

**STUDY ON THE ASYLUM SINGLE PROCEDURE**

**12. NATIONAL REPORT  
PORTUGAL\***

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## Introduction

Portugal ratified the Geneva Convention (1951)<sup>1</sup> in 1960, and the New York Protocol (1967) in 1975.<sup>2</sup> These international instruments define the legal status of refugees and are directly applicable in the Portuguese legal framework. They bind the Portuguese state to recognise and grant this status to foreign citizens and stateless people who meet the criteria set out in the definition of a refugee enshrined in Article 1 of the Geneva Convention.

The Revolution on 25 April 1974 brought an end to the fascist dictatorship, and installed a democratic regime in Portugal, based on the rule of law and respect for basic rights. Thus, the Constitution of the Portuguese Republic contains a universalist concept of human rights and enshrines the right to political asylum, which, pursuant to Sub-section 8 of Article 33 “ is guaranteed for foreign citizens and stateless persons who are being persecuted or are under serious threat of persecution, as a result of their activities in favour of democracy, social and national freedom, peace amongst peoples, freedom and the rights of human beings.”

The right to political asylum is thus conceived as a subjective right of the persecuted, and is guaranteed by the constitution. Asylum can be obtained in Portugal, when they are persecuted or under serious threat of persecution as a result of their fight for these constitutional values. Once such conditions are apparent, asylum cannot be denied, nor can the law limit the terms in which the granting of asylum is guaranteed by the constitution, although it can extend it to include other cases<sup>3</sup>, in particular when refugee status is recognised for foreign citizens and stateless persons who meet the criteria set out in the 1951 Geneva Convention.

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<sup>1</sup> Decree-Law no.43 201, Diário do Governo, 1 October 1960, 1<sup>st</sup> series, no.229, p.2189.

<sup>2</sup> Decree-Law no.207/75, Diário do Governo, 17 April 1975, 1<sup>st</sup> series, no.90, p.581.

<sup>3</sup> J.J. Gomes Canotilho / Vital Moreira, Constituição da República Portuguesa Anotada, 3<sup>rd</sup> Ed., Coimbra, p.211; Vital Moreira “O Direito de Asilo entre a Constituição e a Lei” in O Asilo em Portugal, Lisbon, 1994 (www.cpr.pt).

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This concept of asylum as a right of persecuted people, rather than the State's sovereign prerogative, underpins the entire framework of legal protection for refugees in Portugal.

As far as the single procedure is concerned, legal responses have gone in opposing directions. That is to say, the first Asylum Act from 1980 enshrined the concept of humanitarian asylum, as a form of subsidiary protection which the authorities could grant at their discretion, following the same procedure as for granting asylum, whilst the 1993 Asylum Act enshrined two separate processes for granting asylum and subsidiary protection. In fact, granting residence rights on humanitarian grounds was subject to the procedure set out in the Aliens Act, whilst asylum was granted and refugee status recognised in accordance with the specific procedure set out in the Asylum Act. The Asylum Act of 1998 returned the single procedure for granting asylum (recognition of refugee status) and residence rights on humanitarian grounds (subsidiary protection). The latter was therefore conceived as a subjective right of those concerned and not as a decision for the authorities.

### **I. Legislative Developments**

#### **1.1 The 1980 Asylum Act**

The first Asylum Act was passed in 1980.<sup>4</sup> Article 1 provides foreign and stateless persons with a subjective right to asylum in the following two situations:

- when persecuted as a result of their activities in favour of democracy, freedom, peace and human rights, undertaken in their country of origin or residence;
- when, for fear of persecution by dint of their race; religion; nationality; political opinions, or integration in a particular social group, they cannot or do not wish to return to their country of origin or residence.

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<sup>4</sup> Law no.38/80, 1 August 1980, on the right to asylum and refugee status, *Diário da República*, 1 August 1980, 1<sup>st</sup> Series no.176, p.1942. This law was repealed in 1993 by Law 70/93. The right to asylum and the granting of refugee status, the legal framework for subsidiary and temporary protection are contained in Law 15/98, 26 March 1998. See Teresa Tito de Moraes, *Refugiados em Portugal*, (Janus 2001, Lisbon 2000, pp.192 and 193) for the legislative developments in Portugal on asylum and refugees.

Decree-Law no.415/83, dated 24 November 1983<sup>5</sup>, broadened the scope of personal application of the 1980 Asylum Act to include those cases of serious threat of persecution as a result of the foreign citizen's activities of the values contained therein. The granting of asylum under the terms and effects of Article 1 of the 1980 Asylum Act implied that the beneficiary was also given refugee status.<sup>6</sup>

Article 2 provided for asylum to be granted on humanitarian grounds to foreign and stateless persons who did not wish to return to their country of origin or residence for fear of their safety as a result of armed conflicts or systematic violation of human rights.

Humanitarian asylum, as a means of subsidiary protection, was not conceived as a subjective right, but as a decision made at the authorities' discretion to provide foreign citizens, who did not have a subjective right to asylum under the terms and effects of Article 1, but met the conditions of Article 2, with protection. Those benefiting from humanitarian asylum were not granted refugee status, but were left in an equivalent situation, under the terms and effects of Article 4, sub-section 2, pursuant to legislation on foreign citizens.

As far as the asylum procedure was concerned, the 1980 Asylum Act made no distinction between granting refugee status and humanitarian asylum, thereby establishing a single procedure.

The original version of the 1980 Asylum Act did not foresee a period for assessing whether or not applications were applicable. Once the Borders and Immigration Service (BIS), responsible for compiling the dossier, had received the request, the asylum seeker was issued with a temporary residence permit.<sup>7</sup> Therefore, requests could

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<sup>5</sup> Diário da República, 1<sup>st</sup> Series, no.271, 24 November 1983, p.3873.

<sup>6</sup> Article 4, sub-section 1 of the 1980 Asylum Act.

<sup>7</sup> Article 16 of the 1980 Asylum Act.

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not be turned down immediately. In addition, the BIS was bound by Article 17 to gather evidence *ex officio*. In accordance with Article 18, the Ministers of Home Affairs and Justice were responsible for deciding whether or not to grant asylum, having heard the opinion of the Advisory Committee for Refugees. An appeal against the decision could be lodged with the Supreme Administrative Court, with a suspensory effect, under the terms and effects of Article 19.

Decree-Law no.415/83 tightened up the procedure for granting asylum foreseen in the 1980 Act, mainly by creating the preliminary stage for assessing the admissibility of requests, and in Article 15A, foreseeing immediate refusal for clearly unfounded applications. An appeal against this decision could be lodged with the administrative courts, but would not suspend the decision.

The 1980 Asylum Act was repealed by Law no.70/93, dated 29 September 1993<sup>8</sup>, which established a more restrictive system for granting asylum and subsidiary protection.

### **1.2 The 1993 Asylum Act**

The centre-right parliamentary majority (The Social Democratic Party held an overall majority at the time) approved Law no.70/93, dated 29 September 1993, which enshrined a more restrictive substantive and procedural system for granting asylum. It subjected the granting of residence rights on humanitarian grounds to a separate process foreseen in Decree-Law no.59/93, dated 3 March (Immigration Act).

Therefore, although the personal scope of the right to asylum remained unchanged, the 1993 Asylum Act established the concepts of safe country and host country, for the purposes of implementing the fast-track asylum assessment process, set out in Article 19.

This fast-track process could be implemented in the following situations: when the request for asylum was clearly unfounded, abusive or fraudulent; when the applicant hailed from a safe or host country; when the applicant had been expelled; when the

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<sup>8</sup> Diário da República, 1<sup>st</sup> Series, no.229, 29 September 1993, p.5448.

exclusion clauses foreseen in Article 1-F of the Geneva Convention were applicable, or when there was serious concern for law and order in Portugal or elsewhere.

Under the fast-track process, the BIS had 24 hours to inform and request the opinion of the National Commissioner for Refugees, who in turn had 24 hours to issue his opinion. Should this opinion have been unfavourable, the applicant had 48 hours to lodge a written appeal, with the Minister of Home Affairs then being responsible for deciding as to whether or not the application was admissible. If the application was turned down, the applicant had 15 days in which to leave Portuguese territory or face expulsion. The 1993 Asylum Act had no provision for an appeal against the non-acceptance of a fast-track application. Since the normal procedure specifically permitted appeals, we can deduce that the legislator's intention, in the ilk of his restrictive system, was to deny applicants the right to appeal against fast-track decisions.<sup>9</sup> Nevertheless, since denying someone the right to appeal would be unconstitutional, appeals could be lodged in the normal fashion with the administrative courts, but that does not suspend the decision, and thereby fails to provide any sort of jurisdictional protection.<sup>10</sup>

The use of this extremely fast-track procedure failed to guarantee the rights of legitimate asylum seekers, particularly their right to a fair procedure, in which their application should be carefully studied.<sup>11</sup>

This more restrictive system is linked to the fact that the highest ever number of asylum applications, 1,659, was received in 1993. There were largely due to the turbulent times in Eastern Europe, following the collapse of the Berlin Wall, which along

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<sup>9</sup> See Vital Moreira, "O Direito de Asilo entre Constituição e a Lei" in *O Asilo em Portugal*, Lisbon 1994 ([www.cpr.pt](http://www.cpr.pt)).

