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European Council
on Refugees and Exiles

COMMENTS FROM THE EUROPEAN COUNCIL ON REFUGEES AND EXILES

on the

Amended Commission Proposal to recast the Reception Conditions Directive (COM(2011) 320 final)

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Introduction

Adequate reception conditions for asylum seekers during the examination of their application for international protection are an essential part of any asylum system. They are crucial to ensure that applicants are prepared for both possible outcomes of the asylum procedure, integration into the host society upon recognition or sustainable, dignified return after a full examination of their claim concludes that they are not in need of international protection. At the same time adequate reception conditions are prerequisite for a fair and efficient asylum procedure. States insist on asylum seekers' obligations to cooperate with the asylum authorities during the asylum procedure in order to establish all elements of the claim as soon as possible. However, this is obviously best achieved when asylum seekers have access to adequate social and economic rights. Lack of reception conditions during the asylum procedure may reduce their mental and physical ability to deal with asylum interviews and respond timely to requests for information on their application to the asylum authority. It may also demoralise asylum seekers at an early stage in the process and create a general feeling of despair and marginalization. This may make it even harder for asylum seekers to accept a negative decision and to engage constructively in the return process. For those who are eventually granted status, lack of reception conditions during the asylum procedure may simply delay their integration into the host society or make such integration more complicated as it may have a devastating effect on the person's physical and mental health. The reality in the EU today is that asylum procedures are often lengthy and complex and that the level of reception conditions is problematic in a considerable number of EU Member States.[1]

The transposition of the Directive 2003/9/EC[2] has not created the desired level playing field in this area and a number of studies have revealed various protection gaps in the Member States with regards to reception conditions.[3] Also, the Commission's evaluation report identified a number of problematic areas with regard to reception conditions across the EU including access to the labour market, access to healthcare and housing, the level of material reception conditions, medical assistance and specialised counselling for vulnerable asylum seekers and detention. The 2008 Commission proposal recasting the Reception Conditions Directive (RCD)[4] aimed at addressing those gaps while reducing Member States' discretion with regard to the implementation of the minimum standards laid down in the directive. The latter was widely acknowledged to be one of the main reasons why the level of reception standards across the EU is generally low.[5] ECRE had generally welcomed the proposal as a step in the right direction that considerably increased the standards for asylum seekers, while at the same time making a number of recommendations to further improve the text.

Discussions in the Council on the 2008 Commission recast RCD proposal under the Czech and Swedish Presidencies proved to be difficult and did not result in the adoption of a position that could have served as a basis to enter into negotiations with the European Parliament. However, the European Parliament adopted its position in first reading in May 2009[6] which generally endorsed the Commission's proposal, although it also adopted a number of

[1] SEC(2008) 2944, *Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers. Impact Assessment* (hereinafter 'Impact Assessment Reception Conditions Directive recast Proposal'), p. 15.

[2] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereinafter Reception Conditions Directive), *OJ* 2003 L 31/18.

[3] See *inter alia* Odysseus, *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States* (hereinafter 'Comparative Overview of Implementation of Directive 2003/9/EC'), October 2006.

[4] COM(2008)815 final, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)*(hereinafter '2008 Commission recast RCD proposal'), Brussels, 3 December 2008.

[5] Commission, *Impact Assessment Reception Conditions Directive recast Proposal*, p. 7.

[6] European Parliament, *European Parliament legislative resolution of 7 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast)* (COM(2008)0815 – C6-0477/2008 – 2008/0244(COD) (hereinafter 'Legislative resolution of 7 May 2009 on the Commission Proposal recasting the Reception Conditions Directive'). In total 31 amendments were adopted, the vast majority of which only concerned minor changes to the Commission's proposal.

amendments that weakened the standards suggested by the Commission, such as with regard to the definition of family members or the level of material reception conditions.

As it is the case with its amended Commission proposal recasting the Asylum Procedures Directive,[7] the amended Commission proposal recasting the Reception Conditions Directive tries to "boost up the work" towards achieving a true Common European Asylum System (CEAS) by introducing two types of amendments. Firstly, the amended recast proposal claims to use clearer concepts and more simplified rules and provides more flexibility for Member States to integrate these rules into their national legal systems. Secondly, it should better enable "Member States to address possible abuses of the reception system and it attends to their concerns on the financial and administrative implications of some of the proposed measures" while maintaining "high standards of treatment in line with fundamental rights".[8]

In line with Article 78 of the Treaty on the Functioning of the European Union (TFEU), the amended Commission recast RCD proposal no longer establishes "minimum standards" but simply "standards". However, as the proposal maintains Article 4 it continues to allow Member States to introduce or retain more favourable provisions in the field of reception conditions for asylum seekers as long as they are compatible with the provisions of the Directive. Hence, although a new legal basis is used for the amended Commission recast RCD proposal compared to that of 2008, this does not seem to have any significant consequences as to the nature of the standards laid down in the amended Commission recast proposal. Nevertheless, guidance also needs to be taken from the Stockholm Programme which requires an "equivalent level of treatment as regards reception conditions" regardless of the Member State in which the asylum application is made.[9] Although this seems to leave more scope for flexibility at the national level compared to the requirement of common standards in the field of asylum procedures for example, it is at the same time clear that this flexibility can never be such as to undermine the objective of harmonisation.

Summary of views

The amended Commission recast RCD proposal generally reduces the safeguards for asylum seekers with regard to adequate reception conditions in a number of key provisions compared to the 2008 Commission recast RCD proposal, while at the same time increasing the flexibility for Member States to derogate from the guarantees it is supposed to set. In line with the approach taken in the amended Commission proposal recasting the Asylum Procedures Directive, the initial ambition to aim for high standards of reception conditions while ensuring a sufficiently high level of harmonisation has been seriously lowered. Except for the provisions relating to detention, ECRE considers that the standards proposed in the amended Commission recast RCD proposal provide little added value to the existing standards in the Reception Conditions Directive. This is notwithstanding important recent evolutions in jurisprudence identifying asylum seekers as "members of a particularly underprivileged and vulnerable population group in need of special protection".[10] ECRE regrets such an approach and is particularly concerned with the dilution of standards set out in the 2008 Commission recast RCD proposal including:

[7] See COM(2011)319 final, *Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (recast)* (hereinafter Amended Commission proposal recasting the Asylum Procedures Directive), Brussels, 1 June 2011. For an analysis see ECRE, *Comments from the European Council on Refugees and Exiles on the Amended Commission proposal recasting the Asylum Procedures Directive* (hereinafter 'Comments on the amended Commission proposal recasting the Asylum Procedures Directive'), September 2011.

[8] COM(2011) 320 final, *Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (recast)* (hereinafter 'Amended Commission recast RCD proposal'), Brussels, 1 June 2011, p. 3.

[9] European Council, *The Stockholm Programme – An open and secure Europe serving and protecting citizens* (hereinafter 'Stockholm Programme'), par. 6.2., *OJ* 2010 C 115/1.

[10] ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011, par. 251.

- The exclusion of married minors accompanied by their spouse from the definition of family member in amended recast Article 2(c).

- The reduced procedural safeguards in amended recast Article 9 such as with regard to legal assistance and representation and the ordering of detention by administrative authorities.

- The considerably increased flexibility for Member States to detain asylum seekers in prison accommodation in certain circumstances such as when specialised detention facilities are temporarily not available and the possibility to derogate from standards set with regard to the provision of information to asylum seekers in amended recast Article 10(6).

- The deletion of the prohibition on the detention of unaccompanied children in amended recast Article 11.

- The possibility for Member States to refuse access to the labour market beyond six months after making an application for international protection in amended recast Article 15.

- The possibility for Member States to completely withdraw material reception conditions in cases other than where the asylum seeker has concealed financial resources and has unduly benefited from material reception conditions in amended recast Article 20.

ECRE acknowledges that the amended Commission recast RCD proposal further strengthens a number of safeguards already introduced in the 2008 Commission recast RCD proposal such as:

- The restriction of detention in order to determine the elements of the application for international protection to a preliminary interview in amended recast Article 8(3)(b).

- The addition of a best interest assessment in case Member States make use of the possibility to place an unaccompanied child aged 16 or more in an accommodation centre for adults in amended recast Article 24.

- The deletion of the ill-defined notion of "continued detention" in amended recast Article 11.

Analysis of key articles

In this document ECRE presents its views on the amended Commission recast RCD proposal through an analysis of the key changes to the 2008 Commission recast RCD proposal. These comments and recommendations should be read together with ECRE's comments on the 2008 Commission recast RCD proposal.[11] The latter remain ECRE's position as regards those parts of the 2008 Commission recast RCD proposal that were not modified by the amended Commission recast RCD proposal, unless otherwise indicated.

1. Definition of Family Members (amended recast Article 2 (c))

Amended recast Article 2(c) narrows the definition of family members proposed in the 2008 Commission recast RCD proposal to exclude married minors who are accompanied by their spouses. While this reflects the position of the European Parliament with regard to the

[11] ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Reception Conditions Directive* (hereinafter 'Comments on the Commission recast RCD proposal'), April 2009.

definition of family members,[12] its purpose may be questioned. ECRE can see no objective reason why a married minor *who is accompanied by his or her spouse* should not be entitled to reception conditions under EU law when applying for asylum as a family member while a married minor *who is not accompanied by his or her spouse* would be entitled to reception conditions as a family member. The fact of being married or not has no bearing on the individual's need for reception conditions. As a result, the proposed amendment risks amounting to discrimination as individuals who are in similar situations would be treated differently.[13]

It should also be noted that by excluding spouses of married minors who are on the territory of a Member State from the definition of family member, the amended Commission recast RCD proposal may have undesired side-effects. Since it concerns individuals who are present on the territory, excluding them from the definition of family member will most likely leave them no alternative than to make a separate application for international protection and/or for access to reception conditions, thereby adding to the administrative burden of the Member State concerned. Moreover, it should be emphasised that any extension of the family definition used in the recast Reception Conditions Directive must be clearly distinguished from -and does not affect- the right to family reunification of applicants as it only applies to those family members who are already on the territory of the Member States. The revised family member definition would serve no other purpose than to add to the administrative burden of Member States, while the numbers of married minors seeking asylum in EU Member States remain limited. Therefore, ECRE's preferred option is to maintain the definition of family member as laid down in Article 2(c) of the 2008 Commission recast RCD proposal. [14]

Finally, ECRE maintains its position that the definition of family member should not be limited to family "in so far as the family already existed in the country of origin". This fails to accommodate family ties that may have been formed while residing in a third country during flight and may prevent refugees from enjoying the right to family unity contrary to the 1951 Refugee Convention.

