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THE ALIENATION OF ADJUDICATION AND THE WEAKENING OF
PROCEDURAL RULE OF LAW WITHIN THE CONTEXT OF ASYLUM IN
EUROPE

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INTRODUCTION	677
I. INFRINGEMENT OF PROCEDURAL RULE OF LAW	678
II. HASTY LEGISLATIVE REFORM AND REMOVAL OF INDEPENDENT APPEAL 681	
III. SAFE THIRD COUNTRIES, FIRST COUNTRY OF ASYLUM, MANIFESTLY UNFOUNDED CLAIMS, AND THE NEW “NORMAL” OF ACCELERATED PROCEDURES 685	
IV. LEGAL AID	689
A. <i>The European Commission Proposal for a Common Procedure Regulation</i>	689
B. <i>Procedural Guarantees Linked to Detention</i>	694
C. <i>Buttressing the Procedural Rights of Refugee Children</i>	695
V. CONCLUSION: TOWARDS STRENGTHENING PROCEDURAL RULE OF LAW AND SOLIDARITY.....	697

INTRODUCTION

In 2016, the world experienced a historic peak in the number of people forcibly displaced by war and instability in Africa, Asia, the Middle East, and Europe.¹ While the media provides an endless flow of footage of refugees arriving by boats, trekking on foot, and crossing Nordic frontiers with bicycles, the response by national governments and regional institutions has been largely focused on control measures against smuggling and traffickers. There has also been increased support for external strategies including the maintenance of visa policies, the strengthening of interdiction by FRONTEX, the use of carrier sanctions, the establishment of agreements with “safe countries” such as Turkey, and “new international law” agreements between Italy and sixty tribes within Libya. These responses to the crisis are complicated by the dominance of politicized narratives of invasion prompted by political parties within national legislatures and executive bodies, negatively impacting the national judiciary and reducing the independence of administrative agencies. It may be argued that there has been a weakening of the role and rule of law in this arena.

This Article argues that the extreme politicization of refugee law has prompted the alienation of adjudication by courts and administrative agencies as the relevant institutions to develop refugee law. The Article further underscores the trend

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¹ *Refugee Crisis Reaches New Peak Amid Ongoing Conflicts, Islamophobic Policies* (Feb. 7, 2017), <http://www.ijrcenter.org/2017/02/07/refugee-crisis-reaches-new-peak-amid-ongoing-conflicts-islamophobic-policies/>.

towards diminished the procedural rule of law, including the right of appeal and the opportunity to receive legal aid. It suggests that this trend diminishes the European constitutional values of the rule of law, respect for human rights, justice, and solidarity.² The Article considers the potential impact of the Proposal for a Common Procedure for International Protection presented by the European Commission in July 2016 and the subsequent response by the regional courts.

Part I provides an overview of the components of the procedural rule of law in the context of asylum. Part II presents a case study from Norway illustrating the Parliament's immediate and fundamental violation of the principle of access to an independent decision-making body in the context of a hasty reform of immigration law in response to an influx of asylum seekers on the Russian border in 2015. Part III describes the weakening of access to legal aid for asylum seekers within Europe as well as in other regions. This correlates with the escalation of implementation of detention and deportation (including children) without the guarantee of effective remedy.³

The conclusion calls for reflection on whether European constitutional values should be deemed aspirational in light of the fact that the normative and institutional reforms undertaken in response to the recent arrival of refugees run contrary to the principles which once enabled the region to win the Peace Prize in 2012, "for over six decades [having] contributed to the advancement of peace and reconciliation, democracy and human rights in Europe."⁴ The Article advocates a recommitment to European constitutional values and suggests measures to strengthen respect for the rule of law, human rights, justice, and solidarity, underscoring the importance of engagement by courts at both regional and national levels and training of judges and adjudicators.

I. INFRINGEMENT OF PROCEDURAL RULE OF LAW

In 2016, approximately 1.3 million applications for international protection were made in the European Union ("EU").⁵ The highest numbers of asylum applicants recorded were citizens of Syria, Afghanistan, Iraq, Pakistan, and Nigeria, and a significant number of applicants were under eighteen years of age.⁶ The arrival of asylum seekers has provoked legislative responses affecting the procedural rule of law in the region. As an example, we consider the case of Norway.

² Treaty Establishing a Constitution for Europe, Article I (2), Oct. 29, 2004: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. (available at: https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_establishing_a_constitution_for_europe_en.pdf).

³ See *European legal and policy framework on immigration detention of children* (June 2017), <http://fra.europa.eu/en/publication/2017/child-migrant-detention>.

⁴ *European Union receives Nobel Peace Prize 2012* (Apr. 14, 2018), https://europa.eu/european-union/about-eu/history/2010-today/2012/eu-nobel_en.

⁵ EASO, *Annual Report on the Situation of Asylum in the EU and latest asylum figures* (July 5, 2017), <https://www.easo.europa.eu/news-events/easo-annual-report-situation-asylum-eu-and-latest-asylum-figures-0>.

⁶ *Id.*

In the winter of 2015, 5,500 asylum seekers (mostly from Syria) arrived by bicycle in Storskog, Norway.⁷ The response to this entry was the enactment of hasty immigration reforms to enable speedy detention and deportation, arguing that this constituted an emergency situation even though a state of emergency had not technically been declared. At present, Norway, like much of Europe, is undergoing a slew of xenophobic narratives against asylum seekers. The Pew Research Center recently conducted a poll that demonstrated that in eight of the ten European nations surveyed, half or more believe incoming refugees increase the likelihood of terrorism in their country.⁸ By contrast, counter-terrorism experts have concluded that of the fifty-one terrorist attacks in Europe and the United States since 2014, only 5% were linked to asylum seekers.⁹ Thus, there is a correlation between fear of terrorism and crime, and discriminatory attitudes including religious stereotyping, racial discrimination, fear of non-assimilation to pre-existing cultural values, and concern about competition for scarce jobs and social benefits. Procedural rights are increasingly being streamlined or directly removed during this period of alleged “crisis.”

The concept of procedural rule of law (or procedural justice) includes the following elements: participatory rights (including the right to present and respond to a case), procedural fairness (including the rule against bias and the principle of independence of the decision-making body), and the principle of legality (in which fundamental rights should not be overridden by general considerations).¹⁰ Guy Goodwin-Gill states that “the principle of access to a procedure for the determination of claims is one of the most significant elements in the international legal regime of refugee protection.”¹¹ Nevertheless, he notes that international law is largely silent on the procedural aspects of due process, while individual states emphasize their interest in pursuing rapid decision-making processes and speedy return of those deemed not to be in need of protection. Goodwin-Gill wryly points out that, in practice, “few have successfully married an effective, expeditious national process to the fulfillment of international obligations.”¹² Regional courts that address human rights, such as the European Court of Human Rights (“ECtHR”) and the European Court of Justice (“CJEU”), have provided important checks to states’ expansive restrictions against asylum seekers, such as the articulation of procedural rights.¹³

⁷ *Norway tells refugees who used cycling loophole to enter to return to Russia*, THE GUARDIAN (Jan. 14, 2016), <https://www.theguardian.com/world/2016/jan/14/norway-tells-refugees-bikes-russia-bicycle-immigration-storskog>.

⁸ Jacob Poushter, *European opinions of the refugee crisis in 5 charts*, (Sep. 16, 2016), <http://www.pewresearch.org/fact-tank/2016/09/16/european-opinions-of-the-refugee-crisis-in-5-charts/>.

⁹ Lorenzo Vidino, Francesco Marone, Eva Entenmann, *Fear Thy Neighbor Radicalization and Jihadist Attacks in the West* (June 14, 2017), <https://icct.nl/publication/fear-thy-neighbor-radicalization-and-jihadist-attacks-in-the-west/>.

¹⁰ On the elements of procedural justice see Lawrence B. Solum, *Procedural Justice*, 78 S. Cal. L. Rev. 181, 322 (2004); on procedural fairness see, Chief Justice Robert S. French, Sir Anthony Mason Lecture at University of Melbourne Law School: Procedural Fairness: Indispensable to Justice? (Oct. 7, 2010), <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj07oct10.pdf>.

¹¹ Guy Goodwin-Gill, *Who to Protect, How . . . , and the Future?*, 9(1) INTERNATIONAL JOURNAL OF REFUGEE LAW 1, 4 (1997).

¹² *Id.*

¹³ As noted by Maryellen Fullerton, *Refugees and the Primacy of European Human Rights Law*, 21 UC LA J. INT’L & FOREIGN AFF. 45 (2017), the European Court has proved to be an important judicial check on EU law and policy.

