TRALIM 3 MANUAL

BEST PRACTICES ON IMMIGRATION AND ASYLUM

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Introduction

In September 2022, the European Lawyers Foundation (ELF) together with the Italian Bar, the Spanish Bar, the Polish National Bar of Attorneys-at-Law, the Athens Bar, the Paris Bar, the Cyprus Bar and the Law Society of Ireland began implementing the EU co-funded project TRALIM 3. For more information about TRALIM 3, please click here.

The overall objective of TRALIM 3 is to train 716 lawyers from 7 EU Member States (Italy, Spain, Cyprus, France, Poland, Greece and Ireland) on immigration and asylum law (TRALIM seminars) and on the law relating to migrants who are in a vulnerable situation (TRALVU seminars), plus short visits for lawyers from these EU Member States who work on migration and asylum to Italy, Spain, Greece, Cyprus, France and Poland. In addition to these training activities, and as a complement to them, TRALIM 3 will produce a manual on best practices in asylum and immigration cases from the 7 jurisdictions represented in the project.

For the production of the manual, each partner appointed an expert on migration and asylum who was responsible for drafting their own Member State's chapter. Each national chapter was divided into two blocks, the first on best practices identified in migration cases, and the second on best practices in asylum cases. The pages on best practice which follow are the work of these experts, as follows:

- Cyprus, Katerina Charitou
- France, Emmanuelle Cerf
- Greece, Spyros Papalexis
- Ireland, Joanne Williams
- Italy, Alessio Sangiorgi
- Poland, Magdalena Bartosiewicz
- Spain, Noemí Alarcón

We express our gratitude to these experts for the extraordinary work they have undertaken, which we are sure will be very useful for the lawyers taking part in TRALIM 3 training activities. However, this manual aims to extend its impact beyond the TRALIM 3 project and will be freely available for downloading on ELF's website (here).

We hope that in the future this manual will prove equally useful for other practitioners dealing with migration and asylum cases in the EU, which would justify the work and enthusiasm that went into its production.

Cyprus

Best practices in asylum and immigration cases

EXECUTIVE SUMMARY

In the last decades, migration and asylum form an integral part of political and legal discourse in Cyprus, the destination of an increased number of third country nationals looking for a better economic future, safety or international protection. Lawyers representing migrants, asylum seekers and refugees are facing multiple challenges including the following polarity: on the one hand, a particularly intense and pressing climate requiring that migration numbers, particularly regarding asylum, be effectively managed and, on the other, that justice and the rule of law be nevertheless respected.

Migration and asylum's main regulatory framework consists of the Aliens and Immigration Law (Cap. 105), which governs matters ranging from entry, residence permit and migration status, to return and deportation of "prohibited migrants"; and with respect to asylum, the Refugees Law (No. 6(I)/2000) which governs all matters related to the entry and applications of asylum seekers, recognition and termination of international protection and rights of individuals with international protection status.

Most cases dealing with migration and asylum matters are decided by the two Administrative Courts of Cyprus: the Administrative Court (AC), and the International Protection Administrative Court (IPAC) operating since 2019. As a rule, administrative decisions regarding migrants and asylum seekers are challenged before the AC and IPAC through the means of a "recourse". Such judicial review is governed by the laws establishing the two Courts, as well as Article 146 of the Constitution of the Republic of Cyprus. Migration matters are, as a rule, examined by the Civil Registry and Migration Department (CRMD) whilst the responsibility to receive and examine international protection applications lies with the Asylum Service. Both authorities fall under the competence of the Cyprus Ministry of Interior.

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CHAPTER 1 | IMMIGRATION

A. Arrival

In those cases where lawyers are contacted by individuals prior to their entry to Cyprus, the latter can benefit from an advocate's advice with respect to the requirements of each migration status depending on their purported visit (e.g. visitor, student, employee, house worker, spouse of EU national or spouse of Cypriot national). As a rule, visa applications must be made prior to entry before the Cypriot consulate authorities in the country of departure. Migrants need to enter the country with the necessary documentation substantiating all aspects of their application to avoid problems during passport control.

An individual seeking advice to enter Cyprus will need to be mindful of the definition of the term 'prohibited migrant' which includes categories of migrants whose entry is strictly prohibited on the basis of their financial, mental or health condition, as well as their criminal, prostitution or deportation history. However, the constitutionality and compatibility with international human rights standards of some of these requirements and whether they are outdated, open-ended or discriminatory remains to be determined by the Cypriot courts.

Migrants are further expected to enter through the legally controlled borders and have secured all necessary documentation corresponding to their desired/ applied for residence status before entering. Illegal entry would instead place them into a particularly high risk of being arrested and imprisoned. In this respect, particular attention needs to be paid to the political scene in Cyprus, so that migrants avoid entering the Republic of Cyprus through areas not controlled by the latter's government.

Following entry, migrants need to address the Civil Registry and Migration Department (CRMD) without delay to obtain their residence permit and learn about its duration and conditions. Lawyers are expected to advise their clients about the migrants' rights as well as their obligations, such as to inform the migration authorities of their home address at any given time because they might otherwise miss important correspondence that concerns them. At times, migrants might face difficulties, delays or even inappropriate conduct during visits and communications with the CRMD; in which case it is important that they complain either directly to these authorities (e.g. the CRMD or the Ministry of Interior) on their own or through a lawyer, or through a complaint to the Commissioner for Administration and the Protection of Human Rights (Ombudsman), as improvement in this area depends on the authorities and independent intervention bodies knowing of such incidents, and migrants might later need to defend their position vis-à-vis an alleged omission on their behalf deriving from an act or omission on the behalf of the authorities.

B. Detention

Pursuant to Article 18PF of the Law of Aliens and Migration, which incorporates the provisions of the Returns Directive, detention (administrative detention) is legal only where the requirements of the law are met; that is, where detention is both necessary for the specific reasons set out therein, and proportionate. In interpreting these requirements, the standards of the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights must be taken into consideration. An advocate needs to be well aware of the grounds on which detention may be ordered, and their interpretation in light of the jurisprudence of the Court of Justice of the European Union (CJEU). The fact that detention of migrants is, as a rule, linked to migrants subject to return decisions does not mean that every migrant subject to a return decision must be detained. Each requirement demonstrating the necessity of detention ('risk of absconding', 'avoids or hampers the preparation of return') deserves proper attention and substantiation from the side of the party holding the burden of proof, which is the Prosecution's Office (General Attorney's Office, Legal Service of the Republic).

On the other hand, even if detention is necessary in the sense mentioned, this does not mean that the strict proportionality requirement, derived from EU law and the jurisprudence of the European Court of Human Rights, have been complied with. With respect to the proportionality of the detention, due regard must be given to the duration and all personal circumstances of the detainee. For instance, in the event of detention pursuant to public order reasons, the Prosecutor needs to show that the gravity of the offences in question and circumstances under which the decisions of detention and deportation were issued, comply with the principles and boundaries set out by CJEU case-law. Unfortunately, alternative measures to detention are not widespread with respect to administrative detention of migrants, and judicial findings for breach of the principle of proportionality are particularly rare or non-existent.

Detainees seeking to challenge a decision order have 75 days from the date they receive knowledge of the order. This right and deadline need to be explicitly stated in the order itself, otherwise and in the event that detainee misses his/her opportunity to challenge detention because of this omission, the order might even be annulled, provided of course, that the recourse itself is found to have been admitted in good time. All detainees must be informed of the reasons for their detention, as well as their rights during detention, in a language they understand. Attention must be paid to the language and accessibility mode in which such information and rights are communicated, as knowledge thereof must be real and effective. Detainees must be informed about their right to challenge any violations of their fundamental rights and dignity during detention, including those related to the conditions of detention, access to justice and access to health care and other services. In addition, it is important that detainees be informed of their right to be detained in specialised detention facilities, separated from ordinary prisoners, and that their detention be kept under regular review. Complaints may be placed in the Ombudsman's boxes, if and where available, directly, by a detainee or filed with the responsible authorities, or with the Ombudsman, through a lawyer or an NGO.

Importantly, lawyers need to claim their clients' right to access their lawyer, and to hold meetings in private with them no matter where they might be detained, as frequently detention officers would not have knowledge or training on these rights. As a rule, minors are not detained in Cyprus, even though Article 18PH of the Law of Aliens and Migration permits this as a solution of last resort. However, lawyers might need to be prepared to defend the rights of minors not to be detained in cases of 'hidden minors', that is, those minors whose minority has been rejected by the authorities further to age assessment procedures, especially where those procedures themselves are contrary to the rights of the child and to relevant guidance provided by EU asylum law and the European Union Asylum Agency's manuals.

C. Expulsion

Certain migrants might need to be informed of the return programme run by the Civil Registry and Migration Department of the Ministry of Interior. If eligible, applicants might benefit from a monetary incentive as well as counselling meetings with the Migrant Information Center (MIHUB), in the course of an Action provided by the University of Nicosia in collaboration with the research organisation CARDET and the Cyprus University of Technology, implementing the Action entitled "Migrant Info-Centre CY/2020/AMIF/SO2.No2.1.3/4 which is co-funded by the European Asylum, Migration and Integration Fund (90%) and the Republic of Cyprus (10%). MIHUB offers a wide range of services related to, *inter alia*, housing, employment, education and general advice and guidance.

In line with Article 8(6) of Directive 2008/115/EU and Article 18i (6) of the Aliens and Immigration Law (Cap.105), the Cyprus Commissioner for Administration and Human Rights (Ombudsman) was appointed to act as the Mechanism for Monitoring Forced Return Procedures, implementing Council of Ministers Decision No. 74.333 dated 4 December 2012. The Mechanism operates since January 2019 and is entrusted with the duty to ensure an effective monitoring system of forced returns of undocumented migrants residing in Cyprus, during all stages of return procedures. Migrants subject to forced returns must mention any incidents concerning human rights violations during expulsion as soon as possible to the officers responsible for the monitoring of returns' procedures, or file a complaint. Lawyers must advise their clients under expulsion of the importance of this mechanism and of recording any violations even after arriving in their home country or country of deportation.

Upon notification of a return decision, migrants have 75 days to challenge it. During the judicial procedure, lawyers can raise all relevant reasons capable of setting the decision aside. However, lawyers need to recall that even where a migrant has never sought asylum or invoked such reasons, the Migration Director remains obliged to duly assess whether a migrant is likely to face torture or inhuman and degrading treatment or punishment in the event of return. Therefore, it is important to include, where relevant, appeal grounds regarding respect of the right to non-refoulement so that judicial review covers this crucial aspect of the migrant's return, contrary to the frequent misconception that protection from refoulement is relevant only to asylum seekers.

CHAPTER 2 | ASYLUM

A. Arrival

A significant number of asylum seekers arrive in Cyprus by chance, through smugglers who promise them an "easy way into Europe" to seek international protection. In practice, this usually involves a journey through Turkey and the areas not controlled by the Government of the Republic of Cyprus prior to entering the Republic of Cyprus (areas that are effectively controlled by the Government of the Republic). By the time they enter the areas controlled by the Republic of Cyprus, many of them will be victims of human trafficking (sexual or financial exploitation) during their stay in the areas not controlled by the Government of the Republic of Cyprus, while others will have crossed illegally through unauthorised crossing points, risking arrest and imprisonment following conviction for the criminal offence of illegal entry. This, unfortunately, is the case despite the explicit provision in the Law for Refugees that applicants entering the Republic illegally be not subject to punishment only by virtue of their previous illegal entry or residence provided that they appear before the responsible authorities to set out the reasons for their illegal entry or stay (Article 7, Law for Refugees).

Lawyers need to address the frequent misconception according to which asylum seekers arriving through the North are considered 'fake', either before the Criminal Courts (when accused of illegal entry or stay), or before the IPAC (when challenging detention or a rejection of an international protection application). Lawyers should set out the reality that illegal entry into Cyprus is frequently amongst the only routes available to refugees coming from Africa and Asia. In any event, where lawyers do get the chance to meet their clients upon arrival, it is important to advise them to apply for asylum immediately and, in any event, as soon as possible. Applicants need to be aware of their right to apply for international protection even while being under the control of detention or prison authorities. It is important that they at least express their wish to seek international protection to any official to whom they have the chance to do so, even orally, and at the earliest moment possible. This fact will be taken into consideration not only with respect to detention but also in relation to international protection recourses, in particular in relation to credibility assessment. The IPAC has, on a number of occasions taken into account the oral expression of an applicant's wish to seek international protection in recourses against detention ordered under the corresponding provision of Article 8(3)(d) of Directive 2013/33/EU. In effect, the IPAC applies *V.L*. (C-36/2020 PPU, *Ministerio Fiscal v. VL*, 25 June 2020) in recourses where there is evidence of an oral expression of an asylum application before any state authority.

Upon arrival, applicants need further to be advised to refer to any vulnerability factors potentially involved, such as the existence of disabilities, health problems, illiteracy or history of gender-based violence, as they might be crucial for the determination, and also for provision of their reception conditions. For instance, it is crucial that they be informed which conduct may amount to human trafficking and be assisted to properly report it to the responsible authorities; or to state, during needs and vulnerability assessment, whether a member of their family may be responsible for violence against them, for protection to be provided and housing arrangements to take this into account. Lawyers must also be informed of the applicants' rights to reception conditions, including housing, education and access to social assistance, in order to assist them report to the responsible services or reach out for assistance through NGOs providing relevant counselling services. Importantly the obligation to provide reception conditions to asylum seekers does not stop when the applicants are placed in detention, and a lawyer's intervention might be required to ensure it is respected.

B. Request for asylum process

Applicants must be advised to insist on their right to access the asylum process from wherever they are. Whether in detention and reception centers, police stations, prisons, or hospitals, applicants have a right to access the asylum process through any officer of such facilities/services. Some of these places will provide request forms where applicants can express their wish to access the asylum process in writing. Where this option is not offered, the applicants might be able to show that they have made requests orally. Applicants are advised to inform their lawyers of any such request, written or oral, so that their lawyers can follow them up or intervene where access to the asylum process is unreasonably delayed or denied.

In any event, access to the asylum process must be requested at the earliest possible moment, and any delay will need to be justified by the applicant. Although the timing of an application is not in itself decisive of the credibility or authenticity of the asylum application, it is a factor that will likely be considered by the administrative and judicial authorities later.

It is frequently important that lawyers advise their clients to prepare for the interview at their own personal time, when they can recall details and facts in an organised and coherent manner. Applicants can even keep written notes. Ideally, applicants can prepare the chronology of their story and clearly state the facts composing their claim's central arguments with reference to dates and locations, as far as possible. Applicants must be reminded to try and present all important parts of their claim, even those they are not explicitly invited to describe, and to make space and save energy for the end of the interview; to read the transcript of their interview with concentration and confirm their agreement or make any amendments or additions necessary to ensure their account has been recorded with accuracy.

Lawyers need to encourage the applicants not to hesitate to take the initiative and elaborate on matters that are central to their account. However, they must also be advised as to aspects of their individual circumstances that applicants themselves might not consider to be relevant, let alone important to their case. Victimisation during childhood, or within family, an LGBT identity, a disability, a health problem, gender-based violence, a history of trafficking even where it did not take place in the country of origin but on the applicants' way to Cyprus, are all factors to be raised when applying for international protection, as there is a risk they will be entirely neglected when in fact they could affect the claim and obligations of the Asylum Service in multiple ways.

Applicants must also be mindful to point out any issues concerning interpretation during the interview, and even expressly request a different interpreter where serious reasons require so. Interpretation issues can be key to the determination of an applicant's credibility, as poor interpretations can lead to an inaccurate representation of the applicant's account. This is particularly important considering cases involving dual interpretation, and in view of the fact that in Cyprus interviews are not audio recorded. To the extent that this is possible, applicants must indicate any disagreements with the interpreter's recording of the former's answers in the interview transcript and report any conduct that is not in line with the interpreter's role, such as inappropriate interventions during the interview in either direction (interviewer or interviewee), and then follow it up. Raising an interpretation issue during trial can be much more difficult to pursue, where the issue was not raised during the interview.

C. Appeals against denial of international protection

Following amendments to the Constitution of the Republic of Cyprus and the adoption of the Law for the Foundation and Operation of the International Protection Administrative Court, by which the IPAC was established, applicants have only 30 days to appeal against a rejection decision. Applicants might need to be informed of the strict deadline applicable, and within a limited time be assisted so that lawyers can set out a relatively detailed and straightforward description of the history of the applicants' claim in the recourse.