<sup>10</sup> See Vital Moreira, "O Direito de Asilo entre Constituição e a Lei" in *O Asilo em Portugal*, Lisbon 1994 ([www.cpr.pt](http://www.cpr.pt)); António Filipe, *Direito de Asilo – Anos de retrocesso* ([www.cpr.pt](http://www.cpr.pt)).

<sup>11</sup> See Teresa Tito de Moraes, *Refugiados em Portugal*, (Janus 2001, Lisbon 2000, p.192)

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with the entry into force of the Schengen Implementing Convention, allowed a large number of foreign citizens to enter Portugal.<sup>12</sup>

The 1993 Asylum Act also took a step back as far as subsidiary protection was concerned, by bringing an end to the Portuguese state's ability to grant humanitarian asylum, under the auspices of a single procedure. According to Article 10 of the 1993 Asylum Act, foreign citizens or stateless persons without the right to asylum, but who were or felt unable to return to their country of origin or residence for fear of their safety, as a result of armed conflicts or the systematic violation of human rights, were subject to the extraordinary system for granting residence rights, set out in Article 64 of the Immigration Act, in force at the time.<sup>13</sup> This provided for the Minister of Home Affairs to grant residence rights for up to 5 years in exceptional circumstances.

According to the case-law of the Supreme Administrative Court, whilst the rule of law governed the right to asylum, since it is a basic right, and the authorities must act according to binding powers, when granting or denying such a right, subsidiary protection granted under the auspices of Article 10 had a different legal nature. That is to say, it was not a subjective right of foreign citizens in those circumstances, but was granted on a discretionary basis.<sup>14</sup> The same case-law established that the different legal nature of the two concepts and their premisses required that the two procedures be different. The rejection of an application for asylum did not imply that the basis for granting residence rights under the auspices of Article 10 had been assessed. Thus, the latter required a separate process.

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<sup>12</sup> See Teresa Tito de Morais, *Refugiados em Portugal*, (Janus 2001, Lisbon 2000, pp.192 and 193)

<sup>13</sup> Decree-Law no.59/93, dated 3 March. This Immigration (Aliens) Act was repealed by Decree-Law no.244/98, dated 8 August 1998, and was substantially amended by Decree-Law no.4/2001, dated 10 January 2001.

<sup>14</sup> Supreme Administrative Court Ruling, dated 9 June 1998, in *Boletim do Ministério da Justiça*, no.478, p.429 on.

Subsidiary protection foreseen in the 1993 Asylum Act was less favourable than that provided on humanitarian grounds by the 1980 Act. In fact, those granted humanitarian asylum were in a similar position to refugees, in other words, the decision was for life, unless the status was withdrawn judicially, because there were no longer grounds. Those benefiting from subsidiary protection under the auspices of Article 10 of the 1993 Asylum Act, and holding a 5-year residence permit, were in a more precarious position, governed by the Immigration Act.

The 1993 Asylum Act, which was a step back in terms of the law ensuring a fair hearing for asylum applications, was repealed by Law no.15/98, dated 26 March, based on a bill submitted by the Socialist Party, which took office in 1995, albeit without a parliamentary majority.

### **1.3 The 1998 Asylum Act: the single asylum procedure**

Law no.15/98, dated 26 March (Asylum Act), which came into force on 25 May 1998, establishes the legal framework for asylum and refugees currently in force in Portugal.<sup>15</sup>

The 1998 Asylum Act did not change the personal scope of asylum law, and made substantial changes to the system of subsidiary protection. This was done by entitling foreign citizens, not covered by the scope of asylum law set out in Article 1, with the to a residence permit on humanitarian grounds, when they are or feel unable to return to their country of origin, as a result of armed conflict or the systematic violation of human rights.

Whilst Article 10 of the 1993 Asylum Act subjected subsidiary protection to the special regime for granting residence permits foreseen in the Immigration Act, based on the Home Affairs' Minister's discretion, it is now conceived as a foreign citizen or stateless person's right and applicants have the same guarantees as a refugee, whilst their application is processed.

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<sup>15</sup> Diário da República, 1<sup>st</sup> Series A, no.72, 26 March 1998, p.1328. There is an English and French translation of the law in the journal Documentação e Direito Comparado, no.73-74, 1998, pp.171 on. Hereafter, all the article referred to are from the 1998 Asylum Act, unless specified otherwise.

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The 1998 Asylum Act enshrined a single procedure for granting asylum and the respective recognition of refugee status, and granting subsidiary protection. By dint of Article 26, the same procedure as for granting asylum is applicable to granting humanitarian residence (foreseen in Article 8). The authorities must compile the dossier in the same way for both asylum and humanitarian residence applications.<sup>16</sup>

The 1998 Asylum Act provides a somewhat more favourable procedure and hosting system than the previous one.

On the one hand, it repealed the fast-track process for granting asylum, replacing it with a preliminary assessment stage and decision on whether or not the application for asylum is admissible, and providing applicants with more procedural guarantees. Thus, in addition to concentrating the legal basis for rejecting applications, the applicant is also given the opportunity to request re-assessment by the National Commissioner for Refugees, with suspensory effect.

On the other hand, asylum seekers have better access to the procedure for establishing refugee status. The BIS is obliged to inform applicants of their rights, duties and procedures. They are also given access to interpreting services, legal support and direct legal aid from the UNHCR<sup>17</sup> or the Portuguese Refugee Council (PRC, a Portuguese NGO), at all stages in the process.<sup>18</sup>

Lastly, the Portuguese state is obliged to broadly ensure that applicants for asylum maintain their human dignity, by providing them with a series of rights, such as the right to social support, medical care and medicines, means of subsistence and housing, access to the labour market, education and special support and counselling, when they have been victims of torture, rape or other serious physical or sexual abuse.<sup>19</sup>

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<sup>16</sup> See the Supreme Administrative Court Ruling, dated 15 February 2000, case 45.142.

<sup>17</sup> Since 1998 the UNHCR has not had a delegation in Portugal. It is represented by the Portuguese Refugee Council.

<sup>18</sup> Articles 51 and 52.

<sup>19</sup> Articles 49, 50, 53, 54, 55, 56, 57 and 58.

## II. Description of Rules concerning the Single Procedure

### 1. Implementing the asylum procedure for subsidiary protection

The scope of asylum is defined as follows by Article 1 of the Asylum Act:

“1 – The right of asylum shall be guaranteed to foreign nationals or stateless people persecuted or under serious threat of persecution as a result of their activities undertaken in their country of origin or residence, in favour of democracy, social and national freedom, peace among men, freedom and human rights.

2 – Foreign nationals or stateless people, who have grounds for fearing persecution owing to their race, religion, nationality, political opinions or membership of a particular social group, are unable or unwilling to return to their country of origin or residence, are also entitled to be granted asylum<sup>20</sup>.”

The situation foreseen in Article, sub-section 1 corresponds to the constitutionally guaranteed right to asylum – political asylum *stricto sensu*; the situation in Article 1, sub-section 2 corresponds to the protection granted to persons who meet the criteria set out in the definition contained in Article 1 A of the Geneva Convention. In both cases, the right to asylum provides the beneficiary with refugee status.<sup>21</sup>

Article 8, sub-section 1 defines the scope of subsidiary protection as follows: “A residence permit on humanitarian grounds shall be granted to foreign nationals or stateless people to whom the provisions of Article 1 do not apply and that are prevented or feel unable to return to their country of origin or residence, for fear of their safety as a result of armed conflict or gross violation of human rights.”

The provisions of Article 8, sub-section 1 together with those of Article 26 of the Asylum Act, which stipulate that the procedural rules for asylum are applicable to the situations set out in Article 8, justify there being a single procedure for analysing the protection needs of an applicant for asylum, in terms of both the right to asylum

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<sup>20</sup> Translated by Raquel Tavares, in *Documentação e Direito Comparado*, no. 73/74, 1998, p. 199.

<sup>21</sup> Article 2.

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and the complementary system of subsidiary protection. The latter is conceived as a subjective right of persons meeting the criteria under which it is granted, rather than as a state decision on a discretionary basis.

### **2. The scope of the single asylum procedure: legitimate grounds for protection**

The single asylum procedure is applicable to the following persons:

- persons seeking political asylum (Article 1, sub-section 1);
- persons seeking protection under the Geneva Convention (Article 1, sub-section 2);
- persons seeking subsidiary protection (Article 8).

In accordance with the Asylum Act, once asylum has been granted, the recognition of refugee status is automatic. The right to asylum, therefore, is not conceived as the Portuguese state's prerogative to grant asylum to foreign nationals seeking refuge here, but as a subjective right of foreign nationals and stateless persons who meet the criteria for being granted asylum, as guaranteed by the constitution or set out in Article 1, sub-section 2.

Asylum shall be granted to those persons who are persecuted as a result of the reasons set out in Article 1, when such persecution is carried out directly by representatives of the state throughout national territory<sup>22</sup>. Refugee status is also attributed to those persons who are persecuted or who fear persecution as a result of their race, religion, nationality, political opinions or membership of a particular social group, by agents not representing the state, but when the state of origin is directly or indirectly responsible for this persecution. This occurs when the state of origin tolerates or encourages such persecution, or when it could protect the persecuted, fails to adopt any protection or measures or pursue the persecutors.

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<sup>22</sup> See António Francisco de Sousa, *Perseguição política no direito de asilo*, in *Direito e Cidadania*, n.º 6, Cabo Verde, 1999, p. 48.