ECRE recommends deleting "in so far as the family already existed in the country of origin" in amended recast Article 2(c) to ensure full compliance with the 1951 Refugee Convention.

ECRE recommends the inclusion of married minors in the definition of family members as was laid down in Article 2(c) of the 2008 Commission recast RCD proposal.

[12] European Parliament, Legislative resolution of 7 May 2009 on the Commission Proposal recasting the Reception Conditions Directive, AM 6, 7 and 8.

[13] See Fundamental Rights Agency and European Court of Human Rights, *Handbook on European non-discrimination law*, 2011, p. 21.

[14] ECRE is aware that the compromise reached between the Council and the European Parliament on the Commission proposal recasting the Qualification Directive deleted any reference to married minors in the definition of family members for the purpose of that directive. At the same time, the new recital 36(a) relating to best interest determination when deciding entitlements to benefits under the Qualification Directive states that in "exceptional circumstances, where the close relative of the beneficiary of international protection is a married minor but not accompanied by his or her spouse, the best interests of the minor may be seen to lie with his or her original family". In ECRE's view, there is no justification in the recast Qualification Directive why this should only be the case where the married minor is not accompanied by his or her spouse and may be discriminatory. In reality, the best interests of any married minor, whether he or she is accompanied by his or her spouse or not, will in most cases lie with the original family. Obviously there is no reason why this would be different for married minors with regard to access to reception conditions during the asylum procedure. See Council of the European Union, Doc 12337/1/11 REV 1, *Proposal for a Directive of the European Parliament and of the Council on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, a uniform status for refugees or for persons eligible for subsidiary protection and the content of the protection granted*, Brussels, 6 July 2011.

2. Detention (amended recast Articles 8-11)

Detention of asylum seekers remains an issue of major concern in many EU Member States. In its evaluation report on the implementation of the Reception Conditions Directive, the European Commission highlighted that national legislation in all EU Member States allow for the detention of asylum seekers on various grounds.[15] At the same time, only the Asylum Procedures Directive contains one very general provision on detention of asylum seekers[16] while Article 7(3) of the Reception Conditions Directive deals with "confinement" of asylum seekers in very broad terms. ECRE has consistently held that persons applying for international protection should not be detained and that detention may only be used in exceptional cases and should carry full procedural safeguards.[17]

However, ECRE had generally welcomed the provisions on detention in the 2008 Commission recast RCD proposal as they included detailed safeguards against arbitrary detention; were based on the principle that detention should only be used as a matter of last resort and only where it is necessary and included specific safeguards with regard to the detention of vulnerable asylum seekers. Nevertheless, ECRE had, at the same time, made recommendations to further amend the Commission recast RCD proposal in order to strengthen some of the safeguards.

In light of the growing concerns with regards to the use of detention of asylum seekers in EU Member States, ECRE believes it is important to include in EU asylum legislation sufficiently elaborated safeguards on detention of asylum seekers in line with international human rights law and standards. In this regard, it is positive that the amended Commission recast RCD proposal continues to maintain four detailed provisions on the grounds of detention, procedural guarantees, detention conditions and detention of vulnerable persons and persons with special reception needs. However, at the same time it is regrettable that some of the safeguards have been considerably weakened in the amended Commission recast RCD proposal. ECRE reminds the EU institutions of the fact that detention of asylum seekers concerns deprivation of liberty of individuals who have committed no crime and that the detention of asylum seekers is "inherently undesirable". [18]

2.1. Grounds for detention

Amended recast Article 8 modifies the grounds of detention that were included in Article 8 of the 2008 Commission recast RCD proposal in two ways. Firstly, it is now explicitly stated that the exhaustive list of detention grounds apply without prejudice to the guarantees laid down in amended recast Article 11 on detention of vulnerable asylum seekers and to detention in the framework of criminal proceedings. Secondly, the detention grounds related to determining identity or nationality and the elements on which the application for international protection is based have been modified to better reflect the wording of UNHCR's Guidelines on Detention of Asylum-Seekers.

Amended recast Article 8(3)(a) allows Member States to detain an asylum seeker "in order to determine or verify his/her identity or nationality". [19] ECRE is concerned that this detention

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[15] COM(2007)745 final, *Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers* (hereinafter 'Evaluation Report Reception Conditions Directive'), Brussels, 26 November 2007, p. 7.

[16] See Article 18 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter 'Asylum Procedures Directive'), *OJ* 2005 L 326/13.

[17] See ECRE, *Position Paper on the Detention of Asylum Seekers*, April 1996 and ECRE, *The Way Forward, Towards Fair and Efficient Asylum Systems in Europe* (hereinafter 'The Way Forward – Asylum Systems'), September 2005, p. 41.

[18] UNHCR, *UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (hereinafter 'Guidelines on Detention of Asylum-Seekers'), February 1999, p. 1.

[19] ECRE considers that the deletion of "ascertain" in amended recast Article 8(3)(a) does not substantially change the meaning of this detention ground.

ground, if adopted as it stands, may encourage systematic detention of asylum seekers in practice based on the assumption that detention is in any case necessary in order to allow verification of an asylum seeker's identity or nationality.[20] As mentioned above, detention of asylum seekers is inherently undesirable and should be avoided. It is possible to verify or determine an asylum seeker's identity or nationality without resorting to detention, in particular where the asylum seeker cooperates in such process. Moreover, it remains unclear as to what verification or determination of an asylum seeker's identity means in the context of amended recast Article 8(3)(a) and is as a result open to wide interpretation.[21] Therefore, ECRE's preferred option is to delete this ground for detention. If this ground for detention were to be maintained it should state explicitly that detention on this ground should only be possible if he or she clearly refuses to cooperate in order to frustrate the process of identification.[22]

ECRE welcomes the addition in amended recast Article 8(3)(b) that an applicant can only be detained in order to determine the elements on which the application for international protection is based *within the context of a preliminary interview* and as far as it concerns *elements which could not be obtained in the absence of detention*. This is in line with UNHCR guidelines on detention[23] requiring that detention on this ground is restricted to obtaining essential facts from the asylum seeker as to why asylum is being sought and would not extend to a determination of the merits of the claim, thus limiting detention to the very initial stage of the asylum procedure.[24] Without such an adjustment in the wording of amended recast Article 8(3)(b), Article 43 of the amended Commission proposal recasting the Asylum Procedures Directive, that continues to allow for extensive use of asylum procedures at the border, including for the purpose of examining the substance of the asylum application, risks justifying the systematic detention of asylum seekers at the border for the entire duration of the asylum procedure.

However, ECRE regrets that the amended recast proposal maintains the possibility to detain an applicant "in the context of a procedure, to decide on the right to enter the territory".[25] In its current formulation this ground may be interpreted as allowing systematic detention of asylum seekers in any entry procedure, regardless of whether they have proper documentation, contrary to Member States' obligations under international law and human rights standards. Article 31 of the 1951 Refugee Convention exempts refugees coming directly from a territory where they have a well-founded fear of persecution from any penalty on account of their illegal entry or presence in the country of refuge provided that they present themselves without delay to the authorities and show good cause for such illegal entry or presence. This provision not only applies to persons who have obtained refugee status but also to asylum seekers pending the examination of their claim.[26] This is because refugee status is declaratory, meaning that recognition of refugee status does not make an individual a refugee but declares him or her to be one.[27] Article 31(2) of the 1951 Refugee Convention only allows

[20] See ECRE, *Position Paper on the Detention of Asylum Seekers*, April 1996, par. 18.

[21] It should also be noted that according to UNHCR's Guidelines on Detention of Asylum-Seekers detention on this ground is only possible to "verify" identity and it is further specified that this ground relates to cases where identity "may be undetermined or in dispute". See UNHCR, *Guidelines on Detention of Asylum-Seekers*, p. 4.

[22] Verification of identity or nationality cannot include contacting alleged actors of persecution or serious harm. According to Article 22 Asylum Procedures Directive Member States are prohibited from disclosing information regarding individual asylum applications or the fact that an application has been made to the alleged actors of persecution or serious harm or to obtain any information from such actors in a manner that would result in such an actor being informed of the fact that an application has been made or would jeopardise the applicant's integrity or the security of his/her family members.

[23] UNHCR, *Guidelines on Detention of Asylum-Seekers*, p. 4.

[24] See ECRE, *Comments on the Commission recast RCD proposal*, p. 7.

[25] Amended recast Article 8(3)(c).

[26] "Because no more than physical presence is required to invoke Article 31, the provisional benefit of this right must be granted to all persons who claim refugee status, until and unless they are finally determined not to be Convention refugees". See J. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p. 386.

[27] "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined". See

for restrictions to the movements of refugees that are "necessary" and only "until their status in the country is regularised or they obtain admission into another country". "Regularization" in this context is not to be equated with formal recognition of refugee status but occurs as soon as "an asylum seeker satisfies all legal formalities requisite to refugee-status verification".[28] As amended recast Article 8(3)(c) could be interpreted as allowing for the systematic detention of refugees in the context of an entry procedure irrespective of whether they enter regularly or irregularly or whether they present themselves to the authorities without delay, it is not compatible with the exemption from penalties laid down in Article 31 Geneva Refugee Convention.[29] ECRE therefore reiterates its recommendation to delete this ground for detention maintained in amended recast Article 8(3)(c).

ECRE is also concerned that the possibility to detain an asylum seeker "when protection of national security or public order so requires" in amended recast Article 8(3)(d) is potentially vague and open to broad interpretation. Detention on this ground should be interpreted in a restrictive manner and is only acceptable when there is a "demonstrable" threat to national security and public order as defined by the jurisprudence of the European Court of Human Rights.[30] It should only be possible if the asylum seeker constitutes a genuine, present and sufficiently serious threat and the threat should be assessed on the basis of the individual conduct of the person and not on general assumptions based on nationality for example.[31] ECRE therefore recommends modifying amended recast Article 8(3)(d) accordingly.