The relevant case law of the ECJ includes:

◦ HID and BA v. Ireland, Case C-175/11, EU:C:2013:45

However, we still do not have an International Refugee Law Court to check national practice. The problem of a lack of harmonization of asylum practices persists, resulting in the European Commission's proposal for the Common Asylum Procedure Regulation on July 13, 2016.¹⁴ This underscores Goodwin-Gill's point that national courts must assert their central role as guarantors of the rule of law.

Goodwin-Gill defines fair procedure as form and process.¹⁵ Form consists of the provision of access, the opportunity to claim protection, interpretation, legal advice and assistance, and confidentiality. Process requires the provision of a full hearing before a decision-maker familiar with the applicable law, an assessment on the basis of appropriate evidentiary standards, an evidence-based decision in writing providing clear reasons for the decision, and judicial review or appeal. Peter Billings argues that current mechanisms that seek to manage asylum backlogs—the designation of safe countries, preliminary screening to enable speedy removal of unfounded claims, legislative or administrative presumptions of unfoundedness, and truncated timelines for the submission—actually increase the risk of violations of procedural justice.¹⁶

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- A, B and C v. Staatssecretaris van Veiligheid en Justitie, Case C-148/13, C-149/13 and C-150/13, EU:C:2014:2406
 - Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Abdida, Case C-562/13, EU:C:2014:2453
 - Abdoulaye Amadou Tall v. Centre public d'action sociale de Huy (CPAS de Huy) Case C-239/14, EU:C:2015:824
 - Bahaddar v the Netherlands, app. no. 25894/94, CE:ECHR:1998:0219JUD002589494.

The relevant case law of the ECtHR includes:

- Jabari v. Turkey, app. no. 40035/98, CE:ECHR:2000:0711JUD004003598
- Čonka v. Belgium, app. no. 51564/99, CE:ECHR:2002:0205JUD005156499
- N v. Finland, app. no. 38885/02, CE:ECHR:2005:0726JUD003888502
- Gebremedhin v. France, app. no. 25389/05, CE:ECHR:2007:0426JUD002538905
- Sultani v. France, app. no. 45223/05, CE:ECHR:2007:0920JUD004522305
- Saadi v. Italy, app. no. 37201/06, CE:ECHR:2008:0228JUD003720106
- Ben Khemais v. Italy, app. no. 246/07, CE:ECHR:2009:0224JUD000024607
- MSS v. Belgium and Greece, app. no. 30696/09, CE:ECHR:2011:0121JUD003069609
- Othman (Abu Qatada) v. the United Kingdom, app. no. 8139/09, CE:ECHR:2012:0117JUD000813909
- IM c France, app. no. 9152/092, CE:ECHR:2012:0202JUD000915209
- Hirsi Jamaa and Others v. Italy, app. no. 27765/09, CE:ECHR:2012:0223JUD002776509
- Labsi v. Slovakia, app. no. 33809/08 CE:ECHR:2012:0515JUD003380908
- Singh et autres c Belgique, app. no. 33210/11, CE:ECHR:2012:1002JUD003321011
- Abdulkhakov v. Russia, app. no. 14743/11, CE:ECHR:2012:1002JUD001474311
- El-Masri v. The Former Yugoslav Republic of Macedonia, app. no. 39630/09, CE:ECHR:2012:1213JUD003963009
- AC v. Spain, app. no. 6528/11, CE:ECHR:2014:0422JUD000652811.

¹⁴ European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU (July 13, 2016) available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF>.

¹⁵ Guy S. Goodwin-Gill, paper presented to the Conference on 'The Role of 'Credibility' in International Protection Claims', organized by the Irish Refugee Council: The Law Applicable to the Determination of Claims to International Protection (Nov. 9 2012).

¹⁶ Peter W. Billings, *A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims*, 52 ADMIN. L. REV. 253, 257 (Winter 2000).

II. HASTY LEGISLATIVE REFORM AND REMOVAL OF INDEPENDENT APPEAL

The prevailing context of a persistent fear of terrorist attacks has prompted governments to pursue hasty legislative reforms which have received little oversight by society. It has been suggested that Europe is currently experiencing violations of an aspect of the procedural rule of law similar to those enacted by the Romans at the time of the consul Gaius Marius. In 100 BC, Marius's tribune and praetor passed hasty legislation assigning land in Africa to his military veterans. This speedy process resulted in backlash and the adoption of *Lex Caecilia Didia 98 B.C.* This law called for a period called *trinundium*, which set the amount of time between the publication of a law and its vote in the assembly, either three Roman eight-day weeks (24 days) or *tertia mundinae*, on the third market-day (17 days). This gave citizens time to understand the proposed law in order to vote in an informed manner.¹⁷

In Norway, the Parliament announced a reform to remove the independence of the Immigration Appeals Board on a Friday in November 2015, passing the measure on the following Monday.¹⁸ Hence, in a speedy process with a bare minimum of weekend deliberations, the Immigration Appeals Board was subject to instruction by the Executive Branch, and the judiciary was rendered peripheral. The Norwegian Minister of Justice stated that asylum seekers remain free to bring an appeal to the courts, but the Parliament did not establish a legal mechanism to help realize this in practice.¹⁹ David Cantor explains the grounds for critiquing this reform: "the jurisprudence of the human rights treaty bodies affirms the requirement for an independent review of first-instance decisions by administrative bodies."²⁰ He adds that where there is an issue of refoulement, there must be a right of appeal to a competent court and the state should make adequate provision to allow asylum seekers to seek legal advice and representation.²¹ An additional point of concern is expressed by Goodwin-Gill who opines that the judiciary often defers to administrative immigration entities, in spite of the fact that their decisions "are only too readily influenced by policy, such as immigration control, rather than by obligation, such as the duty to protect."²² He also suggests that "judicial restraint commonly allows incompetence to flourish" and weakens the effective protection of rights.²³

At issue is the fact that the right to an effective remedy before a court is a fundamental right. In order to be effective, a remedy against a negative decision in the asylum procedure must be available before a court or tribunal that is independent from the authority whose decision it is reviewing. It must also have automatic suspensive effect and allow the appeal body to conduct a full examination of issues

¹⁷ A. W. Lintott, *Trinundinum*, 15(2) THE CLASSICAL QUARTERLY 281.

¹⁸ Prop. 16 L (2015-2016) Proposisjon til Stortinget (forslag til lovvedtak), Endringer i utlendingsloven /Amendments to the immigration law (Nov. 13, 2015), <https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/>.

¹⁹ *Innskrenker fri rettshjelp til asylsøkere* (Dec. 8, 2015), <https://www.frp.no/aktuelt/2015/12/innskrenker-fri-rettshjelp-til-asylsokere>.

²⁰ David Cantor, *Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in Light of Recent Human Rights Treaty Body Jurisprudence*, 34 REFUGEE SURVEY QUARTERLY 91, 104 (2015).

²¹ *Id.*

²² Goodwin-Gill, *supra* note 12.

²³ *Id.*

of fact and of law. Furthermore, the remedy must be effective in practice as well as in law. Article 39 of the Asylum Procedures Directive also confirms that Member States must ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against a range of decisions within the asylum procedure.²⁴ Indeed, the International Commission of Jurists confirmed that:

[t]he right to an effective remedy for violations of human rights is a general principle of law and protected under human rights law, including Article 3 ECHR, Article 2.3 ICCPR, Articles 32 and 33 Geneva Refugee Convention and Article 3 and 14 CAT . . . Where there is an arguable complaint that a transfer will violate or subject the transferee to a real risk of violation of human rights, there must be an effective remedy that is independent, impartial, accessible and effective in practice as well as in law, and must not be hindered by the acts of State authorities. The remedy should be provided by a judicial body, but if it is not, it must be provided by an independent and impartial body, which has the competency to review and, if warranted, overturn the decision to expel.²⁵

The European Court of Human Rights has held that, in order to comply with the right to an effective remedy under Article 13 of the European Convention on Human Rights (“ECHR”), a person threatened with an expulsion which arguably violates another Convention right must have:

Access to relevant documents and accessible information on the legal procedures to be followed in his or her case . . . Where necessary, access to translated material and interpretation . . . Effective access to legal advice, if necessary by provision of legal aid . . . The right to participate in adversarial proceedings . . . Provision of the reasons for the decision to expel and a fair and reasonable opportunity to dispute the factual basis for the expulsion (a stereotyped decision that does not reflect the individual case will be unlikely to be sufficient)²⁶

Nevertheless, the European Asylum Support Office (“EASO”) has pointed out that the effect of appeal varies among states:

Among countries with more than 1 000 second instance decisions taken in 2016 more than half of first instance decisions were positive in the United Kingdom (52 % of total) and in the Netherlands (58 %). In three EU+ countries – Belgium, Switzerland and Poland – applicants for international protection who appealed against a decision issued at first instance had a less than 10% chance of success.²⁷

²⁴ AIDA, Access to the procedure and registration, (2016), <http://www.asylumineurope.org/comparator/asylum-procedure>.

