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## EU asylum procedures and the right to an effective remedy

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## 7 | The asylum applicant's right to be heard on his asylum motives

The asylum applicant should be allowed to remain in the territory of the Member State until his asylum claim has been closely and rigorously assessed, in order to effectively guarantee the prohibition of *refoulement*. At the same time a rigorous assessment of the asylum claim is not possible without the presence of the asylum applicant in the Member State. The statements of the asylum applicant play an essential role in the assessment whether he runs a risk of *refoulement* upon return to his country of origin. This is due to the fact that in many asylum cases there is a lack of documentary evidence supporting the asylum claim. The assessment of the credibility of the applicant's asylum account is often decisive for the outcome of the case.<sup>1</sup> It is therefore crucial that claimants are offered sufficient opportunity to present their case to the determining authorities. For this purpose a personal interview is often indispensable. Furthermore it may be considered necessary that the applicant is able to respond to allegations against him and the evidence underlying the (concept) asylum decision.

In Chapter 9 it will be argued that the judicial review required by Article 39 PD must cover the establishment and qualification of the facts. In this light it is relevant to examine whether EU law also demands that the national courts hear the applicant and/or his legal representative at a public hearing.

This chapter addresses the EU standards with regard to the asylum applicant's right to be personally heard on his asylum motives in first instance and appeal proceedings.

### *The right to a personal interview*

It is generally recognised that asylum applicants should have the right to a personal interview. The Commission stated for example that since the right to a personal interview is a basic procedural safeguard, the very possibility of taking a decision without interviewing an applicant makes procedures vulnerable to error and consequent *refoulement*.<sup>2</sup> Furthermore, given the weight

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<sup>1</sup> See also Chapter 8.

<sup>2</sup> Commission Staff Working Document accompanying the 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, COM(2009) 554, SEC(2009) 1377, of 21 October 2009, p 13. See also Council resolution of 20 June 1995 on minimum guarantees for asylum procedures, OJ 19 September 1996, C 274, para 14, which provides

of the applicant's statements, it is considered of utmost importance that this interview is conducted in a profound, patient and objective manner<sup>3</sup> and in a language which the applicant understands.<sup>4</sup> In 2009 the Commission pointed at the fact that due to the circumstances of the interview in some cases information collected in a personal interview is clearly insufficient to correctly apply the provisions of the Qualification Directive.<sup>5</sup> Finally the asylum applicant's statements should be carefully recorded in a report as it is on the basis of this report that the asylum decision is taken.<sup>6</sup>

The Procedures Directive allows for a number of exceptions to the right to a personal interview. It is to a large extent silent on the required conditions of the personal interview. The Court of Justice has not addressed the right to a personal interview or the right to be heard during asylum proceedings yet. This chapter contends mainly on the basis of the ECtHR's case-law and non-binding sources of inspiration that the EU right to be heard and the full effectiveness of the principle of *non-refoulement* set additional standards to those laid down in the Procedures Directive. In section 7.1. it is argued on the basis of these principles that a personal interview may only be omitted in exceptional circumstances. Section 7.2. discusses the requirements as to the way the interview is conducted.

#### *The right to be heard following the personal interview*

The Procedures Directive does not require Member States to offer the asylum applicant the opportunity to comment on the contents of the report of the interview and to respond to the determining authority's conclusions as to the fact-finding and the assessment of the risk of *refoulement*. Section 7.3. addresses the applicant's right to be heard following the personal interview. It examines in particular whether the applicant has the right to comment on the report

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that, before a final decision is taken on the asylum application, the asylum-seeker must be given the opportunity of a personal interview with an official qualified under national law.

- 3 See Doornbos 2005, p 104. See also Commission Staff Working Document COM(2009) 554, SEC(2009) 1377, p 13, where it is stated that the awareness of the applicant about the purpose of the interview, the preparedness of the personnel, and the content of and conditions in which the interview takes place may be decisive for the outcomes of the examination.
- 4 See for example UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice*, March 2010, s 4, p 9.
- 5 It stated that the length of interviews varies significantly between Member States (from 0,5 hour to 3 hours) and that in the UK, a quality control audit found that in about 13 % of 1,085 cases sampled applicants were refused asylum based on decisions and/or interviews that were rated as poor or not fully effective. Furthermore legal advisors indicated that factual mistakes or misunderstandings are common in the reports of interviews having direct impacts on the outcomes of the examination. Commission Staff Working Document, COM(2009) 554, SEC(2009) 1377, p 13.
- 6 See also UNHCR, *Improving Asylum Procedures*, s 6, p 1.

of the interview and on the conclusions of the determining authority concerning the merits of the asylum claim.

*The right to be heard by the national court*

Does EU law require that the asylum applicant and/or his legal representative be heard by the court during a public hearing, or may the appeal against the asylum decision in the meaning of Article 39 PD also be decided on the basis of written documents only? As case-law of the EU Courts on this issue is (almost) non-existent, this question will be addressed in this chapter mainly on the basis of the ECtHR's case-law regarding Article 6 ECHR, which incorporates the right to an oral hearing before a court. It is contended that an oral hearing of the asylum applicant before the court can only be omitted in exceptional circumstances, given the fact that the credibility of the asylum applicant's account and the applicant's personal fear for persecution or serious harm are generally crucial for the asylum decision and the fundamental rights at stake for the applicant.

## 7.1 THE RIGHT TO A PERSONAL INTERVIEW IN FIRST INSTANCE PROCEEDINGS

The Procedure Directive as a general rule provides for a right to a personal interview in all asylum cases including those assessed in border procedures.<sup>7</sup> However the Directive allows Member States to omit an interview on several grounds in the asylum procedure. The absence of a personal interview in asylum cases may limit the applicant's ability to substantiate his asylum claim.<sup>8</sup> Article 12 (4) PD states that the absence of a personal interview in accordance with Article 12 PD shall not prevent the determining authority from taking a decision on an application for asylum. Some applicants may thus only get the opportunity to submit written information to substantiate their asylum claim.

The first ground for making an exception to the right to a personal interview is that the determining authority is able to take a positive decision on the basis of the evidence available.<sup>9</sup> The absence of an interview in such cases may prove problematic if the asylum status is withdrawn in a later stage. In cases of withdrawal of an asylum status a personal interview is not obligatory. The person concerned may also only be given the opportunity to submit the reasons as to why his/her refugee status should not be withdrawn in a written

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<sup>7</sup> See Art 12 PD in normal asylum cases and Art 35 (3) (d) PD in border procedures.

<sup>8</sup> The fact that Art 12 (5) PD provides that the absence of a personal interview pursuant to Art 12 (2) (b) and (c) and (3) shall not adversely affect the decision of the determining authority, does not prevent that. Costello states that if the apparent discretion afforded by Art 12 of the directive were exploited by decision-makers, it would lead to *refoulement*. Costello 2006, p 24.

<sup>9</sup> Art 12 (2) (a) PD.

statement.<sup>10</sup> It is thus possible that an asylum status is granted and withdrawn, while the asylum applicant has not been given the opportunity to explain his asylum motives in an interview.

Secondly Member States may refrain from conducting a personal interview, if the competent authority has already had a meeting with the applicant for the purpose of assisting him with completing his application and submitting the essential information regarding the application.<sup>11</sup> Thirdly an interview may be omitted if the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application to be unfounded where certain circumstances apply which may also be reason to accelerate the procedure. The applicant:

- only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee;
- is considered to be from a safe country of origin;
- can be returned to a safe third country;
- has made inconsistent, contradictory, improbable or insufficient representations;
- has submitted a subsequent application which does not raise any relevant new elements or;
- is making an application merely in order to delay or frustrate his removal.<sup>12</sup>

According to Article 34 (2)(c) PD the preliminary examination in subsequent asylum applications may be conducted on the sole basis of written submissions without a personal interview.

The fourth ground to omit a personal interview is that the interview 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.<sup>13</sup> In that situation reasonable efforts shall be made to allow the applicant or the dependant to submit further information. Finally the Member States have discretion to omit an interview in the case of dependent adults and minors. The right to an interview of these two groups will be addressed separately in sections 7.1.1 and 7.1.2.

According to information of the Commission of 2009, ten Member States have provided for a possibility to derogate from the right to a personal inter-

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<sup>10</sup> Art 38 (1) (b) PD.

<sup>11</sup> Art 12 (2) (b) PD.

<sup>12</sup> Art 12 (2) (c) jo Art 23(4)(a), (c), (g), (h) and (j) PD.

<sup>13</sup> Art 12 (3) PD states that when in doubt, Member States may require a medical or psychological certificate.

view in asylum cases in their national legislation.<sup>14</sup> Also UNHCR mentions in its report of 2010 concerning the implementation of the Procedures Directive that several of the Member States surveyed allow that a personal interview be omitted in specific cases.<sup>15</sup> Slovenia for example usually omits a personal interview when an asylum application is assessed in the accelerated procedure.<sup>16</sup> In France a personal interview may be omitted amongst others in cases in which the asylum applicant is a national of a country to which Article 1C of the Refugee Convention applies, where the elements underlying the asylum claim are manifestly unfounded or where medical reasons prevent the interview.<sup>17</sup>

The question should be raised whether the absence of a personal interview undermines the effectiveness of the right to asylum or the principle of *non-refoulement*. The Court of Justice has not addressed this issue yet. As the right to a personal interview is the general rule, it may be expected that the Court will interpret the exceptions allowed to the right of a personal interview restrictively and in the light of the principle of effectiveness.<sup>18</sup>

The right to an interview should be considered essential to ensure an appropriate examination of a claim of *refoulement* in the meaning of Article 8 (2) PD and therefore for the effective exercise of the right to asylum or the prohibition of *refoulement* for the following reasons. It will be shown in Chapter 8 that EU law requires that the claim of *refoulement* be assessed on an individual basis and be subjected to rigorous scrutiny. This means that claimants must be able to submit relevant information and to substantiate their claim of *refoulement*. In exceptional cases it may be possible to do so by submitting written statements and evidence only. This may for example be the case where the asylum applicant has submitted only that he fears for serious harm as a result of the general human rights situation in his country of origin. Such a case may be decided on the basis of country of origin information provided by governments, UN bodies or NGO's. However, generally the asylum applicant himself will be the most important source of information, at least with regard to the personal risk of persecution or serious harm. This is particularly the case when this person does not have sufficient evidence supporting his claim. Furthermore, as is recognised in Article 4 (3) QD the individual position and personal circumstances of the applicant, including factors such as background

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14 Commission Staff Working Document, COM(2009) 554, SEC(2009) 1377, p 13. According to the Commission up to 111 650 applicants (40 % of the total asylum applicants' population) might be potentially targeted by this derogation. See also Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC, 8 September 2010, COM (2010) 465 final, p 6.

