



**COMMENTS FROM THE EUROPEAN COUNCIL ON
REFUGEES AND EXILES**

on the

**European Commission Proposal to recast the
Reception Conditions Directive**

April 2009

1. Introduction

The European Council on Refugees and Exiles (ECRE), a network of 70 refugee-assisting organisations in 30 European countries, welcomes the opportunity to convey, not only to the European Commission, but particularly to the governments of the Member States and to the European Parliament, its views on the Commission proposal for a recast of the Directive laying down minimum standards for the reception of asylum seekers (hereafter the Directive).¹

ECRE has repeatedly stressed that adequate reception standards are necessary to prepare applicants for both possible results of the asylum procedure, namely return or integration, as well as a prerequisite for due process of law and a fair and efficient procedure.² Many asylum seekers are confronted with lengthy asylum determination procedures, during which they often live cut off from society in difficult circumstances with little to do. Clearly, this situation has a negative impact on refugees' physical and psychological health and integration prospects, leaving them demoralised by the time they are required to fully participate in society and unprepared for return when their applications are rejected or when they want to repatriate voluntarily. Moreover, by ensuring the independence and personal dignity of asylum seekers, adequate reception conditions also contribute to equip them both mentally and physically to deal with the asylum interview process.

In 2003 ECRE welcomed the adoption of European Union (EU) minimum standards on reception, whilst expressing concern about the wide discretion left to Member States by the Directive.³ The European Commission has subsequently recognised that disparate national interpretations undermine "the objective of creating a level playing field in the area of reception conditions."⁴ The Odysseus comparative implementation overview,⁵ as well as other relevant studies,⁶ have identified a number of highly problematic areas in the application of the Directive, including restricted access to employment and health care, insufficient provision of material reception conditions, denial of reception conditions to detained asylum seekers and lack of identification and appropriate treatment of persons with special

¹ European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers*, COM (2008) 815 final/2, 9.12.2008 ('Proposal for a Recast Directive'), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0815:FIN:EN:PDF>. When adopted, the recast will repeal Council Directive 2003/9/EC of 27 January 2003, OJ L 32, 6.2. 2003, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF>

² See ECRE, *Position on the Reception of Asylum Seekers*, November 2001 ('Position on Reception'), available at: http://www.ecre.org/files/ECRE_Reception_Position_2001.pdf; *The Way Forward - Europe's Role in the Global Refugee Protection System: Towards the Integration of Refugees in Europe*, July 2005 ('Way Forward Integration'), available at: <http://www.ecre.org/files/Integ.pdf>; For further information on ECRE's position on reception, please go to: http://www.ecre.org/topics/asylum_in_EU/reception

³ 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 ('Information Note Reception Conditions Directive'), available at: <http://www.ecre.org/files/infonote.pdf>

⁴ European Commission, *Report on the application of the Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, COM (2007) 745 final, 26.11.2007 ('Application Report'), p. 10, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0745:FIN:EN:PDF>

⁵ Odysseus Academic Network, *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*, October 2006 ('Implementation Overview'), available at: http://ec.europa.eu/justice_home/doc_centre/asylum/studies/doc_asylum_studies_en.htm

⁶ See for example 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 ('Reception Report'), available at: http://www.ecre.org/files/Reception%20Report_FINAL_Feb06.doc; European Parliament, Policy Department Citizens' Rights and Constitutional Affairs, *Asylum in European Union Member States: Reception of Asylum Seekers and Examination of Asylum Applications*, PE 365.968, November 2005 ("Reception of Asylum Seekers and Examination of Asylum Applications"; European Parliament, Policy Department Citizens' Rights and Constitutional Affairs, *The Conditions in Centres for Third Country Nationals (Detention Camps, Open Centres as well as Transit Centres and Transit Zones) with a Particular Focus on Provisions and Facilities for Persons with Special Needs in the 25 EU Member States*, PE 293.275, December 2007, both available at the European Parliament studies website: <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>; Pro Asyl, *Information and Cooperation Forum: Final Report*, 28 February 2006.

needs. The experience of ECRE's member agencies confirms these conclusions. Building on this body of evidence substantiating implementation failures, in May 2008 ECRE recommended several amendments to the Directive with a view to promoting further approximation in reception conditions on the basis of higher standards.⁷

2. Summary of views

The European Commission put forward a proposal recasting the Reception Conditions Directive in December 2009.⁸ The main objective of this recast is "to ensure higher standards of treatment for asylum seekers with regard to reception conditions that would guarantee a dignified standard of living, in line with international law."⁹ ECRE fully supports this aim and welcomes many of the amendments proposed by the Commission, which reflect a number of our key recommendations. In particular, ECRE notes the following positive elements in the European Commission proposal and calls on the European Parliament and the Member States to uphold them during the negotiations:

- The clarification that the Directive applies to all types of procedures and in all locations where asylum seekers are housed or held (recast recital 8 and Article 3).
- The extension of the scope of application to cover applicants for subsidiary protection (recast Article 3).
- The provision that asylum seekers may only be detained when it is necessary, on the basis of an individual assessment of each case (recast Article 8.2).
- The requirement that decisions to detain be judicial or, in urgent cases, when an administrative decision is necessary, that there is judicial confirmation of the detention order within 72 hours (recast Article 9.2).
- The obligation for Member States to guarantee access to free legal assistance to detained asylum seekers when they lack sufficient means (recast Article 9.6).
- The prohibition to detain asylum seekers in prison accommodation (recast Article 10.1).
- The prohibition to detain accompanied children unless it is in their best interest and unaccompanied children in all circumstances (recast Article 11.1).
- The obligation for Member States to grant access to employment to asylum seekers within 6 months from the moment an asylum claim is lodged (recast Article 15.1).
- The provision that the value of material reception conditions granted to asylum seekers should be equivalent to the level of social assistance granted to nationals in need of such support (recast Article 17.5).
- The guarantee of medical treatment, including access to mental health care, to asylum seekers with special needs in the same conditions as nationals (recast Article 19.2).
- The limitation of the possibility to withdraw material reception conditions to those cases where applicants have sufficient resources (recast Article 20).
- The obligation for Member States to put in place mechanisms for the identification of persons with special needs immediately after an asylum application is lodged (recast Article 21.2).
- The enhanced guarantees for children, including the definition of minors as persons below the age of 18 (recast Article 2 (e)); the provision for preparatory classes to facilitate access to the education system (recast Article 14.2); the elaboration on the best interest principle (recast Article 22); and the obligation of Member States to establish procedures for family-tracing (recast Article 23.3).
- The enhanced safeguards for victims of torture and violence concerning their access to rehabilitation services and the training of staff working with them (recast Article 24).
- The obligation of Member States to guarantee access to free legal assistance to asylum seekers who want to lodge an appeal against decisions relating to the granting, withdrawal or reduction of benefits under the Directive or decisions relating to the freedom of movement (recast Article 25.2).
- The obligation for Member States to put in place mechanisms for the guidance, control and monitoring of the level of reception conditions and the provision for extended reporting obligations (recast Article 27 and Annex I)

⁷ ECRE, *ECRE Proposals for Revisions to the EC Directive on the Reception of Asylum Seekers*, May 2008, ('Proposals for Revisions to the Directive') available at: http://www.ecre.org/files/ECRE_Reception%20Directive_May08.pdf

⁸ Proposal for a Recast Directive, see note 1 above.

⁹ *Ibid*, p. 4.

However, ECRE notes with concern the following provisions of the Commission proposal:

- The remaining ambiguity concerning the application of the Directive to asylum seekers subject to a procedure for determining which Member State is responsible for examining their application, which undermines the clarification of the scope (recast Article 3).
- The broad definition of the grounds for detaining asylum seekers, which is at odds with the principle that detention should be exceptional and only used when necessary (recast Article 8.2)
- The ability of Member States to set exceptional modalities for material reception conditions when the asylum seeker is in detention or confined to border posts (recast Article 18.8 (c)).

What follows is an analysis of the key provisions of the European Commission proposal recasting the Directive, accompanied with recommendations to the European Parliament and the Council for changes in a number of Articles

3. Specific Comments and Recommendations

Article 2 (c) - Definition of family members

Recast Article 2 (c) amends the definition of family members extending it to include married minor children, when it is in their best interest to reside with the applicant (sub-paragraph (iii)); the parents or guardian of the asylum seeker when he is a minor, including when he is married if it is in his best interest to reside with his parents or guardian (sub-paragraphs (iv)); the minor siblings of the applicant, including when they are married if it is in their best interest to reside together (sub-paragraph (v)). ECRE welcomes the proposed extension, but regrets that the definition of family members is still limited “in so far as the family already existed in the country or origin”. This fails to accommodate family ties which may have been formed during the flight, thus excluding them from the guarantees laid down in the Directive for example with regard to the maintenance of family unity.

- ECRE recommends deleting the wording “in so far as the family already existed in the country of origin” from recast Article 2 (c).

Article 3 - Scope of application

ECRE supports the proposed extension of the scope of the Directive to cover applicants for subsidiary protection (recast Article 3). There is no objective justification as for why these applicants’ needs in terms of reception conditions should be different than for persons claiming refugee status under the Refugee Convention.¹⁰

Recital 8 of the proposed recast clarifies that the Directive applies “during all stages and types of procedures concerning applications for international protection and in all locations and facilities hosting asylum seekers”, an amendment which ECRE welcomes. The Odysseus report revealed problems of non-implementation at certain stages of the asylum process and specific locations, for example at the beginning of the procedure or in detention centres.¹¹ Importantly, the report attributed Member States’ restrictive interpretations of the applicability of the Directive as regards detained asylum seekers to the ambiguity of the text in this crucial point.¹²

However, ECRE notes with concern that recast Article 3 still provides that the Directive applies to asylum seekers only “as long as they are allowed to remain in the territory”. ECRE believes that this wording again risks leading to confusion, especially concerning persons whose asylum applications are considered to be the responsibility of another Member State under Dublin Regulation.¹³ ECRE

¹⁰ The 1951 Convention relating to the status of refugees, available at: http://www.unhcr.ch/html/menu3/b/o_c_ref.htm

¹¹ Odysseus Academic Network, *Implementation Overview*, pp. 9 and 94, see note 5 above.

¹² *Ibid.*, p. 9.

¹³ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 of 25 February 2003, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0343:EN:HTML>

reaffirms that these persons should receive the necessary assistance while the (often lengthy) procedures to transfer them from one Member State to another are underway.¹⁴

- ECRE suggests deleting the wording “as long as they are allowed to remain on the territory as asylum seekers” from recast Article 3.