ECRE welcomes the obligation in amended recast Article 8(4) for Member States to ensure that alternatives to detention are laid down in national law. Such alternatives exist already today and are being applied in a number of states, including EU Member States.[32] As research has shown that detention in most cases has negative effects on asylum seekers' mental and physical health and is likely to make them vulnerable it must be avoided as much as possible.[33] Therefore, it is of the utmost importance that detention is used only as a last resort for exceptional cases when all other options have been tried and failed.[34] Some EU Member States already apply alternatives to detention while others do not. Since the legislation in all EU Member States allows for the detention of asylum seekers, it is useful that

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UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Re-edited, Geneva, January 1992, par. 28.

[28] Any other interpretation would result in a conflict with the presumption against detention once the asylum procedure is underway that is implicit in Article 26 Geneva Refugee Convention on the right to freedom of movement for refugees. See Hathaway(2005), at p. 418.

[29] It should also be noted that, although this detention ground is included in a non-binding resolution of the Council of Europe, UNHCR guidelines on detention of asylum seekers do not include the possibility of detention on such basis. Furthermore, deletion of this ground would not make detention at the border impossible as this would in any case be allowed on the basis of the other three grounds in amended recast Article 8. It would, however, avoid providing a legal basis for systematic detention of all asylum seekers.

[30] ECRE, *Position Paper on the Detention of Asylum Seekers*, par. 13.

[31] See by analogy also the EU Directive on the free movement of EU nationals that allows Member States to restrict the free movement of Union nationals on grounds of public policy, public security or public health but requires that those measures "shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned". It is explicitly required that "[t]he personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted". See Article 27 of EU Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 75/34/EEC, 75/34/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ* 2004 L 158/77.

[32] For an analysis of existing systems in France, the UK, Canada and the Unites States, see France Terre d'Asile, "Quelles Alternatives à la retention administrative des étrangers", Juin 2010, *Les Cahiers du Social*, N° 26. A Community Assessment and Placement Model (CAP Model) has been developed by the International Detention Coalition that identifies five steps that prevent and reduce the likelihood of unnecessary detention. See Sampson, R., Mitchell, G. and Bowring, L., *There are alternatives: A handbook for preventing unnecessary immigration detention*, Melbourne, The International Detention Coalition, 2011.

[33] See JRS-Europe, *Becoming Vulnerable in Detention. Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project)*, June 2010.

[34] See Sampson, R., Mitchell, G. and Bowring, L., *There are alternatives: A handbook for preventing unnecessary immigration detention*, Melbourne, The International Detention Coalition, 2011, p. 009.

the recast Reception Conditions Directive carries the obligation to make alternatives to detention available in national legislation. Moreover, amended recast Article 8(2) now clarifies that Member States may detain an applicant if other less coercive alternative measures cannot be applied effectively. Although this was always implied in the 2008 Commission recast proposal, the provision could have been misunderstood as distinguishing between "less coercive measures" and "alternatives to detention". Alternatives to detention must not only be stipulated in national legislation, they must also be applied in practice. By requiring the effective application of "less coercive alternative measures" before detention, amended recast Article 8(2) now unambiguously establishes a link between Article 8(2) and (4) thus contributes also to the internal coherence of the provision.

ECRE recommends deleting amended recast Article 8(3)(a) as it risks encouraging systematic detention of asylum seekers. If this ground were to be maintained ECRE recommends modifying amended recast Article 8(3)(a) in order to require that detention of an asylum seeker in order to determine or verify his/her identity or nationality is only possible if he or she clearly refuses to cooperate in order to frustrate the process of identification.

ECRE recommends deleting amended recast Article 8(3)(c) allowing Member States to detain asylum seekers "in the context of a procedure, to decide on the right to enter the territory".

ECRE recommends modifying amended recast Article 8(3)(d) to require a "serious and present threat to national security and public order based on the individual conduct of the asylum seeker".

2.2. Guarantees for detained asylum seekers

Procedural guarantees for asylum seekers with regard to detention are significantly modified in the amended Commission recast RCD proposal and present with regard to certain aspects a lower standard compared to Article 9 of the 2008 Commission recast RCD proposal.

First, the 2008 Commission recast RCD proposal explicitly required that detention "shall not exceed the time reasonably needed to fulfil the administrative procedures required to obtain information on the asylum seeker's nationality or on the elements on which his application is based or to carry out the relevant procedure with a view to deciding on his/her right to enter the territory". This is replaced in the amended recast Article 9(1) with a test according to which "administrative procedures relevant to the grounds set out in Article 8(3) shall be executed with due diligence". The criteria for assessing whether administrative procedures are executed with due diligence are not further specified in the amended Commission recast RCD proposal. As a result this is entirely left to national courts and tribunals and administrations. As the notion of "due diligence" may be unclear, in particular in non-common law systems, the text could benefit from further guidance on what constitutes due diligence in a recital. In ECRE's view, it is essential to ensure that concrete and meaningful steps are taken to ensure that the time needed to verify an asylum seeker's identity and nationality or determine the elements upon which the asylum application is based, is kept as short as possible. In addition there must always be a real prospect that such verification or determination of elements of the asylum application can be carried out successfully within the shortest possible time.[35]

[35] This is required by the jurisprudence of the Court of Justice of the European Union in the context of return procedures. "[I]t must therefore be apparent, at the time of the national court's review of the lawfulness of detention, that a real prospect exists that the removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6) of Directive 2008/115/EC, for it to be possible to consider that there is a 'reasonable prospect of removal' within the meaning of Article 15(4) of that directive". See Court of Justice, Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, Judgment of 30 November 2009, par. 65. See also the jurisprudence of the European Court of Human Rights relating to Article 5 ECHR requiring that "the length of detention should not exceed that reasonably required for the purpose pursued". See for example ECtHR, *Saadi v. United Kingdom*, Application

Secondly, amended recast Article 9(2) now allows both judicial authorities and administrative authorities to order detention, whereas in the 2008 Commission recast RCD proposal the latter was only possible *in urgent cases*. Because the decision to detain a person constitutes a serious breach of an individual's right to liberty, the highest standards should apply with regards to the impartiality of the authority responsible for taking such decision. Therefore ECRE recommends maintaining the standard that was included in the 2008 Commission recast RCD proposal. In order to ensure that detention is only exceptionally ordered by non-judicial authorities, the recast Reception Conditions Directive should only empower administrative authorities to do so in urgent cases. ECRE reiterates that it is paramount that the lawfulness of a detention order taken by an administrative authority is always confirmed by a judicial authority as soon as possible and no later than within 72 hours.

Thirdly, amended recast Article 9(3) now makes it mandatory for a detention order to state not only the reasons in fact and in law on which it is based but also the procedures laid down in national law for challenging the detention order.[36] ECRE welcomes this as an improvement of the standard in the 2008 Commission recast RCD proposal that allowed for such information to be provided separately from the detention order. For practical and efficiency reasons, it is preferable that such information is included in the detention order in order to avoid that provision of such information is unnecessarily delayed in view of the serious consequences such a lapse may entail. However, ECRE regrets that amended recast Article 9(3) now states that the detention order must be "in a language the asylum seeker understands or is reasonably supposed to understand". Such a standard is not in line with Article 5 §2 ECHR according to which "everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him". The main purpose of Article 5 §2 ECHR which should be properly reflected in the recast directive is that any person deprived of his or her liberty "must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4...".[37] Allowing authorities to issue detention orders in a language they are reasonably supposed to understand grants these authorities a margin of discretion that is not allowed, for instance, in criminal law proceedings. Therefore, ECRE recommends further revising amended recast Article 9(3) by deleting the reference to "or is reasonably supposed to understand".[38] It should be noted that this need not necessarily be the mother tongue of the asylum seeker as long as it can be shown that he or she can converse in that language at a sufficient level in order to understand the content of the document.

Fourthly, amended recast Article 9(4) now includes an explicit reference to the fact that a judicial authority must review the detention order in specific circumstances including whenever detention is of a prolonged duration or "relevant circumstances arise or new information becomes available which may affect the lawfulness of detention". ECRE fully supports these adjustments to recast Article 9(5). A detained asylum seeker should be able to

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No. 13229/03, Judgment of 29 January 2008, par. 74 and ECtHR, *R.U. v. Greece*, Application No. 2237/08, Judgment of 7 June 2011 (French only), par. 92.

[36] In a recent judgment concerning detention of asylum seekers in Hungary, the European Court of Human Rights re-emphasised the importance of sufficiently motivated decisions on detention and came to the conclusion that the prolongation of detention because of the non-action of the State can also lead to a violation of Article 5 ECHR. According to Hungarian law the administration shall release an asylum applicant at the the initiative of the refugee authority once his or her case reaches the in-merit phase. In a case concerning two Ivorian nationals, the refugee authority had not initiated their release, notwithstanding the fact that their case was admitted to the in-merit phase. The ECtHR found a violation of Article 5 § 1(f) ECHR because the refugee authority's non-action was not incarnated by a decision, accompanied by a reasoning or susceptible to a remedy. According to the ECtHR "the applicants were deprived of their liberty by virtue of the mere silence of an authority – a procedure which in the Court's view verges on arbitrariness. In this connection the Court would reiterate that the absence of elaborate reasoning for an applicant's deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Article 5 of the Convention". See ECtHR, *Case of Lokpo and Touré v. Hungary*, Application No. 10816/10, Judgment of 20 September 2011, par. 24.

[37] ECtHR, *Conka v. Belgium*, Application No. 51564/99, Judgment of 5 February 2002, par. 50.