15 UNHCR mentions Finland, France, Greece, Slovenia and the United Kingdom. UNHCR, *Improving Asylum Procedures*, s 4, pp 33-39

16 UNHCR, *Improving Asylum Procedures*, s 4, p 6 and s 9 p 27.

17 UNHCR, *Improving Asylum Procedures*, s 4, p 37, s 9, p 25.

18 See for example Case C-578/08, *Chakroun* [2010], para 43.

and gender should be taken into account in the assessment 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. This information is best obtained by a personal interview of the person concerned. Moreover an interview is necessary to test the credibility of the applicant's account. As was stated in the explanations with the amended proposal for the Procedures Directive:

Since in most if not all asylum cases the determining authorities must assess the credibility of statements and/or of the applicant on the basis of all available facts, it is imperative for a proper assessment that applicants have, as much as possible, the opportunity to bring these forward in a personal manner, i.e. in an interview.<sup>19</sup>

Finally a personal interview may be necessary to allow the applicant to exercise his EU right to be heard. The applicant may for example clarify any alleged discrepancies, inconsistencies or omissions in an initial written or oral account,<sup>20</sup> give his view on evidence relied on by the determining authorities or rebut the presumption of safety of his country of origin or a third country.<sup>21</sup>

A meeting as mentioned in Article 12 (2) (b) PD should not be considered an appropriate alternative for a personal interview. This meeting serves to assist the applicant with completing his application and to submit the essential information regarding the application mentioned in Article 4 (2) QD. Battjes noted that this meeting does not address the assessment of the applicant's credibility. The interview allows the applicant to present the grounds for their applications in a comprehensive manner and the determining authority to assess the credibility of the asylum account.<sup>22</sup>

*Obligations stemming from the ECHR, the CAT and the Refugee Convention*

The ECtHR has stressed the importance of the personal interview in several asylum cases. The ECtHR attaches much weight to the assessment of the credibility of the applicant's asylum account by an authority who heard the applicant in person. In *R.C. v Sweden* the ECtHR held that as a general principle the national authorities are best placed to assess not just the facts, but, more particularly, the credibility of witnesses 'since it is they who have had an opportunity to see, hear and assess the demeanour of the person concerned'.<sup>23</sup>

19 Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, 18 June 2002, COM (2002) 326 final, pp 7-8.

20 Costello 2006, p 24. See also UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva 1979 (reedited in 1992) (UNHCR Handbook), para 109.

21 Battjes 2006, p 313.

22 See Art 13 (3) PD. See also Battjes 2006, p 313.

23 ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 52.



In *E.G. v the United Kingdom* the Secretary of State had in a subsequent asylum procedure disregarded the fact that the Adjudicator had accepted in the first asylum procedure that the applicant had been detained and ill-treated in the past. The ECtHR considered: 'It is unfortunate, in the Court's view, that the Secretary of State did not consider the findings of the Adjudicator who had had the opportunity to see the applicant give evidence in person.' As a result the Secretary of State did not take into account an important risk factor in this case.<sup>24</sup> In cases in which the national authorities failed to assess the asylum claim of the applicant and thus to conduct a personal interview, the ECtHR relied heavily on the opinion of UNHCR. It stressed that UNHCR interviewed the person concerned and thus had the opportunity to test the credibility of his fears and the veracity of his account of the circumstances in her home country.<sup>25</sup>

When assessing the quality of the national decision-making process the Court takes into account that the applicant was interviewed by the national authorities or was granted 'ample opportunity to state his case and to submit whatever he found relevant for the outcome'.<sup>26</sup> On the other hand in *Charahili v Turkey* the Court referred to the fact that the Turkish Government failed to submit any document to the Court demonstrating that the applicant had been interviewed in relation to his asylum request.<sup>27</sup> In *I.M. v France* the ECtHR took into account when assessing the quality of the French accelerated procedure that the personal interview with the applicant only lasted half an hour. The ECtHR noted in this context that it concerned a first asylum application.<sup>28</sup>

The significance of the personal interview is also recognised in several non-binding views of human rights bodies. In its Concluding Observations on France of 2006, the Committee against Torture recommended for example

that the situations covered by article 3 of the Convention should be the subject of a more thorough risk assessment in accordance with the provisions of article 3,

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24 ECtHR 31 May 2011, *E.G. v the United Kingdom*, no 41178/08, para 72.

25 See for example ECtHR 15 June 2010, *M.B. and others v Turkey*, no 36009/08, para 33, ECtHR 15 June 2010, *Ahmadpour v Turkey*, no 12717/08, para 39, ECtHR 13 April 2010, *Charahili v Turkey*, no 46605/07, para 59, ECtHR 19 January 2010, *Z.N.S. v Turkey*, no 21896/08, para 48, ECtHR 22 September 2009, *Abdolkhani and Karimnia v Turkey*, no 30471/08, para 82.

26 See for example ECHR (Adm) 16 March 2004, *Nasimi v Sweden*, no 38865/02, ECtHR (Adm) 24 June 2004, *Kandomabadi v the Netherlands*, no 6276/03, ECtHR (Adm) 1 October 2002, *Tekdemir v the Netherlands*, nos 46860/99 and 49823/99.

27 ECtHR 13 April 2010, *Charahili v Turkey*, no 46605/07, para 57, See also ECtHR 15 June 2010, *Ahmadpour v Turkey*, no 12717/08, para 38, where the Court considered that 'there is nothing in the case file which shows that the applicant was actually interviewed and that the national authorities indeed examined her request, taking into account the requirements of Article 3 of the Convention'.

28 ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 155.

including by systematically holding individual interviews to better assess the personal risk to the applicant, and by providing free interpretation services.<sup>29</sup>

Both the Committee of Ministers and the Parliamentary Assembly of the Council of Europe have recommended the governments of the Member States of the Council of Europe to ensure the right of all asylum applicants to a personal interview when accelerated procedures are applied.<sup>30</sup> Finally UNHCR EXCOM conclusion No 30 requires a complete personal interview by a fully qualified official in cases deemed manifestly unfounded or abusive.<sup>31</sup> UNHCR states in its Handbook that basic information, frequently given, in the first instance, by completing a standard questionnaire, will normally not be sufficient to enable the examiner to reach a decision, and that one or more personal interviews will be required.<sup>32</sup>

*Subconclusion: the right to a personal interview*

Article 12 PD read in the light of the principle of effectiveness as well as the right to be heard requires in principle that a personal interview is held in each first asylum procedure. It precludes that whole categories of cases are excluded from a right to a personal interview on the basis of the possibilities for derogation mentioned in this article. The absence of a personal interview is only justified in exceptional cases, where it is established that this absence does not make it impossible for the claimant to substantiate his case and for the examining authorities to take a careful decision. Where the interview is omitted, the examining authorities should ensure that sufficient information is gathered to accurately assess the risk of *refoulement*, in particular when the person concerned is not able to be interviewed because of his mental situation.

### 7.1.1 Dependent adults

If Member States provide that an application may be made by an applicant on behalf of his/her dependants,<sup>33</sup> they may give the opportunity of a per-

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<sup>29</sup> ComAT Concluding Observations on France, 3 April 2006, CAT/C/FRA/CO/3, para 6.

<sup>30</sup> Committee of Ministers of the Council of Europe, Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009, under IV 1.d and Parliamentary Assembly of the Council of Europe Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe member states, para 8.10.2.

<sup>31</sup> EXCOM Conclusion no 30 (XXXIV), 1983, on the problem of manifestly unfounded or abusive applications for refugee status or asylum.

<sup>32</sup> UNHCR Handbook, para 199.

<sup>33</sup> See Art 6 (3) PD. In such cases Member States shall ensure that dependant adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf.

sonal interview to each dependant adult, but are not obliged to do so.<sup>34</sup> Persons (mostly women), on whose behalf an asylum application is made by another person, may have independent asylum motives. If an interview of these persons is omitted, there is a risk that these motives will not come to the fore. The woman may be afraid to talk about her experiences, such as sexual abuse, to her husband or he may not want to mention those experiences to the determining authorities.<sup>35</sup> She may be willing to express her personal fear for persecution or serious harm in a confidential interview with the authorities.

The ECtHR and the UN Committees have not addressed the right to an interview of dependent adults specifically. UNHCR is of the opinion that the determining authority should meet with each dependant adult individually to ensure that they understand the grounds for protection and their procedural rights.<sup>36</sup> In order to ensure that gender-related claims, of women in particular, are properly considered in the refugee status determination process, women asylum-seekers should be interviewed separately, without the presence of male family members, in order to ensure that they have an opportunity to present their case. It should be explained to them that they may have a valid claim in their own right.<sup>37</sup>

It may thus be argued that the determining authorities should investigate whether the dependent adult has an independent claim of *refoulement*. This is best done during a personal meeting with the dependent adult without the presence of family members. Where an independent claim is present, the omission of a personal interview may undermine the effectiveness of the right to asylum or the prohibition of *refoulement*.

#### 7.1.2 Accompanied and unaccompanied minor asylum applicants

Article 12 (1) PD leaves it to the discretion of the Member States to determine in which cases a minor shall be given the opportunity of a personal interview. This applies both to accompanied and unaccompanied minors.<sup>38</sup> Thus, even though in an asylum procedure an unaccompanied minor is often the most

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34 According to the UNHCR report of 2010 there was an opportunity for adult dependants to have a personal interview in 10 of the 12 Member States of focus. UNHCR, *Improving Asylum Procedures*, s 4, p 16.

