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# Training of Lawyers on EU Asylum and Immigration Law (TRALIM 2) 23 May 2019



The project is co-financed with the support of the European Union's Justice programme



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# The European Union legal system regulating immigration and asylum instruments and case-law

**Stathis Poularakis**







# The EU legal system regulating immigration and asylum: instruments and case-law

*STATHIS POULARAKIS, Legal Expert on migration and asylum*

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23 May 2019



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# From Schengen to Lisbon

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**1985: *The Schengen Agreement*** five of the ten member states of the then EEC (Belgium, Germany, France, Luxemburg and Netherlands) agreed on the gradual abolition of checks at common borders, followed by the signing in 1990 of the Convention implementing that Agreement

**1990: *Dublin Convention*** most MS of the then EEC decided to set forth criteria for determining the responsible MS among them for the examination of every asylum application

- ❑ *Came into force 1.9.1997 Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxemburg, Netherlands, Portugal, Spain, UK, 1.10.1997 Austria, Sweden, 1998 Finland*

**1992: *Treaty of Maastricht*** acknowledges migration policy as a "matter of common interest" without, however, referring to a "common policy"

- ❑ *Recommendations / resolutions on issues of entry, residence, movement of third-country nationals, fight against irregular immigration, employment, family reunification*

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# From Schengen to Lisbon

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## 1997: Treaty of Amsterdam (*entry into force in 1999*)

- ❑ included among the objectives of the Union, the establishment of an area of freedom, security and justice
- ❑ granted the EU institutions new powers to draw up legislation in the area of asylum using a specific institutional mechanism:
  - a five-year transitional period with a shared right of initiative between the Commission and MS and decision by unanimity in the Council after consultation with Parliament; after this initial phase, regular co-decision procedure (applied since 2005)*
- ❑ the Court of Justice also gained jurisdiction in specific instances

## 1999: Tampere Programme: ‘first phase’ of the Common European Asylum System (CEAS) (minimum standards)

## 2000: EU Charter of Fundamental Rights

## 2004: Hague Programme: the ‘second-phase’ of the CEAS (towards common standards)

## 2009: Lisbon Treaty

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# Immigration Policy

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**Legal Basis:** Articles 79 and 80 of the Treaty on the Functioning of the European Union (TFEU)

**Competences:**

- ✓ Regular immigration
- ✓ Integration
- ✓ Combating irregular immigration
- ✓ Readmission agreements

*EU shares competence in this field with the Member States*



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# Immigration Policy

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Since 2008, a number of significant directives on immigration have been adopted and several have already been revised:

- **'EU blue card'** Directive (2009/50/EC)
- **Single Permit** Directive (2011/98/EU)
- **Seasonal workers** Directive (2014/36/EU)
- **Intra-corporate transfer** of migrant workers Directive (2014/66/EU)
- Directive on entry & residence for **researchers** (EU) 2016/801)
- Directive on TCNs who are **long-term residents** in the EU (2003/109/EC)
- The **family reunification** Directive (2003/86/EC)
- The so-called **'Facilitators Package'** (Directive 2002/90/EC & Framework Decision 2002/946/JHA)
- Directive on **trafficking** (2011/36/EU) and Directive on granting residence permit to trafficked or smuggled persons (2004/81/EC)
- The **'Returns Directive'** (2008/115/EC)
- The **Employers' sanctions** Directive (2009/52/EC)

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# Management of External Borders

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**Legal Basis:** Articles 67 and 77 of the Treaty on the Functioning of the European Union (TFEU)

A single area without internal border checks — the Schengen Area — requires a common policy on external border management

The Schengen external borders acquis:

- **Schengen Borders Code** (Regulation (EU) 2016/399)
- **Visa code** (Regulation (EC) 810/2009)
- **Internal Security Fund:** Borders and Visa
- Centralised **databases** (SIS, VIS, Eurodac)
- **Measures** (known as the Facilitators Package) designed to **prevent and penalise unauthorised entry**, transit and residence
- **European Border and Coast Guard Agency** (Frontex)

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# The Common European Asylum System

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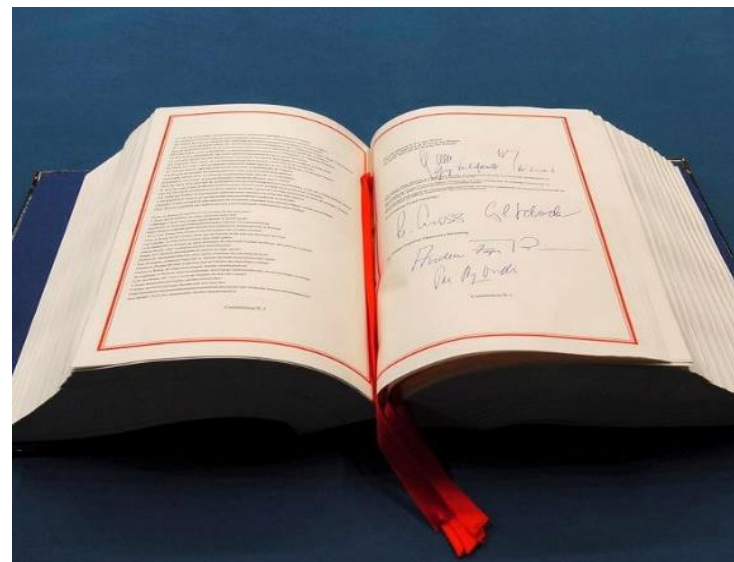
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**Art. 18 EU Charter of Fundamental Rights** “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention [...] in accordance with the TEU and the TFEU”

**Art. 19 Charter of Fundamental Rights** provides for protection in the event of removal, expulsion or extradition

**Art. 78 TFEU** “The Union shall develop a common policy on asylum, subsidiary protection and temporary protection”

**Art. 80 TFEU** enshrines the principle of solidarity and fair sharing of responsibility between MS



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# The Common European Asylum System

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A series of legislative instruments of secondary Union law have been adopted, including:

- “Dublin” Regulation
- “Eurodac” Regulation
- Reception Conditions Directive
- Qualification Directive
- Asylum Procedures Directive
- Temporary Protection Directive



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# Ireland and the CEAS

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## Protocol to the TFEU

Ireland can **opt in or out** of the adoption of the CEAS instruments

Instrument	Phase One	Phase Two
Dublin	Yes	Yes
Reception	No	Yes
Qualification	Yes	No
Procedures	Yes	No

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# The Qualification Directive (recast) (2011/95/EE)

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Establishes **common grounds** for granting international protection and foresees a **series of rights** for its beneficiaries

- ✓ Clarifying the grounds for granting and withdrawing international protection.
- ✓ Regulating exclusion and cessation grounds
- ✓ Rules on Revocation of, ending of or refusal to renew refugee status

*C-391/16, C-77/17 & C-78/17 [GC]: the relevant provisions of the directive are in line with the Geneva Convention and EU law*

- ✓ Improving the access of beneficiaries of international protection to rights and integration measures (residence permits, travel documents, access to employment and education, social welfare and healthcare)



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# The Asylum Procedures Directive (recast) (2013/32/EE)

Establishes **common standards** of safeguards and guarantees to access a **fair and efficient asylum procedure**

- ✓ Setting clear rules for lodging applications (quickly and effectively)
- ✓ Setting a time-limit for the examination of applications (in principle six months at the administrative stage), while providing for the possibility to accelerate for applications that are likely to be unfounded;
- ✓ Training decision makers and ensuring access to legal assistance;
- ✓ Providing adequate support to those in need of special guarantees – for example because of their age, disability, illness – including by ensuring that they are granted sufficient time to participate effectively in the procedure;
- ✓ Clearer rules on appeals in front of courts or tribunals

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# The Reception Conditions Directive (recast) (2013/33/EE)

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**More harmonized standards** of reception conditions throughout the Union

- ✓ It ensures that applicants have access to housing, food, clothing, health care, education for minors and access to employment under certain conditions
- ✓ access to employment within a maximum period of 9 months; education for all children under 18 years old
- ✓ Particular attention to vulnerable persons, especially unaccompanied minors and victims of torture
- ✓ It also includes rules regarding detention of asylum seekers, ensuring that their fundamental rights are fully respected

*C-601/15 [GC]: the various grounds on which a MS may detain an applicant for international protection are listed exhaustively*



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# The “Dublin III” Regulation (604/2013)

- Every single application for international protection shall be examined on the merits by a single, clearly determined MS
- The criteria for establishing responsibility run, in hierarchical order, from family considerations, to recent possession of visa or residence permit in a MS, to whether the applicant has entered EU irregularly, or regularly
- Where no MS responsible can be designated on the basis of the criteria listed in the Regulation, the first MS in which the application was lodged shall be responsible
- Any MS shall retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Asylum Procedures Directive

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# CJEU on “Dublin III” Regulation

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*C-411/10, C-493/10 (joined cases) - N.S., M.E. and others [GC] (following M.S.S. judgement by ECtHR): An asylum seeker may not be transferred to a Member State where he risks being subjected to inhuman treatment*

*C-490/16 [GC]: The Dublin Regulation still stands despite the high influx of 2015*

*C-695/15 – Mirza: inadmissibility before allocation of responsibility for a claim*

*C-670/16 – Mengesteab [GC]: The 3 month period for making a ‘take charge’ request starts to run before a ‘formal’ application for asylum is lodged, if a written document confirming the request for international protection has been received by the competent authority*

*C-47/17, C-48/17 - X. and X. [GC]: Where the requested MS does not reply within that period of 2 weeks to the re-examination request, the requesting MS must, be considered to be responsible*

*C-163/17 - Jawo, C-297/17, C-318/17, C-319/17, C-438/17 (joined cases) [GC]: An asylum seeker may be transferred to the MS normally responsible for processing his application or that has previously granted him subsidiary protection, unless he would be exposed there to a situation of extreme material poverty*

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# The “Eurodac” Regulation (603/2013)

- Establishes an EU asylum fingerprint database. When someone applies for asylum, no matter where in the EU, their fingerprints are transmitted to the EURODAC central system
- Asylum applicants and irregular border-crossers over the age of 14 have their fingerprints taken as a matter of EU law. These are then sent in digitally to the EURODAC central system within 72 hours
- Its primary objective is to serve the implementation of the “Dublin” Regulation (604/2013)

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# European Asylum Support Office (Regulation 439/2010)

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The objectives of EASO are the following:

- ✓ to facilitate, develop and coordinate practical cooperation among EU MS on asylum by facilitating the exchange of information;
- ✓ to contribute to the implementation of the CEAS by collecting and exchanging information on best practices, drawing up an annual report on the asylum situation in the EU
- ✓ to coordinate activities relating to information on countries of origin by gathering relevant, reliable, accurate and up-to date information and by drafting reports on countries of origin;
- ✓ to support EU MS subject to particular pressure on their asylum and reception systems by providing technical and operational assistance



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# Refugee Crisis in Numbers - *Europe*

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**1,015,078** arrivals by sea in 2015

**362,753** arrivals by sea in 2016

*181,436 in Italy*

*173,450 in Greece*

**17,819** dead / missing

from 2014 to 2018



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# EU response – Immediate response

- Triple the capacities and assets for the Frontex joint operations Triton and Poseidon in 2015 and 2016
- Relocation schemes to release pressure to national asylum systems in Italy and Greece
- An new “hotspot” approach
- Resettlement scheme
- Mobilizing emergency funding for frontline member states

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# EU response – The way forward

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## A common European Agenda on Migration with 4 Pillars

- Reducing the incentives for irregular migration
- Securing external borders
- A new policy on legal migration
- A strong asylum policy



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# A strong asylum policy – The CEAS reform

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The EU Commission has tabled **7 legislative proposals** for the reform of the Common European Asylum System (CEAS):

- ✓ **Regulation establishing a European Union Asylum Agency**
- ✓ **Recast Eurodac Regulation**
- ✓ **Dublin IV Regulation**
- ✓ **Qualification Regulation**
- ✓ **Asylum Procedures Regulation**
- ✓ **Recast Reception Conditions Directive**
- ✓ **Regulation establishing a Union Resettlement Framework**



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# EU response – Temporary Reintroduction of Border Controls

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- **Norway (12 May 2019 – 12 November 2019)**  
security situation in Europe; all internal borders with an initial focus on ferry connections with Denmark, Germany and Sweden;
- **Sweden (12 May 2019 – 12 November 2019)**  
serious threat to public policy and internal security; to be determined but may concern all internal borders;
- **Denmark (12 May 2019 – 12 November 2019)**  
severe threat to public order and internal security; internal border with Germany (land and ports with ferry connections); may extend to all internal borders;
- **Germany (12 May 2019 – 12 November 2019)**  
migration and security policy; land border with Austria;
- **Austria (12 May 2019 – 12 November 2019)**  
security situation in Europe and continuous significant secondary movements; land borders with Hungary and with Slovenia;
- **France (1 May 2019- 31 October 2019)**  
Terrorist threats and situation at the external borders.

