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# 1. Reception Conditions Directive (recast): Relevance in Times of High Numbers of Asylum Applications

Lieneke Slingenberg

## 1. INTRODUCTION

Since 2012, the European Union has been faced with an increase in asylum applications. In 2014, the total number of asylum applications<sup>1</sup> remained (just) below the total number of asylum applications submitted in 1992,<sup>2</sup> which was hitherto the peak year of submitted asylum applications in the EU. In 2015, 1,3 million asylum applications were submitted in the EU,<sup>3</sup> which is almost double the number of 1992. As a result of these high numbers, the systems meant for the reception of asylum seekers in many Member States are under increasing pressure.<sup>4</sup>

As a reaction to these developments, Member States have started pursuing more restrictive policies with regard to the reception of asylum seekers. Asylum seekers have had to live in sports facilities or tent camps for prolonged periods of time<sup>5</sup> or were offered no accommodation at all;<sup>6</sup> cash benefits were replaced by benefits in kind;<sup>7</sup> and children had to wait for months before they received access to education.<sup>8</sup> Some of these policies were caused by force majeure, whereas other policies were explicitly intended to deter asylum seekers.

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<sup>1</sup> In 2014, 627.780 asylum applications were submitted in the EU. Source: Eurostat.

<sup>2</sup> In 1992, 672 thousand asylum applications were submitted in the, then, 15 Member States of the EU. Source: Eurostat.

<sup>3</sup> Source: Eurostat.

<sup>4</sup> This pressure is not the same in all Member States; some Member States have received a much higher number of asylum applications than others. E.g. in 2015, Germany received 476,620 asylum applications, which is 35% of the total number of asylum applications submitted in the EU. Hungary received 177,135 asylum applications, a share of 13,9%. Estonia, Croatia, Latvia, Lithuania, Portugal, Slovenia, Slovakia, Iceland and Liechtenstein all received less than 1,000 asylum applications in 2015. Source: Eurostat.

<sup>5</sup> See e.g. for the Netherlands: *Kamerstukken II, 2015/16, 32 317/34 215, nr. FD.*

<sup>6</sup> See e.g. for Greece: Asylum Information Database, *Country Report Greece*, November 2015, p. 74, available at: [http://www.asylumineurope.org/sites/default/files/report-download/aida\\_gr\\_update.iv\\_.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_gr_update.iv_.pdf).

<sup>7</sup> See e.g. for Germany: Asylum Information Database, *Country Report Germany*, November 2015, p. 50-51, available at: [http://www.asylumineurope.org/sites/default/files/report-download/aida\\_de\\_update.iv\\_o.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_de_update.iv_o.pdf); for Finland: Government Action Plan on Asylum Policy, 8 December 2015, available at: [http://valtioneuvosto.fi/en/article/-/asset\\_publisher/hallitus-julkisti-turvapaikkapoliittisen-toimenpideohjelmansa?\\_101\\_INSTANCE\\_3qmUeJglxZEK\\_groupId=10616](http://valtioneuvosto.fi/en/article/-/asset_publisher/hallitus-julkisti-turvapaikkapoliittisen-toimenpideohjelmansa?_101_INSTANCE_3qmUeJglxZEK_groupId=10616).

<sup>8</sup> See e.g. for the Netherlands: *Kamerstukken II, 2015/16, 34 334, nr. 3*; and for the UK: 'Children seeking asylum in UK denied access to education', *The Guardian* 2 February 2016,

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When adopted in 2003, the EU Reception Conditions Directive was primarily a confirmation of existing policies in the (then 15) Member States. In the light of the latest developments with regard to the reception of asylum seekers, the (recast) Directive has gained renewed relevance: in determining the limits of restrictive policies; in establishing budget priorities; and in putting an end to a possible race to the bottom amongst Member States trying to be the least attractive for new asylum seekers. In this contribution, the relevance of the Directive in times of high numbers of asylum applications will be further examined.

In doing this, this contribution will focus on three issues. First, since the Directive provides for a subjective right to housing, food, clothing and a daily expenses allowance for asylum seekers, it is important to establish the precise personal scope of the Directive. From which moment in time are Member States obliged to provide asylum seekers with these facilities? And do these obligations end if the asylum application is rejected and/or if the Member State is not responsible for examining the asylum application (para. 3)? A second relevant question is to what extent the Directive leaves room for exceptions on the basis of high numbers of asylum applications or saturation of reception networks (para. 4). Thirdly, since in many Member States the length of the asylum procedure increases due to the large number of asylum applications, this chapter examines to what extent the Directive provides for an increase of rights through the mere passage of time (para. 5). First, the background of the Directive will be briefly outlined (para. 2).

## 2. BACKGROUND

The need to harmonize the standards on the reception of asylum seekers in EU Member States arose in the nineties of the last century in the context of an increasing number of asylum seekers arriving in the European Union. The European Commission urged Member States to harmonize their reception conditions for asylum seekers in order to prevent 'secondary movements' of asylum seekers, i.e. movements towards the Member State with the most generous conditions.<sup>9</sup> At that time, all the (then 15) EU Member States had exclusionary aspects to their rules on the reception of asylum seekers,<sup>10</sup> in order to deter potential

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available at: <http://www.theguardian.com/society/2016/feb/02/children-seeking-asylum-in-uk-denied-access-to-education>.