35 See for an example ComAT 22 January 2007, *V.L. v Switzerland*, no 262/2005.

36 UNHCR, *Improving Asylum Procedures*, s 4, p 15.

37 UNHCR Guidelines of International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para 36.

38 Art 17 PD on unaccompanied minors does not provide whether such a minor should get a personal interview, but does set out minimum standards in the case such an interview is conducted.

important source of information,<sup>39</sup> the Procedures Directive does not provide him with a right to a personal interview.

The Commission reported in 2010 that applications made by parents generally cover dependent minors. It mentions that in three Member States (Greece, the Netherlands and Germany), the right to lodge an application is recognised for minors of a certain age. Furthermore in a number of Member States a guardian or other representative is competent to lodge an application for an unaccompanied minor.<sup>40</sup>

The asylum claim of an accompanied child will often be directly related to the claims of their parents or other accompanying family members. In such a case the parents may well be able to represent the child in the asylum procedure and to present their and their child's asylum motives in their personal interview. This may be different however if the accompanied child has independent asylum motives. It may for example fear for persecution because of its sexual orientation or religious beliefs. Furthermore it may fear child specific forms of persecution such as under-age recruitment, child trafficking, female genital mutilation, family and domestic violence, forced or underage marriage, bonded or hazardous child labour, forced labour, forced prostitution and child pornography.<sup>41</sup> Potentially the child's parents are not aware of such independent asylum motives or are unwilling to mention them to the determining authorities. The child may for example conceal its homosexual feelings, because it fears to be disowned. Or the parents may be involved in practices such as forced marriage, female genital mutilation or forced labour. In such cases a personal interview with the child will be the only way for the determining authorities to be informed about his asylum motives.<sup>42</sup> Furthermore even if the asylum claim of the child is directly related to the claim of his parents, it is possible that a child has important additional information which supports these asylum claims. The child may for example have personally experienced persecution or serious harm in his country or origin as a result of the political activities of his parent(s).

It is argued in this section that Article 12 PD read in the light of Article 24 of the Charter requires that each child which is sufficiently mature be informed

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39 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, Geneva 22 December 2009, para 70.

40 Commission Report COM (2010) 465 final, p 4.

41 See UNHCR EXCOM Conclusion no 107 (LVIII), 2007, para (g) (viii) and 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, Geneva 22 December 2009, para 18.

42 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, Geneva 22 December 2009, para 70, which stated that 'A child's own account of his/her experience is often essential for the identification of his/her individual protection requirements and, in many cases, the child will be the only source of this information'.

on the asylum process and in particular options to present its own asylum claim. This would also be in line with asylum seeker's right to information guaranteed by Article 10 (1) PD. If the child wants to be interviewed personally on his asylum motives he must be given this opportunity.

*Article 12 PD and Article 24 of the Charter*

Article 12 (1) PD should be read in the light of Article 24 (1) and (2) of the Charter and Article 12 CRC.<sup>43</sup> According to Article 24 (1) of the Charter 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. Furthermore Article 24 (2) provides that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. The best interests principle is also mentioned in Article 17 (6) PD concerning the rights of unaccompanied minors.

*The child's right to be heard according to the Court of Justice*

The Court of Justice has made clear in *Aguirre Zarraga* that Article 24 of the Charter requires that a child be able to express its views in legal proceedings. However it must be assessed in each individual case how the right to be heard should be exercised, taking account of the age and maturity of the child as well as its best interests. This case concerned a child which illegally remained with her mother in Germany instead of with her father in Spain. According to EU law the German court was bound by the Spanish court's judgment which awarded the sole custody over the child to the Spanish father and ordered the return of the child to Spain.<sup>44</sup> One of the preliminary questions put before the Court of Justice was whether the German court should enforce the Spanish judgment even though the Spanish court had not heard the child's opinion on the case before rendering its judgment. In this context the Court of Justice considered that it is for the court which has to rule on the return of a child to assess whether an oral hearing of the child is appropriate. The Court noted that the conflicts which lead to child custody cases and the associated tensions

create situations in which the hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them. Accordingly,

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<sup>43</sup> See also UNHCR, *Improving Asylum Procedures*, s 4, pp 19-20.

<sup>44</sup> Art 42 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [2003] OJ L 338/1. This provision also states that the court deciding on the custody of the child should give the child an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

while remaining a right of the child, 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, in accordance with Article 24(2) of the Charter of Fundamental Rights.<sup>45</sup>

According to the Court of Justice it is not a necessary consequence of the right of the child to be heard that a hearing before the court of the Member State of origin take place. However that right does require that there are made available to that child the legal procedures and conditions which enable the child to express his or her views freely and that those views are obtained by the court.<sup>46</sup>

*Obligations stemming from the Convention on the Rights of the Child*

Article 24 of the Charter is based on several provisions of the CRC, amongst others Article 12 CRC<sup>47</sup> which provides that the child 'shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'. Article 12 CRC applies, according to its text, to all judicial and administrative proceedings affecting the child, and thus also to asylum procedures.<sup>48</sup>

The Committee on the Rights of the Child is of the opinion that Article 12 CRC requires that in the case of an asylum claim, 'the child must [...] have the opportunity to present her or his reasons leading to the asylum claim'.<sup>49</sup> It also stated with regard to unaccompanied and separated children that 'where the age and maturity of the child permits, the opportunity for a personal interview with a qualified official should be granted before any final decision is made'.<sup>50</sup> In order to be able to exercise its right to be heard the child must be informed on the asylum process.<sup>51</sup> According to the Committee on the Rights of the Child there can be no correct application of the best interests

<sup>45</sup> Case C-491/10 PPU, *Aguirre Zaraga* [2010], para 64.

<sup>46</sup> Case C-491/10 PPU, *Aguirre Zaraga* [2010], para 65.

<sup>47</sup> Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 14 December 2007, C 303/25.

<sup>48</sup> Committee on the Rights of the Child, General Comment No 12 (2009), CRC/C/GC/12, para 32 states that Art 12 'applies to all relevant judicial proceedings affecting the child, without limitation, including, for example [...] unaccompanied children, asylum-seeking and refugee children [...].'

<sup>49</sup> Committee on the Rights of the Child, General Comment No 12 (2009), CRC/C/GC/12, para 123. See also paras 32 and 67.

<sup>50</sup> Committee on the Rights of the Child, General Comment No 6 (2005), CRC/GC/2005/6, para 71. See also UNHCR, *Improving Asylum Procedures*, s 4, p 18.

<sup>51</sup> Committee on the Rights of the Child, General Comment No 12 (2009), CRC/C/GC/12, General Comment No 6 (2005), CRC/GC/2005/6, para 25.

of the child principle laid down in Article 3 CRC if the components of Article 12 are not respected.<sup>52</sup>

Article 12 CRC applies to all minors capable of forming their own views, irrespective of their age.<sup>53</sup> The Committee on the Rights of the Child stated that States parties are obliged:

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 her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity.<sup>54</sup>

The Committee points at the fact that children are able to form views from the youngest age, even when they are unable to express them verbally. It states that consequently, full implementation of Article 12 CRC 'requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences'.<sup>55</sup> Furthermore States parties are under the obligation to ensure the implementation of the right to be heard for children experiencing difficulties in making their views heard. For instance, efforts must be made 'to recognise the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language'.

According to the Committee on the Rights of the Child children should never be coerced into expressing views against their wishes.<sup>56</sup> If the child has decided to be heard, he or she will have to decide how to be heard, either directly, or through a representative or appropriate body. The representative can be the parent(s), a lawyer, or another person (inter alia, a social worker). The Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings.<sup>57</sup> The Committee emphasises that that a child should not be interviewed more often than necessary, in particular when harmful events are explored. According to the Com-

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52 Committee on the Rights of the Child, General Comment No 12 (2009), CRC/C/GC/12, para 74. See also UNHCR EXCOM Conclusion no 107 (LVIII), 2007, on Children at risk: 'States, UNHCR, and other relevant agencies and partners 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.'

53 See Art 12 (1) CRC and ComRC General Comment No 12 (2009), CRC/C/GC/12, para 21.

54 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 20.

55 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 21.

56 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 134 (b).

57 ComRC General Comment No 12 (2009), CRC/C/GC/12, paras 35-36.

mittee the hearing of a child is a difficult process that can have a traumatic impact on the child.<sup>58</sup>

*Subconclusion: minor's right to a personal interview*

It should be concluded that Member States do not have full discretion when setting out rules regarding interviewing minors. It follows from Article 12 PD read in the light of Article 24 of the Charter which should in turn be interpreted in conformity with Article 12 CRC that each child must in some way be put in the position to present its asylum claim. For that purpose children should be informed on the asylum process in conformity with Article 10 (1) PD.

If the child is unaccompanied or if it has individual asylum motives or important information in support of his and his parents asylum claim, it should be decided whether the age and maturity of the child permits that the child is interviewed on its asylum motives. If this is the case the child should in principle be personally interviewed if it wishes so. However it should always be noted that an interview in an asylum procedure can be stressful for a child, as it may be asked to talk about traumatic events it experienced in its country of origin. Like in child abduction cases as *Aguirre Zarraga* it should therefore be assessed whether an asylum interview is inappropriate, or even harmful to the psychological health of the child. If interviewing the child would indeed be inappropriate or harmful the interview should be omitted. In analogy with Article 12 (3) PD then reasonable efforts shall be made to allow the child to submit further information, for example via his guardian or legal representative.

## 7.2 REQUIREMENTS AS TO THE CONDUCT OF THE INTERVIEW

According to Article 13 (2) PD personal interviews should take place under conditions which ensure appropriate confidentiality. Furthermore Article 13 (3) PD requires Member States to take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner.<sup>59</sup> Important guarantees in this regard are amongst others that the interview is conducted in a language which the person concerned understands or that he is assisted by an interpreter. Furthermore it is essential that the interviewer is competent and able to gain the trust of the applicant. The Procedures Directive does not guarantee these safeguards in all asylum cases. Therefore these issues will be addressed in this section. Other circumstances which also determine the quality of the interview, which will not be discussed in this section are the con-

<sup>58</sup> ComRC General Comment No 12 (2009), CRC/C/GC/12, para 24.