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# EU response – Relocation

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- ✓ An emergency scheme to relocate refugees in clear need of protection from Greece and Italy to other MS
- ✓ Applicants belonging to nationalities with an EU average recognition rate for international protection of 75% or more

Only around **30 %** of the agreed target – number have been **effectively relocated**

- **Greece 21,238** persons
- **Italy 10,265** persons

**MS reluctant** to relocate asylum seekers

**Some MS** have refused to pledge (Hungary / Poland)

**CJEU** in C-643/15, C-647/15 **upheld the relocation scheme**

Hungary should accept 1,600 People



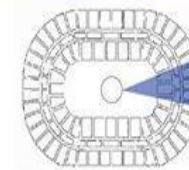
this is the number of tourists that arrive in Budapest in **3 hours!**



Spain should accept 10,000 People



This many will fill **1/8** of the seats of "Santiago Bernabéu"



France should accept 20.000 People



This many visit the Eiffel Tower **per day!**



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# Externalisation of EU migration policies

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Primarily focuses on **curbing migration, shifting responsibility** for preventing irregular migration into Europe **to countries of departure or transit**

## ***“EU - Turkey deal”***

- Undocumented migrants and those who do not apply for asylum or their application is rejected will be sent back from the Greek islands to Turkey
- 1:1 Rule: For each Syrian readmitted to Turkey from the Greek islands, another will be resettled from Turkey to other EU countries

## ***EU-Afghanistan joint declaration***

- Humanitarian and development aid linked with returns from EU to Afghanistan

## ***Cooperation with Libya***

- Training and support to Libyan coastguard authorities on search and rescue operations

## ***Cooperation with African countries***

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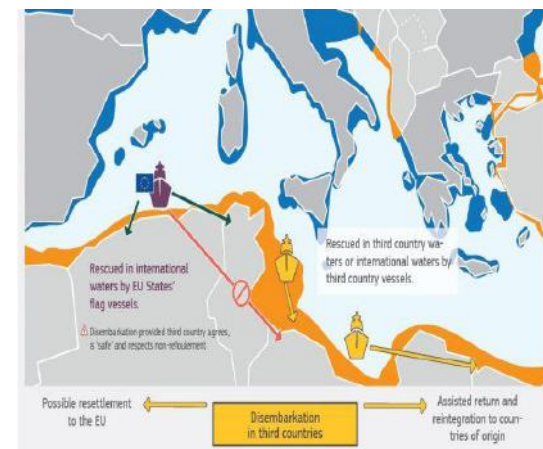
# EU response – State of play

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- ✓ Reform of CEAS in a dead-end
- ✓ Proposals for “controlled centers” & “disembarkation platforms”
- ✓ Bilateral Migration compromise deals between Germany and Portugal, Spain & Greece (“Administrative Arrangements”)
- ✓ Italy closed ports for Search and rescue vessels operated by NGOs



DISCLAIMER: This map is for illustrative purposes only and is NOT indicative of either precise territorial water delimitations or potential disembarkation points or countries.

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# A “common” European Asylum System?

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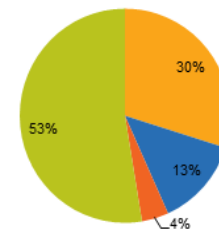
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Overall recognition rates: all asylum seekers

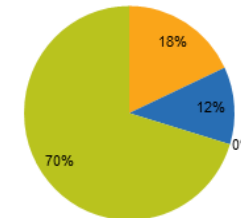
Country	2017	2018
Norway	70.8%	72.6%
Belgium	64.6%	64.2%
Germany	53%	50.2%
Greece	46%	49.4%
Slovenia	63.1%	43.1%
Sweden	46.9%	38.5%
Italy	40%	36%
Bulgaria	35.8%	35%
France	26.8%	26.4%

First instance decisions by outcome, selected Member States, 4th quarter 2018

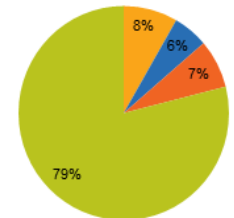
Germany (42300 decisions)



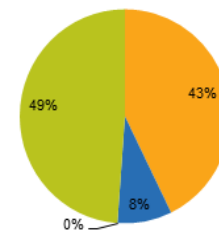
France (29900 decisions)



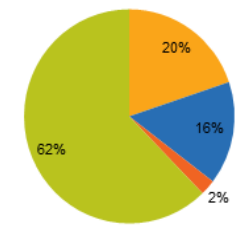
Italy (23195 decisions)



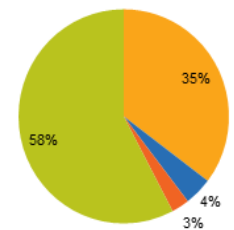
Greece (8820 decisions)



Sweden (7675 decisions)



UK (6575 decisions)



■ Refugee status 
 ■ Subsidiary protection 
 ■ Humanitarian reasons 
 ■ Rejections

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# A CEAS for refugees but without refugees?



- Public narrative:**
  - ✓ People on the move are not “genuine refugees”
  - ✓ EU needs to “control its borders”
  
- This narrative is used **to justify the current strategy of preventing all migration** into Europe
  
- Shifting responsibility** for preventing irregular migration into Europe **to countries of departure or transit**
  - ✓ *Packaging bilateral readmission agreements as ‘statements’ or ‘political agreements’ in a format, bypassing the EP and the necessary legal procedures*
  
- No safe and legal channels to Europe**
  
- The **tightening of border controls encourages migrants to take even more dangerous routes**



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## Immigration and Asylum in the context of BREXIT

Professor Colin Harvey







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# Panel Discussion National legal framework and case-law on asylum and immigration cases in Italy and Greece

Barbara Spinelli & Stathis Poularakis







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# Training of Lawyers on EU Asylum and Immigration Law (TRALIM 2)

*National legal framework and case-law on asylum and immigration  
cases in Italy*

**Avv. Barbara Spinelli**

**Dublin, 23 May 2019**



# Migration and Asylum Law: the Italian legal framework

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## Fundamental provision: Article 10, Constitution of the Italian Republic

1. The Italian legal system conforms to the generally recognised principles of international law.
2. The **legal status of foreigners** is **regulated by law** in conformity with **international provisions and treaties**.
3. A foreigner who, in his home country, is **denied** the actual exercise of the **democratic freedoms** guaranteed by the Italian constitution shall be entitled to the **right to asylum** under the conditions established by law.
4. A foreigner may not be extradited for a political offence.

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# Migration: the Italian legal framework

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- **In the 90's: first legislation on migration (Law Martelli)**, due to the **first large flows** of migrants in Italy when thousand of people were coming from Albania
- 1998: enactment of a **consolidated text** (D. Lgs. n. 286/1998) > still in force;  
**Goals:** manage and schedule **regular entry** and flow decree; set up good standards of **integration** for aliens lawfully **resident** and with a work permit; contrast **irregular/illegal entries**.

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In 2002, the so-called “**Bossi-Fini law**” imposed a new restrictive perspective. In particular:

- Limitation on family reunification;
- regular permanence only for people holding a working contract;
- More strict procedures for expulsion > **compulsory accompanying** to the border even before a judicial pronouncement (then declared partially incompatible by the Constitutional Court);
- Other restrictive amendments made between 2007 and 2009.

**N.B.**: by that time the migrants flow started to become a constant one and emerged as a **sensitive political issue**.

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# Migration: the Italian legal framework

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With the so-called “**Security Package**” (2008-2009) the government laid down also some **criminal provisions, again in a restrictive dimension of immigration:**

- **aggravating circumstance** of aliens committing a common crime;
- **new crime** of illegal entry and permanence;
- Possibility to **hold** irregular migrants for more than 180 days with a new intent of expulsion

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# Asylum law: the Italian legal framework

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- No direct legislation on asylum and international protection
- Transposition of the **Common European Asylum System (CEAS)** (Directives Qualification, Procedures and Reception Conditions)

Legislative Decree no. 251/2007 "Implementation of Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted"

*Amended by:* Legislative Decree no. 18/2014

Legislative Decree no. 25/2008 "Implementation of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status"

*Amended by:* Legislative Decree no. 142/2015

*Amended by:* Decree Law no. 13/2017, implemented by Law no. 46/2017

*Amended by:* Decree Law no. 113/2018, implemented by Law no. 132/2018

Legislative Decree no. 142/2015 "Implementation of Directive 2013/33/EU on standards for the reception of asylum applicants and the Directive 2013/32/EU on common procedures for the recognition and revocation of the status of



# Humanitarian protection

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- Provided for under Article 5, co. 6, D. Lgs. 286/1998 (as amended in 2008)
- **Granted in case of denial for international protection on the base of serious reasons of humanitarian nature (after individual evaluation)**
- Evaluation and protection of **applicant's vulnerabilities**
- police headquarters issue a permit of stay for humanitarian reasons as requested by the Territorial Commission (no discretion)
- Repealed by decree-law n. 113/2018 (Security decree)\*\*\*

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# Asylum law: the Italian legal framework

## International protection

- 1. Refugee status
- 2. Subsidiary Protection

## Humanitarian protection after Salvini D.L. 113/2018

- Special Protection\*
- P.o.S. for natural disaster\*  
(6m, no social services)
- P.o.S. for serious health  
reasons\*
- P.o.S. for high civil merit

*\* no social housing , no  
conversion in P.o.S. for work*

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# Asylum Law:

## Application for international protection



- Asylum seekers must apply through a specific application form as soon as possible, either at the border or at the Police offices;
- The application is transmitted to the relevant Territorial Commission;
- Currently, there are 50 Territorial Commissions in Italy;
- Four members: the President (from the Prefecture), two components from the Ministry of Interior, and a UNHCR delegate;
- Audition of the applicant with possibility of interpreter assistance;
- 3 months for the decision;
- The Commission can grant or deny international protection;
- Possibility of judicial appeal against the denial.

# Asylum Law:

## Application for international protection

- **Registration:** Obstacles to access to the asylum procedure continued to be reported in 2018. Different Questure prevented people from registering an application for reasons such as: limited opening days or hours; unlawful requirement of a domicile; proof of family links with children through documents or DNA tests. Several Civil Court rulings in 2018 have found such obstacles unlawful and have ordered Questure to allow the registration of applications.
- Tribunale di Napoli, ordinanza del 29 aprile 2019 declares that EU Directive 2013/32/UE has been violated by Questura di Napoli limiting only 1 day a week the registration to apply for asylum.