[38] See also European Parliament, Directorate General for internal policies. Policy Department C: Citizens' Rights and Constitutional Affairs – Civil Liberties, Justice and Home Affairs, *Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system. Study*(hereinafter 'EP Study on setting up a CEAS', Brussels, August 2010, at p. 237.

challenge the lawfulness of his/her detention at any moment in case there are new indications that detention may no longer be lawful and not only "at reasonable intervals of time".[39] ECRE also supports the deletion of the notion of "continued detention" that was included in the 2008 Commission recast RCD proposal as this further contributes to the clarity and coherence of amended recast Article 9. However, ECRE maintains its recommendation to include a mandatory *ex officio* judicial review at regular intervals of time in addition to and not as an alternative to judicial review on request by the asylum seeker. In practice detained asylum seekers find themselves often in a precarious position with limited or no access to proper information and quality legal assistance making effective access to judicial protection even more difficult.[40] The combination of *ex officio* judicial review with the possibility for asylum seekers to challenge the lawfulness of their detention at any moment on the basis of new elements in between such regular intervals would considerably reduce the risk of unlawful detention of asylum seekers. Amended recast Article 9(4) should be further amended accordingly.

Finally, amended recast Article 9(5) now only ensures access to free legal assistance and representation for asylum seekers in detention "in cases of appeal or review of the detention order". This is a lower standard than what was guaranteed under the 2008 Commission recast RCD proposal that required access to legal assistance and/or representation "in cases of detention" free of charge where the asylum seeker cannot afford the costs involved. Restricting access to free legal assistance and representation for asylum seekers to cases of appeal or review of detention is not in coherence with the frontloading approach the amended recast proposals still claim to support.[41] Recent research on legal assistance and representation in a selected number of EU Member States has shown that in many cases asylum seekers encounter difficulties contacting a lawyer if prior to their detention they are not already represented by one.[42] The changes to the provisions relating to legal assistance and representation seem to reflect the approach on legal assistance and representation in the amended Commission proposal recasting the Asylum Procedures Directive that restricts access to free legal assistance and representation to the appeal stage. As a result, the amended Commission proposals may reduce the likelihood for a detained asylum seeker to be represented by a lawyer outside the strict context of an appeal or review of the detention order. It is ECRE's position that in view of the growing complexity of asylum procedures in Europe and to ensure both the fairness and efficiency of such procedures, asylum seekers should have access to free legal assistance and representation throughout the procedure in case they have insufficient financial resources to consult a lawyer at their own cost. This should in particular be the case when their right to liberty is at stake. Asylum seekers should be entitled to free legal assistance and representation at the earliest possible stage of any proceeding that may result in their detention if they do not possess the financial means to pay for such a service.[43] Therefore ECRE recommends replacing in amended recast Article 9(5) the words "in cases of an appeal or review of the detention order" with "in cases of detention".

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[39] See also ECRE, *Comments on the Commission recast RCD proposal*, p. 8.

[40] See Fundamental Rights Agency, *Detention of third-country nationals in return procedures,* November 2010, pp. 37-38.

[41] See Commission, *Amended Commission Proposal recasting the Asylum Procedures Directive*, pp. 5-6.

[42] ECRE/ELENA, *Survey on Legal Aid for asylum seekers in Europe*, October 2010, pp. 46-52.

[43] With regard to criminal cases the ECtHR has found in the case of *Salduz v. Turkey* that Article 6 §1 ECHR is applicable in pre-trial proceedings and that the right to a fair trial requires that "as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police" and that "even though the applicant had had the opportunity to challenge the evidence against him at his trial and subsequently at appeal, the absence of a lawyer while he was in police custody irretrievably affected his defence rights". See ECtHR, *Salduz v. Turkey*, Application No. 36391/02, Judgment of 27 November 2008, par. 55 and 62. Whereas the ECtHR has held that the guarantees included in Article 6 ECHR do not apply in asylum cases, this restriction does not typically apply in EU asylum law. The ECtHR's jurisprudence relating to Article 6 ECHR is relevant because the right to an effective remedy as a general principle of EU law is informed by the procedural guarantees under both Article 6 and 13 ECHR. This is because the right to an effective remedy is consolidated in Article 47 EU Charter on Fundamental Rights, which is not limited to civil rights and obligations or criminal charges. See Explanations relating to the Charter of Fundamental Rights of the European Union, Document Convent 49 of 11 October 2000, available at http://www.europarl.europa.eu/charter/convent49_en.htm.

ECRE recommends adding a recital providing further guidance on the notion of due diligence. This should require at least that concrete and meaningful steps are taken to ensure that the time needed to verify an asylum seeker's identity and nationality or determine the elements upon which the asylum application is based, is kept as short as possible. A real prospect must exist that such verification or determination of elements of the asylum application can be carried out successfully within the shortest possible time.

ECRE recommends modifying amended recast Article 9(2) to require that detention can only be ordered by administrative authorities in "urgent cases".

ECRE recommends deleting "or is reasonably supposed to understand" in amended recast Article 9(3).

ECRE recommends further modifying amended recast Article 9(4) to require that "Detention shall be reviewed by a judicial authority at *regular* intervals of time, ex officio *and* on request by the asylum seeker concerned..."

ECRE recommends replacing in amended recast Article 9(5) the words "in cases of an appeal or review of the detention order" with "in cases of detention".

2.3. Conditions of detention

The provision relating to conditions of detention of asylum seekers is subject to important changes compared to the 2008 Commission recast RCD proposal. Amended recast Article 10 provides a lower standard regarding where asylum seekers can be detained; the right to visit asylum seekers in detention; and information provided to asylum seekers while in detention and allows for considerable flexibility for Member States to derogate from safeguards on detention conditions in "duly justified cases".

Firstly, amended recast Article 10 no longer explicitly prohibits detention of asylum seekers in prison accommodation although it maintains as a principle that detention of asylum seekers shall only be carried out in specialised detention facilities. Detention in prison accommodation is now allowed under amended recast Article 10(6)(a), where Member States are obliged to resort to such accomodation in cases where specialised detention facilities are temporarily not available. [44] ECRE regrets the deletion of the explicit prohibition of detaining asylum seekers in prison accommodation, as it emphasised the importance of differentiating asylum-related detention from imprisonment as a result of criminal charges or conviction. Jurisprudence of the ECtHR requires that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention[45]. In its substantive standards, as regards the detention of immigrants in prisons the European Committee for the Prevention of Torture states that "[E]ven if the actual conditions of detention for these persons in the establishments concerned are adequate -which has not always been the case - the CPT considers such an approach to be fundamentally flawed. A prison is by definition not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence".[46] The ECtHR also held that the place and conditions of detention must be appropriate in order for detention not to be arbitrary, "bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens

[44] Although it is acknowledged that the amended recast proposal stipulates that that asylum seekers in detention should be kept separately from ordinary prisoners in such cases.

[45] ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, Judgment of 12 October 2006, par. 102.

[46] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *CPT Standards*, CPT/Inf/E/(2002) 1 – Rev. 2010 (Hereinafter 'CPT Standards'), par. 28 available at http://www.cpt.coe.int.

who, often fearing for their lives, have fled from their own country".[47] Therefore ECRE recommends reintroducing the explicit prohibition on the detention of asylum seekers in prison accommodation in amended recast Article 10(1).[48]

In the case of *M.S.S. v. Belgium and Greece,* the ECtHR also considered that asylum seekers are particularly vulnerable and that this must be taken into account when assessing the conditions of detention. It held in particular that "[I]t considers that, taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker".[49] This should be properly reflected in EU law by imposing the highest standards of conditions of detention, in those exceptional cases where detention would be considered necessary and justified.

While it remains undefined what constitutes a "duly justified case", the reference to the temporary lack of capacity to detain asylum seekers in specialised detention facilities suggests that such a possibility should primarily enable Member States to address situations of increased numbers of asylum seekers. However, as detention of asylum seekers should remain exceptional and a measure of last resort, ECRE believes that the appropriate response to such situations is not to expand the number of places available to deprive asylum seekers of their liberty but to develop asylum systems that are efficient and capable of dealing with fluctuations in the numbers of asylum applications received. It should be noted also that in the case of *M.S.S. v. Belgium and Greece*, the Court explicitly refused to take into account the difficult circumstances Greece is facing in the area of migration and asylum in the assessment of whether detention conditions amounted to inhuman and degrading treatment under Article 3 ECHR or not. This is because of the absolute character of Article 3. Although the Court acknowledged the considerable difficulties States constituting the external borders of the European Union are currently experiencing in coping with the increasing influx of migrants and asylum seekers, it explicitly held that this should never be an excuse to absolve a State from its obligations under that provision.[50] Therefore, ECRE recommends deleting amended recast Article 10(6)(a).

Furthermore, the amended Commission recast RCD proposal no longer explicitly guarantees a right to visit applicants for international protection who are in detention. According to amended recast Article 10, UNHCR and organisations working on behalf of UNHCR must have the possibility to "communicate with applicants and have access to detention facilities". The same right to communicate and have access to detention facilities must be ensured to family members, legal advisers or counsellors and persons representing non-governmental organisations. This provides a lower standard than the requirement for asylum seekers in detention to have the opportunity to "establish contact, including visitation rights, with legal representatives and family members" as laid down in the 2008 Commission recast RCD proposal. The latter also ensured that UNHCR and other relevant and competent national, international and non-governmental organisations and bodies have the opportunity "to communicate with and to visit applicants in detention areas". ECRE would welcome an explicit reference to the right of UNHCR, relevant NGOs, legal advisors, lawyers and family members to visit applicants for international protection as this expresses more clearly their right to meet in person with them. This is not necessarily covered by the "right to communicate" which may take the form of communicating via phone or email, while the "right to access the detention facility" may be interpreted as a limited right to enter the premises of the detention facilities without necessarily implying the right to meet in person with the applicant detained. Research has also indicated that privacy as regards lawyer/client

[47] ECtHR, *Saadi v. United Kingdom*, Application No. 13229/03, Judgment of 29 January 2008, par. 74.

[48] See also, European Parliament, *EP Study on setting up a CEAS*, p. 243.

[49] ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011, par. 233.

[50] ECtHR, *MSS v. Belgium and Greece*, par. 223-224.

meetings is not always ensured in detention facilities in some EU Member States.[51] This is essential to guarantee that the confidential nature of the conversations between lawyers and their clients are fully respected.[52] Amended recast Article 10 could be further improved to include such a guarantee. ECRE therefore recommends further modifying amended recast Article 10(3) and (4) to ensure the possibility for UNHCR, family members, legal advisors, counsellors or lawyers and persons representing relevant non-governmental organisations to "communicate with and visit applicants in conditions that fully respect privacy".