The State cannot be held responsible, albeit indirectly, for persecution, when it can no longer effectively protect people, which is what happens during civil conflicts or when a particular group carries out quasi-state functions in a part of its territory. In such cases, when the applicant from asylum hails from a country where there is widespread violence and the systematic violation of human rights perpetrated by non-state agents, and in which the State is unable to afford protection, he will be granted residence rights on humanitarian grounds. An example of this is the numerous people who fled Sierra Leone, in view of the widespread violence there, and obtained subsidiary protection in Portugal. This is because the system of subsidiary protection set out in Article 8 encompasses all foreign nationals and stateless persons who meet the following conditions:

1. They do not meet the criteria set out in Article 1, sub-section 1 or the criteria of the Geneva Convention, transposed in Article 1, sub-section 2.
2. If they are objectively or subjectively unable to return to their country of origin or habitual residence, in view of a serious threat to their safety owing to an armed conflict or the systematic violation of human rights.

The broad scope given by the wording of Article 8 and its interpretation and implementation in line with the Universal Declaration of Human Rights, the European Convention of Human Rights and the Geneva Convention, which is explicitly imposed by Article 63, affords protection to those who have not been recognised as having refugee status, but who in view of the principle of "non-refoulement", enshrined in Article 33 of the Geneva Convention or Article 3 of the European Convention for the Protection of Human Rights cannot be expelled from national territory and sent back to their country of origin.

The single asylum procedure does not encompass persons seeking other forms of humanitarian protection, including persons relying upon policy decisions on granting temporary protection.

In fact, the legal framework for temporary protection is excluded from the single procedure's scope, under the terms and effects of Articles 9 and 26 of the Asylum Act. According to Article 9, sub-section 1, "the Portuguese State can grant temporary

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protection, for a period not exceeding two years, to persons displaced from their country, as a result of serious armed conflict, which produces a flood of refugees." This provision allows ad-hoc temporary protection schemes to be set up, when there is a substantial flow of refugees from areas of serious armed conflict. The decision to create such a scheme and its criteria is taken on a discretionary basis by the Government Cabinet, under the terms and effects of sub-section 2 of Article 9 of the Asylum Act. Thus, the persons covered by this form of collective protection are not subject to the same procedure as those granted asylum and subsidiary protection under the auspices of the Asylum Act.

Other humanitarian protection cases not covered by subsidiary protection, such as cases of serious illness which prevents return to the country of origin or habitual residence come under the legal framework of Decree-Law no.244/98, dated 8 August, as amended by the Decree-Law no.4/2001, dated 10 January (Immigration Act)<sup>23</sup>. Therefore, in accordance with Article 87 of the Immigration Act, foreign nationals, in Portugal legally or illegally, and who are seriously ill, live matrimonially with another foreign national resident in Portugal, or with a Portuguese citizen, or are victims of people trafficking networks, and who cooperate with the Portuguese authorities, may apply for a residence permit. The BIS is responsible for dealing with the application, according to a purely administrative procedure.

The Asylum Act has a special procedure in Articles 28 – 32 for cases, in which the state responsible for an asylum request must be established. Hence, when there is a strong indication that it is another member state of the European Union which should process the application made in Portugal, the BIS must ask the authorities of the state in question to accept the application.

Should the State accept, the BIS has five days to issue its transfer decision, informing the UNHCR, the Portuguese Refugee Council (an NGO which provides assistance to refugees) and the applicant himself. An appeal with suspensive effect can be lodged

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<sup>23</sup> Diário da República, 1<sup>st</sup> Series, no. 8, p. 99.

against the decision, with the National Commissioner for Refugees (administrative review body), which will make a decision within 48 hours<sup>24</sup>.

Should the State not accept the application for analysis, it will be assessed pursuant to the single procedure<sup>25</sup>.

**3. How does the single procedure treat separately and safeguard the proper assessment of the different grounds for protection?**

All applications for asylum, which according to Article 10 is how a foreign national shall request the protection afforded by the Geneva Convention, invoking the condition of a refugee, that are deemed unfounded, shall be assessed ex officio for granting a residence permit on humanitarian grounds according to Article 8, without the need for a separate request. Thus, an applicant for asylum who does not meet the requirements for being awarded refugees status, but meets the criteria of Article 8, sub-section 1 of the Asylum Act, has a subjective right to residence rights on humanitarian grounds, under the auspices of the single procedure and therefore without the need to file a separate application.

The provisions of Article 26, along with Article 8, sub-section 1, establish that applications for asylum in Portugal be assessed as a priority and separately, during both the admissibility and granting stages, in the light of the premisses for recognising refugee status. Only when the competent authority considers that the application does not fall within the scope of Article 1, which is the first premiss for granting subsidiary protection, must it - and not may it - be analysed according to the second premiss of the system set out in Article 8 (objective or subjective inability to return to the country of origin for serious fear for safety, as a result of armed conflicts or gross violation of human rights)<sup>26</sup>.

This is also the position recently defended in the Supreme Administrative Court's case-law, according to which the concept of "humanitarian grounds" does not afford

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<sup>24</sup> Article 29.

<sup>25</sup> Article 29, sub-section 5.

<sup>26</sup> Thus, the reply of BIS and the Portuguese Refugee Council (PRC) to my questionnaire.

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the state any discretionary powers, but a binding power by implementing Article 8<sup>27</sup>. This means, that once the grounds set out in Article 8 have been established, the state is obliged to grant a humanitarian residence permit, which is a subjective right of persons in the above circumstances.

### **4. The possibility of restricting the application to subsidiary protection**

The scope of subsidiary protection is broad enough to cover all persons, who although they are not being persecuted individually, for reasons which justify refugee status, are affected by a lack of safety, as a result of a civil war or violent internal conflict, ethnic conflict, persecution by non-state agents and other situations in which public order is under serious threat.

Although all applications for asylum which have been turned down, are analysed ex-officio in terms of the criteria for subsidiary protection, the Law does not prevent a separate application for residence being made pursuant to Article 8. The procedural rules for the admissibility and assessment stages are applicable thereto.

There are no substantial differences in the processing of asylum and residence applications, which jeopardise the single procedure and justify a separate application for subsidiary protection, in order to skirt round more restrictive rules on the filing of an asylum application.

The protection afforded under Article 8, however, has the advantage of being based merely on the objective situation in the country of origin, without there being a need to prove personal persecution.

Although the criteria for subsidiary protection are not as stringent, in reality, there are very few applications for residence on humanitarian grounds. Most humanitarian residence permits are issued to persons who had applied for asylum under the single procedure. In fact, since the 1998 Asylum Act came into force, only 12 separate applications for subsidiary protection have been submitted, whilst the Portuguese state has issued 150 residence permits under the auspices of Article 8.

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<sup>27</sup> Supreme Administrative Court Rulings, dated 24 January 2001 (case 45.979) and 31 October 2000 (case 44.667).

## **5. The Single Procedure: procedural rules**

The 1998 Asylum Act defines two stages in the asylum procedure, which is applicable to subsidiary protection by dint of Article 26: a preliminary stage for assessing admissibility of the application, and if admissible, the stage for establishing refugee status or granting subsidiary protection.

The Asylum Act sets strict deadlines for compiling the dossier and deciding on the applications, so as to ensure a swift process, in addition to ensuring that the applicant has a right to appeal at any juncture.

The applicant is entitled to a prior hearing at all stages of the procedure, as well as judicial support (assigned counsel), an interpreter and legal counselling from the UNHCR and the Portuguese Refugee Council (PRC, a Portuguese NGO)<sup>28</sup>. These entities also take part in the decision-making stage, and can issue their opinion before the decision is taken.

### **5.1. The admissibility stage**

The Asylum Act contains a different preliminary admissibility system according to whether the application was filed in Portuguese territory or at the border.

The admissibility stage for applications filed at the border is subject to very strict deadlines, to speed up the process and mitigate the inconvenience of having to detain applicants.

In any case, BIS inspectors are responsible for quickly compiling a dossier, since it is the director of the BIS (which reports back to the Minister for Home Affairs) who is responsible for taking a well-founded decision on the admissibility of the application<sup>29</sup>. The aim of the stage is to quickly identify those applicants who manifestly do not require protection, and those whose application should be analysed.

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<sup>28</sup> Article 52.

<sup>29</sup> See Articles 14, 18, sub-section 3, and 35, sub-section 1.

### **5.1.1 Deadline and Form of Application**

Article 11, sub-section 1 sets a deadline for submitting an application for asylum in national territory, also applicable to a separate application for subsidiary protection by dint of Article 26. Thus, within 8 days of entering national territory, the request for protection must be submitted in oral or written form directly to the BIS or any police authority, which will send it to the BIS. If the foreign national is in Portugal legally, the 8 days shall be counted from when the facts, which serve as grounds for the application, become known<sup>30</sup>.

According to paragraph d) of sub-section 1 of Article 13, unjustified failure to meet this deadline shall render the application inadmissible. In other words, should there be sound justification for failure to meet the 8-day deadline, the application may still be deemed admissible and refugee status or subsidiary protection granted.

If we take this provision along with sub-section 1 of Article 11, then we can conclude that the deadline of 8 days is merely indicative and failure to meet it is not enough to annul the applicant's right to protection and assessment of his application. This only occurs when there are no grounds for late submission.