<sup>59</sup> This provision also applies to interviews in border procedures and in case the refugee status is withdrawn. See Artt 35 (3) (d) and 38 (1) (b) PD.



fidentiality of the interview, the time and assistance available for the asylum applicant to prepare for the interview, the environment in which the interview takes place and the time allocated for and duration of the personal interview.<sup>60</sup>

In 2010 UNHCR pointed out that in several Member States the quality of the personal interviews was not guaranteed. It observed for example that in some Member States the confidentiality of the interview was not ensured<sup>61</sup> and that interviews were conducted by officers who were not properly trained. Furthermore the UNHCR research revealed widespread misconduct involving interpreters in personal interviews, such as a lack of competence and impartiality. Finally UNHCR noted that in some Member States interviews may not take place in a language the applicant actually understands as a result of a shortage of interpreters in a certain language.<sup>62</sup> Conditions such as those described by UNHCR may impede the applicant to fully present his asylum claim and thus undermine the effectiveness of the right to a personal interview.

#### 7.2.1 Language of the interview

Article 13 (3) (b) PD states that communication during the personal interview need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he *may reasonably be supposed to understand* and in which he is able to communicate. According to UNHCR's research of 2010 most interviews were conducted in the mother-tongue of the applicant or in another language chosen by the applicant. However, in some cases the applicant was interviewed in a language he was supposed to, but did not actually understand, mostly as a result of a shortage of interpreters in particular languages.<sup>63</sup>

It may be argued that the effectiveness of the right to a personal interview and consequently the right to asylum or the prohibition of *refoulement* are undermined when it is not ensured that the person concerned is actually able to explain his asylum motives or objections against transfer or expulsion in an interview.<sup>64</sup> It should be remembered that the credibility of the account of the person concerned is assessed on the basis of, often very detailed informa-

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<sup>60</sup> UNHCR, *Improving Asylum Procedures*, s 5.

<sup>61</sup> UNHCR states in its report of 2010 that it observed interviews in Greece, Spain and Italy which took place in conditions which breached Art 13 (2) PD. It occurred for example that three personal interviews were conducted simultaneously in one room. UNHCR, *Improving Asylum Procedures*, s 5, p 10. See also Commission Report COM (2010) 465 final, 2010, p 6.

<sup>62</sup> UNHCR, *Improving Asylum Procedures*, s 5.

<sup>63</sup> UNHCR, *Improving Asylum Procedures*, s 5, p 45. See also Commission Report COM (2010) 465 final, p 7.

<sup>64</sup> Doornbos notes in her research that asylum applicants often hesitate to let the interviewer know that they do not understand the interviewer or the interpreter. Doornbos 2006, p 274.

tion, gathered during the interview. If a person does not understand exactly what the interviewer is asking him or is not able to respond to questions in detail, this may work to his detriment and lead to the conclusion that the account should be deemed not credible.

The Court of Justice, the ECtHR and the UN Committees have not addressed this issue. Both the Parliamentary Assembly of the Council of Europe and UNHCR stress that Member States must ensure the right of all asylum applicants to a personal interview in a language they understand.<sup>65</sup> UNHCR is of the opinion that an interview in the language the applicant understands is a prerequisite for a fair procedure and when it is not fulfilled any evidence gathered in the course of the personal interview may be unreliable.<sup>66</sup> Furthermore UNHCR stresses that there is a difference between the basic ability to make oneself understood in a language and the ability to present a complex account which may include difficult or painful events in that language.<sup>67</sup> UNHCR notes that assumptions that an asylum-seeker speaks or understands the official language of his or her country of origin may be incorrect. As a matter of principle, bearing in mind the need to prevent deliberate obstruction, every effort should be undertaken in this regard by the countries of asylum.<sup>68</sup>

Arguably the principle of effectiveness thus requires Member States to ascertain that the person concerned is actually able to understand the language chosen for the interview and that he can express himself effectively in this language. If the claimant does not understand the interviewer, an interpreter should be used to facilitate communication. If such an interpreter is not available (for example because of the rareness of the language spoken by the claimant) the authorities should take this into account when examining the case and taking a decision on the credibility of the claimant's account.

### 7.2.2 The right to a free and competent interpreter

If the language chosen for the interview is not understood by the person concerned free interpretation services should be provided, in a language this person understands. This follows from Article 10 (1) (b) PD, which grants asylum applicants a right to an interpreter for submitting their case to the competent authorities whenever this is necessary.<sup>69</sup> According to this pro-

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65 Parliamentary Assembly of the Council of Europe Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe member states, para 8.10.2.

66 UNHCR, *Improving Asylum Procedures*, s 5, p 29.

67 UNHCR, *Improving Asylum Procedures*, s 5, p 44.

68 UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), p 13.

69 Note that this right also applies in border procedures in the meaning of Art 35 PD. See Art 35 (3) (c) PD.

vision Member States shall consider it necessary to give the services of an interpreter at least when the determining authority calls upon the applicant to be interviewed and appropriate communication cannot be ensured without such services. Interpreters used at the interview and in other cases where the competent authorities call upon the applicant, shall be paid for out of public funds.<sup>70</sup> Article 13 (3) (b) PD requires Member States to select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview.<sup>71</sup> It may be derived from this provision that the Member States need to ensure that interpreters are competent<sup>72</sup> and qualified and that the languages spoken by the interpreter are understood by the person who is interviewed and the interviewer.<sup>73</sup>

UNHCR mentions in its report of 2010 that a number of Member States face shortages of interpreters in particular languages or in particular regional locations. This problem is sometimes solved by using interpreters in other Member States via a video-conference call.<sup>74</sup> UNHCR also states that in some Member States no specific professional qualifications are required for interpreters and that in the twelve Member States of focus the provision of training for interpreters is at best limited and in many cases non-existent.<sup>75</sup> Finally UNHCR's research revealed widespread misconduct involving interpreters in personal interviews, and serious shortcomings in the ability of interviewers to work effectively with or manage the conduct of interpreters.<sup>76</sup>

The right to an interpreter is considered an important procedural safeguard in asylum proceedings by several sources of inspiration.<sup>77</sup> In *M.S.S. v Belgium and Greece* the ECtHR took into account a number of deficiencies in the Greek asylum procedure which together lead to a violation of Article 13 ECHR. One

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70 See Art 10 (1) (b) PD. See also Council resolution of 20 June 1995 on minimum guarantees for asylum procedures, OJ 19 September 1996, C 274, pp 13-17, para 13.

71 See also recital 13 Preamble PD.

72 See also UNHCR, *Improving Asylum Procedures*, s 5, p 42. According to UNHCR the interviewer should confirm that the applicant and the interpreter understand each other and that the applicant is comfortable with the interpretation arrangement.

73 UNHCR understands the clause 'appropriate communication to also require that the interpreter possesses competent interpreting skills, is neutral in his interpretation, is impartial, does not provide any kind of supplementary information as a contribution to the case he is interpreting and does not provide procedural or legal advice to the applicant'. UNHCR, *Improving Asylum Procedures*, s 5, pp 28-29.

74 UNHCR, *Improving Asylum Procedures*, s 5, pp 32-33.

75 UNHCR, *Improving Asylum Procedures*, s 5, pp 35-36.

76 UNHCR, *Improving Asylum Procedures*, s 5, p 38. UNHCR mentions examples on pp 38-40.

77 See for example Parliamentary Assembly of the Council of Europe Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe member states, adopted on 7 October 2005, para 7 and Parliamentary Assembly of the Council of Europe Recommendation 1236 (1994) on the right of asylum, adopted on 12 April 1994, where the Parliamentary Assembly recommended the Committee of Ministers to insist that asylum-seekers shall be informed, if appropriate, of their right to linguistic assistance.

of those deficiencies was the shortage of interpreters.<sup>78</sup> In *I.M. v France* the ECtHR recognised that a lack of linguistic aid may affect the asylum applicant's ability to present his asylum claim.<sup>79</sup> The Committee against Torture in its Concluding Observations regarding France of 2006, recommended 'that the situations covered by article 3 of the Convention should be the subject of a more thorough risk assessment in accordance with the provisions of article 3, including by systematically holding individual interviews to better assess the personal risk to the applicant, *and by providing free interpretation services*' (emphasis added).<sup>80</sup>

With regard to the competence of the interpreter it is interesting to note that the ECtHR has recognised that in order for the right of every defendant to the free assistance of an interpreter of Article 6 (3) (e) ECHR 'to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided'.<sup>81</sup> On the basis of this judgment it may be argued that in order to comply with their obligation under Article 13 (3) (b) PD, the Member State authorities should control the quality of the interpretation offered by the State.

### 7.2.3 The competence of the interviewer

A personal interview should be conducted by a person competent under national law and not necessarily by the determining authority. Article 13 (3) (a) PD states that Member States must 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 or vulnerability, insofar as it is possible to do so. These are not particularly high standards.

Arguably Article 13 PD does entail that Member States should ensure that interviewers receive proper training. UNHCR observed in its report of 2010 that Greece, Spain and Italy did not provide for formal and compulsory specialist training for all interviewers upon recruitment.<sup>82</sup>

The ECtHR recognised the importance of training for interviewers in asylum cases in *M.S.S. v Belgium and Greece*. In this case it considered the 'lack of training of the staff responsible for conducting the individual interview' to

78 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 301.

79 ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 145.