Finally, amended recast Article 10(5) requires Member States to ensure that asylum seekers in detention are systematically provided with information explaining the rules in the facility and their rights and obligations in a language they understand "or are reasonably supposed to understand". ECRE believes that the latter presents a very weak standard which is open to wide interpretation and does not provide sufficient guarantees that detained asylum seekers fully comprehend their rights and obligations and rules in the detention facilities. Member States should make every effort to inform asylum seekers of their rights and obligations in a language the asylum seeker fully understands rather than in a language authorities may reasonably suppose he or she understands but in reality may not. As already mentioned, a language the asylum seeker understands not necessarily only refers to the mother tongue of the individual concerned, but includes other languages the applicant demonstrably understands at sufficient level. Information is also sufficiently provided in a language understandable to the applicant where interpretation is made available. As the reference to "a language they are reasonably supposed to understand" sets a very ambiguous standard and risks to be interpreted very broadly, potentially lowering existing standards in EU Member States, ECRE recommends deleting it.

Moreover, the exception to the obligation to provide asylum seekers with information on the rules in the detention facility as well as their rights and obligations when asylum seekers are detained at the border or in a transit zone as laid down in amended recast Article 10(6)(b) is not acceptable as it risks being discriminatory. There is no objective justification why asylum seekers detained at the border or in a transit zone should not be entitled to information about their rights and obligations as opposed to asylum seekers detained in other parts of Member States' territory. Detention at the border or in transit zones by definition complicates asylum seekers' access to information and in particular legal assistance and representation.[53] According to the amended Commission recast RCD proposal, such an exception would not be allowed in cases referred to in Article 43 of the amended Commission proposal recasting the Asylum Procedures Directive. While this admittedly limits the scope of the exception allowed under the amended Commission recast RCD proposal, it suggests a possibility for Member States to deprive asylum seekers of information whenever they are detained at a border post or transit zone outside the framework of a border procedure in accordance with Article 43 of the said proposal. This would not only be unfair and discriminatory to the asylum seekers concerned but also be incoherent with the objective of harmonisation. Therefore, ECRE recommends deleting amended recast Article 10(6)(b).

[51] See for instance the problems reported in the Netherlands at the detention centre at Schiphol and the general lack of privacy in consultation rooms in detention centres in Italy. At the same time good practice has been identified in Belgium, France, Finland, Ireland, Romania, Slovenia, Spain and the United Kingdom. See ECRE/ELENA, *Legal Aid Survey*, p. 51.

[52] Also the European Committee for the Prevention of Torture emphasises that in cases of immigration detention "[T]he right of access to a lawyer should apply throughout the detention period and include both the right to speak with the lawyer in private and to have him present during interviews with the authorities concerned". See European Committee for the Prevention of Torture and Inhuman and Degrading Treatment, *CPT Standards*, par. 31.

[53] For an overview of practical barriers to access to legal assistance and representation in cases of detention, see ECRE/ELENA, *Legal Aid Study*, pp. 49-52.

ECRE recommends reinserting in amended recast Article 10(1) an explicit prohibition on the detention of asylum seekers in prison accommodation for the purpose of examining their asylum application as this is not an appropriate place to accommodate persons who have not committed any crime.

ECRE recommends further modifying amended recast Article 10(3) and (4) to ensure the possibility for UNHCR, family members, legal advisors, counsellors or lawyers and persons representing relevant non-governmental organisations to "communicate with and visit applicants in conditions that fully respect privacy".

ECRE recommends deleting the words "or are reasonably supposed to understand" in amended recast Article 10(5).

ECRE recommends deleting amended recast Article 10(6) as it allows Member States to use prison accommodation for the detention of asylum seekers and to deprive asylum seekers of information in a potentially discriminatory way.

2.4. Detention of vulnerable persons and persons with special reception needs

ECRE welcomes the fact that amended recast Article 11 maintains as a principle that in all cases vulnerable persons shall not be detained unless it is established that their health will not significantly deteriorate as a result of detention and where they are detained that regular monitoring and adequate support will be ensured. This is an important standard that will, if adopted, contribute to avoiding detention of vulnerable asylum applicants as much as possible. Research on the impact of detention on the psychological and physical well being of migrants and asylum seekers has shown that in many cases individuals become vulnerable as a consequence of detention.[54] The requirement of regular monitoring where vulnerable asylum seekers are detained is crucial in order to ensure that any deterioration of the person's health during detention is identified in a timely manner and that the person concerned can be released from detention in accordance with amended recast Article 11(1), first sentence. However, ECRE regrets that the amended Commission recast RCD proposal no longer requires certification by a qualified expert that detention will not negatively affect the health of the vulnerable applicant concerned. Such certification is explicitly suggested in UNHCR's guidelines on detention before any decision to detain vulnerable asylum seekers is taken.[55] ECRE's preferred option would be to have such a condition reinserted in amended recast Article 11(1).[56] Moreover, as it is the case for detention of minors, amended recast Article 11(1) should also include an obligation to establish first that other less coercive alternative measures cannot be applied effectively before detention of vulnerable persons is considered, in line with UNHCR guidelines on detention.[57]

ECRE welcomes that guarantees preventing arbitrary detention of minors are strengthened in amended recast Article 11(2) by explicitly stating that detention of minors shall be a measure of last resort; is only possible if other less coercive alternative measures cannot applied effectively; shall be for as short a period as possible; and insofar as *all efforts are made to release the detained minor and place them in accommodation suitable for minors.* The latter guarantee implies a positive and permanent obligation for States to undertake all efforts to end detention of minors in all cases as soon as possible and acknowledges that in general

[54] See JRS-Europe, *Becoming Vulnerable in Detention. Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project)*, June 2010.

[55] UNHCR, *Guidelines on Detention of Asylum-Seekers*, p. 8.

[56] Alternatively, a reference to certification by qualified and independent medical experts should be included in amended recast recital 17.

[57] "Given the very negative effects of detention on the psychological well being of those detained, *active consideration of possible alternatives* should precede any order to detain asylum-seekers falling within the following vulnerable categories: Unaccompanied elderly persons, Torture or trauma victims, Persons with a mental or physical disability."(emphasis added). UNHCR, *Guidelines on Detention of Asylum-Seekers*, p. 8.

detention facilities do not constitute accommodation that is suitable to address their needs. ECRE fully supports these additional safeguards with respect to the detention of minors.

However, ECRE regrets that amended recast Article 11(2) no longer prohibits the detention of unaccompanied minors but now includes a weaker standard according to which "detention of unaccompanied minors shall be resorted to only in particularly exceptional cases". As they are separated from their parents or other primary care-givers, unaccompanied minors are particularly vulnerable and detention is in most cases likely to add to their vulnerability.[58] The devastating effect of detention on the mental and physical health of both unaccompanied children as well as children detained with their parents has been evidenced in numerous reports and studies.[59] It remains ECRE's position that children and in particular unaccompanied asylum- seeking children should never be detained as this is in principle not in their best interest. In fact, the trend in a number of EU Member States and other countries outside the EU seems to be towards ending the practice of detaining children and in particular unaccompanied children.[60] The recast of the Reception Conditions Directive provides a unique opportunity to promote such existing good practice across the EU through legislation. This is also supported by jurisprudence of the European Court of Human Rights relating to detention of asylum seeking children or children residing irregularly on the territory of Contracting Parties, that has emphasised the extreme vulnerability of such children, in particular but not exclusively unaccompanied children.[61] It should be noted that the Court not only found the detention of these children to be arbitrary and in violation of Article 5 ECHR but also that it amounted to inhuman and degrading treatment under Article 3 ECHR.[62] ECRE is concerned that unaccompanied children sometimes disappear from open centres or may even be abducted in some cases, but disagrees that detention is the appropriate response. The Council of Europe's Human Rights Commissioner has emphasised that the protection of unaccompanied children could be strengthened through a number of measures without resorting to the deprivation of liberty, "simply by ensuring a sufficiently strict control by custodial institutions to the movement of the minors in their care".[63] Member States should invest more substantially in accommodation facilities that are better adapted to the special needs of unaccompanied children and equipped to protect their best interests. Therefore,

[58] "In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. See UN Committee on the Rights of the Child, General Comment No. 6, *Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6, par. 61. The UN Working group on Arbitrary Detention stated recently: "The detention of minors, particularly of unaccompanied minors, requires even further justification. Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirements stipulated in article 37 (b), clause 2, of the Convention on the Rights of the Child, according to which detention can be used only as a measure of last resort." See UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 18 January 2010, A/HRC/13/30, par. 60.

[59] See for example Medical Justice, "State Sponsored cruelty. Children in Immigration Detention", 2010; Lorek, A. et al., "The mental and physical health difficulties of children held within a British immigration detention center: A pilot study", Child Abuse & Neglect, Volume 33, Issue 9, September 2009, pp. 573-585.

[60] See UNICEF and Children's Legal Centre, *Administrative detention of children: a global report*, February 2011, p. 66. In the UK, the government declared in December 2010 that it was eliminating its policy of long-term detention of children, claiming "a big culture shift within our immigration system, one that puts our values … above paranoia over our borders" (Liberal Democrats 2010). See http://www.globaldetentionproject.org/countries/europe/united-kingdom/introduction.html. Current policy in the UK can be found here http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/enforcement. In Belgium, according to Article 41 §2 of the law of 12 January 2007 on the reception of asylum seekers and other categories of foreigners, unaccompanied children whose age is not disputed cannot be detained but must be accommodated in an "observation and orientation centre" as of their arrival. See Loi de 12 janvier 2007 sur l'acceuil des demandeurs d'asile et de certaines autres categories d' étrangers, *Moniteur belge*, 7 mai 2007.

[61] "The Court notes that the second applicant was detained in a closed centre intended for illegal immigrants in the same conditions as adults; these conditions were consequently not adapted to the position of extreme vulnerability in which she found herself as a result of here position as an unaccompanied foreign minor". ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, Judgment of 12 October 2006, par. 102.

[62] "In the Courts view, the second applicant's detention in such conditions demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment". See ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, par. 58. The Court also found a violation of Article 3 with respect to four children who were detained together with their mother. See ECtHR, *Mushkhadzhieyeva and others v. Belgium*, Application No. 41442/07, Judgment of 19 January 2010 , par. 63 (French only).

