNHCR and Save the Children, 2001). On a project in Ireland to train asylum staff at first and second instance in interviewing children see, by this author, 'Refugee Status Determination of Separated Children: International Developments and the Irish Response, Part II – The Asylum Procedure', *Irish Journal of Family Law* 2 (2005):21-27.

48 See Fernando Gutierrez, 'Psychological Evaluation of Children and Families in the Immigration Context', *Children's Legal Rights Journal* 19, no. 3 (1999): 17-25.

ticularly in the areas of safety, health, in the number and *suitability of their staff*, as well as *competent supervision*.'[49]

4.2.3 The evaluation of the child's views

Article 12(1) CRC states that 'the views of the child [must be] given due weight in accordance with the age and maturity of the child.' There are a number of issues to be clarified in this statement: first, how to assess the age and maturity of the child; and second, the meaning and implications of the term 'due weight'.

4.2.3.1 Assessment of age and maturity

In the asylum context, the age of the child is not always apparent, particularly when the child is unaccompanied or separated. The Committee RC recommends that age assessment be conducted as part of the prioritized identification of a child as separated or unaccompanied. However, the Committee warns that age assessment:

> […] should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.[50]

Indeed, there is a large amount of 'soft law' guidance and literature on the proper conduct and limits of age assessment.[51]

However, even where the age of the child can be established with a reasonable degree of accuracy, chronological age is not the only measure of the weight to be given to the views of the child: maturity is equally significant. Although the concept of maturity is difficult to define, useful guidance is supplied by Article 5 CRC which acknowledges the need for parental direction and guidance in the exercise by the child of his/her convention rights but links

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49 Emphasis added. See also Council of Europe Guidelines 2010, *supra* n. 12, paras. 14 and 15 on the training of professionals working with and for children.

50 Committee RC, General Comment No. 6, *supra* n. 39, para. 31(i).

51 See for example, UNHCR , *supra* n. 43, para. 75; SCEP, *supra* n. 43, para. D5; Heaven Crawley, *When is a Child Not a Child? Asylum, Age Disputes and the process of Age Assessment* (Immigration Law Practitioners' Association, 2007); Kate Halvorsen 'Report: Separated Children in Europe Programme Workshop on Age Assessment and identification', (Bucharest 2003) (on file with author).

the degree of parental oversight with the child's 'evolving capacities'. This concept acknowledges that maturity is something that is gained over time, not reached at a specific time. Consequently, it has an inherently variable quality depending on information, experience, environment, social and cultural expectations and levels of support. One of the variables is the matter at hand, which may be complex but not necessarily significant (e.g. the travel route), or straightforward but highly significant (e.g. the reason for flight), or complex and significant (e.g. multiple reasons for flight).[52] Consequently, the assessment of the child's maturity it itself a complex task and one that can only be undertaken on the basis of an individualized assessment.

4.2.3.2 The 'due weight' requirement

As to giving 'due weight' to the views of the child, an ordinary reading of the terms suggests that soliciting the views of the child is not enough but that considerable significance has to be attached to those views. Thus the Committee RC states that 'simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming his or her own views.'[53] Consequently, nominal or token consultation with the child is inconsistent with the requirements of Article 12.

However, giving 'due weight' to the child's views is complicated in the asylum context because there seems at first to be little correlation between a child's views and his/her eligibility for international protection. As Daniel O'Donnell notes, '[t]he use of the term 'views' in the second paragraph of Article 12 makes the right more relevant to certain kinds of legal and administrative proceedings than others', for example, in family law proceedings as opposed to juvenile justice proceedings.[54] Actually, it is submitted that the views of the child are relevant to both but different ways. This can be best appreciated by asking the question: views on what? In the family law context, the child's views are relevant to the outcome (which parent to live with), whereas in the juvenile justice context, the child's views on the outcome (prosecution or acquittal) are largely irrelevant. However, his/her views on what happened may be highly relevant from an evidential stand-point. The status determination context is like the criminal context in this regard: the views of the child as to whether he/she would prefer to remain in the host state or return home are largely irrelevant, just as they are in the case of an adult; however, the views of the child about the reasons for flight, the con-

52 On the interaction of maturity and subject-matter, see David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views', *International Journal of Children's Rights* 17 (2009): 1-21.

53 Committee RC, General Comment No. 12, *supra* n. 8, para. 28.

54 Daniel O'Donnell, 'The Right of Children to be Heard: Children's Right to Have Their Views Taken into Account and to Participate in Legal and Administrative Proceedings', *Innocenti Working Paper* (UNICEF, 2009).

ditions in the country of origin and the risks on return are highly relevant from an evidential stand-point, just as they are in the case of an adult.

Consequently, Article 12 CRC requires 'due weight' to be given to the child's view of his/her protection needs, in accordance with his/her age and maturity: the greater sum of the age and maturity of the child, the more weight to be given to the child's views and vice versa.[55] The latter situation (i.e. minimal weight to the views of the child because of a deficit of age and maturity) does not prevent the decision-maker from taking a decision on the matter; rather, it requires the decision-maker to assume more responsibility for the decision, for example, by having greater regard to objective factors. In the asylum context, this has repercussions for the burden of proof and the principle of the benefit of the doubt. Thus, in its guidelines on child asylum claims UNHCR advises:

> Although the burden of proof usually is shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied. If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt.[56]

Furthermore, giving 'due weight' to the views of the child in the asylum context has significant implications for the use of automatic, negative credibility inferences. In this regard, it is worth quoting at some length from the UNHCR guidelines:

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55 This casts doubt on the suggestion in the UNHCR Handbook that '[i]t can be assumed that – in the absence of indications to the contrary – a person of 16 or over may be regarded as sufficiently mature to have a well-founded fear of persecution. Minors under 16 years of age may normally be assumed not to be sufficiently mature. They may have fear and a will of their own, but these may not have the same significance as in the case of an adult'. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1 (1979), Re-edited, Geneva, January 1992, para. 215. This approach effectively conflates age with maturity and conflicts with the Committee RC's recommendation about the presumption of capacity. For critical commentary of the UNHCR Handbook in this regard, see Jacqeuline Bhabha, 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers', *European Journal of Migration and Law* 3 (2001): 297-298.

56 UNHCR, *supra* n. 43, para 73. See further UNHCR Handbook, *ibid*, para. 219. According to paragraph 196 of the Handbook, 'while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, *it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application*.' Emphasis added. In *Hatami v Sweden*, the ECtHR pronounced on the need for flexibility in dealing with claims of traumatized persons or victims of rape or torture who may have difficulties in recounting their experiences. ECtHR, *Hatami v Sweden*, Appl. No. 32448/28, Judgment of 23 April 1998, para 106. Arguably the same principle applies to minors.

> Children cannot be expected to provide adult-like accounts of their experiences. They may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions, lack of education, fear of state authorities or persons in positions of power, use of ready-made testimony by smugglers, or fear of reprisals. They may be too young or immature to be able to evaluate what information is important or to interpret what they have witnessed or experienced in a manner that it easily understandable to an adult. Some children may omit or distort vital information or be unable to differentiate the imagined from reality. They also may experience difficulty relating to abstract notions such as time or distance. Thus, what might constitute a lie in the case of an adult may not necessarily be a lie in the case of a child.[57]

Accordingly, it is submitted that giving 'due weight' to the views of the child in accordance with age and maturity – in the above sense of attributing the proper quality, substance or credence to the child's views – is simply not possible if the weight to be given to testimony has been pre-determined by rules establishing negative credibility inferences. This is particularly the case when such rules are founded on assumptions about how *adults* conduct themselves credibly (or incredibly) – assumptions that do not hold for children.

4.3 PHASE ONE CEAS: COMPLIANCE WITH THE RIGHT OF THE CHILD TO BE HEARD

According to Article 12 CRC, the right of the child to be heard pertains to 'any judicial and administrative proceedings affecting the child'. A large number of asylum proceedings (or 'procedures' to use the lexicon of the CEAS) can be identified as relevant to this right. Two sets of procedures are not covered by the APD: procedures for determining the Member State responsible under the DR and the procedures in the RCD for the reduction or withdrawal of reception conditions. The bulk of procedures, however, are governed by the APD, which will be the focus of this section.

The procedures in the APD may, with some shoe-horning, be classified as follows:

- what might be called the 'regular' first instance procedure which must generally, subject to some derogations, comply with the 'basic principles and guarantees' set out in Chapter II of the directive;[58]

57 UNHCR, *supra* n. 43, para. 72.

58 However, some of the guarantees attach to the *body* in charge of the procedure, as opposed to the procedure itself. Consequently, where an alternative body administers the procedure, such guarantees do not apply. Article 4(2) APD provides that a body other than the usual 'determining authority' may be established for DR cases, so-called national security cases, the specific procedures and the border procedure for processing claims at the border or in transit zones.

- what might be called 'exceptional' first instance procedures to which some or all of the 'basic principles and guarantees' as set out in Chapter II of the directive are not required to apply.[59] These consist of an admissibility procedure,[60] an accelerated procedure[61] and the so-called 'specific procedures'.[62] There are two specific procedures currently in operation:
  - a preliminary examination procedure for screening subsequent applications to determine whether they should be admitted to the regular procedure or summarily rejected;[63] and
  - a border procedure, which Member States can retain on the basis of a stand-still clause, for deciding on permission to enter the territory;[64]
- procedures for the withdrawal of refugee status which establish a unique set of procedural rules but also cross-reference a limited number of the provisions of the 'basic principles and guarantees' of Chapter II;[65] and
- appeal procedures which are governed by some of the 'basic principles and guarantees' of Chapter II and some rules specifically geared to the appellate stage.[66]

Not surprisingly, the procedural guarantees in the APD have been described as 'highly qualified and differentiated',[67] making an assessment of compliance with the right of the child to be heard a complex exercise – itself a portent of the difficulties the child is likely to face in participating in the procedure.

59 The term 'exceptional' is something of a misnomer as the chapter relating to first instance procedures (Chapter III) is largely taken up with establishing exceptional procedures. Thus as Costello opines 'exceptional procedures become the norm'. Cathryn Costello, 'The European Asylum Procedures Directive in Legal Context', *New Issues in Refugee Research*, UNHCR Research Paper No. 134 (2006): 8.

60 Article 25.

61 Article 23(4). The grounds for acceleration may also constitute grounds for a manifestly unfounded determination under Article 28(2).

62 Article 24.

63 Article 32-34.

64 Article 35(2)-(5). Hereinafter, the 'border entry procedure'. This procedure should be distinguished from the 'regular' border procedure under Article 35(1) whose function is to decide at the border or transit zones on applications made at such locations. The latter is not classified as a 'specific procedure'. There was originally a third 'specific procedure' under the directive, namely, the European safe third concept in Article 36. However, since ECJ, *European Parliament v Council*, Case C-133/06, Judgment of 6 May 2008, this concept is no longer operative and therefore will not be analyzed in the context of Phase One CEAS, although it will be analyzed in the context of Phase Two.

65 Articles 37 and 38.

66 Article 39.

67 Cathryn Costello, *supra* n. 59, p. 1.

4.3.1 The right to a hearing

Based on the general presumption of capacity, children should be given the opportunity of a hearing in all asylum procedures to which they are subject. To what extent is the right of the child to a hearing respected in the APD?