<sup>9</sup> Communication from the Commission to the Council and the European Parliament on the right of asylum', Brussels 11 October 1991, SEC(91)1857 final, p 7.

<sup>10</sup> D. Mabbett and H. Bolderson, 'Non-Discrimination, Free Movement, and Social Citizenship in Europe: Contrasting Provisions for EU Nationals and Asylum-Seekers', in: R. Sigg and C. Behrends (eds), *Social Security in the Global Village*, New Brunswick/London: Transaction Publishers 2002, p. 205. See also R. Bank, 'Reception Conditions for Asylum Seekers in Europe: An Analysis of Provisions in Austria, Belgium, France, Germany and the United Kingdom', 69 *Nordic Journal of International Law* 2000, p. 259.

asylum seekers and stimulate voluntary return of rejected asylum seekers,<sup>11</sup> but the content and scope of the exclusionary measures differed greatly.

In 1999, the European Council decided in Tampere to work towards the establishment of a Common European Asylum System (CEAS) including, in the short term, 'common minimum conditions of reception of asylum seekers'.<sup>12</sup> As one of the first components of the CEAS, Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers was adopted on 27 January 2003.<sup>13</sup> This directive deals with different aspects of the reception of asylum seekers, such as restrictions of freedom and detention, schooling, employment, material reception conditions, health care and special needs of vulnerable asylum seekers. In a green paper on the future of the CEAS the Commission noted that the wide margin of discretion left to Member States by several key provisions of this directive resulted in negating the desired harmonization effect. In addition, this wide margin of discretion has led to the establishment of low reception standards, according to the Commission.<sup>14</sup>

The Tampere conclusions provided for two phases for the development of the CEAS. Whereas in the short term, common minimum standards had to be adopted, in the longer term, 'Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union'.<sup>15</sup> As part of the second phase of the CEAS, the Commission issued a proposal for a recast of Directive 2003/9 in December 2008, aimed at ensuring a higher degree of harmonization and better standards of protection.<sup>16</sup> In May 2009, the European Parliament adopted its position on the proposal which approved most of the proposed amendments.<sup>17</sup> The Council documents on this

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<sup>11</sup> R. Bank, 'Reception Conditions for Asylum Seekers in Europe: An Analysis of Provisions in Austria, Belgium, France, Germany and the United Kingdom', 69 *Nordic Journal of International Law* 2000, p. 286-287; A. Bloch and L. Schuster, 'Asylum and Welfare: Contemporary Debates', 22 *Critical Social Policy* 2002, p. 401; M. Liedtke, 'National Welfare and Asylum in Germany', 22 *Critical Social Policy* 2002, p. 494; P.E. Minderhoud, 'Asylum Seekers and Access to Social Security: Recent Developments in The Netherlands, United Kingdom, Germany and Belgium', in: A. Bloch and C. Levy (eds), *Refugees, Citizenship and Social Policy in Europe*, London: MacMillan Press 1999, p. 146; S. Rosenberger and A. König, 'Welcoming the Unwelcomed: The Politics of Minimum Reception Standards for Asylum Seekers in Austria', *Journal of Refugee Studies* 2011, p. 1.

<sup>12</sup> Tampere European Council 15 and 16 October, Presidency Conclusions, available at: [http://www.europarl.europa.eu/summits/tam\\_en.htm# c](http://www.europarl.europa.eu/summits/tam_en.htm# c).

<sup>13</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *OJ* 31/18.

<sup>14</sup> European Commission, *Green Paper on the future Common European Asylum System*, COM(2007) 301 final.

<sup>15</sup> Since the entry into force of the Treaty of Lisbon on 1 December 2009, this aim has been laid down in article 78 of the Treaty on the Functioning of the European Union (TFEU).

<sup>16</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast)*, COM(2008) 815 final.

<sup>17</sup> EP-PE\_TC1-COD(2008)0244.

proposal reveal, however, that the proposed changes encountered opposition from a significant number of Member States and no agreement was reached on this proposal. Delegations wanted 'a better balance between, on the one hand, high standards of reception conditions for applicants for international protection and, on the other hand, the administrative and financial implications for Member States'.<sup>18</sup>

The Commission presented a modified proposal for a recast of Directive 2003/9 in June 2011.<sup>19</sup> The Commission put forward that this modified proposal granted Member States more flexibility and latitude and better ensured that Member States have the tools to address cases where reception rules are abused and/or become pull factors. After difficult negotiations, Directive 2013/33 (hereafter: the Directive) was formally adopted on 26 June 2013 and entered into force upon its publication on 29 June 2013.<sup>20</sup> Member States had to implement this Directive into their national laws before 21 July 2015.<sup>21</sup> Due to the difficult negotiations in Council, the differences between Directive 2003/9 and Directive 2013/33 are, with the exception of the provisions on detention, rather modest.<sup>22</sup>

### 3. PERSONAL SCOPE OF THE DIRECTIVE

#### 3.1 Introduction

Since the coming into force of Directive 2003/9/EC, Member States have been obliged to provide asylum seekers who fall under the Directive's personal scope with housing, food, clothing, ('material reception conditions') and health care.<sup>23</sup> Member States can provide these facilities in kind, as financial allowances, in vouchers, or a combination of the three.<sup>24</sup> Besides these provisions, Member States need to provide asylum seekers with a daily expenses allowance.<sup>25</sup> The

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<sup>18</sup> Council document 6394/1/12 REV 1, ASILE 24, at 1.

