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European Council
on Refugees and Exiles

Information Note on

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

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Introduction¹

The adoption of Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (hereinafter “recast Reception Conditions Directive”) in June 2013, together with the recast Dublin Regulation,² the recast EURODAC Regulation³ and the recast Asylum Procedures Directive,⁴ constituted the final step in the second phase of harmonisation of asylum law in the EU Member States.

The recast Reception Conditions Directive, adopted following a proposal⁵ and an amended proposal by the Commission,⁶ repeals Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers⁷ for the Member States bound by it.⁸ While confirming the principles underlying the 2003 Reception Conditions Directive, it aims at improving standards on reception conditions for applicants for international protection⁹ to ensure a dignified standard of living and comparable living conditions in all Member States. The recast Reception Conditions Directive also intends to approximate and extend the scope of reception conditions in order to ensure “equal treatment of applicants throughout the Union”,¹⁰ an objective also mandated by the Stockholm Programme.¹¹ The harmonisation of reception conditions for applicants for international protection may contribute to more adequate protection of asylum seekers’ fundamental rights in the application of the newly adopted Dublin III Regulation, as domestic and European courts consider that effective access to adequate reception conditions is a key consideration in the lawfulness of transfers be-

1. This Information Note was written with the support of EPIM (European Programme for Integration and Migration), The Sigrid Rausing Trust, Atlantic Philanthropies and UNHCR. The views expressed in this document are those of ECRE and do not necessarily reflect the views of the organisations mentioned. ECRE would like to thank the members of its Asylum Systems Core Group for their input.
2. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (hereinafter “Dublin III Regulation”), OJ 2013 L180/31.
3. Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) (hereinafter “recast EURODAC Regulation”), OJ 2013 L180/1.
4. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (hereinafter “recast Asylum Procedures Directive”), OJ 2013 L 180/60.
5. European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)* (hereinafter “2008 RCD Proposal”), COM(2008) 815, 3 December 2008, 5. For commentary, see ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to Recast the Reception Conditions Directive* (hereinafter “2009 RCD Comments”), April 2009, available at: <http://bit.ly/1H3DILC>.
6. European Commission, *Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast)* (hereinafter “2011 RCD Proposal”), COM(2011) 320, 1 June 2011. For commentary, see ECRE, *Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to Recast the Reception Conditions Directive (COM(2011) 320 final)* (hereinafter “2011 RCD Comments”), September 2011, available at: <http://bit.ly/1fmu8Bz>.
7. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereinafter “2003 Reception Conditions Directive”), OJ 2003 L 31/18.
8. See Article 32 recast Reception Conditions Directive. Denmark, Ireland and the UK have not opted into the recast Reception Conditions Directive.
9. Recital 7 recast Reception Conditions Directive.
10. Recital 8 recast Reception Conditions Directive.
11. See e.g. ECtHR, *MSS v Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011; *Tarakhel v Switzerland*, Application No 29217/12, Judgment of 4 November 2014.

tween Member States under the responsibility-allocation system.¹² It should assist in limiting the secondary movements of applicants within the EU that are “influenced by the variety of conditions for their reception”.¹³

ECRE acknowledges that the recast Reception Conditions Directive increases the level of and access to reception conditions for applicants for international protection during the examination of their application in many respects, but at the same time still leaves considerable flexibility for Member States in the implementation and transposition of the standards laid down in the Directive. This is a major step forward, as the persistent lack of adequate funding and austerity measures have undermined the quality of protection available across the EU, thus amplifying the phenomenon of uneven distribution of asylum seekers across the Union. However, ECRE remains concerned in particular with regard to the potentially negative impact of the broadly formulated detention grounds introduced in the Directive. In this regard, ECRE encourages Member States to make use of the possibility under Article 4 of the Directive to introduce or retain more favourable provisions in the field of reception conditions for applicants and other close relatives, insofar as they are compatible with the Directive.

In ECRE’s view, access to adequate and dignified reception conditions for applicants for international protection are prerequisites for a fair and efficient asylum procedure. Lack of or inadequate reception conditions may reduce asylum seekers’ mental and physical ability to present their protection needs at asylum interviews and to timely respond to requests for information for instance, and may therefore contribute to undermining the quality of decision-making and the overall quality and efficiency of the asylum procedure. It may also create a general feeling of despair and marginalisation which further undermines and delays integration, including of those granted international protection and hinder rehabilitation of those who have gone through traumatic experiences such as victims of torture.

Moreover, the transposition and implementation in practice of the recast Reception Conditions Directive cannot be conducted in a vacuum. It is informed by and must comply with fundamental rights norms that are laid down in other sources of EU law, including the Charter of Fundamental Rights of the European Union (EU Charter)¹⁴ and general principles of EU law as developed by the Court of Justice of the European Union (CJEU). Furthermore, in accordance with Article 78 of the Treaty on the Functioning of the European Union (TFEU), Member States are under an obligation to transpose and implement this Directive in a manner which is consistent not only with the 1951 Convention on the Status of Refugees, but also with other relevant instruments such as the European Convention on Human Rights (ECHR), the Convention against Torture (CAT), the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities.¹⁵ In fact, obligations deriving from international human rights law, the EU Charter of Fundamental Rights as well as general principles of EU law, may require Member States to go beyond the level of guarantees laid down in the Directive with regard to certain provisions as allowed under Article 4.¹⁶

The recast Reception Conditions Directive is to be transposed into national legislation by 20 July 2015.¹⁷ The Directive binds all EU Member States, with the exception of Denmark, which does not participate in the CEAS save for the rules allocating responsibility for examining applications for international protection,

12. Recital 12 recast Reception Conditions Directive.

13. Recital 12 recast Reception Conditions Directive.

14. Following the entry into force of the Lisbon Treaty, the EU Charter has equal legal value to the Treaties as primary EU law: Article 6 Treaty on European Union (TEU).

15. The EU acceded to the United Nations Convention on the Rights of Persons with Disabilities and ratified the Convention on 23 December 2010. See also Council Decision 2010.48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ 2010 L 23/35.

16. See e.g. ECRE and Dutch Refugee Council, *The Application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, available at: <http://bit.ly/1DD08GO> and ECRE, *Reception and Detention Conditions of applicants for international protection in light of the Charter of Fundamental Rights of the EU*, January 2015, available at: <http://bit.ly/1dMaoGv>. Under the principle of primacy, where two interpretations of a provision are possible, Member States must favour the interpretation that complies with the EU Charter.

17. Article 31 recast Reception Conditions Directive.

and Ireland and the United Kingdom, which have opted out of the Directive.¹⁸ However, as discussed below, insofar as detention is applied in the context of the recast Dublin Regulation, the detention guarantees and standards contained in Articles 9-11 of the recast Reception Conditions Directive are binding to *all* Member States and Dublin Associated States.¹⁹

This information note discusses key provisions in the recast Reception Conditions Directive which brought about substantial changes to the 2003 Directive and offers guidance for their appropriate implementation. The note draws on previous ECRE comments on the 2008 and 2011 Commission proposals for a recast Reception Conditions Directive, an ECRE paper on the impact of the EU Charter on the Directive,²⁰ and on Asylum Information Database (AIDA) reports which provide up-to-date information on the legal framework and practice with regard to reception conditions, asylum procedures and detention in 16 EU Member States to date.²¹

18. Note, however, that the UK has opted into the 2003 Reception Conditions Directive and is still bound by its standards.

19. Article 28(4) Dublin III Regulation states that “as regards the detention conditions and the guarantees applicable to persons detained, in order to secure the transfer procedures to the Member State responsible, Articles 9, 10 and 11 of Directive 2013/33/EU shall apply.”

20. ECRE, *An Examination of the Reception Conditions Directive and its Recast in light of Article 41 and 47 of the Charter of Fundamental Rights of the European Union*, December 2013, available at: <http://bit.ly/1NaaioT>.

21. To access the Asylum Information Database, see: <http://www.asylumineurope.org>.

Overview of main amendments

The main changes brought about by the recast Reception Conditions Directive concern the following areas:

» **Scope**

The scope of the Directive is extended to all applicants for international protection at all stages of the procedure, including in procedures subject to the Dublin III Regulation. The territorial scope of the Directive is also clarified as applicable at the border, in territorial waters and airport transit zones (Article 3).

» **Detention**

The Directive introduces detailed provisions on the detention of applicants for international protection. It establishes an exhaustive list of six grounds for detention, subject to the requirement of necessity and proportionality and to a duty to apply alternatives to detention (Article 8). It sets out procedural guarantees for detained applicants with regard to the content of detention orders and the speedy judicial review of the lawfulness of the detention (Article 9). Moreover, the Directive contains specific provisions on the appropriate conditions of detention (Article 10), as well as special rules applicable to vulnerable applicants such as children and persons with special reception needs (Article 11).

» **Access to employment**

The recast Reception Conditions Directive shortens the maximum time-period during which Member States may lawfully restrict applicants' access to the labour market to 9 months (Article 15).

» **Access to material reception conditions**

The Directive limits the grounds on which Member States may set different modalities for material reception conditions (Article 18) and requires in all circumstances access to health care and a dignified standard of living where material reception conditions are reduced or withdrawn, while the late submission of an applicant can no longer justify the refusal of reception conditions (Article 20).

» **Vulnerable applicants with special reception needs**

The Directive extends the non-exhaustive list of vulnerable persons to explicitly refer to include victims of female genital mutilation and introduces an obligation to assess whether applicants have special reception needs and the nature of such needs, within a reasonable period of time following the application for international protection and that the support provided to such persons takes into account their particular needs (Article 22).

Analysis of key articles

1. Definitions and Scope (Articles 2-3)

Definitions (Article 2)

Article 2

(c) ‘family members’: means, in so far as the family already existed in the country of origin, the following members of the applicant’s family who are present in the same Member State in relation to the application for international protection:

— the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals;

— the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law;

— the father, mother or another adult responsible for the applicant whether by law or by the practice of the Member State concerned, when that applicant is a minor and unmarried;

The definition of ‘family members’ in Article 2(c) mirrors the definition contained in Article 2(j) of the recast Qualification Directive,²² thereby extending family members to include the father, mother or another adult responsible for the unmarried minor applicant. ECRE welcomes the deletion of the condition of dependency of minor children of couples but regrets the fact that married minors accompanied by their spouses are excluded from the definition of ‘family members’. As ECRE has previously argued,²³ this exclusion may bear adverse effects for both asylum seekers and Member States. Since these persons are already on the territory of the Member State concerned, precluding their access to reception conditions as family members may leave them with no other alternative than to make a separate application in order to access reception conditions even if their protection needs are directly related to their other family members. This undermines the overall objectives of the recast process relating to efficient processing and reducing administrative burdens.

Moreover, Article 2(c) maintains the restriction of the scope of protected family unity to families already existing in the country of origin. Beyond ignoring the reality that many asylum seekers establish families outside their country of origin during flight, this narrow interpretation of family seems to raise potential incompatibility with the concept of family defined in Article 7 of the EU Charter which contains no restriction to the right to family life. Given the relevance of the EU Charter in the interpretation of the EU asylum *acquis*,²⁴ and the explicit commitment in the preamble of the recast Reception Conditions Directive to comply with Charter provisions on family unity,²⁵ Article 2(c) of the recast Reception Conditions Directive should be read in light of the broader right to family life enshrined in Article 7 of the EU Charter, which is interpreted in accordance with the European Court of Human Rights’ (ECtHR) Article 8 ECHR jurisprudence.²⁶ A correct interpretation of family unity should include families formed following flight from the country of origin.

22. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (hereinafter “recast Qualification Directive”), OJ 2011 L337/9.

23. ECRE, *2009 RCD Comments*, 4; ECRE, *2011 RCD Comments*, 5-6.

24. CJEU, Joined Cases C-411/10 and C/493/10 *NS v Secretary of State for the Home Department; ME v Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011, par. 68.

25. Recital 9 recast Reception Conditions Directive.

26. On the discriminatory character of distinctions between pre-flight and post-flight families, see ECtHR, *Hode and Abdi v UK*, Application No 22341/09, Judgment of 6 November 2012. See also ECRE, *Comments on Regulation (EU) No 604/2013*, March 2015, available at: <http://bit.ly/1SSyy2J>, 10.

Article 2

(k) ‘applicant with special reception needs’: means a vulnerable person, in accordance with Article 21,²⁷ who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive

ECRE calls on Member States to adopt an inclusive approach as regards the definition of applicants with special reception needs in line with the non-exhaustive list of vulnerable applicants in Article 21 of the recast Reception Conditions Directive when transposing the definition. Since the identification of vulnerabilities is left at Member States’ discretion, transposition in national law should be complemented by detailed guidance to the competent authorities as to the categories of asylum seekers that should benefit from special considerations and attention during the asylum process, and effective mechanisms for their identification.