Article 12 (Personal interview) of Chapter II of the APD provides in paragraph 1:

> Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview. Member States may also give the opportunity of a personal interview to each dependant adult referred to in Article 6(3).
> Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.

As outlined in Chapter 3, Article 6(4) APD on access to the procedure permits but does not require Member States to determine whether a minor can be an 'applicant for asylum'. Where a Member State provides that a minor can be an applicant for asylum, the first sentence of Article 12(1), being a mandatory provision, should arguably take precedence over the third sentence, which is an optional provision. Thus, where a minor is an applicant for asylum, he/she must be given the opportunity of a personal interview. However, where a minor is not an applicant for asylum – because the Member State has omitted to legislate for this possibility or because the minor's claim is subsumed into that of his/her parents' or lodged by a representative – then the minor has no automatic right to a personal interview. The Commission's evaluation of the APD contains no information on whether or which Member States grant minors the opportunity of a personal interview.[68] However, a UNHCR report on the application of key provisions of the APD from 2010 notes that '[t]he research found that in the absence of a specific requirement in the APD, national legislation on the circumstances in which a child shall be given the opportunity of a personal interview in the asylum procedure is divergent, and in some cases absent.'[69]

In addition to the ambivalence in the APD regarding whether the child has a right to be interviewed, the directive provides for what has been described as an 'extensive catalogue of situations in which the personal interview can

68 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', COM (2010) 465 final. Hereinafter, 'Commission evaluation of the APD'.

69 UNHCR, 'Improving Asylum Procedures, Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)' (Brussels, 2010), 23.

be omitted'.[70] Therefore, even if the child is granted in principle a right to be interviewed under national law, the Member State may still omit the interview on numerous grounds. While there are at least ten such grounds in the APD, the focus here will be on those grounds which seem likely to be applied or are particularly detrimental to children.[71]

One such ground is Article 12(3) which provides for the omission of the personal interview where it is 'not reasonably practicable, in particular where the competent authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his/her control'. This provision seems apt to be applied to young children whose age is an enduring circumstance beyond their control which, if the procedure is not adapted to children, could render them unfit or unable to be interviewed.[72] Furthermore, the reference to the 'competent authority' as opposed to the usual 'determining authority' means that a body that is not the normal status determination body can make the critical decision that the applicant is unfit or unable to be interviewed. So what kind of body is this 'competent authority'? Some insight is provided by Article 4(2) which provides that an authority that is not the determining authority may administer six different types of procedure, including two types of border procedures.[73] Hence, a body that administers any of these procedures is a 'competent authority' for the purposes of the directive. The idea, for example, that a border guard should be vested with the power to decide whether a child is fit or able to be interviewed is highly troubling.

Another problematic provision is Article 12(2)(c) which allows the personal interview to be omitted in certain unfounded cases which may also be the basis for an accelerated procedure and a manifestly unfounded determination.[74] In a recent judgment, the ECtHR found the respondent State to be in violation of Article 13 in conjunction with Article 3 for, *inter alia*, processing an application for asylum in an accelerated/manifestly unfounded procedure

70 *Ibid*, p. 21.

71 Four grounds arise in the context of the ordinary procedure: in Article 12(2)(a), Article 12(2)(b), Article 12(3) and Article 20. Five grounds arise in the context of the accelerated/manifestly unfounded procedure: in Article 12(2)(c) which cross-references Article 23(4)(a), (c), (g), (h) and (j). One relates to the preliminary examination of subsequent applications in Article 35(3)(d). Finally, Article 25 relating to the admissibility procedure is silent on the question of a personal interview.

72 No feedback on the operation of this provision is provided in the Commission's evaluation of the directive. Commission evaluation of the APD, *supra* n. 68.

73 The six procedures are: the DR procedure, a procedure for dealing with so-called 'national security cases', a preliminary examination procedure for processing subsequent applications, a border procedure for deciding on claims made at the border or in transit zones, a border procedure to decide on permission to enter, and a procedure for dealing with European safe third country cases.

74 According to the Commission evaluation of the directive, 9 Member States avail of the option to omit the personal interview in the context of accelerated procedures: CY, CZ, DE, EL,FI, IT,LU SI, UK. Commission evaluation of the APD, *supra* n. 68, § 5.1.4, p. 6.

which made it practically impossible for the applicant to make out his claim.[75] Of particular interest in the present context, the Court criticized the fact that the applicant was given only a brief half-hour interview. It follows that an accelerated/manifestly unfounded procedure which dispenses with the interview entirely, at least in contexts where there is an allegation of torture or lesser forms of ill-treatment, is likely to fall foul of Article 13 ECHR.

Over and above this general objection, the grounds listed in Article 12(2)(c) are apt to be applied to minors. Five grounds are enumerated: 1) the application is not relevant or of minimal relevance to qualification as a refugee; 2) the applicant comes from an objectively designated safe country of origin or a safe third country; 3) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing; 4) the applicant has submitted a subsequent application which does not raise any new elements; and 5) the applicant is making an application merely in order to delay or frustrate the enforcement of a removal decision. Four of these grounds are problematic in the context of minors. Grounds 1) and 2) are problematic because, as was outlined in Chapter 3, owing to the adult-oriented nature of the definition of persecution, serious harm and restrictive concepts such as safe country concepts, a child-specific protection need may not be immediately perceived as relevant to international protection. Ground 3) is problematic because children's accounts are prone to being non-linear, disjointed and sometimes – in consequence of the cultural relativism of the adjudicator – improbable. And ground 4) is problematic because children who fail to be recognized on account of the reasons just outlined may have no choice but to submit a subsequent application.

A final area where a personal interview can (apparently) be omitted and which is particularly detrimental to children is the admissibility procedure. Article 25 on inadmissible applications exempts the State from having to examine the substance of the application in seven circumstances.[76] Article 25 is silent on the question of a personal interview. However, it can be observed that two of the grounds of inadmissibility, namely, safe third country and the lodging of an identical application, overlap with two of the grounds in Article 12(2)(c). In consequence, a personal interview is not a prerequisite for a finding of inadmissibility on either of these grounds, at least.

The admissibility procedure is particularly detrimental to children because it conflicts with the right of the child to *appropriate* protection in Article 22

75 ECtHR, *I.M. v France*, Appl. No. 9152/09, Judgment of 2 February 2012.

76 The circumstances are: another EU Member State is a first country of asylum; a non-EU Member State is a first country of asylum; a non-EU Member State is a safe third country; the applicant has a status equivalent to refugee status; the applicant has a right to remain pending a decision on the granting of a status equivalent to refugee status; the applicant has lodged an identical application after a final decision; the application is a subsequent application by a dependent who formerly consented to be part of an application made on his/her behalf.

CRC. This mandates an assessment of the child's protection needs which, in turn, requires that a child's claim be considered substantively, as opposed to being screened to exclude a substantive examination on formal or procedural grounds. Moreover, deeming a child's claim to be inadmissible conflicts with the principle of the best interests of the child as laid down in Article 3(1) CRC. As outlined in Chapter 2, the best interests principle mandates an individualized assessment of all relevant facts in order to identify from the available options which is best. Since the admissibility procedure excludes from consideration the facts relating to the substance of the claim, it circumvents a best interests assessment.

Having dealt with the matter of the personal interview at first instance, there are two remaining procedures which must be evaluated in the light of the right of the child to be heard: the procedures for withdrawing refugee status and the appeals procedures.

Article 14 QD establishes the grounds on which refugee status can be withdrawn, grounds such as cessation and exclusion. However, the procedure is governed by the APD. As regards the right to be heard, Article 38(1)(b) APD provides that where a Member State is considering withdrawing refugee status, the person concerned is entitled to submit in a personal interview *or* in a written statement, reasons as to why his/her refugee status should not be withdrawn. Consequently there is no right to a personal interview. Article 38(1)(b) goes on to state that where there is a personal interview, it must be in accordance with Article 12. Article 12, as we have already seen, authorizes Member States to determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.[77]

However, in a number of cases concerning withdrawal of refugee status for reasons of exclusion and cessation, the CJEU has strongly indicated the need for a personal interview on the basis of the wording of the QD. Thus in joined cases *B and D*, the Court held that, in applying an exclusion ground to an applicant, there must be an 'individual assessment of the specific facts',[78] a 'full investigation into all the circumstances of each individual case',[79] and an assessment of individual responsibility 'in the light of both objective and subjective criteria.'[80] The particular case involved exclusion for membership in a terrorist organization. The Court established that:

> […] the competent authority must, *inter alia*, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organization; the extent of the knowledge he had, or was deemed to have, of

77 The Commission evaluation of the directive is silent on the issue of the personal interview in the context of withdrawal procedures. Commission evaluation of the APD, s*upra* n. 68.

78 CJEU, *Bundesrepublik Deutschland v B and D*, Case C-57/09 and C-101/09, Judgment of the Court (GC) of 9 November 2010, para. 91.

79 *Ibid*, para. 93.

80 *Ibid*, para. 96.

> its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.[81]

It is hard to see how the competent authorities could discharge this obligation without interviewing the applicant. Similarly in *Abdulla and Others*, the Court held that, in applying the cessation ground relating to fundamental change of circumstances, the competent authorities must consider, not only whether the original circumstances for seeking refugee status have ceased, but also whether the person has any other reason to fear being persecuted. These issues must be assessed 'having regard to the refugee's individual situation'.[82] Again, this strongly implies that cessation is predicated on a personal interview. Accordingly, it is submitted that, despite the terms of Article 38(1)(b) APD which permit Member States not to interview a refugee in the context of withdrawal, the QD, as interpreted by the Court, does mandate a personal interview. This is significant in the context of children because, as was discussed in Chapter 3, minors are not exempt from having their refugee status withdrawn and, moreover, the application of exclusion and cessation grounds to minors raises particular difficulties from a child-rights perspective, underscoring the need for a personal interview.

Finally, as regards appeal procedures, Article 39(1) on the right to an effective remedy provides that asylum applicants have the right to an effective remedy before a court or tribunal against a first instance asylum decision including: a decision on admissibility; a decision taken at the border or in a transit zone; a refusal to reopen a discontinued application; a decision not to further examine a subsequent application; a decision refusing entry in the context of a border procedure; and a decision to withdraw refugee status. In *Diouf*, the CJEU summarized Article 39(1) as requiring a remedy against all decisions which entail rejection of the application for asylum for substantive reasons or for formal or procedural reasons which preclude any decision on the substance.[83] Consequently the material scope of the right to an effective remedy under the directive is broad.

However, Article 39 is silent on the question of whether the remedy must include a hearing or whether a paper review is sufficient. Certain provisions of the directive appear to militate against an appeal hearing while others appear to imply a hearing. For example, Article 7 provides that, subject to certain exceptions, applicants must be allowed to remain in the Member State until a first instance decision has been made. *A contrario*, there is no right to remain after the first instance decision has been made and, it follows, no right

81 *Ibid*, para. 97.

82 CJEU, *Abdulla, Hasan, Adem, Mosa Rashi and Jamal v Bundesrepublik Deutschland*, Joined cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgment of the Court (GC) of 2 March 2010, para. 70.