Depending on their financial situation as well as their chances of success, it might be appropriate to inform applicants of their right to apply for legal aid. However, they still need to be aware of the applicable deadline for their appeal, which must not be missed while awaiting determination of their legal aid application. It is only in exceptional circumstances, and on a case-by-case basis, that the IPAC might acknowledge that an out of time submission of a recourse is justified on the basis of a delayed decision concerning legal aid. The right to request legal aid deserves particular attention with respect to applicants in detention, as the responsibility for their transfer to court requires the timely cooperation of the detention officers.

During the judicial review of asylum rejection decisions proceedings, lawyers need to request, and insist on obtaining, access to the applicants' individual file at the Asylum Service, notwithstanding the procedural and practical barriers that might be claimed to delay or block this. Access to the asylum claimant's decision file is an undeniable right of applicants, frequently informing the applicants' case. Such access should be sought at the earliest stages of the proceedings as the file could assist the lawyers in accessing details regarding the final decision on asylum, whether the responsible examiner used COI (Country of Origin Information), or whether any vulnerability assessment/considerations took place and the content thereof, whilst some of the inconsistencies attributed to the applicants may be refuted on the basis of information in the file. The representatives of the Republic from the Office of the Prosecutor might need to intervene for access and inspection of the file to take place with the responsible service.

Where new or additional information needs to be set before the Court to be assessed, the new IPAC Regulations invite applicants to provide such information in an affidavit, together with the recourse. Although this practice is likely to accelerate the proceedings, its compatibility with the CJEU's jurisprudence remains to be seen, especially since access to the asylum folder is not provided at the filing stage of a recourse but at a later stage, delaying the applicants' possibility to be duly informed of the case against them. In any event, new or additional information by virtue of legal advice should be admitted without unreasonable or unjustified delay, yet lawyers are advised to always reserve their right to make such additions following the inspection of their clients' file.

Lawyers must always have in mind that the jurisdiction of the IPAC extends to the full and *ex nunc* assessment of all real and legal elements of the case. Appeal grounds must therefore not be limited to procedural errors but also errors of fact linked to updated facts during the time of the judicial proceedings, as the appeal will be examined on its merits.

France

Best practices in asylum and immigration cases

EXECUTIVE SUMMARY

The immigration and asylum Law in France is mainly based on the Code of Entry, Stay and Asylum (Code de l'entrée, du séjour et du droit d'asile - CESEDA), created in 2004 and which brings together all the relevant rules.

A new draft of immigration and asylum law should be examined by the National Assembly in February-March 2023. Among other things, this law would create a regional asylum hub within the administration and the administrative courts of appeal - instead of having one existing national court of asylum (CNDA) in Montreuil (Paris region) whose decisions would bind other courts, there will be a single judge subject to a rapid decision-making timetable.

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CHAPTER 1 | IMMIGRATION

A. Arrival

Most arrivals in France are by land, especially coming from Italy through the Alps or the French Riviera; also by plane and by sea (a few).

When arriving in France with a short-term visa, the migrant may stay in France for 3 months. If s/he wishes to stay longer legally, s/he will need a long-term visa for the Schengen area, from a French consulate. The long-term visa would mention what type of stay the migrant is requesting (work, family reunification, visitor etc…). If the file is complete, the visa should be delivered within a few weeks and is valid for 1 year. Then, in the 3 months following his/her arrival, s/he will have to register online with the *Office français de l'immigration et de l'intégration* (OFII) for a medical check. If this process of validation is not followed, the visa will become invalid. At least 3 months before the expiration of the visa, s/he will have to request a permit to stay. This process has to be pro-active and the administration will never remind the visa holder. The same applies for the renewal of a permit to stay.

If the visa is not granted, the applicant may challenge the express or implied visa refusal (2 months after the request was lodged), before the administrative tribunal in Nantes, which has a national jurisdiction.

When arriving in France without a visa, the applicant may request a permit to stay from the French administration (*prefecture*), without returning to his/her country of origin but under restrictive terms, depending on the type of permit. This procedure is much longer and can take years. For a few years now, in many regions, the administration has developed online registration. The online registration is not satisfactory and has been criticised by many NGOs. Often, access to the registration system is complicated or does not work. And no answer is given to the applicant even after several months. Worse, s/he can receive an automatic message stating that his/her request cannot be dealt with or that s/he has to provide further documents that s/he cannot download or that the software has changed and s/he has to renew his/her request or that it is simply rejected, without any reason. Some situations are Kafka-esque.

If the applicant does not manage to register his/her request online, the only way to register his/her request will be to lodge an emergency request (*référé*) before the administrative tribunal in order to ask the administrative judge to make an injunction to the administration to register the request. After the first registration, the administration (*prefecture*) must deliver by law a receipt (*récépissé*) to the migrant, valid for between 3 and 6 months. In practice, this is far from the case. And applicants remain in France without any temporary authorisation to stay on French territory.

Unaccompanied minors arriving in France are automatically taken in charge by the administration, only if their age is not challenged (see Chapter 2 on 'Asylum').

B. Detention

A migrant without a valid visa/permit to stay may be arrested by the police, notified of an expulsion order and sent to administrative detention.

Before leaving prison after s/he has served his/her sentence, the migrant can also be notified of an expulsion order and an administrative detention placement.

At this stage, s/he is held in a detention centre for a maximum of 90 days (up to 210 days in the case of terrorism).

The administration has to provide evidence that, during this period, it uses all due diligence to expel the migrant to his/her country of origin.

During this process, s/he can be assisted by an NGO, located within the centre. S/he can also be assisted before the judge (*juge des libertés et de la detention*) by his/her own lawyer or if not, by a duty lawyer. The lawyer can contact the NGO to obtain the client's file and can visit the client in the detention centre.

The applicant will be brought to the hearing under police escort. The hearing may take place within the tribunal or out of the tribunal in a special chamber created near the administrative detention centre. The first hearing takes place within 48 hours after the arrest. The judge can extend the detention for a first period of 28 days. Then the judge can extend it for another period of 30 days, then for another 15 days and for a fourth time for 15 days. The judge may decide to place the applicant under house arrest if the migrant provides a hard copy passport. Minors – whatever their age – may be held in detention, although France has already received a judgement against this practice from the European Court of Human Rights (ECHR).

The judge may also decide to free the applicant if the procedure is void or the detention appears irrelevant for the removal of the applicant. In this case, the migrant may remain in France. S/he cannot be served with an expulsion order and sent to administrative detention for 7 days after s/he was freed.

The expulsion order can be challenged before the administrative tribunal during detention. At this stage, the applicant will also be brought before the tribunal under police escort. If the tribunal annuls the expulsion order, the applicant remains free. Otherwise, s/he may lodge an appeal before the administrative court of appeal. The appeal does not suspend the implementation of the expulsion order (See C immediately below).

If a detainee who has served his/her sentence is notified of an expulsion order on the day s/he leaves prison, s/he will be automatically brought to a detention centre, from where s/he can challenge the decision before the administrative tribunal (See C immediately below).

C. Expulsion

An expulsion order may be notified to the migrant by the administration (*prefecture*) before the migrant leaves prison, after an arrest, when a request for a permit to stay is rejected - in the same document - or after the asylum request was rejected - in a different document - even if an appeal is pending before the national court for asylum.

The expulsion order has a deadline of 30 days within which to leave France, and can be challenged before the administrative tribunal within 1 month after notification. If the applicant is not detained, the hearing will take place after several months, from 3 months to a year, depending on the tribunal. This procedure suspends the execution of the expulsion order. After one year, the expulsion order cannot be executed although the refusal of stay remains. After one year has passed, if the administration wants to expel the migrant, it will have to notify the migrant again of a new expulsion order.

A residence ban from French territory for up to 2 years can be attached to the expulsion order. In this case, the residence ban can be challenged at the same time before the administrative tribunal. If the migrant is expelled and comes back in France during the period of the residence ban, s/he can be sent to prison for up to 3 years and served with a longer residence ban of up to 10 years.

An expulsion order with immediate effect can be notified to a non-EU migrant. In this case, s/he has only 48 hours to challenge the decision before the administrative tribunal.

In such procedures, the applicant can challenge the decision by him/herself or be assisted by a private lawyer. S/he can also be assisted by a duty lawyer, although the duty lawyer can only with difficulty intervene within the 48 hours permitted for a challenge. The duty lawyer will be designated by the President of his/her Bar from a list of specialised lawyers, who have to have received training in immigration law. The duty lawyer will assist one or several applicants during the hearings.

If the tribunal annuls the expulsion order, the applicant will not be expelled and will be freed if in detention. Otherwise, s/he will be sent back to the detention centre (see B above). If the applicant is already free, and if the tribunal has also annulled the decision of refusal to stay, s/he will be able to lodge a new request for a permit to stay, provided there is no residence ban or that such a ban was also annulled by the tribunal.

If s/he fails in his/her claim before the tribunal, s/he may lodge an appeal before the administrative court of appeal. But the appeal does not suspend the implementation of the expulsion order.

When being taken by force to a plane, some migrants refuse to embark. In this case, they are sent back to the detention centre and may face a penalty up to 3 years and a residence ban up to 10 years, although they are hardly ever prosecuted.

CHAPTER 2 | ASYLUM

A. Arrival

When an asylum seeker arrives in France, s/he might be taken in charge by an NGO.

When arriving by land, a specialised NGO can help the asylum seeker with lodging his/her asylum request before the administration.

When arriving by plane, the asylum seeker can request asylum upon arrival at the airport.

In this case, s/he will be placed in a waiting zone and will be interviewed by video by the administration (OFPRA). In most cases, the request is rejected but may be appealed before the national court for asylum (CNDA).

When arriving by sea, the asylum seeker can be helped by a specialised NGO. If s/he was rescued, s/he will be taken care of after his/her disembarkation, and a waiting zone may also be created on the spot for a temporary period if their disembarkation is outside of a point of border control.

While the request for asylum is pending, housing is not automatic because of lack of accommodation. Families and single women are prioritised but not automatically housed. Others can be housed by their friends or families but some remain homeless.

A judgement was recently made against France by the European Court of Human Rights on the ground of Article 6 para. 1 because the administration failed to comply with the order of a judge to find emergency housing for vulnerable asylum seekers (ECHR December 8, 2022, n° 34349/18, 34638/18, 35047, *M.K et a. v France*). But the Council of State (CE - *Conseil d'Etat*) has always justified the absence of housing by the lack of accommodation in the country even when the applicants are vulnerable or accompanied by small children (CE, November 19, 2010, n° 344286 ; CE *réf*. April 27, 2018, n° 419884 ; CE *réf*. Feb. 26, 2019, n° 428203). France has dedicated special housing for Ukrainians, which cannot be used by other nationalities even if there may be room, in order to maintain dedicated accommodation justified by the uncertainty of flow due to the war (CE, December 15, 2022, n° 469503).

There is no doubt that housing logistics could be improved at this stage.

The situation in the French overseas departments and territories (DOM-TOM) is even worse because of a lack of NGOs, political will, budget and appropriate housing.

B. Request for asylum process

The request for asylum has to be lodged before the French administration (OFPRA) within 90 days after arrival through the regional administration (*prefecture*). If not, the asylum seeker will be placed in priority procedure and his/her case will be dealt with by immediate proceedings, which means shorter deadlines. And s/he will not benefit from the allowance for asylum seekers.

S/he also can be deported under the Dublin procedure if his/her fingerprints were taken in another EU Member State. In reality, if the Dublin procedure is not enforced, the case will be registered and the appeal will be granted.

If the applicant lodges an asylum request in detention, s/he will be interviewed by video.

Depending on the region concerned, the registration of the request may pose a real challenge. In the Paris region, in order to make an appointment, you have to call a toll number, and wait for a long time before a human being answers, if s/he answers at all. This is the only way to make an appointment. In smaller regions, you may just show up at the prefecture and have your request registered on the spot. You will then be given a form to fill in in French, and your fingerprints will be taken. When you return with the form filled in – within 3 weeks (or 1 week if you are placed in priority procedure) – and if no Dublin procedure is conducted, you are given a temporary certificate of asylum application, renewable every 6 months until the end of the procedure.

A few months later, an interview is conducted by an agent of OFPRA at its headquarters in Fontenay sous Bois - Paris region. During this interview, the asylum seeker is assisted by an interpreter. S/he can now be assisted by a private lawyer. No duty lawyer is available before OFPRA. The interview generally lasts for 1 to 4 hours, depending on the complexity of the case, and is conducted in a room which is partially glazed, which may have an impact on confidentiality. The agent takes note of the interview directly on a computer and the interview is also audio-recorded. The asylum seeker is asked about his/her identity, family, grounds for fear of persecution or mistreatment in his/her country of origin and the identity of his/her persecutors. The interview might be more or less detailed with more or less open questions. At this stage, the asylum seeker can present all the evidence s/he might have.

The new 2023 immigration law would create asylum hubs within the regional administrations. And OPFRA interviews could take place in the regions, as is already the case from time to time within the DOM-TOM or in areas remote from Paris with a high rate of asylum requests (e.g. Nice).

The issue of interpreting, especially for languages not commonly heard, will remain and video interviews cannot be expected to be satisfactory at either the OPFRA or court stages (See C below).

C. Appeals against denial of international protection

Appeals against the denial of international protection by the French administration (OFPRA) are lodged before the National Court for Asylum (CNDA) within 1 month following the notification of the decision. In most cases, the applicant asks for legal aid, which is allowed by law. S/he now has to ask for legal aid within 15 days after the OFPRA decision was notified to him/her. If not, s/he loses the right to ask for legal aid but can still lodge the appeal. The applicant may be assisted by a lawyer but can also self-represent before the court. The request for legal aid within the 15 days will automatically give him/her the right to be assisted by a duty lawyer designated by the CNDA.

In some places, when the applicant has only a postal address, the OFPRA decision might not reach him/her. If s/he misses the deadline for appeal, s/he can make a special request to the CNDA explaining that it is not his/her fault. Before this, s/he has to request a copy of the decision from OPFRA – which is not a new notification – and several weeks can pass before s/he receives it. When s/he has received it, only a strong argument will convince the court to register the case for appeal.

Before the CNDA, after the appeal has been submitted and registered by the court, the applicant or his/her lawyer has access to the entire file: first narrative, the interview before OFPRA – audio of the interview and the notes – and the documents. Most of the applicants are assisted by a lawyer, most of the time paid for by legal aid.

In practice, hearings are currently taking place within an average of 2 months after the appeal has been lodged before the court. Delays have drastically accelerated over the past year. This means that the applicant benefits from a short time to gather all the evidence (medical documents are harder to obtain since appointments at medical centres often have to be made at least 6 months in advance).

The CNDA is located in Montreuil, Paris region. The court is composed in principle of 3 judges (one representative of the administration, one of the High Commissioner for Refugees (UNHCR) and a professional judge). Its decisions are given 3 months after the hearing takes place. In some specific cases, the CNDA is composed of 1 only professional judge. In this case, the decision is given after 1 week. The single judge should become the rule if the 2023 immigration law passes.

Additionally, if the new 2023 immigration law passes, within the regional administrative court of appeals system the CNDA will cede its position to asylum chambers.

Video conferences might gain in prominence with future regionalisation. The problem of interpreting will remain an issue, especially for languages not commonly found in France. Video conferences are already in use for hearings taking place in the DOM-TOM (i.e Martinique, Guyana and Mayotte). In those cases, the applicant is heard by video-conference by judges based in Montreuil. The translater and the lawyer are generally sitting next to the applicant, although it could happen that the lawyer pleads in Montreuil directly before the judges. The quality of the video-conferences remains an issue. And it often happens that the video cuts out or that the applicant can hardly be heard. Those poor conditions necessarily have an impact on the final decision. Before the State decided to reduce the budgets, two panels of judges and staff from the CNDA used to visit the DOM-TOM on a 15-day mission to conduct physical hearings.

The lack of in-person hearings raises questions about whether the applicant is receiving a fair trial.

Greece

Best practices in asylum and immigration cases

EXECUTIVE SUMMARY

Greece holds the lead as a gateway to the European Union from the Eastern Mediterranean route. Mixed migratory flows from African, Eastern European and especially Asian countries enter the country from different entry points. The bulk of these flows enter from Turkey, mainly by sea, with the main destinations being the North Aegean islands and Evros. Recently (end of July 2022), the global actors had been concerned about the trapping of 38 refugees in Evros, on the borders between Greece and Turkey.