80 ComAt Concluding Observations on France, 3 April 2006, CAT/C/FRA/CO/3, emphasis added.

81 ECtHR (GC) 18 October 2006, *Hermi v Italy*, no 18114/02, para 70.

82 UNHCR, *Improving Asylum Procedures*, s 5, pp 12-25.

be one of the deficiencies in the Greek asylum procedure which lead to a violation of Article 13 ECHR.<sup>83</sup> UNHCR stresses that the task of the interviewer is 'hugely challenging and complicated'.<sup>84</sup> According to the UNHCR Handbook it will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings.<sup>85</sup>

UNHCR specified the minimum knowledge and skills any interviewer should have, which may provide useful guidance for the interpretation of Article 13 (3) (a). In UNHCR's view Member States should ensure amongst others that interviewers have knowledge and understanding of the applicable national, international refugee and human rights law. Furthermore interviewers should have knowledge of and be able to use appropriate interviewing and questioning techniques and must be competent to take account of the applicant's vulnerabilities. They must be able to work with interpreters and to ensure effective communication and a complete record of the personal interview. Finally they must be impartial and objective.<sup>86</sup>

#### 7.2.4 Gender-sensitive interviews

Some persons claiming a risk of *refoulement*, in particular victims of sexual violence, may feel apprehensive to talk about their experiences. According to the Committee against Torture: 'It is well-known that the loss of privacy and prospect of humiliation based on revelation alone of the acts concerned may cause both women and men to withhold the fact that they have been subject to rape and/or other forms of sexual abuse until it appears absolutely necessary'.<sup>87</sup> It may be argued that Article 13 (3) PD requires the use of an interviewer and interpreter of the same sex as the claimant, if this is necessary to (better) allow the applicant to present the grounds for his application in a comprehensive manner. When interpreters of the same sex are not available the examining authorities should arguably take this into account when taking the decision and/or when assessing the value of late statements in first or subsequent asylum procedures.<sup>88</sup>

Several non-binding sources of inspiration have stressed the importance of the involvement of female interviewers and interpreters in interviews with women. The Council resolution on minimum guarantees for asylum procedures provides that Member States must endeavour to involve skilled female

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83 ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 301.

84 UNHCR, *Improving Asylum Procedures*, s 5, p 12.

85 UNHCR Handbook, para 200.

86 UNHCR, *Improving Asylum Procedures*, s 5, pp 12-13.

87 ComAT 22 January 2007, *V.L. v Switzerland*, no 262/2005, para 8.8.

88 See with regard to late statements also section 8.5.

employees and female interpreters in the asylum procedure where necessary, particularly where female asylum-seekers find it difficult to present the grounds for their application in a comprehensive manner owing to the experiences they have undergone or to their cultural origin.<sup>89</sup> The Human Rights Committee in its Concluding Observations regarding Austria noted with concern that asylum-seeking women were not automatically interviewed by female asylum officers and assisted by female interpreters. The Committee recommended that the State party should adopt a gender-sensitive approach to refugee status determination by automatically assigning female interviewers and interpreters to asylum-seeking women.<sup>90</sup> Furthermore UNHCR stressed the importance of the use of female interpreters in interviews with female asylum applicants in EXCOM conclusion No 64.<sup>91</sup>

#### 7.2.5 Child-friendly interviews

Article 17 provides for special provisions concerning the interview of unaccompanied minors. Article 17 (1) (b) PD states that the Member States should ensure that the minor's representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Furthermore it requires Member States to allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview. Article 17 (4) (a) PD demands that if an unaccompanied minor has a personal interview on his application for asylum, that interview be conducted by a person who has the necessary knowledge of the special needs of minors.

Such special guarantees do not apply to the interviews with accompanied minors. It may be argued on the basis of the Court of Justice's judgment in

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<sup>89</sup> Council resolution of 20 June 1995 on minimum guarantees for asylum procedures, OJ 19 September 1996, C 274, pp 13-17, para 28.

<sup>90</sup> HRC Concluding Observations on Austria, 30 October 2007, CCPR/C/AUT/CO/4, para 18. See also ComAT Concluding Observations on Austria, 15 December 2005, CAT/C/AUT/CO/3 and Parliamentary Assembly of the Council of Europe Recommendation 1374 (1998) on the situation of refugee women in Europe, where it is recommended that the Committee of Ministers urge the member states to ensure that female medical and social staff (including interpreters) are available for refugee women.

<sup>91</sup> EXCOM Conclusion no 64 (XLI) 1990, on Refugee Women and International Protection (1990) states that, wherever necessary, skilled female interviewers should be provided in procedures for the determination of refugee status. See also UNHCR Guidelines of International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para 36, which even states that Claimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves and that they should be provided automatically for women claimants.

*Aguirre Zarraga* as well as the views of the Committee on the Rights of the Child and UNHCR that Article 17 (4) PD should be applied by analogy to such interviews. Such application would be in line with the requirement included in Article 13 (3) PD that personal interviews must be conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner and that the person who conducts the interview should be sufficiently competent to take account of the personal circumstances of the applicant including his vulnerability.

UNHCR reported in 2010 that several Member States did not provide special training for interviewing children.<sup>92</sup> Only four of the twelve Member States of focus in UNHCR's research of 2010 had specific guidelines on interviewing children.<sup>93</sup>

#### *Interviewing in a child-friendly manner*

The Court of Justice has recognised that Article 24 of the Charter requires that the State authorities should ensure that a hearing of the child should be conducted in a child-friendly manner. In *Aguirre Zarraga* it considered that where a court decides to hear the child, Article 24 of the Charter requires 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 those provisions, and to offer to the child a genuine and effective opportunity to express his or her views'.<sup>94</sup>

According to the Committee on the Rights of the Child interviews with children should take place in a friendly and safe atmosphere.<sup>95</sup> 'A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age'.<sup>96</sup> Furthermore it stated that 'the context in which a child exercises her or his right to be heard has to be enabling and encouraging, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has

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<sup>92</sup> UNHCR, *Improving Asylum Procedures*, s 5, pp 22-23.

<sup>93</sup> UNHCR, *Improving Asylum Procedures*, s 5, p 61.

<sup>94</sup> Case C-491/10 PPU, *Aguirre Zaraga* [2010], para 66.

<sup>95</sup> ComRC General Comment No 6 (2005), CRC/GC/2005/6, para 20. See also 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*, Geneva 22 December 2009, para 72, which states that interviewing children 'may require involving experts in interviewing children outside a formal setting or observing children and communicating with them in an environment where they feel safe, for example, in a reception centre'.

<sup>96</sup> ComRC General Comment No 6 (2005), CRC/GC/2005/6 para 34.

decided to communicate'.<sup>97</sup> In order to be able to express its views effectively the child should according to the Committee be well-prepared for the interview. The decision maker 'should provide explanations as to how, when and where the hearing will take place and who the participants will be, and has to take account of the views of the child in this regard'.<sup>98</sup>

#### *Training of interviewers*

The Committee on the Rights of the Child is of the view that officials working with separated and unaccompanied children and dealing with their cases should be trained in amongst others 'appropriate interview techniques'.<sup>99</sup> According to the Committee interviews of unaccompanied minors in the context of the asylum procedure should be conducted by representatives of the refugee determination authority who will take into account the special situation of unaccompanied children in order to carry out the refugee status assessment and apply an understanding of the history, culture and background of the child.<sup>100</sup>

It is UNHCR's position that 'personal interviews of children – whether they are accompanied, unaccompanied or separated – should be carried out by an interviewer who has special training and knowledge regarding the psychological and emotional development and behaviour of children'.<sup>101</sup> UNHCR mentions that the training of the personnel of the determining authority charged with conducting the personal interview of children should include relevant human rights norms, standards and principles, including the rights of the child, the impact and consequences of persecution, serious harm and trauma on children and understanding of the effect of the child's age and stage of development on the child's recall of events and knowledge of conditions in the country of origin. Interviewers should furthermore have appropriate adult-child communication skills and must be able to use interview techniques that minimise trauma to the child while maximising the quality of information received from the child. Interviewees must finally have the skills to deal with children in a sensitive, understanding, constructive and reassuring manner.<sup>102</sup>

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97 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 42. See also para 23 which states: 'States parties must ensure conditions for expressing views that account for the child's individual and social situation and an environment in which the child feels respected and secure when freely expressing her or his opinions.'

98 ComRC General Comment No 12 (2009), CRC/C/GC/12, para 41.

99 ComRC General Comment No 6 (2005), CRC/GC/2005/6 para 96.

100 ComRC General Comment No 6 (2005), CRC/GC/2005/6 para 72.

101 UNHCR, *Improving Asylum Procedures*, s 5, p 21.

102 UNHCR, *Improving Asylum Procedures*, s 5, pp 21-22.



### 7.3 THE ASYLUM APPLICANT'S RIGHT TO BE HEARD FOLLOWING THE PERSONAL INTERVIEW

The question which will be addressed in this section is whether the asylum applicant's right to be heard under EU law is completely fulfilled with the personal interview. Should he also be offered the opportunity to add information to the report of the interview or to correct mistakes? Must he be able to comment on conclusions of the determining authority with regard to the credibility of his account, the value of other evidence underlying the assessment of the asylum claim and the risk of *refoulement* before the decision on the asylum application will be taken?

It is argued in this section that, although the Procedures Directive does not require the determining authorities to give the asylum applicant such opportunity, the EU right to be heard does. It follows from the EU right to be heard that the addressees of decisions which significantly affect their interests, such as asylum decisions, be placed in a position in which they may effectively make known their views on the evidence on which the decision is based<sup>103</sup> and the relevant facts and circumstances.<sup>104105</sup> This implies that the asylum applicant should not only be able to present his asylum motives during the personal interview, but also to express his views regarding the fact-finding and assessment of the risk of *refoulement* by the determining authorities.

#### 7.3.1 The right to comment on the report of the interview

Article 14 (1) PD requires the Member States to ensure that a written report of the personal interview be made 'containing at least the essential information regarding the application, as presented by the applicant'.<sup>106</sup> In this context the provision refers to Article 4(2) QD, which mentions the elements needed to substantiate the asylum claim: statements concerning the applicant's age, background, including that of relevant relatives, identity, nationality, country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection. In many cases this report forms, together with the evidence

103 See for example Case C-28/05, *Dokter* [2006], para 74 and Case C-32/95P, *Commission v Lisrestal and others* [1996], para 21.

104 Case C-269/90, *Technische Universität München* [1991], para 25 and Case C-458/98 P, *Industrie des Poudres Sphériques v Council* [2000], para 99.

105 See section 4.4.2.

106 This provision also applies to interviews held in the context of border procedures (Art 35 (3) (d) PD) or procedures in which a refugee status is withdrawn (Art 38 (1) (b) as well as in cases in which a meeting was held with the applicant for the purpose of assisting him/her with completing his/her application and submitting the essential information regarding the application referred to in Art 12 (2)(b) PD (see Art 14 (4) PD).

submitted by the asylum applicant and the determining authorities as well as country of origin information, the basis of the decision on the asylum claim.<sup>107</sup> The Procedures Directive does not give the applicant the right to comment on the contents of the report of the interview.<sup>108</sup> Article 14 (3) PD only states that Member States may request the applicant's approval of the contents of the report of the personal interview. Where an applicant refuses to approve the contents of the report, the reasons for this refusal shall be entered into the applicant's file.