83 CJEU, *Diouf v Ministre du Travail, de l'Emploi and de l'Immigration*, Case C-69/10, Judgment of 28 July 2011, para. 42.

to an appeal hearing. However, Article 7 must be interpreted in the light of Article 39(3) which allows Member States, in accordance with their international obligations, to decide on the question of suspensive effect. But Member States' international obligations (in particular, the right to an effective remedy under Article 13 ECHR) mandate a remedy with automatic suspensive effect.[84] Furthermore, the case-law of the ECtHR on Article 13 strongly suggests the need for an appeal hearing.[85] Unsurprisingly in view of the ambiguity in the directive on the question of an appeal hearing, state practice is mixed: although the Commission evaluation has nothing to say on the question of an appeal hearing, the UNHCR report on the directive notes that only six of the twelve countries surveyed provides the appellant with the possibility of a hearing.[86]

In sum, the qualified right of the child to a personal interview which is undermined by the catalogue of situations in which a personal interview may be omitted – some of which are apt to be applied or are particularly detrimental to children – suggest that the right of the child to a hearing is not guaranteed in the first instances procedures as established in the APD. The right of the child to a hearing is no better secured in the withdrawals procedure or in the appeals procedure. However, it is submitted that the discretion given to Member States regarding a personal interview or appeal hearing is likely to be fettered by the CJEU and the ECtHR.

There is one final issue to address in this subsection: whether the APD conceives of the hearing of the applicant as a right of the applicant or a duty of the applicant. Article 12 CRC establishes that a child cannot be forced to be heard against his/her will. However, the APD is ambiguous as to whether the hearing of the applicant is a right or a duty. Article 12 (Personal interview) refers to the 'opportunity of a personal interview', presenting the interview as a right, not an obligation. However, various other provisions of the directive suggest the contrary, providing for negative procedural consequences if the

84 For a cross-section of cases, see ECtHR, *Jabari v Turkey*, Appl. No. 40035/98, Judgment of 11 July 2000; ECtHR, *Conka v Belgium*, Appl. No. 51564/99, Judgment of 5 February 2002; ECtHR, *Gebremedhin v France*, 25389/05, Judgment of 26 April 2005; ECtHR, *Abdolkhani and Karimnia v Turkey*, Appl. No. 30471/08, Judgment of 22 September 2009; ECtHR, *Baysakov and Others v Ukraine*, Appl. No. 54131/08, Judgment of 18 February 2010; ECtHR, *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, Judgment of 21 January 2011. For commentary, see Marcelle Reneman (2010) 'An EU Right to Interim Protection during Appeal Proceedings in Asylum Cases?' *European Journal of Migration and Law,* 12, 407-434.

85 For instance, in the context of an allegation that expulsion will violate Article 3, the ECtHR has stressed the need for a full and *ex nunc* assessment of the claim. It is hard to see how this could be done in the absence of an appeal hearing. See, for example, ECtHR, *Salah Sheekh v The Netherlands*, Appl. No. 1948/04, Judgment of 11 January 2007 and ECtHR, *NA. v The United Kingdom*, Appl. No. 25904/07, Judgment of 17 July 2008.

86 UNHCR, s*upra* n. 69, p. 91.

applicant does not appear for or engage with the personal interview.[87] There is no exemption for minors and indeed Article 17 on guarantees for unaccompanied minors, having established the right to a representative in paragraph 1, provides in the second sub-paragraph that 'Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.'[88] Consequently, the APD does not prohibit and may even facilitate the interviewing of children against their will.

4.3.2 The conduct of the hearing

The right of the child in Article 12 CRC to be heard 'either directly or through a representative' and to express views 'freely' has significant implications for the conduct of the hearing. In particular, the child has a right to a representative and to an appropriately modified hearing. To what extent are these rights met in the APD?

4.3.2.1 The right to a representative

Article 17 APD (Guarantees for unaccompanied minors) provides in paragraph 1(a) that Member States must 'take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application.' Article 17(1)(b) establishes that the representative plays an information and support role in relation to preparing the minor for the personal interview. Moreover, the representative must be permitted to be present at the interview and to ask questions or make comments within the framework set by the person who conducts the interview. The representative,

87 Thus, Article 12(6) provides: Irrespective of Article 20(1) Member States, when deciding on the application for asylum, may take into account the fact that the applicant failed to appear for the personal interview, unless he/she had good reasons for the failure to appear.' Article 20, in turn, sets out the procedure to be followed in the case of implicit withdrawal or abandonment of the application. It provides in paragraph 1(a) that failure to appear for interview constitutes a ground for implicit withdrawal or abandonment of an application. Article 33 (Failure to appear) allows Member States to apply the preliminary examination procedure for subsequent claims to an applicant who fails to appear before the competent authority at a specified time. Finally, failure to engage with the hearing may fall under any one of a number of grounds for accelerating the claim under Article 23(4) such as ground (d), withholding relevant information or ground (g) making insufficient representations, all of which also constitute grounds for a manifestly unfounded determination.

88 Similarly, Article 16 relating to the scope of legal assistance and representation provides in the second sub-paragraph of paragraph 4 'Member States may require the presence of the applicant at the personal interview, even if he/she is represented under the terms of national law by […] a legal adviser or counselor, and may require the applicant to respond in person to the questions asked.'

who can be the same person as the representative appointed under the RCD, is defined in Article 2(i) as:

> [A] person acting on behalf of an organization representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organization which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests.

On the one hand, these provisions can be regarded as positive since they establish the right of an unaccompanied minor to a representative. But on the other, the wording and generality of the provisions leads to ambiguities. For example, Article 2(i) fails to specify any minimum requirements relating to the qualifications, independence or role of the representative. Indeed, the task of the representative as it emerges from the above provisions of the APD is not necessarily to represent the child. In this regard, note the 'and/or' formulation in Article 17(1)(a) and the limited role of the representative at interview in Article 17(1)(b), which suggest that the role can be reduced to one of an assistant. This contrasts with Article 12 CRC which requires that, where necessary, the representative represent – in the sense of 'speak for' – the child. The net result of these various provisions is uncertainty about the role of the representative in the procedure.

This is reflected in the Commission evaluation of the APD which reports that while all Member States do provide for representation of unaccompanied minors in the procedure, generally in the form of a guardian, the guardianship systems vary considerably between Member States in terms of institutional arrangements, authorities involved and the guardians' role and qualifications.[89] This is consistent with the findings of a number of recent reports.[90] For example, in a report into separated children seeking asylum in the EU, the Fundamental Rights Agency found that 'most of the children interviewed were not fully aware of whether they had a guardian, who that person was or which responsibilities were attached to the guardianship function.'[91] Consequently, there is a need for a fuller definition of the role and responsibilities of the representative in the APD.

Furthermore, Article 17(2) and (3) APD establish derogations from the obligation to appoint a representative. Article 17(2) provides that Member States may refrain from appointing a representative where a) the unaccompanied minor will in all likelihood reach the age of maturity before a decision at first instance is taken (i.e. age out); b) can avail himself, free of charge, of

89 Commission evaluation of the APD, *supra* n. 68, § 5.1.6, p. 8.

90 See, for example, UNHCR, *supra* n. 69, p. 36 and Defence for Children International-ECPAT The Netherlands, 'Core Standards for Guardians of Separated Children in Europe: Goals for Guardians and Authorities' (Leiden, 2011).

91 EU Fundamental Rights Agency, 'Separated, asylum-seeking children in European Union Member States' (Summary Report/Conference Edition) (2010), 33.

a legal adviser 'or other counsellor admitted as such under national law to fulfil the tasks assigned above to the representative'; c) is married or has been married.[92] Article 17(3) permits Member States to retain a derogation existing at the time of the adoption of the directive from appointing a representative to an unaccompanied minor over 16 'unless he/she is unable to pursue his/her application without a representative.'[93]

Article 17(2)(b) is unfortunate because it conflates two fundamentally distinct roles: the representative and the legal adviser. As regards the other grounds for derogation, it can be observed that they all relate to the constructive emancipation of the minor – something that is discouraged by the Committee RC, as will be discussed in Chapter 5. On the other hand, a presumption of capacity on the part of older children is consistent with the notion of the evolving capacities of the child in Article 5 CRC, *providing that the presumption can be rebutted*. In this regard it is worth noting that Article 17(2) and (3) must be read in the light of Article 17(6) which establishes that the best interests of the child shall be a primary consideration for Member States when implementing the article. Since it is necessary to undertake an individualized assessment of best interests, it is submitted that this offers the possibility to rebut the presumption in the individual case. Consequently, the grounds for derogation that relate to constructive emancipation of the minor can be interpreted consistently with the right to a representative.

Article 17(1) on the right to a representative is explicitly stated to apply to 'all procedures provided for in this Directive'. However, it is unclear how this provision interacts with Article 24 which allows Member States to derogate from the basic principles and guarantees of Chapter II (including Article 17) in the context of the specific procedures. In this regard, it is necessary to refer to the provisions relating to the specific procedures. Articles 32-34 on the preliminary examination procedure for subsequent applications are silent on the question of a representative for unaccompanied minors. However, the provisions on the border entry procedure cross-reference Article 17(1)-(3), thereby establishing that the guarantees relating to the representative subsist, albeit subject to the derogation provisions.[94]

Finally, the obligation to appoint a representative only applies to unaccompanied minors. No provision of the APD refers to the need for an accompanied minor who lodges an application on his/her own behalf or makes representations in relation to his/her parent's claim to be represented by someone – either the parent or, in case of a conflict of interest, an independent representative. However, Article 13 (Requirements for a personal interview) does allow,

92 According to the Commission evaluation of the APD, '[o]nly a few Member States apply exceptions to the duty to appoint a representative.', *supra* n. 68, § 5.1.6, p.8.

93 According to the Commission evaluation of the APD, just two Member States have retained this derogation, *ibid*, § 5.1.6, p. 8.

94 Article 35(3)(f).

exceptionally, for the presence of family members at interview where the determining authority considers it necessary. Hence Article 13 could be used as an enabling provision. This would not, however, address the need for an independent representative where there is a conflict of interest.

In brief, the provisions of the APD relating to the appointment of a representative for unaccompanied minors are drafted at a level of generality that does not guarantee that the requirements of Article 12 CRC will be met. Furthermore, the obligation to appoint a representative to an unaccompanied minor can be derogated from in various circumstances, at least some of which are problematic. Finally, the APD fails to establish the right of an accompanied minor to an independent representative in situations of conflict of interest. In sum, therefore, it can be said that the APD goes some, but not all, the way toward meeting the requirements of Article 12 CRC regarding the right of the child to be heard, if necessary, through a representative.

4.3.2.2 The adaptation of the hearing

As regards the first instance procedure, Article 17 APD (Guarantees for unaccompanied minors) stipulates in paragraph 4 that personal interviews of unaccompanied minors (where they take place) and decisions on the applications of unaccompanied minors must be conducted/taken by a person 'with the necessary knowledge of the special needs of minors'. On the one hand, this is an important recognition of the fact that interviewing minors and assessing their claims is a qualitatively different exercise than in the case of adults. On the other hand, in view of the myriad ways that the interview needs to be adapted in order to be 'child-friendly', it is submitted that Article 17(4) is a rather inadequate expression of what is at stake.[95] While one would not necessarily expect guidelines on child-friendly interviewing to appear in legislation, one might legitimately expect to find a direction to Member States to provide such guidance in their domestic legislation along with some broad indications of the content of such guidance. In this regard, it is interesting to note that, in its report on the APD, UNHCR recommends that EU-wide guidelines on the personal interview of children should be adopted and implemented.[96]

While the reference in Article 17(4) to 'the necessary knowledge of the special needs of minors' implicitly presupposes staff training, Article 17 establishes no explicit training requirement much less any direction as to the content of such training. Indeed, there are only two references to training in the entire

95 In this vein, the Fundamental Rights Agency report observes that '[t]he interview process itself was invariably an unpleasant experience for children, who often complained, especially in Austria and Belgium, that it was a long and detailed interrogation with the same questions asked repeatedly.' EU Fundamental Rights Agency, *supra* n. 91, p. 100.