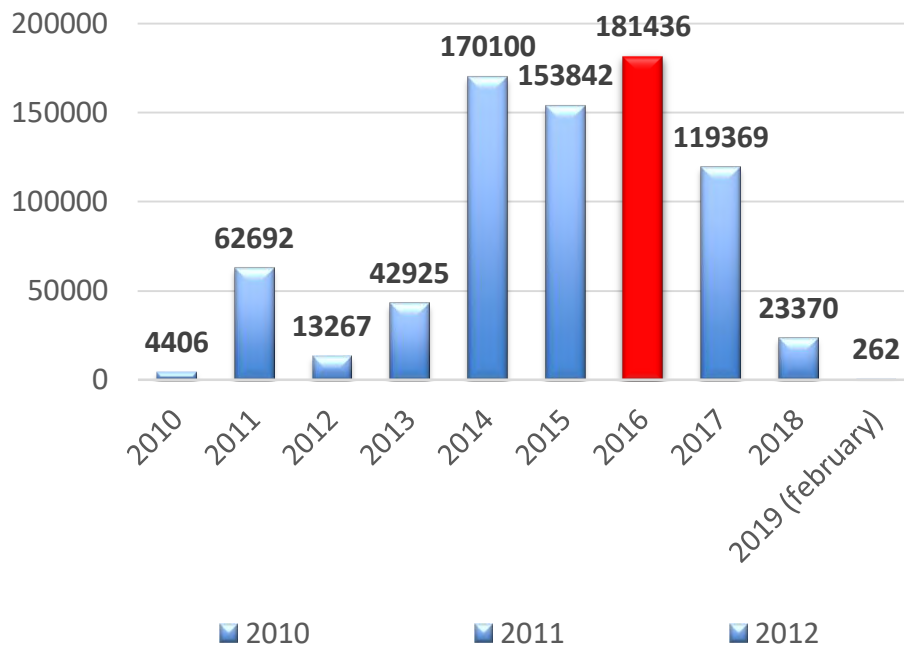
# Statistics

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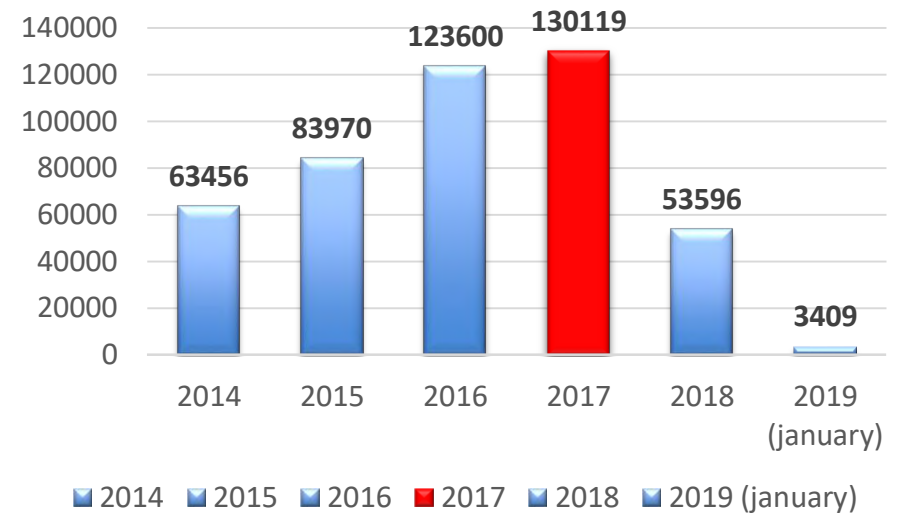


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## Arrivals



## Applications for international protection



Source: Ministry of Interior

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# Recent legislative reforms

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- **Minniti - Orlando Decree-Law**, D.L. n. 13/2017 (later converted with amendments into Law n. 46/2017).
- **Salvini Decree-Law** (also known as **Security Decree**), D.L. n. 113/2018 (later converted with amendments into Law n. 132/2018).

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# Minniti – Orlando Decree-Law

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## POSITIVE ASPECTS:



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- **Professionalisation of Territorial Commissions**
  - ✓ **250 new officials** hired after public competition (since May 2018)
  - ✓ Modification in the composition: **two permanent officials** with administrative functions
- **Specialised sections** in the courts, responsible for Migration and International Protection
  - ✓ knowledge of English or French
  - ✓ preference to those with previous experience
  - ✓ training courses

~~BUT~~ no extra burden upon public  
finances, and  
no increase in the workforce (hon.  
judges)

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## NEGATIVE ASPECTS:

- **Special and speedy Chamber proceedings** (no more than 4 months in first instance and no more than 6 months at the Court of Cassation)
- **No hearing before a judge** (utilisation of video recording of the audition in front of the Territorial Commission)
- **Extremely short deadline** to challenge the denial of international protection and to appeal the decision of first instance (30 days)
- **Removal of the second instance on the merit** (*unicum* in Italy)
- **No automatic suspensive effect of the appeal** to the Court of Cassation

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# Salvini Decree-Law

## Negative aspects

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- **Repeal of humanitarian protection:** replaced by temporary residency permit, awarded only in **six exceptional cases** → acts of particular value to society, severe labour exploitation, torture, domestic violence, extraordinary natural disasters and particularly serious health reasons
- Possibility of **denying or even withdrawing** internationally recognised refugee status in case of a broadened number of crimes (including “socially dangerous” crimes such as sexual violence; the manufacture, trafficking and possession of drugs for non-personal use; robbery and extortion; violence or threat against a public official)

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# Salvini Decree-Law

## Negative aspects

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- **Detention of asylum seekers** within hotspots in order to ascertain their identity and nationality is set at **30 days** > in case of difficulties with the process of identification, the period of detention can be extended to up to **six months**
- **No civil registration** for asylum seekers (this is without prejudice to the inscription to the sanitary system, access to work, enrolment of children in school, reception measures) – Florence and Bologna Tribunale allowed it
- **Revocation of Italian citizenship** for convicted of terrorism felonies
- **No legal aid** whether the appeal against the decision issued by the Territorial Commission is dismissed as inadmissible or barred to proceed further

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# Salvini Decree-Law

## Negative aspects

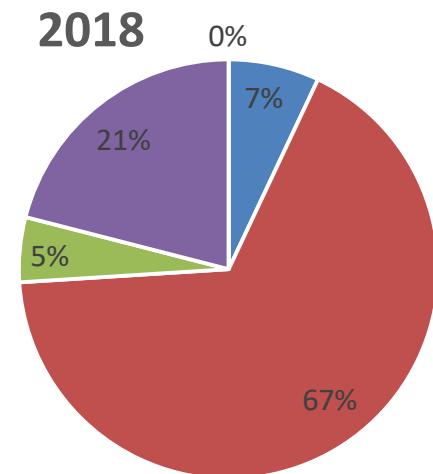
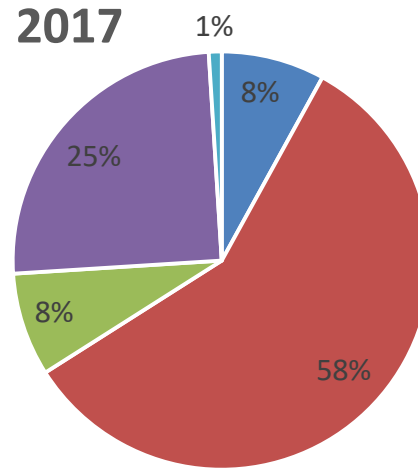
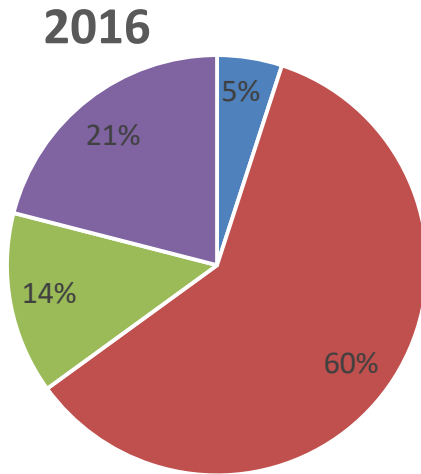
- introduced the concept of “**safe country of origin**” in the law, as a ground for applying prioritized examination, the accelerated procedure and the border procedure. No list of safe countries of origin has been adopted yet.
- Introduced **border procedure** and **immediate procedure**
- Codified the concept of **internal protection alternative** for the first time in Italian law
- Introduced the possibility of **automatically declaring inadmissible a subsequent application** made “during the execution phase of a removal procedure”
- **No more special reception facilities for holders of humanitarian protection and for asylum seekers (ex SPRAR only for holders of international protection)**
- **Reception conditions:** prevent asylum seekers from accessing second-line reception in the former SPRAR system, now renamed SIPROIMI. Asylum seekers, including Dublin returnees, can be now accommodated only in first reception centres and in CAS.
- The services provided in these centres, already “essential” or “basic” according to previous legislation, are now almost eliminated by the tender specifications scheme adopted by the Ministry of Interior on 21 November 2018, that considerably lowers the fee paid to managing bodies, de facto forcing the **closure of small structures** and encouraging the reception of asylum seekers in large facilities, cutting legal aid and psychological services.

# Applications outcomes

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■ Refugee  
■ Subsidiary

■ Rejection  
■ Humanitarian

Source: Ministry of Interior

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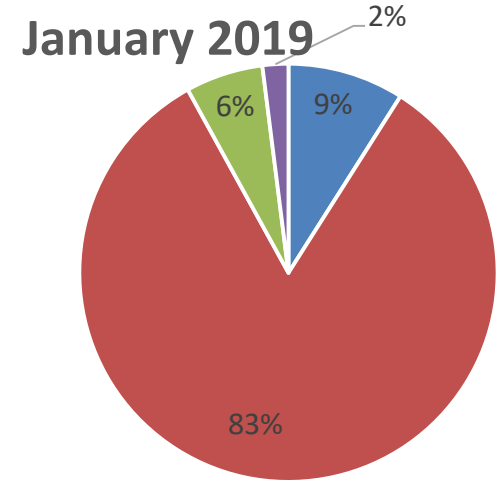
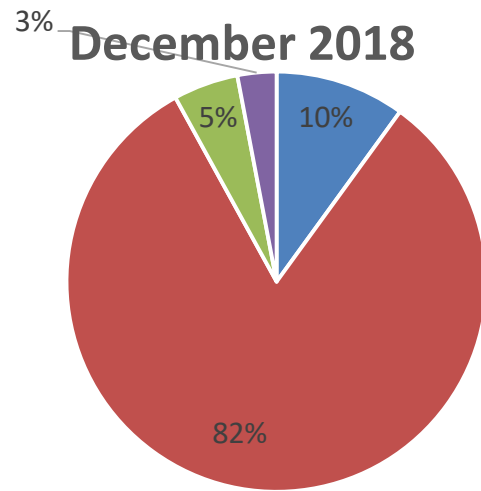




# Applications outcomes

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-  Refugee
-  Rejection
-  Subsidiary
-  Humanitarian

Source: Ministry of Interior

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# The closure of ports and the new draft of Salvini II decree

- On many occasions since June 2018, the Italian Government has seriously **delayed the disembarkation of potential asylum seekers rescued at sea** as part of operations coordinated by the Italian (Maritime Rescue Coordination Centre (MRCC) or by ships deployed as part of EU NAFVOR MED Operation Sophia or by naval units of the Italian State, without indicating a port of disembarkation or prohibiting the disembarkation of people following the berth in port. The “closure of ports” policy has delayed the access of rescued persons to the asylum procedure.
- **CRIMINALIZATION OF CIVIL SOCIETY ORGANISATIONS CARRYING OUT SEARCH AND RESCUE OPERATIONS** (ACQUARIUS, SAROST5, DICIOTTI, SEA WATCH, MARE JONIO)
- **REFOULEMENT TO LYBIA:** Since August 2018, the government has repeatedly threatened to return people rescued at sea to Libya.
- *NEW DRAFT F SALVINI L.D. : fines of up to 5,500 Euros per rescued migrant for civilian search and rescue vessels disembarking in Italy.*

# The closure of ports and the new draft of Salvini II decree

## 15.5.2019 Letter of UN Special Rapporteurs to Italy



UNITED NATIONS  
HUMAN RIGHTS  
SPECIAL PROCEDURES  
PROSPERITY, JUSTICE AND INCLUSION

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Mandates of the Special Rapporteur on the situation of human rights defenders; the Independent Expert on human rights and international solidarity; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on trafficking in persons, especially women and children

REFERENCE:  
AL/ITA/4/2019

15 May 2019

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights defenders; Independent Expert on human rights and international solidarity; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Special Rapporteur on trafficking in persons, especially women and children, pursuant to Human Rights Council resolutions 34/5, 35/3, 34/21, 34/35, 34/19 and 35/5.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the recent 'Directive for the unified coordination of surveillance activities of maritime borders and fight against illegal immigration according to article 11 of Legislative Decree n. 286/1998', *alias* Ministerial Circular n. 14100/141(8) (hereinafter: Directive) addressed to the Italian Chief-of-Police, the General Command of the Carabinieri Corp, the General Command of Finance Police, the General Command of the Port Authorities, the Chief of Staff of the Armed Forces and the Chief of Defence and issued on 18 March 2019 by the acting Minister of Interior Matteo Salvini. This Directive, which calls on Italian maritime and military authorities to prevent private vessels that have carried out search and rescue activities in international waters – allegedly referring to the north of Libya – from accessing Italian territorial waters and ports, has the potential of seriously affecting the human rights of migrants, including persons seeking asylum and victims or potential

.../2

His Excellency  
M. Enzo Moavero Milanesi,  
Minister of Foreign Affairs and International Cooperation

- The UN experts said that, should the decree – yet to be approved by the government – enter into force, **it would seriously undermine the human rights of migrants, including asylum seekers, as well as victims of torture, of trafficking in persons and of other serious human rights abuses.**
- They also asked for the withdrawal of two previous Directives banning NGO vessels rescuing migrants off Libya's coasts from accessing Italian ports. In particular, the second Directive singled out the Italian ship Mare Jonio for helping those at sea.