Migration as a whole is a major issue for Greece, which is called upon to receive a larger number of migrants and refugees than it can objectively handle. Although the relevant legislation is scattered, the main legislation on migration is Law 4251/2014 "Migration and Social Integration Code and other provisions", with its amendments, while for asylum the recent Law 4939/2022 "Ratification of the Code of Legislation on the reception, international protection of third country nationals and stateless persons and temporary protection in case of mass influx of deported foreigners" applies.

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CHAPTER 1 | IMMIGRATION

A. Arrival

From the moment the third-country national enters Greek territory illegally and stays in it illegally, apart from the possibility of filing an application for international protection, he/she also has some other possibilities of legalisation.

The main one is the submission of an electronic application for Exceptional Reasons, in which he/she must demonstrate his/her continuous stay in Greece for the last seven years before the submission of the application, providing documents of a certain date.

The lawyer can inform the third-country national of his/her rights, help him/her gather his/her supporting documents and, above all, assure him/her which of the documents he/she already possesses are considered by law to be documents of a certain date. For example, medical certificates from public hospitals are considered documents of a certain date, while receipts of remittances preceding that date by more than five years or medical certificates from private doctors are not taken into account.

The lawyer can also advise the irregular third country national to ensure that he/she obtains documents with a definite date every year, so that in the future he/she can prove his/her seven-year stay in Greece and so obtain strong legal documents. It is common for third-country nationals to remain in Greece illegally for many years but not to be regularised because they have not taken care to obtain the necessary documents demonstrating their continuous stay.

However, apart from this possibility, which has been consistent in recent years - formerly a third-country national had to prove a continuous 10-year stay in Greece and the development of strong personal and/or family ties - a new possibility was recently introduced, due to the increased needs of the Greek agricultural economy: the issuing of a work permit to irregular third-country nationals.

For the issuing of a 3-month work permit, the lawyer can be the liaison between the third-country national and the Greek employer, prepare the file and submit the application to the competent Aliens and Immigration Department.

The recent implementation of the Memorandum of Understanding between Greece and Bangladesh on Migration and Mobility is an important breakthrough in the legalisation of irregular immigrants. It is enough for a third-country national to prove that he/she has been living in Greece prior to 9-2-2022 and to present a job-offer from an employer, in order to obtain legal status.

In this case too, the lawyer can be the liaison between the third-country national and the employer, advise them on the steps to follow and submit the relevant application.

Therefore, the third country national is entitled to apply to the competent Tax Office for the issue of a Tax Identification Number (AFM) and then to the National Social Security Fund (EFKA) for the issue of a Social Security Number (AMKA) and a Registration Number in a public institution, if he/she is employed.

To this end and to avoid long delays, it is good practice for the lawyer to request in good time from the third-country national the issue of a birth certificate by the authorities of his or her home country, its legal authentication by the Greek authorities and its translation into Greek. Although, as regards the issue of a residence permit, it is only required when the passport of the third country national does not mention his/her place of birth, the birth certificate or civil (family) status certificate is always necessary for the issue of a Social Security Number ("AMKA").

In any case, it goes without saying that the lawyer must advise third-country nationals to refrain from any misconduct, let alone criminal offences - e.g. forgery - as any arrest for lack of legal documents will lead to administrative expulsion, while any criminal conviction may, under certain conditions, deprive them of the right to have their residence or work permit issued or renewed.

It is also useful for the lawyer to point out to the third country national that when applying for the issuance or renewal of his/her residence permit, he/she must declare to the administration his/her actual residence, prove it with public documents and avoid at all costs the use of fictitious electronic lease contracts. The latter may come about either because the third-country national does not have a valid tenancy agreement, or because he or she wishes to have his or her request examined by a specific service that deals with requests more quickly. If the administration finds that the lease submitted is a false lease, it rejects the request as frivolous.

Recently, a serious issue has also arisen with electronic lease contracts which, although they are properly registered in the database of the Independent Authority for Public Revenue, are not valid as far as the owners of the property are concerned. In this case, in addition to the rejection decision of the administration, the third country national is also referred to a criminal court for forgery.

B. Detention

It is pretty common, in checks by the police, random or not, to find that a third-country national lacks legalisation documents. The third-country national may be detained for the implementation of a deportation decision to their country of origin only for the following reasons:

a) Flight risk

b) Impeding return preparation or removal process

c) Reasons of national security - public order

If a third-country national is detained, his/her lawyer can visit him at the place of temporary detention, talk to him/her in person and obtain authorisation. In this way, he/she will have access to his/her file kept at the competent Police Directorate. He/she can also obtain copies of decisions against him/her and exercise his/her legal rights.

The lawyer should advise the pre-trial detainee to comply and not to take any action that impedes his/her expulsion, as otherwise, such illegal conduct may in itself result in administrative expulsion.

Against a temporary detention for lack of legalisation documents, the third-country national has the following options:

a) He/she can put forward objections within 48 hours from the moment of his/her arrest, and prior to the issuance of a detention decision against him/her, to the police authority responsible for issuing the deportation decision. In these objections, the third-country national must state the reasons why he/she is not a flight risk, nor a danger to public order, and prove his/her assertions by any legal means (e.g. documents of previous legal residence permits, a valid lease contract, an employment contract, insurance coverage, tax returns, etc.).

In addition to stable and known residence, the third-country national must also demonstrate that he/she has the financial means (either himself/herself or with the support of a third party) to cover his accommodation and living expenses until he/she voluntarily leaves the country.

b) If the above objections are rejected or not lodged, a third-country national may raise his/her objections before the Administrative Court of First Instance, in whose district he/she is detained. In this case as well, he/she must prove that he is not a flight risk, nor a danger to public order.

In any case, best practice is for the lawyer to hold as many meetings with the pre-trial detainee and his/her relatives or friends as necessary to form a full understanding of the case and to gather all the necessary documents to prove the validity of his/her arguments.

In both the aforementioned cases, If the objections raised are accepted, the detained migrant is ordered to be released and given a period of up to 30 days for voluntary departure. In the above period, the third country national must obtain legal status, otherwise he/she must comply with the decision.

In the event of a second or further arrest for the same reason, the chances of the migrant being released again are significantly reduced.

In practice, the lawyer advises the detainee on the appropriate procedure to follow, which is chosen each time on the basis of the documents that the detainee himself/herself or his/her relatives or friends can provide. There are also cases in which the lawyer may himself obtain a supporting document or certificate at the request of the competent authority or service. One or more meetings with the detainee's relatives may be necessary to complete the file.

Schematically, if the detainee has been arrested for the first time and can provide a third party's solemn declaration that he/she can accommodate himself/herself and cover his/her living expenses until voluntary departure from Greece, it is preferable to raise objections before the police authority, as they

are less costly. The above does not apply to nationals of certain Asian countries. No hearing is foreseen in this procedure.

In all other cases, it is preferable for the lawyer to submit the objections and for them to be heard by the president on duty of the competent administrative court.

In this case, the lawyer has the right to be heard in support of the objections by the president on duty. This is always useful, as the president may request clarification or the production of further documents not in the file. In the past, some presidents used to allow a witness to be present on an exceptional basis, but, especially since the pandemic, this practice has almost disappeared.

The acceptance of objections does not affect the validity of the expulsion decision, for which the third-country national must initiate different procedures.

Finally, if, while in detention, the third-country national obtains legal status, e.g. through an online application for Exceptional Reasons (7 years) or an application for employment in the agricultural economy is approved, and there is no other ground for detention, the detention is lifted

That is why the lawyer must explore all the possibilities of legalisation of a third-country national and, if any of them actually exist, take all the necessary steps to achieve it.

C. Expulsion

Administrative expulsion applies to third-country nationals if:

a) they have been sentenced by a final decision to a prison sentence of at least one (1) year or, regardless of the length of the sentence, for a series of crimes of particular social and moral abhorrence;

b) they have violated the provisions of the Immigration Code for the entry, residence and social integration of third country nationals in the Greek Territory;

c) their presence on Greek territory constitutes a risk to public order or the security of the country;

d) their presence on Greek territory constitutes a risk to public health, because they suffer from infectious diseases or belong to groups vulnerable to infectious diseases.

In the first two categories mentioned, the administration is required to issue an expulsion decision, while in the other two, the discretion of the administration is established.

An expulsion decision against a migrant is issued, either by the Departments that examine residence permit requests - in case of rejection of a request for granting or renewing a residence permit or in case of revocation of an already valid residence permit - or by the police authorities, if during a check, it is found that the Third-Country National resides illegally in Greek territory.

If the national of a third country wishes to challenge the legality and soundness of the expulsion decision, regardless of whether he/she is detained or released, he/she must primarily file an appeal within five (5) days after the issuance of the expulsion decision, which is usually brought before the competent Police Colonel.

In this administrative appeal, the migrant must set forth all legal and factual errors that render the expulsion or return decision invalid. The decision on the appeal is delivered within three (3) days from its submission and until then, the expulsion of the national of a third country is suspended.

In practice, there is a possibility that the registration of the third-country national as a danger to public order may not correspond to reality. This may happen because the police database has not been informed e.g. of the acquittal of the person concerned in the Criminal Court of Appeal. In addition, sometimes the information provided by the police to the Department that examines permit requests may be false, as it may actually concern the registration of another person with almost identical data. The latter is not rare, due to the large number of third country nationals.

In the event that the return decision is issued by the competent authority for the granting of residence permits and is incorporated into the decision of rejection or revocation according to the above, the third-country national at first has the right to submit an objection to the decision to the Administration requesting the revocation or modification of the decision. The objection to the decision is submitted to the issuing agency within sixty (60) days of notification of the decision to the third-country national and the administration must render a decision on it also within thirty (30) days. As long as the delivery of a decision on the objection is pending, the enforcement of the expulsion decision is not suspended; however, there is the possibility to order its suspension, either *ex officio*, or following a relevant request of the third country national concerned.

In both of the above cases, the third-country national has the right to file an application for annulment, as well as an application for suspension, with a request for a Provisional Order. The deadline is sixty (60) days and starts from the day after the delivery of the decision on the administrative appeal in the event that the expulsion decision is issued by the competent police authorities, and from the day after the service of the rejection or revocation decision in the event that the return decision is issued by the competent authority for granting residence permits.

Since this is principally a legal process, the role of the lawyer is particularly important. The lawyer should ensure the collection of the necessary documents and the drafting of a proper pleading outlining the legal grounds of invalidity of the contested decision.

To this end, and in this case also, it is useful for the lawyer to hold the necessary meetings with the third-country national and to use all the information and data obtained to his/her advantage.

Both in the application for suspension and in the application for a provisional order, the applicant must prove that he/she will suffer irreparable damage if the decision is enforced. Therefore, he/she will have to prove a private circle of vital relationships in Greece worthy of protection.

The application for a provisional order is heard by the president on duty, and the lawyer has the right to be heard. As in objections to detention, the hearing may prove very important for the granting of the request.

The application for suspension is heard in council, without the presence of a lawyer, while the application for annulment is heard in court. Although the procedure is based on documents, the lawyer's request to briefly develop some important points orally regarding the application or to provide clarifications is usually accepted.

Finally, as long as the third-country national is a detainee, he/she has the right to submit immediately a declaration of intent - a request for international protection. As long as the examination of his/her request for international protection in first and second instance is pending, the enforcement of the expulsion decision is suspended. Such requests are examined within a fast-track procedure, and their abusive exercise should be avoided, so that the competent services are not further burdened with unnecessary material.

CHAPTER 2 | ASYLUM

A. Arrival

The increasing scale and complexity of migration flows creates a challenging environment at the EU's external borders. People with different motivations and goals move in parallel, using the same routes and means of transport.

Given that upon the arrival of refugees-immigrants at the points of entry, it is particularly difficult to find and contact a private lawyer, the need for a first approach and information about their legal rights is usually covered by lawyers cooperating with NGOs.

Indeed, mixed teams of lawyers and interpreters carry out visits to detention centres or airports for scoping interviews and assistance to asylum seekers, as well as visits to refugee reception areas, to inform applicants about asylum-related matters and to implement intervention operations and actions before the relevant authorities.

Moreover, member missions of collaborating lawyers and interpreters to refugee entry points (outermost regions) are carried out to inform the authorities on asylum-related matters and to provide legal assistance to asylum seekers. To this end, lawyers often produce and disseminate information material on asylum and human rights matters to all parties concerned.

Since the state authorities are exclusively responsible for the reception and first contact with the entrants, it becomes clear that the presence of a lawyer is a guarantee for compliance with the legal procedure and the use of every possible option it offers in the interest of the applicant.

The intervention of the lawyer for asylum seekers is particularly important when - for any reason - their access to the asylum procedure is blocked or is made impossible.

It should be kept in mind that a large number of applicants, for a number of reasons, do not trust the state authorities of their country of origin, and the same distrust is conveyed – deliberately or not - to the host countries.

As someone independent vis-à-vis the state authorities, a lawyer is the guarantor of the correct application of the legal procedures and the absolute respect of the individual rights of the asylum seeker.

Ideally, the potential asylum seeker should be approached in the presence of a psychologist, so as to ensure the most appropriate approach to the applicant and to establish a climate of absolute security, confidentiality and trust.

B. Request for asylum process

A lawyer or legal adviser can assist the applicant for international protection in the initial stages of the procedure: by submitting the application, at his/her personal interview, and by submitting a memorandum on the interview.

In particular, legal assistance includes:

a) holding a meeting - meetings with the applicant for the investigation and best possible documentation of the reasons for international protection invoked (probably requiring the assistance of an official or unofficial interpreter);

b) the collection or search of all the necessary documents or certificates documenting the reasons for international protection invoked by the applicant; the submission of the relevant supporting documents can be done at any stage of the procedure;

c) the filing of an application;

d) the proper preparation of the applicant's interview;

e) support during the formal interview - the lawyer is allowed to ask the applicant questions only at the end. In addition the lawyer him/herself can make a statement in the form of a comment at the end of the procedure; and

f) compilation and submission of a memorandum on the interview.

The assistance of the lawyer appears to be particularly important for the applicant, since, in addition to the legal documentation of the application and highlighting the essential elements of the background, it provides the applicant with a feeling of security and confidence.

In addition, if the applicant is temporarily detained, the lawyer can visit him/her at the place of his/her temporary detention, talk to him/her and, if he finds that there are indeed grounds for international protection, advise him to submit immediately a declaration of intent through the police authority.

The declaration of intent initiates the fast-track examination procedure of the application for international protection in first and second instance and, while it is pending, the implementation of the forced return of the applicant is suspended.

It is very common for asylum seekers, because of their fear of the authorities in their home country, not to declare their true identity to the Greek authorities. This common practice is also facilitated by the specific nature of these applications, which forgives the non-production of genuine certificates by the authorities from the applicant's country of origin.

However, this illegal practice, apart from being a criminal offence, is very likely to create insurmountable problems for the asylum seeker in the future in trying to change his/her true identity. Apart from the inability to adequately and reasonably justify to the administration how the change of his/her data took place, he/she very often finds himself/herself confronted by the Greek criminal justice system.

For the above reasons, it is particularly important and useful for the lawyer to convince the asylum seeker to declare his/her true identity from the beginning.

C. Appeals against denial of international protection

After the examination of the application for international protection in the first instance has been completed and the applicant has been served with the rejection decision on his/her application, the second stage of the procedure before the Appeals Authority follows. At this stage the applicants have the opportunity to challenge the rejection decision and present their claims a second time, in order to be recognised as beneficiaries of international protection.

At this stage of the procedure, for the first time, applicants are provided with free legal assistance from the Asylum Service itself. In the earlier stages of the procedure (submission of an application, personal interview, filing of a memorandum on the interview), applicants are entitled to consult a lawyer or legal adviser at their own expense. Their right is therefore substantially limited, as only a small number of applicants can afford to hire a private lawyer to support their case.

The Asylum Service has a register of lawyers who can support applicants free of charge during the submission and examination of the appeal in the second instance. A prerequisite for the provision of free legal assistance to applicants is that the applicant is not represented by a lawyer other than one listed on the Register of Lawyers of the Asylum Service. In fact, if during the secondary examination procedure, the applicant assigns his/her representation to another lawyer, the provision of free legal assistance automatically ceases.