Ongoing transposition reforms have envisaged the inclusion of this definition in national law. By way of example, France aims to adopt the non-exhaustive list of vulnerable applicants contained in Article 21 of the recast Reception Conditions Directive,²⁸ while Poland is discussing a broader definition which would expressly include persons subjected to gender-based violence and violence related to sexual orientation or gender identity.²⁹ Poland’s proposed definition illustrates a good example of protective implementation relating to Article 2(k) that could be followed by other Member States.

Scope (Article 3)

Article 3

1. This Directive shall apply to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law.
2. This Directive shall not apply in cases of requests for diplomatic or territorial asylum submitted to representations of Member States.
3. This Directive shall not apply when the provisions of [the Temporary Protection Directive] are applied.
4. Member States may decide to apply this Directive in connection with procedures for deciding on applications for kinds of protection other than that emanating from [the recast Qualification Directive].

The implementation of the personal and territorial scope of the 2003 Reception Conditions Directive revealed significant discrepancies and protection gaps in practice, as several Member States did not apply the Directive in detention centres or in relation to applicants subject to admissibility or Dublin procedures.³⁰ These gaps have been largely addressed by the recast Reception Conditions Directive, which now expressly states that its standards apply equally at the border or in transit zones of international airports, as well as during all stages and types of procedures concerning applications for international protection.³¹

ECRE welcomes this clarification of the scope of the Directive which reflects the jurisprudence of the CJEU in the case of *Cimade and GISTI*, confirming that the obligation to provide reception conditions under EU

27. Article 21 recast Reception Conditions Directive reads: “Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.”

28. AIDA, Country Report France: Third Update, January 2015, available at: <http://bit.ly/1SwhezD>, 97. See the latest version of the proposed Article L744-6 of the Code of Entry and Residence of Foreigners and of Asylum (CESE-DA).

29. AIDA, Country Report Poland: Third Update, January 2015, available at: <http://bit.ly/1HODNwS>, 68. See the proposed amendments to Article 68 of the Law of 13 June 2003 on Granting Protection to Foreigners.

30. European Commission, *Report on the application of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers* (hereinafter “RCD Implementation Report”), COM(2007) 745, 26 November 2007, 3.

31. See Recital 8 recast Reception Conditions Directive.

law extends to all applicants, including those who are subject to procedures under the Dublin Regulation. Interpreting Article 3(1) of the 2003 Reception Conditions Directive, the Court found that asylum seekers “are allowed to remain not only in the territory of the Member State in which the application for asylum is being examined but also in that of the Member State in which that application was lodged.”³²

As neither the recast Reception Conditions Directive nor the jurisprudence of the CJEU allow for any different treatment of asylum seekers depending on the type or stage of the procedure, Member States must guarantee the same level of treatment and reception conditions to applicants in Dublin procedures or special type of procedures such as accelerated or border procedures+.

Despite this welcome clarification of the scope of the recast Directive, access to the rights and entitlements of the recast Directive is only guaranteed to third-country nationals “who make an application for international protection”. ECRE’s research has pointed to the problems asylum seekers still face to date in a number of EU Member States to access the asylum procedures in practice due to administrative delays or barriers with regard to the formal registration of their asylum application. In order to reduce the protection gaps arising from such barriers, ECRE reminds Member States that any expression of the wish to obtain protection to any Member State authority must be considered as an application “being made” under Article 6 of the recast Asylum Procedures Directive, whether this is done orally, in writing or in any other possible way.³³

Where Member States provide for protection statuses other than refugee status or subsidiary protection status as defined in the (recast) Qualification Directive in national law, ECRE recommends applying the standards laid down in the recast Reception Conditions Directive in the procedure for deciding on such applications in accordance with Article 3(4) of the Directive as this would enhance legal certainty for the applicants concerned and would contribute to reception standards pending such procedures benefiting from monitoring by EU institutions and guidance from the Court of Justice of the European Union (CJEU). In such case these standards should be interpreted and applied in line with ECRE’s recommendations set out in this information note.

2. Information and Documentation (Articles 5-6)

Provision of information (Article 5)

Article 5

1. Member States shall inform applicants, within a reasonable time not exceeding 15 days after they have lodged their application for international protection, of at least any established benefits and of the obligations with which they must comply relating to reception conditions.

Member States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care.

2. Member States shall ensure that the information referred to in paragraph 1 is in writing and, in a language that the applicant understands or is reasonably supposed to understand. Where appropriate, this information may also be supplied orally.

Article 5(1) obliges Member States to provide information on reception conditions “within a reasonable time not exceeding 15 days” following the lodging of an application. Recent research by ECRE indicates that, in a number of EU Member States, insufficient information was provided or information was provided in a language that was not understood by the applicant for international protection, which can have serious consequences for the applicant. In other instances, no information was provided at all.³⁴

^{32.} CJEU, Case C-179/11 *Cimade and GISTI v Ministre de l’Intérieur*, Judgment of 19 September 2012, par. 48. See also Recital 11 Dublin III Regulation.

^{33.} See ECRE, *Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, December 2014, available at: <http://bit.ly/1cv9GMM>, 9-10.

^{34.} ECRE, *Reception and Detention of applicants for international protection in light of the EU Charter of Fundamental Rights*, 22.

Proper information is required in order to ensure that applicants have effective access to reception conditions and can assert their rights in reception facilities and are not penalised for non-compliance with rules they may be unaware of. It is also necessary to ensure proper access to legal assistance and information so that their application for international protection is properly and comprehensively examined.

ECRE therefore encourages Member States to transpose short and concrete time-limits for providing applicants with clear, concise and effective information on their rights and obligations relating to reception conditions in order to comply with the duty to provide material reception conditions without delay. Such information should preferably be given upon issuance of the document certifying the applicant's status, as per Article 6(1).³⁵ Member States must also take the necessary measures to ensure that the information provided is also effectively understood by the applicant, including through oral translations where necessary and by ensuring that the information provided is of a non-technical nature. In particular, due attention should be paid to the age, profile and level of education of the applicant. Where the applicant is a child, the information shall be provided by fully trained authorities and in a child-friendly manner.

Documentation (Article 6)

Article 6

1. Member States shall ensure that, within three days of the lodging of an application for international protection, the applicant is provided with a document issued in his or her own name certifying his or her status as an applicant or testifying that he or she is allowed to stay on the territory of the Member State while his or her application is pending or being examined.

If the holder is not free to move within all or a part of the territory of the Member State, the document shall also certify that fact.

2. Member States may exclude application of this Article when the applicant is in detention and during the examination of an application for international protection made at the border or within the context of a procedure to decide on the right of the applicant to enter the territory of a Member State. In specific cases, during the examination of an application for international protection, Member States may provide applicants with other evidence equivalent to the document referred to in paragraph 1.

3. The document referred to in paragraph 1 need not certify the identity of the applicant.

4. Member States shall adopt the necessary measures to provide applicants with the document referred to in paragraph 1, which must be valid for as long as they are authorised to remain on the territory of the Member State concerned.

5. Member States may provide applicants with a travel document when serious humanitarian reasons arise that require their presence in another State.

6. Member States shall not impose unnecessary or disproportionate documentation or other administrative requirements on applicants before granting them the rights to which they are entitled under this Directive for the sole reason that they are applicants for international protection.

According to the Commission, timely issuance of documents has proved to be one of the main challenges in the implementation of the original Reception Conditions Directive in most Member States.³⁶ ECRE reminds Member States that there is no provision in the recast Reception Conditions Directive which makes the provision of reception conditions dependent on the issuance of a residence document. In fact, Article 17(1) of the recast Reception Conditions Directive requires Member States to ensure that material reception conditions be made available to asylum seekers “when they make their application for international protection”. In practice, however, a number of EU Member States link the provision of material reception conditions to the issuance of a residence card or document stating the asylum seeker's status. Consequently, delays caused by the national administration in issuing such documents may leave applicants excluded from material reception conditions such as housing and vulnerable to destitution.³⁷

35. The document must be provided within 3 days of the lodging of the application. See Article 6(1) recast Reception Conditions Directive.

36. European Commission, *RCD Implementation Report*, 4.

37. ECRE, *Reception and Detention in light of the Charter*, 21.

Moreover, the jurisprudence of the CJEU in the cases of *Cimade and GISTI* and *Saciri*³⁸ has interpreted the 2003 Reception Conditions Directive as imposing an obligation on Member States to provide asylum seekers with access to material reception conditions as soon as they make an application for international protection. The right to dignity enshrined in Article 1 of the EU Charter precludes asylum seekers from being deprived from basic reception conditions at any stage of the procedure.³⁹

ECRE urges Member States to comply with the obligation in Article 6(6) of the recast Reception Conditions Directive not to impose unnecessary or disproportionate documentation or other administrative requirements on applicants for granting rights to reception conditions they are entitled to. ECRE calls on Member States to ensure swift access to material reception conditions required under the recast Reception Conditions Directive and not to make such access conditional on the issuance of any document certifying the status of the person concerned as an applicant for international protection.

3. Residence and Freedom of Movement (Article 7)

Article 7

1. Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.
 2. Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection.
 3. Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national law.
 4. Member States shall provide for the possibility of granting applicants temporary permission to leave the place of residence mentioned in paragraphs 2 and 3 and/or the assigned area mentioned in paragraph 1. Decisions shall be taken individually, objectively and impartially and reasons shall be given if they are negative.
- The applicant shall not require permission to keep appointments with authorities and courts if his or her appearance is necessary.
5. Member States shall require applicants to inform the competent authorities of their current address and notify any change of address to such authorities as soon as possible.

ECRE draws attention to the formulation of Article 7(2) of the recast Reception Conditions Directive, which refers to Member States' right to "decide on the residence of *the applicant* for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring" of the application. Such wording, clearly distinguishable from the general reference to "applicants" in Article 7(1), implies an individualised assessment of the applicant's circumstances prior to deciding on his or her residence on the aforementioned grounds. Although such an individual assessment is not explicitly referred to in Article 7(2), it is nevertheless required under the EU law general principle of the right to good administration as developed by the CJEU which includes the right of every person to be heard before any individual measure that may adversely affect him or her is taken.⁴⁰ It should be noted that such an individual assessment is explicitly required with regard to the possibility to make the provision of material reception conditions subject to actual residence in a specific place in Article 7(3) of the recast Reception Conditions Directive.

38. CJEU, Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Saciri*, Judgment of 27 February 2014.

39. CJEU, *Cimade and GISTI*, par. 56; *Saciri*, par. 35.

40. See, for instance, CJEU, Case C-249/13 *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, Judgment of 11 December 2014, par. 36 and Case C-166/13 *Sophie Mukarubega v Préfet de police, Préfet de la Seine-Saint-Denis*, Judgment of 5 November 2014, par. 46.

In ECRE's view, this precludes the adoption of national law provisions enabling general restrictions on freedom of movement for all applicants on the territory of a Member State, without a case-by-case assessment of individual circumstances.⁴¹

4. Detention (Articles 8-11)

ECRE has consistently held that, as a general rule, applicants for international protection should not be detained. Seeking asylum is not an unlawful act and concerns persons who have committed no crime. Detention of asylum seekers is and remains inherently undesirable as it concerns the deprivation of liberty of "members of a particularly underprivileged and vulnerable population group in need of special protection".⁴² Moreover, given the devastating effects of detention on the mental and physical health of those concerned,⁴³ the deprivation of liberty of persons pending the examination of their application should be avoided. In line with the presumption against the detention of asylum seekers firmly established in international refugee and human rights law, detention of asylum seekers may only be resorted to in the most exceptional circumstances as a measure of last resort and always in compliance with states' obligations under international refugee and human rights law, in particular the principles enshrined in Article 5 ECHR and Article 6 of the EU Charter.

In addition, as discussed below, workable and rights-respecting alternatives to detention are available. Therefore, ECRE calls on Member States to design asylum policies that aim at ending the detention of asylum seekers and refugees, in line with UNHCR's "Beyond Detention" strategy.⁴⁴ In this regard, ECRE reminds Member States that the recast Reception Conditions Directive, while including detailed provisions on the detention, leaves the possibility for Member States not to detain applicants for international protection pending the examination of their application.

ECRE urges Member States to transpose and apply the Directive based on the abovementioned principle that asylum seekers should not be detained, except in extremely limited circumstances where alternatives to detention cannot be applied and, because of the devastating effects of detention on individuals' mental and physical health, prohibit the detention of those asylum seekers who are particularly vulnerable such as children and victims of torture and other forms of serious violence.