<sup>19</sup> European Commission, *Amended proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast)*, COM(2011) 320 final.

<sup>20</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L180/96.

<sup>21</sup> The Directive does not apply to the United Kingdom, Ireland and Denmark. For the United Kingdom, Directive 2003/9 will continue to apply.

<sup>22</sup> See further chapter 2 of this book. See also S. Peers, 'Statewatch analysis. The EU Directive on Reception Conditions: A weak compromise' July 2012, available at: <http://www.statewatch.org/analyses/no-184-reception-compromise.pdf>.

<sup>23</sup> Arts. 13(1) in conjunction with Art. 2(j) and Art. 15(1) of Directive 2003/9/EC; Art. 17(1) in conjunction with Art. 2(g) and Art. 19 of Directive 2013/33/EU.

<sup>24</sup> Art. 13(5) of Directive 2003/9/EC; Art. 2(g) of Directive 2013/33/EU.

<sup>25</sup> Art. 2(j) of Directive 2003/9/EC; Art. 2(g) of Directive 2013/33/EU. See about the obligation to provide a daily expenses allowance: K. Groenendijk and L. Slingenberg, 'Niet bij brood

Directive contains an exhaustive list of grounds for reduction or withdrawal of reception benefits e.g. if an asylum seeker does not comply with reporting duties, abandons the place of residence determined by the competent authority without informing it, or breaches the rules of the accommodation centre.<sup>26</sup> Due to the fact that this list is exhaustive, Member States are no longer free to deny assistance to categories of asylum seekers of their own choosing. These basic obligations for Member States have not been changed by the recast Directive. They provide for an important subjective right for asylum seekers; the right to be provided with (some kind of) housing, food, clothing, health care and a daily expenses allowance.

It is, therefore, important to know who falls under the personal scope of the Directive and is entitled to these provisions. Who is an asylum seeker? As from which moment are Member States obliged to provide these facilities? From the moment an asylum seeker sets foot on the territory? Or once his asylum application has been registered by the authorities? And until what moment do the obligations apply in case the application is rejected? Until the final appeal is unsuccessful? This section will try to answer these questions.

Article 3(1) of the Directive reads:

This Directive shall apply to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law.

For the definition of an 'application for international protection' the Directive refers to Article 2(h) of Directive 2011/95/EU.<sup>27</sup> Accordingly, both applicants for refugee status and applicants for subsidiary protection fall under the scope of the Directive. This is an important change with regard to Directive 2003/9/EC which contained the possibility to exclude applicants for subsidiary protection.<sup>28</sup> Another difference with Directive 2003/9 is that Article 3 of Directive 2013/33 explicitly refers to applications made in the territorial waters or in the transit zone of Member States. Such applications also fall under the Directive's personal scope. An 'applicant' is defined as 'a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken'.<sup>29</sup> Hence, in order to fall under the scope of Directive 2013/33, three important conditions have to be fulfilled:

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alleen. Onthouden dagvergoeding aan asielzoekers in noodopvang is onwettig', *A&MR* 2016, no. 2.

<sup>26</sup> Art. 16 of Directive 2003/9/EC; Art. 20 of Directive 2013/33/EU.

<sup>27</sup> Art. 2(a) Directive 2013/33/EU.

<sup>28</sup> Art. 2(b) and Art. 3(4) of Directive 2003/9/EC.

<sup>29</sup> Art. 2(b) of Directive 2013/33/EU.

1. An application for international protection must have been made;
2. No final decision must have been taken on this application; and
3. The applicant must be allowed to remain on the territory.<sup>30</sup>

The Directive does not contain definitions of the terms used in these conditions. However, as part of the CEAS, the Directive needs to be interpreted in conformity with the other instruments of the CEAS. Especially the recast of the Asylum Procedures Directive<sup>31</sup> clarifies the meaning of these conditions. This (sometimes still rather unclear) meaning will be discussed in the following sections.

### 3.2 Making, Registering or Lodging an Application

An important question with regard to the Directive's personal scope is from which moment in time are Member States obliged to provide asylum seekers with reception conditions? From the moment they state their intention to apply for asylum to the authorities, from the moment they are registered as asylum seekers, or from the moment they have formally lodged their asylum application? In some Member States, state benefits are only provided to asylum seekers once they are registered as asylum seekers. When there are large numbers of simultaneous asylum applications, there is not always enough capacity to register them all. In such cases, asylum seekers sometimes have to wait for weeks before they are provided with state benefits.<sup>32</sup> This illustrates that it is important to know the precise moment when Member States' obligations to provide benefits to asylum seekers become activated.

According to the English-language version, the Directive applies to third-country nationals and stateless persons who *make* an application for international protection. Other articles in this version of the Directive use the term *lodge*. For example, Article 5 on the right to information contains a time limit of 15 days after an application is *lodged*.<sup>33</sup> Also the French language version uses different terms in Article 3 (*présentent une demande de protection*) and Article 5

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<sup>30</sup> This latter condition is also explicitly mentioned in the preamble of Directive 2013/33. Recital 8 holds: 'In order to ensure equal treatment of applicants throughout the Union, this Directive should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and *for as long as they are allowed to remain on the territory of the Member States as applicants'* (emphasis added).

<sup>31</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *OJ* L180/60.