²⁵ International Commission of Jurists, “Common Asylum Procedure Regulation: ICJ Comments on the Current Proposal of the Regulation” page 14 (April 2017).

²⁶ MSS v. Belgium and Greece, app. no. 30696/09, CE:ECHR:2011:0121JUD003069609, para. 302, CG and Others v. Bulgaria, app. no. 1365/07, CE:ECHR:2008:0424JUD000136507, paras. 56-65. Hirsi Jamaa and Others v. Italy, app. no. 27765/09, CE:ECHR:2012:0223JUD002776509, paras. 202-204).

²⁷ EASO, *Annual Report on the Situation of Asylum in the EU and latest asylum figures* (July 5, 2017), <https://www.easo.europa.eu/news-events/easo-annual-report-situation-asylum-eu-and-latest-asylum-figures-0>.

The following table reveals the complexity of the right to appeal, in particular in cases of onward appeal, which may require leave, and where some courts may only look at points of law and not of fact, rendering the appeal insufficient to provide a remedy.

Table 1: The right to appeal in the Regular Procedure, against a negative decision on the application for asylum.

	First Appeal		Onward Appeal →			
	Administ-rative	Court	Administ-rative	Court ²⁸	Court ²⁹	Court ³⁰
Austria	-	√	-	√	-	-
Belgium	-	√	-	√ ³¹	-	-
Bulgaria	-	√	-	√	-	-
Croatia	-	√	-	√	-	-
Cyprus	-	√	-	√	-	-
Czech Republic	-	√	-	√	-	-
Denmark	√	-	-	-	-	-
Estonia	-	√	-	√	√	-
Finland	-	√	-	√	-	-
France	-	√	-	√	-	-
Germany	-	√	-	√	√	-
Greece	√	-	-	√ ³²	√	-
Hungary	-	√	-	-	-	-
Ireland	-	√	-	√	-	-
Italy	-	√	-	√	- ³³	-
Latvia	-	√	-	-	-	-
Lithuania	-	√	-	-	-	-
Luxembourg	-	√	-	√	-	-
Malta	√	-	-	√	-	-
Netherlands	-	√	-	√	-	-
Norway	√	-	-	√	√	√
Poland	√	-	-	√	√	-
Portugal	-	√	-	√	-	-
Romania	-	√	-	√	-	-
Slovakia	-	√	-	√	-	-
Slovenia	-	√	-	√	-	-

* Administrative= Independent, quasi-judicial bodies. ** Court= Regular and/or administrative courts or tribunals

²⁸ Often requires leave for appeal. Some of the Courts only look at points of law – judicial review (not the merits).

²⁹ Often requires leave for appeal. Some of the Courts only look at points of law – judicial review (not the merits).

³⁰ Often requires leave for appeal. Some of the Courts only look at points of law – judicial review (not the merits).

³¹ Yes, but no effective remedy.

³² Application for annulment.

³³ The Decree-Law 13/2017 published on 17 February 2017 has abolished the possibility to appeal the Civil Tribunal decisions on international protection before the Court of Appeal.

Spain	√ ³⁴	√	-	√	-	-
Sweden	-	√	-	√	-	-
Switzerland	-	√	-	-	-	-
UK	-	√	-	√	√	√

In order to demonstrate the impact of the removal of the independence of the appeal institution, we should consider the consequences of the Norwegian case. Although Norway experienced an increase in asylum seekers, appeals of negative decisions by the Immigration Board actually went down from 230 in 2014 to 156 in 2015.³⁵ The police carried out 7,825 forced deportations in 2015, surpassing the government's goal of 7,800. This was an increase of 8% as compared to 2014. The First Instance Body ("UDI") reported a total of 31,145 asylum seekers (10,536 from Syria), and 5,297 total unaccompanied minors.³⁶ In the area of Storskog, there were 371 forced returns of persons originating from Afghanistan, Syria, Nepal, and Pakistan. In the previous year, persons from Albania, Nigeria, Afghanistan, Romania, and Syria were deported. The five countries who received the deportees included Italy, Albania, Russia, Romania, and Spain.

In 2015, the Immigration Appeals Board received 3,400 fewer appeals than those received the prior two years.³⁷ The Board reported that it is believed that the police's increased use of deportations has resulted in reduction of appeals.³⁸ The Foreigners Police increased its staff from 135 persons in 2004 to 950 persons in 2016. The majority of the cases the Immigration Appeals Board ("UNE") receives involve unaccompanied minors from Afghanistan, and the second most common country of origin is Iraq. These appeals include issues of age verification and the application of internal flight alternative or safe country determination. Gregor Noll concluded that radiological age assessments do not comply with forensic science norms and are insufficient to remove doubt regarding the age of an applicant.³⁹ The application of internal flight alternative and safe country determinations are often formalistic and risk an insufficient analysis of counter-interests, such as the best interests of the child.

The question of what kind of procedural guarantees should be offered to asylum seekers is compelling. David Cantor describes the standard of procedural justice (within the context of the jurisprudence of the EctHR) as referring to a risk of expulsion to harm, contrary to Article 3 in conjunction with the violation of Article 13 on effective remedies. This would include "access to a competent national authority, independent and rigorous scrutiny of the complaint, a particularly prompt response, and automatic suspensive effect of the expulsion measure."⁴⁰ Cantor contends that the EctHR requires the existence of an accessible and competent set of asylum procedures. Violations of procedural justice include automatic and

³⁴ Optional, can appeal directly to the courts.

³⁵ *Arsrapport* (2015), <https://www.une.no/globalassets/om-une/arsrapporter-etc/arsrapport-2015.pdf>.

³⁶ Karen Tjernshaugen, *Her er grafene som forklarer asylaret 2015*, Aftenposten (Jan. 7, 2016), <https://www.aftenposten.no/norge/politikk/i/wAjA/Her-er-grafene-som-forklarer-asylaret-2015>.

³⁷ *Id.*

³⁸ *Id.* at 13.

³⁹ Gregor Noll, *Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum*, 28(2) INTERNATIONAL JOURNAL OF REFUGEE LAW (2016) 234.

⁴⁰ Cantor, *supra* note 21, citing *MSS v. Belgium and Greece*, app. no. 30696/09, CE:ECHR:2011:0121JUD003069609, para. 293.

mechanical application of procedural formalities concerning admissibility and lack of access to information regarding asylum procedures.⁴¹ He notes that the ECtHR has held that summary procedures for pre-admission screening of an asylum claim (such as those applied to “manifestly unfounded” claims presented at the border) remain subject to these standards.”⁴² The next section addresses these procedures.

III. SAFE THIRD COUNTRIES, FIRST COUNTRY OF ASYLUM, MANIFESTLY UNFOUNDED CLAIMS, AND THE NEW “NORMAL” OF ACCELERATED PROCEDURES

A “safe third country” refers to a state in which the asylum seeker could have received protection. Cathryn Costello notes that “[t]he practice of returning asylum-seekers to [safe third countries] is a European invention, with scant foundation in international law . . . [safe third country] practices have proved to be unjust, unfair, and inefficient.”⁴³ She cites the phenomenon of chain refoulement and credits the ECtHR and the CJEU for setting forth criteria for identifying the risk of human rights violations linked to these transfers, seeking to counter the trend towards disguised collective expulsions.⁴⁴ The Norwegian reforms amended Section 32 of the Norwegian Immigration Law, which provided that an asylum application could be denied if the applicant had resided in a state where he or she was not persecuted and where he or she would have filed the asylum application.⁴⁵ The Norwegian authorities send asylum seekers back to countries where the right to an asylum adjudication is not guaranteed, such as Russia. UNE and UDI internal regulations state that lawyers will not be provided for asylum seekers falling under this category, with the exception of unaccompanied minors.⁴⁶

Amnesty International published a position paper on the proposed EU asylum procedures regulation in March 2017. The paper categorically rejected the concept of safe countries of origin as incompatible with the right to a fair and efficient

⁴¹ *Id.*

⁴² *Id.* (citing *Gebremedhin v. France*, app. no. 25389/05, CE:ECHR:2007:0426JUD002538905, paras. 58-67).

⁴³ Cathryn Costello, *The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?*, 7 EUROPEAN JOURNAL OF MIGRATION AND LAW 35, 40 & 47 (2005).