For free legal assistance, applicants interested in international protection must submit a relevant application either to the regionally competent Regional Asylum Office, or through the electronic platform of the Ministry of Immigration and Asylum, before filing an appeal.

At this stage, legal assistance - free or not - includes:

a) the drafting and filing of an appeal - if the appeal does not have a suspensory effect, then also the filing of a stay request;

b) holding meetings with the applicant for the appropriate preparation of his/her case (if communication between the free lawyer and the applicant cannot be ensured otherwise, interpretation services are provided free of charge - up to two hours in total - by the Asylum Service); and

c) the drafting and filing of a memorandum and any other required document item.

Access to legal assistance is the cornerstone of the process of examining requests for international protection in the second instance. The lawyer, after hearing the applicant's allegations, undertakes to collect the necessary information to check whether all procedural guarantees have been observed in the previous stages of the procedure, to challenge any defects in the rejection decision in the first instance and to present the facts as fully as possible justifying the applicant's status of international protection. Indeed, in order to provide the best possible representation, the lawyer may ask the applicant to provide him/her with evidence, such as extracts from the local press, in order to prove that the conditions of eligibility for international protection are met, as often the sources available to the Asylum Service are not up to date. At the same time, the lawyer ensures that the legal deadlines for filing an appeal and filing a memorandum before the Appeals Authority are met.

As the procedure for examining the request in the second instance is – usually – made in writing, legal assistance is necessary and the role of the lawyer is decisive.

However, despite the legislative provision of providing free legal assistance in the process of examining requests for international protection in the second instance, in practice this remains partial because of the numerous administrative, legislative and practical obstacles.

For instance, applying for legal aid through the Ministry of Immigration and Asylum's online platform is likely to be a hindrance for a significant number of applicants. The fact that the services provided by the electronic platform are only in Greek and English makes its use unfriendly to applicants who either do not know Greek or English, or are not familiar with electronic media.

Another problematic issue is the lack of timely notification of the applicants regarding the assignment of their case to a lawyer listed by the Asylum Service Registry, taking into account the short deadlines for filing an appeal.

The recent, post-coronavirus "tactic" of the Asylum Service to deliver rejection decisions fictitiously is also problematic. In these cases, the applicants are deprived from the beginning of effective legal assistance - free or not - as they are asked to justify the late submission of the appeal, due to the existence of *force majeure* and to demonstrate it with documents.

In particular, fictitious service means that the rejection decision is not served in a manner in which the applicant will take note of it (by post to the address indicated, by e-mail or in person) but is served on the head of the competent asylum office and the applicant is deemed to have taken note of it from that date. Unforunately in some cases decisions are fictitiously served without any attempt to properly serve them, so in practice applicants risk missing the deadline for their appeal. In such cases, the lawyer, who generally has free access to the Asylum Services under the Greek Code of Lawyers (unlike applicants who are not allowed access to the Asylum Services without a scheduled appointment, which are given for limited actions and certainly not for simple information on the progress of their case) must ensure that he/she stays regularly informed of the progress of the client's application so that, even if the decision is fictitiously served, there is time to make an appointment within the prescribed time limits.

Against the appellate rejection decision of the Appeals Authority, the applicant can appeal to the competent Administrative Court of First Instance by lodging an application for annulment and suspension. However, there is no provision for a request for a provisional order

The time limit for lodging an application for annulment is thirty days, starting from the day after the notification of the second instance decision. In this case, too, the lawyer should invoke those grounds for annulment - e.g. lack of legal grounds - which will lead to the annulment of the rejection decision and the recognition of the applicant's status as a political refugee.

Ireland

Best practices in asylum and immigration cases

EXECUTIVE SUMMARY

Historically, Ireland was a migrant-producing nation; inward migration is a relatively recent phenomenon. In recent decades, however, a vibrant legal community has developed in Ireland with expertise on all aspects of international protection and on diverse immigration-related issues. The legal profession (which is made up, primarily, of solicitors and barristers) provides advice, assistance and representation before the domestic authorities and courts, the Court of Justice of the EU and the European Court of Human Rights in the field of international protection and also in relation to visas, employment permits, family reunification, free movement of EU citizens and their family members, long-term residency, citizenship and naturalisation. This Chapter highlights some of the best practices that have developed in Ireland across these fields.

Solicitors are the first and primary point of contact for migrants in Ireland. They provide a wide range of client-facing services. Solicitors consult barristers for specialist advice, and they brief barristers if litigation is contemplated. This Chapter focuses primarily on the best practices developed by solicitors, but many of the same practices are followed by barristers.

Co-funded by the European Union

CHAPTER 1 | IMMIGRATION

The legal framework regulating immigration law, practice and procedure in Ireland is made up of a number of primary statutes and a series of statutory instruments. The principal statutes are the *Aliens Act 1935,* the *Irish Nationality and Citizenship Acts 1956-2004,* the *Immigration Acts 1999, 2003 and 2004*, the *Illegal Immigrants (Trafficking) Act 2000,* and subsequent amendments to these Acts. Among the most frequently consulted statutory instruments are the *ECs (Free Movement of Persons) Regulations 2015* (SI No. 548 of 2015), as amended, which give effect to Directive 2004/38/EC. Information can be found in various Department of Justice *Policy Guidelines* about how it applies the legislation.

A. Arrival

As is the case in many countries, different immigration rules apply in Ireland to persons from outside the EEA, on the one hand, and to persons from within the EEA, the UK and Switzerland, on the other. This Chapter focusses largely on the services provided by solicitors and barristers to persons from outside the EEA, the UK and Switzerland (described hereafter, for ease of reference, as 'migrants').

Migrants arrive in three ways: by air, via the land-border with Northern Ireland, and (in lesser numbers) by sea. (Unlike its nearest neighbour, Ireland does not have many arrivals in small boats.)

Many migrants arriving in Ireland have already applied for, and been granted, an employment permit and/or a visa or another form of pre-clearance (as appropriate), before arriving in the State. Solicitors can, and do, assist them to prepare such applications before they begin their journeys by explaining what documents are needed and where they should be submitted. If an application for a permit or visa is refused, the solicitor reviews the reasons given and, if there are grounds for doing so, assists the applicant to bring an appeal or to seek an internal review of the refusal (as appropriate). After exhausting all other remedies available to them, the solicitor briefs a barrister and, if there are grounds for doing so, they commence judicial review proceedings in the High Court.

The most common issue that solicitors encounter with newly-arrived migrants is the refusal of 'leave to land' at the airport, which is addressed under 'Detention', below.

If contacted by a migrant who has recently arrived in Ireland with a valid immigration 'permission', who is granted leave to land and who plans to stay for more than 90 days, the solicitor explains how, where and when to *register* with the immigration authorities. After the client has registered, the solicitor explains what the immigration '*stamps*' on their passport mean in practical terms and what conditions apply to their stamp. If appropriate, the solicitor advises the person about how, where and when to *renew* their permission, and how to *change* from one type of permission to another.

General

Irrespective of whether they are consulted at the point of arrival or at a later point, solicitors and barristers advise their clients of the importance of being truthful and candid in all of their dealings with the State's immigration authorities, and encourage them to disclose all relevant facts at the earliest possible opportunity. They explain that non-disclosure of material facts – inadvertent or otherwise – may have a significant detrimental effect on any future application.

Solicitors advise their clients about how to seek out and submit the best evidence to support any applications, i.e. the original document or, if the original has been lost or destroyed, a certified copy. They also assist clients to obtain reliable, certified translations of all relevant documents. Solicitors submit documents to decision-makers on behalf of their clients. They use registered post to submit original documents. Solicitors specify in a cover letter whether the document enclosed is an original or a copy and, if it is a copy, they explain why the original is not available. Solicitors advise clients to retain the envelope/packaging of any documents sent to them from their country of origin and, if appropriate, to submit it to the decision-maker; this can help to establish the authenticity of the document. In appropriate cases, solicitors assist clients to put sworn evidence before the decision-maker.

Solicitors advise their clients to furnish them with copies of any documents that the client submits directly to the decision-maker. Solicitors keep a careful record of all documents submitted, the dates on which they were submitted, and any correspondence acknowledging of receipt, and they retain a good quality, colour digital copy of each document. If necessary, solicitors apply for original documents to be returned if they are needed, e.g. to renew a passport, to register the birth of a child, or for the purpose of travel.

Solicitors strive to provide information and advice to clients using plain language. If using an interpreter, the solicitor assumes that the interpreter is not familiar with legal terms. Where possible, the solicitor avoids legal jargon and, if necessary, explains in simple terms what legal terms mean. The solicitor ensures that the client is aware of the importance of asking for clarification if anything that the interpreter says is unclear, and stresses that any concerns about the competence of the interpreter, or the quality of interpretation services, should be immediately drawn to his / her attention. Solicitors are at all times watchful of the body language of the applicant and the interpreter, and they query any apparent confusion that arises. Solicitors are also vigilant to intervene if the interpreters is not acting in a professional way, and ensures that the interpreter does not seek to advise or assist the applicant in an inappropriate way or to give evidence themselves.

Solicitors advise their clients to update them on any new developments or changes of circumstances after they have submitted an application (e.g. the birth of a new child, a new job or course of study, an engagement, marriage, separation or divorce, etc). If this happens, the solicitor immediately brings any relevant developments to the attention of the decision-maker.

Solicitors emphasise the importance of notifying the immigration authorities immediately of any change of address, and of the potential consequences of failing or neglecting to do so.

All written representations and documents drafted by a solicitor on behalf of their client are clear, concise and case-specific. Solicitors know that the decision-maker is likely to be working from a large hard-copy file, under time constraints, with many other files piled up awaiting their attention, and with little if any secretarial or administrative support. Solicitors draft all correspondence in such a way to make the decision-maker's job as easy as possible. If appropriate, written representations are drafted in such a way that, if the decision-maker accepts them, they can readily be incorporated into a written decision.

Solicitors and barristers are conscious that hyperbole or exaggeration is unlikely to impress a decision-maker or to assist their clients, and they take care to draft representations in a dispassionate, analytical fashion.

If there is a protracted stream of correspondence between the decision-maker and the solicitor, the solicitor ultimately compiles and submits to the decision-maker either (i) a full list of all letters and documents exchanged, noting the date and subject-matter of each, and any enclosures, or (ii) an indexed, paginated booklet of all relevant materials. This helps to ensure that the decision-maker does not miss out on anything significant.

B. Detention

Immigration-related detention occurs primarily in three contexts in Ireland: (i) at a port of entry, when a person is refused '*leave to land*' (i.e. permission to enter the State); (ii) for the purpose of giving effect to a deportation order, a removal order or an exclusion order, and (iii) where a protection applicant is perceived to have breached immigration and/or protection legislation. (Detention on suspicion of criminal activity can also occur, but is outside the scope of this Chapter).

There is no dedicated 'holding centre' for immigration detainees in Ireland; detainees are, instead, held in a police station or prison (among the general prison population). A police station was opened within the boundary of Dublin airport in 2022 which has facilities to detain people who are denied 'leave to land'. This enables the police ('the Gardaí') to quickly put the person on an outbound flight. Because this can happen very quickly, solicitors know they need to act speedily when contacted by or on behalf of a person who has been detained at the airport.

The solicitor immediately seeks a copy of the written reasons given by the immigration or police officer for the refusal, and scrutinises the reasons given.

The solicitor seeks to have a consultation in private with the detainee (optimally in person but usually by phone, at least initially) and, if necessary, ensures that a competent interpreter is present both during their consultations and during any subsequent interaction that the detainee has with immigration officers or police officers.

The solicitor requests that the detainee is reviewed by a doctor, or by a nurse reporting to a doctor, and advocates for all necessary medication and medical treatment to be provided to the detainee.

If so requested, the lawyer notifies family members, friends, and the relevant Embassy about the detainee's situation.

If the person is being held in a prison, the lawyer advocates for full adherence with the Prison Rules, including in relation to visits from family members and friends.

The solicitor ensures that the detainee understands why they have been refused leave to land, and takes detailed instructions about their personal circumstances. The solicitor works with the detainee (and, with their consent, with their family members or friends) to obtain reliable, up-to-date evidence clarifying any matters in dispute, e.g. the detainee's identity, nationality or nationalities; the veracity of their passport, visa, employment permit, or any other documents they have presented (e.g. hotel bookings; job offers; acceptance letters from a school/college, etc); whether or not they are visa-exempt; the purpose of their visit to Ireland; their ability to support themselves while in Ireland, etc. If it has been confiscated, the solicitor seeks internet-enabled access to the detainee's mobile phone for the purpose of obtaining verifying information (e.g. bank accounts).

Based on the information provided by the detainee, the solicitor assesses whether or not the detainee can seek to remain in the State on an alternative basis to that presented at the port of entry (bearing in mind that the detainee might not be aware of all of his options). The solicitor advises the detainee of his/her entitlement to apply for international protection from the place of detention and, if the detainee wishes to do so, assists him or her to do so. The solicitor advises the detainee that, depending on the circumstances, they might remain in detention until any such application is processed to finality, though that does not often happen.

If matters are not resolved in favour of the detainee within a short period of time, the solicitor may brief a barrister and, if there are grounds for arguing that the person is being unlawfully detained, they may bring a *habeus corpus*-type application before the High Court, seeking his release.

Alternatively, if the detention is not unlawful but there are other grounds for challenging the refusal of 'leave to land', the solicitor and barrister may bring an urgent application for leave to bring judicial review proceedings. They act, at all times, with utmost good faith when bringing any such application. If time allows, the application is made on notice to the State authorities.

The solicitor may ask the authorities to provide an 'undertaking', i.e. a promise not to remove the person until the legal proceedings have been determined. If the authorities do not provide an undertaking and arrangements are being made to secure the person's removal from the State, the solicitor and barrister may seek an urgent injunction from the High Court preventing the authorities from removing the person pending the determination of the leave application and, if leave is granted, pending the final determination of the judicial review proceedings, to include any appeal.

A similar course is followed if the solicitor is contacted by or on behalf of a person who has been detained on foot of a deportation order (or, similarly, an exclusion order or a removal order). Further and alternative practices followed in those circumstances are set out under 'Expulsion' below.

If contacted by a protection applicant who has been detained, the solicitor advocates for the detainee to be brought before a District Court judge without delay and represents the detainee in court. Depending on the circumstances, the solicitor may argue that there are no grounds for his/her continued detention and may seek the detainee's release; if necessary, subject to suitable conditions. As in any bail application, the solicitor liaises with the detaining police or immigration officers before the court hearing to ascertain the officers' objections to the detainee's release, and they work to negate or minimise the officers' concerns - e.g. by identifying a reliable independent surety and furnishing police officers with their details, by identifying the source of any money that could be lodged in court to secure the person's release, and by furnishing officers with the detainee's proposed address. If the detainee is not released, the solicitor advocates for him/her to be returned before the District Court as soon as it becomes apparent that there are no longer any grounds for detention and, in any event, no later than 21 days after their first court appearance, so that their detention can be reviewed afresh.

C. Expulsion

Frequently, a solicitor's first point of contact with a migrant is after the person has received notice of the Minister for Justice's intention to make a deportation order against them. The solicitor then drafts robust written representations on the person's behalf, outlining why such an order should not be made. The solicitor ensures that these representations are submitted within the timeframe specified in the notice issued on behalf of the Minister. If there is any delay in taking full and clear instructions, the solicitor writes to the Department of Justice indicating their intention to make representations, outlining their difficulties and seeking an extension of time.

The solicitor arranges a consultation in-person with the foreign national, if necessary with the assistance of an interpreter, and takes detailed instructions on all aspects of their private and family life.

If the applicant's instructions point towards an entitlement to reside in Ireland on the basis – for example – of a marital or familial relationship with an Irish national or other EU citizen, or a UK national, or parentage of an Irish citizen child, the solicitor works with the applicant to compile a dossier of cogent, reliable, up-to-date documentary evidence to prove that a genuine, continuing relationship exists based on marriage / cohabitation / family ties / parentage. If a birth certificate is not available to establish a parental relationship, the solicitor may advise the applicant to seek out DNA evidence. Where free movement rights are relied upon, the documentary dossier will include proof of the EU citizen's residence and circumstances (e.g. work / study / resources), and, where appropriate, the relationship of dependency between the applicant and the EU citizen. Where parentage of a citizen child is concerned, the dossier will include proof of the applicant's active and continuous involvement in the child's upbringing (financial, emotional, social and educational) and – if relevant – establishing the situation of the other parent.