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# Italian case-law

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- *Decisions n. 3999 and n. 4004 of 27 September 2016, Council of State*  
**No transfer in Bulgaria and in Hungary of asylum seekers for breach of Article 3 ECHR** (Dublin cases)
- *Judgment n. 4890 of 19 February 2019, Court of Cassation*  
**No retroactivity** for the repeal of humanitarian protection
- *Judgment 28152 of 24 novembre 2017, Court of Cassation*  
Refugee status for woman who experienced **domestic violence** or other form of **gender-based discrimination** in the Country of origin

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# References

- <http://www.asylumineurope.org>



Country Report: Italy



2018  
Update



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# THANKS FOR THE ATTENTION

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# Seeking asylum in Greece: The EU-Turkey deal and beyond

*STATHIS POULARAKIS, Legal Expert on migration and asylum*

**Training of Lawyers on EU Asylum and Immigration Law (TRALIM 2)**

**23 May 2019**



AINING



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# Refugee Crisis in Numbers

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## Greece



**1** of the **3** main **points of entry** in EU

**Transit** country for refugees

**3<sup>rd</sup>** country among EU MS in terms of first-time **asylum applications** Q3 2018

## Germany



Usual **destination** country for migrants and refugees

Almost **1 million** asylum applications in 2016-2017

**1<sup>st</sup>** country among EU MS in terms of first-time **asylum applications** Q3 2018

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# Refugee Crisis in Numbers - Greece

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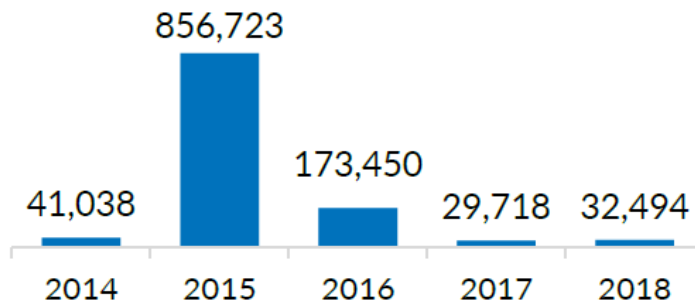


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# 32,494

sea arrivals January to December 2018 <sup>1</sup>

## Arrivals from 2014 to 2018



**18,014** land arrivals in 2018

**4,836** arrivals so far in 2019

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# Refugee Crisis in Numbers - Greece

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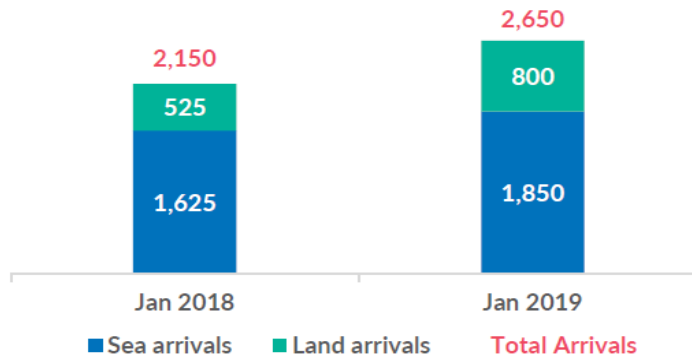
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## REFUGEES AND MIGRANTS IN GREECE\*

# 72,300

14,550 on the islands and 57,750 in the mainland

### Arrivals



\*UNHCR estimate as of 31 January 2019 of those who arrived and remained in Greece since the 2015 – 2016 flow.

Almost **24.800**  
migrant and refugee  
children are present in  
Greece \*

\*UNICEF, *Refugee and Migrant Crisis in Europe, Humanitarian Situation Report, July-September 2018*

**Key Facts**  
3.708\* Estimated number of UAC currently in Greece  
Out of the total:  
93,8% Boys  
6,2% Girls  
7,3% <14 years old

\*EKKA Dashboard for UACs in Greece - 15 February 2019

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# UNHCR Turkey: Key Facts and Figures 2018

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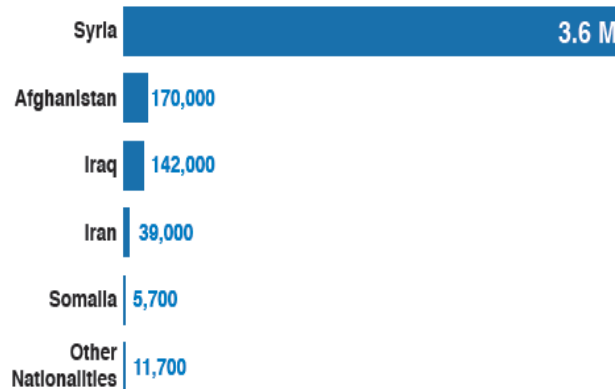
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## Key Figures



3.9 million

Number of Persons of Concern (as of 31 December 2018)



## Apprehension and Interception Figures in 2018 (as of 31 December 2018)

Dead / Missing in 2018 in Turkish Territorial Water: **91**

Total Interceptions at sea in 2018:



**26,679**

## Total Apprehension Incidents at western sea borders in 2018:



**686**

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# The Greek Asylum and Reception system

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Over the past years, the **Greek Asylum and Reception System** has experienced **four (4) milestone events**:

- ✓ The **pilot judgments by ECHR and ECJ**
- ✓ The **mass influx** of migrants and refugees **in 2015**
- ✓ The **closure** of borders along **the Western Balkan route**
- ✓ The **“EU – Turkey deal”** on migration **in March 2016**



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# The Greek Asylum System after the EU – Turkey deal



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The **impact of the EU-Turkey statement** has been a **de facto divide** in the asylum procedures applied in Greece: **islands vs mainland**

The **main changes** in law and practice are as follows:

- ✓ **Reception and identification** procedure - the new “hotspot approach”
- ✓ **Geographical restriction** on the islands
- ✓ **Fast-track border procedure**
- ✓ The **safe country** concept
- ✓ The **enhanced role** of **EASO** in the procedure
- ✓ **Differential treatment** of specific **nationalities**
- ✓ **Appeal Committees** reform



# Implementing the new hotspot approach

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**5 hotspots on islands** (*Lesvos, Chios, Kos, Samos and Leros*)

**Migrants stay changed from a few days transit to a much longer stay** (*months*)

**Newcomers** (after March the 20<sup>th</sup>) are:

- Allowed to **move to the mainland** if their **claim** is considered **admissible**, or they **belong to vulnerable groups**; or
- Required to **remain on the islands until claim is examined**
- **Returned to Turkey** in case they do not seek asylum or their applications are rejected



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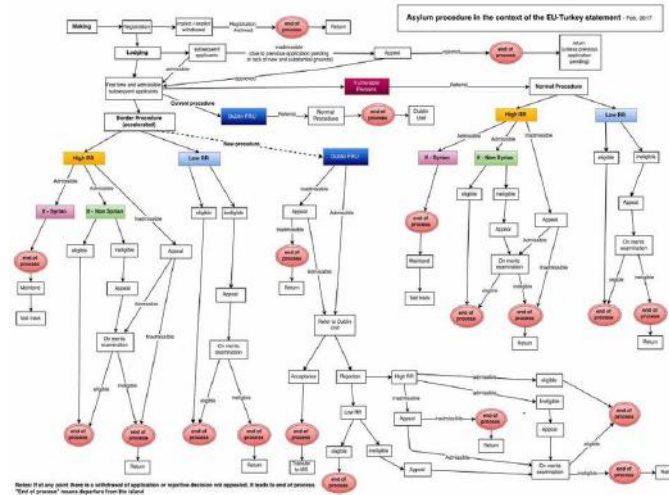


# Restriction of movement



- ❑ **Various restrictive policies** on freedom of movement implemented
- ❑ **Differential treatment of certain nationalities** i.e. with low recognition rate
- ❑ Initial **3-day restriction** on “freedom of movement” **within the hotspots / prolonged up to 25 days** (at the same time detention order in view of deportation by Police)
- ❑ **Once the 25 days pass, suspension of expulsion** and imposition of **obligation to remain on the island by the police authorities**
- ❑ A blanket **geographical restriction** is also imposed **by a decision of the Director of the GAS** for all asylum seekers on the islands (“Vulnerable” or “Dublin family cases” excluded)
- ❑ ECtHR: 3 Afghans detained for 1 month in view of readmission to Turkey - no violation of art. 5 or 3 of ECHR (*J.R. v. Greece - 22696/16 - see also O.S.A. and others v. Greece - 39065/16*)

# Fast-track border procedure



A new special border procedure, known as a “fast-track” border procedure, visibly connected to the implementation of the EU-Turkey statement was introduced in April 2016

# The enhanced role of EASO in the procedure

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Since the **EU Turkey statement**, **EASO** has **played a more active role** in the asylum procedure **per se**:

- ❑ In **Fast-Track Border Procedure**, the **interview** is conducted by EASO (As of 2019 in all cases on the islands)
- ❑ EASO also involved in the “**Vulnerability Assessments**” in the context of the Fast-track border procedure
- ❑ A reform in March 2017 enabled EASO to **assist** the Appeals Committees **in the examination of appeals**

**Serious concerns** on:

- ✓ Level of **training and expertise** of EASO caseworkers
- ✓ lack of “**checks and balances**” regarding EASO staff

**EU Ombudsperson** (735/2017/MDC): “genuine concerns” but **ultimately the responsibility** for individual claims **lies with the Greek authorities**



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# The safe country concept



Firstly **introduced in 2008**, but **never enforced** in practice

**After the EU-Turkey deal**, the GAS started **examining claims on admissibility**

**Only applied in the context of the Fast-Track Border Procedure for those arrived after 20 March 2016 on the islands and subject to the EU-Turkey statement**

**In practice**, first-instance decisions for **Syrians**, reject **claims as inadmissible** on the basis that **Turkey** can be considered a **“safe third country”** or “first country of asylum”

**“Vulnerable” or “Dublin family cases”** are referred to “regular” procedure and **examined on the merits**

In December 2016, a joint **examination on admissibility and eligibility** under the fast-track procedure has started in December 2016 **for nationalities with a recognition rate over 25%**

# The safe country concept



For a country to be considered as a "safe third country" for a particular applicant, **the following criteria must be met cumulatively:**

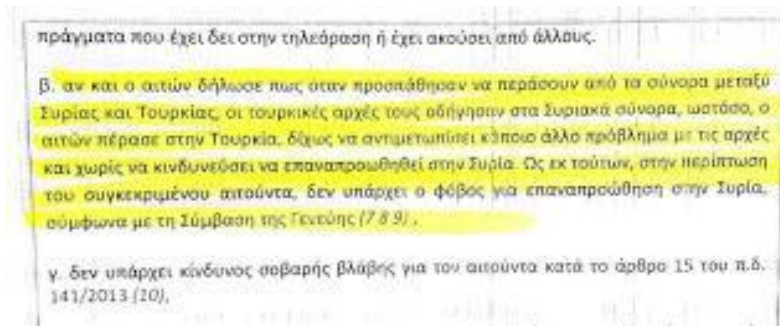
- (a) His/her life and liberty are not threatened** on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) the principle of non-refoulement in accordance with the Geneva Convention is respected;**
- (c) there is no risk of serious harm** (death or execution/torture/inhuman or degrading treatment)
- (d) the prohibition of removal**, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment **as laid down in international law, is respected**
- (e) the possibility exists to request refugee status** and, if found to be a refugee, to receive protection **in accordance with the Geneva Convention.**
- (f) a connection exists between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country;**

# Turkey as a safe third country



**Decisions mainly refer to the provisions of the Turkish law and to the assurances given by the Turkish authorities or the Commission without fully assessing the situation in practice**

Usually were **based on a pre-defined template** prepared by the Asylum Service **thus, in many cases identical**