⁴⁴ *TI v. UK*, app. no. 43844/98; *Hirsi Jamaa and Others v. Italy*, app. no. 27765/09, CE:ECHR:2012:0223JUD002776509; *MSS v. Belgium and Greece*, app. no. 30696/09, CE:ECHR:2011:0121JUD003069609; *NS v. Secretary of State for the Home Department* Case C-411/10 and C-493/10, EU:C:2011:865; Cathryn Costello, *Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored*, 12(2) Human Rights Law Review 287 (2012); *See also* ECtHR, *Sharifi and Others v. Italy and Greece*, app. no. 16643/09, CE:ECHR:2014:1021JUD001664309. The case addressed the indiscriminate expulsion of 35 asylum seekers from Italy to Greece who had no access to asylum procedures and who feared deportation to their countries of origin. In regards to four of the applicants, the Court noted notably a lack of communication between applicant and asylum authorities, shortage of lawyers and translators, lack of legal aid and excessive delays in obtaining a decision and held that Greece violated Article 13 (right to an effective remedy) and Article 3 (prohibition of inhuman or regarding treatment). It also held that Italy violated Articles 13 and 3 as well as Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens.)

⁴⁵ Reform of the Norwegian Immigration Act, LOV-2016-06-17-58, (June 17, 2016) Norwegian Ministry of Justice, the Norwegian Immigration Act, LOV-2008-05-15-35. (entry into force January 1, 2010).

⁴⁶ Regulation GI-13/2015 (November 25, 2015) applicable to UNE and UDI, Quick case processing for asylum seekers who have been in Russia, referring to the Norwegian Immigration Act §§ 32 and 90. (entry into force January 1, 2010).

individualized asylum procedure. It suggests that this policy leads to discrimination against asylum seekers on the basis of their nationality and often results in an excessively high burden of proof on the applicant to overcome an unreasonable presumption against the validity of their claim. The application of a safe country of origin concept may preclude whole groups of asylum seekers from refugee status and ultimately result in direct or indirect refoulement.⁴⁷ Indeed, this view was confirmed by the ECtHR in *Ilias and Ahmed v. Hungary*,⁴⁸ where the assignment of Serbia as a safe third country was viewed as risking chain refoulement. The Court emphasized the state's disregard of International Organization country reports, noting that this imposed an unfair and excessive burden of proof on the applicants, breaching the effective procedural guarantees provided for in Article 3.⁴⁹

As to the meaning of first country of asylum, this refers to a state that provided protection to asylum seeker. Amnesty International suggests that this should be considered only if the person has been recognized in the third country as a refugee in accordance with the 1951 Convention Relating to the Status of Refugees and the refugee can exercise the rights, protection, and treatment granted under that Convention.⁵⁰ In Norway, Prop. 91 L strengthened 48-hour procedures to address manifestly unfounded asylum claims and established maximum 72-hour detention in order to facilitate speedy case processing and return. Exceptions are made for minor children and adults with minor children.⁵¹

Indeed, Peter Billings underscores that speed “must be balanced against the need for procedural justice.”⁵² He notes that migrants are not likely to file a complaint when faced with an erroneous decision, and thus procedural fairness is even more important in primary adjudication than at the appellate level.⁵³ As a result, European countries pursue internal strategies, such as the preliminary screening of unfounded claims, legislative and administrative presumptions of the invalidity of claims, and short timelines for the submission of claims and evidence or for filing appeals. Almost all European countries provide for accelerated procedures in their domestic law that conform with Article 31 (8) of the Asylum Procedures Directive (recast), which permits procedures with shorter time limits as long as they do not have a suspensive effect on appeal.⁵⁴ Marcelle Reneman notes that accelerated procedures

⁴⁷ Amnesty International, Position Paper: The Proposed Asylum Procedures Regulation (Mar. 31, 2017), http://www.amnesty.eu/content/assets/AI_position_paper_on_APR_proposal.pdf.

⁴⁸ *Ilias and Ahmed v. Hungary*, app no. 47287/15, CE:ECHR:2017:0314JUD004728715.

⁴⁹ See also *The Netherlands*, District Court The Hague, AWB 16/12222 (Aug. 5, 2016), where the Court call for reference to various sources when determining “safe third country”; see also *UK - Mr Husain Ibrahim and Mr Mohamed Abasi v. The Secretary of State for the Home Department* [2016] EWHC 2049, where the court held that return to the alleged “safe third country” Hungary would give rise to a real risk of chain refoulement to Iran; See also *Hungary - Szeged Administrative and Labour Court*, 5 December 2016, 10.Kpk.28.795/2016/3, holding that determination that Serbia is a safe country inappropriate given contrary objective IO report, it quashed the decision and called upon the State to create a new procedure to better ensure the right of rebuttal.

⁵⁰ Amnesty Report, *supra* note 48 at page 3.

⁵¹ Prop. 91 L (2015–2016), Proposisjon til Stortinget (forslag til lovvedtak) - Amendments to the Immigration Act (Apr.15, 2016).

⁵² Peter W. Billings, A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims, 52 ADMIN. L. REV. 253, 257 (Winter 2000).

⁵³ *Id.*

⁵⁴ European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive

have been criticized for “not being fair and for resulting in inaccurate decisions.”⁵⁵ AIDA published a briefing which stated that the number of applications subject to accelerated procedures varies among states. For example, in 2016, France subjected 38.8% of cases to accelerated procedures (largely from Albania, Sudan, and Kosovo), while Poland only applied it to 2% of cases.⁵⁶ As for accelerated procedures, EASO reports that:

Of the countries issuing more than 1 000 decisions, the accelerated procedure was used most often in France, followed by Belgium and Spain, and the admissibility procedure by Hungary and Greece (409). According to the EPS data collection, special procedures are used in a small proportion (9 %) of all decisions issued. While most decisions issued in the EU+ using accelerated or border procedures lead to a rejection of the application in a significantly higher proportion than for decisions made via normal procedures, there are cases where international protection is granted using special procedures. Accelerated procedures had a 11 % recognition rate, and border procedures 10 %.⁵⁷

The United Nations High Commissioner for Refugees (“UNHCR”) expressed concern about the negative consequences that flow from the use of accelerated procedures, and argued that procedural rights must be safeguarded in such proceedings:

The right to an effective remedy in asylum cases includes the right to appeal a (negative) decision made in an accelerated procedure. To be effective, the

2013/32/EU (July 13, 2016) available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF>

See Access to the procedure and registration, (2016), <http://www.asylumineurope.org/comparator/asylum-procedure> Article 31(8) of the Directive identifies ten grounds where the accelerated procedure may be applied.

1. the applicant has only raised issues not relevant to refugee or subsidiary protection status
2. the applicant comes from a “safe country of origin”
3. the applicant has misled the authorities by presenting false documents or withholding relevant information relating to identity and nationality which could adversely affect the decision
4. it is likely that, in bad faith, he or she has destroyed or disposed of identity or travel documents
5. the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his or her claim unconvincing
6. the applicant has filed an admissible subsequent application
7. applicant entered or stayed irregularly in the territory and, without good reasons, did not present him or herself to the authorities to file an application as soon as possible
8. is making an application to delay or frustrate the enforcement of a return decision
9. the applicant is a danger to national security or has been expelled for reasons of public security and public order
10. the applicant refuses to be fingerprinted.

⁵⁵ Marcelle Reneman, *Speedy Asylum Procedures in the EU: Striking a Fair Balance between the Need to Process Asylum Cases Efficiently and the Asylum Applicant’s EU Right to an Effective Remedy*, 25 (4) INTERNATIONAL JOURNAL OF REFUGEE LAW 717, 718 (2014). She cites *IM v. France*, app. no. 9152/09, CE:ECHR:2012:0202JUD000915209, in which the European Court of Human Rights critiqued the speed of the French accelerated procedures as contributing to the Article 13 violation as well as Concluding observations by both the UN Committees CAT and HRC to states with accelerated procedures.

⁵⁶ AIDA, *Accelerated, prioritized and fast-track asylum procedures* 4-5 (May 2017).

⁵⁷ EASO report, *supra* note 28.

remedy must provide for a review of the claim by a court or tribunal, and the review must examine both facts and law based on up-to-date information. In addition, in respect of the principle of non-refoulement, the remedy must allow automatic suspensive effect except for very limited cases.⁵⁸

There are problems regarding the rejection of appeals based on a failure to file within the time limit. The reasonableness of time limits for appealing decisions in the accelerated procedure was examined in *Diouf*, where the CJEU held that a two-week time limit could be considered reasonable in a procedure aimed at processing manifestly unfounded cases.⁵⁹

The following table confirms the advancement of use of accelerated procedures within Europe:

Table 2: Countries providing for an accelerated procedure in domestic law.

	Yes	No
Austria	√	
Belgium	√ ⁶⁰	
Bulgaria	√	
Croatia	√	
Republic of Cyprus	√	
Czech Republic	√	
Denmark	√	
Estonia	√	
Finland	√	
France	√	
Germany	√ ⁶¹	
Greece	√	
Hungary	√	
Ireland	√	
Italy	√	
Latvia	√	
Lithuania	√	
Luxembourg	√	
Malta	√	
Netherlands		√ ⁶²
Norway	√	
Poland	√	
Romania	√	

⁵⁸ UN High Commissioner for Refugees (UNHCR), UNHCR public statement on the right to an effective remedy in relation to accelerated asylum procedures in relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration pending before the Court of Justice of the European Union (May 11, 2010), <http://www.refworld.org/docid/4bf67fa12.html>, para. 21

⁵⁹ Samba Diouf v. Ministre du Travail, Case C-69/10, EU:C:2011:524, ¶ 67.