96 UNHCR, *supra* n. 69, p. 36.

APD – one in a recital[97] and one, ironically, relating to authorities *other than* the usual 'determining authority'.[98] The Commission evaluation notes that institutional arrangements for training including follow-up training are in place in just eight Member States and that 'other Member States tend to rely on *ad hoc* training and the length, intensity and content of training vary considerably.'[99] For its part, UNHCR recommends that:

> All determining authorities should ensure that there is specific training on interviewing children and that sufficient numbers of interviewers are available, of both genders, who are specially trained to conduct interviews of children.
> Determining authorities must ensure that all interviews of children are conducted by interviewers who have been specially trained and have the necessary knowledge regarding the psychological and emotional development and behaviour of children.[100]

Furthermore, unsatisfactory though it is, there is no corollary to Article 17 for accompanied minors. Consequently, those accompanied minors who are entitled to lodge an asylum application on their own behalf and who are permitted to be interviewed do not benefit from any child-specific guarantees relating to the hearing. In response to this lacuna, UNHCR recommends that '[t]he APD should be explicit in providing that all interviews of children – not just unaccompanied children – are conducted by a person who has the necessary knowledge of the special needs of children.'[101]

There are, however, a number of important general (i.e. non child-specific) standards established in the directive regarding staff competence, the examination of applications and the conduct of the personal interview, which are equally applicable to minors. Thus, Article 4 (Responsible authorities) requires in paragraph 1 that the designated determining authority must conduct an 'appropriate examination' of applications. Article 8 (Requirements for the examination of applications) reiterates this requirement in paragraph 2 and stipulates that the personnel examining applications and taking decisions must have knowledge of the relevant standards in asylum and refugee law. Article 12 (Personal interview) provides in paragraph 1 that before a decision is taken by the determining authority, the applicant must be given the

97 Recital 10 provides: 'It is essential that decisions on all applications for asylum be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge or receives the necessary training in the field of asylum and refugee matters.'

98 Article 4(3) states: 'Where [alternative] authorities are designated […], Member States shall ensure that the personnel of such authorities have the appropriate knowledge or receive the necessary training to fulfill their obligations when implementing this Directive.'

99 Commission evaluation of the APD, *supra* n. 68, § 5.1.3, p. 5.

100 UNHCR, *supra* n. 69, p. 30.

101 *Ibid*, p. 31.

opportunity of a personal interview with 'a person competent under national law to conduct such an interview'.

Moreover, Article 13 (Requirements for a personal interview) provides in paragraph 3 that Member States must take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicant to present the grounds for their application in a comprehensive manner, while sub-paragraph (a) obliges Member States to 'ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin and vulnerability, insofar as it is possible to do so.' While the qualification of the term 'competent' is unfortunate, as is the reference to personal 'or' general circumstances as if they were alternatives,[102] the reference to vulnerability is promising for our purposes. This was picked up on by the Commission, which notes in its evaluation that '[w]hile this standard is of relevance to those applicants who due to their gender, *age* and/or consequences of trauma may be in need of additional support, the Directive does not explicitly set guarantees for applicants with special needs, such as gender sensitive interviews'.[103] However, it appears that the implicit reference to additional support for vulnerable applicants is not enough. In the research for its report, UNHCR observed a variety of poor interviewing techniques used in respect of both vulnerable applicants and in general. These included a lack of gender-sensitive interviewing, insufficient time allocated for the interview, failure to interview in an appropriate environment, poor structuring of the interview and inappropriate questioning dominated by credibility assessment.[104]

What is more, some or all of the general standards can be derogated from – explicitly or implicitly – in various circumstances, all of which potentially apply to minors. Firstly, it is not clear from the wording of Article 12(1) that the personal interview must be conducted by the determining authority.[105] If not, then the standards that are established in respect of the determining authority in Articles 4 and 8 are not applicable.

Secondly, Article 4(2) of the APD provides that an authority other than the usual 'determining authority' may be established for processing cases under

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102 In *R.C. v Sweden*, the ECtHR stated that '[i]n order to determine whether there is a risk of treatment, the Court must examine the foreseeable consequences of sending the applicant [back to his country of origin], bearing in mind the general situation there *and* his personal circumstances.' ECtHR, *R.C. v Sweden*, Appl. No. 41827/06, Judgment of 9 March 2010, para. 51 (emphasis added).

103 Commission evaluation of the APD, *supra* n. 68, § 5.1.4, p. 7 (emphasis added).

104 UNHCR, *supra* n. 69, pp. 35-40.

105 Article 12(1) first sub-paragraph provides: 'Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview.' It is not obvious that the 'person competent under national law' must be from the determining authority.

six categories, including the specific procedures (i.e. the preliminary examination of subsequent applications and the border entry procedure) and the border procedure to decide at the border or in transit zones on applications made at those locations. Here again the standards established in Articles 4 and 8 are not applicable. Article 4(3) does oblige Member States to 'ensure that the personnel of such [alternative] authorities have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this directive.' However, this is clearly a lesser, or at least a less detailed, standard that that laid down in Article 8, in particular.

Thirdly, as regards the specific procedures, even if Member States do not appoint an alternative authority to administer such procedures, they are permitted in Article 24 to derogate from the basic principles and guarantees of Chapter II, including Article 8, 12, 13 and 17 discussed above. Hence the question arises as to whether the articles dealing with the specific procedures specify any minimum requirements regarding a possible hearing. As regards the preliminary examination procedure for subsequent applications, perhaps unsurprisingly in view of the fact that it permits Member States to omit a personal interview, Article 34 does not establish any standards regarding a hearing. As for the border entry procedure, although Article 35(3) cross-references some paragraphs of Article 17 (Guarantees for unaccompanied minors), no cross-reference is made to Article 17(4) requiring that any interview be conducted 'by a person who has the necessary knowledge of the special needs of minors.' Consequently, there is no requirement that border staff who decide whether the applicant can enter the territory should be specially qualified to interview unaccompanied minors. However, Article 35(3)(d) does require the interview to be conducted by 'persons with appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law'.

Neither the provisions on withdrawal of refugee status nor the provisions relating to the appeals procedures make any reference to the need to adapt the hearing, if there is one, to facilitate the participation of minors. Indeed, the lack of any provision in the appeals chapter of the APD on a hearing, much less the conduct of the hearing, appears to have facilitated the growth of widely divergent approaches to the conduct of appeals in Member States. Thus, in a 2010 report on access to effective remedies under the APD, the Fundamental Rights Agency observes that:

> Although only a limited number of respondents had attended an appeal hearing, it appears that their role at the hearing varied considerably from country to country. In Austria and Hungary, asylum seekers found it important to stress that during the hearing they could present the reasons for not being able to return to their home country. In Ireland, Poland or the UK, respondents were only asked to reply to

> specific questions, whereas in a third group of countries – including Germany, Slovenia and Spain – respondents said [sic] not having spoken at all.[106]

In conclusion, the APD contains a limited acknowledgement of the need to adapt the interview for unaccompanied, though not accompanied, minors. While this is bolstered by a number of important general standards regarding staff competence, the examination of applications and the conduct of the personal interview, some or all of those standards may be derogated from in various circumstances. The provisions of the directive relating to the procedure for the withdrawal of refugee status and the appeals procedure contain no acknowledgement of the need to adapt the hearing for minors. Consequently, the APD falls short of the requirements of Article 12 CRC relating to the right of the child to express views 'freely'.

4.3.3 The evaluation of the child's views

Article 12(1) CRC establishes that the views of the child must be given due weight in accordance with the age and maturity of the child. This necessarily involves an assessment of age and maturity and a serious consideration and weighing of the views of the child. What provisions of the APD speak to these requirements and in what way?

4.3.3.1 Assessment of age and maturity

The APD envisages the use of medical examinations to determine the age of unaccompanied minors. Thus, Article 17 (Guarantees for unaccompanied minors) provides in paragraph 5:

> Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for asylum. In cases where medical examinations are used, Member States shall ensure that:
> (a) unaccompanied minors are informed prior to the examination of their application for asylum and in a language which they may reasonably be supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the application for asylum, as well as the consequences of refusal on the part of the unaccompanied minor to undergo medical examination.
> (b) Unaccompanied minors and/or their representatives consent to carry out an examination to determine the age of the minors concerned; and

106 EU Fundamental Rights Agency, *'Access to effective remedies: The asylum-seeker perspective'*, Thematic Report, (2010), 35.

> (c) The decision to reject an application for asylum from an unaccompanied minor who refused to undergo this medical examination shall not be based solely on that refusal.
> The fact that an unaccompanied minor has refused to undergo such a medical examination shall not prevent the determining authority from taking a decision on the application for asylum.

According to the Commission evaluation, medical examinations to determine age are possible in 17 Member States, all of which request the minor's and/or his/her representative's prior consent. However, the Commission reports that '[w]here a person refuses to consent, he/she is treated as an adult (CZ, HU, NL, RO, PL and SK), the credibility of his/her statements is affected (AT and LU), or he/she may not rely on the benefit of the doubt principle (LT).'[107] Somewhat inconsistently, the Commission considers only the latter consequence to be 'at variance' with the Directive.

A number of observations may be made about Article 17(5). First, there is no reference to safeguards in conducting age assessment other than the requirement of consent. However, doubt must be cast on whether such consent as is obtained under Article 17(5) is free, in view of the negative consequences of withholding consent. Second, there is no reference to the principle of the benefit of the doubt. This, combined with the lack of safeguards, falsely suggests that medical assessments of age are reliable. Third, there is no reference to maturity. Finally, it is difficult to see how this provision could be applied consistently with the best interests principle which, according to Article 17(6), applies to the implementation of Article 17. In sum, the whole tenor of Article 17(5) suggests that the purpose of age assessment is not to identify the unaccompanied minor as such or to decide what weight to be given to the views of the child, but rather to expose adults masquerading as minors.[108] This underlying rationale for age assessment has been highlighted in a number of recent reports.[109] Nevertheless, it is submitted that Article 17(5) could

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107 Commission evaluation of the APD, *supra* n. 68, § 5.1.6, p. 8.

108 Bhabha has opined on the reasons adjudicators tend to be skeptical about the age of unaccompanied minors. She remarks: 'It is often claimed that these children are 'really' much older and can be treated as adults, that they are not children like 'our' children, but rather manipulative impostors. The traumatic quality of their life experience is so at odds with decision makers' concepts of what constitutes 'childhood', that the category 'child' is viewed as inapplicable to this class. Heightened skepticism and hostility rather than compassion are thus, paradoxically, typical official responses. Like street children in other contexts, they are viewed as 'people out of place', more rather than less suspect for being displaced and detached from firm anchoring in familiar social settings.' Jacqueline Bhabha, *supra* n. 55, at 294.