Article 5 - Information

Under current Article 5, Member States have the duty to inform asylum applicants within fifteen days of their benefits/obligations with regard to reception conditions and the organisations able to provide them with legal assistance and further information on reception conditions “in a language that the applicants may reasonably be supposed to understand”. The European Commission proposal amends the wording of Article 5 to read “in a language that the applicants *are* reasonably supposed to understand” (recast Article 5.2).

The Odysseus implementation overview revealed that in the absence of a written translation to the language of the asylum seeker most Member States foresee the provision of information orally by an interpreter.¹⁵ However, the resolution adopted by the European Parliament on the basis of the visits conducted by delegations of the LIBE Committee to reception and detention centres in several Member States expressed concern about the frequent lack of adequately trained interpreters.¹⁶ ECRE has consistently argued that it is essential that information is communicated to asylum applicants in a language that they understand,¹⁷ and therefore believes that the amendment proposed by the European Commission constitutes an insufficient improvement to the present text.

- ECRE recommends amending recast Article 5.2 to read: “Member States shall ensure that the information referred to in paragraph 1 is in writing and in a language that the applicants *understand*.”

Article 7 - Residence and freedom of movement

The proposed recast addresses freedom of movement separately from the issue of detention.¹⁸ For this reason, the European Commission has suggested deleting current article 7.3 allowing Member States to detain asylum seekers “When it proves necessary, for example for legal reasons or reasons of public order”. However, under recast Article 7 Member States may still significantly restrict asylum seekers’ freedom of movement by obliging them to reside in a specific area of their territories (paragraph 1); and imposing residence obligations on asylum seekers for reasons of public order or interest, or when necessary for the swift processing of their applications (paragraph 2). Furthermore, Member States may make reception assistance conditional to the residence of applicants in a specific place (paragraph 3).

ECRE regrets that the Commission has not taken this opportunity to propose that asylum seekers’ right to freedom of movement is guaranteed for the whole territory of the Member State responsible for examining the asylum application. In practice, restrictions such as the ones outlined in this article have hindered asylum seekers’ access to other entitlements laid down in the Directive, such as the right to employment or education.¹⁹ The Odysseus implementation overview also concluded that, although

¹⁴ ECRE, *Information Note Reception Conditions Directive*, p. 3, see note 3 above.

¹⁵ Odysseus Academic Network, *Implementation Overview*, October 2006, p. 39, see note 5 above.

¹⁶ European Parliament, *Resolution on the implementation in the European Union of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers and refugees: visits by the Committee on Civil Liberties 2005-2008*, P6_TA(2009)0047, 5 February 2009 (‘Resolution on the Implementation of the Directive’), paragraph 16, available at: <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=A6-0024/2009>

¹⁷ ECRE, *Position on Reception*, paragraphs 20-24, see note 2 above; *Information Note Reception Conditions Directive*, pp. 3-4, see note 3 above.

¹⁸ European Commission, *Annex to the proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers*, COM (2008) 815 final (‘Detailed Explanation of the Proposal’), p. 2, available at: [http://www.ulb.ac.be/assoc/odysseus/CEAS/COM\(2008\)815%20bis.doc](http://www.ulb.ac.be/assoc/odysseus/CEAS/COM(2008)815%20bis.doc)

¹⁹ See e.g. Pro Asyl, *Information and Cooperation Forum: Final Report*, 28 February 2006, p. 13.

compatible with EU law, it was of concern that several Member States limited or refused access to reception conditions to asylum seekers who declined to live in reception centres in favour of independent accommodation, as this undermined the autonomy of the persons concerned.²⁰

- ECRE recommends deleting Article 7.1 of the proposed recast.
- Regarding a possible decision making reception assistance subject to residence in a specific place, ECRE proposes adding the following sentence to Article 7.3: “It [such decision] shall not deprive asylum seekers who choose to reside in private accommodation from reception conditions”.

Article 8 - Detention

The European Commission report on the application of the Directive concluded that asylum seekers were detained in the Member States on numerous grounds, including irregular entry.²¹ The proposed recast aims to ensure that detention “should normally be avoided and used only in exceptional cases”,²² an objective that ECRE fully supports. As a general rule, persons claiming protection should not be detained.²³ Asylum seekers may have suffered imprisonment or torture in the countries from which they have fled and detention can thus inflict severe physical and psychological distress on them and even amount to inhuman and degrading treatment.

Amended Article 8.2 lays down that detention can only be used “When it proves necessary and on the basis of an individual assessment of each case ... if other less coercive measures cannot be applied effectively”. ECRE welcomes this amendment and stresses that respect for the principle of necessity of detention is paramount, in line with international human rights standards. Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which regulates the liberty and security of the person, states that “No one shall be subjected to arbitrary arrest or detention”. The protection afforded by this provision applies to all deprivations of liberty, including immigration control.²⁴ The jurisprudence of the Human Rights Committee has clearly established that detention “could be considered arbitrary if it is not necessary in all the circumstances of the case”.²⁵ Conclusion No. 44 (XXXVII) of UNHCR’s Executive Committee, the UNHCR Detention Guidelines and the Council of Europe Committee of Ministers Recommendations on Detention, all unequivocally refer to the necessity requirement.²⁶

²⁰ Odysseus Academic Network, *Implementation Overview*, pp. 8 and 47-8, see note 5 above.

²¹ European Commission, *Application Report*, p. 7, see note 4 above.