UNHCR stated in 2010 that practice with regard to the possibility to check the accuracy and change the content of the report of the personal interview is divergent among the Member States.<sup>109</sup> In some Member States the report is printed out immediately after the interview and read back to the applicant before he is asked his signature of approval. In other Member States applicants are asked to sign the report, although they had not had the opportunity to read it or to have it read back to them.<sup>110</sup> In several Member States the written report of the interview is provided after the asylum decision has been taken.<sup>111</sup> The Commission noted in 2010 that the accuracy of records therefore varies.<sup>112</sup>

In the light of the crucial role of the statements of the asylum applicant as evidence in the asylum procedure, it is of utmost importance for the quality of the decision that the written report of the personal interview is complete and that the information contained in it is accurate.<sup>113</sup> Gaps or mistakes in the report may occur as a result of disturbed communication, faults or omissions by interpreters or the person drawing the report.<sup>114</sup> In order to ensure the accuracy and completeness of the report and thus an adequate examination of the case in the meaning of Article 8 PD, it may be considered necessary that the person concerned or his representative be able to examine this report and to correct mistakes or fill in gaps.

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107 See further on evidentiary assessment sections 8.6-8.7.

108 Commission Staff Working Document, COM(2009) 554, SEC(2009) 1377, 21 October 2009, p 13.

109 UNHCR, *Improving Asylum Procedures*, s 6, p 11.

110 UNHCR, *Improving Asylum Procedures*, s 6, pp 12-17.

111 The Commission mentions Belgium, Cyprus, France, Greece and Romania. Commission Report COM (2010) 465 final, p 7. See also UNHCR, *Improving Asylum Procedures*, s 6, pp 19-20.

112 Commission Report COM (2010) 465 final, p 7. See also UNHCR, *Improving Asylum Procedures*, s 6.

113 See also UNHCR, *Improving Asylum Procedures*, s 6, p 2.

114 Doornbos 2006, p 45. She states that also researches from other States than the Netherlands are critical of the quality of reports of the interview. UNHCR in its 2010 expressed grave concerns about the quality of the reports of interviews in Greece. It found during its observations of interviews in Athens that the written summary reports made of personal interviews did not reflect the oral evidence given by the applicant at all. UNHCR, *Improving Asylum Procedures*, s 6, pp 7-9.

Arguably Article 14 (3) PD read in the light of the EU right to be heard requires that the applicant is granted the opportunity to comment on the report of the interview, in particular when the determining authority intends to reject the asylum application on the basis of the information included in the report. If for example the determining authority finds the statements of the applicant as written down in the report inconsistent, contradictory, vague or incomplete and thus not credible, the applicant should be able to respond to those allegations.

This also implies that the report of the personal interview(s) should be provided to the applicant before the decision on the asylum application is taken.<sup>115</sup> The EU right to be heard requires that the parties concerned must be informed of the evidence adduced against them.<sup>116</sup> Article 14 (2) PD demands that Member States ensure that applicants have timely access to the report of the personal interview. However, this provision allows that access to the report is only granted after the decision on the application. If the Member State chooses to make use of this option, access must be made possible as soon as necessary for allowing an appeal to be prepared and lodged in due time.<sup>117</sup> Such late provision of the report of the interview may infringe the EU right to be heard, as the person concerned must, according to the standing case-law of the Court of Justice, in principle be able to exercise this right before the administrative decision is adopted.<sup>118</sup> Furthermore it should be derived from this case-law that the person concerned must be afforded a reasonable period to effectively put forward his views.<sup>119</sup> The content of the report of the interview should thus be made known to the applicant at a moment that it is still possible to effectively exercise his right to be heard.

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115 See also UNHCR, which recommends that in all cases the applicant must be granted the right to rectify, clarify or provide additional information for inclusion in the transcript. For that purpose the content of the report must have been read by, or to the applicant, in a language s/he understands. UNHCR, *Improving Asylum Procedures*, s 6, pp 12-17.

116 Case T-228/02, *Organisation des Modjahedines du peuple d' Iran v Council* [2006], para 93. Case C-32/95P, *Commission v Lisrestal and others* [1996], para 41. See also T-49/88, *Al-Jubail Fertilizer v Council* [1991], para 17.

117 According to the explanations of the Commission with the amended proposal for the Procedures Directive this provision reflects the principle of a fair and effective procedure. It is meant to enable the applicant to exercise his appeal rights properly and to enable appellate bodies, when appropriate, to verify whether the decision is based on relevant information. Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, 18 June 2002, COM (2002) 326 final, pp 8-9.

118 See for example C-269/90, *Technische Universität München* [1991], para 25, Joined cases C-379/08 and C-380/08, *ERG and Others* [2010], paras 54-56 and Case C-28/05, *Dokter* [2006], para 74.

119 Case C-462/98 P, *Mediocurso v Commission* [2000], para 38.

### 7.3.2 The right to comment on the fact-finding and risk assessment

After the personal interview(s) the determining authority will establish the facts and assess the credibility of the asylum account. Following the establishment of the facts, it is decided whether there is a real risk of *refoulement* upon return to the country of origin or transfer to a third country. The determining authority may include evidence in these assessments on which the applicant has not had the opportunity to comment. The question rises whether the claimant should be heard on the conclusions of the decision-making authority concerning the fact-finding and risk assessment. This could be done for example by offering the claimant the opportunity to comment on these conclusions (and the evidence on which they are based) in an oral hearing or by submitting written observations.

The Procedures Directive does not provide for a right to be heard on the conclusions reached by the determining authority. Such a right may be derived from Article 4 (1) QD, which states that the Member State has the duty to assess the relevant elements of the application in cooperation with the applicant.<sup>120</sup> According to Noll this provision entails far-reaching obligations to communicate, for both the Member State and the applicant. The Member State should allow the applicant to participate in the assessment of the evidence.<sup>121</sup> This interpretation of Article 4 (1) QD has not yet been confirmed by the Court of Justice.<sup>122</sup>

On the basis of the EU Courts' case-law concerning the EU right to be heard discussed in section 4.4.2 it should be concluded that the addressee of an asylum decision has a right to effectively make known his views on the evidence on which this decision is based and the relevant facts and circumstances taken into account, before the decision is taken. The EU right to be heard may require that a draft decision is submitted to the party concerned.<sup>123</sup> Article 4 (1) QD should be interpreted in the light of this case-law and must therefore be considered to include a right to be heard on important evidence relied on and the main conclusions reached by the determining authority. If the applicant did not have the opportunity to comment on such evidence and conclusions during the personal interview, in response to the written report of the personal

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<sup>120</sup> It concerns a duty to assess the elements underlying the asylum claim together with the applicant. Battjes 2006, p 226.

<sup>121</sup> Noll 2005-II, p 4.

<sup>122</sup> This question will probably be answered in Case C-277/11, *M v Minister for Justice, Equality and Law Reform Ireland*, which was pending when this study was finalised. A.G. Bot concluded in his opinion that the duty to cooperate laid down in Art 4 (1) QD has the sole objective of assisting the applicant to complete his application and to assemble the elements deemed essential for that purpose. It does in his view not entail an obligation for the determining authority to seek the applicant's observations on the elements on which it intends to base a negative decision before such decision is taken.

<sup>123</sup> Case C-462/98 P, *Mediocruso v Commission* [2000], para 42.

interview or otherwise, he should be granted this opportunity before the negative decision is taken. This is in particular the case if the applicant's comments concerning the fact-finding or credibility assessment cannot be fully taken into account in the appeal-phase as a result of a limited judicial review of the fact-finding by the national court.<sup>124</sup>

This view is supported by the ECtHR's judgment in *I.M. v France*. In this case the applicant's asylum application was rejected in essence because his statements during the interview were very imprecise and wrong with regard to his ethnic origin as well as his family's origin from the Darfur region. According to the French determining authority the applicant's origin could therefore not be established. Furthermore it was stated in the decision that the applicant's statements regarding the applicant's involvement in a student movement, the circumstances of his arrest, the conditions of his detention, and the reasons for his release were not sufficiently precise and credible. The fact that the applicant was not granted the opportunity to dispute these allegations was one of the factors leading to a violation of Article 13 ECHR in this case. The ECtHR considered that

le caractère accéléré de la procédure n'a pas permis au requérant d'apporter des précisions sur ces points, éventuellement par écrit ou au cours d'un second entretien, alors même qu'il a pu, par la suite, dissiper les incohérences supposées et fournir les documents manquants.<sup>125</sup>

Furthermore the ECtHR has held that asylum applicants must be put in the position to effectively comment on the decision-making authority's conclusions as to the credibility of the asylum account or the authenticity of the documents submitted by the applicant. According to the ECtHR the individual must provide a satisfactory explanation for the alleged discrepancies, when the examining authorities present information which gives strong reason to question the veracity of an asylum-seeker's submissions.<sup>126</sup> Furthermore it ruled that when the authorities examined documents adduced by the applicant and give detailed reasons why they consider these documents to be forgeries, the applicant has to contest these allegations.<sup>127</sup> This implies that the applicant must be put in the position to present its views on the authority's conclusions during the asylum proceedings.

On the basis of the ECtHR's case-law potentially Article 4 (1) QD read in the light of the EU right to be heard should be considered to include a right to contest the decision-making authorities' main conclusions as to the credibil-

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124 See section 9.2. It is argued in this section that Art 39 PD requires a thorough judicial review of the asylum decision.

125 ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 147.

126 See ECtHR 9 March 2010, *R.C. v Sweden*, no 41827/07, para 50, ECtHR (Adm) 8 March 2007, *Collin and Akaziebie v Sweden*, no 23944/05.

127 ECtHR (Adm) 21 June 2005, *Matsiukhina and Matsiukhin v Sweden*, no 31260/04.

ity of the asylum account, the assessment of the evidence and the existence of a risk of *refoulement* upon return. The EU right to be heard also requires that the determining authority's conclusions be made available to the applicant and that the applicant have access to the evidence underlying the (concept) asylum decision.