109 See, for example, Separated Children in Europe Programme (SCEP), 'Review of current law, policies and practices relating to age assessment in 16 European Countries' (2011); European Migration Network, 'Policies on Reception, Return and Integration arrangements for and numbers of Unaccompanied Minors – an EU comparative study' (2010), 73-83; and EU Fundamental Rights Agency, *supra* n. 91. The latter report found that '[m]ost children

(more) productively be put to use as one of the tools necessary in determining the weight to be given to the views of the child. The directive is silent on assessing the age and maturity of the accompanied child.

4.3.3.2 The 'due weight' requirement

Giving due weight to the child's view of his/her protection needs may require the Member State to assume a greater burden of proof, desist from applying automatic negative credibility inferences and/or apply more liberally the principle of the benefit of the doubt. To what extent is this foreseen in the APD?

Burden of proof

The APD does not contain any clear statement relating to the burden of proof. However, Article 4 of the QD (Assessment of facts and circumstances) is of relevance, even though it does not use that exact term. Article 4(1) provides that 'Member States *may* consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant, it *is* the duty of the Member State to assess the relevant elements of the application.'[110] Thus a distinction is made in the first and second sentences between, what Noll describes as a burden of assertion, which may be placed on the applicant, and a burden of assessment, which is placed on the Member State, to be acquitted in cooperation with the applicant.[111] The burden of assertion is the burden of submitting 'all elements needed to substantiate the application for international protection'. On first reading, this phrase implies that the burden of establishing eligibility may be placed on the applicant. However, when read in the light of Article 4(2) which exhaustively lists the elements needed to substantiate the application, this is clearly not the case. The list of elements in Article 4(2) comprise

expressed fear and were critical of age assessment procedures, and in some countries had little information on these procedures. In others, children considered age assessment essentially unfair and most children wished that officials would simply believe them. Some children seemed troubled and perplexed by the fact that their statements about their age were challenged, as well as being distressed about the possibility of being perceived as liars.' Summary/conference version, p. 36.

110 Emphasis added.

111 According to Noll, 'Article 4 QD merely demands that the applicant deliver a sufficient amount of information to trigger the procedure, which can be described as a 'burden of assertion'. Compared to the prevalent conception that the applicant is bound by some form of burden of proof, this puts the applicant in a less onerous position. On the face of it, placing the 'burden of proof' on the applicant would suggest that the claim is rejected if the application is unable to present evidence reaching the standard of proof. This is not the way refugee determination procedures should work in practice. Therefore, it appears to be more accurate to speak of a 'burden of assertion'. Gregor Noll, 'Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive', *European Public Law* 12, no. 2 (2006): footnote 17. See further, Gregor Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2005).

the applicant's statements and documentation relating to bio-information, previous asylum applications, travel routes, identity and travel documents and, critically, 'the reasons for applying for international protection'. Thus, when Article 4(1) first sentence is applied, the applicant must explain his/her reasons for applying for, *as distinct from being granted*, international protection.

Where an applicant is unable to do this, for example on account of age, the second sentence of Article 4(1) – a mandatory provision – subsists. Thus Member States must still discharge the burden of assessment. The factors to be taken into account in the assessment are illustratively listed in Article 4(3) and go beyond the elements of the application in Article 4(2). They include country of origin information and 'the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm'. Thus, Member States are required (Article 4(1) first sentence notwithstanding) to go beyond the information given to them by the applicant. Where the applicant is unable to give them much, the burden of assertion necessarily recedes and the burden of assessment comes to the fore. As a result of this dynamic between the burden of assertion and the burden of assessment, it is suggested that the (overall) burden of proof is shared and flexible.[112] This bodes well for giving 'due weight' to the views of the child.

However, while certain provisions of the APD appear to reinforce the concept of a shared and flexible burden of proof established in the QD, others appear to undermine it.[113] For reasons of space, the focus here will be on the 'safe country' concepts in the APD, which, among other provisions of the directive, appear to place the burden of proof solely on the applicant.[114] The

112 Thus, the CJEU has stated in relation to Article 4(1) and (2) of the QD that '[i]t must be acknowledged that the level of difficulty encountered, first, in gathering the relevant elements for the purposes of the assessment of the circumstances may, solely from the perspective of the relevance of the facts, prove to be higher or lower from one case to another.' CJEU, *Abdulla and Others v Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-197/08, Judgment of 2 March 2010, para 86.

113 Certain paragraphs of Article 12, for example, reinforce the concept of a shared and flexible burden of proof. Paragraph 3 of Article 12 permits the personal interview to be omitted where the applicant is 'unfit or unable to be interviewed owing to enduring circumstances beyond his/her control'. Paragraph 4 establishes that this 'shall not prevent the determining authority from taking a decision on an application for asylum, while paragraph 5 states that the absence of a personal interview 'shall not adversely affect the decision of the determining authority.' If the lack of a personal interview is not to adversely affect the decision, it follows that the determining authority must assume greater responsibility for investigating the claim.

114 Two further provisions are of concern. Article 23(4)(o) was mentioned in Chapter 3. It relates to accompanied minors who lodge an application after their parents' claim is rejected and appears to place the burden entirely on the minor to raise new elements with respect to his/her particular circumstances or to the situation in his/her country of origin. Article

provisions of the APD that relate to safe country of origin (SCO), safe third country (STC) and first country of asylum (FCA) concepts establish a presumption based on objective factors that the country of origin or a third country is safe for the applicant, thereby placing the burden on the applicant to rebut that presumption. The stakes are high: in the case of SCO, if the applicant cannot rebut the presumption of safety, the claim may be accelerated, designated manifestly unfounded and a personal interview may be omitted;[115] in the case of STC, the claim may *additionally* be deemed inadmissible;[116] and in the case of FCA, the claim may 'simply' be deemed inadmissible.[117] The stakes are even higher for children because, as was outlined in Chapter 3, the assessment of what makes these countries safe does not necessarily include a child-rights assessment.

Thus, in relation to SCO, the APD establishes that Member States should be able to 'presume [a designated country's] safety for a particular applicant, unless he/she presents serious counter-indications'[118] and should operate 'on the basis of a rebuttable presumption of safety of that country'.[119] The presumption will be rebutted if the applicant submits 'serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances and in terms of his/her qualification as a refugee […].'[120] In its report on the APD, UNHCR notes:

> The majority of states that apply the safe country of origin concept have legislation which increases the burden of proof on the applicant. However, in only one of those surveyed was the entire burden shifted to the applicant. In others, the responsibility *in law* to establish the facts continued to be shared between the applicant and the authority, in accordance with the QD. UNHCR is concerned that *in practice, however, some states may place the burden of proof entirely on the applicant*, sometimes in the context of an accelerated procedure, without adequately recognizing the necessity of a shared examination of the claim [emphasis added].[121]

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34 on procedural rules governing preliminary examinations of subsequent applications also appears to permit placing the burden of proof solely on the applicant. Specifically, Member States are permitted to establish rules in national law obliging the applicant concerned to 'indicate facts and substantiate evidence which justify a new procedure'.

115 Article 23(4)(c)(i), Article 28(2) and Article 12(2)(c) APD respectively.

116 Article 25(1)(c). The claim may also be accelerated and deemed manifestly unfounded under Articles 23(4)(c)(ii) and 29(2) and be decided without a personal interview under Article 12(2)(c).

117 Article 25(1)(b).

118 Recital 17.

119 Recital 19.

120 Article 31(1). The Commission evaluation of the APD reports that only 4 Member States do not have a SCO procedure in place and that '[w]ide divergences are identified between Member States which have SCO procedures in place.' S*upra* n. 68 , § 5.2.5, p. 12.

121 UNHCR (2010), *supra* n. 69, p. 71.

As regards STC, Article 27 provides in paragraph 2(c) that Member States must lay down in national legislation rules 'in accordance with international law' providing for an individual examination of the safety of the third country for the particular applicant which 'at a minimum, permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.' The reference to international law in conjunction with the reference to torture, cruel, inhuman or degrading treatment or punishment suggests that international law can be reduced to the requirements of international human rights law. However, international law also includes international refugee law, which establishes a prohibition of *refoulement* which is broader in scope than the right of *non-refoulement* in the torture context.[122] Consequently, Article 27(2)(c) is highly ambiguous, mandating rules in accordance with international law but then establishing a minimum standard which falls short of the requirements of international law. Where Member States avail of the minimum option – and four do according to the Commission – this means that the presumption of safety on all other objective grounds is conclusive and hence that there is *no way* for the applicant to discharge the burden of proof in relation to those grounds.[123] Unfortunately, a recent judgment of the CJEU in relation to the DR (which is a specialized form of STC) lends credence to this reductionist approach.

In *N.S. and others v Secretary of State for the Home Department and others*, the question referred to the Court was whether Member States are entitled under the DR to operate on the basis of a conclusive presumption of safety even where there is clear evidence that the treatment of asylum seekers in a receiving EU Member State is contrary to fundamental rights in the EU Charter of Fundamental Rights.[124] The Court observed that the DR is part of the CEAS which establishes minimum standards for the treatment of asylum seekers in line with fundamental rights. Consequently, it is reasonable to assume that in all Member States asylum seekers will be treated in compliance with fundamental rights. It is 'not however inconceivable' that a Member State should

122 If *non-refoulement* in refugee law is interpreted strictly in line with Article 33(1) of the 1951 Refugee Convention, then a person cannot be returned to a country where his or her life or liberty is likely to be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion. It can be observed that a threat to life or liberty encompasses but is broader than a risk of torture or inhuman or degrading treatment or punishment. If, however, in accordance with state practice, *non-refoulement* is interpreted in the light of the definition of a refugee in Article 1A(2) of the 1951 Convention, then it includes contemporary interpretations of persecution. According to Article 9 QD, acts of persecution within the meaning of the Geneva Convention comprise 'a severe violation of basic human rights'. It can be observed that 'basic human rights' are broader than simply the prohibition of torture and inhuman or degrading treatment or punishment.

123 Commission evaluation of the APD, *supra* n. 68, § 5.2.4, pp 11-12.

124 CJEU, *N.S. and others v Secretary of State for the Home Department and others* Joined Case C-411/10 and C-493/10, Judgment (GC) of 21 December 2011.

experience 'major operational problems' resulting in treatment of asylum seekers in a manner incompatible with their fundamental rights. However, rather than conclude, as the Advocate General did, that if there is a real risk of a serious violation of a fundamental right in a receiving state, the sending state's responsibility under the sovereignty clause is engaged,[125] the Court ruled that that eventuality only arises where the sending state 'cannot but be unaware that systematic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face *a real risk of being subjected to inhuman or degrading treatment* within the meaning of Article 4 of the Charter.'[126]

As regards FCA, Article 26 APD infers that the country is safe from the simple fact that the applicant was recognized as a refugee there or 'otherwise enjoys sufficient protection in that country, including benefiting from the principle of *non-refoulement*.' Article 26 is silent on whether or how an applicant can rebut the presumption of safety.