Grounds for detention (Article 8)

Permissibility of detention under the ECHR and the EU Charter

Detention of asylum seekers under Article 5(1)(f) ECHR, and its mirrored interpretation in Article 6 of the EU Charter, remains an area of legal uncertainty and controversy, in light of prevailing jurisprudence of the European Court of Human Rights (ECtHR) permitting Member States to detain international protection applicants to prevent them from effecting an "unauthorised entry". In *Saadi v United Kingdom*, the Court found that, until a state authorises entry to its territory, any entry is unauthorised.⁴⁵ Nevertheless, the peculiar context of the CEAS calls into question the assumption in *Saadi* that an asylum seeker is effecting an unauthorised entry in the state's territory. The recast Asylum Procedures Directive clarifies that applicants are entitled to reside on the territory of the Member State concerned throughout the duration of the examination of their application.⁴⁶ In the case of *Suso Musa v Malta*, the ECtHR stated that, where a Contracting Party has enacted legislation pursuant to EU legislation explicitly authorising entry or stay pending the ex-

41. Cyprus has proposed the possibility to restrict freedom of movement for all applicants through a regulatory administrative act in the draft law transposing the recast Reception Conditions Directive. See AIDA Country Report Cyprus: First Update, February 2015, available at: <http://bit.ly/1H3kAWy>, 76.

42. ECtHR, *MSS v Belgium and Greece*, Application No 30696/09, Judgment of 21 January 2011, par. 251.

43. JRS Europe, *Becoming Vulnerable in Detention*, June 2010 available at: <http://bit.ly/1Ck1paR>.

44. UNHCR, *Beyond Detention 2014-2019: A Global Strategy to support governments to end detention of asylum-seekers and refugees*, 2014, available at: <http://www.unhcr.org/53aa929f6.html>.

45. ECtHR, *Saadi v United Kingdom*, Application No 13229/03, Judgment of 29 January 2008, par. 65. For a critique, see C Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015, Forthcoming), Chapter 7.

46. Article 9(1) recast Asylum Procedures Directive.

amination of the asylum application, “an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5 § 1 (f).” It furthermore held that in such context it would be difficult to consider the deprivation of liberty as a “measure closely connected to the purpose of deportation”.⁴⁷

Under such an interpretation, it has been suggested by academics that the ECHR would only leave scope for detaining asylum seekers under Article 5(1)(b) ECHR, which only permits “the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law”; the second limb being relevant in this context.⁴⁸ Such an obligation must be of a specific and concrete nature,⁴⁹ and has been relied on by the ECtHR in cases relating to security checks when entering a country⁵⁰ or disclosing details of one’s identity.⁵¹ In its jurisprudence relating to Article 5(1) (b) ECHR, the Court has consistently held that it requires an “unfulfilled obligation incumbent on the person concerned and the arrest and detention must be for the purpose of securing its fulfilment and not punitive in character. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5(1) (b) ceases to exist. Moreover, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty.⁵² At the same time, it should be noted that the ECtHR so far never assessed the lawfulness of immigration-related detention under Article 5(1)(b) ECHR.

In any event, the exhaustive list of grounds for detention laid down in the recast Reception Conditions Directive will have to be interpreted and applied in light of the evolving jurisprudence of the ECtHR on the implications of asylum seekers’ authorised entry and stay under EU asylum law for the lawfulness of their detention under the ECHR.

The recast Reception Conditions Directive grounds for detention (Article 8)

Article 8

1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with [the recast Asylum Procedures Directive].
2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.
3. An applicant may be detained only:
 - (a) in order to determine or verify his or her identity or nationality;
 - (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
 - (c) in order to decide, in the context of a procedure, on the applicant’s right to enter the territory;
 - (d) when he or she is detained subject to a return procedure under [the Returns Directive], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection

47. See ECtHR, *Suso Musa v Malta*, Application No 42337/12, Judgment of 23 July 2013, par. 97. As a result, the Court found “some merit” in the applicants’ argument that there is no lawful basis for detention under Article 5(1) (f) ECHR where the stay of asylum seekers is authorised under EU law.

48. C Costello, ‘Immigration Detention: The Grounds Beneath our Feet’ in R Chambers, J King and V Mantouvalou (eds), *Current Legal Problems* (OUP 2015, Forthcoming). On this issue see also P De Bruycker (ed.), A Bloomfield, E Tsourdi and J Pétin, *Alternatives to Immigration and Asylum Detention in the EU. Time for Implementation* (hereinafter “Odysseus Network, MADE REAL”), January 2015, 51.

49. ECtHR, *Ciulla v Italy*, Application No 11152/84, Judgment of 22 February 1989, par. 36; *Sarigiannis v Italy* App No 14569/05, Judgment of 5 April 2011, par. 43.

50. ECtHR, *McVeigh v United Kingdom*, Applications Nos 8022/77, 8025/77 and 8027/77, Report of 18 March 1981.

51. ECtHR, *Vasileva v Denmark*, Application No 52792/99, Judgment of 25 September 2003. In this case, the Court found the detention of a Bulgarian national for 13 hours in order to secure the obligation in law to establish her identity was not proportionate to the cause of her detention and therefore violated Article 5(1) ECHR. See also ECtHR, *Sarigiannis v Italy*.

52. See for instance ECtHR, *Vasileva v Denmark*, par. 36-37.

merely in order to delay or frustrate the enforcement of the return decision;

(e) when protection of national security or public order so requires;

(f) in accordance with Article 28 of [the Dublin III Regulation].

The grounds for detention shall be laid down in national law.

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.

ECRE welcomes the fact that Article 8(2), combined with Recital 15, lays down the requirement of a necessity and proportionality test on the basis of an individualised assessment and only allow for detention of asylum seekers “if other less coercive alternative measures cannot be applied effectively”. This is further strengthened by the obligation on Member States to lay down rules in national law concerning alternatives to detention. This can be seen as the expression in EU law of the presumption against detention of asylum seekers that is enshrined in international refugee and human rights law.⁵³ Where Member States choose to detain asylum seekers, that choice requires a careful and individual assessment of the necessity and proportionality of detention in light of the asylum seeker’s individual circumstances. Such assessment must necessarily be done taking into account the personal experiences and the special position of asylum seekers as “members of a particularly underprivileged and vulnerable population group in need of special protection”.⁵⁴

Article 8 sets out an exhaustive list of six grounds for detention and prohibits detention on the sole basis that the person has applied for international protection.⁵⁵ As mentioned above, ECRE’s position is that persons applying for international protection should not be detained and that detention may only be used in exceptional cases as a measure of last resort and should carry full procedural safeguards.⁵⁶ ECRE recalls that Member States have no obligation to implement any of the detention provisions of the recast Reception Conditions Directive or the recast Dublin Regulation and therefore can opt not to detain asylum seekers.

ECRE is concerned that the grounds listed in Article 8(3) leave broad discretion to Member States and urges them to adopt a restrictive interpretation of such grounds as otherwise the exceptional nature of detention of asylum seekers reflected in Article 8(2) may be rendered meaningless in practice.

» **(a) “in order to determine or verify his or her identity or nationality.”**

ECRE is concerned as to the wide scope of this ground, since the determination or verification of the applicant’s identity or nationality always forms a necessary step in the asylum procedure. More specifically, UNHCR correctly submits that the identification of nationality is a complicated rather than summary assessment, especially as far as stateless applicants are concerned.⁵⁷ By permitting detention for that purpose, subject to no concrete limitations, Article 8(3)(a) seems to confer upon Member States the possibility to systematically detain *any* applicant on the basis that their nationality and identity must be verified in order for the application to be processed.⁵⁸ In that light, this ground may interpreted in such way as to permit, ‘through the back door’, detention of applicants for international protection solely because they lodged an application, contrary to the prescriptions of Article 8(1) of the recast Reception Conditions Directive and Article 26 of the recast Asylum Procedures Directive.

53. See Article 31 Refugee Convention, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.

54. ECtHR, *MSS v Belgium and Greece*, par. 251

55. See also Article 26 recast Asylum Procedures Directive.

56. ECRE, *Position Paper on the Detention of Asylum Seekers*, April 1996, available at: <http://bit.ly/1IXPk15>; ECRE, *The Way Forward: Towards Fair and Efficient Asylum Systems in Europe*, September 2005, available at: <http://bit.ly/1GfXuZ9>; ECRE, *2011 RCD Comments*, 7.

57. UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, par. 27.

58. ECRE, *2011 RCD Comments*, 7-8.

As the vast majority of applicants arrive in EU Member States without documentation or with false documents, this should not be used as a basis for the systematic detention of asylum seekers upon arrival, as this would be neither necessary nor proportional.⁵⁹ 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 this process. Moreover, the verification of the asylum seeker's identity or nationality must be consistent with Member States' obligation not to disclose the fact that an application has been made to the alleged actor of persecution or serious harm.⁶⁰ In absence of valid documentation, fully ascertaining a person's identity or nationality will in most cases only be possible through the cooperation of the authorities of the country of origin of the applicant, which is prohibited under the recast Asylum Procedures Directive.

For these reasons, ECRE encourages Member States not to transpose this detention ground in national legislation or at a minimum to detail the circumstances where the identity or nationality verification process would require the applicant to be detained and to include the necessary guarantees to ensure that such verification takes place in compliance with Member States obligations under Article 30 recast Asylum Procedures Directive. Such a clarification in national law is also necessary in light of the prohibition of detaining an asylum seeker for the sole reason that he or she is an applicant, laid down in Article 8(1) of the recast Reception Conditions Directive.

» **(b) “in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant.”**

ECRE regrets the deletion of the reference to a “preliminary review” which appeared in the amended Commission proposal and which constituted an important safeguard limiting detention to the very initial stage of the asylum procedure and was in line with UNHCR's Guidelines on Detention.⁶¹

ECRE reminds Member States that, should they choose to apply this ground, they must do so in compliance with the UNHCR Guidelines on Detention which limit its use to the context of a preliminary interview. In ECRE's view, the proper examination of asylum applications is undermined when it is carried out in detention, as it diminishes effective access to procedural guarantees such as legal assistance. Moreover, for persons who are already vulnerable, detention facilities are an inappropriate environment which may increase rather than decrease lack of trust in the asylum authorities and may also adversely impact on the cooperation between the authorities and the applicant, necessary to establish all the elements and facts of the case. Therefore, detention is in the vast majority of cases counterproductive to the objective of a full and efficient establishment of the facts. Moreover, ECRE reminds Member States that the UNHCR guidelines only allow the use of detention for the purpose of “recording” the elements on which the application is based, which obviously implies a less time-consuming and thorough activity than the “determination” of such elements.

Therefore, if Member States want to apply this detention ground, ECRE urges Member States to do so only in the context of a preliminary interview and never to extend detention to the entire duration of the asylum procedure as this would be contrary to the exceptional nature of detention of asylum seekers and the principle that detention of asylum seekers should only be for as short a period as possible as is laid down in Article 9(1) of the recast Reception Conditions Directive.

59. Which is also acknowledged in Article 31(1) Refugee Convention prohibiting State Parties to impose penalties, on account of their illegal entry or presence, on refugees coming directly from a territory where their life or freedom was threatened in the sense of the refugee definition, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

60. Verification of identity or nationality cannot include contacting alleged actors of persecution or serious harm. According to Article 30 of the recast Asylum Procedures Directive on the collection of information on individual cases, 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 applicants integrity or the security of his or her family members.

61. ECRE, *2011 RCD Comments*, 8. See also UNHCR, *2012 Detention Guidelines*, par. 28.

Furthermore, while Article 8(3)(b) includes the “risk of absconding” as part of this detention ground, the recast Reception Conditions Directive does not include a definition of such risk, whereas this is defined in the Dublin III Regulation and the EU Return Directive.⁶² First, it should be noted that the risk of absconding is only referred to in relation to this specific ground for detention and therefore cannot be used as a separate detention ground. In this respect, the words “in particular” only relate to the need to detain in order to collect the elements of the application that would be lost in absence of detention. The “risk of absconding” cannot be used in relation to any of the other grounds, as this would go against the exhaustive nature of the list of detention grounds listed in Article 8(3).

Second, the presumption against the detention of asylum seekers requires a restrictive interpretation of the risk of absconding, which should be clearly defined under national legislation and necessarily be linked to the purpose of collecting the substantive elements of the asylum application. This also means that the often extensive list of “objective criteria” used by Member States to define the risk of absconding in the context of the EU Return Directive cannot serve as a basis to interpret and apply the notion of risk of absconding in Article 8(3) of the recast Reception Conditions Directive, as they are linked to the return of third-country nationals who are staying irregularly on the territory, whereas the right to remain on the territory of applicants for international protection is clearly laid down in Article 9 of the recast Asylum Procedures Directive. Furthermore, the assessment of the risk of absconding of an applicant for international protection should not rely on automatic assumptions based on the applicant’s irregular entry into the territory, as this would be at odds with the principle of non-penalisation of irregular entry under Article 31 of the Refugee Convention.⁶³

Accordingly, in ECRE’s view, should Member States choose to apply this ground, in line with the principle that applicants may only be detained in “clearly defined exceptional circumstances”, at a minimum, Article 8(3) (b) should be interpreted as having the restrictive meaning of recording the elements of the application that otherwise would be demonstrably lost and only in the context of a preliminary interview. Any assessment of the risk of absconding must be strictly related to the recording of the elements of the application that would be demonstrably lost in the absence of detention and in light of the individual’s capacity as an applicant for international protection.