#### 7.4 THE RIGHT TO AN ORAL HEARING BEFORE A COURT OR TRIBUNAL

In Chapter 9 it will be concluded that the right to an effective remedy guaranteed by Article 39 PD requires a thorough judicial review of the asylum decision. This entails that the national courts review asylum decisions on points of fact as well as points of law. Furthermore it implies as a minimum that the national court or tribunal assesses the claim of a risk of *refoulement* on its merits. It should carefully examine the facts and evidence underlying the asylum claim.

The question which will be addressed in this section is whether the national court is obliged to hear the asylum applicant in the context of his appeal against the refusal of his asylum claim. It will be argued that Article 39 PD read in the light of Article 47 of the Charter requires that the asylum applicant is heard in an oral hearing by the court or tribunal in the sense of Article 39 PD, if this court decides on factual issues, including the credibility of the applicant's asylum account. According to the UNHCR report of 2010 in several Member States the national court may decide on the appeal against the negative asylum decision without holding an oral hearing.<sup>128</sup>

Article 39 PD does not contain standards with regard to the right to a public and oral hearing. Article 47 of the Charter provides that everyone is entitled to a fair and public hearing by an independent and impartial tribunal. The Court of Justice has not yet interpreted the EU right to a public hearing yet. No judgments were found in the context of this study which addressed the right to an oral hearing in the light of the general principle of effective judicial protection. However, the ECtHR has developed an extensive body of case-law regarding the right to an oral hearing under Article 6. It is argued here that Article 47 of the Charter should be interpreted in conformity with this case-law.

##### *Obligations stemming from the ECtHR*

The ECtHR has not ruled on the question whether Article 13 requires that asylum applicants be heard by an independent authority. However it should be reiterated that the ECtHR has recognised the importance of an oral hearing in particular for the assessment of the credibility of the asylum applicant's statements.<sup>129</sup>

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128 UNHCR, *Improving Asylum Procedures*, s 16, pp 58-60.

129 See further section 7.1.

Like Article 47 of the Charter, Article 6 ECHR provides for a right to a 'fair and public hearing'. According to the standing case-law of the ECtHR the right to a public hearing includes the right to an oral hearing before a court or tribunal.<sup>130</sup> The Court is of the opinion that the right to a public hearing, which applies both in criminal and in civil cases, is a right of a fundamental nature.<sup>131</sup>

The obligation to hold a hearing is not absolute. A hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest making a hearing necessary.<sup>132</sup> Furthermore the ECtHR assesses the overall fairness of the procedure. An oral hearing does not have to take place in every instance before a court or tribunal. The absence of a hearing before a second or third instance may be justified by the special features of the proceedings at issue,<sup>133</sup> in particular the fact that the appellate or Cassation court is only competent to review questions of law.<sup>134</sup> Absence of an oral hearing may however not undermine the right to adversarial proceedings and the principle of equality of arms.<sup>135</sup>

The complete absence of an oral hearing before a court or tribunal in a procedure can only be justified in exceptional circumstances.<sup>136</sup> The character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court. The frequency of such situations is not relevant: Article 6 (1) ECHR does not mean that the absence of an oral hearing may only be justified in rare cases.<sup>137</sup> The Court has accepted exceptional circumstances in cases where proceedings concerned exclusively legal or highly technical questions. The ECtHR held for example 'that disputes concerning benefits under social-security schemes are generally rather technical and their outcome usually

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130 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 40.

131 ECtHR (GC) 11 July 2002, *Göç v Turkey*, no 36590/97, para 46, ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 40.

132 A waiver can be done explicitly or tacitly, in the latter case for example by refraining from submitting or maintaining a request for a hearing. See for example ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 37.

133 See for example ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 39.

134 According to the ECtHR 'proceedings for leave to appeal or proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 even where the appellant was not given an opportunity of being heard in person by the appeal or cassation court'. ECtHR (GC) 26 July 2002, *Meftah and others v France*, nos 32911/96, 35237/97 and 34595/97, para 41. See also ECtHR (Plen) 26 May 1988, *Ekbatani v Sweden*, no 10563/83, para 32.

135 ECtHR 25 March 1998, *Belziuk v Poland*, no 23103/93, para 39. In this case the public prosecutor attended the hearing before the Court of Cassation and submitted oral statements while the applicant was not allowed to be present.

136 See for example ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 39.

137 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 42.

depends on the written opinions given by medical doctors. Many such disputes may accordingly be better dealt with in writing than in oral argument.<sup>138</sup>

Furthermore an oral hearing may be dispensed with when a case 'raises no questions of fact or law which cannot be adequately resolved on the basis of the case-file and the parties' written observations.'<sup>139</sup> As an example of such cases the ECtHR mentions cases 'where there are no issues of credibility or contested facts'.<sup>140</sup> In *Jussila v Finland* the ECtHR considered that 'checking and ensuring that the taxpayer has given an accurate account of his or her affairs and that supporting documents have been properly produced may often be more efficiently dealt with in writing than in oral argument.' It was not persuaded by the applicant that in this particular case any issues of credibility arose in the proceedings which required oral presentation of evidence or cross-examination of witnesses.<sup>141</sup>

If factual questions are at issue in the first instance or second instance appeal procedure, the ECtHR is generally of the opinion that an oral hearing should be held.<sup>142</sup> The ECtHR ruled on the necessity of an oral hearing in several cases in which the applicant had claimed compensation before the national court for damage suffered as a result of alleged unlawful detention. In these cases, when deciding on the level of compensation, the national court had regard to a series of personal factors, namely the financial and social status of the applicant and, in particular, the extent of the emotional suffering which he endured during the period of his detention. According to the ECtHR an oral hearing could not be dispensed with in these cases because of 'the essentially personal nature of the applicant's experience, and the determination of the appropriate level of compensation'. It considered:

While it is true that the fact of the applicant's detention and the length of that detention as well as his financial and social status could be established on the basis of the report drawn up by the judge rapporteur and without the need to hear the applicant [...], different considerations must apply to assessment of the emotional suffering which the applicant alleged he endured. In the Court's opinion, the

138 ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 41. In this case the ECtHR considered that no oral hearing was necessary in a social security case as the appeal concerned the correct interpretation of written medical evidence. According to the ECtHR the appellate court could adequately resolve this issue on the basis of the medical certificates in question and the applicant's written submissions.

139 See for example ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 37.

140 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 41.

141 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 47.

142 ECtHR (GC) 12 July 2001, *Malhous v the Czech Republic*, no 33071/96, para 60, ECtHR 25 April 1995, *Fischer v Austria*, no 16922/90, para 44 and ECtHR 26 January 2006, *Brugger v Austria*, no 7693/01, para 23. See for examples in which an oral hearing was considered necessary before an appellate court, which considered both questions of fact and law: ECtHR (Plen) 29 October 1991, *Helmerts v Sweden*, no 11826/85, para 38 and ECtHR (Plen) 26 May 1988, *Ekbatani v Sweden*, no 10563/83, para 32.



applicant should have been afforded an opportunity to explain orally to the Karşıyaka Assize Court the moral damage which his detention entailed for him in terms of distress and anxiety.<sup>143</sup>

In the ECtHR's view the administration of justice and the accountability of the State would have been better served in the applicant's case by affording him the right to explain his personal situation in a hearing before the domestic court subject to public scrutiny.<sup>144</sup>

When deciding whether the omission of an oral hearing is justified the ECtHR takes into account the interests at stake for the applicant. In *Fischer v Austria* for example it had due regard 'to the importance of the proceedings in question for the very existence of Mr Fischer's tipping business'.<sup>145</sup> However the ECtHR also held that 'the fact that proceedings are of considerable personal significance to the applicant, as in certain social insurance or benefit cases, is not decisive for the necessity of a hearing'.<sup>146</sup>

Furthermore the ECtHR has acknowledged that the national authorities may have regard to the demands of efficiency and economy.<sup>147</sup> Systematically holding hearings could for instance be an obstacle to the particular diligence required in social-security cases.<sup>148</sup> In determining the necessity of a public hearing at stages in the proceedings subsequent to the trial at first instance considerations such as the right to trial within a reasonable time and the related need for expeditious handling of the courts' case-load must be taken into account.<sup>149</sup> In the cases mentioned above in which compensation was claimed for damage suffered as a result of unlawful detention the ECtHR held that the interests served by an oral hearing outweighed the considerations of speed and efficiency on which the absence of an oral hearing was based.<sup>150</sup>

Finally it is relevant to note that the ECtHR has ruled in criminal cases that Article 6 ECHR also includes the right of the person concerned to hear and follow the proceedings before the court or tribunal and generally to participate effectively in them. 'Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in subparagraphs (c), (d) and (e) of paragraph 3 of Article 6 [...] – "to defend himself in person", "to examine or have examined witnesses", and "to have the free

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143 ECtHR (GC) 11 July 2002, *Göç v Turkey*, no 36590/97, para 51.

144 ECtHR (GC) 11 July 2002, *Göç v Turkey*, no 36590/97, para 51, ECtHR 20 October 2005, *Ozata v Turkey*, no 19578/02, para 36.

145 ECtHR 25 April 1995, *Fischer v Austria*, no 16922/90, para 44. See also ECtHR (Plen) 29 October 1991, *Helmers v Sweden*, no 11826/85, para 38, where the ECtHR referred to the seriousness of what was at stake for the applicant, namely his professional reputation and career.

146 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 44.

147 ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 42.

148 ECtHR 12 November 2002, *Döry v Sweden*, no 28394/95, para 41.

149 ECtHR (Plen) 29 October 1991, *Helmers v Sweden*, no 11826/85, para 36.

150 ECtHR (GC) 11 July 2002, *Göç v Turkey*, no 36590/97, para 51.

assistance of an interpreter if he cannot understand or speak the language used in court”<sup>151</sup>. The ECtHR considered that in the case of a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.<sup>152</sup> The right to adversarial proceedings also applies in civil law cases as well as cases falling within the scope of Articles 5 and 13 ECHR.<sup>153</sup> It is therefore conceivable that the right to participate effectively in a hearing before a court or tribunal also applies in such cases.