These safe country concepts appear to be fundamentally at odds with the obligation to give 'due weight' to the views of the child in Article 12 CRC and, in particular, the need for a shared and flexible burden of proof. However, the judgment of the ECtHR in *M.S.S. v Belgium and Greece* is cause for some hope in this regard.[127]

Preceding the *N.S.* judgment of the CJEU (and perhaps inadvertently setting the parameters for that judgment), the ECtHR in *M.S.S.* found, *inter alia*, that Belgium was in violation of Article 3 ECHR for sending the applicant, under the DR, back to Greece and thereby exposing him to harms arising from the deficiencies in the Greek asylum procedure amounting to a real risk of chain *refoulement*. The Court held that at the time of the applicant's expulsion Belgium knew or ought to have known about the crisis in Greece's asylum system and should have exercised its right under the so-called 'sovereignty clause' to take responsibility for the asylum claim. The Court also pronounced on the issue of the burden of proof, holding that 'the applicant should not be expected to bear the entire burden of proof' in establishing the risk of *refoulement* in a STC where such a risk is well known to the authorities.[128] The Court stated:

> The Government argued that the applicant had not sufficiently individualized before the Belgian authorities the risk of having no access to the asylum procedure and being sent back by the Greek authorities. The Court considers, however, *that it was*

125 Opinion of Advocate General Trstenjak delivered on 22 September 2011, *N.S. v Secretary of State for the Home Department*, Case C-411/10. See, in particular, para. 127.
126 *Ibid*, para. 94 (emphasis added).
127 ECtHR, *M.S.S. v Belgium and Greece,* Appl. no. 30696/09, Judgment of 21 January 2011.
128 *Ibid*, para. 352.

> *in fact up to the Belgian authorities*, faced with the situation described above, *not merely to assume* that the applicant would be treated in conformity with the Convention standards but, on the contrary, *to first verify* how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3 [emphasis added].[129]

Thus the Court decisively shifted the burden of proof back onto the state. The principle established in *M.S.S.* – that the presumption of safety and the placing of the burden on the applicant to rebut the presumption are only tenable in the absence of known counter-indications – is equally applicable to all safe country concepts. Nevertheless, the scope of the judgment is restricted to cases where the supposed 'safe country' is clearly not safe on any objective evaluation. The fact remains that in many cases a 'safe country' will be, if not entirely safe, then not manifestly unsafe either. In such cases, the problem of the presumption of safety and the placing of the burden solely on the applicant persists.

In sum, despite the concept of a shared and flexible burden of proof in the QD, the APD contains a number of provisions that appear to place the burden of proof solely on the applicant. Minors are not exempt from these provisions. This is problematic in light of the obligation in Article 12 CRC to give 'due regard' to the views of the child, which may require the state to assume a greater than usual share of the burden of proof.

Automatic negative credibility inferences

An issue related to the burden of proof is the use of automatic negative credibility inferences which establish a presumption that the application is manifestly unfounded and justify the processing of the application in an accelerated procedure. Article 23(3) APD permits Member States to 'prioritise or accelerate' any asylum claim, while Article 23(4) specifies 16 different grounds on which Member States may fast-track applications, all of which may also constitute the basis for a manifestly unfounded determination under Article 28(2). Ostensibly, a claim can only be deemed manifestly unfounded, *per* Article 28(1) 'if the determining authority has established that the applicant does not qualify for refugee status pursuant to [the QD].' In reality, however, the grounds taint the credibility of the applicant and/or the substance of the claim, making a negative decision a formality. This is confirmed in the Commission evaluation of the APD which found that 11 Member States automatically reject an applicant as manifestly unfounded if the determining authority establishes a circumstance falling under Article 23(4) APD.[130] A recent judgment of the ECtHR casts doubt on the compatibility of such practices,

129 *Ibid*, para 359.

130 Commission evaluation of the APD, *supra* n. 68, § 5.2.1, p. 10.

at least in the context of Article 3 ECHR claims, with the right to an effective remedy in Article 13 ECHR.[131]

While many of the 16 grounds in Article 23(4) APD can be criticized for being irrelevant to the core of the claim and consequently to the credibility of the applicant on the main issue, the following ground (g) is particularly problematic for children: the making of 'inconsistent, contradictory, improbable or insufficient representations which make [the applicant's] claim clearly unconvincing in relation to his/her having been the object of persecution referred to in [the QD].' Apart from the general objection that this ground seems to be backward-, as opposed to forward-looking, there is the specific objection that this ground is apt to be applied to children, particularly younger, immature or less articulate children.[132]

The benefit of the doubt

Since many provisions of the APD are problematic from the point of view of the obligation to give 'due weight' to the views of the child, the question arises as to whether, as a counter-measure, a liberal application of the benefit of the doubt is possible. Here, the obstacle lies in the QD. Although the term 'benefit of the doubt' is not used in the QD, Article 4(5) does speak to the issue. It states:

> Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:
> (a) the applicant has made a genuine effort to substantiate his application;
> (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
> (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
> (d) the applicant has applied for international protection at the earliest possible time unless the applicant can demonstrate good reason for not having done so; and
> (e) the general credibility of the applicant has been established.

On the one hand, the existence of a provision relating implicitly to the benefit of the doubt is to be welcomed. One the other, the grounds are both individually demanding and cumulative. Furthermore, sub-paragraphs (c) and (e)

131 ECtHR, *I.M. v France*, Appl. No. 9152/09, Judgment of 2 February 2012.

132 It is likely that this ground requires too much of adults too. See Hilary Evans Cameron, 'Refugee Status Determination and the Limits of Memory', *International Journal of Refugee Law* 22, no. 4 (2010): 469-511.

are highly problematic in the case of children, based as they are on linear, adult-based constructions of credibility. In short, Article 4(5) QD is likely to be of little benefit to child applicants.

In summary, the consistency of the APD with the obligation to evaluate the child's views in Article 12(1) CRC is highly doubtful. Although the directive permits and nearly all Member States conduct age assessments of unaccompanied minors, these are used to assess credibility and to detect 'abuse' but not to evaluate the weight to be given to the child's views. The directive does not establish that due weight be given to the views of the child in accordance with age and maturity. On the contrary, several provisions, for example, relating to the burden of proof in the context of the safe country concepts, the sanctioning of automatic credibility inferences and the principle of the benefit of the doubt appear to undermine the testimony of the child.

4.4 Phase Two CEAS: prospects for enhanced compliance

The proposed recast APD simplifies to a limited extent the plethora of confusing procedures that currently exist. Of greatest importance, there are no longer any 'specific procedures' in respect of which Member States can opt to derogate from the basic principles and guarantees of the directive.[133] The procedure for preliminary examination of subsequent applications subsists in a modified form and a new border procedure is put in place, but these are no longer categorized as 'specific procedures'.[134] Furthermore, the possibilities for establishing an authority in lieu of the usual determining authority – which is an indirect way of permitting derogations from the standards established in the directive for the determining authority – are somewhat reduced.[135] The accelerated/manifestly unfounded procedure subsists, albeit with fewer grounds, as does the admissibility procedure.[136] Separate guarantees are maintained in respect of procedures for withdrawing international protection and appeals procedures.[137] Hence, it is fair to say that the proposed recast falls short of the kind of radical revision that would make the APD transparent and easily comprehensible. Against this backdrop, the question arises as to

133 Existing Article 24 is deleted in its entirety.

134 Articles 40-42 and Article 43, respectively.

135 Article 4 (Responsible authorities) establishes that an authority other than the determining authority may be established in respect of Dublin Regulation cases and border procedures. Article 14 (Personal interview) provides that '[i]nterviews on the substance of the application for international protection shall be conducted by the personnel of the determining authority.' *A contrario*, interviews not on the substance of the application can be conducted by personnel of another authority. Article 14 further establishes that personnel of another authority may exceptionally conduct personal interviews where the determining authority is over-burdened by the number of applicants.

136 Article 31(5) and Articles 33-34, respectively.

137 Articles 44-45 and Article 46, respectively.

whether the right of the child to be heard is any better served in the proposed recast than it is at present.

4.4.1 The right to a hearing

Under the current directive, whether or not a minor has a right to a personal interview is left to the discretion of Member States. Even where such a right is established in domestic law, the APD provides for an 'extensive catalogue of situations' in which the personal interview can be omitted, which apply equally to adults and children alike. Three bases for omitting a personal interview seem likely to be applied or are particularly detrimental to children: where an applicant is deemed unfit or unable to be interviewed; on certain manifestly unfounded/acceleration grounds; and on (at least) some grounds of inadmissibility. Furthermore, the APD envisages that refugee status may be withdrawn without a personal hearing and fails to clearly establish a right to an appeal hearing. Consequently, the APD is highly ambivalent on the right of the child to a hearing. Is the situation improved in the proposed recast APD?

The most important thing to note is that the provision which gives discretion to Member States as to whether to give the opportunity of a personal interview to a minor (currently Article 12(1)) is unchanged in the proposed recast (Article 14(1)). However, the 'extensive catalogue of situations' in which Member States can opt to omit the personal interview is significantly reduced. In terms of the three areas mentioned in the analysis, the situation is substantially improved.

Firstly, while Article 14(2) of the proposed recast establishes that a personal interview can be omitted where the applicant is unfit or unable to be interviewed, this provision is tightened up in several respects. It is now only the determining authority which can decide that the applicant is unfit or unable to be interviewed. Furthermore, when in doubt, the determining authority must consult a medical expert to establish whether the condition that makes the applicant unfit or unable to be interviewed is temporary or permanent. Finally, owing to various other innovations in the proposed recast which effectively facilitate the claims of minors, analyzed below, the risk of systematically applying this ground to minors is significantly reduced.

Secondly, the provision allowing the personal interview to be omitted in the context of an accelerated/manifestly unfounded procedure is deleted. Furthermore, unaccompanied minors are exempted from such a procedure.[138]

Thirdly, section II of the proposed recast refines the admissibility procedure, adding a new article specifying that 'Member States shall conduct a personal interview on the admissibility of the application'.[139] An exception to this

138 Article 25(6).
139 Article 34(1).

requirement is crafted in respect of the preliminary examination of subsequent applications (which is now explicitly linked to the admissibility procedure).[140] As outlined in Chapter 3, an application by an unmarried minor who lodges an application after an application has already been made on his/her behalf by a parent may be dealt with under this procedure for subsequent applications.[141] However, in such cases, the exception to the personal interview does not apply. In other words, accompanied minors in this situation (as opposed to accompanied minors who lodge an independent application and subsequently lodge another one) must be afforded a personal interview. Furthermore, unaccompanied minors are exempt from the admissibility procedure on the ground of safe third country, although not on the other grounds of inadmissibility.[142]

No change is envisaged to the procedure for withdrawing refugee status and hence no right to a personal interview in such circumstances is envisaged.