*“...Despite the fact that when the applicant originally tried to pass the borders and enter Turkey, the authorities send him back to Syria, he ultimately managed to enter Turkey. Since then, he did not encounter any problem by the Turkish authorities. As a result there is no real risk of ‘refoulement’ ...”*

# Differential treatment of specific nationalities

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## Mainland

**Fast-track processing** under the regular procedure since 23 September 2014 for **Syrians**

**Relocation** scheme available for applicants “in clear need of international protection” (EU average recognition rate for international protection over 75%)

**Dedicated Asylum Units** for certain nationalities (Pakistanis, Albanians and Georgian, Sub-Saharan Africa)

## Islands

The **Fast-Track Border Procedure** variably **implemented** depending on **nationality**



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# The “vulnerability contest”



“**Vulnerability**” has become the “**ticket out**” of the islands and not returning to Turkey

Vulnerability may affect the application of the “**Dublin**” liability criteria (Article 16 (2), 17) as well as the “**legality**” of the transfer

Vulnerability may lead indirectly to international protection:

- ✓ It either **confirms the risk of harm** / persecution in the country of origin
- Or**
- ✓ The asylum seeker **skips the admissibility phase** (safe third country)

**Serious gaps** in vulnerability assessments - Lack of a universal system  
Thus, **many fall through the cracks** of the system

## VULNERABILITY RATING

<input type="checkbox"/>	A. LOW	
	B. MEDIUM	
	C. HIGH	

*Circle one of the above*

# Appeals Committees reform



New **three-member** Independent Appeals Committees with the participation of **two administrative judges** and **one member indicated by UNHCR**

**Extremely low recognition rate** of international protection by the New Appeals Committees

	First instance		Appeal	
	Number	Percentage	Number	Percentage
<b>Total number of decisions</b>	22,513	-	4,354	-
Positive decisions	10,364	46%	277	6.2%
<i>Refugee status</i>	9,323	41.4%	80	1.8%
<i>Subsidiary protection</i>	1,041	4.6%	43	0.9%
<i>Referral for humanitarian status</i>	-	-	154	3.5%
Negative decisions	12,149	54%	4,077	93.8%

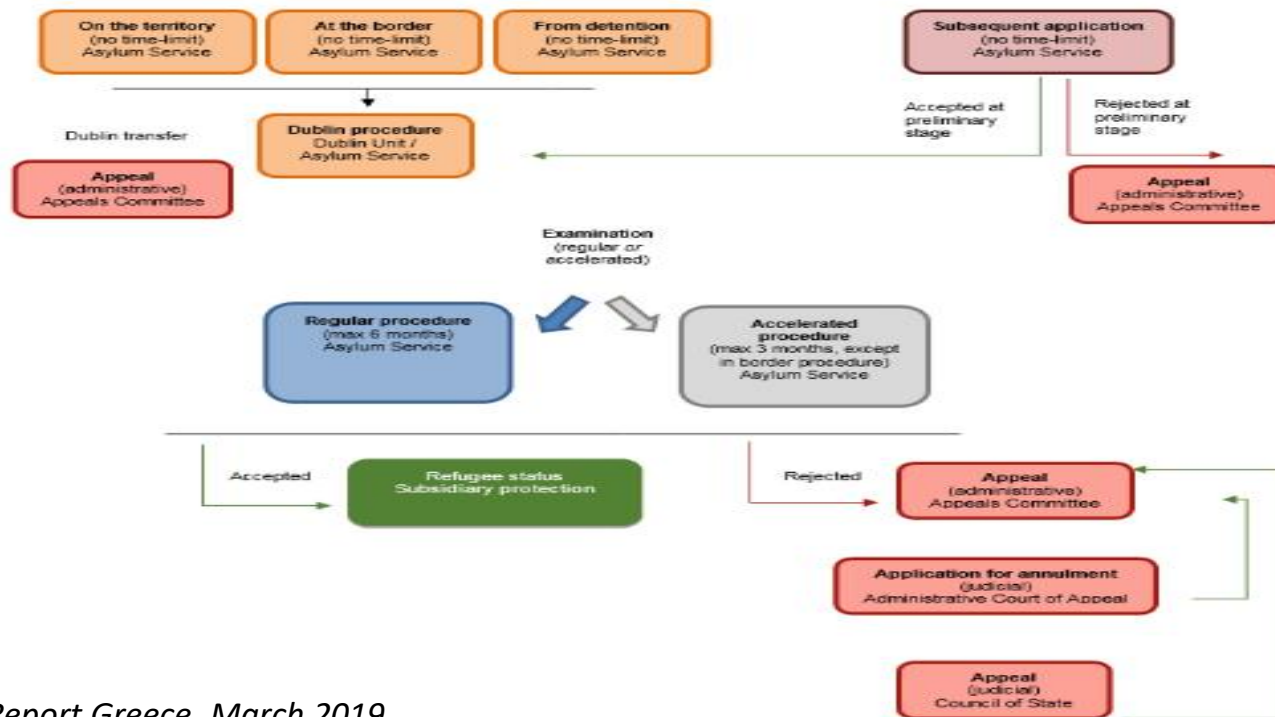
The involvement of judicial officials in an administrative body, was **challenged on “constitutionality”** before the Greek Council of State

The **legality** of the establishment of the New Appeal Committees was **upheld by the Plenary of the CoS** on the 8 May 2017

# Asylum Procedure



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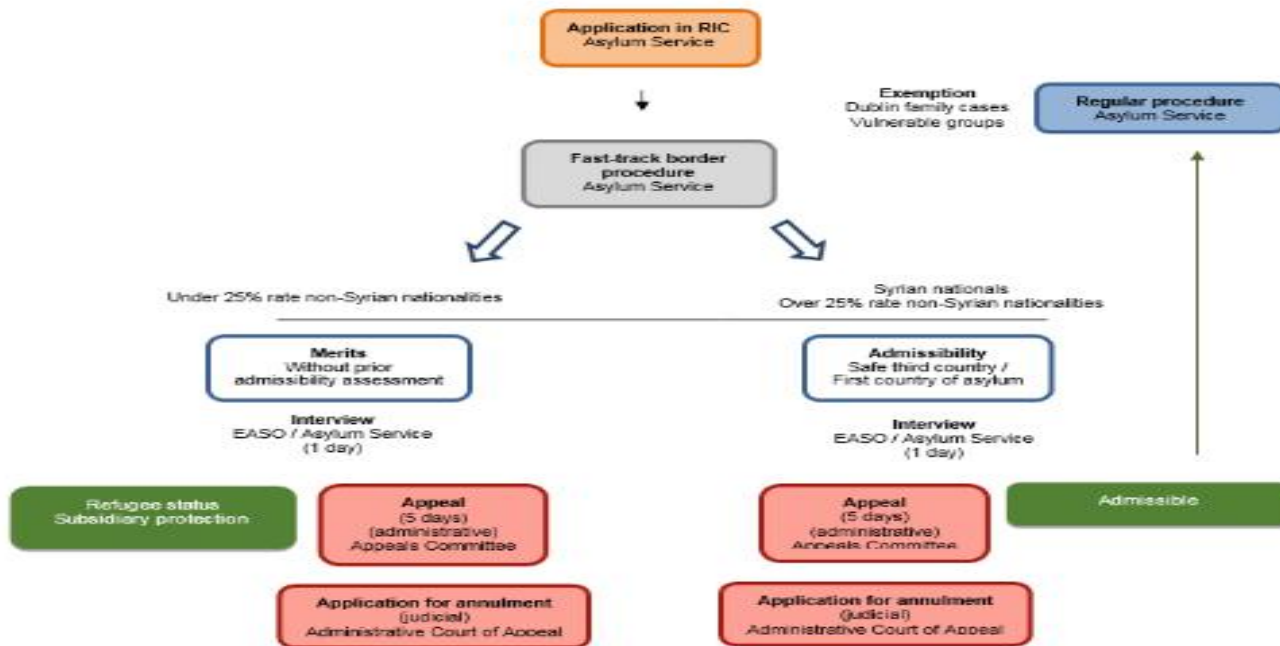


Source: AIDA Report Greece, March 2019

# Fast-track border procedure



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Source: AIDA Report Greece, March 2019

# CoS 805/2018: Geographical restriction of asylum seekers on the islands

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**Falls within the notion of "necessary restrictive measures"** that may be imposed on asylum seekers "until their status in the country is regularized" (*Article 31 (2) of the Geneva Convention*)

Article 5 of the **Constitution does not prohibit the imposition of restrictions** on free movement to aliens who apply for international protection

However, the **measure has resulted in unequal distribution of asylum seekers** across the national territory and **significant pressure on the affected islands** compared to other regions, including negative effects on their economy and public order

**No serious reasons of public interest** are deduced **from the Decision** to justify such a measure

Therefore, the Council of State majority **annulled the Decision** in question.

**2 days later, a new Decision** of the Asylum Service Director **was issued, explicitly invoking** the need to implement **the EU – Turkey deal**

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# CoS 2347-8/2017 – Turkey as a safe third country

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The Council of State **interpreted the criteria** set forth by the Directive **2013-32 in a way that opens the way for returns to Turkey**

**By a majority of just one vote (13-12) did not referred the case for a preliminary ruling to ECJ**

"the **Temporary Protection Regulation for Syrians in Turkey** can be considered as a **protection in accordance with the Geneva Convention**"

CoS **rejected allegations that Turkey does not respect the principle of non-refoulement**

- The applicant's life and freedom will not be threatened on account of his Syrian nationality
- Turkey hosts a large number of Syrian refugees
- Assurances are given by the Turkish authorities to the Commission

Following the judgement, the Independent Appeals **Committees overturn decisions** by GAS **only in cases where there is no genuine link between the applicant and Turkey**

**9th Independent Appeals Committee (20802/25.9.2018 & 20898/26.9.2018): Turkey cannot be considered as a safe third country for two families of Syrians from Afrin, due to Turkey's military operations in the area**

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# *The Case of Turkish 'eight'*

Training of Lawyers on  
European Law relating to  
Asylum and Immigration



#TRALIM 2

On **July 15<sup>th</sup> 2016**, a **coup d'état** was attempted in Turkey

**8 Turkish military personnel** arrived in Greece on board a helicopter and **claimed asylum**

Greece's Supreme Court (Areios Pagos) **denied the extradition** of all eight soldiers

On December 2017 the **Appeals Committee approved the asylum request** of one of the eight Turkish soldiers

The **Greek government asked** the country's judicial authorities to **cancel the decision**

On March 2018, Turkey arrested 2 Greek soldiers for allegedly entering a Turkish military zone, at the Greek-Turkish border

**Council of State (1694/2018) rejected government appeal** and reaffirmed the Appeals Committee reasoning that the Turkish soldier should be granted asylum

**More than 7,000 Turkish nationals** have **applied for asylum in Greece**, since the coup d'état

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# "Administrative Arrangement"

Training of Lawyers on  
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Asylum and Immigration



#TRALIM 2

- ❑ **Reform of CEAS in a dead-end**, proposals for “controlled centers” & “disembarkation platforms”
- ❑ **Migration compromise deal between Germany, Spain and Greece** on the sidelines of EU Summit late June 2018
- ❑ **Exchange of letters by Ministers of Germany and Greece** in August on specific common objectives towards EU migration policy
- ❑ **Final operational details were annexed to the letters**, under the title “Administrative Arrangement”
- ❑ Legal Basis: Art. 36 of the Dublin III Regulation

ANNEX 1

Administrative Arrangement

between

the Ministry of Migration Policy of the Hellenic Republic

and

the Federal Ministry of the Interior, Building and Community of the Federal Republic of Germany

on cooperation when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border

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# "Administrative Arrangement"

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#TRALIM 2

Readmission to Greece of persons identified during temporary checks at the German-Austrian border

- Any adult third-country national identified during temporary checks at the German-Austrian border, having previously applied for asylum in Greece from July 1st, 2017 onwards will be readmitted to Greece
- Unaccompanied children at the time of the identification are excluded
- Readmission within 48 hours, unless Greece objects within 6 hours upon receipt of notification of refusal of entry in Germany
- Within 7 days, if it is demonstrated that there was an error (refusal of entry in error), Germany will readmit the person

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# "Administrative Arrangement"

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#TRALIM 2

Provisions for concluding pending Dublin cases of family reunification from Greece to Germany

Germany commits to:

- swiftly conclude family reunifications from Greece by the end of 2018, with respect to “take charge” requests already accepted by the German Dublin Unit before 1 August 2018
- examine all pending “take charge” requests submitted before 1 August 2018 within two months
- examine and reply "without undue delay" to all requests for re-examination submitted before 1 August 2018
- The number of people to be transferred is capped at 600 people per month and family reunifications should be completed by December 2018

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# "Administrative Arrangements"

Training of Lawyers on  
European Law relating to  
Asylum and Immigration



#TRALIM 2

- ❑ Not an arrangement on operational issues and actions based on and within the framework of Dublin
- ❑ But rather a legal instrument setting forth “new” binding rules along and beyond “Dublin”
- ❑ A bilateral quasi-Dublin system that reduces/eliminates a series of procedural rights and guarantees
- ❑ Management of migration issues aside EU acquis

ANNEX 1  
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between  
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# Concluding remarks

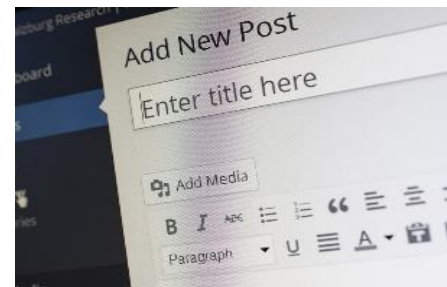
## *The “Greecification” of EU Asylum policy*



- ❑ The "Instrumentalization" of the lack of adequate reception conditions and slow asylum procedures in Greece to discourage new migration flows to Europe
- ❑ “Insufferable pressure is being put on us to reduce our standards and minimise the guarantees of the asylum process... to the lowest possible under the EU [Asylum Procedures] directive.”
- ❑ Law and practice have been **totally subjected to deterring new migratory flows**
- ❑ Greece a testing ground for restrictive policies reflected in EU Commission proposals for CEAS Reform
- ❑ Commission’ proposals serve as **soft law for amendments to national legislation** in Europe
- ❑ Managing legal issues through use of political priorities **raises many questions** about the **future of the asylum system, the protection of human rights and the rule of law**

## Contact Details

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- ❑ Blog: Immigration.gr:
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<https://www.facebook.com/immigration.gr>



# Questions?

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## Q&A Session





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# Developments in the national legal framework for protecting and supporting immigrants and asylum seekers

Catherine Cosgrave & Katie Mannion



# Developments in the national legal framework for protecting and supporting immigrants and asylum seekers

Catherine Cosgrave

Immigrant Council of Ireland  
Independent Law Centre

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# Overview of Irish Immigration Law

## Principal Legislation

Immigration Act 1999 – deportation

Immigration Act 2003 – carrier liability & removal

Immigration Act 2004 – entry & residence

Employment Permits Acts 2003-2014

Irish Nationality and Citizenship Acts 1956-2004

# 'Ministerial discretion'

Ireland does not participate in relevant EU Directives:

- Long-Term Residence
- Family Reunification

Administrative schemes dealing with specific issues, for example:

- Spouse/partner of Irish national
- Parent of Irish citizen child
- Long-Term Residence
- International Humanitarian Access Programme
- Special Scheme for International Students



# Remedies

- No independent appeal procedures
- Administrative review in some cases
- Judicial Review pursuant to Illegal Immigrants (Trafficking Act) 2000
- High Court Practice Direction 81 & Explanatory Note

# Employment Permission

Administered by Department of Business, Enterprise and Innovation

See: <https://dbei.gov.ie/en/What-We-Do/Workplace-and-Skills/Employment-Permits/>

Singh v Minister for Enterprise, Business and Innovation & Ors. [2018] IEHC 810

Ling and Yip v Minister for Enterprise, Business and Innovation [2018] IEHC 546

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# Family Life/Reunification

INIS Family Reunification Policy Document 2016

Article 8 ECHR – section 3 European Convention of Human Rights Act 2003

Article 41, Irish Constitution

Different migrants, different rights

- Nationality and residence status of ‘sponsor’
- Nationality and residence status of ‘applicant’
- Category of ‘family member’

Pre-entry clearance April 2019

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# Labour Market Access of Family Members

Residence Permission granted depends on circumstances

Stamp 4 – right to work

Stamp 3 – dependent

## **Revised immigration arrangements for the Spouses and De Facto, March 2019**

Stamp 1 – permission to access labour market but without requirement to take up employment permit

Minor dependent children?

Employment Permits Act 2014 – registration requirements.

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# Luximon and Balchand v Minister for Justice and Equality

## Irish Supreme Court Cases

**[2018] IESC 24**

Whether the Minister was under a duty to consider constitutional family rights or art. 8 ECHR rights, either generally, or in the circumstances of these cases, in deciding applications under s.4(7) of the Immigration Act 2004?

# Decision in Luximon & Balchand

Requiring a person who applied to have their residence permission renewed or varied pursuant to s.4(7) of the 2004 Act to remove themselves from the State in order to make the application was not permitted by that section.

As a matter of statutory construction, s.4(7) dealt with an application to be made from within the State.

In making a decision under s.4(7), the appellant was under a duty to act in a manner compatible with the provisions of the European Convention on Human Rights (ECHR).

A consideration under s.4(7) should be carried out having regard to art.8 ECHR rights where necessary at the time of that assessment, and at a time when the applicant remained within the State. Pursuant to art.8 ECHR, there may be a positive obligation to establish **an effective and accessible** procedure.

# Citizenship

- Irish Nationality and Citizenship Acts 1956-2004
- Section 19 Revocation
- Procedures of Committee of Inquiry
- Habte -v- The Minister for Justice and Equality & Ors [2019] IEHC 47



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# Training of Lawyers on EU Asylum and Immigration Law (TRALIM 2)

**Katie Mannion**



# Developments in the national legal framework for protecting and supporting immigrants and asylum seekers

Katie Mannion

Irish Refugee Council Independent  
Law Centre

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# Developments in the national legal framework for protecting and supporting immigrants and asylum seekers

- The International Protection Act 2015
- Came into effect on 31 December 2016
- Introduces single procedure
- Provides for single legislative instrument for the protection system
- Changes family reunification rights

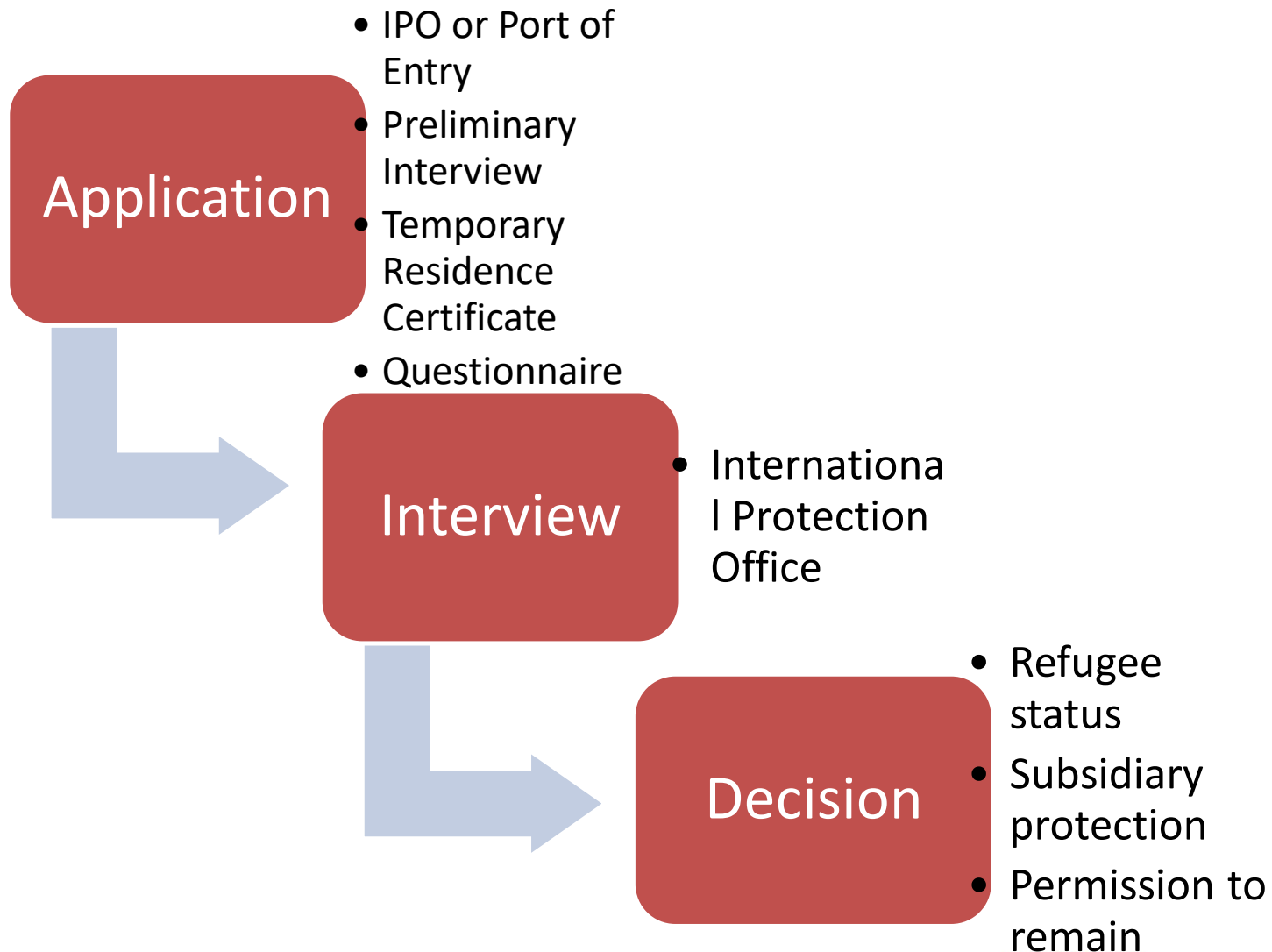
# Refugee status

Well founded fear of being persecuted for reasons of:

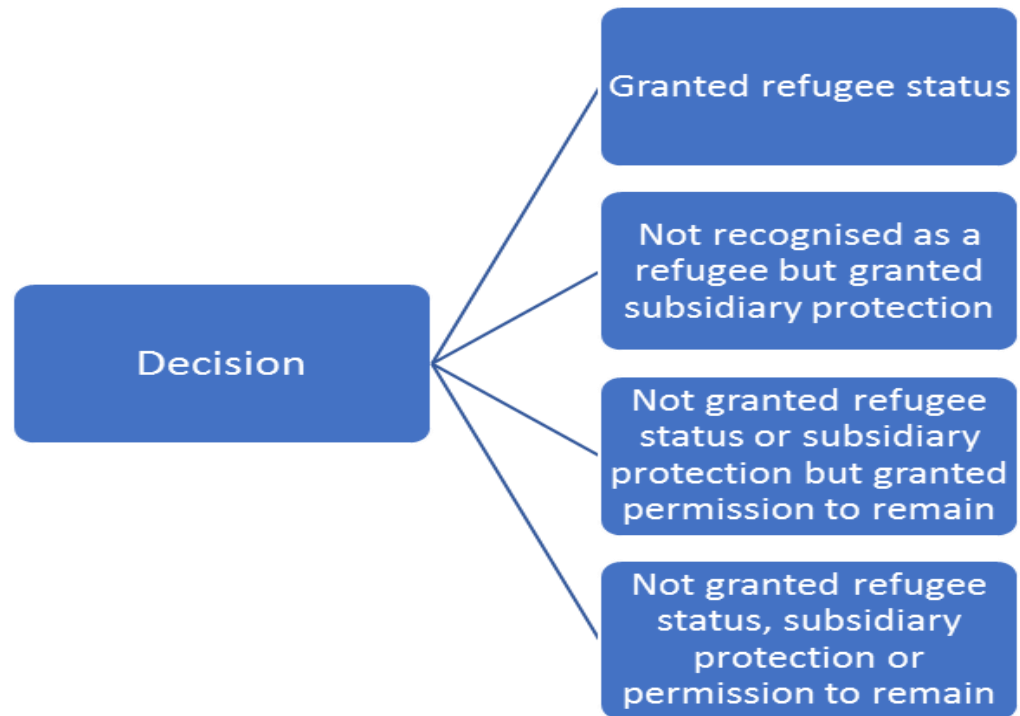
- Race
- Religion
- Nationality
- Political Opinion
- Membership of a particular social group