In the alternative, the solicitor may assist the person to apply for permission to remain in Ireland on 'humanitarian' grounds. Representations seeking permission to remain are case-specific but generally highlight the following, at a minimum:

- The length of time that the applicant has been resident in Ireland and the legal basis for his/her residence;
- The strength and depth of the applicant's integration into Irish society (supported by letters of reference from friends and neighbours, evidence of volunteering activities, engagement in social and cultural projects, etc);
- The applicant's employment history in Ireland and future employment prospects (including the question of whether or not he/she is likely to require financial support from the State);
- The applicant's character and conduct (including a lack of criminal convictions, etc);
- The nationality, language and ethnicity of any spouse, and any obstacles that the spouse and any dependent children would face if they wished to join or visit the person in their country of origin;
- The educational and social progress of any dependent children in Ireland.

Solicitors will, in their representations, endeavour to demonstrate the detrimental effect upon the person and on any family members of the proposed deportation.

If the applicant or any of their close family members suffers from a medical condition, the solicitor seeks out and submits the following:

- Reliable, up-to-date documentation showing the extent, severity and likely duration of the medical condition and the required medication / treatment / care;
- Reliable, up-to-date country of origin information ('COI') about the availability and cost of the necessary medication / treatment / care in the applicant's country of origin;

- Medical evidence or other expert evidence regarding the likely effect of the discontinuation or diminution of medication / treatment / care, and (if relevant) the lack of family support on the sick person.

If a person attends a solicitor only after a deportation order has been issued, the solicitor takes instructions to assess whether or not there are grounds for applying for the amendment or revocation of the order. The solicitor brings any relevant new or newly-discovered evidence to the attention of the Minister (and will explain why the evidence was not submitted previously) and/or highlights any deficiencies in the process whereby the deportation order was made.

Solicitors fully exhaust all statutory appeals/review processes available to them before briefing a barrister and seeking leave to bring judicial review proceedings in the High Court in relation to a deportation order. Solicitors and barristers abide strictly by their duty to act with utmost good faith in the course of all *ex parte* applications, and they disclose all relevant information, including information that is unfavourable to the applicant.

If the person in question has, in the past, received a negative decision on an application for international protection but there has been a relevant change in their personal circumstances or in their country of origin since the date of that decision, the solicitor may seek the consent of the Minister for the person to make a fresh ('subsequent') application for international protection. The solicitor will, in the application, explain why any newly-discovered facts were not brought to the attention of the decision-maker in the course of the previous application. Any such application will be supported by cogent, reliable, up-to-date COI. If the application is refused, the solicitor will consider whether or not there are grounds for bringing an appeal to the *International Protection Appeals Tribunal.*

CHAPTER 2 | ASYLUM

A. Arrival

Under the *International Protection Act 2015*, which came into force at the start of 2017 and has subsequently been amended, Ireland introduced a single application procedure for persons seeking to be recognised as refugees and persons in need of subsidiary protection (known collectively as 'international protection'). Numerous statutory instruments have been made under that Act; among the most frequently consulted are regulations establishing appeals procedures and separate regulations designating certain 'safe countries of origin'. Further effect has been given to Regulation (EU) No. 604/2013 by the *EU (Dublin System) Regulations 2018* (SI No. 62 of 2018), as amended, and to Directive 2013/33/EU by the *ECs (Reception Conditions) Regulations 2018* (SI No. 280 of 2018), as amended.

It is not common for solicitors to have access to prospective applicants immediately after they have arrived in Ireland or, indeed, at any time prior to the making of an application. Applications at sea-ports occur infrequently; they tend instead to be lodged either at Dublin airport or at the *International Protection Office* ('IPO'), which is close to Dublin city centre. Applicants are required to complete a short application form and to attend a brief interview at that time or a short time afterwards. It is usually only at that stage that the applicant is advised of their entitlement to apply for legal aid. If they apply to the Legal Aid Board, they are required to pay a contribution of €10 and are allocated a solicitor as quickly as possible. They may, alternatively, seek the services of a solicitor privately.

An exception applies in the case of an unaccompanied or separated child. If the child indicates his/her intention to apply for international protection, he or she is referred to the Child and Family Agency and a solicitor becomes involved then, before the initial interview. The solicitor works with the social worker, the child and any known relatives or friends to submit all available documentation evidencing the child's age at the earliest possible opportunity. The solicitor requests that a vulnerability assessment is carried out; that a trained and experienced IPO caseworker is assigned, and that the case is given priority. The solicitor attends the initial interview with the child, together with the person who is *in loco parentis* (e.g. the social worker).

If contacted by or on behalf of a protection applicant who has not been provided with any or adequate material reception conditions (e.g. housing, food, financial allowances, medical card, health screening, ancillary supports), the solicitor makes representations to the relevant State service on their behalf. Solicitors may advocate for a vulnerability assessment to be carried out and, if appropriate, for special reception conditions to be provided. If the State withdraws or reduces the material reception conditions provided to an applicant, the solicitor may seek an internal review of that decision and, if unsuccessful, may act quickly to bring an appeal to the *International Protection Appeals Tribunal* ('IPAT'). In the event of a persistent failure to meet the applicant's basic needs, the solicitor may brief a barrister and seek the intervention of the courts.

Solicitors also advise applicants about their entitlement to seek access to the labour market if they have been waiting for more than six months for a decision from the IPO and, if necessary, will assist them to complete the necessary paperwork. Solicitors ensure applicants are aware that, if their income exceeds a certain threshold, this may impact upon their financial allowances and they may also be required to contribute financially to their reception conditions. If the applicant is refused access to the labour market or if their access is withdrawn or not renewed, their solicitor may seek an internal review and, if unsuccessful, may act speedily to bring an appeal to the IPAT.

B. Request for asylum process

As soon as they are allocated an applicant for international protection by the Legal Aid Board, or instructed by an applicant privately, the solicitor immediately requests from the IPO a full copy of the applicant's file to date, including their initial application form, the record of their preliminary interview, the records of any interviews conducted under the Dublin III Regulation, and copies of any documents submitted by or on behalf of the applicant or taken from them at the airport. If the applicant is from a designated 'safe' country, the solicitor also seeks a copy of the Questionnaire completed when the applicant first attended at the IPO.

The solicitor arranges an in-person consultation with the applicant at the earliest possible opportunity and ensure that a suitable interpreter is present, where required. The solicitor conducts a thorough review of the full file with the applicant at that consultation. If any mistakes or omissions are identified, the solicitor immediately writes to the IPO to clarify and explain, and to seek copies of any documents not provided to him/her.

The solicitor ensures that the applicant's language and dialect are correctly recorded in the initial documents and conveys all relevant information in that regard to the IPO without delay.

If the information provided by the applicant and/or a EURODAC fingerprint 'hit' raises the possibility of a transfer under the Dublin III Regulation, the solicitor takes detailed instructions and, if there are grounds for opposing a transfer, drafts written representations outlining those reasons. If appropriate, the solicitor seeks out and submits any reliable, up-to-date COI demonstrating that there are systemic and generalised deficiencies in the protection system or reception conditions of the country to which the applicant is likely to be transferred, or demonstrating any specific deficiencies that are likely to affect the applicant and his/her dependent family members having regard to their personal circumstances.

A small number of applications for international protection are deemed inadmissible. If this happens, the solicitor scrutinises the written report issued by the IPO outlining its reasons, and takes detailed instructions to assess whether or not there are grounds for appealing to the IPAT. Solicitors are conscious any such appeal will be considered on the papers without an oral hearing, and they work diligently to prepare the grounding documents accordingly.

If the application is accepted and Ireland is deemed responsible for considering the application, the solicitor assists the applicant to complete his/her Questionnaire. As part of that process, the solicitor stresses how important it is to provide detailed, accurate information relating to their own individual experiences and fears. The solicitor advises the applicant of the damaging effect of providing incomplete, vague, ambiguous, false or misleading information to the IPO. If the applicant has already submitted his/her Questionnaire before availing of legal advice but the lawyer finds, upon reviewing it, that it has not been completed in full and with sufficient clarity and detail, the solicitor will submit additional information to the IPO on behalf of the applicant without delay and will explain why the information was omitted when the Questionnaire was first completed.

Solicitors are mindful that even the most articulate applicants can have literacy problems and are often unwilling to disclose those problems, especially in the presence of an interpreter from their country of origin. If it is apparent that someone other than the applicant has drafted correspondence or completed the Questionnaire on his/her behalf, the solicitor will gently probe why this happened and will insist that any literacy problems are drawn to the attention of the IPO. It is important that this is done before the substantive interview because an illiterate or semi-literate applicant may be unable to review and correct the written record created at that interview, and may sign the interview record (and thereby acknowledge that it is accurate) without actually knowing what it says.

The solicitor advises the applicant about the importance of seeking out and submitting all available documentary evidence to substantiate their application. The solicitor explains that, if it is safe to do so, the applicant should seek documents by contacting family, friends and/or by contacting any institutions or groups with which the applicant was associated in their country of origin, and the solicitor encourages the applicant to take these steps as soon as possible.

The solicitor advises the applicant to retain the envelope / packaging in which documents arrive from their country of origin, and to submit them with the documents. If a formal document such as a passport, birth certificate, ID card or voting card bears all or most of the features described in COI, the solicitor highlights this when submitting the document.

If a date has not already been fixed for the applicant's substantive interview, the solicitor corresponds with the IPO to seek the earliest available date, and follows up on a regular basis (if necessary, indicating that the intervention of the courts will be sought if a date is not fixed within a specified period).

At least one week before the date fixed for the substantive interview, the solicitor submits (i) case-specific written legal submissions, drawing attention to any relevant case-law and addressing any legal issues that might arise in the particular circumstances of the case, and (ii) a select amount of focussed, up to date, reliable COI, highlighting the specific paragraphs that support the applicant's claim. The solicitor is conscious that it is of little assistance to submit a large volume of wide-ranging COI without pinpointing the passages that are specifically relevant to the applicant's case.

Solicitors are watchful for indications of vulnerability and, if necessary, request that additional supports are provided to the applicant at the substantive interview to enable them to participate as fully as possible. For example, if an applicant presents as a survivor of sexual or gender-based violence, the solicitor asks if she has a preference for an interviewer and/or interpreter of a particular gender and, if so, the solicitor advocates for this on her behalf.

If there are indications that the applicant has suffered physical or mental pain or suffering as a result of past persecution, and that this was inflicted by State agents or other persons acting in an official capacity, the solicitor considers whether or not to refer the applicant directly to SPIRASI (Ireland's national centre for victims of torture) for a medico-legal report. In the alternative, or where the person presents with injuries inflicted by non-state actors, the solicitor advises the applicant to ask his/her GP for a referral to a specialist medical practitioner at the earliest possible opportunity. If a referral is made, the solicitor liaises with the GP and/or the specialist (with the applicant's consent) to obtain a medico-legal report and, to that end, asks the practitioner employs the terminology used in the Istanbul Protocol. If the report supports the applicant's case, the solicitor submits it to the IPO as soon as it is available. If appropriate, the solicitor seeks postponement of the applicant's substantive interview to await the medico-legal report, but consults with the applicant before doing so to ensure that the applicant is aware that there is likely to be a delay, and perhaps a substantial delay.

If the applicant is availing of rehabilitative services or other forms of medical care from SPIRASI or from any other professional, the solicitor seeks his/her consent to obtain up-to-date documentation from the case-worker, counsellor, psychologist, psychiatrist, etc., as appropriate, and – if such documentation supports the applicant's case – submits it to the IPO before the substantive interview. If there is any evidence of a heightened risk of re-traumatisation, the solicitor draws specific attention to this and seeks written confirmation that the interviewer (who may be a staff member or a member of an external panel of interviewers) has received and considered this evidence in advance of the substantive interview.

If an applicant presents as a survivor of human trafficking, the solicitor furnishes him/her with information about the supports available. If the applicant chooses to avail of such supports, the solicitor seeks consent to liaise with the applicant's counsellor, social worker and/or any Gardaí (police officers) who have engaged with him/her, and – if supportive documentation is available – submits same to the

IPO without delay. The solicitor advocates for the applicant to have a social worker or neutral companion accompany him/her for support at the substantive interview.

The solicitor advises the applicant how important it is to immediately draw attention to any difficulties with, or concerns about, the services provided by the interpreter provided to them at any interaction with the IPO.

In the case of a child applicant, the solicitor requests that a specialist child interviewer is assigned and that the child is afforded an opportunity to visit the (child-friendly) interview room and to have an informal meeting with the interviewer (and, if relevant, the interpreter) on a date before the interview.

Solicitors do not attend substantive interviews on a regular basis but, when they do so, they will raise any concerns that they have about the way in which the interview is being conducted when there is a natural break in questioning. They intervene in the course of the questioning only if it is imperative that they do so. They may seek time to consult in private with the applicant in the course of the interview.

Solicitors correspond with the IPO to seek a decision after a reasonable period of time has elapsed after the interview, and they follow up on a regular basis (if necessary, indicating that the intervention of the courts will be sought if a decision does not issue within a specified period).

Permission to Remain

Applicants for international protection are automatically deemed to have also applied for permission to remain on humanitarian grounds. Solicitors explain to applicants that this application is considered in parallel with their international protection application at first instance; that a part of their Questionnaire is dedicated to this application; that questions will not be asked of them at their substantive interview at the IPO in that regard but that they can (and should), of their own volition, mention any facts or circumstances that they wish to have taken into consideration; and that a decision on permission to remain will issue at the same time as a decision on international protection. Solicitors assist the applicant to seek out and submit to the IPO cogent, reliable, up-to-date supporting documentation at the earliest opportunity, and they update the IPO on any relevant developments or changes of circumstances. If the applicant is granted permission to remain but his/her application for protection is refused, the solicitor advises the applicant of the advantages and disadvantages of pursuing a protection appeal. If both the permission to remain application and the international protection application are refused, the solicitor explains to the applicant that the IPAT has no jurisdiction to consider issues relating to permission to remain, but that they can ask the Minister for Justice to review of the refusal of permission to remain if their protection appeal is not decided in their favour.

C. Appeals against denial of international protection

As soon as a solicitor is notified that the IPO has recommended that an applicant should not be granted refugee status or subsidiary protection, the solicitor arranges an in-person consultation with the prospective appellant to discuss and prepare for an appeal, and takes up-to-date instructions on all relevant matters (including but not limited to any difficulties that the applicant encountered at first instance). An interpreter is engaged for that purpose, if necessary.

Solicitors help appellants to complete, sign and submit their Notices of Appeal as fully as possible in the short amount of time available, and they follow up as quickly as possible by sending to the IPAT any supplementary information or documentation that was not available before the expiry of the statutory time limits for filing an appeal.

Solicitors draft concise, case-specific grounds of appeal, omitting any generic or unduly general representations.

If issues relating to the appellant's language, dialect, health or other vulnerabilities have not already been highlighted at first instance, the solicitor highlights these issues in the Notice of Appeal (or follows up without delay after the Notice has been submitted). Solicitors are conscious that interpretation may be provided in a language that the appellant may reasonably be supposed to understand, and not necessarily in the appellant's preferred language.

Most oral hearings before the IPAT are, at present, conducted remotely via audio-video link. The solicitor indicates in the Notice of Appeal if the appellant is likely to have difficulty participating in a remote hearing (e.g. if the appellant has hearing, sight or literacy difficulties) and, if so, advocates for an on-site hearing.

Attention is drawn in the Notice of Appeal to any evidence of a heightened risk of re-traumatisation at an oral hearing.

The solicitor indicates in the Notice of Appeal if this is an appropriate case for a 'female room' to be assembled (e.g. if the case involves sexual or gender-based violence).

If the appellant presents with an alternative gender identity (or none), or as transgender, the solicitor takes instructions on the appellant's preferred gender pronouns, draws them to the attention of the Tribunal, and advocates for all participants to respect these throughout the oral hearing.

If the applicant comes from a designated safe country of origin, the Notice of Appeal is accompanied – or followed, without delay – by detailed written legal submissions and by any fresh evidence and COI on which the appellant wishes to rely for the purpose of the appeal. Where necessary in a particular case, the solicitor make written representations explaining why the interests of justice request that an oral hearing be convened, but the solicitor assumes that the appeal will be decided on the papers and potentially without any further correspondence, and acts diligently to prepare the documents grounding the appeal accordingly.