²² European Commission, *Detailed Explanation of the Proposal*, p. 2, see note 18 above.

²³ ECRE, *Position Paper on the Detention of Asylum Seekers*, April 1996, available at: <http://www.ecre.org/files/detain.pdf>; See ECRE, *The Way Forward - Europe’s role in the global refugee protection system: Towards Fair and Efficient Asylum Systems in Europe*, September 2005 (‘Way Forward – Asylum Systems’), pp. 41, available at: <http://www.ecre.org/files/ECRE%20WF%20Systems%20Sept05.pdf>

²⁴ Human Rights Committee, *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Person)*, 30 June 1982, paragraph 1, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument)

²⁵ Human Rights Committee, *A. v. Australia*, Communication No 560/1993: Australia. 30/04/97. CCPR/C/59/D/560/1993, paragraph 9.2. This approach was reaffirmed in Human Rights Committee, *C. v. Australia*, Communication No 900/1999: Australia, 13/11/2002, CCPR/C/76/D/900/1999, paragraph 8.2; *Jalloh v. The Netherlands*, Communication No. 794/1998: The Netherlands, 15/04/2002, CCPR/C/74/D/794/1998, paragraph 8.2.

²⁶ See UNHCR, *Detention of Refugees and Asylum-Seekers*, No. 44 (XXXVII), 13 October 1986, paragraph (b), available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>; UNHCR, *UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999 (‘Detention Guidelines’), p.1, available at: <http://www.unhcr.org/refworld/pdfid/3c2b3f844.pdf>; Council of Europe: Committee of Ministers, *Recommendation Rec(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers*, 16 April 2003 (‘Recommendations on Detention’), paragraph 4, available at: <https://wcd.coe.int/ViewDoc.jsp?id=2121&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>

However, the principle that asylum seekers should be detained only exceptionally and when strictly necessary would be undermined if the grounds for detention are broadly defined. Recast Article 8.2 codifies a number of grounds for the detention of asylum seekers, which are partially based on the UNHCR Detention Guidelines and on the Council of Europe Committee of Ministers Recommendations on Detention. In ECRE's view, sub-paragraphs (b) and (c) can be interpreted very widely and thus may justify the systematic detention of asylum seekers. Their ambiguity may also risk violating Article 5 of the European Convention on Human Rights (ECHR), which requires that laws on detention be formulated with "sufficient precision".

Ground (b) allows for the detention of an asylum seeker "in order to determine the elements on which his application for asylum is based which in other circumstances could be lost". Without further interpretation, this provision could cover a potentially large number of asylum applicants in the EU and justify detention for the whole duration of the asylum procedure. Yet, the UNHCR Detention Guidelines make clear that in this case detention cannot extend to a determination of the merits of the asylum claim, being only permissible "for the purposes of a preliminary interview".²⁷ ECRE suggests adding a reference to this effect, in order to ensure that detention on the basis of ground (b) is not prolonged beyond the initial stage of the asylum procedure.

Under ground (c) of the proposed recast, Member States may detain asylum seekers "in the context of a procedure, to decide on his right to enter the territory". ECRE believes that this would amount to a penalty within the meaning of Article 31 of the Refugee Convention.²⁸ Moreover, this approach sits uncomfortably with the principle that asylum seekers who have duly presented a claim for international protection should be *ipso facto* considered lawfully within the territory for the purposes of Article 12 ICCPR (freedom of movement).²⁹ Such an approach is also reflected in EU asylum law, which in the Asylum Procedures Directive provides asylum seekers with a right to remain in a Member State during the status determination procedure.³⁰ Consistently with this notion, the Returns Directive also states that an applicant "should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right to stay as asylum seeker has entered into force".³¹ ECRE thus recommends deleting sub-paragraph (c) from recast Article 8.2.

- ECRE suggests amending recast Article 8.2 sub-paragraph (b) to read as follows: "*within the context of a preliminary interview*, in order to determine the elements on which his application for asylum is based which in other circumstances could be lost".
- ECRE also recommends deleting article 8.2 sub-paragraph (c) in order to ensure that asylum seekers are detained only in exceptional cases.

Article 9 - Guarantees for detained asylum seekers

Recast Article 9.2 requires that decisions to detain asylum seekers be judicial, and, in urgent cases, where administrative detention is required, that there is judicial confirmation of a decision to detain

²⁷ UNHCR, *Detention Guidelines*, p. 4, see note 26 above.

²⁸ Article 31.1 of the 1951 Refugee Convention provides that: 'The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence' (see note 10 above).

²⁹ Crucially, when addressing their obligations under this article with regard to the Human Rights Committee, states regularly set out the relevant national law and practice relating to asylum seekers. See for example the German Government's 5th Periodic Report to the Human Rights Committee, CCPR/C/DEU/2002/5, 4 December 2002, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.DEU.2002.5.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.DEU.2002.5.En?Opendocument)

³⁰ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005, Article 7.1, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>

³¹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, recital 9, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF>

within 72 hours. It also establishes that if the judicial authority does not reach a decision within that time frame or if it rules that detention is unlawful, the person concerned should be released immediately. ECRE welcomes this amendment, as judicial scrutiny is crucial in order to ensure the necessary degree of independence and objectivity in decisions related to deprivation of liberty.