Finally, as regards a possible appeal hearing, although this issue is not squarely addressed in the proposed recast certain provisions imply an appeal hearing.[143] Thus Article 46, reiterating the right to an effective remedy, provides in paragraph 3 for a full examination of both facts and law including an *ex nunc* examination of the claim, at least on appeal. This suggest a full (re) hearing of the claim. This suggestion is bolstered by the use of the term 'hearing' in the revised article on free legal assistance and representation which provides that:

> Member States shall ensure that free legal assistance and representation is granted on request in appeals procedures provided for in Chapter V. This shall include, at least, the preparation of the required procedural documents and *participation in the hearing* before the court or tribunal of first instance on behalf of the applicant.'[144]

This provision seems to take for granted the fact of an appeal hearing. Furthermore, the apparent discretion afforded to Member States in the APD on the question of suspensive effect – a significant practical obstacle to participation

140 Article 42(2)(b).
141 Article 40(6)(b).
142 Article 25(6).
143 One significant change to the material scope of the right to an effective remedy should be noted. Whereas under the APD, there is a right to appeal against a negative European Safe Third Country decision, this provision is deleted in the proposed recast. If there is no right to appeal against such a decision, it follows that there is no right to an appeal hearing. The deletion is problematic because, although the European STC concept is not operative at the moment, the power of the Council to designate European safe third countries having been successfully challenged by the European Parliament in Case C-133/06, Judgment of 6 May 2008, the proposed recast makes it workable again by allowing national, as opposed to Council, designation of European safe third countries.
144 Article 20(1).

in any appeal hearing – is addressed in the proposed recast. In line with the jurisprudence of the ECtHR, Article 46(5) establishes a norm of automatic suspensive effect. However, an exception to automatic suspensive effect is crafted in Article 46(6) in respect of accelerated procedures and admissibility procedures. Even in such cases, however, a court or tribunal must have jurisdiction to rule on a right to remain pending the outcome of the appeal, either on the request of the applicant or on its own motion and the Member State must allow the applicant to remain pending the outcome of that ruling. While *accompanied* minors remain fully susceptible to accelerated and admissibility procedures, unaccompanied minors are exempt from the former and from one of the grounds of inadmissibility (safe third country).[145]

The final issue to address in this subsection is whether the proposed recast APD is better than its predecessor in establishing that the interview, at least for minors, is a right and not an obligation. Unfortunately, the relevant provisions of the proposed recast are mostly unchanged in this regard.[146] Article 25 (Guarantees for unaccompanied minors), for example, still provides that Member States may compel the minor to be present at interview.

In sum then, although the right of a minor to a hearing is no more clearly established in the proposed recast than it is in the APD, if the minor is entitled to a hearing pursuant to domestic law, then the possibilities for further curtailing that right are significantly reduced in the proposed recast, particularly as regards unaccompanied minors. Of course, a clear articulation of the right of the child to be heard would be preferable. Finally, the proposed recast appears to permit Member States to compel a minor to be interviewed, contrary to Article 12 CRC.

4.4.2 The conduct of the hearing

4.4.2.1 The right to a representative

The APD establishes the right of an unaccompanied minor to a representative in Article 17. However, the definition and role of the representative is vague, leading to considerable divergence in State practice. Moreover, the obligation

145 Article 25(6). Furthermore, a new article on applicants in need of special procedure guarantees establishes that where it is considered that an applicant has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, the accelerated procedure is not applicable (Article 24(2)).

146 There are two exceptions. First, Article 23(4)(g) APD, which establishes that making 'insufficient representations' is a manifestly unfounded ground, is amended: proposed recast Article 31(6)(e) no longer refers to 'insufficient representations'. Second, Article 33 APD on failure to appear is deleted. All the other provisions establishing or implying negative procedural consequences for failing to appear at or engage with the interview subsist in the proposed recast.

to appoint a representative can be derogated from on three grounds and a stand-still clause permits Member States to retain a further derogation existing in national law at the time of the adoption of the directive. To what extent is this situation improved in the proposed recast?

The definition of 'representative' undergoes substantial change in the proposed recast. Article 2(n) defines the representative as:

> A person or organization appointed by the competent bodies to act as a legal guardian in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the child's best interests and exercising legal capacity for the minor where necessary. Where an organization acts as a representative, it shall appoint a person responsible for carrying out the duties of the legal guardian in respect of the minor, in accordance with this Directive.

This definition is superior to the existing definition in Article 2(i) in establishing that the representative is the legal guardian of the child, in specifying that the role of the representative is to assist *and* represent the child in the procedure, in establishing that the representative is the guardian of the child's best interests and in providing that, even where an organization acts as representative, it must appoint an individual to act as legal guardian. Furthermore, Article 25 (Guarantees for unaccompanied minors) is more elaborate on the qualities of the representative than existing Article 17. It reiterates the enabling role of the representative in the procedure and specifies that the representative 'shall have the necessary expertise in the field of childcare and shall perform his/her duties in accordance with the principle of the best interests of the child.' However, critically, a requirement of impartiality which was included in the 2009 proposed recast was omitted from the 2011 amended recast.[147] The significance of this, when Article 25 is read in the light of Article 2(n), is that the competent authority which appoints a representative could be the determining authority itself.

A further disappointing innovation in the proposed recast is that the representative's role at interview may be acquitted by 'a legal guardian or other counsellor admitted as such under national law'. This unfortunate conflation of the separate roles of the representative (*qua* guardian or adviser) and the legal adviser has already been commented upon in the context of the grounds for derogating from the obligation to appoint a representative in the current APD. On a more positive note, however, the other grounds for derogating from the obligation to appoint a representative are reduced to one

147 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast), COM (2009) 554 final, Article 21(1)(a).

namely, where the minor is likely to 'age out' before a first instance decision is taken.

Finally, it should be noted that the obligation to appoint a representative is limited to unaccompanied minors in the proposed recast, just as it is currently. Consequently the accompanied minor has no right to an independent representative.

4.4.2.2 The adaptation of the hearing

In the article on guarantees for unaccompanied minors, the APD establishes that the personal interview of an unaccompanied minor and decision on his/her application must be conducted by a person 'with the necessary knowledge of the special needs of minors'. Accompanied minors, by contrast, benefit only from the general guarantees established in respect of staff competence, the examination of applications and the personal interview, which are rather vague, open to derogation and have lead to uneven practice.

In the proposed recast, the above-mentioned guarantee for unaccompanied minors subsists unchanged, but higher and in some cases child-specific standards are established in relation to staff competence and training, the examination of applications and the personal interview. These are significant from the point of view of adapting the hearing for *all* minors who get a hearing. However, a number of explicit and implicit derogations are established or retained in respect of these standards. For clarity, the new standards will be set out first, before addressing the various derogations.

Article 4 of the proposed recast (Responsible authorities) contains two significant additions. Firstly, a new requirement is laid down that the determining authority 'is provided with appropriate means, including competent personnel, to carry out its tasks in accordance with this Directive.'[148] Secondly, for the first time the issue of staff training is explicitly addressed. Paragraph 3 provides:

> Member States shall ensure that the personnel of the determining authority are properly trained. To that end, Member States shall provide for initial and, where relevant, follow-up training which shall include the elements listed in Article 6(4)(a)-(e) of [the EASO Regulation]. Member States shall also take into account the training established and developed by the European Asylum Support Office.

Of particular note for our purposes, Article 6(4)(b) of the EASO Regulation provides for training on issues related to the handling of asylum applications from minors and vulnerable persons with specific needs, while sub-paragraph

148 Para 1.

(c) provides for training on interview techniques.[149] While it is unfortunate that follow-up training is required only 'where relevant' – especially in view of the fast pace of developments in the area of the right to an effective remedy in general and the right of the child to be heard in particular – it is submitted that this provision will have a significant impact on the right of the child to an appropriately adapted hearing.

Article 10 (Requirements for the examination of applications) reiterates in paragraph 3 the requirement in current Article 8 that decisions by the determining authority on applications be taken after an appropriate examination. However, a new paragraph is added on the steps that have to be taken in this regard. Sub-paragraph (d) obliges Member States to ensure that 'the personnel examining applications and taking decision are instructed and have the possibility to seek advice, whenever necessary, from experts on particular issues such as […] child-related […] issues.' Article 14 (Personal interview) specifies, where existing Article 12 is silent, that interviews on the substance of the application for international protection shall be conducted by the determining authority.[150] This means that the Article 4 competence and training standards are fully applicable to staff conducting such personal interviews. Article 15 (Requirements for a personal interview) contains some apparently minor but actually significant amendments to the obligation in existing Article 13 that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application. Notably, the word 'sufficiently' is deleted, with the result that the requirement of competence is not qualified in any way; and the disjunction 'or' is replaced by the conjunction 'and' with the result that both personal and general circumstances must be taken into account.[151] Furthermore, a new sub-paragraph is added whereby Member States are obliged to 'ensure that interviews with minors are conducted in a child-appropriate manner.'[152] Finally, a new article (Content of a personal interview) is added in Article 16, which provides:

> When conducting a personal interview on the substance of an application for international protection, the determining authority shall ensure that the applicant is given an adequate opportunity to present elements needed to substantiate the application in accordance with Article 4 of the [QD] as completely as possible. This shall include the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in his/her statements.

As this provision applies equally to minors, it provides an important counterbalance to 'soft' requirements of a child-friendly hearing, and hence is a

149 Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.
150 Para 1.
151 Para 3(a).
152 Para 3(e).

significant addition. In sum, while these amendments fall short of a direction to Member States to establish guidelines on child-friendly interviewing, the mix of improved general standards and additional child-specific standards makes for a better likelihood of a child-friendly hearing.

It is unfortunate, then, that many of these provisions can be derogated from in various circumstances. Firstly, Article 4 (Responsible authority), permits Member States to establish an alternative authority for DR cases and, significantly, for 'granting or refusing permission to enter' in the framework of the border procedure established in Article 43 'subject to the conditions as set out therein and on the basis of the opinion of the determining authority'.[153] Article 43, in turn, provides for an admissibility procedure for applications made at the border or in transit zones and an accelerated/manifestly unfounded procedure. It can be observed that the status of the 'opinion' of the determining authority in unclear. Specifically, it is unclear whether the alternative border authority must base the entry decision on the opinion of the determining authority or simply take note of it. In any event, the alternative authority is not subject to the training requirements of Article 4(3), but rather to the lesser requirements of Article 4(4) which provides that that personnel 'have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing this Directive'. Moreover Articles 10 and 16, outlined above, do not apply since they explicitly relate to the determining authority. While unaccompanied minors are exempt from border procedures by virtue of Article 25(6), accompanied minors remain fully susceptible to them.

Secondly, Article 14 (Personal interview) specifies that interviews on the substance of the application for international protection must be conducted by the personnel of the determining authority.[154] *A contrario*, interviews that are not on the substance of the application need not be conducted by the personnel of the determining authority. This raises the question: what is (and is not) the substance of the application? Recitals 34-36 of the proposed recast APD shed some light on this question. Recital 34 provides that all applications should be examined on the substance 'except where the present Directive provides otherwise, in particular where it can be reasonably assumed that another country would do the examination or provide sufficient protection.' Recital 34 goes on to list the concept of first country of asylum as such an instance. Recital 35 provides that Member States are not obliged to assess the substance of an application where the applicant comes from a safe third country. Recital 36 reiterates this position viz. a viz. European safe third countries – a currently defunct concept that is set to be reintroduced in the proposed recast (of which more below). Accordingly, as regards FCA, STC and European STC, interviews need not be conducted by the personnel of the

153 Para 2(b).
154 Para. 1.

determining authority. It follows that whatever standards are established in respect of the determining authority – notably in Article 4, 10 and 16, outlined above, will not apply. No alternative standards are specified, although the obligation to ensure that interviews with minors are conducted in a child-appropriate manner as set out in Article 15 is still applicable as this obligation is not expressly linked to the determining authority. Unaccompanied minors are exempt from the STC concept under Article 25(6) but are fully susceptible to the FCA and European STC concepts. Accompanied minors are susceptible to all safe country concepts.