- » **(c) “in order to decide, in the context of a procedure, on the applicant’s right to enter the territory.”** ECRE reiterates its position against the introduction of this controversial ground for detention.⁶⁴ This provision is drafted with dangerous ambiguity that may lead to systematic detention at the border, where border procedures are carried out. The wide scope of Article 8(3)(c) seems to imply that detention is permissible throughout the full duration of a border procedure, which may last up to four weeks.⁶⁵

If applied systematically, Article 8(3)(c) would be at odds with the principle of non-penalisation of illegal entry in Article 31 of the 1951 Refugee Convention concerning refugees who come directly from a territory where they have a well-founded fear of persecution, and present themselves directly to the authorities with good cause for illegal entry. While the guarantees of Article 31 of the Refugee Convention are not available to all applicants (such as with regard to applicants entering from a ‘safe’ country of transit, for instance), the interplay of ECHR and EU Charter safeguards with the recast Reception Conditions Directive is crucial in this context.

In this regard, ECHR case-law provides helpful guidance vis-à-vis the limits of this ground. As mentioned above, in the case of *Suso Musa v Malta*, the ECtHR held that obligations under EU

62. Article 2(n) Dublin III Regulation; 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* 2008 L 348/98, Article 3(7). It should be noted that in both cases the definition of the risk of absconding requires the actual objective criteria defining such risk to be specified in national law.

63. Moreover, criteria such as irregular entry do not necessarily constitute factors relevant to the assessment of the applicant’s *future* conduct. On the contrary, in the case of a person applying for international protection in the Member State responsible for the examination of his or her application, the existence of dependent children or a health condition are rather to be seen a presumption that there is no risk of absconding in that case.

64. ECRE, *2011 RCD Comments*, 8-9.

65. Article 43(2) recast Asylum Procedures Directive.

law may further restrict the possibility for Member States to lawfully detain under Article 5(1)(f) “in order to prevent unauthorised entry”. As asylum seekers have the right to remain on the territory as soon as they have made an asylum application and are therefore authorised to stay on the territory during the examination of their claim, detention can in their case no longer serve the purpose of preventing their unauthorised entry. The only exception to the right to remain on the territory pending the examination of the application allowed under the recast Asylum Procedures Directive is with regard to subsequent asylum applications or in case of extradition or surrender to a third country.⁶⁶ As the border or transit zones are part of the territory of Member States, Article 43(2) of the recast Asylum Procedures Directive (according to which Member States shall grant entry to the territory to an asylum seeker in case no decision has been taken in the context of a border procedure within four weeks) cannot be interpreted as meaning that until such decision has been taken, the asylum seeker has no right to remain on the territory. Hence, as soon as an asylum seeker has made an application at the border and the exception to the right to remain laid down in Article 9(2) recast Asylum Procedures Directive does not apply, it could be argued that his or her detention cannot serve the purpose of “preventing unauthorised entry” and therefore is at odds with Article 5(1)(f) ECHR, first limb.

Conversely, the second limb of Article 5(1)(b) ECHR only allows detention for the fulfilment of a concrete obligation prescribed by law. Yet in the framework of a border procedure, the purpose of detention seems to be the assessment of an application’s admissibility or merits by the authorities, rather than the fulfilment of an obligation by the asylum seeker. In that regard, a broadly construed power to detain while deciding “on the applicant’s right to enter the territory” would not be faithful to Article 5(1)(b) ECHR.

» **(d) when he or she is detained subject to a return procedure...when there are reasonable grounds to believe that he or she is making the application for international protection in order to delay or frustrate the enforcement of the return decision**

This ground allows Member States to detain persons who apply for international protection from detention while already being subject to a return decision. ECRE reminds Member States that this ground for detention requires Member States to demonstrate, on the basis of objective criteria, that there are reasonable grounds to believe that the application was made merely in order to delay or frustrate the enforcement of the return decision. This means that the burden of proof of such intention is on the authorities as part of an individualised assessment.

The fact that the person had the opportunity to access the asylum procedure is mentioned as an objective criterion in Article 8(3)(d). In ECRE’s view, this must be applied and interpreted with utmost caution and assessed on a case-by-case basis. The abusive nature of the application should never be assumed on the basis that the applicant had access to the asylum procedure before. Not only may the asylum procedure have serious flaws undermining its fairness and efficiency, including lack of access to information which prevented the person from asserting their right to asylum, but it may also occur that the applicant has obtained new elements substantiating a subsequent asylum application while being in detention. Moreover situations may occur where a person may have had an “opportunity” to access the asylum procedure in theory, but in practice faced insurmountable obstacles to access the asylum procedure effectively, for instance because the registration of asylum applications is seriously delayed due to deficiencies in the asylum system and a return order is served before the application is registered or due to the particular vulnerability of the applicant.⁶⁷ Therefore, ECRE urges Member States to apply and interpret this ground in a restrictive manner, to thoroughly assess the individual circumstances of the applicant and to refrain from any automatic assumptions about the applicant having had an “opportunity” to access the asylum procedure. Where this criterion is applied it must be assessed whether the applicant had an *effective* opportunity to access the asylum procedure before he or she was detained for the purpose of removal.

ECRE reminds Member States that the CJEU, in its jurisprudence relating to the Return Directive, has held that the detention of asylum seekers and that of third-country nationals for the purpose of

66. See Article 9(2) recast Asylum Procedures Directive.

67. See for instance, ECRE, *What’s in a name? The reality of First “Reception” at Evros: AIDA Fact-Finding Visit in Greece*, February 2015, available at: <http://bit.ly/1GfXlzk>, 62.

removal are subject to different legal regimes in EU law. In the case of *Arslan*, the CJEU held that it was possible to detain an asylum seeker on the basis of a national provision if it is clear that the application for international protection was made solely to delay or jeopardise the removal but at the same time the Court emphasised that:

“[T]he mere fact that an asylum seeker, at the time of the making of his application, is the subject of a return decision and is being detained on the basis of Article 15 of Directive 2008/115 does not allow it to be presumed, without an assessment on a case-by-case basis of all the relevant circumstances, that he has made that application solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary and proportionate to maintain detention.”⁶⁸

» (e) “when protection of national security or public order so requires”

As ECRE has previously submitted,⁶⁹ the broad construction of the “national security” and “public order” detention ground may open up risks of arbitrary and systematic detention. The CJEU has, however, interpreted the concept of “national security or public order” in other legislative instruments beyond the CEAS.

The term “public order” is synonymous to “public policy”. Where the concept is used to derogate from a right enshrined in EU law, “public order” must be narrowly interpreted.⁷⁰ In that regard, the onus is on the Member State to prove why a particular person presents a threat to public order. Under the EU Citizenship Directive,⁷¹ the Court has found that an assessment of the individual conduct of the applicant is necessary for determining whether he or she constitutes a “genuine, present and sufficiently serious threat” to national security or public order.⁷²

ECRE therefore reminds that Article 8(3)(e) of the recast Reception Conditions Directive affords very narrow scope for detaining asylum seekers on the basis of national security and public order grounds. The burden of proof is on Member States to establish that an individual applicant’s conduct is such as to present a genuine, present and sufficiently serious threat. Such assessment can never be based on general assumptions such as the nationality of the applicant.

Consequently, if this ground is being used in the context of asylum detention, national legislation should explicitly exclude that the mere breach of immigration legislation, such as the use of false documents or irregular entry can be considered as constituting such a threat. In this regard, it should be noted that according to the 2014 European Migration Network (EMN) study, in Ireland the concept of public order is very narrowly defined as constituting a serious threat to fundamental State interests and excludes breaches of immigration law.⁷³

» (f) “in accordance with” the Dublin III Regulation

This ground cross-refers to the detention provision contained in Article 28 of the Dublin III Regulation, which permits detention for the purpose of securing an asylum seeker’s transfer where there is a “significant risk of absconding”.⁷⁴ The deliberate inclusion of the term “*significant*” introduces a difference in degree between this ground and the “risk of absconding” ground laid down in Article 8(3)(b).

68. CJEU, Case C-534/11 *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, Judgment of 30 May 2013, par. 62.

69. CJEU, Case C-145/09 *Land Baden-Württemberg v Tsakouridis*, Judgment of 23 November 2010, par. 25.

70. The Court has interpreted the concept in the context of the Return Directive: CJEU, Joined Cases C-473 and C-514/13 *Bero and Bouzalmate*, Judgment of 17 July 2014, par. 25. See also Case C-554/13 *Zh and O v Staatssecretaris van Veiligheid en Justitie*, Judgment of 11 June 2015, par. 50.

71. Directive 2004/38/EC of the European Parliament and of the Council 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, OJ 2004 L 158/77.

72. ECRE, 2011 *RCD Comments*, 9.

73. See EMN, *The use of detention and alternatives to detention in the context of immigration policies: Synthesis Report for the EMN Focussed Study 2014*, available at: <http://bit.ly/1Ksa36l>, 24.

74. For more detailed comments on this provision and the recast Dublin Regulation, see ECRE, *Comments on Regulation (EU) No 604/2013*, March 2015, available at: <http://bit.ly/1SSyy2J>, 32-33.

ECRE is concerned that the absence of specific criteria defining the risk of absconding in national legislation, whereas this is required under Article 28 Dublin III Regulation, has not hindered Member States in practice from detaining asylum seekers in the context of Dublin procedures. As of December 2014, at least 10 countries participating in the Dublin system had adopted no specific criteria on the significant risk of absconding and continued to apply the grounds for detention applicable to asylum seekers, even though the Dublin III Regulation had been in force since the beginning of the year.⁷⁵ This approach has been sanctioned by national courts in Germany and Austria as incompatible with the recast Dublin Regulation.⁷⁶

In that light, and whilst urging for reforms to render national legislation compatible with the Dublin III Regulation, ECRE encourages Member States to define “significant risk of absconding” through narrowly defined criteria, other than those provided for in Article 8(3)(b) as they serve a different purpose. In this respect, ECRE reminds Member States that according to the recast Dublin Regulation, they are prohibited from detaining a person for the sole reason that he or she is subject to a Dublin procedure. The Regulation also makes detention subject to principles of necessity and proportionality. ECRE reiterates its call on Member States to refrain from detaining applicants under the Dublin III Regulation in practice and to apply alternatives to detention.⁷⁷ Moreover, ECRE has also seriously questioned the legality of detention in the context of Dublin procedures under a proper reading of the jurisprudence of the ECtHR on Article 5 ECHR in combination with the right of asylum seekers to remain on the territory of Member States pending the examination of their application, which is clearly established in the EU asylum *acquis*.⁷⁸

More generally, the risks of widespread detention attached to the leeway left by Article 8(3) of the recast Reception Conditions Directive grounds seem to be reflected in practice. According to a December 2014 comparative study on detention by the EMN,⁷⁹ the most commonly invoked grounds for detention of international protection applicants are: establishing identity; risk of absconding; and threat to national security and public order. In that respect, a significant part of the Article seems to amount rather to codification of prevailing detention practice than to actual curtailment of detention power. ECRE therefore urges Member States to adopt a narrow reading of the detention grounds in Article 8 of the recast Reception Conditions Directive in line with the presumption against detention of asylum seekers as recommended in this information note.

Alternatives to detention (Article 8)

Article 8

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.
4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.

Article 8(2) and (4) codify the concept of alternatives to detention, under which detention may only be resorted to for one of the aforementioned six grounds where less coercive measures cannot effectively be applied. Article 8(4) elaborates on alternatives to detention by requiring Member States to lay down provisions on alternatives such as “regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place” in national law. ECRE welcomes the explicit obligation in Article 8(2) to apply alternatives to detention effectively before considering detention and urges Member States to introduce detailed rules on alternatives to detention in national legislation. In ECRE’s view, this should be

⁷⁵. EMN, *The use of detention and alternatives to detention in the context of immigration policies*, 17.

⁷⁶. German Federal High Court, V ZB 31/14, 26 June 2014; Austrian Administrative High Court, VwGH 2014/21/00755, 19 February 2015.

⁷⁷. See ECRE, *Comments on Regulation (EU) NO 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, March 2015, 31-32.

⁷⁸. See AIDA, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation*, AIDA Legal Briefing No. 1, June 2015, available at: <http://bit.ly/1Jk1Ly1>.