#### *Application to asylum cases*

On the basis of the ECtHR’s case-law it may be argued that the right to a public hearing in the meaning of Article 47 of the Charter should include a right to an oral hearing. The absence of an oral hearing, in particular in first instance appeal proceedings is only allowed in exceptional cases. The ECtHR’s case-law indicates in particular that an oral hearing is necessary in cases in which a court or tribunal needs to decide on factual issues, in which the credibility of the person concerned is disputed or in which the personal experiences of the person concerned play an important role.

As was mentioned before, asylum cases often hinge on the credibility of the applicant’s asylum account. Furthermore the personal experiences of the asylum applicant in the country of origin in the past are important for the assessment of his individual risk of *refoulement* upon return.<sup>154</sup> It should be derived from the ECtHR’s case-law that a court which reviews the asylum decision on such factual grounds should in principle hold an oral hearing. The fact that in asylum cases the fundamental nature of the EU right to asylum and the prohibition of *refoulement* are at stake adds to the need for an oral hearing. An oral hearing is less crucial if the disputed facts do not concern the individual asylum seeker, but for example only the seriousness of the general human rights situation in his country of origin. The court may include in its decision whether to hold an oral hearing, the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum.<sup>155</sup>

It should thus be concluded that there are strong arguments that Article 39 PD read in the light of Article 47 of the Charter generally requires an oral hearing before the (first instance) court or tribunal hearing the appeal against the rejection of the asylum claim. Furthermore it should be derived from the

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151 ECtHR 23 February 1994, *Stanford v the United Kingdom*, no 16757/90, para 26.

152 ECtHR 16 December 1999, *V. v the United Kingdom*, no 24888/94, para 86. ECtHR 15 June 2004, *S.C. v the United Kingdom*, no 60958/00, para 28.

153 See further section 10.3.2.

154 See further sections 8.2 and 8.3.1.

155 Recital 11 Preamble PD.

ECtHR's case-law under Article 6 ECHR that the right to an oral hearing can only be effectively exercised if the person concerned is able to hear and follow the proceedings before the court or tribunal and generally to participate effectively in them. Therefore arguably the EU right to a fair trial requires for example that in asylum cases free interpretation services are available for asylum applicants who do not understand the language spoken in the court.<sup>156</sup>

## 7.5 SYNTHESIS OF FINDINGS

Asylum applicants must be granted sufficient opportunity to substantiate their claim that their return will violate the prohibition of *refoulement*. Often these persons are themselves the most important source of information as to the risk of *refoulement*, for example because there is no evidence supporting the claim and/or because their personal experiences play an important role in the assessment of this risk. With regard to the asylum applicant's right to be heard the following conclusions were drawn in this chapter.

### *The right to a personal interview*

- A personal interview is indispensable in order to fulfil the requirement to carry out an appropriate examination of the asylum claim in the meaning of Article 8 (2) PD. The ECtHR's case-law indicates that a personal interview with the applicant is crucial for the assessment of the credibility of the applicant's asylum account. According to the ECtHR the absence of such interview is a factor which may contribute to a violation of Articles 3 and 13 ECHR.<sup>157</sup> Also other sources of inspiration have pointed at the importance of a personal interview in all asylum cases, including cases considered manifestly unfounded and/or examined in an accelerated procedure.<sup>158</sup>

<sup>156</sup> See also ComAT Concluding Observations on France, 20 May 2010, CAT/C/FRA/CO/4-6, para 15, where the Committee expressed its concerns regarding the fact that the administrative judge may reject the appeal against the decision refusing entry for the purposes of asylum by court order, thereby depriving the applicant of a hearing at which he may defend his case, and of procedural guarantees such as the right to an interpreter and a lawyer. The Committee recommended that any appeal relating to an asylum application submitted at the border be subject to a hearing at which the applicant threatened with removal can present his case effectively, and that the appeal be subject to all basic procedural guarantees, including the right to an interpreter and counsel.

<sup>157</sup> ECtHR 13 April 2010, *Charahili v Turkey*, no 46605/07, para 57 and ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 155.

<sup>158</sup> See notably Committee of Ministers of the Council of Europe, Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009, under IV 1.d and Parliamentary Assembly of the Council of Europe Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe member states, para 8.10.2, EXCOM Conclusion no 30 (XXXIV), 1983, on the problem of manifestly unfounded or abusive applications for refugee status or asylum.

- Therefore the exceptions to the right to a personal interview allowed for by Article 12 of the Procedures Directive may only be applied in exceptional cases.
- The determining authority of the Member State should ensure that the EU right to *refoulement* will not be undermined as a result of the absence of an interview. The asylum applicant should be given sufficient opportunity to substantiate his asylum claim, for example by submitting written information.
- The determining authorities should arguably investigate whether dependent adults have independent asylum motives which could best be explained in a personal interview.<sup>159</sup>

Article 24 of the Charter limits the Member State's discretion to interview minor asylum applicants.

- A minor asylum applicant should in principle be interviewed if he wishes so and if the age and maturity of the child permits. Only if an interview is not considered to be in the best interests of the child, for example because it would cause harm to the child, should an interview be omitted.<sup>160</sup>

*Requirements as to the conduct of the interview*

- It follows from Article 13 PD as well as several (non-binding) sources of inspiration that the right to a personal interview can only be exercised effectively if the conditions, under which interviews are conducted, allow applicants to present the grounds for their applications in a comprehensive manner.
- This means that the interviewer should be able to communicate effectively with the applicant. The principle of effectiveness requires the determining authority to ascertain that the applicant is actually able to understand the language chosen for the interview and that he can express himself effectively in this language.<sup>161</sup>
- If the applicant does not understand the language of the interview the Member State should provide free of charge for a competent and qualified

<sup>159</sup> UNHCR, *Improving Asylum Procedures*, s 4, p 15, UNHCR Guidelines of International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para 36.

<sup>160</sup> Case C-491/10 PPU, *Aguirre Zaraga* [2010], paras 64-65, Committee on the Rights of the Child, General Comment No 12 (2009), CRC/C/GC/12, para 123 and General Comment No 6 (2005), CRC/GC/2005/6, para 71.

<sup>161</sup> Parliamentary Assembly of the Council of Europe Resolution 1471 (2005) on accelerated asylum procedures in Council of Europe member states, para 8.10.2, UNHCR, *Improving Asylum Procedures*, s 5, pp 29 and 44 and UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004), p 13.

interpreter who facilitates communication. If no such interpreter is available the determining authority should take this into account when examining the case.<sup>162</sup>

- The interviewer must be competent and properly trained to interview asylum applicants.
- On the basis of several non-binding sources of inspiration it may be argued that Article 13 PD entails that interviews be conducted in a gender-sensitive manner.<sup>163</sup>
- It follows from the Court of Justice's judgment in *Aguirre Zarraga* as well as the views of the Committee on the Rights of the Child and UNHCR that Article 24 of the Charter requires that minors be heard in a child-friendly manner.<sup>164</sup>

*The asylum applicant's right to be heard following the personal interview*

- The fact that the applicant was interviewed on his asylum motives does not necessarily suffice for the Member State to comply with the EU right to be heard.
- It is conceivable that the EU right to be heard requires that the applicant be granted the opportunity to comment on the report of the personal interview. This is particularly so if the determining authority intends to reject the asylum application on the basis of the information contained in the report and the applicant was not able to comment on this information during the interview. The applicant should have timely access to the report of the interview in order to be able to exercise his right to be heard.<sup>165</sup>
- The EU right to be heard obliges the Member States at one stage of the administrative procedure to hear the asylum applicant on its main conclusions regarding the fact-finding (including the assessment of the credibility of the asylum account) and the assessment of the risk of *refoulement* as well as important pieces of evidence on which these conclusions are based. This is in particular so if the applicant's comments concerning the

162 Artt 10 (1) (b) and 13 (3) (b) PD. See also ECtHR (GC) 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para 301 and ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 145.

163 Council resolution of 20 June 1995 on minimum guarantees for asylum procedures, OJ 19 September 1996, C 274, pp 13-17, para 28, EXCOM Conclusion no 64 (XLI) 1990, on Refugee Women and International Protection (1990), HRC Concluding Observations on Austria, 30 October 2007, CCPR/C/AUT/CO/4, para 18 and ComAT Concluding Observations on Austria, 15 December 2005, CAT/C/AUT/CO/3.

164 Case C-491/10 PPU, *Aguirre Zaraga* [2010], para 66, ComRC General Comment No 6 (2005), CRC/GC/2005/6, paras 20 and 34, 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, Geneva 22 December 2009, para 72.

165 The EU right to be heard requires that the parties concerned be informed of the evidence adduced against them. See for example Case T-228/02, *Organisation des Modjahedines du peuple d' Iran v Council* [2006], para 93.

fact-finding or credibility assessment cannot be fully taken into account in the appeal-phase as a result of a limited judicial review of the fact-finding by the national court.<sup>166</sup>

*The right to a hearing before a court or tribunal*

- It follows from the ECtHR's case-law under Article 6 ECHR that the right to a public hearing guaranteed by Article 47 includes the right to an oral hearing before a court or tribunal.<sup>167</sup>
- Article 39 PD read in the light of Article 47 of the Charter arguably requires that in principle an oral hearing be held before the first instance court or tribunal reviewing the negative decision on the asylum claim.
- The ECtHR's case-law indicates that an oral hearing is especially indispensable when the court decides on important questions of fact or the credibility of the applicant and where the applicant's personal experiences play an important role.<sup>168</sup>
- It should be derived from the ECtHR's case-law under Article 6 ECHR that Article 47 of the Charter requires the Member States to ensure that the applicant is able to hear and follow the proceedings before the court or tribunal and generally to participate effectively in them.<sup>169</sup>

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<sup>166</sup> The EU right to be heard may require that a draft decision is provided to the parties concerned. See Case C-462/98 P, *Mediocruso v Commission* [2000], para 42. See with regard to asylum procedures ECtHR 2 February 2012, *I.M. v France*, no 9152/09, para 147.

<sup>167</sup> ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, para 40.

<sup>168</sup> ECtHR (GC) 23 November 2006, *Jussila v Finland*, no 73053/01, paras 41 and 47. ECtHR (GC) 11 July 2002, *Göç v Turkey*, no 36590/97, para 51.

<sup>169</sup> ECtHR 23 February 1994, *Stanford v the United Kingdom*, no 16757/90, para 26.