According to Article 9.3 of the proposed recast, the detention order “shall specify the maximum period of detention”. ECRE understands that any decision on the length of detention should be adopted in accordance with the principle laid down in paragraph 1 of this Article, namely that detention should be ordered for the shortest period possible. It is essential that judges and administrative authorities refrain from automatically imposing the maximum time limit laid down in national legislation when issuing detention orders.

ECRE also notes that the wording used in recast Article 9.4 to describe the language in which decisions relative to detention are communicated to asylum seekers (“a language they are reasonably supposed to understand”) should be brought fully into line with Article 5 of the European Convention on Human Rights (ECHR), which requires that information be provided to a detained person “in a language which he understands”.

Recast Article 9.5 establishes that “continued detention shall be reviewed by a judicial authority at reasonable intervals of time either on request by the asylum seeker concerned or *ex officio*”. As the recast Directive does not define the term “continued detention”, ECRE is concerned that its inclusion in this Article risks creating ambiguity and restricting periodic judicial review to cases considered as falling under the category of “continued detention”. Furthermore, ECRE believes that the recast Directive should guarantee that the regular judicial review of detention takes place *ex officio*, although allowing asylum seekers to challenge their detention in line with Article 5.4 ECHR whenever their circumstances change or new elements support their release. ECRE also understands that the reviewing judicial authority would be competent to determine not only the lawfulness of the decision to detain, but also its necessity.

In its resolution on the implementation of the Directive, the European Parliament regretted that access to free legal aid for asylum seekers is limited “and amounts sometimes to no more than a list of lawyers’ names, resulting in people without sufficient funds being left without assistance”.³² Yet, the provision of qualified legal advice is an essential safeguard in the asylum process and an integral element of the right to an effective remedy, as provided in Article 47 of the EU Charter of Fundamental Rights.³³ ECRE thus welcomes Article 9.6 laying down an obligation for Member States to ensure access to free legal assistance and/or representation for detained asylum seekers.

- ECRE supports recast Article 9.2 requiring that decisions to detain be judicial, and, in urgent cases, where administrative detention is required, that there is judicial confirmation of a detention order within 72 hours.
- ECRE suggests amending Article 9.5 to read: “Detention shall be reviewed by a judicial authority at reasonable intervals of time *ex officio and on request by the asylum seeker whenever the circumstances change and/or new elements support his or her release.*”
- ECRE supports recast Article 9.6 providing that Member States should ensure access to legal assistance and/or representation for detained asylum seekers and that this should be free of charge when the asylum seeker lacks sufficient resources.

Article 10- Conditions of detention

ECRE supports recast Article 10.1 prohibiting the detention of asylum seekers in prison accommodation and specifying that deprivation of liberty should only take place in specialised facilities. The reports of the LIBE Committee delegations on their visits to several Member States revealed that in a number of countries asylum seekers were detained under prison conditions.³⁴ In

³² European Parliament, *Resolution on the Implementation of the Directive*, paragraph 18.

³³ See ECRE, *Way Forward - Asylum Systems*, pp. 44-5, see note 23 above.

³⁴ European Parliament, *Resolution on the Implementation of the Directive*, paragraph 33. See also European Parliament, *Report from the Committee on Civil Liberties delegation on the visit to the Temporary Holding Centre*

ECRE's view, this contributes to the stigmatisation of asylum seekers and reinforces the growing tendency in public opinion to fuse together immigration and asylum with security issues. In addition, it is clearly unacceptable to detain in the same facilities two groups of people whose situation and needs differ so widely. In this regard, ECRE notes that the European Court on Human Rights reaffirmed in *Saadi v United Kingdom* that, for detention not to be arbitrary, the place and conditions on detention should be appropriate, taking into account that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country".³⁵

ECRE also welcomes that the proposed recast guarantees the possibility for asylum seekers to establish contact with and receive visits from legal advisors and family members, and provides for the physical access to detention facilities of UNHCR, relevant international organisations and NGOs (recast Article 10.2).

- ECRE supports recast Article 10 prohibiting detention of asylum seekers in prisons and providing for visitation rights and the physical access of NGOs and UNHCR to detention centres.

Article 11 - Detention of vulnerable groups and persons with special needs

ECRE welcomes the proposed amendment prohibiting the detention of unaccompanied children and stating the primacy of the child's best interest as regards the detention of accompanied children (recast Article 11.1). Recast Article 22.2 further elaborates on the best-interest principle by drawing a non-exhaustive list of factors that Member States should take into account when doing an assessment to this effect: (a) family reunification possibilities; (b) the child's well-being and social development; (c) safety and security considerations; (d) the child's views in accordance with his/her age and maturity. Such specification constitutes an additional safeguard that ECRE fully supports.

Recast Article 10.4 requires Member States to accommodate female asylum seekers separately from male applicants, "unless these are family members and all concerned individuals consent thereto". ECRE welcomes this amendment and understands that this safeguard is applicable to all female asylum seekers, not only to those who fall under the category of "persons with special needs". In order to ensure that this is actually the case, ECRE would welcome the inclusion of this provision under Article 10 dealing with conditions of detention in general.

The European Commission has also proposed to rule out the detention of persons with special needs "unless an individual examination of their situation by a qualified professional certifies that their health, including their mental health, and well-being, will not significantly deteriorate as a result of the detention" (Article 11.5). As well as children, vulnerable persons include "disabled people, elderly people, pregnant women, single parents with minor children, victims of trafficking, persons with mental health problems and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence" (recast Article 21.1). It is difficult to see how the special needs of these asylum seekers could possibly be met in detention and therefore it is ECRE's view that in general vulnerable persons should never be detained. ECRE welcomes the safeguard included in recast Article 11.5 and stresses that the individual examination to which it refers should be carried out by professionals whose independence is beyond doubt, in order to ensure that the strongest guarantees are in place in these cases.