Thirdly, Article 14 adds a new sub-paragraph to the provision on the personal interview, which provides:

> Where a large number of third country nationals or stateless persons simultaneously request international protection, which makes it impossible in practice for the determining authority to conduct timely interviews on the substance of an application, Member States may provide the personnel of another authority be temporarily involved in conducting such interviews. In such cases, the personnel of that authority shall receive in advance the necessary training which shall include the elements listed in Article 6(4)(a) to (e) of [the EASO Regulation] […].[155]

No exception is made for minors or other persons in need of special procedural guarantees. It is hard to see how another authority brought in at short notice to conduct personal interviews could possibly be competent to interview minors, notwithstanding the provision of training. In this regard, it is doubly unfortunate that Article 10 outlined above on instruction and advice on child-related matters is stated to apply to the determining authority and not, therefore, to any alternative authority.

No changes on question of the conduct of the hearing are made to the procedure for withdrawing refugee status or the appeals procedure. Hence, these procedures remain impervious to any child-specific modifications.

In short, the proposed recast APD contains substantial improvements with regard to the adaptation of the hearing for *all* minors at first instance. However, these improvements are diminished because Member States are permitted to derogate from the new standards in various circumstances. While unaccompanied minors are exempted from some (though not all) of the derogations, accompanied minors are not. No improvements are made to the procedure for the withdrawal of refugee status or the appeals procedure. Therefore, the proposed recast APD can best be characterized as a modified improvement on its predecessor in terms of adapting the hearing for minors.

155 Para 1, 2nd sub-para.

4.4.3 The evaluation of the child's views

4.4.3.1 Assessment of age and maturity

It was seen that Article 17(5) APD on medical examinations for age assessment is problematic as a method of evaluating the age and maturity of the child. Are any improvements envisaged in the proposed recast?

Article 25(5) replicates the provisions of Article 17(5) APD but add two new elements. First, the use of medical examinations to determine the age of unaccompanied minors is no longer presented as an automatic part of the procedure, but one to be resorted to 'where, following general statements or other relevant evidence, Member States still have doubts concerning the applicant's age.' This suggests that other (i.e. non medical) methods of age assessment should be deployed first. Moreover, it is stated that '[i]f those doubts persist after the medical examination, Member States shall assume that the applicant is a minor.' This provision is potentially far-reaching in view of the fact that medical assessments are notoriously unreliable in borderline cases. Hence, only in clear-cut cases of majority are medical assessments likely to produce definitive results. In such cases it is quite appropriate that the benefit of the doubt should be withheld. Second, Article 25(5) stipulates that '[a]ny medical examination shall be performed in full respect of the individual's dignity, selecting the less invasive examinations.' This is an important safeguard. However, the proposed recast gives no hint that age assessment can be used positively as a tool in ascertaining the weight to be given to the views of the child.

4.4.3.2 The 'due weight' requirement

The 'due weight' requirement in Article 12(1) CRC impacts on the burden of proof in asylum claims, requiring a shared and flexible burden of proof. It is inconsistent with the use of automatic negative credibility inferences and mandates a liberal application of the principle of the benefit of the doubt. The APD was found to undermine the shared and flexible burden of proof established in the QD in certain contexts, such as the safe country concepts. The APD was also found to sanction the use of automatic negative credibility inferences. Finally, the provision of the QD relating to the principle of the benefit of the doubt was found to be of little use to children. To what extent do the proposed recasts of the QD and APD improve this situation?

Burden of proof

On the question of the burden of proof, the first thing to note is that although Articles 4(1)-(3)QD implicitly relating to the burden of proof are unchanged in the recast of that directive, the proposed recast APD contains a new provision that appears to impact on Article 4(1) QD. Article 13 of the proposed recast

APD on obligations of the applicants for international protection provides in paragraph 1 that 'Member States shall impose upon applicants for international protection the obligation to cooperate with the competent authorities with a view to establishing their identity and other elements referred to in Article 4(2) of the [QD].' This appears to change the discretionary duty of assertion in the first sentence of Article 4(1) QD ('Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection') into a mandatory duty. It can be observed that some children at least will be unable to discharge this obligation. Nevertheless, it is submitted that this new provision does not change the dynamic between the duty of assertion and the duty of assessment, nor, consequently, the overall burden of proof.

The second thing to note is that the burden of proof situation in relation to the safe country concepts is largely unchanged. Thus, as regards the safe country of origin and safe third country concepts, the burden of rebutting the presumption of safety continues to be placed on the applicant in Article 36(1) and 38(2)(c), respectively, although the latter no longer permits Member States to confine the rebuttal to the case of torture, cruel, inhuman or degrading treatment or punishment. Hence the applicant can rebut the presumption of safety on any grounds. Nonetheless, these provisions are contrary to the requirement of a shared and flexible burden of proof in the case of child applicants. Significantly, however, Article 25 of the proposed recast (Guarantees for unaccompanied minors) provides in paragraph 6 that the safe third country concept no longer applies to unaccompanied minors. It further provides that unaccompanied minors are exempt from the operation of the accelerated/manifestly unfounded procedure (and hence the concept of safe country of origin). These exemptions do not extend to accompanied minors, however.

As regards first country of asylum, Article 35 of the proposed recast adds a new stipulation that '[t]he applicant shall be allowed to challenge the application of the first country of asylum concept in his/her particular circumstances.' While this is an improvement on the silence of the current provision with its implication that the presumption of safety of the first country of asylum is conclusive, nevertheless, the burden seems to be placed solely on the applicant. There are no exemptions for either accompanied or unaccompanied minors.

Furthermore, in a definite retrograde step from the point of view of the appropriate burden of proof in children's claims, Article 39 of the proposed recast APD reintroduces the concept of the European safe third country. Modeled on existing (but inoperative) Article 36, Article 39 provides in paragraph 1:

> Member States may provide that *no, or no full, examination* of the application for international protection and *of the safety of the applicant in his/her particular circumstances* as described in Chapter II, shall take place in cases where a competent authority has established on the basis of the facts, that the applicant for international

> protection is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.[156]

If the minimum option of no examination of the safety of the applicant in his/her particular circumstances is adopted by Member States, this effectively establishes a conclusive presumption of safety which the applicant is powerless to rebut. However, it seems unlikely that Member States will be free to pursue this minimum option in the light of the judgments of the ECtHR and the CJEU in *MSS v Belgium and Greece* and *N.S.* respectively. But even the higher option – a perfunctory examination of the safety of the applicant – appears to place the burden solely on the applicant. Neither unaccompanied nor accompanied minors are exempt from the European STC concept. And yet unaccompanied minors would appear to be highly susceptible to the European STC concept as they generally enter the EU illegally, being unlikely to meet the formal requirements for legal entry into the EU owing to their age and unaccompanied status.[157]

Negative credibility inferences

On the issue of the use of negative credibility inferences, the situation in the proposed recast APD is somewhat improved. In a positive move, the grounds for an accelerated/ manifestly unfounded procedure are reduced from 16 to 7. Unfortunately, existing ground (g) (i.e. inconsistent, contradictory, improbable or insufficient representations, claim clearly unconvincing…) subsists albeit in an amended form. This contrasts with the situation under the 2009 proposed recast where ground (g) was deleted entirely.[158] Article 31(6)(e) now reads:

> The applicant has made clearly false or obviously improbable representations which contradict sufficiently verified country-of-origin information thus making his/her claim clearly unconvincing in relation to whether he/she qualifies as a refugee or a person eligible for subsidiary protection by virtue of the [QD].

This version is an improvement on the current ground (g) because only improbable representations (as opposed to inconsistent, contradictory or insufficient representations) trigger the ground, and the forward-looking nature of the assessment is reaffirmed. While the link to country of origin information looks at first to be an improvement, whether it actually is in the case of children depends on whether the country of origin information is child-sensitive, as demonstrated in Chapter 3.

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156 Emphasis added.

157 See European Migration Network, 'Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study' (2010), Chapter 5 (Entry procedures including border controls).

158 2009 proposed recast APD, *supra* n. 147, Article 27(6).

Benefit of the doubt

Finally, on the issue of the principle of the benefit of the doubt, it will be recalled that the provision of the QD relating to the principle of the benefit of the doubt is too stringent to mandate a liberal application of the principle in the case of children. Unfortunately, this provision remains unchanged in the recast QD.

In sum, there are some modest improvements in the provisions of the proposed recast APD that impact on giving 'due weight' to the views of the child. However, these improvements are by no means systematic. For example, unaccompanied minors are exempt from two of the three safe country concepts in the APD, while accompanied minors are exempt from none. The rationale for the exemptions, according to the Commission, is 'that unaccompanied minors may be unable, *due to their age*, to articulate and substantiate their request for international protection'.[159] While this coincides exactly with what is being expressed in this chapter, it is not followed through to its logical conclusion, which is that *all* minors should be exempted from *all* such procedures.

4.5 SYNTHESIS OF FINDINGS

This chapter posed the question of whether the right of the child to be heard is met in the CEAS. The normative content of the right of the child to be heard was presented along three lines: the right to a hearing, the right to an appropriately adapted hearing and the right of the child to have his/her views given due weight in accordance with age and maturity. Phase One CEAS, in the form of the APD, was found to comply with none of these elements. Thus, whether or not the child is entitled to an asylum interview is left to Member States and, even if domestic law does allow the child to be interviewed, the directive permits Member States to omit the interview on numerous grounds, some of which are apt to be applied to or are particularly detrimental to children. Decisions relating to withdrawals can be taken without a hearing and the directive is silent on the question of an appeal hearing. Unaccompanied, though not accompanied, minors are entitled to a representative but the representative's role is unclear and the right can be derogated from in various situations. Where an interview occurs, the directive provides that the 'needs' of unaccompanied, though again not accompanied, minors must be taken into account

159 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast) COM (2009) 554 final, ANNEX, 'Detailed Explanation of the Proposal', pp. 11-12 (emphasis added). It is assumed that the detailed explanation of provisions of the 2009 proposal applies to the equivalent provisions of the 2011 proposal to the extent that such provisions remain unchanged. There is no detailed explanation of the 2011 proposal.

– a stipulation that is omitted in the provisions relating to withdrawals and appeals. Finally, as regards giving due regard to the views of the child, not only does the directive not legislate for this, it contains several provisions relating to the burden of proof, safe country concepts and the benefit of the doubt that appear to disregard the views of the child. In short, Phase One CEAS does not comply with the right of the child to be heard.

Some improvements can be discerned in Phase Two. However, the improvements are generally qualified in some way. Thus, the opportunities for Member States to omit the interview are curtailed but the child still has no right to an interview; a general right to an appeal hearing is implied but not explicitly stated; significant improvements are made regarding the representative for the unaccompanied minor but still no provision is made for the possibility that the accompanied minor might need a representative; notable improvements are made with regard to the adaptation of the hearing for all minors but these improvements are detracted from because the proposed recast is peppered with derogation provisions, express and implied and, furthermore, no child-friendly modifications are made to the withdrawals or appeals procedure; some amendments improve the likelihood that 'due weight' will be given to the views of the child but these apply neither to all children nor to all objectionable concepts. In sum, relatively speaking, Phase Two CEAS is better than Phase One in terms of the right of the child to be heard, but considered on its own merits in the light of the normative requirements of the right, it cannot be said to be in compliance.