⁶⁰ Yes, albeit not labelled as “accelerated procedure” in national law.

⁶¹ An accelerated procedure was introduced in German law in March 2016.

⁶² There is no accelerated procedure, but all asylum applications are first examined in the short asylum procedure in which decisions are taken within 8 working days (this time limit may be extended by 6, 8, or 14 days). AIDA, Country Report: Netherlands, (Dec. 31, 2016), http://www.asylumineurope.org/sites/default/files/report-download/aida_nl_update.v_final.pdf, p. 36.

Slovakia		√ ⁶³
Slovenia	√	
Spain		√ ⁶⁴
Sweden	√ ⁶⁵	
Switzerland	√ ⁶⁶	
UK	√	

The 2016 European Commission Proposal for a Common Procedure for International Protection in the Union sets forth grounds for accelerated procedures in Article 40 (which reiterates the terms from Article 31(8) of the recast Asylum Procedure) including: the lack of articulation of issues relevant to international protection; clear inconsistency and contradictory, false, or improbable representations in contradiction with verified country of origin information; the presentation and withholding of false information or documents; and finally, an intent to delay enforcement of removal, safe country of origin, security reasons, or an appeal with no tangible prospect of success.⁶⁷ The Proposal defines “first country of asylum” in Article 44 and addresses safe third countries in Articles 45–50; reference is also made to non-refoulement standards. In Article 50, the Proposal would permit states to retain or introduce legislation that allows for national designation of safe third countries or safe countries of origin other than those designated by the EU for five years.⁶⁸ As such, variances will persist and European states will continue to apply accelerated procedures, which will present ongoing procedural protection dilemmas.

IV. LEGAL AID

A. *The European Commission Proposal for a Common Procedure Regulation*

There also appears to be a universal trend to diminish state funded legal aid and representation for asylum seekers in first instance and appeal proceedings. The 2016 Proposal for a Common Procedure for International Protection in the Union

⁶³ Slovak legislation foresees neither border procedure, nor any separate accelerated asylum procedure. However, an accelerated procedure could be considered a procedure within which an asylum application is considered as manifestly unfounded (provided that the legal conditions are met). www.emn.nl/nl/dsresource?objectid=4553&type=org p. 21-22.

⁶⁴ The Asylum Law foresees an urgent procedure, which is applicable inter alia on grounds Article 31(8) of the recast Asylum Procedures Directive. However, since it does not entail lower procedural guarantees for the applicant, the urgent procedure is more accurately reflected as a prioritized procedure rather than an accelerated procedure. AIDA, Country Report: Spain, (Dec. 31, 2016), http://www.asylumineurope.org/sites/default/files/report-download/aida_es_2016update.pdf, p. 29.

⁶⁵ In Sweden, the accelerated procedure is labelled as the procedure for manifestly unfounded claims.

⁶⁶ The planned reform of the Asylum Act which mainly aims at accelerating the procedure was accepted by the Swiss people in a referendum on 5 June 2016. AIDA, Country Report: Switzerland, (Dec. 31, 2016), http://www.asylumineurope.org/sites/default/files/report-download/aida_ch_2016update.pdf, p. 10.

⁶⁷ European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU (July 13, 2016), <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-467-EN-F1-1.PDF>.

⁶⁸ *Id.*

includes guarantees of legal aid to be provided in administrative and appeal procedures. The Right to Legal Assistance and Representation (Article 14) provides that: (1) Applicants shall have the right to consult, in an effective manner, a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications at all stages of the procedure; (2) Without prejudice to the applicant's right to choose his or her own legal adviser or other counsellor at his or her own cost, an applicant may request free legal assistance and representation at all stages of the procedure in accordance with Articles 15-17.⁶⁹ The applicant shall be informed of his or her right to request free legal assistance and representation at all stages of the procedure.⁷⁰

Article 15 establishes that legal aid at the administrative level has to include (1) information on the procedure in light of the applicant's individual circumstances; (2) assistance preparing the application and personal interview (including participation in the personal interview as necessary); (3) an explanation of the reasons for, and consequences of, a decision refusing to grant international protection; and (4) information as to how to challenge that decision.⁷¹ Nevertheless, section 3 of Article 15 allows Member States to deny free legal assistance when the applicant has sufficient resources or does not have any "tangible prospect of success," or in the case of a subsequent application. As to what "tangible prospect of success" means, in some jurisdictions, legal aid is only provided to asylum seekers who do not come from countries listed as "manifestly unfounded" or "safe."⁷² At the appellate level, legal aid includes the preparation of required procedural documents and of the appeal, and participation in the hearing before a court or tribunal on behalf of the applicant. Legal aid at the appellate level may be denied due to the sufficiency of the applicant's resources, or the lack of a tangible prospect of success or second-level appeal. Nevertheless, in the case of a finding of no tangible prospect of success, the applicant shall have the right to an effective remedy before a court or tribunal and shall be granted legal aid for that purpose.

The International Commission of Jurists published comments on the European Commission's proposal on a Common Asylum Procedure Regulation in April 2017, in which it underscored that:

[t]he principle of effective legal protection means that national rules must not make it 'impossible or excessively difficult,' in practice to exercise EU law rights. In the field of asylum, that entails ensuring that protection is granted to those who are entitled to it (Article 18 EU Charter: the right to asylum).⁷³

⁶⁹ European Commission, Proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final (July 13, 2016),

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0467&from=EN>

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* Jurisdictions which use manifestly unfounded lists include: Austria, Belgium, Czech Republic, Denmark, France, Germany, Ireland, Malta, Slovakia, and the United Kingdom. See: AEDH / EuroMed Rights / FIDH, Safe Country: A denial of the right of asylum, (May 2016), <http://www.ohchr.org/Documents/Issues/MHR/ReportLargeMovements/FIDH2%20.pdf>

⁷³ International Commission of Jurists, "Common Asylum Procedure Regulation: ICJ Comments on the Current Proposal of the Regulation" page 6-7 (April 2017).

The Commission of Jurists emphasized that “without legal aid, a person who may on the superficial consideration seem unlikely to succeed, may well have a more complex case, but one that can only be expressed with legal assistance.”⁷⁴ They expressed concern that the denial of free legal aid on the basis of presumptions of manifest unfoundedness or of a safe third country, safe country of origin, or first country of asylum, disadvantages applicants and hinders their ability to rebut the presumption “that applications from countries identified as safe are manifestly unfounded are more likely to be confirmed in the absence of legal representation.”⁷⁵ Similarly, the European Council of Refugees and Exiles recommends that “[l]egal aid should be available for manifestly unfounded claims particularly to appeal the decision to process the application as a manifestly unfounded claim.”⁷⁶ The Council also stated that the timelines in accelerated procedures must not be fixed because asylum seekers need to time to consult their legal representatives and obtain relevant evidence.

Until the new proposal is adopted, Member States are expected to follow the binding legal provisions concerning legal assistance and representation for asylum seekers in the Asylum Procedures Directive. The Directive guarantees asylum seekers the opportunity to consult a legal advisor or other counsellor “at their own cost”.⁷⁷ Member States have discretion to limit the provision of free legal aid.⁷⁸ They may limit legal aid to first instance appeals only, or to cases where the appeal or review is likely to succeed.⁷⁹ Member States may also impose monetary and/or time limits on the provision of free legal aid.⁸⁰

As to the scope of the legal assistance and representation guaranteed to asylum seekers, the Asylum Procedures Directive provides a limited standard.⁸¹ There is currently a trend towards the provision of legal information instead of representation. Legal Information includes information about a process within a legal system. In the asylum field, that standard would include information about how to apply for asylum or subsidiary protection. It may also include legal advice in specific cases. Legal representation consists of a person acting in an official capacity on behalf of another person in relation to a legal matter and responsible for assisting with the legal issues in their case.⁸²

⁷⁴ *Id.* at 7

⁷⁵ *Id.*

⁷⁶ ECRE/ELENA, Survey on Legal Aid for Asylum Seekers in Europe (Oct. 2010), https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Survey-on-Legal-Aid-for-Asylum-Seekers-in-Europe_October-2010.pdf.

⁷⁷ Directive 2013/32/EU of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection, art. 15, 2013 O.J. L 180

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ ECRE/ELENA, Survey on Legal Aid for Asylum Seekers in Europe (Oct. 2010), https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Survey-on-Legal-Aid-for-Asylum-Seekers-in-Europe_October-2010.pdf, p. 14.