Submitting an application for protection under the Asylum Act in national territory does halt the procedures on illegal entry and sojourn of the applicant. The case will be filed should asylum or subsidiary protection be granted<sup>31</sup>. Foreign nationals who do not meet requirements for entering national territory may submit an application for asylum or humanitarian residence at the border post, and await the decision there.

### **5.1.2 Applicant's hearing and information**

The admissibility stage guarantees the applicant a hearing. Thus, a statement must be made immediately if the application is submitted directly to the BIS in national territory. If the application is made to the police authorities, they must send it to the BIS

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<sup>30</sup> Article 11, sub-section 2.

<sup>31</sup> Article 12.

immediately, which will summon the applicant to give a statement within 5 days. This will count as his hearing<sup>32</sup>.

The UNHCR, represented by the PRC, will be informed of any applications made at border posts immediately. They can issue an opinion and interview the applicant within 48 hours<sup>33</sup>. Pursuant to Article 18, sub-section 2 of the Asylum Act, all statements by the applicant count as a prior hearing.

In order to improve access to the asylum procedure, and its transparency, the Asylum Act ensures that applicants are informed of their rights and duties when they submit their applications<sup>34</sup>.

### **5.1.3 The Role of the UNHCR and the Portuguese Refugee Council**

Since 1998 the UNHCR is represented by the PRC. The UNHCR / PRC, who provide applicants with legal counselling, informed of all requests for protection<sup>35</sup>.

The Asylum Act foresees a greater role for these entities in the admissibility stage of applications submitted at border posts, in an attempt to improve the quality of decisions made in a very short space of time. Thus, the UNHCR / PRC is given the option of interviewing the applicant and issuing an opinion within 48 hours. This possibility is available to them when applications are submitted in national territory, although they can give applicants legal counselling under the terms of article 52 of the Asylum Act.

The UNHCR / PRC is always informed of any rejections<sup>36</sup>. They can issue an opinion within 48 hours, when the rejected application has been made at a border post<sup>37</sup>.

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<sup>32</sup> Articles 11, sub-section 3 and 4, and 18, sub-section 2.

<sup>33</sup> Article 18, sub-section 1.

<sup>34</sup> Articles 11, sub-section 5, and 18, sub-section 2.

<sup>35</sup> Articles 11, sub-section 4, 18, sub-section 1 and 52.

<sup>36</sup> Articles 14, sub-section 3, and 18, sub-section 4.

<sup>37</sup> Article 19, sub-section 2.

### 5.1.4 Competent authority and decision deadlines

The director of the BIS must make a well-founded decision on the admissibility or otherwise of an application<sup>38</sup>. There are different deadlines for the decision, according to whether the application was made at a border post or in national territory. It is a tight deadline in any case, so that unfounded applications can be quickly identified. The tight deadlines, however, can sometimes prevent a careful study of the application from being made, which is often vital for making a correct decision.

The director of the BIS must make his decision within 20 days on applications made in national territory. The period is calculated differently, according to whether the application was made directly to the BIS or the police. If it was submitted to the BIS directly, it is calculated from the day on which the applicant made his statement, that is to say, the day when it was submitted.

If the application is made to the police and then sent to the BIS, the decision deadline is calculated from the day on which the applicant made his statement, or after 5 days, which is the legal deadline for making it.

The director of the BIS must make a well-founded decision on applications made at border posts within 5 days, following the 48-hours period given to the UNHCR and PRC to give their opinions and interview the applicants.

The Asylum Act, therefore, sets deadlines, which are too tight for the BIS to make a full police investigation into asylum applications. The decision becomes a merely administrative one, with prejudice to applicants' rights to a careful analysis of their case.

If no decision is taken within the deadline, then the application is deemed tacitly accepted. The applicant is issued with a provisional residence permit until the process is completed<sup>39</sup>.

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<sup>38</sup> Articles 14, sub-section 1, and 18, sub-section 3.

<sup>39</sup> Article 21.

The fact that BIS officials analyse applications and the decision on their admissibility lies in the hands of the director of the BIS (an entity which reports back to the Minister of Home Affairs) is open to criticism. On the one hand, special training is only required of staff for handling applications filed at border posts<sup>40</sup>. On the other hand, applications are not analysed by an independent body, but by administrative body with a police role. Hence, those responsible for analysing the requests for protection are not necessarily completely impartial and objective. In conjunction with the tight deadlines for assessing admissibility of applications, the applicant's right to a fair procedure, which relies on a careful analysis of the application, could be infringed.

### 5.1.5 Grounds for inadmissibility

Article 13 of the Asylum Act provides a comprehensive list of situations in which an application shall be deemed inadmissible<sup>41</sup>:

- Manifest grounds for refusing the applicant asylum, in view of his acts against Portugal's interests or sovereignty, having committed a malicious crime, punishable by a prison sentence of over 3 years or being covered by the situations set out in Article 1 - F of the Geneva Convention (Article 13, sub-section 1, especially paragraph c) and article 3).
- The request is clearly unfounded, because it is obvious that it does not meet any of the criteria defined by the Geneva Convention, because the allegations that the applicant fears persecution in his or her country have no reason to be, or because it constitutes an abusive usage of the asylum process (Article 13, sub-section 1, paragraph a)). According to Article 13, sub-section 2, the application is considered to be fraudulent or is an abusive usage of the asylum process, when the applicant: a) bases upon and justifies his or her request with evidence emerging from false or forged documents, when questioned about them, declares that they are authentic, deliberately and in bad faith, renders false statement related to the object of the request or destroys docu-

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<sup>40</sup> Article 17, sub-section 2.

<sup>41</sup> Also applicable to subsidiary protection according to Article 26.

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ments that prove his or her identity"; b) deliberately omits the fact that he or she has already submitted an asylum petition in one or several countries, possibly using false identity."

- The applicant is a national or habitual resident of a safe country<sup>42</sup> or third host country<sup>43</sup>;
- The applicant submitted his application after the deadline, without due justification;
- The applicant had been the subject of an expulsion order from Portuguese territory (paragraph e));

Asylum or subsidiary protection can also be refused, if granting them would pose a serious threat or danger to internal or external security or public order<sup>44</sup>.

Although there is a comprehensive list of clauses for excluding the right to protection, some allow the authorities plenty of leeway for a discretionary assessment. One such example is the lack of grounds for missing the deadline for application, and another, acts against the country's basic interests, or the danger to security or public order. Any applicant for asylum who meets the criteria of Articles 1 or 8 has a subjective right to being awarded refugee status or granted humanitarian protection.

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<sup>42</sup> According to Article 13, sub-section 3, paragraph a), a safe country is a "country in relation to which can safely be determined that, in an objective and verifiable way, it does not give rise to any refugees or in relation to which can be determined that the circumstances that could previously justify the claim of the 1951 Geneva Convention have ceased to exist, taking namely into account the following elements: respect of human rights, existence and normal operation of democratic institutions, political stability".

<sup>43</sup> According to Article 13, sub-section 3, paragraph b), a third host country is a "country where it has been demonstrated that the asylum seeker is not subject to threats to his or her life or liberty, as defined by Article 33 of the Geneva Convention, or subject to torture or inhuman or degrading punishments, where he or she obtained protection or got the opportunity, at the frontier or within its territory, to make contact with local authorities to seek protection or where he or she has provenly been admitted and benefits from protection against refoulement, as defined by the Geneva Convention."

<sup>44</sup> Articles 3, sub-section 2, 13 and 26.

Thus, when Article 13 allows for refusals based on facts which do not personally relate to the applicant or on discretionary grounds - by using concepts which are so vague as to allow the authorities a good deal of leeway in their assessment - it could be considered incompatible with the principles of proportionality and prohibiting discretion, which underpin the limits on subjective rights in the rule of law<sup>45</sup>. In any case, an appeal can be lodged against refusal.

#### **5.1.6 Administrative and Judicial Remedies**

Should the application be turned down, the Asylum Act provides two levels of appeal: the first is an administrative appeal to the Office of the National Commissioner for Refugees (ONCR), and the second is judicial, to the local administrative court (appeals against its decision can be lodged, with the appeal Court, in general terms).

The ONCR is an entity created under the auspices of the Ministry of Home Affairs, and is responsible for drawing up well-founded proposals for granting or refusing asylum, issuing or renewing humanitarian residence rights and deciding on re-assessment requests. It comprises a national commissioner for refugees (a judge or public prosecutor), who chairs it, an assistant national commissioner (also a judge or public prosecutor) and someone with a degree in law and who is an expert on asylum law, who acts as advisor. The members of the ONCR are appointed by a joint despatch from the Ministries of Home Affairs and Justice<sup>46</sup>. According to Article 34, sub-section 1, the ONCR is the competent entity for drawing up well-founded proposals, which will serve as a basis for the Ministry of Home Affairs to grant asylum or subsidiary protection, as well as re-assessing applications deemed inadmissible, under the terms of Article 16, sub-section 1.

The Asylum Act establishes a different system of appeal for asylum applications which have been turned down by the Director of the BIS, according to whether they have been submitted in national territory or at a border post.

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<sup>45</sup> See Vital Moreira, *op. cit* ([www.cpr.pt](http://www.cpr.pt)).

<sup>46</sup> See Article 34.