As soon as time allows, the solicitor and the appellant engage in a thorough review of the written record of the substantive interview conducted at the IPO, if necessary with the assistance of an interpreter, and the solicitor draws the Tribunal's attention to any mistakes or omissions identified in by the appellant.

Optimally, this occurs before the Notice of Appeal is completed but, if this is not possible owing to time constraints, it takes place without delay thereafter.

If medical evidence or a medico-legal report is awaited and the solicitor anticipates that there will be a delay before it is received, the solicitor highlights this in the Notice of Appeal (or in correspondence as soon as possible thereafter) and outlines the expected timeframe. If appropriate (having discussed the

matter with the appellant), the solicitor asks for the oral hearing to be postponed to await the medical evidence or medico-legal report and, if so, for what reason.

Together with the appellant, the solicitor reviews the list of documentation that is set out in the report issued by the IPO, and draws the IPAT's attention to any omissions therein. The best available copies of any documents omitted from the IPO's list are submitted afresh to the Tribunal. If the solicitor does not have a copy of all of the documents in the IPO's list, or is unclear in that regard, the solicitor highlights this in the Notice of Appeal and, if necessary, seeks out a copy of each document. Optimally, the solicitor prepares and submits to the Tribunal, in advance of the oral hearing, a tabbed and paginated booklet containing all relevant documents, and the solicitor furnishes a hard copy of the booklet to the appellant for use at the oral hearing.

The solicitor arranges for the translation of any new or newly-discovered documents that are submitted to the Tribunal, and explains why any such documents were not submitted at first instance.

The solicitor works with the appellant to identify any witnesses who might be called to give supportive, corroborative or expert evidence at the appeal hearing. If necessary, the solicitor furnishes their contact details to the IPAT, sets out the nature and purpose of the evidence that the witness is expected to provide, and requests the Tribunal to direct the witness's attendance.

The solicitor prepares written submissions in support of the appeal highlighting a select amount of focussed, up-to-date, reliable COI, and draws attention to the specific passages that support the appellant's narrative. (Alternatively, the solicitor briefs a barrister for the purpose of the appeal in a timely manner, and instructs him or her to draft submissions). If necessary, the solicitor requests the Refugee Documentation Centre to conduct focused COI research in good time before the oral hearing. The solicitor prepares a standalone index of all COI reports that the appellant wishes to rely upon, and submits these to the Tribunal within the statutory time limits. The index contains a functioning hyperlink for all publicly-accessible COI reports. The solicitor furnishes full COI reports only if they are not publicly-accessible or if so requested by the Tribunal Member.

Solicitors are familiar with the IPAT's decisions archive, and they draw attention to any decisions issued previously by the Tribunal involving similar facts, or where legal issues of specific relevance to the appellant's case arose for consideration.

If the appeal hearing is being conducted remotely, the solicitor engages with the appellant in good time before the hearing to ensure the appellant has the necessary log-in details, has a stable, secure internet connection, and has access to a private, quiet, comfortable location where there is no risk of interruption. If there are any concerns in that regard, the solicitor invites the appellant to attend from his/her office or at a neutral location where privacy, comfort and uninterrupted connectivity are ensured. If none of these options is viable, the solicitor seeks an on-site hearing.

Solicitors are conscious that the Tribunal has limited discretion to admit documents after the expiry of the statutory timeframe (i.e. ten days prior to the date fixed for the oral hearing), and they assume that additional time will not be given after the appeal hearing for supplementary documents to be submitted.

At the start of an oral hearing (or, optimally, by way of *inter partes* correspondence in advance of the hearing), the appellant's solicitor or barrister seeks clarity from the Presenting Officer (a lawyer who represents the Minister for Justice at the hearing) about what factual matters are in dispute, and the solicitor seeks the Tribunal's directions on the need to call evidence on undisputed matters.

While an appellant is being examined and cross-examined, their solicitor or barrister and the Presenting Officer are at all times conscious of the risk of re-traumatisation, and their questions are carefully formulated in order to minimise any such risk. The lawyers at all times act respectfully towards the appellant, and take care not to be aggressive or unnecessarily accusatory.

At the start of cross-examination, the Presenting Officer reminds the appellant that he/she can seek clarification of any question that he/she does not understand or is unsure about. If the appellant presents as a member of the LGBTI+ community, the Presenting Officer explains to the appellant that he/she is not permitted to ask about the intimate details of the appellant's personal life and will not do so. If the

appellant's narrative features sexual or gender-based violence, the Presenting Officer seeks the leave of the Tribunal to cross-examine on intimate details, and seeks such leave only if absolutely necessary.

If a negative appeal decision issues, the appellant's solicitor and barrister will quickly advise the appellant whether or not there are grounds for seeking leave to apply for judicial review, paying attention to the short time limits that apply for such applications to be brought. If there are no identifiable grounds for seeking judicial review, and if the person has been refused permission to remain, the solicitor acts speedily to assist the person to prepare a robust application for review of that refusal, drawing attention to any new developments and any new or newly-discovered evidence, and to cogent, up-to-date, reliable COI.

Italy

Best practices in asylum and immigration cases

EXECUTIVE SUMMARY

Irregular migrants and asylum seekers arrive in Italy primarily from African and Asian countries (first five countries of nationality declared in 2022 were Egypt, Tunisia, Bangladesh, Syria and Afghanistan). Arrivals in Italy are mainly maritime arrivals.

In the last few years there has been some interesting case law concerning the disembarkation of migrants from NGO boats after Search and Rescue (SAR) activities.

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CHAPTER 1 | IMMIGRATION

A. Arrival

Arrival in Italy by foreign nationals (who are not EU citizens) is strictly subject to the stringent requirements of domestic legislation on migration (i.e. the consolidated text on immigration, T.U. n. 286/1998). In particular, legal entry is generally permitted only when the foreign national of a given third country is in possession – *inter alia* – of an entry visa, which must be obtained from the relevant consular or diplomatic representation abroad. Lawyers can facilitate this by directly interacting with Italian consulates or embassies abroad which are competent to issue the relevant visa.

Migrants who are not asylum seekers can legally enter Italian territory and, if they respect their visa's criteria, can obtain a regular residency permit, which must be obtained from the Ministry of Interior.

The application for different types of residency permit is nowadays managed online through the Ministry of Interior's website, and the role of lawyers in this matter can be of fundamental importance. Lawyers can help the applicant in gathering the various documents required, finding a solution when a document is missing or another problem arises, in respecting deadlines and filing a correct application.

If a third country national of does not respect the law on immigration, their entry is to be considered irregular and can constitute the basis for detention, expulsion or non-admittance (pushback). Given the difficulties in obtaining a visa and residency permit to enter Italy by third country nationals, a high percentage of entries per year are irregular.

One of the main difficulties after the arrival of migrants in Italian territory (either by sea or by land) arises from their identification, and the need to distinguish those who wish to apply for international protection.

Lawyers can play a significant role in safeguarding respect for the right to be informed - promptly and correctly - of the meaning and methods of access to international protection, from the very first stages of rescue and assistance.

Lawyers can also contribute - together with other operators in the field (such as the International Organization for Migration (OIM), the UN Refugee Agency (UNHCR), and the European Agency for Asylum (EUAA) personnel in hotspot centres) – in ensuring the identification of migrants with particular vulnerabilities which need special treatment (for example trafficked victims or potential victims, which according to the law are to be placed under special protection and within specific reception centres; or unaccompanied minors, who cannot be expelled, but must be directed to specific reception centres and must have a guardian appointed expeditiously).

Indeed, it is only through adequate information and evaluation that effective access to the procedure of recognition of the fundamental right to asylum can be realised (see the paragraph on arrival in the section on asylum).

B. Detention

Detention of a migrant can arise for different reasons, including detention with a view to return an irregular migrant to their country.

When a migrant is first put into detention, the right to be informed must be respected by relevant authorities.

Violation of the right to information can be claimed during the validation of detention orders issued by the police in execution of expulsion decrees or deferred refoulement. Violation can also be challenged after removal has taken place, in appeals to the Court of Cassation against orders validating the detention itself, provided, of course, that illegitimacy has been claimed in the procedure on the merits and appears on the record, under penalty of inadmissibility of the issue.

Lawyers should inform the applicant that they can challenge their detention, that they are entitled to legal aid and that detention, when it is not due to a conviction or the commission of a crime, must not exceed the terms strictly necessary to overcome the problem that hinders preparation for return or removal (usually a maximum of 90 days).

Lawyers can challenge the merit of the detention order, but also of the orders on which they are based, on several grounds, for instance *i)* because of an unlawful collective expulsion order, *ii)* pregnancy, *iii)* unaccompanied minor, or *iv)* the wish to apply for international protection.

Following lawyers' interventions, decisions have been declared unlawful when they essentially lack proper reasoning, as it often happens that the judge uses a pre-printed form or uses multiple style formulas (such as "the prerequisites of the law exist", or "considering the reasons of the Administration, which are herein referred to in full, to be well-founded"). In those cases, there is no reasoning to justify the planned measure which limits the migrant's personal freedom. Such a limitation of a fundamental right cannot be imposed either without an understandable reasoning or for an uncertain duration.

Lawyers can also ask the judge for a decision on the constitutionality of the law concerning detention of foreign persons, where there is no clear legal basis (particularly in primary legislation, as required by the Italian constitution under Article 13 when it comes to limitations on the right to personal freedom).

Complaints may also be lodged against detention orders before the National Guarantor of the Rights of Persons Deprived of their Liberty (i.e. the national preventative mechanism against torture), as well as before regional or local guarantors.

When the order is confirmed, the decision of the judge can be appealed to the Court of Cassation, without automatic suspensive effects.

C. Expulsion

An irregular migrant, who does not have a valid residence permit or has not applied for a residence permit, risks receiving an expulsion/refoulement order, since there is no right under the relevant immigration legislation to remain on Italian territory without a valid permit. The decision to repatriate an irregular migrant may be also issued while they are still in prison, or after their release from prison. The expulsion can thus be either of an administrative or criminal nature.

Lawyers should inform the migrant that they cannot be deported nor detained in centres for repatriation (so-called CPR) in the following cases, in which it is easy to challenge the expulsion order:

a) When they risk persecution on the grounds of race, sex, language, nationality, religion, political opinion, personal or social conditions (even if they have never applied for international protection);

b) When they risk being subjected to torture or inhuman or degrading treatment in the country of return (i.e. widespread violations of human rights in the home state are also taken into account in assessing these grounds);

c) When expulsion means violating their right to private and family life (for example, if the migrant's life is rooted in Italy, because of family ties on Italian soil or they have lived and worked there for a long time);

d) When they are cohabiting with relatives within the second degree (parents, children, siblings) or spouse of Italian nationality (NB. In such cases it is necessary to prove cohabitation, through family status or other documents);

e) When the migrant is pregnant and/or in the 6 months following the birth of the child;

f) When the migrant is the father of the child to be born and/or in the 6 months after the birth of his child;

g) When their health condition is very serious and they cannot be treated in their country of return/origin.

Additionally, if migrants fearing expulsion have experienced physical, psychological or sexual violence, or are being treated for physical or mental health problems, lawyers should intervene as well, because those types of situation may clearly be incompatible with deportation and/or detention in the detention centre for repatriation (CPR).

The expulsion order must be communicated within 48 hours to the justice of the peace, who will set a hearing that must be attended by the person concerned and a lawyer (in the absence of the appointment of a lawyer, one will be appointed *ex officio*) and, within the following 48 hours, the justice of the peace will either confirm or not confirm the order. A migrant who meets the requirements will be eligible for free legal aid. An appeal against a confirmed expulsion order can be presented, but it does not generally have automatic suspensive effective, which must be specifically requested by the lawyer.

When the expulsion order is confirmed and there are no other remedies, lawyers can file a request for interim measures as a measure of last resort before the European Court of Human Rights (ECtHR) (provided that the case meets the stringent requirements provided by Article 39 of the Rules of the Court, as interpreted by ECtHR case law, i.e. only in case of risk for life and/or torture, inhuman or degrading treatment).

CHAPTER 2 | ASYLUM

A. Arrival

Respect of right to information

The competent public administration has an obligation to properly, adequately and individually inform foreign nationals (and stateless persons) of the possibility of applying for international protection. This obligation applies to:

1) those who have arrived by sea,
2) those who have been rescued in operations at sea,
3) those who have arrived at border crossings,
4) those who are detained in detention centres (CPR).

It is important to clarify that this obligation applies with respect to all those who arrive in Italy without prior authorisation, hence irrespective of their irregular entry.

Lawyers can play a role in the effective respect of the right to be informed - promptly and correctly - of the meaning and systems of access to international protection, from the very first stages of rescue and assistance.

First, their role is crucial in explaining the responsibility of the police personnel in charge of border crossing controls: not in assessing the merits of a possible request for help (in the sense of international protection), but exclusively regarding the task of informing people of the possibility of formalising, in the manner and timeframe most appropriate to the specific and individual situation, their application for international protection**.**

Second, a major role can be played in case of violation of this fundamental right, as the consequence could greatly damage the migrant/asylum seeker. Lawyers have through their work contributed to the consolidation of well-established case law on the matter, thanks to which it has been clarified not only that the Ministry of Interior has the obligation of information mentioned above, but also that the burden of proving that the obligation has been fulfilled falls to the Ministry of the Interior. If not proved, the conclusion is that it has been violated.

Arrival by sea

Lawyers can play a decisive role in the arrival of potential asylum seekers, by allowing for the disembarkation of people seeking asylum, usually from private NGO boats which have operated search & rescue (SAR).

Lawyers can ask for precautionary measures when the relevant authority has failed to allow the arrival of asylum seekers. The case can be presented either to (a) the competent judge, who have consistently granted disembarkation to migrants rescued by NGO vessels, or (b) alternatively to the European Court of Human Rights (see the case of *Sea Watch 3*, where disembarkation was not granted but rather assistance, especially for vulnerable persons).

Arrival at the border

Regarding arrival by land, there was strategic litigation challenging a practice called 'informal readmission' at the border with Slovenia, whereby said practice was challenged was declared unlawful by the Tribunal of Rome. However, there are reports that the conduct continues, which demonstrates the role a lawyer can play in the effective protection of asylum seekers.

B. Request for asylum process

The application for international protection can be presented by a foreign citizen in two ways: a) at the Border Police Office upon entry into national territory or b) at the office of the competent Police Headquarters based in the applicant's place of residence ("dimora"). The application will be registered by police officers using a form called C3, which contains information concerning personal data and a few questions about the reasons that led the applicant to leave his/her country and ask for protection abroad.

An application for international protection must be presented in a timely fashion and migrants must explicitly demonstrate their wish to file an application for international protection and to have it formalised. The applicant can be assisted by a lawyer, but no legal aid is granted for this administrative phase. If delay can be foreseen for various reasons, it is advisable to send a formal communication (letter, certified email or similar) before filing for international protection to the relevant authority stating that the client wishes to file an application for international protection, and asking for an appointment as soon as possible to file the C3 form.

The right to asylum must be always granted by the competent police offices, as shown by recent case law which censured the practice of a police headquarters aimed at denying the right to formalise the application for international protection (and consequently to access the reception system), due to a lack of documents such as a statement of hospitality, which are not required by the asylum legislation in order to submit the application.

To complete the application, it is necessary to present to the Police Immigration Office some ID photos, a copy of the passport, if in possession, and any other document proving the reasons for the request. In particular, it is necessary to deposit relevant documentation attesting to the specific persecution of the applicant and the reason why he/she needs protection by the Italian State, if such documents are in the possession of the asylum seeker.

It is advisable, at the time of the application, to deliver a written note (preferably directly written by the applicant and eventually revised – but not signed – by the lawyer), complemented by appropriate documentation. The applicant should submit documents that prove persecution and other circumstances declared in the note (newspaper articles, photos, official documents, NGO reports, etc.), where available.

Those who persecute or cause serious harm to the applicant can be the State, parties or organisations that control the State or part of its territory, or non-state subjects if the State, or whoever controls it, does not want or is unable to provide protection to the victim of persecution or serious damage.

After lodging the application, the applicant is fingerprinted and the Police Headquarters sends the request to the competent Territorial Commission, which is the only Italian authority competent to decide on status recognition. While waiting for the decision from the Territorial Commission, the police issues the applicant with temporary residence pending the conclusion of the procedure.