<sup>32</sup> See for example Asylum Information Database, *Country Report: Germany*, November 2015, p. 49, available at: <http://www.asylumineurope.org/reports/country/germany>; European Council of Refugees, 'Belgium restricts access to protection and leaves hundreds of asylum seekers without shelter', 4 December 2015, available at: <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1308-belgium-restricts-access-to-protection-and-leaves-hundreds-of-asylum-seekers-without-shelter.html>.

<sup>33</sup> Other examples of provisions that use the term *lodge* are Arts 6, 14 and 15.

(*l'introduction de leur demande de protection*). Other language versions use the same word in Articles 3 and 5, but use present tense in Article 3 and past tense or present perfect in Articles 5 and 6.<sup>34</sup> This indicates that in order to fall under the personal scope of the Directive, it is not necessary to officially *have lodged* the application in conformity with national law.

The question remains, however, which moment in time is then decisive for activating Member States' obligations under the Directive. The moment an asylum seeker sets foot on the territory and states his intention to apply for international protection to the authorities? Or only after a first registration has taken place? The Asylum Procedures Directive contains some indications for this latter interpretation. Article 6 of this Directive distinguishes between making, registering and lodging an asylum application. There are strict time limits for the registration of applications. Three working days after an asylum application has been made to the competent authorities, the application should be registered.<sup>35</sup> This deadline is six working days if the application is made to other authorities which are likely to receive such applications, but not competent for the registration under national law.<sup>36</sup> Where a large number of simultaneous applications for international protection make it very difficult in practice to respect these time limits, Member States may provide for an extension of the registration deadline to 10 working days.<sup>37</sup> Registration of the application is not the same as lodging the application, as Article 6 also provides that Member States must ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible.<sup>38</sup> Member States may require that applications should be lodged in person and/or at a designated place.<sup>39</sup>

Registration of the application is not mentioned in other provisions of the Asylum Procedures Directive, nor in the Dublin Regulation or the Reception Conditions Directive and seems, therefore, not to have any legal effect. The strict registration time limits for Member States and the possibility of extending these time limits in case of large numbers of applications, however, suggest otherwise. If registration of the application had no legal effect, then the moment of registration would be irrelevant. Arguably, therefore, Member States are only obliged to provide reception conditions to asylum seekers once asylum seekers have registered their application. Depending on the situation and the competence of the authorities to whom an asylum seeker has stated his intention to apply for asylum, the maximum waiting period between stating this intention and its registration is 3 to 10 working days. An interpretation of the personal scope of the Reception Conditions Directive in conformity with Article 6 of the

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<sup>34</sup> For example, the Dutch language version uses *indienen* in Art. 3, *de indiening* in Art. 5 and *ingediend is* in Art. 6. The Spanish language version similarly uses *presenten* in Art. 3, *hayan presentado* in Art. 5 and *la presentación* in Art. 6.

<sup>35</sup> Art. 6(1) of Directive 2013/32/EU.

<sup>36</sup> *Idem*.

<sup>37</sup> Art. 6(5) of Directive 2013/32/EU.

<sup>38</sup> Art. 6(2) of Directive 2013/32/EU.

<sup>39</sup> Art. 6(3) of Directive 2013/32/EU.



Asylum Procedures Directive, therefore, would be that asylum seekers fall under the personal scope as soon as their application is registered, and in any case no later than 3, or, depending on the situation, 6 or 10 working days after they have stated their intention to apply for asylum to the (competent) authorities.

In order to fall under the Directive's personal scope it is not necessary to make the application to the authorities of the Member State *responsible* for the examination of that application under the Dublin Regulation. In the first judgment on Directive 2003/9,<sup>40</sup> the Court of Justice of the European Union (CJEU) ruled that Directive 2003/9 applies as soon as an application for asylum is first submitted<sup>41</sup> to a Member State; not only once it is submitted to the authorities of the Member State responsible for the examination of that application. This has not been changed by the recast Directive and recast Dublin Regulation.

### 3.3 Final Decision

The first condition of the Directive's personal scope deals with the start of Member States' obligations. The other two conditions deal with the end of it. An asylum seeker only falls under the personal scope of the Directive as long as no final decision on his application has been taken. An important question, therefore, is what is considered to be a 'final decision' in the context of the Directive. The Directive does not contain a definition of this term. The Asylum Procedures Directive defines 'final decision' as a 'decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status by virtue of Directive 2011/95/EU and which is no longer subject to a remedy within the framework of Chapter V of this Directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome'.<sup>42</sup> Chapter V of the Asylum Procedures Directive deals with appeal procedures and contains the right to an effective remedy. According to Article 46(1) of this chapter, asylum seekers have the right to an effective remedy before a court or tribunal against decisions taken on their application. This chapter does not contain a right to a remedy in two instances. A restrictive reading of the term 'final decision' would therefore be that a final decision has been taken if a court or tribunal, of first instance, has reviewed the decision of the authorities on the application for asylum or if the asylum seeker has not made use of a possible appeal against this decision. In this reading, asylum seekers who appeal to a higher national court or authority do not fall under the scope of the directive. A wider reading of the term 'final decision' is also possible. In that case 'a remedy within the framework of Chapter V' of the Asylum Procedures Directive should be understood more broadly and 'final decision' would mean a decision without further appeal. In that case, a decision on the asylum application should only be considered 'final' if all domestic remedies have been ex-

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<sup>40</sup> CJEU 27 September 2012, C-179/11 (*Cimade and GISTI*).