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Therefore, when the director of the BIS makes a well-founded decision to turn down an application made in national territory, the applicant has five days after having been informed of the decision to ask for the application to be assessed by the national commissioner for refugees, who may interview the applicant should he deem it necessary. This has a suspensive effect<sup>47</sup>, meaning that it suspends the effects of refusal, that is to say, voluntarily leaving within 10 days or immediate expulsion<sup>48</sup>. The commissioner's final decision must be made within 48 hours, from when the re-assessment request was made or the interview of the applicant. An appeal can be lodged with the local administrative court against his decision, within 8 days, and in general terms without suspensive effect<sup>49</sup>.

Should the application have been made at a border post, the applicant may within 24 hours request re-assessment by the National Commissioner for Refugees, with suspensive effect. He in turn has 24 hours to give his final decision<sup>50</sup>. If the National Commissioner for Refugees does not turn the request within this time, it is deemed admissible and the applicant may enter and stay in national territory<sup>51</sup>. Should the National Commissioner for Refugees deem the application inadmissible in his final decision, the applicant must leave immediately, and has only 48 hours maximum stay, to allow him to get a lawyer to lodge a judicial appeal<sup>52</sup>.

Whilst there is an extremely swift process for assessing applications made at border posts, there is no system of legal protection which works quickly enough to prevent the applicant from being forcefully repatriated. Although theoretically he can use a lawyer to lodge a judicial appeal, in reality, since it does not have suspensive effect, his right to effective jurisdictional protection is denied, when it has been guaranteed by the Portuguese Constitution.

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<sup>47</sup> Article 16, sub-section 1.

<sup>48</sup> Article 15, sub-section 1.

<sup>49</sup> Article 16, sub-section 2.

<sup>50</sup> Article 19, sub-section 1.

<sup>51</sup> Article 20, sub-section 3.

<sup>52</sup> Article 20, sub-section 2 and 4.

From the above, we are led to conclude that the means of appeal offered to applicants, whose application has been deemed inadmissible, do not guarantee them effective legal protection.

This is because, firstly, although the appeal lodged with the National Commissioner for Refugees against the inadmissibility of an application made in Portuguese territory has suspensive effect, he is a government appointed figure. Although the government must appoint someone proposed by the Higher Council of Judges or the Higher Council of Prosecutors, in the case of a judge or public prosecutor, he does not act as a judge, but as an official of the Ministry of Home Affairs. Thereby, this does not guarantee the independence that an appeal body for asylum applications should have.

Secondly, the 48 hours that the National Commissioner for Refugees is given by Article 16, sub-section 2, for making his final decision on re-assessment cases, is not long enough for him to base it on careful analysis. Thus, the applicant's right to an objective and careful process is limited. This limitation takes on serious proportions, when one considers that the decision may be based on reasons such as those invoked in Article 1 - F of the Geneva Convention, which require in-depth knowledge of complex situations which cannot be obtained in such a short space of time. The same could be said of the 24 hours that the national commissioner for refugees is given to take his final decision on applications made at border posts. In fact, whilst this system does enable applicants with no right to protection to be quickly identified, preventing the asylum system from becoming overloaded, it does deny applicants for asylum the right to a fair procedure for determining refugee status. This would require careful and unbiased analysis and real possibility of appealing against decisions.

Lastly, the fact that judicial appeal against inadmissibility - a decision reached in just over a month for applications made in national territory and up to 8 days for applications made at border posts, was enshrined without suspensive effect, denies the applicant his right of effective jurisdictional protection against administrative acts, which could well interfere with his basic rights. Even the right to request a separate writ of prevention of the effects of the refusal of the application, in order to avoid

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expulsion, is incompatible with the effective protection in real time of the applicant's right to the protection of the Portuguese state, when he meets the criteria for asylum or humanitarian residence. In specific cases, this system could be incompatible with Article 33 of the Geneva Convention and Article 3 of the European Convention of Human Rights, which are in full force in the Portuguese legal framework, which override domestic law, and are directly applicable in the courts<sup>53</sup>.

### **5.2 The assessment stage of the admissible request: the procedure for granting asylum or subsidiary protection**

Once the request has been admitted, the dossier is compiled and then a final decision is taken on granting asylum or residence on humanitarian grounds

#### **5.2.1 Compiling the dossier: competent authority and deadline**

Should the application be admitted, either explicitly or tacitly, the BIS has 60 days, which can be extended for a further 60 days, in which to compile the dossier<sup>54</sup>.

Although the Asylum Act requires the applicant to give an account of the facts or circumstances on which his application is based and indicate all possible evidence<sup>55</sup>, the BIS is bound by article 22, sub-section 1 to do everything in its power to establish all the facts needed to make a swift and fair decision.

As for assessing the credibility of the facts presented by the applicant, there is a natural difference in the procedures for subsidiary protection and recognising refugee status. As for humanitarian residence, the applicant needs only to allege an objective impediment to his returning to his country of origin, as a result of a serious lack of safety there, due to an armed conflict or the gross violation of human rights. There-

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<sup>53</sup> Article 8 of the Portuguese Constitution. See Moura Ramos, Rui, *A Convenção Europeia dos Direitos do Homem – Sua posição face ao ordenamento jurídico português*, in *Boletim de Documentação e Direito Comparado (BDDC)* n.º 5, 1981, Lisboa, p. 97 and following.; Duarte, Maria Luisa, *O Conselho da Europa e a Protecção dos Direitos do Homem*, BDDC, n.º 39/40, 1989, p. 238 and following.

<sup>54</sup> Article 22, sub-sections 1 and 2.

<sup>55</sup> Article 11, sub-section 3.

fore, the authorities need only to establish the objective credibility of the alleged facts in relation to the situation in the country of origin. They can use well-known even if not alleged facts to do this.

### **5.2.2 The National Commission for Refugees' Draft Decision**

Once the dossier has been compiled, the BIS writes a report which it sends to the National Commission for Refugees<sup>56</sup>. It, in turn, has 10 days to present a draft decision on whether to grant asylum or refuse it and grant humanitarian residence<sup>57</sup>. Pursuant to Article 23, sub-sections 2 and 3, the applicant, the UNHCR / PRC shall be informed of this draft decision, and have 5 days in which to give their opinion. Should they do so, the National Commission for Refugees has 5 days in which to re-assess the application in light of the new elements, and provide the Ministry of Home Affairs with a well-founded decision<sup>58</sup>.

### **5.2.3 The final decision to grant asylum or subsidiary protection**

The Minister of Home Affairs is responsible for taking the final decision on granting asylum or humanitarian residence, on the basis of the National Commission for Refugees' proposal, and within 8 days of having received it<sup>59</sup>. It must be based on the same general terms as all administrative acts. The UNHCR / PRC must be informed of refusals<sup>60</sup>.

### **5.2.4 Judicial Remedies**

#### **a) Appeal against refusal of asylum or humanitarian residence**

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<sup>56</sup> Article 22, sub-section 4.

<sup>57</sup> Article 23, sub-section 1.

<sup>58</sup> See Articles 23, sub-section 4, and 34, sub-section 1.

<sup>59</sup> Articles 8, sub-section 3, 23, sub-section 4, and 33.

<sup>60</sup> See Article 24, sub-section 2.

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An appeal against the Home Affairs Ministry's refusal of asylum or subsidiary protection at the end of the single procedure can be lodged with the Supreme Administrative Court, within 20 days and with automatic suspensive effect<sup>61</sup>.

Should the Supreme Administrative Court confirm refusal, the applicant may remain in national territory for up to 30 days, after which he shall be subject to the Immigration (Aliens) Act<sup>62</sup>. This means that he shall be subject to an administrative expulsion under the terms and effects of article 119 and following or may use legal mechanisms foreseen in this law; in particular, application for a residence permit, under the auspices of article 87 or an extraordinary residence permit on the basis of special interest to the country, pursuant to Article 88 of the Immigration (Aliens) Act.

### **b) Appeal against the refusal of asylum and granting of subsidiary protection**

An appeal with suspensive effect can be lodged with the Supreme Administrative Court against the Home Affairs Ministry's decision to award subsidiary protection for humanitarian reasons under the auspices of the single procedure, and refuse asylum, because the applicant has been denied refugee status. In fact, the Asylum Act does not limit the applicant for asylum's right of appeal at all, when the authorities only award subsidiary protection. On the one hand, the fact that the decision enables the applicant for asylum to remain in national territory does not correct the possible damage of such a decision, which denies the applicant the right to asylum. It should be pointed out that the right to asylum is a basic right guaranteed by the Portuguese constitution, and is not be confused with the right to subsidiary protection, which is merely legally enshrined. Their legal nature and status are different. Any other conclusion would contravene Article 268 of the Portuguese Constitution which guarantees effective jurisdictional protection to all citizens who have been affected by an administrative act, by means of a contentious appeal against any decision which restricts the basic right to asylum.

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<sup>61</sup> Article 24, sub-section 1.

<sup>62</sup> Article 25.

### **5.3 How do administrative courts deal with the issue of different legal grounds on which different kinds of protection may be granted?**

Following the 1998 Asylum Act's entry into force, the case-law of the Supreme Administrative Court revealed a certain lack of understanding of the single procedure and interpretation of Article 8, sub-section 1 in conjunction with Article 26. Thus, initially, the case-law based on the previous legislation continued, whereby asylum and subsidiary protection applications were separate. In the first case, the authorities were bound to act in this way and in the second, they used discretionary powers, in which the jurisdictional control was limited to incorrect use of power or mistakes in the facts, but does not cover contravening the law<sup>63</sup>.