- ECRE supports the absolute prohibition of detention of unaccompanied minors and the provision that accompanied minors should only be detained if it is in their best interest, in accordance with recast Article 11.1.

(*THC in Lampedusa (IT)*, 19 September 2005; *Report on the LIBE committee delegation visit to Paris (FR)*, 22 March 2006; *Report by the LIBE Committee delegation on its visit to the administrative detention centres in Malta*, 30 March 2006; *Report from the LIBE Committee Delegation on the Visit to Greece (Samos and Athens)*, 17 July 2007, all available at: <http://www.europarl.europa.eu/activities/committees/publicationsCom.do?language=EN&body=LIBE>

³⁵ European Court of Human Rights, *Saadi v United Kingdom*, Judgment of 11 July 2006, App. No.1329/03, paragraph 74. In making this assertion, the Court was drawing on its ruling on *Amuur v. France*, Judgment of 25 June 1996, Appl. No. 19776/92, paragraph 43.

- ECRE recommends referring to the provision of separate accommodation for women under Article 10 on conditions of detention, to ensure that all female asylum seekers can benefit from this safeguard.
- ECRE supports Article 11. 5 enshrining a presumption against detention in the case of asylum seekers with special needs. In order to strengthen this safeguard, ECRE recommends amending this provision as follows: “Persons with special needs shall not be detained unless an individual examination of their situation by a qualified *and independent* professional certifies that their health ... will not significantly deteriorate as a result of the detention”.

Article 15 - Employment

ECRE fully supports the proposed amendment laying down an obligation for Member States to grant asylum seekers access to employment within 6 months following the date when an application for international protection was lodged, irrespective of whether a decision at first instance has been taken or not (Articles 15.1 and 15.2). It is important that asylum seekers be able to seek employment as soon as possible. The right to work is essential to safeguard asylum applicants against social exclusion, promoting their self-sufficiency and facilitating their reintegration upon return.³⁶ Nine Member States already authorise asylum seekers’ access to employment before the current maximum deadline of one year.³⁷

The establishment of additional conditions on asylum seekers’ access to employment, such as work-permit requirements, limitation of the right to work to specific economic sectors and severe time restrictions, obstructs that access in practice.³⁸ Some of these restrictions have also been found to foster underground employment,³⁹ which makes asylum seekers vulnerable to exploitation.⁴⁰ The proposed recast still allows Member States to lay down certain limitations in accordance with their national legislation, although prohibiting them from “unduly restricting asylum seekers’ access to the labour market” (Article 15.2) with a view to ensure that applicants are provided with fair opportunities to work in the Member States.⁴¹ ECRE fully supports this objective, but believes that the best way to pursue it is to refrain from imposing additional conditions once access to employment is granted.⁴² At a minimum, the safeguard included in recast Article 11.5 should be strengthened by ruling out not only undue restrictions but also delays in access to the labour market. ECRE also reaffirms that the European Commission should step up its efforts to monitor the impact of additional conditions imposed by Member States and hold them accountable for any breach in their obligations concerning access to employment.⁴³

- ECRE suggests amending Article 15.2 to read as follows: “Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national legislation, without unduly restricting *or delaying* asylum seekers’ access to the labour market.”

Article 17 - Material reception conditions

³⁶ See ECRE, *Position Reception*, paragraph 38-9; *Way Forward Integration*, p. 29 (see note 2 above).

³⁷ European Commission, *Application Report*, p. 8, note 4 above. See also Odysseus Academic Network, *Implementation Overview*, pp. 69-70, note 5 above.

³⁸ ECRE, *Reception Report*, p. 16, note 6 above. See also European Commission, *Application Report*, p. 8, note 4 above, and Odysseus Academic Network, *Implementation Overview*, pp. 69-70, note 5 above.

³⁹ Odysseus Academic Network, *Implementation Overview*, p. 71, note 5 above.

⁴⁰ As denounced by the Cyprus Ombudswoman in January 2008. See ‘Ombudswoman blasts cheap labour ‘exploitation’ of asylum seekers’, *Cyprus Mail*, 23 January 2008, available at: http://www.cyprus-mail.com/news/main.php?id=37158&cat_id=1.

⁴¹ European Commission, *Proposal for a Recast Directive*, p. 5, see note 1 above.

⁴² See ECRE, *Reception Report*, note 6 above, p. 21; *Proposals for Revisions to the Directive*, p. 13, see note 7 above.

⁴³ ECRE, *Reception Report*, p. 21, note 6 above.

Article 17.5 of the proposed recast places an obligation on Member States to ensure that “the total value of material reception conditions to be made available to asylum seekers is equivalent to the amount of social assistance granted to nationals requiring such assistance.” Social welfare assistance constitutes the minimum amount of support that must be granted to someone not possessing sufficient resources in order to allow that person to have a dignified standard of living.⁴⁴ While generally supporting this amendment, ECRE would like to point out that there are wide differences in the level of social assistance across the Member States. Asylum seekers lack family, networks and other informal kinds of support in the host country, which means that, even if they receive material reception conditions commensurate with the minimum social support granted to nationals, this may still not suffice to provide them with a dignified standard of living. In fact, the Odysseus implementation overview showed that this was the case in a number of Member States.⁴⁵

- ECRE supports recast Article 17.5 establishing that the amount of assistance granted to asylum seekers in the Member States should be commensurate to the level of support provided to nationals.