The Territorial Commission will interview the applicant at a specific hearing, during which the applicant can be assisted by a lawyer. The lawyer is advised to prepare the applicant before the hearing and to review the steps leading to the request for international protection. For example, it is strongly advisable that the applicant clearly states the reasons for the application, e.g. their sexual orientation, their religion or any other status/situation which is the cause of persecution.

Once protection status has been granted, the person can request an asylum residence permit from the Immigration Office. For refugees, the residence permit is valid for five years and renewable.

C. Appeals against denial of international protection

If the application for international protection is not granted (and other forms of protection are also denied, such as special protection), the asylum seeker must be informed in a timely manner of their right to appeal the decision before the Tribunal, or the risk is to be expelled.

Asylum seekers have also to be informed of their right to apply for legal aid and of the requirements to be met in that case.

This information is very important, as recent legislation has consistently reduced the deadline to file an appeal against the denial of international protection. The deadline is 15 or 30 days from the notification of the decision of denial.

Lawyers, particularly those contacted only during this phase, should ask for all relevant documentation, i.e. not only the decision of the Territorial Commission but also the other relevant documentation from the administrative procedure (at least the transcript of the hearing). Moreover, they should go beyond the documents and talk to the asylum seeker in order to obtain their story and ascertain their right to international protection and how to obtain it.

Lawyers should apply, when the case allows it, for provisional measures if suspension of the denial is not automatically implemented after the application has been introduced, i.e. when the applicant is being held in an expulsion centre, has already eluded or attempted to elude border control, and is classified as an irregular migrant, or if the applicant is ineligible and their asylum application is unfounded.

Since the new procedure does not automatically allow for a hearing with the applicant, if the video recording and transcripts of the interview before the Territorial Commission are not available in the file of the Tribunal, lawyers should make a specific request for a hearing for the applicant before the judge (in practice the recording of the interview is often missing from the file).

Lawyers should insist on a check on the credibility of the asylum seeker, in particular challenging the negative assessment of his/her narrative made during the administrative procedure. Depending on the individual’s situation, it is generally suggested to request a new evaluation of the applicant’s intrinsic and extrinsic credibility, trying as much as possible to substantiate the applicant's story, and also making sure to include into the file the most relevant documentation and sources aimed at confirming the applicant's narrative.

Lawyers should also insist on asking the judge to fulfil their duty of investigative cooperation, in accordance with the principle of mitigated burden of proof in this field.

If the application to the Tribunal is rejected, lawyers must inform the applicant in a timely manner, and collect a special power of attorney which – according to the new rules and case law – must be signed on a date subsequent to the tribunal’s negative decree.

Moreover, as any appeal lacks automatic suspensive effects on the first instance decree, the lawyer should evaluate whether there is room for a precautionary measure in front of the judge of first instance in order to suspend the negative decision and avoid the possibility of an expulsion order.

Poland

Best practices in asylum and immigration cases

EXECUTIVE SUMMARY

In the case of Poland, two main routes of arrival of migrants have been recently identified - the Polish-Belarusian border and the Polish-Ukrainian border. For the purposes of this chapter, the author focuses on the arrivals of migrants across the Polish-Belarusian border with citizenship other than Ukrainian, as the exercise of their rights is mainly at stake in Poland and in these cases the role of a lawyer is crucial. Polish authorities treat persons arriving from Ukraine in accordance with the law in a privileged manner and these persons have no problem with entering Poland, with legalising their stay here and obtaining assistance.

The situation is completely different for migrants from non-European countries who cross the Polish-Belarusian border. These persons are in most cases forced by Belarusian authorities to cross the border at places outside the official border crossing points (usually a forest or a river). Very often, they wander over bad terrain and in bad weather conditions and try to reach the nearest human settlement. When they are apprehended, they are usually returned to Belarus, where they are in danger of being subjected to violence by Belarusian officers who want to return them to Poland.

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CHAPTER 1 | IMMIGRATION

In Poland, attempts have been made to legalise so-called "push-backs". Pursuant to enacted regulations, a foreigner who is apprehended immediately after irregularly crossing the border of the Republic of Poland may be turned back to the state border by the Border Guard, and in fact forced to cross it without, or under simplified, administrative procedure. When turning back migrants to the border, the border guards apparently routinely ignore verbal asylum declarations by migrants and do not allow the procedure to be initiated. Due to the ongoing humanitarian crisis on the Polish-Belarusian border and complaints lodged by migrants, there have been ten judgements to date by national courts confirming that the methods used by the Polish Border Guard to return foreigners to Belarus are, in most cases, incompatible with international law as well as with the Polish Act on granting protection to migrants, as the regulation enabling the use of push-backs includes powers that go beyond statutory authorisation. In dozens of cases the European Court of Human Rights (ECHR) has issued interim measures orders requesting Polish authorities not to return migrants to Belarus.A number of further cases are also pending before the ECHR. This does not change the fact that push-backs are still carried out by the Border Guard at the time of writing, and the role of lawyers in preventing them in Poland is crucial.

A. Arrival

Given the current migration situation in Poland, the role of the lawyer is very important in supporting migrants who arrive in Poland by land through the Polish-Belarusian border. Lawyers who want to assist migrants in Poland are generally in regular contact with NGOs working on behalf of migrants, and NGOs mediate the first contact between the lawyer and the migrant. The Border Guard does not inform the lawyer that they have apprehended a group of migrants who have crossed the border and are on Polish territory. As mentioned, the lawyer usually receives such information from NGOs or persons cooperating with them who provide humanitarian assistance to migrants.

A quick reaction of the lawyer is very important in such a case. The lawyer should, if possible, appear on the spot and meet the migrants in person. It is good practice for lawyer to have ready-made power of attorney forms in Polish and in the languages most commonly spoken by migrants, so that the persons concerned can give their power of attorney to the lawyer on spot. A lawyer who receives a power of attorney from a migrant indicating that he/she wishes to apply for asylum should help such a person to make the relevant declaration in the presence of Border Guard officers. The presence of a lawyer can deter a potential push-back of migrants.

If lawyers (not necessarily present at the border) are informed by NGOs operating in the border area about the presence of migrants, the lawyers may submit a request to the European Court of Human Rights to issue a so-called interim measure asking Polish authorities not to remove the migrants in question to Belarus. Since August 2021, a large number of such requests have been submitted, and the requested measures granted. Polish authorities then followed these measures, and the migrants in question were not removed.

Lawyers therefore very often treat ECHR interim measures as a solution to protect migrants effectively from push-backs. Each of the lawyers operating at the border (and not only at the border) is trained to prepare the relevant applications to the ECHR. This procedure works very efficiently.

The Border Guard is not always in a position to take an asylum application from a migrant at the time of his/her declaration of willingness to apply for asylum (in Poland, such an application must be submitted on a form specially prepared for this purpose). The role of a lawyer in such a case is to ensure that the information that the migrant wishes to apply for international protection is included in the migrant's detention protocol. Such a protocol is drawn up on the basis of an interview with the migrant, during which a lawyer should be present. The lawyer's role is to watch vigilantly how the interrogation proceeds and whether the migrant is provided with access to a duly prepared interpreter.

At this stage, lawyers should also ensure that all the rights of the migrant are respected by the Border Guard, including the possibility of access to medical and humanitarian assistance, in particular if the

person is in a bad psycho-physical condition. Unfortunately, persons crossing the Polish-Belarusian border are very often emaciated, injured and victims of violence from the Belarusian services. At this stage, the lawyer's role is not only limited to legal assistance, but very often the lawyer is also the migrant's spokesperson in contact with the Border Guard and medical services.

B. Detention

There are 6 guarded centres for migrants in Poland. In situations specified by law (to secure asylum procedure or to secure return procedure or to secure execution of the return decision), migrants can be placed in guarded centres for foreigners (GCF), i.e. in detention. The Border Guard applies to the District Court for placing a migrant in detention in practically all situations in the case of migrants apprehended while crossing the Polish-Belarusian border.

A migrant can be placed in detention only by a decision of the District Court, issued as a result of the examination of the Border Guard's application. The effectiveness of Border Guard applications is almost 100% in Poland. The decision to place a migrant in detention is served on the migrant and on the lawyer (if already appointed in the case). The lawyer should file an appeal against the order within 7 days of its receipt.

The national law states that the migrant cannot be detained if: a) it could cause danger to his/her life or health, b) his/her psycho-physical state may justify the presumption that he/she has been subjected to violence or c) he/she is an unaccompanied minor or a disabled person. The lawyer should therefore start by identifying whether the migrant he/she represents is in such a situation. The evidence that a lawyer can show in such a case is e.g.: a) results of a medical examination carried out as soon as the migrant is detained, b) medical/psychological documentation, c) protocol of interrogation or detention), d) photographs, e) description of the violence suffered (type, perpetrator, time, place, circumstances), f) description of mental state. The lawyer should also examine whether the Border Guard's methods of dealing with the migrant were appropriate and in accordance with the law.

In addition, detention is possible under the law if alternative measures cannot be applied to the migrant. Alternative measures to detention are: a) an obligation to report at specified intervals of time to a designated authority, b) payment of a monetary security in a specified amount, not less than twice the minimum remuneration, c) residence in a designated place. The lawyer should therefore consider such alternatives, and indicate any possibility in the appeal.

Lawyers very often add additional motions to the appeal such as: a) a request to bring the migrant to the hearing (together with the appointment of an interpreter), b) service of the Border Guard's motion for prolongation in the GCF together with attachments, c) requesting the Office for Foreigners to provide the migrant with information on what actions the Office has to carry out in order to recognise the migrant’s asylum application, d) asking the Border Guard what actions and when it took to establish identity/obtain documents necessary for expulsion.

The appeal is considered by the Regional Court (second instance) at a hearing. A lawyer should appear at the hearing to represent the migrant. Unfortunately, Regional Courts usually do not agree to bring the migrant to the hearing as it is not obligatory, according to the law. This makes the presence of a lawyer all the more important. At the hearing, the Regional Court issues a decision. There are cases where the Regional Courts overrule the decision of the District Courts and agree to release the migrant (less than 10% of cases, according to statistics).

The migrant is placed in GCF for a specific period of time (as a rule 90 days). After this period, at the request of the Border Guard, the District Court can issue a decision on a possible extension of the migrant’s stay in GCF. Such a decision should again be served on the lawyer and the migrant. If the Court extends the stay, the lawyer should again appeal against the order within 7 days based on the methodologies mentioned above.

The Border Guard may release a migrant from GCF if: a) the reasons for detention have ceased to exist or b) negative grounds for detention have arisen (see above). A migrant may also be released from GCF by the Office for Foreigners if the evidence collected in the case for intercountry protection shows that the migrant meets with high probability the conditions for granting refugee status or subsidiary protection and his/her stay in Poland does not pose a threat to state defence or security or the protection of public security and order. The lawyers therefore monitor the actual situation of migrants on an ongoing basis and, if he/she becomes aware of a change in the situation which may help to apply any of the above-

mentioned conditions, they submit an application to the relevant authority for the migrant's exemption from GCF. If the decision is refused, the lawyer may file an appeal against it.

Migrants are not usually informed about their situation, about their rights and obligations, and lawyers provide such information to them. This is a very important function of a lawyer in this type of case. In a number of cases of detention of vulnerable persons (torture victims, families with children etc.) lawyers make efforts on behalf of their clients and in a number of cases succeed in securing the release of migrants (often only after a few months), despite the fact that these people should not have been deprived of their liberty in the first place.

C. Expulsion

Expulsion of a migrant is carried out on the basis of a decision on the migrant's obligation to return. Such a decision is issued by the Border Guard after the migrant has been apprehended on the territory of Poland and interrogated. The basis of the decision is irregular stay, performing work without a permit, irregular border crossing, not leaving the territory of Poland after having received a negative asylum decision etc. The decision should be issued in writing and delivered to the migrant.

Apart from the obligation to return itself, the decision contains two more important matters. The first is the determination of the deadline for voluntary return, i.e. the time within which the decision should be executed and the migrant should leave Poland. It ranges from 15 to 30 days and is calculated from the date of its delivery. In certain situations, for example in the case of the need for the migrant to appear before a Polish public authority or if the migrant's exceptional personal situation so requires, the Border Guard authority may extend this deadline. In specific cases, the Border Guard authorities may issue a decision on obliging the migrant to return, without specifying the deadline for its execution. This refers to cases when there is a probability of escape or when it is necessary for reasons of defence or protection of public security and order. This may happen in the case of crossing the border in violation of the law or in the case of lack of identity documents.

The second important matter is a ruling prohibiting re-entry into the territory of the Republic of Poland and other Schengen States. The period of this prohibition is mainly justified by the reason for which the decision was issued. If the decision was issued due to exceeding the permitted period of stay, the re-entry prohibition may be issued for a period of 6 months to 3 years. If issued due to the fact that it is required by considerations of defence or state security or the protection of public security and order or the interest of the Republic of Poland, the entry prohibition period is set at 5 years.

The proceedings for the issuance of a return decision and the enforcement of that decision (if already issued) are suspended *ex lege* at the moment when the proceedings for international protection are initiated. However, the lawyer should appeal against this decision and not ignore it.

The decision on the obligation to return can be appealed to the Head of the Office for Foreigners. This should be done in writing, in Polish, through the authority that issued this decision (usually the Commander of the Border Guard). The time limit for lodging an appeal is 14 days from its delivery. As a rule the appeal suspends the obligation, i.e. the migrant does not have to leave Poland until it is considered. The decision of the Head of the Office for Foreigners may be appealed against to the Voivodship Administrative Court in Warsaw. The deadline for lodging a complaint is 30 days from the delivery of the decision of the Head of the Office for Foreigners. An appeal to the court with request to suspend the decision of the Head of the Office for Foreigners automatically suspends it. The suspension of proceedings continues until the decision of the Office is received by the migrant.

Within the return procedure, the lawyer should also consider submitting a request to to the Border Guard for a humanitarian stay or a tolerated stay permit for the foreigner. Both of these are a kind of lifeline for migrants. The Border Guard may agree when, for example, the migrant can only be obliged to return to a country where his/her liberty and security of person would be threatened or he or she could be subjected to torture or inhuman or degrading treatment or punishment, forced to work or deprived of the right to a fair trial or be punished without a legal basis. The migrant's right to family life and the protection of minors are also examined.

Lawyers should bear in mind that, even when the time limit for appealing against a return obligation decision has expired, it is possible to request its annulment in relevant proceedings. A decision is declared invalid when it flagrantly violates the law, for instance on the failure of the Border Guard to examine the individual situation of the migrant but just to issue a return decision without a second thought.

CHAPTER 2 | ASYLUM

A. Arrival

In this section, reference should be made to the situation already described in the section "Arrival" in Chapter 1 "Immigration". Asylum and international protection in Poland are currently often sought by migrants crossing the Polish-Belarusian border. A different legal regime applies to Ukrainian nationals and their spouses who arrive in Poland after 24 February 2022 fleeing the war in Ukraine, namely Temporary Protection and the special law on assistance to Ukrainian citizens, which was adopted in Poland in March 2022. These persons therefore do not need to apply for international protection in order to receive protection in Poland.

A person who has been forced to flee his or her country due to persecution and does not have the possibility to apply for the protection of his or her rights there, may apply for international protection in Poland. There are two types of protection in Poland: refugee status and subsidiary protection. With the receipt of one of them, a person receives a number of rights– the right to reside permanently with access to the labour market, the right to benefit from social assistance, state health services, the right to cross the border on the basis of a travel document, etc. In addition, a person with refugee status or with subsidiary protection has the right to support in the social integration process, to receive cash benefits for maintenance and learning Polish, and to stay in sheltered housing.

As already mentioned, push-backs are executed in Poland on migrants crossing the Polish-Belarusian border. One possibility to protect themselves from this procedure is to apply successfully for international protection. When a migrant is apprehended on the territory of Poland by the Border Guard, he/she usually submits a declaration of willingness to apply for international protection (asylum). The role of a lawyer in such a case is to take action to have this declaration received and registered by the Border Guard. The declaration must be made by the migrant himself/herself at the first contact with the Polish services after crossing the border. The lawyer cannot make such a statement on behalf of the migrant. The lawyer should, however, instruct the migrant about the consequences and benefits of submitting the application, as well as what the migrant should pay attention to when submitting the application.