This case-law was based on the 1993 Asylum Act and showed the judges' lack of training and understanding of the consequences of the single procedure having been brought in. Fortunately, this has been redressed by a series of recent rulings by the Supreme Administrative Court, which have been more in line with the letter and spirit of the 1998 law. They have started to look at the legal basis of refusals not just in terms of granting refugee status but also subsidiary protection.

Hence, according to the Supreme Administrative Court's ruling of 15 February 2000 (case 45.142), the authorities must compile the dossier on the asylum request and subsidiary protection request, pursuant to Article 8 of the Asylum Act. Pursuant to the Court's ruling of 9 November 2000 (case 45.754), the authorities' power to decide in subsidiary protection cases, under the auspices of Article 8, is not discretionary, but compulsory. They are bound to grant it, should the legal requirements have been met, or refusal may be overturned as a contravention of the law. This case-law was confirmed by the Court's ruling of 24 January 2001 (case 45.979).

### **5.4 Applicant's status during the single asylum procedure**

In the single procedure, the application for asylum is taken as an application for protection, which could fall within the scope of subsidiary protection, should there not

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<sup>63</sup> Supreme Administrative Rulings, dated 11 March 1999 (case 43.771) and 7 October 1999 (case 44.331)

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be grounds for granting asylum. Thus when the case is being analysed and the dossier compiled, the legal provisions concerning the applicant's status are applicable until the final decision is made. This is because, regardless of the nature of the final decision on an application by a foreign national or stateless person for asylum (refusal of protection, granting of asylum or subsidiary protection), he is an applicant until such a decision is made. Even when someone makes a separate application for subsidiary protection on humanitarian grounds, one can defend applying the same rules to him as those which define the status of asylum applicants.

According to article 49 of the Asylum Act, the Portuguese State must ensure that all asylum applicants, from the moment they submit their application to the final decision, can maintain their human dignity. Thus, the Asylum Act guarantees applicants the following rights:

- The right to state social aid, when they are in economic and social need (Article 50);
- The right to be informed by the BIS of their rights and obligations, as well as the procedural steps (Article 51);
- the right to an interpreter to help them formulate their application and during the procedure (Article 52, sub-section 1);
- the right to legal support (Article 52, sub-section 3);
- the right to medical care and medicines (Article 53);
- housing and food support, when in economic difficulties (Article 54);

Once the application has been admitted and the applicant issued with a provisional residence permit, Article 55 of the Asylum Act provides him with access to the labour market. Should the asylum applicant take up gainful employment, the state should suspend its social aid.

### **5.5 How are the special needs of minors, traumatised persons and victims of torture and/or sexual violence taken into account in a single procedure?**

The Asylum Act has a few special provisions for particularly vulnerable applicants. Only the needs of minors are taken into account in a single procedure. Thus, Article

56 provides legal representation for (unaccompanied) minors seeking asylum by a non-government organisation (in practice, the PRC) or a public entity, without prejudice to writs of prevention.

The other special provisions concern social support. Pursuant to Article 57 asylum applicants of school age, whose application has been admitted, and which therefore hold a provisional residence permit, have access to state schooling on an equal footing with Portuguese citizens.

Applicants who have been victims of torture, rape or other physical or sexual abuse, have the right, in accordance with Article 58, to special (psychological, medical etc.) attention and counselling, through the social security services or the entities with which they have support protocols.

#### **5.6 Required skill of decision makers in a single procedure**

The skills of people taking decisions are very varied, and change according to the stage of the process.

As far as special training is concerned for people who receive and analyse asylum applications, the Asylum Act contains only two provisions: Article 17, sub-section 2, which sets out special training for people receiving applications at border posts; and Article 34, sub-section 2 which sets out the composition of the National Commission for Refugees. This provision sets out that the National Commissioner for Refugees, who is responsible for re-assessing administrative rejections of admissibility and for drafting the ministerial decision on granting asylum and subsidiary protection, and the assistant commissioner must merely be judges or public prosecutors with at least ten years' experience and good assessments. They are not required to have any specific training in asylum law; the advisor must have a law degree and have a good grounding or experience in asylum law.

Judges in the appellate administrative courts do not have any specific asylum training.

Since 1995, the PRC has been giving specific training to lawyers.

Specific training was given to BIS officials, particularly those working at border

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posts, when the single procedure came into force<sup>64</sup>. It should be pointed out that assistant inspectors (secondary school completed) and inspectors (degree in law or international relations) belonging to the BIS' Office for Asylum and Refugees with specific training in the area, including interviewing techniques and behavioural analysis, analyse and process asylum applications.

Some feel that the major shortcomings in training of those involved in the decision process are not so much of a legal as a social and information nature<sup>65</sup>. Lack of access to information about the situation in other countries could be given as a reason for the low number of refugees recognised in Portugal<sup>66</sup>. Although their number rose between 1997 and 1999 (from 4 to 16), in relative terms, it is still very low (only 6% of applications were approved). In addition, poor training could lead to their being a higher number of humanitarian residence permits being granted, since this is done on an objective basis, which is easier to verify.

### **5.7 Consequences of the single procedure for distinguishing between Geneva Convention Status and Subsidiary Protection Status**

The single procedure has not necessarily blurred the distinction between refugee and subsidiary protection status<sup>67</sup>, for several reasons:

Firstly, legislative developments have only harmonised procedural rules and not statuses. That is, the differences between the legal status of a refugee and that of someone who has humanitarian residence remain unchanged. The former enjoys stability and a series of rights, concerning the duration of the status, which the latter does not.

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<sup>64</sup> Information given by BIS-Office for Asylum and Refugees.

<sup>65</sup> Thus, Adelino Gomes, Judge of the Supreme Administrative Court in a interview given on 6<sup>th</sup> February 2002.

<sup>66</sup> Thus, the reply of PRC to my questionnaire on 3th April 2002.

<sup>67</sup> Thus, the opinion of the BIS (Dra Cláudia Rocha), National Commissioner for Refugees (Dra. Ana Romba) and Supreme Administrative Court (Judge Adelino Gomes).

Secondly, the legal nature of the right to asylum has not been altered by the single procedure. It is a basic right, guaranteed constitutionally. It has the advantage of considering subsidiary protection to be a legally protected subjective right and not a state faculty.

Lastly, pursuant to Article 8, subsidiary protection is only granted when an asylum application does not meet the requirements for granting refugee status. The wording of Article 8, sub-section 1 points to the priority, which, those responsible for analysing cases and taking decisions on protection, must give to the right to asylum and refugee status, as defined by the Geneva Convention. Humanitarian residence is thereby merely a complementary and subsidiary form of protection. In other words, there is a clear hierarchy in the process, which sets out that an application for asylum must first be considered in view of the criteria for granting refugee status, and subsequently, should it not meet them, it can in addition be considered in view of the criteria for subsidiary protection.

For the PRC (Portuguese Refugee Council) the Geneva Convention has been undervalued, in practice, due to its restrictive application; the lack of compliance with the principle of the benefit of the doubt related to the proof; and also the lack of information about the social, politic and economic situation of the officials that analyse the asylum applications<sup>68</sup>.

Even though the authorities tend to grant humanitarian residence to the detriment of granting refugee status, an asylum applicant who has been granted the former, but not the latter, can always appeal against the decision, since the right to asylum is a constitutionally guaranteed basic right and is always legally protected. Provided there are effective jurisdictional guarantees for the refugee who has been granted subsidiary protection to have the corresponding status recognised, as is his right, there is little danger that the Geneva Convention and the constitutionally guaranteed right to obtain asylum in Portugal will lose their effect.

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<sup>68</sup> Reply to my questionnaire on 3th April 2002.

### **III A Single asylum procedure; awarding two statuses**

Although the single procedure has created just one status for applicants until the final decision is taken, refugee and beneficiary of subsidiary protection status are still separate.

Under the terms of Article 2, anyone granted asylum also obtains refugee status. According to article 6, refugees enjoy the same rights as immigrants with residence in Portugal and have the same obligations (they must accept the law and measures for maintaining public order), provided this does not contravene the Asylum Act and the Geneva Convention. They are also entitled to an identity document, proving their status, as per the Geneva Convention. In addition, refugees are fully protected from extradition, when the request is based on the facts which were the basis for granting asylum<sup>69</sup>.

Holders of humanitarian residence permits granted under the single procedure do not have refugee status, but are legal immigrants, with the same status as immigrants who hold residence permits granted under the Immigration (Aliens) Act.

There are substantial differences in these statuses, as far as duration, family reunification, protection against expulsion are concerned, and similarities, especially regarding economic and social rights.

#### **1. The differences between the refugee status of someone granted asylum and the status of someone granted subsidiary protection**

##### **1.1 The precarious status of someone benefiting from subsidiary protection compared to refugee status**

Whilst the duration of the refugee status is theoretically indefinite and can only be withdrawn in the specific circumstances set out in Article 36 of the Asylum Act, those benefiting from humanitarian residence can only enjoy the status for a maximum of 5 years, which is renewable<sup>70</sup>.

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<sup>69</sup> Article 5, sub-section 1.

<sup>70</sup> Article 8, sub-section 2.