<sup>41</sup> The CJEU did not clarify the difference between 'lodging' and 'making' an application.

<sup>42</sup> Art. 2(e) Directive 2013/32/EU.

hausted. This latter interpretation would solve problems of interpretation when the higher court refers back to the court of first instance.

In the context of 'Dublin' procedures, when a Member State calls upon another Member State to take charge of or to take back an asylum seeker, the CJEU has ruled that only the actual transfer of the asylum seeker by the requesting Member State brings an end to the examination of the application for asylum in that Member State and should therefore be seen as the 'final decision'. The CJEU ruled this in a case about Directive 2003/9/EC and based this interpretation on the general scheme and purpose of this Directive and on the observance of human rights.<sup>43</sup> This wide interpretation by the CJEU of the term 'final decision' in the context of Dublin procedures is an argument in favour of the wider reading of this term in general.

Since international courts or committees are clearly not remedies within the framework of the Procedures Directive, and no 'appeal' can be lodged against national decisions with these bodies, asylum seekers who have exhausted domestic remedies and who lodge a complaint with an international court or committee have received a 'final decision' on their asylum application and, consequently, do not fall under the personal scope of the directive.

### 3.4 Allowed to Remain on the Territory

A final condition that needs to be fulfilled in order to fall under the personal scope of the Directive is to be allowed to remain on the territory. Again, the Directive does not contain further provisions on this condition. According to Article 2(p) of the Asylum Procedures Directive, 'remain in the Member State' means 'to remain in the territory, including at the border or in transit zones, of the Member State in which the application for international protection has been made or is being examined'. Hence, the border and the transit zone of an airport must be considered to form part of a Member State's territory. The question remains, however, as to when an asylum seeker is 'allowed' to remain on the territory. To answer this question, a distinction should be made between the procedure in first instance and the appeal procedure.

Pursuant to Article 9(1) of the Asylum Procedures Directive, an asylum seeker is allowed to remain in the Member State until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. Chapter III of the Asylum Procedures Directive contains rules and guarantees for different kind of procedures and applications, such as accelerated procedures, inadmissible and unfounded applications, subsequent applications and border procedures. Accordingly, asylum seekers are allowed to remain on the territory, and fall under the personal scope of Directive 2013/33, in all these situations, until a decision in first instance has been taken. The CJEU confirmed in *Arslan* that an asylum seeker has the right to remain in the territory of the

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<sup>43</sup> CJEU 27 September 2012, C-179/11 (*Cimade and GISTI*), paras 51-58.

Member State concerned 'at least until his application has been rejected at first instance'.<sup>44</sup>

Article 9(2) of the Asylum Procedures Directive states, however, that Member States may make an exception to the right to remain where they will surrender or extradite an asylum seeker or where an asylum seeker makes a subsequent application referred to in Article 41. Article 41(1) stipulates that Member States may make an exception from the right to remain on the territory where an asylum seeker:

- a) has lodged a first subsequent application, which is not further examined pursuant to Article 40(5), merely in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State; or
- b) makes another subsequent application in the same Member State, following a final decision considering a first subsequent application inadmissible pursuant to Article 40(5) or after a final decision to reject that application as unfounded.

In addition, this article provides that Member States may make such an exception only where the determining authority considers that a return decision will not lead to direct or indirect *refoulement* in violation of that Member State's international and Union obligations. A subsequent decision that is not further examined will be considered inadmissible pursuant to Article 40(5). Since an inadmissibility decision is a decision in first instance, the end of the right to remain on the territory seems to follow directly from Article 9(1) of the Asylum Procedures Directive. Article 41(1)(a) seems therefore to be rather superfluous for this stage of the procedure.<sup>45</sup> The exception mentioned in Article 41(1)(b) is of relevance for this stage. This provision stipulates that Member States may deny the right to remain to asylum seekers who make a further subsequent application, following a subsequent application that has been declared inadmissible or unfounded, irrespective of whether that further subsequent application will be further examined or not. This means that asylum seekers who make a third or further asylum application in the same Member State, after their second application has been declared inadmissible or unfounded, do not have the right to remain on the territory pending the decision in first instance on their application and consequently, do not fall under the personal scope of Directive 2013/33/EU.

The Asylum Procedures Directive also provides for a right to remain on the territory pending the appeal procedure. On the basis of Article 46(5-8) of the Asylum Procedures Directive, asylum seekers who lodge an appeal against the

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<sup>44</sup> CJEU 30 May 2013, C-534/11 (*Arslan*), para 48.

<sup>45</sup> As Art 9(1) only obliges Member States to allow asylum seekers to remain on the territory 'until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III'. An inadmissibility decision on the basis of Article 40 is such a decision.

rejection of their application generally have the right to remain on the territory pending the outcome of the remedy or, in certain specified cases, until a court or tribunal has ruled whether or not the applicant may remain on the territory pending this period. This latter rule applies for example when an application is declared inadmissible or manifestly unfounded in an accelerated asylum procedure. Under certain circumstances, Member States may derogate from this latter right to remain in the case of a (further) subsequent application. The same conditions apply as with regard to the possibility to derogate from the right to remain with regard to subsequent applications pending the procedure in first instance.<sup>46</sup> This means that generally, asylum seekers who lodge an appeal against the rejection of their application must be allowed to remain on the territory until a court or tribunal has considered, at least, their request to stay on the territory pending the outcome of their appeal. Only in case of a subsequent application that is merely lodged in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State and that will not be further examined or in case of a further subsequent application, after the first subsequent application is declared inadmissible or unfounded, asylum seekers do not have the right to remain on the territory pending this court procedure, and will not, therefore, fall under the personal scope of Directive 2013/33/EU.