⁸² <https://study.com/academy/lesson/legal-representation-definition-rights.html>.

The following table demonstrates the variability of the provision of legal information versus legal representation, both in the first instance and on appeal, in Europe:

Table 3: State-funded legal information and/or representation in the regular procedure.

I = (Legal) information, R = (Legal) representation √ = Fully accessible in practice. √wd = Yes, with difficulty (could be means tested or merits tested or other practical hindrance).

	First instance (application)		Appeal	
	I	R ⁸³	I	R
Austria	√wd	-	√	√
Belgium	√	√	√	√
Bulgaria	-	-	-	√wd
Croatia	-	-	√	√
Republic of Cyprus	√wd	√wd	√wd	√wd
Czech Republic	-	-	√	√
Denmark	-	-	√	√
Estonia	-	-	√wd	√wd
Finland	√	√wd	√	√
France	√	-	√	√
Germany	-	-	√wd	√wd
Greece	-	-	√wd	√wd ⁸⁴
Hungary	√wd	√wd	√wd	√wd
Ireland	√	-	√	√
Italy	-	-	√wd	√wd
Latvia	-	-	√	√
Lithuania	-	-	√	√
Luxembourg	√	√	√	√
Malta	-	-	√	√
Netherlands	√	√	√	√
Norway	√wd	-	√ ⁸⁵	√ ⁸⁶
Poland	√wd	-	√wd	√wd
Portugal	-	-	√	√
Romania	N/A	N/A	N/A	N/A
Slovakia	-	-	√	√
Slovenia	-	-	√	√
Spain	√	√	√	√
Sweden	√	√	√	√
Switzerland	√wd	√wd	√wd	√wd
UK	√wd	-	√wd	√wd

⁸³ Usually during interviews.

⁸⁴ By the end of February 2017, no free legal aid was in place in practice under the auspices of the Greek authorities for appeal procedures, and for this reason Greek authorities still do not comply with their obligation under national legislation and the recast Asylum Procedures Directive.

⁸⁵ Only at first appeal (UNE).

⁸⁶ Only at first appeal (UNE).

To understand the consequences of relying on legal information as opposed to proper legal representation, we will consider the case of Norway. In Norway, the police register an asylum seeker and inform him or her of his or her rights and duties.⁸⁷ The asylum seeker is provided with information (either in writing or by phone) about the Norwegian Organization for Asylum Seekers (NOAS), a prominent asylum NGO.⁸⁸ The next day, the NOAS provides the asylum seeker with guidance and the UDI will conduct an interview only if deemed necessary.⁸⁹ Asylum seekers have access to a lawyer if the UDI has issued a rejection, or if they are subject to expulsion, or in cases involving detention (unless they are to be deported, released, or incarcerated).⁹⁰ The Norwegian authorities argue that, since deportation is considered a civil (rather than criminal) proceeding, a lawyer need not be provided. In forming its opinion that the Norwegian legal aid system sufficiently respected due process obligations, the Ministry of Justice noted the lack of criticism by UNHCR and other actors.⁹¹

Originally, lawyers did provide assistance for asylum seekers, but the system was altered so that NOAS provided representation in the first hearing. NOAS has not been very successful. In 2015, they intervened in 355 cases, losing 157 and winning only 61.⁹² The organization is concerned that the Norwegian system is flawed because appellate cases are sent to an individual caseworker, and asylum seekers are only rarely given the chance to appear in person (between 4-6% are given this right). This is especially problematic because many cases are based on credibility determinations. The Norwegian Lawyers' Association is concerned that the statements asylum seekers give to police both initially and during the UDI interview, may be used against him or her.⁹³ The fact that the lawyer raises additional facts is also used against the applicant and taken as evidence of negative credibility.⁹⁴ Furthermore, when the court finds an appeals decision to be incorrect, they send it

⁸⁷ NOAS, *The Asylum Process in Norway*, <http://www.noas.no/the-asylum-process-in-norway-eng/>.

⁸⁸ NOAS, *Anbefalinger for Asylprosessen*, <http://www.noas.no/anbefalinger-for-asylprosessen/>

⁸⁹ The police will be able expand their registration activity to address cases in which there is evidence of criminal issues, including breach of the immigration law, new asylum applications after rejection, and in cases where the cases is identified as being based on socio-economic interests. UNHCR is critical of this because, they prefer that a central authority conduct both the interview and the case processing. The Immigration Police will be given instruction in "interview techniques", but there is no mention of refugee law, human rights law, etc. The Department of Justice gives its assurance that the expanded registration process will uphold high quality standards, without giving evidence as to how this will be achieved. They point out that by using the police to conduct the interviews, UDI staff will have a lower caseload and they will save money on translation services. This is very problematic, because if the Immigration Police's interview technique is one of confrontation (typically aimed at revealing inconsistencies), there is more of a likelihood of alienating the asylum seeker and backfiring, in addition the police are more likely to harbor a "culture of disbelief" which runs against protection interests. Moreover there is actually a greater need for translation services not less. Mistranslation can affect credibility determination. Furthermore, 48 hours is insufficient time to attain substantive legal aid.

⁹⁰ See Prop. 91 L (2015–2016) and Prop. 90 L (2015-2016), Proposisjon til Stortinget (forslag til lovvedtak) - Amendments to the Immigration Act (Apr. 2016).

⁹¹ See Prop. 91 L (2015–2016) and Prop. 90 L (2015-2016), Proposisjon til Stortinget (forslag til lovvedtak) - Amendments to the Immigration Act (Apr. 2016).

⁹² Statistics provided by E-mail from NOAS, Marek Linha, to the author (Sep. 3, 2016).

⁹³ Av Eirik Hind Sveen, *Asylbarnas advokat: Derfor fungerer ikke det norske asylsystemet*, (Sep. 15, 2014), <https://www.dagbladet.no/nyheter/asylbarnas-advokat-derfor-fungerer-ikke-det-norske-asylsystemet/60929343>.

⁹⁴ *Id.*

back to the Appeals Board where the same caseworker then issues a second, negative decision.⁹⁵

In this situation, Norwegian lawyer Arild Humlen notes that the caseworkers are often biased and unwilling to overturn their own decisions.⁹⁶ Humlen also expressed concern that the decisions are based on documentary evidence, instead of a personal interview with the case worker. He calls for a process in which asylum seekers are given the right to an additional interview if their statement is found incomplete.⁹⁷ NOAS and the Norwegian Lawyers' Association argue for the establishment of an adversarial, independent appeal system in which asylum seekers would have the right to appear and be represented by a lawyer or NOAS. In contrast to NOAS, the Lawyers' Association presented seventy-four pro bono cases to the court and won 70%.⁹⁸ Norway's non-adversarial model of asylum processing, which denies the applicant a hearing, the right to call witnesses and dispute adverse testimony or evidence, as well as judicial review, is problematic because there is no evidence that the processing is fair. This Norwegian system runs completely contrary to the European Council on Refugees & Exiles' Best Practices, which call for the provision of sufficient public funding to ensure that legal aid providers can effectively assist and represent asylum seekers, guarantee that legal aid will be made available at all stages of the asylum procedure, and ensure that lawyers are able to assist in preparing the asylum application by accompanying applicants to the preliminary interview and assisting with any subsequent appeals.⁹⁹

B. *Procedural Guarantees Linked to Detention*

It is significant that all European countries allow for the detention of asylum seekers in national legislation. Norway has substantially increased its use, in spite of the fact that detention is supposed to be an exceptional measure. Detention should be carried out in accordance with the law and subject to effective control by an independent judicial authority. The procedure should allow applicants access to counsel and permit the pursuit of legal alternatives, if possible. Procedural guarantees in detention should include the prompt and full communication of the detention order (written with reasons and rights in a language the detainee understands), the right to counsel, free legal aid, automatic review before a judge or independent administrative agency, periodic review, the right to challenge detention at a review hearing and rebut findings, and the right to contact and be contacted by UNHCR and national refugee bodies.

⁹⁵ *Id.*

⁹⁶ Humlen is cited by Mona Byrkjedahl, VG, *Juseksperter: Derfor taper Utlendingsnemnda i retten*, (Jan. 20, 2016), <https://www.vg.no/nyheter/innenriks/asyl-debatten/juseksperter-derfor-taper-utlendingsnemnda-i-retten/a/23565134/>.

⁹⁷ *Id.*

⁹⁸ Indeed as result of their success, the Norwegian law students association awarded the Norwegian Lawyers' Association a human rights prize for responding to the lack of legal aid for asylum seekers and serving as good role models for the law students to promote engagement in the field. Menneske Rettighets UKA 2018, *Jusstudentenes Menneskerettighetspris Til Advokatforeningens Aksjons – Og Prosedyregruppe For Utlendingsrett*, <http://www.menneskerettighetsuka.no/2014/02/26/jusstudentenes-menneskerettighetspris-til-advokatforeningens-aksjons-og-prosedyregruppe-for-utlendingsrett/>.