[63] Commissioner for Human Rights, *Positions on the rights of minor migrants in an irregular situation*, CommDH/Position Paper(2010)6, Strasbourg, 25 June 2010, p. 4.

ECRE's preferred option is for the amended Commission recast RCD proposal to prohibit the detention of unaccompanied children as was stipulated unambiguously in the 2008 Commission recast RCD proposal. ECRE also recommends to include in amended recast Article 11(2) the obligation for Member States to ensure access to education for children in accordance with Article 28 UN Convention on the Rights of the Child.

Furthermore, ECRE reiterates its recommendation to include the safeguard in amended recast Article 11(4), according to which female asylum seekers who are detained must in principle be accommodated separately from male asylum seekers, in amended recast Article 10. This guarantee should be applicable to all female asylum seekers, not only those who are considered to be vulnerable or having special reception needs. [64]

Finally, similar to amended recast Article 10(6), amended recast Article 11(5) provides a possibility for Member States to derogate from a number of safeguards with respect to vulnerable asylum seekers in "duly justified cases and for a reasonable period that shall be as short as possible" when the asylum seeker is detained at a border post or in a transit zone. However, this is again with the exception of cases referred to in Article 43 of the amended Commission proposal recasting the Asylum Procedures Directive relating to border procedures. The possible derogations concern the possibility for minors to engage in leisure activities, separate accommodation for detained families guaranteeing adequate privacy and separate accommodation for female asylum seekers. The amended recast proposal remains silent as to the meaning and scope of "duly justified cases" leaving a wide margin of discretion for Member States. It should be noted that contrary to amended recast Article 10(6) this provision does not require any causal link with lack of capacity which could temporarily justify such derogations. As a consequence, amended recast Article 11(5) potentially covers a very wide range of situations and risks being used by national authorities at their convenience without properly taking into account the specific needs of the asylum seekers concerned. Depriving children from leisure activities, families from adequate privacy and female asylum seekers from separate accommodation seriously interferes with their fundamental rights and increases their vulnerability. In case Member States are not capable of ensuring these basic and essential safeguards at the border or in transit zones, in ECRE's view it simply means that the facilities concerned are not appropriate to accommodate these vulnerable groups and that other accommodation on the territory must be found. ECRE recommends deleting amended recast Article 11(5).

ECRE recommends adding to amended recast Article 11(1): "Unaccompanied children shall never be detained" and deleting the third and sixth subparagraph of amended recast Article 11(2) accordingly.

ECRE recommends adding to amended recast Article 11(2): "Minors shall have access to education".

ECRE recommends including the guarantee of separate accommodation for female asylum seekers in amended recast Article 10 on detention conditions in general to clarify that such guarantee applies to all female asylum seekers, regardless of whether they have been identified as vulnerable and having special reception needs.

ECRE recommends deleting amended recast Article 11(5) as it allows, in a potentially large number of cases, for unacceptable derogations from basic safeguards that would add to the vulnerability of the persons concerned.

[64] ECRE, *Comments on the Commission recast RCD proposal*, p. 9.

3. Employment (amended recast Article 15)

Giving asylum seekers the right to work within a reasonable time after having lodged an asylum application is in the interests of both asylum seekers and the country receiving their application. For asylum seekers the right to work is essential to avoid social exclusion and prolonged dependency on state-provided reception conditions. It is also essential in allowing them to become self-sufficient. Lack of access to the labour market during the initial period of their arrival in the host country seriously hinders their integration prospects in the long term. At the same time, the work experience they have gained during the asylum procedure may positively affect their reintegration in the country of origin upon return, thereby making it more sustainable. It is obviously also in the State's interest that asylum seekers engage in gainful employment as it reduces the cost of reception conditions for asylum and generates contributions to the fiscal system through labour taxation.[65] As asylum procedures last longer, the risk of social exclusion increases and access to the labour market becomes more important. A number of EU Member States already allow asylum seekers to work within a period of 6 months or less after they have applied for asylum.[66] Consequently, ECRE welcomes the fact that the principle according to which "applicants must have access to the labour market no later than 6 months following the date when the application for international protection was lodged" is maintained in amended recast Article 15(1).[67]

However, such a principle risks being seriously undermined in practice as a result of amended recast Article 15(1) subparagraph 2. This provision reintroduces the possibility for Member States to extend the period during which asylum seekers can be denied access to the labour market to one year in two situations referred to in Article 31(3) (b) and (c) of the amended Commission proposal recasting the Asylum Procedures Directive. The latter provision proposes to allow Member States to conclude a procedure under the Asylum Procedures Directive within maximum one year instead of maximum six months in a number of cases. These cases include the situation where the arrival of a large number of asylum seekers applying simultaneously for international protection makes conclusion of the procedure within six months impossible in practice and where "the delay can clearly be attributed to the failure of the applicant to comply with his/her obligations under Article 13". ECRE believes that establishing a link between the reasons for extending the time limit for concluding the asylum procedure and access to the labour market is counterproductive. For reasons explained above, it is in the interest of both States and asylum seekers that access to the labour market is made possible at the earliest possible stage. Extending the period during which asylum seekers cannot have access to the labour market increases the duration that they are dependent on state-provided reception conditions and is therefore more expensive, while work qualifications may become outdated etc.. Moreover, the conditions laid down in Article 31(3)(b) and (c) of the Commission proposal recasting the Asylum Procedures Directive are open to broad interpretation. This may result in some Member States denying asylum seekers access to the labour market for one year, and thus a status quo vis-à-vis the current directive, in a large number of cases. The amended Commission proposal recasting the Asylum Procedures Directive does not provide any further guidance as to what constitutes "a large number of third country nationals or stateless persons applying simultaneously" or "failure of the applicant to comply with his/her obligations under Article 13". As this is entirely left to the national authorities this may not only increase divergences between EU Member States as regards the duration of the procedure, but also as regards the access to the labour

[65] According to the Commission's impact assessment shortening time restrictions regarding employment would have insignificant impact on the national labour market. "According to available EU data in 2006 there were 216,525,000 economically active persons between 15 and 64 years old, of whom 198,226,000 were actually employed. Asylum applications in 2007 reached 227,000. Thus, assuming that requests for employment were made by all asylum seekers and that they all have in practice gained access to the labour market, their number would represent an increase of just 0.11% in the employed population and 0.10% in the economically active population. See SEC(2008) 2944, *Impact Assessment Reception Conditions Directive recast Proposal*, p.41.

[66] Greece allows immediate access to employment, Portugal after 20 days, Austria and Finland after 3 months, Sweden after 4 months and Italy after 6 months. See Commission, *Impact Assessment Reception Conditions Directive recast Proposal*, p. 16.

[67] The right to work is laid down in international human rights instruments such as Article 23 of the Universal Declaration of Human Rights, Article 6 of the International Covenant on Economic, Cultural and Social Rights and in Article 15(1) of the EU Charter of Fundamental Rights.

market. Moreover, postponing access to the labour market because more time is needed for processing the asylum application of the individual concerned would be for the wrong reasons and illogical.

ECRE recommends deleting amended recast Article 15(1) subparagraph 2 as it risks rendering the guarantee of access to the labour market no later than six months after the application for international protection was lodged, meaningless in practice.

Research has shown that conditions imposed in national legislation regarding asylum seekers' access to the labour market allowed under the Reception Conditions Directive often obstruct such access in practice.[68] While, according to amended recast Article 15(2), Member States can still decide to impose such conditions, they must now do so "while ensuring asylum seekers have effective access to the labour market". ECRE considers this to be an improvement as it provides a stronger guarantee against the inclusion of conditions in national legislation that in practice render access to the labour market for asylum seekers impossible. Contrary to the 2008 Commission recast RCD proposal it now imposes a positive obligation on Member States to ensure effective access to the labour market for asylum seekers.[69] If adopted, any condition for granting access to the labour market laid down in national legislation making such access impossible in practice would no longer be compatible with the recast Reception Conditions Directive. This would constitute an important step in the right direction and would remove an important obstacle to asylum seekers' access to the labour market in a number of EU Member States today. ECRE therefore fully supports amended recast Article 15(2).

ECRE recommends deleting amended recast Article 15(1) subparagraph 2 allowing Member States to postpone asylum seekers' access to the labour market up to one year because additional time is needed to process the asylum application for reasons that are outside the control of the asylum seeker or leave a wide margin of discretion to Member States.

ECRE supports the new wording in amended recast Article 15(2) imposing a positive obligation on Member States to decide the conditions for granting access to the labour market in accordance with their national law "while ensuring asylum seekers have effective access to the labour market".

4. General rules on and modalities for material reception conditions and health care (amended recast Articles 17 and 19)

Although the evaluation of the implementation of the Reception Conditions Directive showed deficiencies in relation to the level of material support Member States provide to asylum applicants,[70] the amended Commission recast RCD proposal no longer requires the total value of material reception conditions to be equivalent to the amount of social assistance granted to nationals. According to the Commission, this is because the European Parliament in its report deleted such a reference to equal treatment with nationals and a number of Member States in the Council had reservations with regard to such a principle.[71] Nevertheless, ECRE believes that this is at a minimum required as a benchmark at EU level.

[68] These include work permit requirements, limitations of the right to work to specific economic sectors and restrictions to the total amount of time per year asylum seekers are allowed to work. See ECRE, *The EC Directive on the Reception of Asylum Seekers: Are asylum seekers in Europe receiving material support and access to employment in accordance with European legislation?*, November 2005, p. 15 and Odysseus, *Comparative Overview of Implementation of Directive 2003/9/EC*, p. 70-71.

[69] Whereas Article 15(2) of the 2008 Commission recast RCD proposal only required such conditions for granting access to the labour market to be decided in accordance with their national legislation "without unduly restricting asylum seekers' access to the labour market".

[70] See COM(2007) 745 final, *Evaluation Report Reception Conditions Directive*, p. 5-6.

[71] Amended Commission recast RCD proposal, Explanatory Memorandum, p. 7.