### 3.5 Concluding Remarks

All of the above means that a number of categories of asylum seekers who are still awaiting a (court) decision on their asylum application do not fall under the personal scope of Directive 2013/33. First of all, it could be argued that asylum seekers who have only stated their intention to apply for asylum to the authorities but who have not yet been registered as such by the authorities, while the authorities did not yet exceed the registration deadline, do not yet fall under the Directive's personal scope. Secondly, Member States may choose to exclude two categories of asylum seekers from the right to remain on their territory pending the procedure in first instance and, consequently, from the personal scope of Directive 2013/33. These two categories are asylum seekers who lodge a further subsequent application after their second asylum application has been declared inadmissible or unfounded and asylum seekers who will be surrendered or extradited. Thirdly, a court or tribunal may rule on (and, hence, may deny) the right to remain on the territory during the appeal stage in certain specified circumstances.<sup>47</sup> Finally, asylum seekers who lodge a complaint with an international court or committee, or, arguably, who lodge a further domestic appeal against the rejection of their application do not fall under the personal scope of Directive 2013/33, since they have already received a 'final decision' on their application.

The *Cimade and GISTI* case indicates that the CJEU might give a broader definition of the Directive's personal scope. As mentioned earlier, the CJEU held in

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<sup>46</sup> Art. 41(2)(c) of Directive 2013/32/EU.

<sup>47</sup> See Art 47(6) and (7) of Directive 2013/32/EU.

this case that asylum seekers for whom another Member State is responsible on the basis of the Dublin Regulation fall under the personal scope of the Reception Conditions Directive until they have actually been transferred to the responsible Member State. The CJEU based this conclusion on the fact that for such asylum seekers, a 'final decision' on their application has not yet been taken. The CJEU, however, failed to address the question whether these asylum seekers are still allowed to remain on the territory of the Member State in which they have lodged their asylum application. Since the CJEU referred to the general scheme and purpose of the Directive and to the observance of human rights as arguments for this interpretation, this could indicate that the CJEU is, more generally, of the opinion that asylum seekers fall under the personal scope of the Directive until they have received a final decision on their application.

#### 4. SATURATION OF RECEPTION NETWORKS

When the number of arriving asylum seekers significantly increases in a Member State, there is a risk that the general reception facilities that the Member State has in place for asylum seekers become overcrowded or even completely full. The Directive allows Member States to react to such a saturation of the reception network in (only) two ways.

The first option is laid down in Article 18(g). This Article mentions explicitly the situation that 'housing capacities normally available are temporarily exhausted'. In that case, Member States may, exceptionally, 'set modalities for material reception conditions different from those provided for in this Article'. The possibility of departing from the obligations laid down in Article 18 is further conditioned by the requirement to have a 'duly justified case' to deviate and to apply these exceptions for as short as possible. Article 18 provides further rules when accommodation is provided in kind. It stipulates, for example, in paragraph 1 that where housing is provided in kind, it should take one or a combination of the following forms:

- a. 'Premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones;
- b. Accommodation centres which guarantee an adequate standard of living;
- c. Private housing, flats, hotels or other premises adapted for housing applicants.'

Accordingly, asylum seekers can be housed in all kinds of premises, as long as these premises are specifically adapted for or used for the housing of asylum seekers. With reference to Article 18(g), however, Member States can house asylum seekers in premises that are not specifically meant for or adapted for housing asylum seekers. The current situation shows that many Member States do indeed use this possibility and accommodate asylum seekers in various forms

of emergency shelters, such as (army) tents, municipal evacuation shelters, or sports halls.<sup>48</sup>

Article 18(g) gives the possibility to temporarily depart from all rules laid down in Article 18. As a result, if normally available housing capacities are temporarily exhausted, Member States can also deviate from the requirement to take into consideration gender and age-specific concerns of asylum seekers when housing them;<sup>49</sup> to ensure that transfers of asylum seekers to another reception facility only take place when necessary;<sup>50</sup> and to ensure that reception centre personnel are adequately trained.<sup>51</sup>

The second option that Member States have is to provide for accommodation in the form of financial allowances. This option is not limited to the situation of saturation of reception networks. Member States can under all circumstances choose between providing accommodation in kind, as financial allowances or in vouchers, as long as they ensure that the material reception conditions 'provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health'.<sup>52</sup>

In *Saciri*,<sup>53</sup> the CJEU ruled that if Member States choose to provide for accommodation in the form of financial allowances, the amount of these allowances must be such that asylum seekers are actually and effectively able to obtain housing, if necessary on the private rental market. In addition, housing should immediately be available when asylum seekers make their application for asylum. In this case, the reception facilities for asylum seekers in Belgium were overloaded, as a result of which asylum seekers were referred to bodies in the general public assistance system. The *Saciri* family was referred to such a body, but was unable to find housing or to pay the rent at the private rental market. The CJEU held that Member States have a certain margin of discretion as regards the methods by which they provide the material reception conditions and that they may use, therefore, bodies of the general public assistance system as intermediary. However, Member States should ensure that those bodies provide the minimum standards laid down in the Directive; 'saturation of the reception networks not being a justification for any derogation from meeting those standards'.<sup>54</sup>

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<sup>48</sup> See for example Sweden (<http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Nyheter/2016-02-05-Great-need-for-housing-despite-fewer-applicants.html>); the Netherlands (<https://www.government.nl/topics/asylum-policy/contents/asylum-procedure/reception-asylumseeker>); Germany (<http://www.asylumineurope.org/reports/country/germany/reception-conditions/access-forms-reception-conditions/types-accommodation>); France (<http://www.asylumineurope.org/reports/country/France/reception-conditions/access-and-forms-reception-conditions/types>).