In addition, humanitarian residence can only be renewed following an analysis of the situation in the country of origin by the competent authorities, that is to say, the Ministry of Home Affairs, on the basis of a sound opinion from the National Commissioner for Refugees<sup>71</sup>. The loss of refugee status because the grounds on which it was granted no longer exist can only be determined judicially, and then the refugee can apply for a residence permit<sup>72</sup>.

## **1.2 The right to family reunification**

Both the holder of a humanitarian residence permit and a refugee are entitled to family reunification. There are, however, different legal premises and scopes for this exercise.

Regarding the scope, the beneficiary of subsidiary protection, as the holder of a residence permit, enjoys a broader right to family reunification, defined in the Immigration (Aliens) Act, than that afforded refugees by the Asylum Act. According to Article 56, sub-section 1 and 2 of the Immigration Act, foreign residents are entitled to be reunified with family members outside national territory, or who are in Portugal. The Immigration Act provides a broad concept of family for this purpose, encompassing the spouse, dependent children under the age of 21, and disabled children, of the couple or spouse, of any age, children adopted by judicial decision, recognised in Portugal; dependent parents of the holder of the residence permit and spouse; younger brothers and sisters under the guardianship of the resident<sup>73</sup>. These family members will be given a residence permit with full rights, identical to the applicant's. Article 87 of the Immigration Act, as per the amendments of Decree-Law 4/2001, foresees granting a residence permit to foreign citizens who live matrimonially with another foreign national, resident in Portugal.

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<sup>71</sup> Articles 8, sub-section 3, and 34, sub-section 1.

<sup>72</sup> Article 37, sub-section 3 of the Asylum Act and Article 87, sub-section 1, paragraph c) of the Immigration (Aliens) Act.

<sup>73</sup> Article 57 of the Immigration (Aliens) Act.

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Pursuant to Article 4, sub-section 1 of the Asylum Act, the concept of family for the purposes of family reunification is more limited, and covers only the family nucleus. According to this provision, refugee status is extended to the spouse, children under 18, adopted and disabled children. The right to family reunification with parents or younger dependent siblings is only recognised to refugees under 18, in accordance with article 4, sub-section 2.

Alternatively, the Home Affairs Ministry can grant these family members an extraordinary residence permit, dispensing with the Immigration Act's requirements for recognising the residence permit holder's right to family reunification (proof of suitable accommodation and means of subsistence for the family's needs).

Whilst the broader definition of family in the Immigration Act for the purposes of family reunification provides more favourable personal scope, the same cannot be said of the premises for the exercise. According to Article 56, sub-section 4 of the Immigration Act, two criteria must be proved before family reunification can take place: suitable accommodation and enough resources to meet the family's needs. This proof is not required of refugees for the purposes of family reunification.

Family reunification with the refugee's or spouse's dependent children aged under 21 or parents is legally possible, but in the same terms as for a holder of a residence permit, in other words, by proof of suitable accommodation and means of subsistence.

In fact, according to Article 6, sub-section 1 of the Asylum Act, refugees enjoy the same rights as foreign residents in Portugal, provided this does not contradict the Asylum Act. Granting a residence permit to children under 21, dependent parents or dependent younger siblings under the terms of Articles 56 and 57 of the Immigration Act does not contradict Article 4 of the Asylum Act, but provides residents, and by dint of Article 6, sub-section 1, refugees, with a more favourable scope for family reunification. Article 4 aims to extend refugee status to the members of the family unit, so it would go against the intentions of this article to apply the provisions of the Immigration Act on family reunification, so as to extend the granting of refugee status to family members not covered by article 4. This does not mean that such family members cannot be granted a residence permit, since they fall within the scope of

the Immigration Act for this purpose. This is because refugees are residents for all effects. They therefore benefit from all the rights granted to foreign residents by the Aliens Act, including granting residence permits to children under the age of 21 and dependent parents.

In the same way, a residence permit must be granted to a foreign national who lives matrimonially with a refugee, under the terms of Article 87 of the Immigration Act.

### **1.3 The end of the status when the grounds it was granted on are no longer valid**

According to article 39, sub-section 2, only the Appeal Court can decide to end refugee status when the grounds it was granted on are no longer valid. The foreign national in question then becomes entitled to a residence permit<sup>74</sup>. The situation of a beneficiary of subsidiary protection is different. In fact, non-renewal of the residence permit on humanitarian grounds because the grounds it was granted on are no longer valid is determined administratively by the Minister of Home Affairs, and places him in an illegal situation and therefore can be expelled from the country.

The Immigration Act, however, as amended by Decree-Law 4/2001, foresees a plethora of ways to legalise the situation. Thus, provided he has had resident status in Portugal for two consecutive years, he can apply for a residence permit under the auspices of Article 87, sub-section 1, paragraph j) of the Aliens Act. He/she has the same rights if they live matrimonially with a Portuguese or foreign national holding a residence permit, according to article 87, sub-section 1, paragraph i) of the Aliens Act.

Should he not be covered by any of the situations which the Immigration Act foresees for legalising his stay, the end of subsidiary protection status means that the foreign national will be detained by the BIS and face administrative expulsion, under the terms of Articles 99, sub-section 1, paragraph a) and 119, sub-section 1 of the Immigration Act. Nevertheless, in order to avoid detention and expulsion, which

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<sup>74</sup> Article 37, sub-section 3 of the Asylum Act and Article 87, sub-section 1, paragraph c) of the Immigration Act.

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results in a minimum five year ban from entering Portuguese territory<sup>75</sup>, the BIS may ask the foreign national to leave the country of his own accord<sup>76</sup>.

Both article 38 of the Asylum Act and Article 105 of the Immigration Act do not allow foreign nationals to be expelled to a country where the foreign national who lost the right to asylum or subsidiary protection might be persecuted for the reasons on which the law based the granting of asylum.

These are not the only legal provisions protecting foreign national from expulsion. Articles 3 and 8 of the European Convention which are directly applicable in Portuguese law and above domestic law are particularly important for protecting foreign nationals from expulsion. Therefore, in accordance with the case-law of the European Court of Human Rights, article 3 of the convention obliges the Portuguese state without derogation to not expel a foreign national, when such expulsion could lead to his being tortured or subjected to degrading or inhuman treatment. Also, Article 8 of the convention may be used to prevent expulsion should it interfere unjustifiably in his right to a private and family life.

Although these provisions prevent expulsion, they do not mean that a legal stay permit is awarded. This means that in extreme cases, and despite the legal flexibility afforded by the Immigration Act, permanent illegal stays of foreign nationals may be "tolerated". They would thus find themselves in legal limbo, which goes against the values of human dignity.

### **2. Similarities between refugee and immigrant status concerning economic and social rights: constitutional principle of equality between Portuguese and foreign nationals**

Portuguese and foreign nationals have the same constitutional rights and duties. This general principle of Portuguese law which has a long tradition<sup>77</sup>, is currently enshrined in Article 15, sub-section 1 of the 1976 Constitution of the Portuguese Re-

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<sup>75</sup> Article 106 of the Immigration Act.

<sup>76</sup> Article 100 of the Immigration Act.

<sup>77</sup> See Jorge Miranda, *Manual de Direito Constitucional*, Tomo III, p. 132 and following.

public (CPR), which states that "foreign nationals and stateless persons in or residing in Portugal enjoy the same rights and duties as Portuguese citizens." According to Article 15, sub-section 4 of the CPR, the law may entitle foreign residents to vote and be elected to local councils, when reciprocal rights are granted.

As for permanent residents in Portugal from another Portuguese-speaking country, the constitutional principle of equality is taken further. In fact, under the terms of Article 15, sub-section 3 of the CRP, introduced by the constitutional review of 2001, these foreign citizens have the same rights as Portuguese citizens, when reciprocal, except for holding the following positions: President of the Republic; Speaker of the National Assembly; Prime Minister; President of the Supreme Courts, as well as serving in the armed forces or diplomatic service.

There is also specific reference in article 59 of the CPR to extending basic labour principles to all workers regardless of their citizenship and country of origin, refugee status or as holder of a residence permit.

Under the terms of Article 15, sub-section 2 of the CPR, political rights, holding non-technical public office and the rights and duties which the Constitution or Law reserve exclusively for Portuguese citizens (such as serving in the armed forces or as a diplomat) are exceptions to the principle of equality. Such exclusions can only be determined by law and are unconstitutional if made by the authorities. Legislative exclusion cannot be so broad as to nullify the principle of equality<sup>78</sup>.

In short, except for the exceptional cases foreseen in the Constitution and Law, foreign nationals in Portugal enjoy the same rights as the Portuguese. Thus, both a refugee and the beneficiary of subsidiary protection have a right to access to the labour market, education; health; housing, and social security, in the same terms as the legal framework provides Portuguese citizens with these rights.

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<sup>78</sup> See Jorge Miranda, *Manual de Direito Constitucional*, Tomo III, p. 136.

## **IV An analysis of the practical application of the single procedure**

### **1. Actual use of a single procedure in the asylum system in Portugal**

All asylum applications submitted in Portugal from 25 May 1998 onwards, the date when the 1998 Asylum Act came into force, are assessed in the light of the criteria for granting subsidiary protection, when the specific situation does not fall within the scope for awarding the applicant refugee status.