⁷⁹. EMN, *The use of detention and alternatives to detention in the context of immigration policies*, 15.

interpreted as meaning that it has been shown by the authorities that alternatives to detention cannot be applied on an individual basis. This would necessarily also imply in the vast majority of cases that, in line with the presumption against detention of asylum seekers and where detention is considered, any alternative to detention should be applied first before detention can be resorted to. In this regard, 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,⁸⁰ the availability of workable alternatives to detention provides further argumentation against the necessity of the use of detention of asylum seekers.⁸¹

As of December 2014, 21 Member States provided for alternatives to detention in immigration or asylum detention, according to the EMN study.⁸² The most frequently applied measures were reporting obligations to police or immigration authorities, followed by residence requirements and obligation to surrender travel documents.⁸³ ECRE calls on Member States to prioritise real alternatives to detention that respect the right to liberty of asylum seekers such as reporting obligations to police or immigration authorities or obligations to surrender travel documents and refrain from mechanisms that in reality operate as alternative forms of detention.⁸⁴

Guarantees for detained applicants (Article 9)

Article 9

1. An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable.

Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

2. Detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based.

3. Where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted *ex officio* and/or at the request of the applicant. When conducted *ex officio*, such review shall be decided on as speedily as possible from the beginning of detention. When conducted at the request of the applicant, it shall be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall define in national law the period within which the judicial review *ex officio* and/or the judicial review at the request of the applicant shall be conducted.

Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.

4. Detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation.

5. Detention shall be reviewed by a judicial authority at reasonable intervals of time, *ex officio* and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention.

6. In cases of a judicial review of the detention order provided for in paragraph 3, Member States shall ensure that applicants have access to free legal assistance and representation. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant.

Free legal assistance and representation shall be provided by suitably qualified persons as admitted or permit-

80. 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 2011.

81. For an analysis of existing systems in France, the UK, Canada and the United States, see France Terre d'Asile, 'Quelles Alternatives à la rétention administrative des étrangers', June 2010, *Les Cahiers du Social*, No 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 R Sampson, G Mitchell and L Bowring, *There are alternatives: A handbook for preventing unnecessary immigration detention*, Melbourne, The International Detention Coalition, 2011.

82. EMN, *The use of detention and alternatives to detention in the context of immigration policies*, 33.

83. *Ibid.*

84. For an in-depth analysis see Odysseus Network, MADE REAL.

ted under national law whose interests do not conflict or could not potentially conflict with those of the applicant.

7. Member States may also provide that free legal assistance and representation are granted:

(a) only to those who lack sufficient resources; and/or

(b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.

8. Member States may also:

(a) impose monetary and/or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to legal assistance and representation;

(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

9. Member States may demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.

10. Procedures for access to legal assistance and representation shall be laid down in national law.

Notification of detention

Article 9(4) of the recast Reception Conditions Directive requires Member States to inform applicants of the detention order “in a language which they understand or are 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”.⁸⁵ This has been interpreted by the Strasbourg Court as imposing an obligation on States to inform an applicant “in simple, non-technical language that he can understand, [of] 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.”⁸⁶ 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.

In that light, ECRE urges Member States to transpose Article 9(4) of the recast Reception Conditions Directive, in a manner consistent with the prescriptions of Article 5(2) ECHR and Article 6 of the EU Charter of Fundamental Rights. Notification of detention in line with fundamental rights standards should only be given to applicants in a language which they *actually* understand.

Duration of detention

Article 9 of the recast Reception Conditions Directive does not set out a maximum duration for the detention of applicants for international protection but requires such detention to be for “as short a period as possible”. This must be read together with the duty of “due diligence” with regard to the execution of administrative procedures relevant to the grounds for detention set out in Article 8(3) in the second sentence of Article 9(1). ECRE reminds Member States that according to the preamble the notion of due diligence requires “at least that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible”.⁸⁷ This must necessarily be read in light of the Strasbourg jurisprudence on Article 5(1)(f) ECHR.⁸⁸

As the Court explained in *Saadi*, one of the conditions for detention to be lawful is a length not exceeding that reasonably required for the purpose pursued,⁸⁹ which is also clearly stipulated in the preamble. However, in addition to the requirement of concrete and meaningful steps mentioned above, recital 16 of the recast Reception Conditions Directive also requires that “there is a real prospect that such verification [of

85. See ECRE, *2011 RCD Comments*, 11.

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

87. See Recital 16 recast Reception Conditions Directive.

88. The term is used in ECtHR, *Chahal v United Kingdom*, Application No 22414/93, Judgment of 15 November 1996, par. 113.

89. ECtHR, *Saadi v UK*, par. 74.

the detention grounds] can be carried out successfully in the shortest possible time”. This further limits the duration of detention on the basis of – and questions the very use of – grounds of detention such as the verification or determination of nationality or identity to the extent that this would require consultation of the authorities of the country of origin. As this would be prohibited under the recast Asylum Procedures Directive as discussed above, by definition no reasonable prospect that such verification can be carried out successfully can ever exist.

To promote legal certainty, ECRE thus encourages Member States to lay down the obligation not to exceed the duration of detention required for the specific purpose pursued under Article 8(3) and the specific requirements in recital 16 when defining the duty of “due diligence” under Article 9(1) of the recast Reception Conditions in national law. Specifying the content of due diligence in that way will ensure both administrative efficiency for authorities applying detention and clearer standards of review for courts in line with Article 5 ECHR and enhance asylum seeker’s protection against arbitrary detention.

Judicial review of detention

Article 9(3) requires a speedy judicial review of the lawfulness of detention to be conducted “*ex officio*” and/or at the request of the applicant, and imposes an obligation to define in national law the period within which such review must be conducted. Similarly, Article 9(5) of the recast Reception Conditions Directive provides for periodic review of detention orders “at reasonable intervals”, to be conducted “*ex officio* and/or at the request” of the detained applicant. The breadth of the provision creates a number of risks in implementation. ECRE is concerned that, where countries choose not to introduce upon courts the duty to review detention *ex officio*,⁹⁰ scrutiny of the legality of detention depends on the detained asylum seeker’s access to adequate legal assistance so as to start judicial review proceedings.⁹¹ In practice, asylum seekers often face many obstacles to accessing quality free legal assistance when detained which result from a variety of factors, such as the fact that detention centres are often located in remote areas, that they have limited means of communication with lawyers or NGOs or that availability of legal aid in general is diminished as a result of budget cuts.⁹²

Moreover, in some Member States that provide *ex officio* review, the periodicity of judicial control remains problematic in practice. In fact, the time-limit for automatic review of detention may be as long as 4 months for some countries, thereby significantly departing from the requirement that detention should always be “for as short a period as possible”.⁹³

For these reasons, ECRE calls on Member States to provide both for a judicial review *ex officio* and the possibility for the detained asylum seeker to challenge the detention. ECRE recommends, in line with UNHCR Guidelines, that if detention has been ordered by an administrative authority, the initial decision should be subject to automatic judicial review within 48 hours maximum. With regard to the requirement of judicial review “at reasonable intervals of time”, it must be ensured that after the initial review, the necessity and proportionality of detention is reviewed by a Court or tribunal every seven days after the initial review for the first month and after that automatic judicial review should take place on a monthly basis until the maximum time period set in law is reached.⁹⁴

However, in parallel, the applicant should have the right to challenge the lawfulness of his or her detention both of the initial detention provision and in between the automatic reviews. Article 9(5) requires a review *ex officio* and/or at the request of the applicant at reasonable intervals of time, “in particular whenever the detention is of prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention”. For this provision to have any meaning in practice and be effective, it is necessary that the applicant is able to request a review of the lawfulness of his detention himself as otherwise it would be impossible to submit such new information or circumstances to the court or tribunal.

90. This is the case in Belgium, Bulgaria, Cyprus, Czech Republic, Spain, France, Greece, Ireland, Lithuania, Luxembourg, Malta, Poland, Portugal, Sweden, Slovakia and the UK.

91. ECRE, *2011 RCD Comments*, 12. See also Section 8 on Appeals for a discussion on free legal assistance.

92. See AIDA, *Mind the Gap: An NGO perspective on challenges to accessing protection in the Common European Asylum System*, Annual Report 2013/2014, 57-58.

93. See e.g. AIDA Country Report Austria: Third Update, 79;

94. See UNHCR, *2012 Detention Guidelines*.

In sum, automatic judicial review is necessary as a minimum guarantee that detention of every individual is subject to speedy judicial oversight and to compensate for the lack of legal assistance that may exist in practice. At the same time, the possibility for the applicant to challenge the detention at his or her own request is necessary to compensate for potentially very long intervals of time in between the *ex officio* judicial reviews.

Free legal assistance

As ECRE has previously argued, the restriction of free legal assistance to the judicial review leaves applicants exposed to significant obstacles to accessing justice to prevent detention,⁹⁵ contrary to the ostensible front-loading approach to legal support encouraged by the recast asylum *acquis*. Member States must take the necessary measures to facilitate asylum seekers' access to quality free legal assistance as this is a crucial aspect in protecting asylum seekers from arbitrary detention. Legal guarantees laid down in law and protection derived from general principles of EU law or the EU Charter of Fundamental Rights may be of little use if asylum seekers do not have access to the legal assistance necessary to enforce those guarantees.

In this regard, ECRE welcomes the explicit requirement in Article 9(6) of free legal assistance to be provided by suitably qualified persons who do not have in any way a possible conflict of interest with those of the applicant, thereby guaranteeing access to fully independent legal assistance. Moreover, ECRE reminds Member States that the provision of free legal assistance may only be made conditional on two exhaustively listed grounds relating to the lack of resources of the applicant and the use of counsellors or legal advisers specifically designated by national law. This means that access to free legal assistance relating to detention of asylum seekers can under no circumstances be refused on the basis that the review of the detention has no tangible prospect of success.⁹⁶

Conditions of detention (Article 10)

Article 10

1. Detention of applicants shall take place, as a rule, in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners and the detention conditions provided for in this Directive shall apply.

As far as possible, detained applicants shall be kept separately from other third-country nationals who have not lodged an application for international protection.

When applicants cannot be detained separately from other third-country nationals, the Member State concerned shall ensure that the detention conditions provided for in this Directive are applied.

2. Detained applicants shall have access to open-air spaces.

3. Member States shall ensure that persons representing the United Nations High Commissioner for Refugees (UNHCR) have the possibility to communicate with and visit applicants in conditions that respect privacy. That possibility shall also apply to an organisation which is working on the territory of the Member State concerned on behalf of UNHCR pursuant to an agreement with that Member State.

4. Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.

5. Member States shall ensure that applicants in detention are systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations in a language which they understand or are reasonably supposed to understand. Member States may derogate from this obligation in duly justified cases and for a reasonable period which shall be as short as possible, in the event that the applicant is detained at a border post or in a transit zone. This derogation shall not apply in cases referred to in Article 43 of [the recast Asylum Procedures Directive].

95. ECRE, *2011 RCD Comments*, 12.

96. Which is still possible under Article 26(3) recast Reception Conditions Directive with regard to appeals relating to the granting, withdrawal or reduction of benefits under the Directive or decisions taken under Article 7.

ECRE regrets that Article 10(1)(a) of the recast Reception Conditions Directive leaves a margin of discretion relating to detaining asylum seekers in prison facilities. For reasons outlined below ECRE opposes the detention of asylum seekers in prison facilities and therefore urges Member States not to make use of such discretion. However, even if the provision enables Member States to detain applicants in prison accommodation, justifying such detention conditions for asylum seekers would prove highly onerous in practice under ECHR and EU Charter of Fundamental Rights safeguards.

In the interpretation of this provision, it is crucial to recall that the asylum context concerns the detention of persons who have committed no criminal offence. For that reason, the place and conditions under which an applicant is detained are inherent in the assessment of the legality of detention according to the ECtHR's Article 5 ECHR jurisprudence.⁹⁷ Given that applicants for international protection are not detained for having committed a crime, their detention in prison facilities cannot therefore be justified as relevant to the purpose pursued under Article 8 of the recast Reception Conditions Directive. Moreover, Article 3 ECHR is also relevant in this context.⁹⁸ Its guarantees against detention conditions amounting to inhuman or degrading treatment are of an absolute character. The standard of protection set by Article 3 ECHR is not affected by a Member State's difficulty to provide appropriate accommodation when faced with large numbers of applicants.⁹⁹

Analogies may be drawn from the CJEU's strict interpretation of the conditions of pre-deportation detention under the Return Directive.¹⁰⁰ The Court has held that Member States are required to use special detention facilities, even if there are no such facilities in a specific area or region of the country.¹⁰¹ The Court has also stated that the duty not to detain migrants awaiting deportation together with persons convicted of criminal offences is an "unconditional obligation" imposed upon Member States.¹⁰² The lack of available specialised accommodation cannot therefore justify the use of prison facilities for immigration detention.