⁹⁹ ECRE/ELENA, *Survey on Legal Aid for Asylum Seekers in Europe* (Oct. 2010), https://www.ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Survey-on-Legal-Aid-for-Asylum-Seekers-in-Europe_October-2010.pdf.

One problem with asylum processing and detention in Norway is the lack of transparency; proceedings are not open to the public. Preventive detention deprives asylum seekers of their physical liberty without a finding of criminal guilt. It may be employed if the applicant is judged to be a flight risk or to prevent crime. However, the decision should be the result of a fair individual determination; ideally in a hearing demonstrating the necessity and proportionality of detention and with an opportunity for the applicant to give testimony and evidence. Without such procedural safeguards, detention would be excessive and constitute punishment in violation of due process.¹⁰⁰

C. *Buttressing the Procedural Rights of Refugee Children*

UNICEF estimates that there are 11 million refugee and asylum seeking children around the world.¹⁰¹ Because of this, it is important to consider their special situation. According to Article 37(d) of the Convention on the Rights of the Child,

[e]very child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.¹⁰²

NOAS published a shocking report on the detention and deportation of children in Norway which underscored the importance of not detaining children.¹⁰³ There were eighteen confirmed suicides and suicide attempts among young men in the detention centers between 2014 and 2015.¹⁰⁴ In 2017, the Ministry of Justice issued a regulation ordering immigration authorities to grant only temporary protection to young male asylum seekers between the ages of fifteen and seventeen, and refer them to an internal flight alternative on their eighteenth birthday.¹⁰⁵ Having an internal flight alternative means that a person may be refused asylum if it would be reasonable and not unduly harsh to send the person to another part of the country of origin. Its application across Europe has resulted in many problems. For example, it places a *de facto* burden of proof on asylum seekers to disprove the assumption of an internal flight alternative and the procedure fails to consider whether a return will actually result in a durable solution or merely deliver the applicant to an uncertain, illusory, or unpredictable situation. It also fails to consider the best interests of the child.¹⁰⁶ This policy provoked stress among young detainees, several of whom

¹⁰⁰ David Cole, In Aid of Removal: Due Process Limits on Immigration Detention, 51 EMORY L. J. 1003, 1011 (2002).

¹⁰¹ Sarah Begley, *UNICEF: 11 Million Children Are Refugees and Asylum-Seekers*, TIME (Sep. 6, 2016), <http://time.com/4481211/child-refugees-asylum-migrants-displaced-unicef/>.

¹⁰² UN General Assembly, Convention on the Rights of the Child, Treaty Series, vol. 1577, (Nov. 20, 1989), p. 3.

¹⁰³ NOAS, *Jeg har ikke gjort noe galt*, (2017), http://www.noas.no/wp-content/uploads/2017/05/Opplevelser-tvangsretur_web_v3_.pdf.

¹⁰⁴ Ingvild Jensen, *18 selvmordsforsøk og selvskading pa Trandum*, TV2 (Dec. 9, 2015), <http://www.tv2.no/a/7765555/>.

¹⁰⁵ GI-02/2017 – Instruks om praktisering av utlendingsloven § 38, jf. utlendingsforskriften § 8-8 – enslige, mindreårige asylsøkere mellom 16 og 18 år som kan henvises til intern-flukt.

¹⁰⁶ See UNHCR, *The Internal Flight Alternative Practices: Study in the Central Eastern European Countries* (June 2012).

testified to feeling utter hopelessness at the prospect of return to Afghanistan.¹⁰⁷ The irony is that a nation that prides itself on the primacy of children's interests ended up adopting policies that use asylum seeking youths as a means to fulfill the state's immigration priorities instead of designating their best interest as the end. This practice culminated in a disturbing call by the Minister of Immigration and Integration to all school teachers to report refugee children who admitted having visited their countries of origin during the summer in order to facilitate the withdrawal of protection status and eventual deportation.¹⁰⁸

In response to this trend, some national courts have extended their efforts to defend the procedural rights of minor refugees from Afghanistan. This was the case in the 2017 case of *AM (Afghanistan) v. SSHD & Lord Chancellor*, in the United Kingdom ("UK").¹⁰⁹ The case involved a fifteen year-old Afghan who claimed fear of forced recruitment by the Taliban. The Secretary of State rejected his case on account of credibility, however he was granted discretionary leave to remain in the UK until he was seventeen and a half years old. In addition to underscoring the importance of taking into account the applicant's age, vulnerability, and learning difficulties when looking at alleged inconsistencies, the UK Court of Appeal upheld the principle that "a child is foremost a child before he or she is a refugee" and that "a decision taken without regard to the need to safeguard and promote the welfare of any children involved will not be 'in accordance with the law' for the purposes of Article 8 ECHR."¹¹⁰ The Court called upon the state to uphold its obligation to take medical and psychological evidence into account when considering overall credibility, to demonstrate flexibility in relation to a wide range of specialist expertise, and to appoint a "litigation friend" (i.e., an individual appointed to make decisions regarding a court case on behalf of an adult lacking mental capacity or a child) where required for the sake of fairness and effective access to justice.

This decision is buttressed by the recent Joint General Comments of the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and of the United Nations Committee on the Rights of the Child.¹¹¹ The former underscores the importance of upholding best interests standards in migration-related procedures or decisions, specifically stating that "[t]he best-interests assessment should be carried out by actors independent of the migration authorities in a multidisciplinary way" and that "[c]onsiderations such as those relating to general migration control cannot override best-interests considerations."¹¹² Furthermore, the Committee on the Protection of the Rights of

¹⁰⁷ Thomas Olsen and Lene Li Dragland, *Send tut selv om retten fastslo at han er et barn: Vi er utrygge her I Kabul og redde for a ga ut*, Aftenposten, (Dec. 8, 2016), <https://www.aftenposten.no/norge/i/PJOeR/Sendt-ut-selv-om-retten-fastslo-at-han-er-et-barn-Vi-er-utrygge-her-i-Kabul-og-redde-for-a-ga-ut>.

¹⁰⁸ <https://www.bt.no/nyheter/innenriks/i/GVEaQ/Listhaug-oppfordrer-til-a-angi-flyktninger-pa-hjemreise>.

¹⁰⁹ *AM (Afghanistan) v. Secretary of State for the Home Department*, [2017] EWCA Civ 1123.

¹¹⁰ *Id.* at ¶ 35, citing Jane McAdam, *Complementary Protection in International Refugee Law*, 196, OUP, 2007 and para. 36 citing *ZH (Tanzania) v Home Secretary* [2011] 2 AC 166 "at [24] per Baroness Hale of Richmond JSC. The significance of the best interests of a child as 'a primary consideration' is explained by Lady Hale at [25]".

¹¹¹ UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and the UN Committee on the Rights of the Child, Joint General Comment No. 3 on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, (Nov. 16, 2017).

¹¹² *Id.*

All Migrant Workers and Members of their Families and the Committee on the Rights of the Child set forth the due process rights of children, calling for the provision of free, quality legal advice and representation, individual consideration of child-specific needs, and a right of appeal, with suspensive effect.¹¹³

In May 2017, the Court of Appeals of Oslo issued a decision determining that the Norwegian state had violated Articles 3 and 37 of the Convention on the Rights of the Child, and Article 8 of the ECHR in a case involving the detention of an Afghan family who had sought asylum.¹¹⁴ The Court underscored the importance of respecting the “best interest of the child” standard when considering detention and found that neither the police nor the courts had conducted a proper evaluation of the best interests of the children.

V. CONCLUSION: TOWARDS STRENGTHENING PROCEDURAL RULE OF LAW AND SOLIDARITY

The violation of structural procedural law through emergency legislation, the normalization of accelerated procedures, the application of safe country and manifestly unfounded categories, the reduction of legal aid, and limitations on the right to appeal all reveal that the European constitutional values of rule of law, human rights, justice, and solidarity are subject to systematic violations. Additionally, these structural violations of the procedural rule of law indicate a weakening of democracy throughout Europe. European nations are struggling to define solidarity in the context of asylum; some countries believe that building fences constitutes solidarity, while other governments indicate that only an equitable distribution of refugees would support solidarity. For example, at one end, the “Coalition of the Willing” (Austria, the Benelux countries, Finland, Germany, Greece, and Sweden) have begun to meet regularly to pursue higher level solidarity on migration issues.¹¹⁵ At the other end, the Visegrad countries (the Czech Republic, Hungary, Poland, and Slovakia) adopted common positions more hostile to the relocation of refugees.¹¹⁶

One of the greatest challenges we face is the wide disparity in asylum grant rates.¹¹⁷ The EASO pointed out that although the EU median recognition rate for asylum seekers from Syria is 97%, it varies between countries from 10% to 100%. For Eritrean applicants, the EU median is 89% but varies from 47% to 100%.¹¹⁸ The politicization of refugee issues may account for some of these disparities between

¹¹³ UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and the UN Committee on the Rights of the Child joint general comment no. 4 on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination, and return, CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017).