# Subsidiary protection (SP)

- Serious harm =
  - death penalty or execution,
  - torture or inhuman or degrading treatment or punishment of a person in his or her country of origin or
  - serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or internal armed conflict



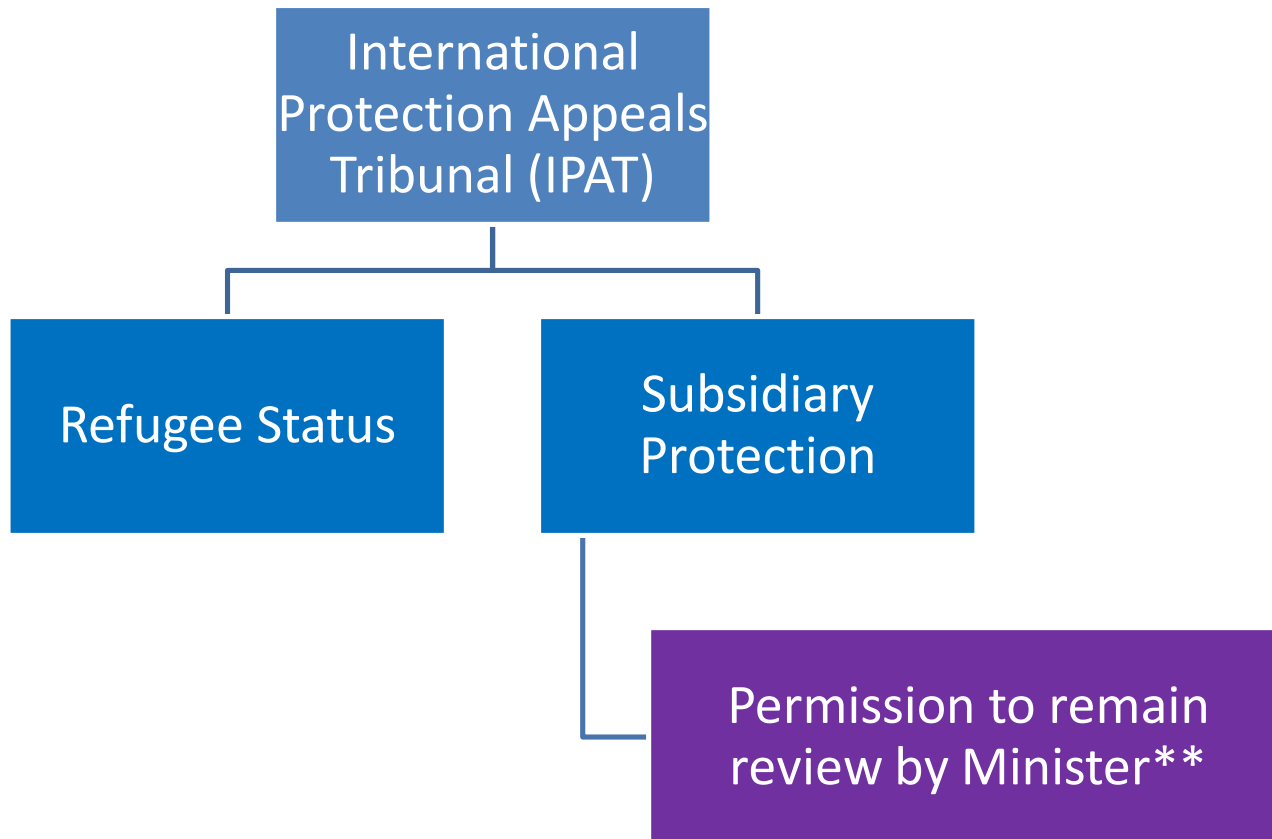
# Decision from IPO



# Refugee status

Well founded fear of being persecuted for reasons of:

- Race
- Religion
- Nationality
- Political Opinion
- Membership of a particular social group





# Dependants for purpose of your application

- Your children under the age of 18, who are not Irish citizens, are deemed to be included in your application if they are in Ireland or are born here while you are in the asylum procedure\*\* (some children with foreign national parents may have right to Irish citizenship)
  - This includes children who arrive in Ireland while you are still in the asylum procedure

*Important that you raise any protection needs they may have in your questionnaire and interview throughout the procedure*

*Remember they may have additional or different protection needs and/or fears if returned to your country of origin*

- All adult family members must make their own applications

# RIGHTS FOR BENEFICIARIES

## **A qualified person shall be entitled to:**

- Seek and enter employment
- Engage in any business
- Access education & training
- Medical care
- Social welfare benefits

# RIGHTS FOR BENEFICIARIES

## Permission to reside in the State:

- For a specified period not less than 3 years.
- A family member – for a specified period not less than 1 year.
- Renewable unless *'compelling reasons'* of:
  - National security
  - Public order

# FAMILY REUNIFICATION

## Family member defined as:

- Spouse or civil partner provided marriage or civil partnership (CP) subsisted at time application for international protection made;
- Child under 18 not married;
- Parents & siblings – (Unaccompanied child sponsor & not married) who are under 18 yrs. at date of application & not married.
- **Time Limits:** 12 months to apply for F.R ; Min. set time limits for entering
- **Ending of F.R.:** If marriage or CP ceases; Min. may refuse or revoke F.R.

# FAMILY REUNIFICATION (2)

- Applications for family reunification by persons who were granted status prior to the coming into force of the 2015 Act must be received by the Minister within 12 months of 31 December 2016. Such persons are entitled to make an application for family reunification **up to and including 30 December 2017**

# Permission to remain

*Family & personal circumstances as well as your right to respect for your private life & family life*

- The Minister will have due regard to:
  - The nature of your connection with Ireland;
  - Humanitarian considerations (*illness, special needs* etc)
  - Your character & conduct within & outside Ireland
  - Considerations of national security & public order
  - Any other considerations of the common good.

*Important to keep IPO informed of any change of circumstances relevant for permission to remain*

# Reception Conditions Directive and SI

- 6 July 2018 - Ireland transposed recast Reception Conditions Directive
- [European Communities \(Reception Conditions\) Regulations 2018](#) (S.I. 230 of 2018)
- Place reception conditions on statutory footing for the first time in Ireland.



# Reception Conditions Directive and SI

## Who Does it Apply to?

- **Recipient** is a person who has expressed a desire to claim asylum or someone who has lodged their claim (note time limit)

## Who Does it Not Apply to?

- people who fall outside of the scope of the Directive (i.e. people living in DP with status, or people on deportation orders).

# Information to be Given to Recipient

- **Regulation 3** – Requirement to provide information re material conditions within 15 days
- **Regulation 4** - Entitlement to receive the material reception conditions at designated accommodation centre where he or she does not have sufficient means to have an adequate standard of living.

# Reduction or Withdrawal

- **Regulation 6**
- Reception conditions may be reduced or withdrawn where:
  - (1) the asylum seeker is obstructing the asylum procedure or fails to comply with obligations in the process;
  - (2) the asylum seeker seriously breaches the house rules of the reception centre;
  - or (3) engages in seriously violent behaviour.

# Vulnerable Persons

- **Reg 8** – Requirement to complete vulnerability assessment within 30 days of person giving indication of intention to seek international protection etc. Potential for reassessment after 30 days if necessary
- Must be **multi-disciplinary** – currently only medical screening on arrival – resulted in difficulties with LGBT applicants, etc.

# Minors

- **Reg 9** - Best interests of the child as a primary consideration in application of these Regs
- Specified factors include:
  - include the possibility of family unity,
  - the minor's well being and social development (taking into account the minor's background),
  - safety and security considerations including possibility of the child being a VoT,
  - and the views of the minor in accordance with his or her age or maturity.

# Unaccompanied Minors

- **Reg 10** - Regs apply to UAMs who have given/deemed to have given indication of desire to seek international protection etc
- Specified duties of Child and Family Agency – NB designated employee and (qualified) duty to trace
- **Reg 17** – access to primary and post-primary education for under-18s

# Labour Market Access

- **Regulation 11** Allows applicants to request a labour market access permission for the purposes of employment or self-employment, which “may” be granted if they have not received a first instance decision on their claim after 9 months through no fault of their own.
- Application can be submitted on 8 months so can work at 9 months
- **Regulation 14** prescribes the obligations of employers in the process.

# Education

- Equivalence between a recipient who is a minor and a minor who is an Irish citizen (**Reg. 17 (1)**)
- NB: Minister for Education *shall* ensure that a recipient is provided with such *support services and language supports* as are necessary to facilitate the recipient's access to, and participation in, school (S. 17 (2))



# Right to Health Care

## Reg. 18

- Minister for Health ***shall*** ensure recipient has access to:
  - Emergency health care
  - such health care as is necessary for the treatment of serious illnesses and mental disorders,
  - such other health care as is necessary to maintain his or her health, and
  - where the recipient is ***vulnerable***, such mental health care as is appropriate, having regard to his or her special reception needs.

# Detention

- Reg. 19.
- Maintains the broader detention provisions in Sec. 20 of the IPA
- Permits detention of vulnerable persons (contrary to IRC and UNHCR recommendations – and general principles of international human rights law).
- Designates Cloverhill Prison as the place of detention.

# Review of certain decisions made under the Regulations

- The following decisions can be reviewed by the Minister:
  - (a) under Regulation 4, that the recipient is not entitled to receive the relevant reception conditions, (ie whether he or she has sufficient means to have an adequate standard of living)
  - (b) under Regulation 5(2), requirement to contribute to costs of relevant reception conditions, (ie based on assessment of income and applying table in schedule 2)
  - (c) under Regulation 5(3), to seek a refund of the cost of providing the recipient with the relevant reception conditions, (eg if the Minister learns that the recipient had sufficient means to have an adequate standard of living or concealed financial resources)

# Review of certain decisions made under the Regulations

(d) under Regulation 6(1), to reduce or withdraw the relevant reception conditions provided to a recipient, (eg if the delay in issuing a first instance decision is attributed to the applicant, or he or she is failing to comply with statutory obligations in relation to the application; serious breach of house rules; or engaged in seriously violent behaviour)

(e) under Regulation 11, to refuse to grant or renew a labour market access permission, (eg findings that the delay is attributable to the applicant, or that the 9 month period has not expired, or that the applicant has not complied with the Regs for the purposes of renewal) or

(f) under Regulation 12(1), to withdraw a labour market access permission, findings that the delay is attributable to the applicant, or that the 9 month period has not expired, or that the applicant has not complied with the Regs for the purposes of renewal

# Review of certain decisions made under the Regulations

- Other decisions can be reviewed by the Minister for Employment Affairs and Social Protection, namely:
  - (a) under Regulation 4, that the recipient is not entitled to receive the daily expenses allowance,
  - (b) under Regulation 5(1), to reduce the amount of the daily expenses allowance payable to the recipient,
  - (c) under Regulation 5(6) to require a refund of or raise an overpayment for all or part of the daily expenses allowance amount paid to a recipient, or
  - (d) under Regulation 6(2), to reduce or withdraw the daily expenses allowance payable to the recipient.