Beyond ECHR safeguards, additional protection offered by the EU Charter of Fundamental Rights should be highlighted. While Strasbourg case-law has scrutinised detention conditions against the prohibition of torture, inhuman or degrading treatment, the right to dignity enshrined in Article 1 of the EU Charter must be read as affording separate guarantees with regard to detention conditions. It "implies that a human being cannot be treated as an object and that their intrinsic worth must be respected. The onus cannot be placed on the applicant to ensure that their essential needs are met."¹⁰³

ECRE therefore urges Member States not to make use of the possibility in Article 10(1)(a) of the recast Reception Conditions Directive to detain applicants in prison accommodation. The choice of detention place must be relevant to the detention purpose pursued under Article 8(3) of the recast Reception Conditions Directive and meet the standards set by Article 3 ECHR in order for detention itself to be lawful. Therefore, where detention is not possible in a specialised detention facility, in line with the presumption against the detention of asylum seeker and its exceptional nature, Member States must opt not to detain rather than resort to prison accommodation.

Moreover, ECRE regrets the failure of Article 10 of the recast Reception Conditions Directive to provide appropriate guidance relating to the requisite living standards in detention. In numerous reports, the European Committee for the Prevention of Torture (CPT) has raised concerns in relation to the widespread use across the EU of detention facilities with poor hygienic and accommodation standards.¹⁰⁴ Another concern is also the use of detention facilities with a prison-like atmosphere although the detainees are accommodated in

97. ECtHR, *Mayeka and Mitunga v Belgium*, Application No 13178/03, Judgment of 12 October 2006, par. 102; *Saadi v UK*, par. 74.

98. ECRE, *2011 RCD Comments*, 14.

99. ECtHR, *MSS v Belgium and Greece*, par. 223-224.

100. Article 16(1) Return Directive similarly allows Member States to detain migrants in prison facilities separately from other detainees, where accommodation in specialised facilities is not possible.

101. CJEU, *Bero and Bouzalmate*, par. 28-31.

102. CJEU, Case C-474/13 *Pham*, Judgment of 17 July 2014, par. 17.

103. ECRE, *Reception and Detention in light of the Charter*, 59.

104. See for example, CPT, *Report on the visit to Bulgaria from 24 March to 3 April 2014*, CPT/Inf(2015) 12, Strasbourg, 29 January 2015; CPT, *Report on the visit to Greece from 4 to 16 April 2013*, CPT/Inf(2014) 26, Strasbourg, 16 October 2014.

centres specifically designed for the purpose of immigration detention.¹⁰⁵

Guidance may be provided by UNHCR's 2012 Detention Guidelines, CPT standards¹⁰⁶ and ECtHR jurisprudence. On one hand, UNHCR provides helpful guidance in determining the minimum guarantees required in detention such as medical treatment, right to practice one's religion and access to basic necessities.¹⁰⁷ On the other hand, both CPT standards and Strasbourg jurisprudence has laid down standards including sufficient space to prevent overcrowding,¹⁰⁸ access to natural light or air, ventilation and heating, the possibility of using sanitary facilities in private,¹⁰⁹ the quality of food and bedding,¹¹⁰ as well as the possibility to walk/exercise.¹¹¹

ECRE calls on Member States to ensure full compliance with EU Charter standards when transposing Article 10, incorporating the standards with regard to detention conditions as laid down in the 2012 UNHCR Guidelines on Detention, CPT standards and the Strasbourg jurisprudence.

Finally, ECRE calls on Member States not make use of the possibility in Article 10(5) of the recast Reception Conditions Directive to derogate from the obligation to systematically provide asylum seekers in detention with information on the rules in the facility and their rights and obligations "in duly justified cases and for a reasonable period which shall be as short as possible". The latter sets a very vague standard and leaves too wide a margin for interpretation as to which circumstances would allow derogations from this obligation. Access to information on their rights and obligations is crucial for asylum seekers in particular to enable them to effectively access free legal assistance, which is indispensable to challenge their detention. In order to be able to contact legal practitioners or organisations providing much needed legal assistance in detention, asylum seekers must first be informed of their right to access such legal assistance and how they can do so in practice. In ECRE's view, no circumstances justify a derogation from Member States' obligation to inform asylum seekers on their rights and obligations, in particular as this does not impose disproportionate burdens on the authorities.

ECRE also reiterates its concern vis-à-vis the weakened procedural guarantees laid down in Article 10(5), referring to the right of detainees to be informed of their rights "in a language which they understand or are reasonably supposed to understand." The issues identified in respect of Article 9(4) of the recast Reception Conditions Directive and ECRE's recommendations with respect to the latter provision apply here *mutatis mutandis*.

Detention of vulnerable applicants (Article 11)

1. The health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities.

Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health.

2. Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.

The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States.

Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.

3. Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible.

¹⁰⁵. CPT, *Report on the visit to Spain from 14 to 18 July 2014*, CPT/Inf (2015) 19.

¹⁰⁶. CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2015.

¹⁰⁷. UNHCR, *2012 Detention Guidelines*, par. 48.

¹⁰⁸. ECtHR, *Aden Ahmed v Malta*, Application No 55352/12, Judgment of 23 July 2013, par. 87.

¹⁰⁹. ECtHR, *Ananyev v Russia*, Application No 42525/07, Judgment of 10 January 2012, par. 149.

¹¹⁰. ECtHR, *Modarca v Moldova*, Application No 14437/05, Judgment of 10 May 2007, par. 68.

¹¹¹. ECtHR, *HH v Greece*, Application No 63493/11, Judgment of 9 October 2014. For a detailed overview, see ECRE, *Reception and Detention in light of the Charter*, 60-62.

Unaccompanied minors shall never be detained in prison accommodation.

As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.

Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

4. Detained families shall be provided with separate accommodation guaranteeing adequate privacy.

5. Where female applicants are detained, Member States shall ensure that they are accommodated separately from male applicants, unless the latter are family members and all individuals concerned consent thereto.

Exceptions to the first subparagraph may also apply to the use of common spaces designed for recreational or social activities, including the provision of meals.

6. In duly justified cases and for a reasonable period that shall be as short as possible Member States may derogate from the third subparagraph of paragraph 2, paragraph 4 and the first subparagraph of paragraph 5, when the applicant is detained at a border post or in a transit zone, with the exception of the cases referred to in Article 43 of [the recast Asylum Procedures Directive].

Detention of persons with special reception needs

In view of the devastating effect of detention on the mental and physical health of the individuals concerned, ECRE opposes the detention of particularly vulnerable asylum seekers as defined in Article 21 of the recast Reception Conditions Directive. In this regard, ECRE regrets that the wording of Article 11(1) of the recast Reception Conditions Directive has been weakened in the negotiation process and now only imposes an obligation on national authorities to take the health of vulnerable detainees as a “primary concern” and to “ensure regular monitoring and adequate support”. Moreover, the concept of “adequate support” has not been defined by EU legislators in either the operative part or the Preamble of the recast Reception Conditions Directive.

However, the linkage between the recast Reception Conditions Directive and the recast Asylum Procedures Directive relating to the treatment of vulnerable applicants provides further guidance on this point. Under Article 24(3) of the recast Asylum Procedures Directive, Member States are required to provide such persons with “adequate support” to meet their special procedural needs,¹¹² in the form of sufficient time to submit the elements relevant to their claim, for example.¹¹³ Where such adequate support cannot be provided under accelerated or border procedures, however, Member States are precluded from placing vulnerable applicants into those procedures.¹¹⁴ Accordingly, the provision of “adequate support” in its procedural limb becomes a necessary condition for applying expedient procedures.

As stated above, the reception limb of “adequate support” is not defined *per se* in the recast Reception Conditions Directive. However, Article 22(1) of the recast Reception Conditions Directive clarifies that Member States need to provide vulnerable applicants with the support required to meet their special reception needs.¹¹⁵ Yet providing adequate support to meet special reception needs of vulnerable applicants is irreconcilable with the very practice of detention. Evidence across different countries has shown that detention exacerbates vulnerabilities such as mental trauma and often creates previously inexperienced conditions.¹¹⁶ Since vulnerable applicants cannot be provided with adequate support needed to meet their needs while detained, an appropriate reading of the recast Reception Conditions Directive should prohibit their detention. ECRE thus considers that the obligation in Article 11(1) to ensure “adequate support” precludes Member States from detaining vulnerable applicants, given that the necessary support for the fulfilment of their special reception needs cannot be provided in detention.

Accordingly, ECRE encourages Member States to transpose the provision through a prohibition to detain vulnerable applicants.

^{112.} Article 24(3) recast Asylum Procedures Directive.

^{113.} Recital 29 recast Asylum Procedures Directive.

^{114.} Article 24(3) recast Asylum Procedures Directive.

^{115.} See also UNHCR, *2012 Detention Guidelines*, 49-65.

^{116.} JRS, *Europe: Becoming Vulnerable in Detention*, June 2011, 61. ECRE, *Reception and Detention in light of the Charter*, 80.

General principles

Article 11 of the recast Reception Conditions Directive also contains specific provisions on the detention of children. ECRE reiterates that children should never be detained as this is never in their best interests.¹¹⁷ Their double vulnerability, stemming firstly from their inherently vulnerable status as asylum seekers and secondly as children, and specific needs are decisive factors which must take priority over considerations of immigration control.¹¹⁸

While ECRE opposes the detention of children and would have preferred a clear ban on the detention of asylum-seeking children in the Directive, it is acknowledged that Article 11 of the recast Reception Conditions Directive emphasises the exceptional nature of this particularly vulnerable group by stating that minors are only detained “as a measure of last resort” and where alternatives to detention cannot effectively be applied and “for the shortest period of time”. Moreover, both with regard to accompanied and unaccompanied children Article 11(2) and (3) impose a positive obligation on Member States to undertake “all efforts” to release them and place them in accommodation suitable for minors.¹¹⁹ ECRE urges Member States to transpose these obligations in such way as to respect the best interests of the child.¹²⁰ If nevertheless, Member States choose to maintain the possibility to detain asylum-seeking children, ECRE reminds Member States that also CPT standards emphasise, owing to the particular vulnerability of a child, the need to observe additional safeguards whenever a child is detained, particularly in those cases where the children are separated from their parents or other carers, or are unaccompanied, without parents, carers or relatives.¹²¹

Accompanied children

In the case of children accompanied by their families, the primordial importance of keeping the family together has been stressed not only as a component of the best interests principle, but also as an integral part of Article 3 ECHR protection.¹²² Yet the prescriptions of the “best interests” principle carry particularly strong weight *against* detaining families with children. The burden of proof that it is in a child’s best interests to be placed in detention with his or her family members rather than being free, is entirely on the State authorities and would be highly onerous to discharge. Even where a child is accompanied, it is crucial to recall that the ECtHR has sanctioned detention in places inappropriate to meet the needs of children under Article 3.¹²³

Unaccompanied children

Under Article 11(3), unaccompanied children are only to be detained “in exceptional circumstances”. While the recast Reception Conditions Directive does not define the exceptional circumstances or specify how they differ from the last-resort approach taken for other minors, the best interests principle should be the central point of reference for justifying the legality of detention. Read appropriately, the principle leaves very narrow scope for Member States to detain unaccompanied children, as doing so adversely affects their physical and mental health, precludes their access to education and exacerbates their vulnerability.¹²⁴ As will be discussed below, in ECRE’s view, detention would never amount to “accommodation suitable for minors”, as required by Article 24(2)(d) of the recast Reception Conditions Directive. Moreover, the detention of unaccompanied children in premises not suitably adapted to their needs has been sanctioned as

117. ECRE, *Reception and Detention in light of the Charter*, 82.

118. ECRE, *Amicus Curiae in Bilalova v Poland*, par. 26, citing ECtHR, *Tarakhel v Switzerland*, Application No 29217/12, Judgment of 4 November 2014, par. 99, *Mayeka and Mitunga v Belgium*, par. 55 and *Popov v France*, Application No 39472/07, Judgment of 19 April 2012, par. 91.

119. ECRE, *2011 RCD Comments*, 16-17.

120. Article 3 CRC; Article 24(2) EU Charter; Articles 11(2) and 23(2) recast Reception Conditions Directive.

121. These include that as soon as possible after the presence of a child becomes known to the authorities, a professionally qualified person should conduct an initial interview, in a language the child understands. An assessment should be made of the child’s particular vulnerabilities, including from the standpoints of age, health, psychosocial factors and other protection needs, including those deriving from violence, trafficking or trauma. Steps should be taken to ensure a regular presence of, and individual contact with, a social worker and a psychologist in establishments holding children in detention. See CPT, *CPT Standards*, CPT/Inf/E (2002) Rev 1. 2015, par. 99.