While there continue to be wide divergences between Member States as to the level of such social welfare assistance allowances for nationals, it is at this moment the most workable tool to ensure that asylum seekers have at least access to the minimum amount of support that is required in the Member State concerned to ensure a dignified standard of living. It should be kept in mind that because of the lack of family, social networks and other informal kinds of support, material reception conditions equivalent to social welfare assistance granted to nationals may in practice still not be sufficient for asylum seekers to reach a dignified standard of living.

Amended recast Article 17(5) proposes a system according to which the amount of material reception conditions must be determined on the basis of points of reference established by each Member State in law or in practice to ensure adequate standards of living for nationals.[72] The minimum level of social welfare assistance is mentioned by way of example of such point of reference. As such this may be acceptable as in reality in all Member States the minimum level of social welfare assistance for nationals presents the minimum required to ensure an adequate standard of living. However, amended recast Article 17(5) also allows Member States to "grant less favourable treatment to asylum applicants compared to nationals in this respect, where it is duly justified". This may potentially lead to Member States granting unacceptably low levels of material reception conditions that may be well below what is an adequate standard of living as required under amended recast Article 17(1). The extent to which treatment may be less favourable compared to nationals is not qualified. As a result, this is a very weak and uncertain standard. This is in addition to flexibility allowed for Member States to use points of reference that are established not by law but by practice. Therefore, ECRE recommends deleting the last sentence of amended recast Article 17(5).

Amended recast Article 19(2) relating to the provision of medical or other assistance to applicants who have special reception needs, including appropriate health care where needed no longer requires such assistance to be provided "under the same conditions as nationals". ECRE regrets this deletion as it provided for a clear benchmark contributing to the objective of harmonisation as well as strengthening asylum seekers' access to health care in practice. In ECRE's view, asylum seekers should have access to health care under the same or similar conditions as nationals and therefore recommends reintroducing this benchmark in the amended recast Article 19(2).[73] Considering the extent to which mental disorders, such as depression, are common to asylum seekers both in open and closed centres, the explicit reference to Member States' obligation to ensure in particular appropriate mental health care is a welcome improvement of the current standard in the Reception Conditions Directive and should be maintained.

ECRE recommends deleting in amended recast Article 17(5) the following sentence: "Member States may grant less favourable treatment to asylum applicants compared to nationals in this respect, where it is duly justified".

ECRE recommends further modifying amended recast Article 19(2) by adding the words "under the same conditions as nationals".

5. Reduction or withdrawal of material reception conditions (amended recast Article 20)

Whereas the 2008 Commission recast RCD proposal only allowed Member States to completely withdraw material reception conditions when asylum seekers have their own means of support, amended recast Article 20(1) reintroduces the possibility for Member

[72] This only applies where member States provide material reception conditions in the form of financial allowances and vouchers. It should be noted that the possibility of providing material reception conditions in the form of vouchers is no longer explicitly mentioned as a result of the deletion of Article 13(5) Reception Conditions Directive.

[73] See ECRE, *ECRE Proposals for Revisions to the EC Directive on the Reception of Asylum Seekers*, May 2008, p. 13.

States to withdraw material reception conditions in all situations where this is allowed under the current directive. A duly motivated decision, based on the reasons for the disappearance, regarding the re-installation of the grant of some or all of the material reception conditions, must now be taken only in relation to the cases mentioned in amended recast Article 20(1) (a) and (b) when the asylum seeker is traced or voluntarily reports to the competent authority.[74] Furthermore, whereas the 2008 Commission recast RCD proposal added the crucial safeguard that Member States under all circumstances shall "ensure subsistence, access to emergency health care and essential treatment of illness or mental disorder", this is now limited in the amended Commission recast RCD proposal to an obligation to ensure access to health care in accordance with amended recast Article 19.

ECRE opposes the possibility for Member States to completely withdraw reception conditions except where it is shown that the asylum seeker concerned has sufficient means of support ensuring an adequate standard of living which guarantees his/her subsistence and protects his/her physical and mental health. The withdrawal or reduction of reception conditions below an adequate standard of living is not consistent with the requirements of human rights law. No one should be deprived of basic social assistance, foodstuffs, housing and health care and the best interests of the child should always be a primary consideration.[75] In the case of *M.S.S. v. Belgium and Greece* the European Court of Human Rights held that the fact that an asylum seeker had spent months in living in a state of extreme poverty, unable to cater for his most basic needs in combination with prolonged uncertainty and the total lack of any prospects of his situation improving amounted to a violation of Article 3 ECHR.[76] This was *inter alia* based on the fact that "the obligation to provide accommodation and decent material reception conditions to impoverished asylum seekers has now entered into positive law".[77] In view of the Court's general consideration that asylum seekers are members of "a particularly underprivileged and vulnerable population group in need of special protection",[78] EU legislation on reception conditions for asylum seekers should contain the necessary safeguards to prevent asylum seekers from falling into poverty.

ECRE had welcomed the amendments to Article 16 of the Reception Conditions Directive in the 2008 Commission recast RCD proposal as it guaranteed all asylum seekers at least access to minimum reception conditions, except where they have concealed financial resources. As mentioned above, access to material reception conditions during the asylum procedure is a key requirement in order to ensure that the examination of the asylum application is conducted in the best possible circumstances. Everyone, including an asylum seeker, has a right to access basic means of subsistence in accordance with international human rights law. Material reception conditions should not be withdrawn simply because the asylum seeker abandoned the place of residence without permission or has not complied with reporting duties in the asylum procedure. There may be good reasons why an asylum seeker left the place of residence for a short period or was unable to comply with reporting duties, such as where he or she has been in hospital.

The same applies to the situation where an asylum seeker has lodged a subsequent application. The growing number of such applications is a reason for concern in many EU Member States. However, in many cases subsequent applications are lodged because asylum seekers are convinced that their first application has not been examined fairly or thoroughly and because return is no option. From this perspective, the growing number of subsequent applications may well be an indication of failing asylum systems rather than "abuse" of asylum systems. In such cases, withdrawing material reception conditions or reducing them below the level of what is adequate to ensure subsistence, is incompatible with

[74] This merely clarifies the text of the current directive as in cases (c) and (d) of amended recast Article 20(1) the asylum seeker concerned has not disappeared and therefore no motivated decision on the re-installation of the grant of the material reception conditions is required.

[75] See ECRE, *Information Note on the Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers*, June 2003, p.7.

[76] See ECtHR, *M.S.S. v. Belgium and Greece*, par. 263.

[77] See ECtHR, *M.S.S. v. Belgium and Greece*, par. 250.

[78] See ECtHR, *M.S.S. v. Belgium and Greece*, par. 251.

Member States' obligations under international human rights law and the right to asylum as enshrined in Article 18 Charter of Fundamental Rights of the European Union.

ECRE therefore recommends that, at a minimum, the possibility to withdraw material reception conditions in amended recast Article 20(1), first sentence is deleted. The possibility to withdraw material reception conditions should be limited to the situation where an asylum seeker has concealed financial resources and has therefore unduly benefited from material reception conditions. A separate paragraph should be reintroduced to this end. Moreover, ECRE would also be in favour of reintroducing a specific reference to the need to ensure subsistence in case reception conditions are being reduced in order to ensure that asylum seekers are prevented from becoming destitute in all circumstances.[79] ECRE recommends modifying amended recast Article 20(4) accordingly.

ECRE recommends deleting the words "or withdraw" in amended recast Article 20(1) first sentence.

ECRE recommends deleting amended recast Article 20(1)(d) and introducing a new paragraph 2 reading: "Member States may reduce or withdraw material reception conditions where an applicant has concealed financial resources, and has therefore unduly benefited from material reception conditions".

ECRE recommends inserting the word "subsistence," in amended recast Article 20(4) to ensure that asylum seekers in all circumstances have access to the necessary material reception conditions to prevent them from becoming destitute.

6. Identification of special reception needs of vulnerable persons (amended recast Articles 22 and 24)

The amended Commission recast RCD proposal includes a conceptual change in the way the issue of vulnerable persons is addressed. Whereas in the 2008 Commission recast RCD proposal all vulnerable persons were automatically considered as persons with special needs, this is no longer the case in the amended Commission recast RCD proposal. Amended recast Article 21 now simply includes a non-exhaustive list of vulnerable persons whose specific situation Member States must take into account. The identification of the special reception needs of vulnerable persons is now dealt with in a new amended recast Article 22.

Identification of the special reception needs of vulnerable persons

Amended recast Article 22(1) imposes an obligation for Member States to establish "mechanisms" rather than "procedures" with a view to identifying whether an applicant is a vulnerable person and if so, if he or she has special needs and the nature of such needs. The approach taken in amended recast Article 22 does not substantially alter Member States' obligations with respect to vulnerable persons compared to the 2008 Commission recast RCD proposal,[80] except for the requirement that such mechanisms must be initiated "within a reasonable time after an application for international protection is made" instead of "as soon as an application for international protection is lodged".[81] The latter is regrettable as it

[79] In the case of Limbuela, the UK House of Lords came to the conclusion that in certain circumstances and depending on the conditions depriving asylum seekers from material reception conditions while not allowing them to work constituted inhuman and degrading treatment prohibited under Article 3 ECHR. House of Lords, *R (on the application of Limbuela, Tesema and Adam) v Secretary of State for the Home Department* [2005] UKHL 66, par. 78.

[80] Amended recast Article 21(1) now includes "persons with serious physical illnesses, mental illnesses, or post traumatic disorders" in the non-exhaustive list of vulnerable persons instead of the term "persons with mental health problems" used in the 2008 Commission recast RCD proposal but this merely further clarifies the latter term.

[81] See Article 21(2) 2008 Commission recast RCD proposal.

provides Member States with considerable flexibility as to when such identification process should start, whereas it is essential that special needs of vulnerable persons are identified as early as possible after their arrival. Delay in identification of their special needs can be detrimental for the vulnerable persons concerned as valuable time may be lost that may cause further and irreparable damage to their mental or physical health in the long term and is also detrimental to their protection needs. Postponing the start of the identification process may also undermine the efficiency and quality of the asylum procedure as determining authorities may not timely become aware of the asylum seeker's special needs that may have an impact on his or her ability to make consistent and coherent statements for instance. This could in particular be problematic where Member States make use of the possibility in the amended Commission proposal recasting the Asylum Procedures Directive to use the mechanism provided for in amended recast Article 22 to identify applicants in need of special procedural guarantees in due time.[82]

As it is in the interests of both States and applicants for international protection that special reception needs and the need for special procedural guarantees are identified at the earliest possible stage, ECRE recommends including in amended recast Article 22(1) the requirement that identification mechanisms must be initiated "as soon as an application for international protection is made".[83] ECRE welcomes the additional explicit guarantee in amended recast Article 22(1) that special needs must also be addressed in accordance with the Directive if they become apparent at a later stage. While a number of asylum seekers may become vulnerable with special needs in the course of the asylum procedure, for others their vulnerability and special needs may only become apparent at a later stage in the process. Sufficient flexibility is required to ensure that special reception needs and the need for special procedural guarantees can be addressed at all times.