# Appeals to IPAT

- Can appeal decision of review officer to International Protection Appeals Tribunal on fact or law
- Time limit for appeals is 10 working days from receipt of notification of the decision of the review officer.
- Appeal forms in schedule 7 and to be accompanied by copies of any documents referred to in the appeal.
- Time limit for determination of appeals (15 days) – presumption no oral hearing



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# Developments in the national case law in asylum cases and the influence of Europe

Hilkka Becker







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# Training of Lawyers on EU Asylum and Immigration Law (TRALIM 2)

23 May 2019





# Developments in national case-law in asylum cases and the influence of Europe

Overview:

- *The International Protection Appeals Tribunal and its remit under national and EU law*
- *Selected issues concerning the influence of Europe on national case law in the area of international protection*
  - *Reception Conditions Cases*
  - *Dublin III Cases*

# The International Protection Appeals Tribunal and its remit under national and EU law

*H.I.D. and B.A. v Refugee Applications  
Commissioner and Others*, Case C-175/11, 31<sup>st</sup>  
January 2013

- **compatibility of the role and functions of the Refugee Appeals Tribunal (RAT) with the requirement of Article 39 of the Procedures Directive 2005/85/EC that an ‘effective remedy’ be provided in national law by way of appeals against the first instance determinations of asylum applications by the Office of the Refugee Applications Commissioner (ORAC).**

# Effective Remedy (Art. 39 APD)?

*Effective remedy notwithstanding the existence of administrative or organisational arrangements?*

- *retention by a Government Minister of residual discretion to override a negative decision on an application;*
- *existence of organisational or administrative links between the bodies responsible for the first instance determination and the determination of appeals;*
- *decision-making members of the Tribunal appointed by the Minister and serve on a part-time basis for a period of three years and are remunerated on a case by case basis;*
- *The retention by the Minister of powers to give directions?*

# Concept of Independence

*“the concept of independence, which is inherent in the task of adjudication, implies above all that **the body in question acts as a third party in relation to the authority which adopted the contested decision**” (Case C-175/15)*

- *two aspects to that concept:*
  1. *external: the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them;*
  2. *internal: linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests in relation to the subject-matter of those proceedings.*

# Guarantees of Independence and Impartiality

- *“(….) require rules, particularly as regards the **composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.***
- *(…) the case-law requires, inter alia, that **dismissals of members of that body should be determined by express legislative provisions**”. (Case C-175/11)*

# Refugee Appeals Tribunal

- independent in the performance of its functions;
- residual discretion to grant refugee status despite a negative decision on an asylum application, it should be noted that, where the Refugee Appeals Tribunal finds in favour of the applicant for asylum, the Minister is bound by the decision of that tribunal and is therefore not empowered to review it;
- Members appointed for a specific term from among persons with at least five years' experience as a practising barrister or a practising solicitor, and the **circumstances of their appointment by the Minister do not differ substantially from the practice in many other Member States**;
- with regard to the issue of the removal of members of the Refugee Appeals Tribunal, it follows from paragraph 7 of the second schedule to the Refugee Act that the **ordinary members of that tribunal may be removed from office by the Minister, and the Minister's decision must state the reasons for such removal.**

# External Dimension of Independence

CJEU: Independence presupposes that the ‘court or tribunal’ exercises its functions

- wholly autonomously,
- without being subject to any hierarchical constraint or subordinated to any other body and
- without taking orders or instructions from any source whatsoever,
- and is thus protected against external interventions or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them.

See for example: [Case C-503/15, Ramón Margarit Panicello v Pilar Hernández Martínez](#); and also more recently, Case C-64/16, [Associação Sindical dos Juizes Portugueses v Tribunal de Contas](#)

# ***S.N. (Ghana) v IPAT & ors. [2019] IEHC 19***

**“(…) judges who, in our system, are by definition generalists and whose exposure to asylum law may in any event be intermittent, are in a weaker position to take a view on what is or is not probable in a given country than members of the IPAT” (Humphreys J.)**



# E.D. v Refugee Appeals Tribunal [2016] IESC 77

*“So far as the facts are concerned a court's function is to determine whether the facts, as found by the administrative body, can be sustained on judicial review principles.”* (Clarke J. in *E.D. v. Refugee Appeals Tribunal* [2016] IESC 77)

(...), while the **members of the IPAT are individually independent** in relation to any particular case, **the tribunal is organised on a corporate basis** and its members are institutional actors (Humphreys J. in *S.N. (Ghana) v IPAT & Ors* [2019 IEHC 19]).

# International Protection Appeals Tribunal

- organised on a basis that ensures that **any personal know-how, or lack of know-how, of an individual member is addressed by co-ordinated measures to ensure consistency in the tribunal overall**;
- S.63(2) of the 2015 Act: *“the chairperson may issue to the members of the Tribunal **guidelines on the practical application and operation of the provisions or any particular provisions of [that part of the Act] and on developments in the law relating to international protection**”*;
- Sub-s.(6) the chairperson may convene **meetings with a member or members of the tribunal for the purposes of discussing matters relating to the transaction of the business assigned to the tribunal or such members, “including, in particular, such matters as the avoidance of undue divergences in the transaction of business by the members”**; and
- Sub-s.(7): **annual meeting** with members of the tribunal *“and, where necessary, to make provision for **training programmes for members**”*.

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# ***Minister for Justice and Equality & anor v WRC (Case C-378/17)***

- applicants for recruitment to An Garda Síochána
- above the maximum age for recruitment
- complaints before the Equality Tribunal (now WRC): exclusion from recruitment constituted discrimination prohibited by **Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation**
- disapplication of national law by the then Equality Tribunal challenged by the Minister for Justice and Equality:

**Did the Equality Tribunal lack jurisdiction on the ground that the measure imposed the maximum age for recruitment to the national police force was a measure of national law, meaning that only courts established under the Constitution of Ireland had jurisdiction to decide, if necessary, to dis-apply such a provision?**

# Duty to Disapply National Law?

*“that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also **by all organs of the State — including administrative authorities — called upon, within the exercise of their respective powers, to apply EU law (...)**”, and it stated further that: **“It follows that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules”**.*

# Contrary to Constitutional Provisions?

*“Rules of national law, even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of EU law (...)”*

*“It follows from the principle of primacy of EU law, (...), that bodies called upon, within the exercise of their respective powers, to apply EU law are **obliged to adopt all the measures necessary to ensure that EU law is fully effective, disapplying if need be any national provisions or national case-law that are contrary to EU law.** This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means”.*

# The influence of Europe on national case law in the area of international protection

## Reception Conditions Cases:

- interpretation of the word *'applicant'* in Article 15 of Directive 2013/33/EU, regarding access to the labour market;
- whether a particular category of persons, such as persons who are the subject of a transfer decision, may be excluded from the benefits of Article 15 by virtue of their status within the protection system of the Member State in which they happen to be;
- consideration of the phrase qualification contained in Article 15(1), that *"the delay cannot be attributed to the applicant"*.

# December 2018/March 2019 IPAT Decisions

***“The benefits of the Reception Conditions Directive (Recast) must be afforded to all applicants as long as they are on the territory of a Member State. (...) an applicant is entitled to ‘material reception conditions’, i.e. food, housing, clothing”;***

***“(T)he position is not as clear in relation to the entitlement to seek access to the labour market”;***

***“(...) the Directive does envisage that access to the labour market is a discrete reception condition in that it necessitates a time lapse before it can apply, but there is nothing in the Directive to show that any category of persons are excluded from seeking access to the labour market once the other conditions of the Article are satisfied”.***



# CIMADE, GISTI v Ministre de l'Interieur, de l'outre-mer, des collectives territoriales et de l'immigration (Case C-179/11)

“(…) **the obligation for the Member State in receipt of an application for asylum at its border or in its territory to grant the minimum conditions** laid down by Directive 2003/9 to an asylum seeker in respect of whom it decides, under Regulation No 343/2003, to call upon another Member State, as the Member State responsible for examining his application for asylum, to take charge of or take back that applicant, **ceases only when that applicant has actually been transferred by the requesting Member State**”.



# Reception Conditions Regulations 2018

## Regulation 2(2):

- For the purposes of these Regulations, **where a transfer decision**, within the meaning of [European Union (Dublin System)] Regulations 2018, **is made in respect of an applicant**, he or she shall, on and from the sending to him or her of the notification under Regulation 5 (2) of those Regulations of the making of the transfer decision
  - **cease to be an applicant, and**
  - **be deemed to be a recipient but not an applicant.**
- There is **no similar provision in Directive 2013/33/EU** distinguishing between categories of protection applicants. The Tribunal has had regard to the following definitions under Article 2 of Directive 2013/33/EU:

***K.S. (Pakistan) v The International Protection Appeals Tribunal & ors; M.H.K. (Bangladesh) v IPAT & ors [2019] IEHC 176***

**Second Question:**

***“(…) whether Article 15 of the Reception Conditions Directive (Recast) 2013/33/EU applies to a person in respect of whom a transfer decision under the Dublin III Regulation (…) has been made?”***

# Abuse of Rights or Right to Judicial Protection?

*“(...) there is a significant abuse of rights issue in the Dublin system context. A person, such as either of these applicants, who finds themselves the subject of a Dublin transfer decision is by definition someone who has, to a certain extent at least, abused the process envisaged by the Common European Asylum System by failing to apply for asylum in the EU Member State on whose territory they were first present, or who, having made such an application, then abusively leaves that country and applies elsewhere.*

*Under the general doctrine of abuse of rights, such a person is not someone who should be lavished with further rights of access to the labour market. (...)”.*

# Position of the IPAT

*“(…) it is open to the Tribunal to take into account my proposed answers to the questions posed in the case in carrying out its functions, although of course those are by definition only proposed answers rather than answers. Nonetheless, I consider that the matter is not acte clair (…), and irrespective of whether the proposed answers are right or wrong it is hard to see how, pending the CJEU judgment, the Tribunal could be seriously faulted or held liable if it decides to take them into account in the meantime”.*

# Article 17(1) Dublin III Regulation - Sovereign Discretion

*M.A. & ors v International Protection Appeals Tribunal & ors* (Case C-661/17) 23<sup>rd</sup> January 2019

- Whether Article 17(1) means that the fact that a Member State, designated as 'responsible' within the meaning of the Dublin III Regulation, has notified its intention to withdraw from the EU under Article 50 TEU, obliges the determining Member State to examine the international protection application under the discretionary clause set out in Article 17(1) – **the 'Brexit Question'**
- Whether the Dublin III Regulation means that it requires the determination of the Member State responsible under the criteria defined by that regulation and the **exercise of the discretionary clause set out in Article 17(1)** of that regulation to be carried out **by the same national authority.**

# More Questions in M.A. & ors.

- Whether Article 6(1) of the Dublin III Regulation requires a Member State which is not responsible under the criteria in that regulation for examining an application for international protection, to take into account the **best interests of the child** and to examine the application under Article 17(1) of that Regulation.
- Whether Article 27(1) of the Dublin III Regulation requires a **remedy** to be made available **against the decision not to use the option provided in Article 17(1)** of that Regulation.
- Whether Article 20(3) of the Dublin III Regulation, in the absence of evidence to the contrary, establishes a **presumption that it is in the best interests of the child to treat the child's situation as indissociable from that of its parents.**

# The 'Brexit Question'

“(...) notification by a ‘responsible’ Member State to withdraw from the EU in accordance with Article 50 TEU does not oblige a determining Member State, under Article 17(1), to examine an application for international protection”.

# Jurisdiction for Article 17(1) Discretion

(...) the Dublin III Regulation does not specify which authorities have these powers, or that both powers need to be entrusted to the same authority.

Moreover, the expression “**authorities responsible**” in Article 35 of the Regulation, and other similar expressions in the Regulation, implied that a **Member State is free to entrust the tasks to different authorities.**

Thus, the answer to this question is that **the Dublin III Regulation does not require the determination of the responsible Member state and exercise of the discretion set out in Article 17(1) of the regulation to be undertaken by the same national authority.**



# Best Interest of the Child

***“(...) Article 6(1) of the Dublin III Regulation must be interpreted as meaning that it does not require a Member State which is not responsible, under the criteria set out by that Regulation, for examining an application for international protection, to take into account the best interests of the child and to itself examine that application, under Article 17(1) of that Regulation”.***

# Effective Remedy?

*“the objective of the rapid processing of applications for international protection and, in particular, the determination of the Member State responsible, underlying the procedure established by the Dublin III Regulation and referred to in recital 5 of that Regulation, **discourages multiple remedies**”.*

*“(…) if a Member State refuses to use the discretionary clause set out in Article 17(1), that means that the Member State must adopt a transfer decision”.*

*“Article 27(1) of the Regulation does not require a remedy to be made available against the decision not to use the discretion set out in Article 17(1), **without prejudice to the fact that the decision may be challenged at the time of an appeal against a transfer decision**”.*

# Best Interest of the Child and Indissociability

(...) it is only where it is established that such an examination carried out in conjunction with that of the child's parents is not in the best interests of the child that it will be necessary to treat the child's situation separately from that of its parents.

Thus, the answer is that **Article 20(3), in the absence of evidence to the contrary, establishes a presumption that it is in the best interests of the child to treat the child's situation as indissociable from that of its parents.**

# So are we clear?

**M.A.** awaiting judgment from the High Court

**U.** for judgment on the 26<sup>th</sup> of June 2019

**H.N.?** *“(...) it is at least arguable (...) that the Tribunal Member was in fact under an obligation to consider exercising this Article 17(1) jurisdiction (...)”*

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