122. ECtHR, *Tarakhel v Switzerland*, par. 120.

123. ECtHR, *Kangaratnam v Belgium*, Application No 15297/09, Judgment of 13 December 2011.

124. For an overview of reports on the situation of unaccompanied children, see ECRE, *2011 RCD Comments*, 17.

incompatible with Article 3 ECHR by the ECtHR.¹²⁵ As rightly stated by the UN Working Group on Arbitrary Detention:

“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 CRC, according to which detention can only be used as measures of last resort”.¹²⁶

A considerable number of Member States have laid down a prohibition on detention of unaccompanied children in law or as a matter of practice.¹²⁷ Yet, a number of countries detain unaccompanied children when their age is contested until the authorities deem their minority confirmed. This use of detention not only ignores the “exceptional circumstances” approach to detention set out in Article 11(3) of the recast Reception Conditions Directive, but also may contravene Article 25(5) of the recast Asylum Procedures Directive, under which authorities are bound to assume that the applicant is a minor when persistent doubt exists as to his or her age. Accordingly, ECRE urges Member States to apply the “benefit of the doubt” in order to refrain from detaining applicants whose minority is contested on the assumption that they will be confirmed as adults following an age assessment.

For the reasons outlined above, ECRE urges Member States to lay down provisions prohibiting the detention of children, as doing so contravenes their best interests.

5. Access to Employment (Article 15)

1. Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.

2. Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law, while ensuring that applicants have effective access to the labour market.

For reasons of labour market policies, Member States may give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.

3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.

ECRE reiterates that access to employment is the most meaningful way for asylum seekers to avoid social exclusion and dependency on state funds, bringing beneficial results for both them and host states.¹²⁸ The importance of promoting self-sufficiency is expressly acknowledged by Recital 23 of the recast Reception Conditions Directive. To that end, there seems little justification behind hindering applicants’ access to the labour market from both an economic and social perspective.

Given the degree of flexibility left by the original Directive, which authorised restrictions on access to the labour market for up to 1 year, almost all Member States complied with its provisions on employment.¹²⁹ Yet the impact of such restrictions on the economic and social well-being of asylum seekers was undoubtable.

Currently, only Greece and Sweden provide for immediate access to the labour market. Restrictions then vary from 3 months to 6 months to the maximum of 9 months, while certain countries still retain the 1-year restriction beyond the terms of the recast Reception Conditions Directive. Bearing in mind that a regular

¹²⁵. ECtHR, *Mayeka and Mitunga v Belgium*, par. 50.

¹²⁶. United Nations Human Rights Council, *Report of the Working Group on Arbitrary Detention* 18 January 2010, A/HRC/13/30, par. 60.

¹²⁷. This is the case in Italy and Belgium, for instance. The Netherlands also prohibits detention of unaccompanied children at the border.

¹²⁸. ECRE, *2011 RCD Comments*, 19.

¹²⁹. European Commission, *RCD Implementation Report*, 8.

asylum procedure should normally last up to 6 months under the recast Asylum Procedures Directive,¹³⁰ most countries allow applicants to access the labour market only when the processing of their claim has been delayed beyond the usual time-limit.

While Article 15 requires Member States to ensure access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision has not been taken, ECRE reminds Member States that it does not prevent States to provide access to the labour market at an earlier stage or even immediately after the application was lodged. ECRE encourages Member States to ensure access to the labour market as early as possible after the application was lodged and in any case no later than 6 months after such date as this is in the interest of both asylum seekers and Member States. Early access to the labour market obviously is an important tool to “promote the self-sufficiency of applicants” referred to in recital 23 and therefore Article 15 must be interpreted and applied accordingly.

Moreover, ECRE calls on Member States to adopt a narrow interpretation of “delays that can be attributed to the applicant” with regard to the time necessary to take a first instance decision on the asylum application. Whether such delays can be attributed to the applicant is obviously open to interpretation and this notion should not be used such as to render access to the labour market meaningless in practice.

Furthermore, the recast Article 15(2) introduces a duty upon Member States to ensure that “applicants have effective access to the labour market.” This obligation, which should be read in line with the general principle of effectiveness in EU law, poses significant constraints on the employment restrictions which may permissibly be imposed on asylum seekers. Therefore, while Member States may impose conditions for access to employment such as a restriction of employment sectors or a labour market test, such conditions cannot render it unduly difficult for asylum seekers to find employment.

6. Material Reception Conditions (Articles 17-20)

General rules (Article 17)

1. Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection.

2. Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.

Member States shall ensure that that standard of living is met in the specific situation of vulnerable persons, in accordance with Article 21, as well as in relation to the situation of persons who are in detention.

3. Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence.

4. Member States may require applicants to cover or contribute to the cost of the material reception conditions and of the health care provided for in this Directive, pursuant to the provision of paragraph 3, if the applicants have sufficient resources, for example if they have been working for a reasonable period of time.

If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when those basic needs were being covered, Member States may ask the applicant for a refund.

5. Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined on the basis of the level(s) established by the Member State concerned either by law or by the practice to ensure adequate standards of living for nationals. Member States may grant less favourable treatment to applicants compared with nationals in this respect, in particular where material support is partially provided in kind or where those level(s), applied for nationals, aim to ensure a standard of living higher than that prescribed for applicants under this Directive.

Research on the implementation of the original Reception Conditions Directive showed that, generally, where material reception conditions were provided exclusively or mostly in kind, they were generally

¹³⁰. Article 31(3) recast Asylum Procedures Directive.

deemed adequate.¹³¹ On the contrary, financial allowances were deemed inadequate to guarantee asylum seekers health care and subsistence.¹³² As a 2014 comparative study by the EMN indicates, the coverage and level of financial allowances varies substantially across Member States.¹³³

In *Saciri*, the CJEU held that the level of financial assistance must “be sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence”,¹³⁴ while also taking into account the best interests of children and the special needs of vulnerable applicants.¹³⁵ Both the *Cimade and GISTI* and *Saciri* rulings imply that the right to human dignity enshrined in Article 1 of the EU Charter and interpreted as a free-standing fundamental right is aimed at establishing broader positive socio-economic obligations for Member States in the reception context,¹³⁶ beyond the socio-economic implications of Article 3 ECHR.¹³⁷

In ECRE’s view, the obligation to provide an “adequate standard of living” in Article 17(2) and (5) must be implemented and laid down in law or administrative practice in accordance with the prescriptions of the Court in the *Saciri* judgement, including by allowing the applicant to afford housing in the private rental market, if needed.¹³⁸ ECRE also highlights the need to give due consideration to family unity and the best interests of the child, as underlined in *Saciri*.

Finally, ECRE reiterates its concern regarding Article 17(5) which enables Member States to derogate from equal treatment to nationals on non-exhaustive grounds. The wide margin of discretion left to Member States runs the risk of leading to unacceptably low levels of material reception conditions for applicants.¹³⁹ For that reason, beyond being “duly justified”, decisions to grant less favourable treatment to asylum seekers should be closely scrutinised against the duty to provide a dignified standard of living in accordance with Article 1 of the EU Charter of Fundamental Rights and the *Saciri* judgment.¹⁴⁰

Modalities for material reception conditions (Article 18)

1. Where housing is provided in kind, it should take one or a combination of the following forms:
 - (a) premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones;
 - (b) accommodation centres which guarantee an adequate standard of living;
 - (c) private houses, flats, hotels or other premises adapted for housing applicants.
2. Without prejudice to any specific conditions of detention as provided for in Articles 10 and 11, in relation to housing referred to in paragraph 1(a), (b) and (c) of this Article Member States shall ensure that:
 - (a) applicants are guaranteed protection of their family life;
 - (b) applicants have the possibility of communicating with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non-governmental organisations and bodies;
 - (c) family members, legal advisers or counsellors, persons representing UNHCR and relevant non-governmental organisations recognised by the Member State concerned are granted access in order to assist the applicants. Limits on such access may be imposed only on grounds relating to the security of the premises and of the applicants.

131. Odysseus Network, ‘Comparative Overview of the Implementation of the Directive 2003/9 in the EU Member States’, October 2006, available at: <http://bit.ly/1GurM9y>, 27-29.

132. *Ibid*, 29. See also European Commission, *RCD Implementation Report*, 6.

133. EMN, *The Organisation of Reception Facilities for Asylum Seekers in different Member States*, 2014, available at: <http://bit.ly/1ltwQwh>, Table A3.1.

134. CJEU, *Saciri*, par. 40.

135. CJEU, *Saciri*, par. 41.

136. J Jones, ‘Human Dignity in the EU Charter of Fundamental Rights and its Interpretation before the European Court of Justice’ (2012) 33 *Liv LR* 281, 296; Tsourdi, ‘Reception Conditions for Asylum Seekers in the EU: Towards the Prevalence of Human Dignity’, 20.

137. See to that effect ECtHR, *MSS v Belgium and Greece*.

138. CJEU, *Saciri*, par. 42.

139. ECRE, *2011 RCD Comments*, 21.

140. See also German Federal Constitutional Court in BVerfG, 1 BvL 10/10 1 BvL 2/11, 18 Jul 2012, discussed below.

3. Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b).
4. Member States shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres referred to in paragraph 1(a) and (b).
5. Member States shall ensure, as far as possible, that dependent adult applicants with special reception needs are accommodated together with close adult relatives who are already present in the same Member State and who are responsible for them whether by law or by the practice of the Member State concerned.
6. Member States shall ensure that transfers of applicants from one housing facility to another take place only when necessary. Member States shall provide for the possibility for applicants to inform their legal advisers or counsellors of the transfer and of their new address.
7. Persons working in accommodation centres shall be adequately trained and shall be bound by the confidentiality rules provided for in national law in relation to any information they obtain in the course of their work.
8. Member States may involve applicants in managing the material resources and non-material aspects of life in the centre through an advisory board or council representing residents.
9. In duly justified cases, Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:
 - (a) an assessment of the specific needs of the applicant is required, in accordance with Article 22;
 - (b) housing capacities normally available are temporarily exhausted.
 Such different conditions shall in any event cover basic needs.

ECRE emphasises that the restrictions to access of family members, legal advisors, NGOs and UNHCR to reception facilities under Article 18(2)(c) of the recast Reception Conditions Directive are only permissible insofar as “grounds relating to the security of the premises and of the applicants” require so. Therefore, such restrictions cannot be interpreted as allowing the restriction of access to reception facilities on public order or security grounds. ECRE therefore urges Member States to specify the precise grounds relating to the security of the premises and the residents which would warrant limitations on applicants’ access to family members, legal advisors, NGOs and UNHCR, when transposing this provision.

Furthermore, in relation to the derogation foreseen by Article 18(9), ECRE welcomes the further reduction of permissible grounds in the recast Directive and the requirement that this can only be done in duly justified cases, which further strengthens the exceptional nature of such a measure. ECRE reminds States that the “modalities for material reception conditions different from those” in the provision must “in any event cover basic needs”. While the concept of basic needs is not defined in the recast Reception Conditions Directive, guidance may be drawn from the CJEU’s interpretation in *Abdida*,¹⁴¹ concerning the Return Directive. There, the Court states that the requirement to provide “emergency health care and essential treatment of illness” would be meaningless without a concomitant duty to provide “basic needs”.¹⁴² In his Opinion, Advocate-General Bot elaborates on the content of an applicant’s basic needs by referring to a “decent standard of living adequate for his [or her] health”, which includes the ability to secure accommodation.¹⁴³

Interpretative guidance on the content of “basic needs” is also found in national courts’ case-law. In the UK, for instance, the High Court found that “Some of the items that need to be included, when setting the level of support, are essential household goods such as: cleaning materials and disinfectant, special requirements of new mothers, babies and very young children and non-prescription medication.”¹⁴⁴ The German Constitutional Court has also referred to the content of basic needs as covering the physical existence of a human being and the opportunity to maintain interpersonal relationships and a minimum level of participation in

¹⁴¹. CJEU, Case C-562/13 *Abdida v Centre public d’action sociale d’Ottignies-Louvain-La-Neuve*, Judgment of 18 December 2014.

¹⁴². CJEU, *Abdida*, par. 60.

¹⁴³. CJEU, *Abdida*, Opinion of Advocate-General Bot, par. 157.

¹⁴⁴. UK High Court, *Refugee Action v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin), cited in ECRE, *Reception and Detention in light of the Charter*, 18.

social, cultural and political life.¹⁴⁵

Moreover, as will be discussed below, the right of applicants to a “dignified standard of living” in accordance with Article 1 of the EU Charter is always applicable in the context of reception conditions. Therefore the content of “basic needs” provided under different modalities of material reception conditions pursuant to Article 18(9) must be scrutinised against these criteria.

In that light, ECRE encourages Member States to provide further guidance on the content of “basic needs” available to the applicant when, in duly justified cases it is necessary to set modalities for reception conditions different than the ones laid down in Article 18(1) to (8), with reference to the right to dignity in Article 1 of the EU Charter of Fundamental Rights. Such needs should include at a minimum health care and the possibility of securing accommodation.