¹¹⁴ Borgarting lagmannsrett - 2017-05-31-LB-2016-8370

¹¹⁵ Pierre Vimont, *Migration in Europe: Bringing the Solidarity Gap*, Carnegie Europe, (Sep. 12, 2016), <http://carnegieeurope.eu/2016/09/12/migration-in-europe-bridging-solidarity-gap/j5bf> See also: Stefan Lehne, *How the Refugee Crisis Will Reshape the EU*, Carnegie Europe, (Feb. 4, 2016), <http://carnegieeurope.eu/2016/02/04/how-refugee-crisis-will-reshape-eu-pub-62650>.

¹¹⁶ On the roots of sub-regional restrictive tendencies within Europe see Rosemary Byrne, Gregor Noll, and Jens Vedsted-Hansen, *Understanding Refugee Law in an Enlarged European Union*, 15(2) *European Journal of International Law* 355 (2004).

¹¹⁷ Jaya Ramji-Nogales, Andrew I. Schoenholtz, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, 60 *Stan. L. Rev.* 295 (2007-2008).

¹¹⁸ EASO, *Annual Report on the Situation of Asylum in the EU and latest asylum figures* (July 5, 2017), <https://www.easo.europa.eu/news-events/easo-annual-report-situation-asylum-eu-and-latest-asylum-figures-0>.

states. Social scientists Bernd Parusel and Jan Schneider drafted a report that demonstrated further fragmentation.¹¹⁹ They used statistical analysis to examine the unequal distribution of asylum seekers among EU Member States and the variability of asylum decisions, resulting in a lack of harmonization of recognition rates. They showed how some states over-performed in relation to the numbers of asylum seekers they admitted, while others underperformed. For example, they juxtaposed the generosity of Italy regarding Afghani refugees (97% asylum protection in 2016) with the Swedish fluctuation in response to a terrorist attack and other events (37.3% in 2016).¹²⁰

There is a complete lack of harmonization on account of the politicization of refugee issues. Solutions should focus on how to reintroduce objective legal standards as the primary frame of reference. Would this require strengthening the role of courts to correct *ad hoc* practices, or the creation of a new regional refugee court to harmonize refugee law? Or should we continue to rely on the transnational interplay of human rights courts and national courts? The CJEU issued a decision upholding the EU's use of an emergency quota to distribute refugees who had come to Italy and Greece among the various Member States, despite complaints by Slovakia and Hungary, making reference to the principle of solidarity.¹²¹ Yet the decision is limited to specific action taken at a particular moment, leaving open the question of future policies. There is a need to submit refugee matters to objective legal procedures and to improve the quality of decision-making. It may also be worthwhile to strengthen the training of immigration judges and lawyers, as well as other judges, to ensure due attention is paid to procedural and substantive protection issues.

By comparison, the US identified measures to improve its immigration courts and the Board of Immigration Appeals in 2006.¹²² These measures included new performance evaluations for judges and board members (assessing their skills and temperament), an examination on immigration law, improved training on current developments in immigration law and writing decisions, up-to-date reference materials, tracking of poor conduct and decision quality (e.g., unusually high reversal rates, frequent or serious complaints, or significant backlogs), and an analysis of disparities in asylum grant rates. Unfortunately, at present, training for US immigration judges is being cut back, increasing the risk of erroneous decision-making.¹²³ The European Branch of the International Association of Refugee Law

¹¹⁹ Bernd Parusel and Jan Schneider, *Reforming the Common European Asylum System: Responsibility-sharing and the Harmonisation of Asylum Outcomes Report*, DELMI, <http://www.delmi.se/en/publications-seminars#!en/reforming-the-common-european-asylum-system-delmi-policy-brief-20179>.

¹²⁰ *Id.*

¹²¹ *Slovak Republic and Hungary v. Council of the European Union*, Case C-643/15, EU:C:2017:631.

¹²² The US Attorney General, Memorandum for the Deputy Attorney General. Assistant Attorney General for Legal Policy, Director of the Executive Office for Immigration Review, Acting Chief Immigration Judge on Measures to Improve the Immigration Courts and the Board of Immigration Appeals (August 9, 2006).

¹²³ Paul Whickman Schmidt, IT'S TRUE! – DOJ Eliminates U.S. Immigration Judges' Only Annual Training! – Quality & Professionalism "Deprioritized" In TrumpEra – Billions For Enforcement & Incarceration – Crumbs for Due Process – When Is Congress Going To "Just Say No?", BLOG (Apr. 13, 2017), <http://immigrationcourtside.com/2017/04/13/its-true-doj-eliminates-u-s-immigration-judges-only-annual-training-quality-professionalism-de-prioritized-in-trump-era-billions-for-enforcement-incarceration-crumbs-for-du/>.

Judges provides training through Independent Appeal Committees and this training should be expanded.¹²⁴

Civil society may also contribute to the correction of this structural dysfunction. In addition to the recent attention given by courts to the impact of detention on refugee children, there has been an increase in scholarship by academics and responses by NGOs and international organizations to immigration reform legislation.¹²⁵ For example, the UNHCR issued several strong responses to the Norwegian Immigration Amendments, criticizing the removal of the Immigration Appeals Board's independence, and calling for a child-sensitive interpretation of "refugee" and reconsideration of the use of temporary protection for youths.¹²⁶ Legal academics such as Syd Bolton and Jason M. Pobjoy have provided substantive guidance as to how to apply a best interests of the child evaluation in the refugee context.¹²⁷ These initiatives pursue the aim of maintaining the role of law in the refugee context, strengthening the procedural rule of law, and restoring the primary role of the judiciary. This type of joint stakeholder engagement should serve as a model going forward, as it creates substantial pressure to counter populist initiatives that degrade European values of the rule of law and respect for human rights.

On December 15, 2017, the Norwegian Parliament revoked the amendment to the immigration law and ended political control of the Immigration Appeals Board.¹²⁸ The following month, the Norwegian Parliament decided that the cases involving young male applicants aged fifteen to seventeen who had only been granted temporary protection until they turned eighteen (based on an internal flight alternative) would be reconsidered and deportations halted until new processing could commence, within ninety days.¹²⁹ This group was specifically granted the right to free legal aid. This case signals that it is possible to reverse the trend of the alienation of adjudication within refugee law by prioritizing violations of the procedural rule of law. Indeed, a group of important European NGOs formed a Legal Aid Actors Task Force and issued a statement outlining the need for legal aid for migrants, asylum seekers, and refugees in Greece, and the role to be played by national governments and the European Institutions in supporting legal aid.¹³⁰ By providing legal aid and respecting procedural rights for refugees, Europe may

¹²⁴ IARLJ, <https://www.iarlj.org/regional-chapters/european-chapter>.

¹²⁵ Amnesty International, *Forced Back to Danger Report* (2017), <https://www.amnesty.no/sites/default/files/298/AfghanistanReport%204OCT%20AMEND.pdf> outlines the consequences of return of asylum seekers to Afghanistan.

¹²⁶ UNCHR responses to Norwegian Immigration Reforms are available here: <http://www.refworld.org/country,,UNHCR,,NOR,,,0.html>.

¹²⁷ Jason M. Pobjoy, *The Child in International Law* (Cambridge University Press 2017), Syd Bolton, *Best interests: safeguarding and promoting the welfare of children in immigration law and practice in Working with Refugee Children: Current issues in best practice* (London: Immigration Law Practitioners Association, 2nd edition, 2012) 1-38.

¹²⁸ The Ministry maintains the power to issue instructions in matters that concern national security or foreign policy issues. Missing citation to the specific case.

¹²⁹ Utlendingsnemnda UNE, *Ny behandling etter stortingsvedtak*, (Nov. 11, 2017), <https://www.une.no/aktuelt/arkiv/2018/ny-behandling-etter-stortingsvedtak/>.

¹³⁰ Legal Aid Task Force, *Legal Aid for Migrants, Asylum Seekers, and Refugees*, (Jan. 2018), <https://drc.ngo/media/4240248/legal-aid-gaps.pdf> See also ECRE/ELENA, *Call on European States to Ensure that Legal Aid is Provided to all Asylum Applicants without Sufficient Means, at all Stages of the Asylum Procedure and Regardless of the Specific Asylum Procedures that they May Fall Under* (Nov. 2017), <https://www.ecre.org/wp-content/uploads/2017/11/Legal-Note-2.pdf>.

safeguard its commitment to the rule of law and human rights as fundamental values for the region.