ECRE recommends modifying amended recast Article 22(1) to read: "Those mechanisms shall be initiated as soon as an application for international protection is made".

Unaccompanied minors

Article 19(1) Reception Conditions Directive requires Member States to ensure the necessary representation of unaccompanied minors by legal guardianship, an organization which is responsible for the care and well being of minors or by any other appropriate representation. This leaves a wide margin of discretion to the Member States with regard to the actor representing the unaccompanied minor and mentions legal guardianship as one of three options for ensuring representation. Amended recast Article 24(1) proposes to modify this provision whereas this was left untouched in the 2008 Commission recast RCD proposal. Member States are now under an obligation to take measures as soon as possible to ensure "that a representative represents and assists the unaccompanied minor to enable him/her to benefit from the rights and comply with the obligations provided for in this Directive". As a result of the definition of a representative included in amended recast Article 2(j),[84] Member States have no other option than to provide representation through a system of legal guardianship. ECRE welcomes this as an important improvement that also corresponds to the

[82] See Article 24(1) amended Commission proposal recasting the Asylum Procedures Directive.

[83] As Article (6)(3) of the amended Commission proposal recasting the Asylum Procedures Directive ensures registration as an applicant for international protection as soon as possible and no later than 72 hours after a persons expressed the wish to make an application, identification mechanisms should be initiated as soon as an application is made and not as soon as it is "lodged" as the latter can take place at a later point in time.

[84] ""representative" means a person or an organization appointed by the competent bodies to act as a legal guardian in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the child's best interests and exercising legal capacity for the minor where necessary. Where an organization acts as a representative, it shall appoint a person responsible for carrying out the duties of the legal guardian in respect of the minor, in accordance with this Directive".

current situation in most EU Member States.[85] Although there may still be differences between EU Member States as to how legal guardianship is organized and whether it is available in practice or not,[86] in most EU Member States unaccompanied asylum-seeking children are entitled to a form of legal guardianship.[87] The new definition of "representative" in amended recast Article 2(j) and in Article 2(n) of the amended Commission proposal recasting the Asylum Procedures Directive also better acknowledges the different roles of representatives of unaccompanied children and lawyers or legal advisors in the asylum procedure. In ECRE's view, unaccompanied minors should always be entitled to legal assistance and representation in addition to legal guardianship, in light of their particular vulnerability and the growing complexity of asylum procedures.

However, ECRE is concerned that the amended Commission recast RCD proposal maintains the possibility for Member States to place unaccompanied children in accommodation centres for adults. Accommodation centres for adults may not be the appropriate environment for an unaccompanied child, even if above 16, in particular if staff of the accommodation centre lacks child-specific training. Therefore, ECRE welcomes the added requirement in amended recast Article 24 (2) that Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers "if it is in their best interest, as prescribed in Article 23(2)". Although this is already an important improvement of current Article 19(2) Reception Conditions Directive, ECRE would welcome a further amendment to this provision clarifying that Member States may only make use of such possibility "as a last resort" and "only" if it is in their best interests".

Amended recast Article 24(3) on family tracing is only slightly amended as it requires "mechanisms" for such tracing instead of "procedures"; no longer explicitly requires such mechanisms to be laid down in national legislation; and adds that "where necessary" this is done "with the assistance of international or other relevant organisations". None of these changes to the 2008 Commission recast RCD proposal substantially alters the meaning of the Member States' obligations with regard to tracing family members, although ECRE would welcome an explicit requirement that tracing mechanisms be stipulated in national legislation to enhance legal certainty. As most EU Member States have a system for family tracing in place,[88] such a reference would only consolidate existing practice in EU legislation.

The importance of the specific requirement in amended recast Article 24(3) that tracing family members of an unaccompanied minor takes place "whilst protecting his/her best interests" has been illustrated again by recent research showing that this is often a sensitive and emotionally charged process and may result in traumatizing experiences, for instance if the unaccompanied child learns that the family member is dead.[89] As amended recast Article 23(2) provides more specific indications of the factors that need to be taken into account when assessing the best interests of the child, amended recast Article 24(3) could be further clarified by explicitly referring to his/her best interests, as prescribed by amended recast Article 23(2).

[85] For an overview of the situation in 22 EU Member States see European Migration Network, *Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors - an EU comparative study* (hereinafter Comparative Study Unaccompanied Minors), May 2010, pp. 53-57.

[86] One of the remarkable findings of recent comparative research on the situation of separated asylum-seeking children in the EU is that most children interviewed did not know whether they had a guardian, or who it was or what the responsibilities of a guardian are. See Fundamental Rights Agency, *Separated, asylum-seeking children in European Union Member States. Comparative report* (hereinafter Comparative Report Separated asylum§seeking children) , 2011, pp. 49-52.

[87] See Odysseus, *Comparative Overview of Implementation of Directive 2003/9/EC*, p. 82.

[88] See European Migration Network, *Comparative Study Unaccompanied Minors*, p. 86.

[89] See Fundamental Rights Agency, *Comparative Report Separated, asylum-seeking children,* pp.56-60.

ECRE recommends further modifying amended recast Article 24(2) as follows: "Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers *only as a measure of last resort and* if it is in their best interests, as prescribed by Article 23(2)".

ECRE recommends further modifying amended recast Article 24(3) as follows: "Member States shall establish mechanisms *in national legislation* for tracing the family members of an unaccompanied minor" and "…whilst protecting his/her best interests, as prescribed in Article 23(2).

7. Appeals (amended recast Article 26)

In order to ensure consistency with the modified provisions in the amended Commission proposal recasting the Asylum Procedures Directive relating to the right to free legal assistance and representation, amended recast Article 26(2) now explicitly guarantees access to free legal assistance and representation with regard to appeals against decisions relating to the granting, withdrawal or reduction of benefits under the Reception Conditions Directive. ECRE welcomes the explicit guarantee of access to legal assistance and representation free of charge where asylum seekers cannot afford the costs involved and insofar as this is necessary to ensure their effective access to justice.[90] Appeals concerning such decisions are often dealt with in complex procedures making effective access to legal assistance and representation indispensable to fully preserve asylum seekers' fundamental rights.

8. Guidance, monitoring and control system (amended recast Article 28 and Annex I)

Amended recast Article 28 modifies Member States' obligation to provide information on the implementation of the recast Reception Conditions Directive compared to the 2008 Commission recast RCD proposal in two ways. First, Member States are no longer required to submit the reporting form in Annex I to the Commission on an annual basis. This is now replaced with an obligation to submit the form by 1 year after the transposition deadline at the latest and to resubmit the form when there is a "substantial change in national law or practice that outdates the provided information". Secondly, Member States' reporting obligations are reduced compared to the 2008 Commission recast RCD proposal. Member States are no longer required to submit information on the total number of asylum seekers who have access to the labour market and who are currently employed nor statistical data on the number of asylum seekers, including those with special reception needs.

ECRE believes it is important to include a proper monitoring and control mechanism in the recast Reception Conditions Directive, in particular in light of the considerable degree of flexibility for Member States that is maintained in the amended Commission recast RCD proposal as well as the enormous differences in standards between EU Member States in practice. ECRE considers the obligation on Member States to only resubmit changes in the national laws or practice that outdates the initially provided information reasonable. Information on the practice is essential as this constantly evolving and should also include an opportunity for specialised NGOs assisting asylum seekers to submit their assessment of substantial changes in law and practice.

[90] However, this should be read together with ECRE's critical analysis of certain aspects of the corresponding provisions in the amended Commission proposal recasting the Asylum Procedures Directive, in particular with regard to the possibility of government officials or specialised services of the State providing such assistance. Those observations apply *mutatis mutandis* with respect to amended recast Article 26(2). See ECRE, *Comments on the amended Commission proposal recasting the Asylum Procedures Directive*, p. 19-23.

However, ECRE believes that there is added value in the mandatory provision of detailed statistical information on asylum seekers with special reception needs broken down by category as well as on asylum seekers' access to the labour market as was required under the 2008 Commission recast RCD proposal. This would help to improve the quality of statistical data on asylum seekers in the EU and contribute to a better understanding of the challenges with regard to the reception of asylum seekers at EU level. Member States are not required to submit such information under Regulation (EC) No 862/2007 on Community statistics on migration and international protection.[91] In order to be meaningful, the statistical data should be provided on a yearly basis. This should be distinguished from the other information requested in Annex I that should be re-submitted to the Commission when there is a substantial change in national law and practice as mentioned above.

ECRE recommends adding an obligation for Member States in Annex I to provide statistical data on an annual basis on the number of asylum seekers with special reception needs identified broken down by the groups of vulnerable persons mentioned in amended recast Article 21(1) as well as on asylum seekers' access to the labour market.

Conclusion

A CEAS based on high standards of protection must include a sufficiently high level of reception conditions for asylum seekers. Extensive research on the implementation of the Reception Conditions Directive has shown the need for substantial revision and improvement of the standards laid down in the Directive. Nevertheless, the amended Commission recast RCD proposal generally lowers the ambition as regards the level of reception conditions guaranteed under the recast directive compared to the 2008 Commission recast RCD proposal. In this document, a number of concrete recommendations have been made to improve the amended Commission recast RCD proposal and ensure an adequate level of reception conditions for asylum seekers across the EU. ECRE calls on the European Parliament, the Council and the Commission to amend the Reception Conditions Directive in a way that addresses the gaps identified with regard to the reception of asylum seekers in EU Member States today.

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[91] See Regulation (EC) No 862/2077 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers, *OJ* 2007 L 199/23.