Article 18 - Modalities for material reception conditions

ECRE supports the proposed amendments providing that Member States should take into consideration concerns related to gender, age and the situation of persons with special needs, as well as adopt measures to prevent gender based violence, including sexual assault, in reception centres (recast Article 18.2).

Recast Article 18.8 would no longer allow Member States to set exceptional modalities for material reception conditions in a certain geographical area, an amendment that ECRE supports. Lack of appropriate reception standards in some regions has resulted in the *de facto* detention of asylum seekers in a number of Member States, often in appalling conditions.⁴⁶ This can have a seriously detrimental impact in the development of the asylum procedure, with dramatic consequences for asylum seekers' future and personal safety.⁴⁷

However, for the reasons outlined above, ECRE is disappointed that the proposed recast still allows Member States to resort to exceptional modalities of material reception conditions “In duly justified cases ... when the asylum seeker is in detention or confined to border posts” (recast Article 18.8 (c)). This provision is at odds with the fact that conditions in detention are regulated under recast Article 10 and undermines the principle laid down in amended recital 8 stating that the Directive applies in all locations and facilities hosting asylum seekers.

- ECRE supports the European Commission proposal for a recast Article 18.2 stating that gender and age specific concerns as well as the situation of persons with special needs should be taken into account in accommodation centres and providing for appropriate measures to prevent gender based violence in such facilities.
- ECRE recommends deleting recast Article 18.8 (c) allowing Member States to set up exceptional modalities for material reception conditions when “the asylum seeker is in detention or confined to border posts.”

⁴⁴ See for example the Mutual Information System on Social Protection in the EU Member States and the European Economic Area, which provides an overview of the principles underpinning schemes of non-contributory minimum assistance in the Member States. See: http://ec.europa.eu/employment_social/missoc/2003/index_en.htm

⁴⁵ The report highlighted in particular the cases of Cyprus, Slovenia and Latvia. See Odysseus Academic Network, *Implementation Overview*, p. 31, note 5 above.

⁴⁶ See European Parliament, Policy Department Citizens' Rights and Constitutional Affairs, *Reception of Asylum Seekers and Examination of Asylum Applications*, p. 28 (see note 6 above) as well as the reports drawn on the basis of the visits of LIBE delegations to detention centres (note 34 above). See also United Nations, *Press Release: UN Working Group on Arbitrary Detention Concludes Visit to Malta*, 23 January 2009, <http://www.unhcr.ch/hurricane/hurricane.nsf/0/125F21AAD7DCBD1AC125754A0057F318?opendocument>

⁴⁷ See Amnesty International Italia et al. *Appeal to the institutions about the serious and imminent risk of widespread violations of the fundamental rights of refugees and migrants present in Lampedusa*, Rome, 23 January 2009, p. 6, available at: <http://www.statewatch.org/news/2009/jan/italy-%20lampedusa.pdf>

Article 20- Reduction or withdrawal of material reception conditions

The European Commission proposal amends the Directive with a view to ensure that reception conditions are only withdrawn when asylum seekers have their own means of support,⁴⁸ i.e. where “an applicant has concealed financial resources, and has therefore unduly benefited from material reception conditions” (recast Article 20). In any event, Member States would be obliged to ensure subsistence, access to emergency health care and essential treatment of illness and mental disorder (recast Article 20.4). ECRE supports these amendments, which should contribute to ensure that the reduction or withdrawal of reception conditions do not compromise the fundamental rights of the persons concerned.

In addition, ECRE welcomes the European Commission proposal to suppress current Article 16.2 allowing Member States to refuse reception conditions where an asylum seeker “fails to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival”, a policy which the UK House of Lords had found to be in breach of Article 3 ECHR.⁴⁹

- ECRE supports the European Commission proposal for recast Article 20 limiting the grounds for withdrawing material reception conditions to those situations where asylum seekers have sufficient financial resources

Articles 21-24 - Persons with special needs

ECRE welcomes recast Article 21.1 extending the scope of current Article 17 to require that the specific situation of persons with special needs be taken into account in the implementation of the Directive as a whole, rather than only in connection with material reception conditions and health care. In addition, ECRE fully supports the proposed amendment providing for the establishment of procedures to identify asylum seekers with special needs as soon as an asylum claim is lodged (recast Article 21.2). A large number of Member States currently have no such a mechanism in place,⁵⁰ despite the fact that, as stressed by the European Commission, “Identification of vulnerable asylum seekers is a core element without which the provisions of the Directive aimed at special treatment of these persons will lose any meaning”.⁵¹ The Care Full initiative and the MAPP project in the Netherlands represent useful good practices concerning the identification of vulnerable asylum seekers.⁵²

In addition, ECRE supports the specific safeguards envisaged in the European Commission proposal to ensure that reception conditions meet the special needs of vulnerable asylum seekers. These include specific accommodation arrangements (recast Article 18.2, see above), access to health care, including mental health care, under the same conditions as nationals (recast Article 19.2), and particular detention provisions (recast Article 11, see above). ECRE also welcomes the guarantees concerning children, such as the inclusion of a definition of minors as persons below the age of 18 (recast Article 2 (f)), in line with the United Nations Convention on the Rights of the Child; the provision of preparatory classes to facilitate access to the national education system (recast Article 14 (2)); the specification of the best-interest principle (recast Article 22); and the establishment of an obligation concerning family-tracing (recast Article 23(3)).