As already mentioned in Chapter I "Immigration", a migrant, who has been apprehended after irregularly crossing the Polish-Belarusian border and who has managed to make an asylum request, is usually detained upon arrival in Poland. If the declaration of willingness to apply for international protection has been successfully made, the Border Guard is obliged to set a deadline for collecting the formalised application from the migrant. This is usually done at GCF. In such a case, the lawyer is in contact with the Border Guard officers who perform their duties at GCF where the migrant is placed, submits his/her power of attorney to GCF and makes sure that the deadline mentioned above is set. Such information is best obtained in writing for evidentiary purposes. It is possible for a lawyer to be present during the migrant's application activity. In practice, the possibility to get into GCF and participate in this activity is very difficult, usually due to the reluctant attitude of the Border Guard. However, whenever possible, it is recommended that a lawyer be present.

In any case, before a foreigner lodges a formalised application for protection and before the asylum interview, the lawyer should meet with the migrant and inform him/her how the asylum procedure works and what elements are examined by the authority.

B. Request for asylum process

After receiving an application for international protection from a migrant on a form, the Border Guard passes the documents to the Office for Foreigners, which conducts proceedings for granting international protection to a migrant. In these proceedings, the lawyer focuses mainly on informing the migrant about the elements of an asylum interview and collecting documents in the migrant's possession which may prove evidence in the case justifying granting protection to the foreigner.

The date of the status interview is set by the Office. If the migrant is not detained, the interview takes place in the Office in-person. If the migrant is in detention at GCF (the vast majority of cases), the interview takes place remotely. The Office notifies both the migrant and the lawyer representing him/her of the date of the hearing. Upon receipt of the notification, the lawyer should make a declaration of his/her willingness to participate in the interview.

At the hearing, the Office asks the migrant a series of questions which are designed to elicit as much information as possible about his or her experiences as a basis for obtaining asylum. The most important of the questions concern the reasons why the migrant decided to leave his or her country of origin and seek asylum in Poland. The lawyer should draw the migrant's attention to the conditions that must be satisfied in these proceedings in order to be able to grant the migrant international protection. Thus, lawyers meet with the migrants and ask them all those questions which are asked at the asylum interview, at the same time indicating to which elements the migrant should pay special attention and so develop. The asylum interview is the most important activity in these proceedings and in fact the only opportunity for the migrant to explain to the Office the reasons which forced him/her to leave his/her country of origin and come to Poland. The lawyer must be aware that if all doubts are not clarified during the asylum interview, then, in practice, the migrant may not be able to add new evidence nor comment on the case. This is because in practice (as will be indicated in the next section), the appellate authorities no longer question the migrant further.

The presence of a lawyer at the asylum interview is important. Asylum interviews are held with the participation of an interpreter in the language which the migrant understands. The migrant is therefore able to speak freely. The lawyer may ask the migrant questions at the end of the interrogation. If the migrant does not say something which he/she told the lawyer, and which according to the lawyer is important for the migrant to obtain a positive decision, the lawyer asks additional questions and makes sure that the important issues are included in the protocol. After the interview is over and the protocol is read, the lawyer carefully monitors whether everything the migrant has said has been duly recorded.

Pending the proceedings, additional evidence may also be submitted, such as e.g. photos, recordings or documents in the migrant's possession which confirm the facts indicated by the migrant during the interview. However, the best option is to submit this evidence during the interview. Throughout the case, the lawyer upholds all the migrant's rights, which are, i.a.: a) the right to be informed of the initiation of proceedings at the request of another person or *ex officio*, b) the right to be informed of facts known to the office, c) the right to a thorough explanation of the facts by the official, d) the right to protection of personal data, e) the right to have the case settled without undue delay, f) the right to information, g) the right to medical and humanitarian assistance, and h) the right to active participation in the proceedings.

Before issuing a decision on the case, the Office also informs the lawyer that he/she has 7 days to review the final evidence material collected in the case and make a final statement before issuing a decision. It is worthwhile for the lawyer to review the case files and react in case of need. The final step is the issuance of a decision by the Office. The decision may grant the migrant refugee status, subsidiary protection or refuse protection altogether.

C. Appeals against denial of international protection

A decision of the Office for Foreigners considering an application for international protection to be unfounded may be appealed. It is best if appealed by a lawyer. The appeal must be submitted within 14 days from the date of its delivery or announcement. The appeal to the Refugee Board must be submitted through the Office for Foreigners. According to administrative rules, the Refugee Board should consider the appeal within 1 month.

The Refugee Board is obliged to reconsider both points of fact and law and to decide the case. It cannot limit itself to merely reviewing the Office's decision or considering only complaints presented by the applicant. The lawyer should do his/her best and properly justify the appeal. The appeal may point to specific provisions of law that have been misinterpreted or misapplied by the Office as grounds for the decision. If the Office has made errors in the taking of evidence or has failed to fulfil its duties, which may have affected the outcome of the proceedings, this should be raised in the appeal. It is also necessary to clarify any issues that have given rise to the Office's doubts and to address the arguments raised by the Office which were detrimental to the applicant. In the appeal proceedings, the migrant may also supplement his/her testimony and provide additional evidence. In practice, however, the Refugee Board, despite this possibility, does not summon migrants to a hearing. This is why it is so important to ensure that the migrant is properly prepared for the status hearing before the Office for Foreigners in the first instance proceeding.

As a rule, the lodging of an appeal suspends the enforcement of the appealed decision. Following the proceedings, the Refugee Board may issue a decision in which it: a) upholds the contested decision, b) overturns the contested decision in whole or in part and decides on the merits of the case, c) overturns the contested decision in its entirety and discontinues the first instance proceedings, d) discontinues the appeal proceedings. The Board may also revoke the contested decision in its entirety and refer the case back to the Office for reconsideration if the resolution of the case requires a prior investigation in whole or in substantial part.

As a result of examining the appeal, the Board cannot issue a decision which would be less favourable to the migrant than the decision of the Office challenged by the appeal. A lawyer should therefore always attempt to file an appeal and prove the migrant’s case in the appeal proceedings as well. The Board's decision is the final decision in the administrative course of instances.

If the Board's decision is not satisfactory to the migrant, the lawyer should consider filing an appeal against the decision to the administrative court. The appeal should be filed through the Refugee Board within 30 days from the date of delivery of the final decision. An instruction on the possibility of filing an appeal should be included in the decision.

A lawyer must remember that, unlike in the case of an appeal to the Refugee Board, lodging of an appeal to the Court does not suspend the execution of the decision of the Council. If the appeal is lodged, the Council may suspend its enforcement *ex officio* or at the request of the complainant. Once the appeal has been forwarded to the Voivodeship Administrative Court, the suspension of enforcement of the decision can only take place at the request of the complainant. The Voivodeship Administrative Court issues a decision to suspend the execution of the contested decision if its execution would entail the danger of causing significant damage or causing effects which would be difficult to reverse. The lawyer must therefore remember to include such a request in the decision.

The administrative court conducts an examination only on points of law, which means that, as a rule, no evidentiary proceedings take place before the court. The court’s considerations are based on administrative case files. The court conducts an examination *ex officio* and is not bound by the appeal complaint. However, it is advisable that the lawyer actively participates in the court proceedings to uphold the applicant’s interest.

Spain

Best practices in asylum and immigration cases

EXECUTIVE SUMMARY

The main legal framework in Spain on immigration cases is the Immigration Law: L.O. 4/2000, of 11 January, the Immigration Regulation: Real Decreto 557/2011, of 20 April and the Free Legal Aid Law 1/1996 of 10 January. Article 22 of the Immigration Law states that legal aid is embedded as a constitutional right in Article 119 (Spanish Constitution): *"Justice shall remain free when thus provided by law and shall in any case be so in respect of those who have insufficient means to litigate".* For a migrant or refugee (foreigners), Article 22 of Immigration Law entitles them to the same right to legal assistance and legal aid as nationals in the following procedures: denial of entry, expulsion or return and for international protection procedures. They have access to it at the first instance (administrative) and the judicial instance

The main legal framework in Spain on asylum cases is the Spanish Asylum Law 2/2009 of 30 October, the Free Legal Aid Law 1/1996 of 10 January, Article 16.2 of the Asylum Law and Article 22 of the Immigration Law (mentioned above), which contain specific rules for international protection, Directive 2013/32/EU on common procedures for granting and withdrawing international protection and Directive 2013/33/EU laying down standards for the reception of applicants for international protection. (These directives have not been implemented into domestic law yet, but can be invoked directly in case of any violation of content).

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CHAPTER 1 | IMMIGRATION

A. Arrival

When a migrant tries to enter or has entered Spanish territory in an irregular manner (a person who does not have any kind of authorisation to enter or stay in the country), there are different possibilities under domestic law as to when a return decision must be issued by the authorities. The types of return decisions that could be initiated could be: "devolucion" or "expulsion".

In any case, when the authorities apprehend an irregular migrant and initiate a return procedure against him/her, access to a lawyer must be ensured from the beginning of the procedure. In practice, when a person is under police custody/detention in these circumstances, the police officers must immediately ask the Bar to provide a legal aid lawyer to assist the person (except when the detainee appoints a private lawyer, in which case the private lawyer will assist him/her). This first phase of the detention, so-called police detention (for the purpose of identification, analysis of personal circumstances, opening the return file, etc.) must never last more than 72 hours (this is a constitutional safeguard).

The legal aid lawyer who will assist a migrant has received special training on migration law to be entitled to provide legal aid services for migrants and refugees. This training is regulated and provided by the Bar. After a first such access training course, there is a refresher course every 2 years.

B. Detention

When an expulsion file is opened against a migrant, the authorities decide to request the detention of the person for the sole purpose of returning him/her. In that case the police officers should ask the judge to allow for the detention in a CIE (Migrant detention centre). A lawyer will assist the migrant before the court. If the detention request is overturned, the migrant will be released. This does not mean that administrative expulsion will not continue. In the circumstances described in the Immigration Law, alternatives to detention apply, but the administrative decision of expulsion should be appealed by the lawyer and if refused, should be appealed to the court. no

Otherwise, if the detention has not been overturned, the migrant will be placed in the CIE for a length of time determined by the judge. Under the Spanish law, the period can never be more than 60 days and is for the sole purpose of enforcing the return.

Two relevant points should be taken into consideration, related to the second section of this factsheet:

- a migrant under detention has the right to submit an asylum claim and must under those circumstances be assisted by a lawyer;

- during the hearing before the judge on whether the migrant will be detained or not, it is also possible for the migrant to invoke asylum; the judge is considered an authority (other authorities) to take into account an asylum claim, and to refer the asylum seeker to the authority in charge of the register of such applications and to reception facilities, if needed (see CJEU: C 36/20 PPU, 25 January 2020).

A good practice is that the lawyer who assists a migrant in police custody will be the same lawyer who assists the migrant at a hearing before the court, and if the judge decides to detain the migrant, the same lawyer should appeal the judgement, if necessary and after agreement with his/her client.

Another good practice is that the lawyer who has assisted any migrant in administrative detention must defend his/her clients in all instances, administrative and judicial, to ensure the unity of the proceedings.

C. Expulsion

During the detention phase, once the return decision has been issued and expulsion is determined, the return decision becomes immediately enforceable (and the authorities will enforce it over a period of 60 days). If the return decision is to be enforced, judicial review can take place, and the migrant can submit new reasons, facts or evidence. Lawyers may request, within the judicial appeal, for the expulsion to be halted by requesting urgent interim measures.

If the migrant has not been subject to previous detention, and the migrant has not left the territory voluntarily, then after a return decision has been issued, it is enforceable under the same rules as explained above

CHAPTER 2 | ASYLUM

A. Arrival

Most asylum seekers enter Spanish territory in an irregular manner as an irregular migrant and ask for asylum on entry, or are detected as potential beneficiaries of international protection by the authorities or other stakeholders, or ask for asylum once they are on the territory, as normally there is no legal pathway to access the territory regularly, except for those who come with a visa or as tourists and then ask for asylum once inside the country.

The irregular entry of a potential beneficiary of international protection will be not sanctioned by the authorities (Article 17 Asylum Law). Under Spanish Asylum law, there are 2 types of procedures, depending on where a person requests asylum. It could be at the border or within the territory itself. The procedure at the border applies at all border checkpoints, airports, ports and migration detention centres (CIE). It is an urgent procedure and faster than being in-territory. The procedure within territory applies once in-territory, and for those rescued at sea (as they do not have to cross any border).

On arrival by sea (rescued at sea), once the migrants have disembarked, they are placed in a special facility (called CATE - Temporary Care Centres for Migrants) for the screening procedure to begin by the competent authorities. In Spain, this first procedure should not take more than 72 hours, and immediately the authorities must call the Bar to appoint lawyers to provide this first legal assistance, which should take place within these facilities and under legal safeguards that must be respected (individual assistance, privacy, secrecy of communication between client and lawyer, access to an interpreter, if needed, among others). If the migrant does not have any document to permit him/her to stay in Spain, a return decision will be issued, as explained above. But if the migrant/refugee requests asylum at this time, the return procedure must be automatically suspended in order to respect the principle of non-refoulement, and no detention can follow. If this rule is not respected, the lawyer must appeal the decision and ensure a judicial review. Also of relevance, lawyers can scrutinise the activity of the authorities if they try to prevent a claim for asylum at this first moment, for instance by telling migrants to exercise the right in detention facilities or any other humanitarian facilities.. In these cases, lawyers must ensure that the asylum claim has been taken into consideration - otherwise the outcome may not be in favour of the refugee due to a claim for asylum in a detention facility being different because of the type of procedure applying to them (urgent procedure).

Given that legal assistance must be provided at an early stage, this allows the person to be assisted not only for his/her detention, but also for detection of possible cases of international protection, vulnerable persons, unaccompanied or separated children, trafficked migrants, among others. This practice also allows for preparation of a better defence of each case and knowledge of the details from the beginning.

If a person would like to ask for asylum, the lawyer will make sure that the application is made to the police officers present for the operation, and the non-refoulement principle must apply from this first moment, as, once the intention to claim asylum has been expressed, the person is an applicant with all the rights and obligations attached to such a status.

For arrivals by sea, lawyers deployed to assist migrants upon arrival have received specialised training for such operations, and have to be registered to give legal aid services for migrants.

B. Request for asylum process

As mentioned, someone can ask for asylum at the border or within the territory.

At the border or in the CIE (migration detention centre), the procedure is faster and assistance by a lawyer is compulsory. There is a very short admission phase of the claim. The asylum seeker must remain at the border facilities until a decision is given as to whether the case is allowed to be examined in further detail. If accepted, the applicant will be authorised to enter and remain in Spain to continue with the asylum application. If denied, it is possible to request a review of the application, to which the Spanish administration must give a decision within 48 hours. If the claim is refused a second time, it is possible to submit an appeal.

Within Spanish territory, the asylum seeker should first make an appointment at the police station and as soon as possible on arrival (under Spanish law, the application must be made within the first month after arrival in the country). The Police must register the intention to request asylum and issue a document as a result of the intention to ask for international protection. This document does not represent the launch of the procedure but protects the claimant against refoulement and leads to an appointment for a personal interview. For this personal interview, the claimant is permitted (it is not compulsory) to be assisted by a lawyer. If provided, the legal assistance is part of the free legal assistance scheme. Claimants are strongly recommended to be assisted by a lawyer, not only for the interview, but indeed for the whole procedure to be carried out by the OAR - Oficina de Asilo y Refugio (based in Madrid), which will issue the final decision granting or denying international protection.

In Spain, there is no difference between making an application on the mainland, the islands, or the enclaves (Ceuta and Melilla). Once admitted, the person enjoys freedom of movement within the whole territory (this right has been established by case law, despite the fact that the law does not prohibit it).

C. Appeals against denial of international protection

For a denial of international protection, there are two types of appeal: an administrative appeal (not covered by the legal aid system, as under Spanish administrative law, such an appeal is not compulsory given that the second route here described is also open and is covered by legal aid); and a judicial appeal to the Court (Audiencia Nacional), this second route being covered by legal aid.

Under Spanish law, there is no automatic suspension when appealing a denial decision on international protection, in the sense laid down by the CEAS Directives, which state that, pending an appeal, the asylum applicant is entitled to remain within the territory (non-refoulement). In Spain, the lawyer must ask for suspension through interim measures. Recently, though, and because of the Directives and the caselaw of the Tribunal Supremo (Spanish Supreme Court), if an appeal has been submitted, the administration and the Court interpret it to mean that the applicant has the right to remain and for his or her rights to be safeguarded (Sentencia 1582/2022 en el recurso de casación 1314/2022).

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