Prior to the 1998 Asylum Act, different procedures had been used to deal with asylum and subsidiary protection applications. Asylum applications, therefore, had only been analysed in view of the criteria for granting refugee status. When applications for asylum were turned down, applicants from very unsafe countries, where there was an armed conflict or gross violation of human rights could apply to the Home Affairs Minister for a special residence permit on humanitarian grounds, under the auspices of a separate process foreseen in the Immigration Act, without procedural guarantees and with a discretionary decision.

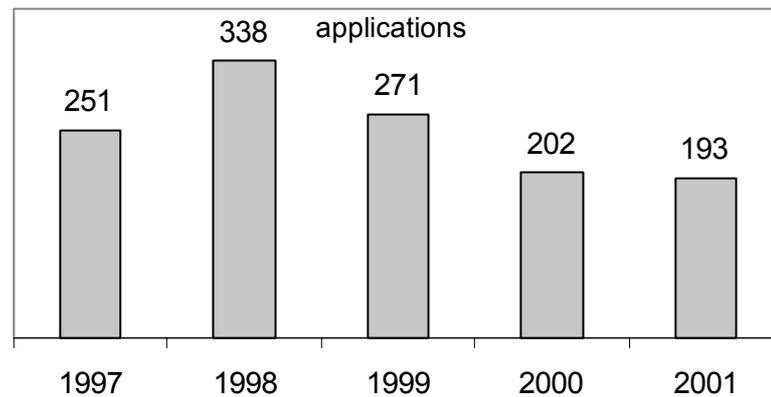
### **2. Effects of the single procedure on the length of time for processing an applications for protection**

Although there are no figures on how long it takes to process an asylum application, the law imposes tight deadlines for compiling the dossier and taking a decision. This means that protection can be afforded more rapidly to foreign nationals who fall within the scope of the right to asylum or subsidiary protection. Thus, an application that is approved (asylum or humanitarian residence granted) is dealt with in 4 months on average.

Pursuant to the 1993 Asylum Act, the asylum process was also subject to strict deadlines. When asylum was not granted, however, the applicant had to submit a separate application for subsidiary protection to the Ministry of Home Affairs, under the terms of the Immigration Act. There was no deadline foreseen for taking this decision, there were no procedural guarantees ensuring a fair and swift process. The opposite was true, as the authorities had discretionary power and could take months or even years to assess the process, without there being a case to take to court.

### 3. Links between the single procedure and the number of applications filed

In Portugal, there are relatively few applications for asylum. The single procedure has not led to a significant increase in their number. Although there have been very few separate applications for subsidiary protection, the figures given here refer to asylum applications, which are then examined in view of subsidiary protection criteria.



**Source: BIS (SEF)**

Thus, 251 applications were submitted in 1997, rising to 338 in 1998, when the single procedure was introduced and when there were a large number of applicant from Sierra Leone.

From 1999 to 2001, a period in which the 1998 Asylum Act was in full force, the number of applications fell steadily. 271 applications were submitted in 1999, 3 of which were for subsidiary protection. In 2000, 202 people sought protection, 4 of whom submitted a separate application for subsidiary protection. In 2001, 193 asylum applications were made with no separate applications for subsidiary protection.

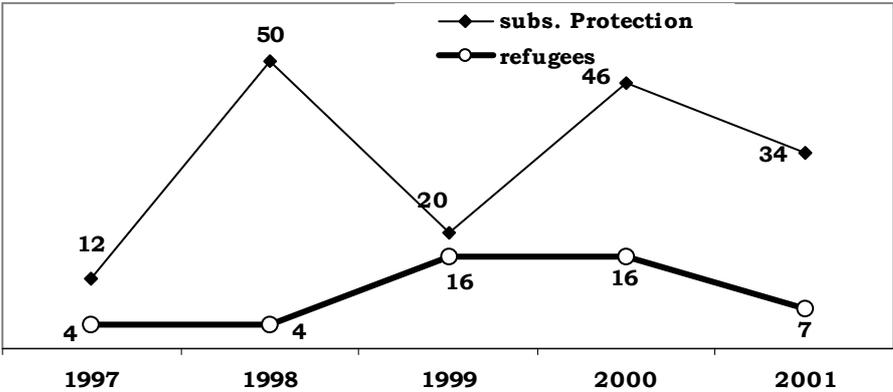
In view of these figures, it appears that the single procedure, with its improvements in procedural guarantees for subsidiary protection beneficiaries, did not lead to an increase in the number of applicants.

The number of applicants in Portugal is much lower than in other European Union member-states. There are cultural, social and family reasons for this, but above all, it

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is the fact that asylum applicants do not receive the same level of social benefits (housing, means of subsistence, etc.) as they do in other European countries. In addition, the introduction of Decree-Law 4/2001, which made it easier for immigrant workers to legalise their stay in Portugal, by granting a stay permit to all foreign workers with a contract of employment and with no criminal record, contributed to the drop in asylum applications in 2001.

**4. Links between the single procedure and the number of recognised refugees**



**status and the number of beneficiaries of subsidiary protection**

Source: BIS (SEF)

If we compare the number of refugees recognised and humanitarian residence permits issued, then it appears that the latter is preferred to the former. There could be political reasons for this, whereby the authorities prefer to award a more precarious status for a limited period of time so they have more power over renewal, when they re-assess the grounds on which the status was granted.

The huge rise in the number of subsidiary protections awarded in 1998 was caused by the single procedure and the fact that it enabled a swift analysis of many applications for asylum from citizens of Sierra Leone, in the light of criteria for subsidiary protection. 42 out of the 50 humanitarian residence permits awarded that year went to nationals of Sierra Leone. In 1999, 84 people from Sierra Leone sought asylum in Portugal, they were refused refugee status and only 15 were given humanitarian pro-

tection. This sudden restriction on granting protection to citizens of Sierra Leone, led to a drop in the number of applications to 49 in 2000<sup>79</sup>.

Only a very small proportion of applicants are granted asylum in Portugal. This may be caused by officials who are in charge of analysing applications not having been trained properly, as well as a lack of legal support for applicants. Nevertheless, recognition of refugee status has climbed steadily (from 1% in 1998 to 8% in 2000). The same can be said of humanitarian residence (in 1998, 15% of asylum applicants were awarded subsidiary protection, rising to 23% in 2000).

Overall, taking refugee status and humanitarian protection together, there was a sharp rise of protection from 1998 onwards, with the trend only having been inverted in 2001. This drop coincides with the entry into force of the new Immigration Act in Portugal which made things easier for people working illegally in Portugal or in a humanitarian situation (for example, the seriously ill) to be issued with a residence permit by the BIS.

##### **5. General perception on the consequences of the procedural framework for the quality, speed of decision-making and efficiency of the asylum system as a whole**

In Portugal, there are no known studies on the single procedure and its contribution to the efficiency of the Portuguese asylum system and the quality of decision in individual cases. According to PRC the quality of the decisions in individual cases does not respect the standards required by UNHCR, International Amnesty or Human Rights Watch<sup>80</sup>. Nor are there empirical surveys based on applicants' experience. In addition, the public is largely unaware of the system as a result of the small number of applications, and there is no political or public debate on its efficiency.

Certain conclusions, however, can be drawn from the interviews conducted with the BIS official responsible for processing and analysing applications; the assistant commissioner for refugees (Dra Ana Romba); the PRC, and the Supreme Adminis-

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<sup>79</sup> Source: BIS (SEF).

<sup>80</sup> Reply to my questionnaire on 3th April 2002.

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trative Court judge with most experience in the field of asylum (Dr. Adelino Lopes), for the purposes of this study:

1. Overall, the single procedure is welcomed, as along with the small number of applications, it has contributed towards an efficient asylum system. It is generally thought that it has improved protection for those, who although not refugees as per the Geneva Convention, require international protection, by speeding up and making the process fairer.
2. The single procedure means that asylum applications, whose request is ultimately turned down by the appellate court, do not have to embark upon a new process leading to recognition of subsidiary protection, with obvious gains in time and the rational use of human resources and materials.
3. The single procedure is linked to granting a subjective right to subsidiary protection, which is no longer subject to the authorities' discretion. This measure means that requests are analysed in view of different forms of protection. The authorities must grant subsidiary protection, even if it has not been applied for, which makes for more efficient protection. This also improves the quality of decisions, although there are some shortcomings, not so much in the training of those in charge of analysing applications, but in their access to information.

There are shortcomings in the single procedure, particularly in the admissibility stage, which have adverse effects on the quality of decisions - deadlines which are too tight for careful analysis; grounds for inadmissibility, which would need far more time to be checked up on than the deadlines allow; lack of effective legal protection owing to appeals not automatically having suspensive effect - but despite them, the single procedure has made the process quicker and fairer.

On the one hand, dealing with humanitarian protection cases in the single procedure substantially improves beneficiaries' procedural position, since protection does not depend on the authorities' discretion, which would be hard to argue against in Court.

On the other hand, the single procedure allows a greater number of people seeking refuge in Portugal to be protected, since it avoids the need for a separate application for a residence permit to be submitted, should the asylum application be rejected.

The same entities now analyse all requests in the light of subsidiary protection criteria, with obvious gains for human resources management and materials used in processing applications for protection. Thus, whilst in 1997, Portugal only provided protection (asylum or subsidiary protection) to 6% of applicants, the figure rose to 13% in 1999 and 31% in 2000.

Lisbon, April 2002