<sup>49</sup> Art. 18(3) of Directive 2013/33/EU.

<sup>50</sup> Art. 18(6) of Directive 2013/33/EU.

<sup>51</sup> Art. 18(7) of Directive 2013/33/EU.

<sup>52</sup> Art. 17(2) Directive 2013/33/EU.

<sup>53</sup> CJEU 27 February 2014, C-79/13 (*Saciri*).

<sup>54</sup> Para. 50.

The *Saciri* judgment was positively received by some commentators as an extension of asylum seekers' rights under the Directive. The judgment would display a 'robust upholding of asylum seekers' rights'<sup>55</sup> or an 'extension of the protection scope of the Directive'.<sup>56</sup> In my view, however, the Court answers to the preliminary questions follow logically from the wording of the definition of 'material reception benefits' in the Directive, which explicitly includes housing, and the lack of a possibility to reduce or withdraw reception benefits in case of saturation of the reception facilities.<sup>57</sup>

To conclude, if the reception capacity in Member States becomes overloaded due to an increase in asylum applications, Member States can either temporarily provide for forms of emergency shelter that do not need to comply with all the rules laid down in the Directive for the provision of housing in kind, or they can provide asylum seekers with enough financial benefits in order for them to effectively and immediately find their own housing. Not providing any kind of housing to asylum seekers, even temporarily, is not in conformity with the Directive. When adopting the Directive, the Member States have, therefore, subjected themselves to an important, result-oriented obligation; an obligation that is more far reaching than the more perform-oriented obligation to provide for housing in human rights treaties, which generally leaves room for budgetary constraints and for progressive realization.<sup>58</sup>

## 5. RELEVANCE OF THE LAPSE OF TIME

The length of the asylum procedure can vary widely, both within a Member State, as well as among Member States. When large numbers of asylum seekers apply for asylum simultaneously, the length of the procedure can increase significantly. The Asylum Procedures Directive holds that, generally, Member States should conclude the procedure in first instance within six months from the lodging of an application.<sup>59</sup> However, while Member States may provide for acceler-

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<sup>55</sup> B. Venkata, 'Destitute asylum seekers - what are member states' obligations? Case Comment: *federaal agentschap v Saciri*, available at: <http://eutopialaw.com/2014/03/04/destitute-asylum-seekers-what-are-member-states-obligations-case-comment-federaal-agentschap-v-saciri-c-7913/>.

<sup>56</sup> M. Enquist Källgren, 'A worthy standard of living for asylum seekers and Belgian catch-22', available at: <http://luxembourgweekly.blogspot.nl/2014/03/c-7913-saciri-migration-law.html>.

<sup>57</sup> See my case comment in EHRC 2014/95. See also S. Peers, 'The CJEU secures asylum seekers' right to family housing', available at: <http://eulawanalysis.blogspot.nl/2014/02/what-obligations-do-member-states-have.html>. As discussed in these case comments, the CJEU does broaden Member States' obligations a bit with regard to the obligation to protect family unity.

<sup>58</sup> Cf. Art. 2 of the International Covenant on Economic, Social and Cultural Rights; Art. 31(2) of the European Social Charter (Revised).

<sup>59</sup> Art. 31(3) of Directive 2013/32/EU.

ated procedures on a number of grounds,<sup>60</sup> they may also extend the time limit with another nine months where complex legal and factual issues are involved in the individual case; the delay is attributable to the asylum seeker; or, a large number of asylum seekers simultaneously apply for asylum.<sup>61</sup> In addition, by way of exception, Member States may exceed the time limits by a maximum of three months 'where necessary in order to ensure an adequate and complete examination of the application for international protection'.<sup>62</sup> Hence, Member States may, under certain, rather widely defined, circumstances take 18 months to decide on the asylum application. Alongside possibilities for extending and exceeding time limits, Member States may postpone the procedure in first instance 'due to an uncertain situation in the country of origin which is expected to be temporary'.<sup>63</sup> In any event, the procedure in first instance should be concluded within 21 months from the lodging of the application.<sup>64</sup> These time limits only apply to the procedure in first instance. If the asylum application is rejected, the procedure in first instance is usually followed by an appeal procedure, sometimes in two instances. The Asylum Procedures Directive does not contain time limits for the conclusion of this part of the procedure; it only allows Member States to lay down time limits in their domestic legislation.<sup>65</sup> Accordingly, an asylum procedure that takes many months or years is not in violation of, nor unforeseen by EU law.