Article 24 of the proposed recast also enhances guarantees for victims of torture and violence, explicitly noting that they should get access to rehabilitation services involving the provision of medical and psychological treatment. This provision also establishes training and confidentiality obligations for those working with these asylum seekers (recast Article 24.2). ECRE generally supports these

⁴⁸ European Commission, *Detailed Explanation of the Proposal*, p. 5, see note 18 above.

⁴⁹ See *R (Q) v Secretary of State for the Home Department* [2004] QB 36, confirmed by the Opinion of the Lords of Appeal for Judgment in the case *Regina v Secretary of State for the Home Department* [2005] UKHL 66.

⁵⁰ Odysseus Academic Network, *Implementation Overview*, p. 76, note 5 above.

⁵¹ European Commission, *Application Report*, p. 9, see note 4 above. See also Odysseus Academic Network, *Implementation Overview*, pp. 75-7, note 5 above.

⁵² For further details on the Care Full Initiative, please go to: <http://www.pharos.nl/supernavigatie/english/383?pagina=3>. Information on the MAPP project is available at: http://www.askv.dds.nl/mapp/overzicht_pagina.php?&cat_id=46&sub_cat_id=66

amendments, but recommends changing the wording of paragraph 2 to make it explicitly applicable not only to victims of torture but also to persons who have suffered from rape or other serious acts of violence, in order to ensure greater consistency with the overall aim of this provision.⁵³

- ECRE supports the enhanced safeguards for persons with special needs included in the proposed recast.
- ECRE suggests amending Article 24.2 to read as follows: “Those working with victims of torture, *rape or other serious acts of violence* shall have had and continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in the relevant national law, in relation to any information they obtain in the course of their work.”

Article 25 – Appeals

ECRE welcomes recast Article 25 extending appeal rights to decisions on withdrawal and reduction of reception conditions and ensuring access to legal assistance and/or representation in appeal cases, which should be free of charge if the asylum seeker cannot afford the costs involved. In this regard, ECRE reiterates its comments on recast Article 9.6 above stressing that the provision of legal advice constitutes a prerequisite for asylum seekers to have access to an effective remedy.

- ECRE supports recast Article 25.2 requiring Member States to guarantee access to free legal assistance to asylum seekers in appeal cases if they cannot afford the costs involved.

Article 27- Monitoring and control systems

The Odysseus implementation overview revealed significant problems as regards control of the level of reception conditions in the Member States.⁵⁴ In ECRE’s view, while new legislation is needed to address the flaws of the Directive, permanent and effective monitoring mechanisms are also essential to ensure that appropriate reception standards are guaranteed across the European Union.⁵⁵

The proposed recast sets an obligation for the Member States to create specific guidance, monitoring and control mechanisms (Article 27.1). It also establishes extended reporting obligations, which would include *inter alia* information on persons with special needs; the number of asylum seekers benefiting from access to the labour market and the conditions attached to such access; and the level of material reception conditions afforded to applicants (Article 27.2 and Annex I). ECRE supports these amendments and believes that, if adopted, would contribute to ensure the proper application and implementation of the Directive. In line with previous recommendations, ECRE would also suggest that all stakeholders partaking in the provision of reception conditions, including NGOs, are involved in the operation of monitoring systems.⁵⁶

- ECRE supports the European Commission proposal for recast Article 27 strengthening control mechanisms of the level of reception standards. ECRE recommends that all stakeholders participating in the provision of reception to asylum seekers, including NGOs, are involved in the operation of such mechanisms.

4. Concluding remarks

⁵³ The European Commission detailed explanation of the Proposal stresses that it is important ‘to ensure that those working with victims of torture *and violence* have had and continue to receive appropriate training’ (emphasis added). European Commission, *Detailed Explanation of the Proposal*, p. 6, see note 18 above.

⁵⁴ Odysseus Academic Network, *Implementation Overview*, October 2006, pp. 101-4, note 5 above.

⁵⁵ ECRE, *ECRE Proposals for Revisions to the Directive*, pp. 16-7, see note 7 above.

⁵⁶ *Ibid.*, p. 16.

ECRE welcomes the European Commission proposal to recast the Reception Conditions Directive. While the application of the Directive has led to improvements in reception conditions, it is clear that the provision of dignified and comparable living standards to asylum seekers is still far from being a reality across the EU. Many of the amendments proposed would contribute to the further approximation of national reception conditions on the basis of higher standards, in particular by closing outstanding legal gaps which have allowed Member States to interpret the Directive in a restrictive manner. ECRE calls on the European Parliament and the Member States in the Council to maintain the positive elements of the Commission proposal, while at the same time introducing further safeguards where necessary. In addition, ECRE reaffirms that in the meantime the European Commission should continue to actively monitor the Directive's implementation to ensure that Member States are in full compliance with their obligations under existing EU legislation on reception.

For further information contact:

European Council on Refugees and Exiles (ECRE)
www.ecre.org

María Duro Mansilla (Research Officer)

Tel.: + 32 2 212 0 811

Email: MDuro@ecre.org