The Reception Conditions Directive does take a possible long duration of asylum procedures into account by providing for an (albeit rather limited) accretion in rights through the passage of time. For example, Article 15(1) of the directive holds that Member States should ensure that asylum seekers have access to the labour market no later than nine months from the lodging of the application. This obligation, however, only applies if a first instance decision by the competent authority has not been taken within these nine months *and* the delay cannot be attributed to the applicant. If the authorities reject the application within nine months (or if a delay on the decision can be attributed to the asylum seeker) Member States may deny asylum seekers access to the labour market pending possible appeal procedures. The Directive, therefore, under certain conditions still allows Member States to deny access to the labour market pending the entire asylum procedure, which may take years. If, however, the authorities are unable to decide on the application within nine months – which may happen more often now with the increase in asylum applications and which is allowed for under the Asylum Procedures Directive – Member States should ensure access to the labour market. Member States may set conditions for granting access and may give priority to Union citizens and to legally resident

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<sup>60</sup> Art. 31(8) of Directive 2013/32/EU.

<sup>61</sup> Art. 31(3) of Directive 2013/32/EU.

<sup>62</sup> *Idem*.

<sup>63</sup> Art. 31(4) of Directive 2013/32/EU.

<sup>64</sup> Art. 31(5) of Directive 2013/32/EU. Note that these time limits should only be transposed into domestic law by 20 July 2018 (art. 51(2) Directive 2013/32/EU).

<sup>65</sup> Art. 46(10) of Directive 2013/32/EU.



third-country nationals, but should ensure 'effective' access.<sup>66</sup> In addition, once access to the labour market is provided, it may not be withdrawn during appeals procedures, if the appeal has suspensive effect.<sup>67</sup>

Another example of a provision where the passage of time plays a role is Article 14 on education. Article 14(2) provides that access to the education system for minors may be postponed, but for no longer than three months from the lodging of the application. In addition, Article 14(1) stipulates that once access to secondary education is provided, it may not be withdrawn for the sole reason that the minor has reached the age of majority.

Other provisions do not refer to the passage of time, where this would have made sense in view of relevant state practice. For example, providing material reception benefits entirely in kind (apart from a daily expenses allowance); housing asylum seekers in accommodation centres; deciding on the residence of asylum seekers; and making provision of the material benefits subject to actual residence in a specific place; all of these lack a specific time limit. Asylum seekers may be accommodated in (large scale) accommodation centres and may be subjected to an obligation to live there throughout the asylum procedure. Time limits on the provision of in kind benefits and/or accommodation in large scale accommodation centres do exist in state practice. For example, in Belgium, asylum seekers can apply for a transfer to individual accommodation after they have lived for four months in a collective accommodation centre, provided their application has not been rejected.<sup>68</sup> In Germany, regular social assistance benefits are provided to asylum seekers after 15 months of receiving more limited and usually in kind benefits under the Asylum Seekers' Benefits Act.<sup>69</sup>

## 6. CONCLUSION

The Directive refers only once to the situation that Member States receive many asylum applications; if the normally available housing capacities for asylum seekers are temporarily exhausted, Member States may, in duly justified cases and for as short as possible, deviate from the specific safeguards laid down in the Directive for housing that is provided in kind. The Asylum Procedures Directive provides for an extension of the deadline for registration and for an extension of

<sup>66</sup> Art. 15(2) of Directive 2013/33/EU.

<sup>67</sup> Art. 15(3) of Directive 2013/33/EU.

<sup>68</sup> Art. 12(1) *Wet betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen*. After a negative decision, asylum seekers can still apply for a transfer if they have lodged an appeal with the Council of State that has been declared admissible. See also: [http://www.asylumineurope.org/sites/default/files/report-download/aida\\_be\\_update.iv\\_\\_o.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_be_update.iv__o.pdf).

Due to the increase in asylum applications, these transfers have been put on hold. Since August 2015, asylum applicants with a high chance of receiving international protection (e.g. Syrians) are immediately assigned to an individual accommodation structure.

<sup>69</sup> § 2(1) *Asylbewerberleistungsgesetz (AsylbLG)*. See also: [http://www.asylumineurope.org/sites/default/files/report-download/aida\\_de\\_update.iv\\_\\_o.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_de_update.iv__o.pdf), p. 50.

the deadline to conclude the procedure in first instance when a large number of asylum seekers apply simultaneously for asylum, which (arguably) affects the start and duration of Member States' obligations under the Directive. Apart from this, the Directive leaves no room for exceptions based on high numbers of asylum applications, as has been explicitly confirmed by the CJEU. The Directive does provide for a number of important rights for asylum seekers. For example, they have a right to be provided with housing or enough money to be able to effectively obtain housing themselves and, if they have not received a first instance decision within nine months, to have effective access to the labour market. It is, therefore, important to establish the precise personal scope of the Directive.

In its evaluation report regarding the 2003 Directive, the Commission concluded that the objective of creating a level playing field in the area of reception conditions had not been reached.<sup>70</sup> Even though the 2013 recast of the Directive changed little regarding Member States' obligations, it would now be possible to conclude differently, due to changed circumstances and Member States' reactions to the increase in asylum applications. Although there remains room for improvement with regard to the content of the recast Directive,<sup>71</sup> in the light of the current developments, the focus should first be on the correct implementation of this Directive. Other contributions in this book will critically examine this.

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<sup>70</sup> European Commission, *Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, COM(2007) 745 final.

<sup>71</sup> For example from the perspective of state practice as mentioned above in para. 5 or from the perspective of Member States' obligations under international refugee law, social security law and human rights law. See: L. Slingenbergh, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality*, Oxford: Hart Publishing 2014.