Reduction or withdrawal of material reception conditions (Article 20)

1. Member States may reduce or, in exceptional and duly justified cases, withdraw material reception conditions where an applicant:

(a) abandons the place of residence determined by the competent authority without informing it or, if requested, without permission; or

(b) does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down in national law; or

(c) has lodged a subsequent application as defined in Article 2(q) of [the recast Asylum Procedures Directive].

In relation to cases (a) and (b), when the applicant is traced or voluntarily reports to the competent authority, a duly motivated decision, based on the reasons for the disappearance, shall be taken on the reinstatement of the grant of some or all of the material reception conditions withdrawn or reduced.

2. Member States may also reduce material reception conditions when they can establish that the applicant, for no justifiable reason, has not lodged an application for international protection as soon as reasonably practicable after arrival in that Member State.

3. 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.

4. Member States may determine sanctions applicable to serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour.

5. Decisions for reduction or withdrawal of material reception conditions or sanctions referred to in paragraphs 1, 2, 3 and 4 of this Article shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 21, taking into account the principle of proportionality. Member States shall under all circumstances ensure access to health care in accordance with Article 19 and shall ensure a dignified standard of living for all applicants.

6. Member States shall ensure that material reception conditions are not withdrawn or reduced before a decision is taken in accordance with paragraph 5.

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. No one should be deprived of basic social assistance, foodstuffs, housing and health care, while the best interests of the child should always be a primary consideration.

Therefore, as the complete withdrawal of reception conditions is optional according to Article 20, Member States should not foresee such possibility in national legislation. Where such possibility is nevertheless provided, ECRE deems that the duty to justify withdrawal in exceptional cases leaves Member States very narrow scope for withdrawing reception conditions. In that light, any decision to exclude applicants from material reception conditions must be based on one of the Article 20(1) grounds with reference to the indi-

¹⁴⁵ BVerfG, 1 BvL 10/10 1 BvL 2/11, 18 July 2012, cited in ECRE, *Reception and Detention in light of the Charter*, 18.

vidual circumstances of the case.¹⁴⁶

Moreover, even withdrawal of material reception conditions does not absolve Member States of their reception obligations towards applicants. On that point, ECRE draws particular attention to Article 20(5). Recalling that access to health care and “a dignified standard of living for all applicants” must *always* be provided, the provision introduces an implicit reference to Article 1 of the EU Charter. The content of the EU Charter right to dignity must be interpreted as distinct from Article 4 of the EU Charter, which would safeguard asylum seekers from destitution amounting to inhuman or degrading treatment.¹⁴⁷ While the relationship between the “adequate standard of living” afforded to applicants benefiting from material reception conditions under Article 17 and the “dignified standard of living” guaranteed even to those who are excluded from reception conditions is ambiguous in the Directive,¹⁴⁸ the applicability of Article 1 of the EU Charter ensures substantive protection for *all* applicants.¹⁴⁹ Under an appropriate reading of the right to dignity in the CJEU judgment in *Saciri*, Member States must therefore ensure the applicant’s subsistence and pay due regard to vulnerability and the best interests of children even where reception conditions have been restricted or withdrawn.

In light of the above, ECRE calls upon Member States to define the form and level of reception conditions they must afford to applicants following a withdrawal of material reception conditions under Article 20 of the recast Reception Conditions Directive, in full respect of a “dignified standard of living”.

7. Special Reception Needs of Vulnerable Persons (Articles 21-25)

Assessment of special reception needs (Article 22)

Article 22

1. In order to effectively implement Article 21, Member States shall assess whether the applicant is an applicant with special reception needs. Member States shall also indicate the nature of such needs.

That assessment shall be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure.

Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.

2. The assessment referred to in paragraph 1 need not take the form of an administrative procedure.

3. Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive.

4. The assessment provided for in paragraph 1 shall be without prejudice to the assessment of international protection needs pursuant to [the recast Qualification Directive].

Article 22(1) establishes an obligation on Member States to assess whether a vulnerable asylum seeker has special needs within a reasonable period of time, to indicate the nature of such needs and to ensure that such needs are addressed, including if they come apparent at a later stage of the asylum procedure. In ECRE’s view, this provision sets important standards that, if transposed and implemented properly, can contribute to fairer and better functioning asylum systems adapted to the specific needs of asylum seekers

¹⁴⁶. See also Article 20(5) recast Reception Conditions Directive, requiring individual decisions, taking particular account of possible vulnerabilities of the applicant. In that spirit, the proposed exclusion of applicants falling under Article 20(1)(a)-(b) from reception conditions in France seems more in line with the terms of the Directive, as it explicitly takes into account vulnerability: AIDA Country Report France: Third Update, 98.

¹⁴⁷. See e.g. ECtHR, *MSS v Belgium and Greece* and *Tarakhel v Switzerland*.

¹⁴⁸. Recital 11 recast Reception Conditions Directive provides little interpretative assistance, as it hints that the terms “dignified standard of living” and “adequate standard of living” are used interchangeably in the Directive. If that reading is correct, the content of reception guarantees in Articles 17 and 20 should be equivalent.

¹⁴⁹. For a detailed overview of the content of the right to dignity, see ECRE, *Reception and Detention in light of the Charter*, 16-17.

who are particularly vulnerable. However, the method of that identification is left to the discretion of Member States, as it is stipulated that such assessment does not need to take the form of an administrative procedure. Therefore, the establishment of efficient mechanisms for the identification of vulnerable applicants with special needs forms one of the central challenges of the recast Reception Conditions Directive's transposition process. However, it is at the same time clear that Article 22 requires Member States to take active steps to assess the individual needs of asylum seekers and therefore they cannot rely solely on an asylum seeker's self-identification to effectively guarantee his or her rights under EU law.

Understanding what amounts to an efficient identification mechanism raises questions of both fairness and timing in vulnerability assessments. The need to avoid additional layers of procedural complexity need be borne in mind. Due to their very vulnerable status, the categories of applicants envisaged by Article 21 of the recast Reception Conditions Directive should be guaranteed swift access to reception conditions tailored to their specific needs. Yet, as many situations of vulnerability among the protected categories listed in Article 21 are often based on past experiences, the assessment of special reception needs could be implemented in such a way as to create additional complexity in an already complicated asylum process.¹⁵⁰ Even though Article 22(2) does not require Member States to institute a separate administrative procedure for that purpose,¹⁵¹ Article 22 of the recast Reception Conditions Directive implies an additional procedural step for applicants prior to gaining access to appropriate reception conditions.

Accordingly, ECRE draws attention to fairness and timeliness as necessary considerations in the transposition of Article 22 of the recast Reception Conditions Directive.

Fair assessment

In relation to vulnerability assessments under the recast Asylum Procedures Directive, ECRE has reiterated that:

“[T]he assessment of a person's special procedural and reception needs should preferably take place within the context of a predefined procedure or mechanism in order to maximise its effectiveness and fairness. Although special reception needs may not in all circumstances generate special procedural needs and vice-versa, they are often linked. [...] Whether such assessment is done through a separate administrative procedure or not, the applicant's rights under the EU Charter of Fundamental Rights and general principles of EU law, including the right to good administration, which includes the right to be heard before any individual measure that may adversely affect the applicant is taken and the obligation of a reasoned decision, will have to be respected in practice.”¹⁵²

The applicability of the right to be heard as a general principle of EU law entails the possibility for the applicant to submit observations during the identification process so as to explain why they should benefit from special reception conditions. These observations need in turn be taken into consideration by the national authorities conducting the assessment.¹⁵³ Similarly, decisions relating to special reception conditions which may adversely affect an applicant must give reasons, including where vulnerabilities become apparent at later stages of the asylum procedure.¹⁵⁴

Timely identification

ECRE places significant emphasis on the time-limits within which vulnerability assessments need to be carried out. In this respect the “reasonable period of time” criterion in Article 22(1) of the recast Reception Conditions Directive must be read in light of the duty to make material reception conditions available as soon as persons make an application for international protection, according to Article 17(1) of the recast Reception Conditions Directive and the Court's interpretation in the *Cimade and GISTI* and *Saciri* judgments. As mentioned above, the right to dignity protected by Article 1 of the EU Charter of Fundamental Rights safeguards

¹⁵⁰. E Guild *et al.*, ‘New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection’, October 2014, PE509.989, 73-74.

¹⁵¹. Under Article 24(2) recast Asylum Procedures Directive, Member States may assess special reception needs and special procedural needs *in tandem*. This assessment may be integrated in the examination procedure.

¹⁵². ECRE, *Information Note on Directive 2013/32/EU*, 29.

¹⁵³. ECRE, *RCD in light of Article 41 and 47 of the Charter*, 12.

¹⁵⁴. *Ibid*, 14.

applicants from any deprivation of the reception conditions necessary for their subsistence at any stage of the asylum procedure. In the implementation of Article 22 of the recast Reception Conditions Directive, ECRE considers that this requires the establishment of rapid and effective identification mechanisms that will assess vulnerability without delaying applicants' access to reception conditions.

Unaccompanied minors (Article 24)

1. Member States shall as soon as possible take measures to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of the representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child, as prescribed in Article 23(2), and shall have the necessary expertise to that end. In order to ensure the minor's well-being and social development referred to in Article 23(2)(b), the person acting as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives.

Regular assessments shall be made by the appropriate authorities, including as regards the availability of the necessary means for representing the unaccompanied minor.

2. Unaccompanied minors who make an application for international protection shall, from the moment they are admitted to the territory until the moment when they are obliged to leave the Member State in which the application for international protection was made or is being examined, be placed:

- (a) with adult relatives;
- (b) with a foster family;
- (c) in accommodation centres with special provisions for minors;
- (d) in other accommodation suitable for minors.

Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult applicants, if it is in their best interests, as prescribed in Article 23(2).

As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

3. Member States shall start tracing the members of the unaccompanied minor's family, where necessary with the assistance of international or other relevant organisations, as soon as possible after an application for international protection is made, whilst protecting his or her best interests. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.

4. Those working with unaccompanied minors shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.

ECRE welcomes the strengthened safeguards in Article 24 with regards to the appointment and regular assessment of the representative of an unaccompanied minor, including the explicit requirement for such representative to act in accordance with the child's best interests, have the necessary experience to do so and not to present any actual or potential conflict of interest with that of the unaccompanied minor concerned. Our research shows that guardians, although central to procedures, are often not appointed immediately, and in some States have too high a workload which prevents them from properly engaging and following each of the children under their responsibility. This in turn can impact the child's access to legal assistance. Therefore, it is of the utmost importance for Member States to establish sufficiently resourced systems of persons or organisations with a clear mandate to ensure the best interest of the child and exercising legal capacity for the child where necessary.¹⁵⁵ As there are currently no harmonised standards in relation to the status and mandate of representatives, ECRE strongly recommends that Member States align their practice with recommendations of the EU Fundamental Rights Agency (FRA) in order to ensure that national child

¹⁵⁵ ECRE, *Right to Justice: Quality Legal Assistance for Unaccompanied Children – Comparative Report*, July 2014, available at: <http://bit.ly/1Hf01mV>.

protection system clearly respond to the specific needs of unaccompanied minors.¹⁵⁶ In this regard ECRE reminds Member States that Article 25 of the recast Asylum Procedures Directive allows for the representative, who shall represent and assist the child, to be the same representative as referred to in the recast Reception Conditions Directive. As argued by ECRE, this is in the interest of both unaccompanied children and the authorities.¹⁵⁷ For the unaccompanied children concerned this means that they have a unique focal point, whereas appointing different representatives could create confusion and undermine the necessary trust-based relationship with the representative. From the perspective of the authorities, appointing one representative avoids unnecessary duplication of roles adding to the administrative burden and costs. This allows for a holistic approach to the role of the representative under the asylum *acquis*, taking into account the general well-being of the child beyond complementing the child's limited legal capacity. At the same time, unaccompanied minors should always be entitled to legal assistance and representation in addition to such specialised representative, in light of their particular vulnerability and the growing complexity of asylum procedures.

ECRE is concerned by the restrictive formulation of family tracing duties in Article 24(3) of the recast Reception Conditions Directive. The provision refers to "tracing the members of the unaccompanied minor's family", which under Article 2(c) of the recast Reception Conditions Directive only extends to family already existing in the country of origin. However, the wording of Article 24(3) is in tension with the wider concept of "adult relatives" in Article 24(2)(a),¹⁵⁸ with whom an unaccompanied child should be placed as soon as the application for international protection is lodged. ECRE reminds that Member States have an obligation to trace an unaccompanied child's family members *and* relatives for the purposes of applying the family unity provisions of the Dublin Regulation.¹⁵⁹

In that light, Article 24(3) of the recast Reception Conditions Directive must be interpreted in light of (a) the obligation to place an unaccompanied minor with adult relatives and (b) the obligation to trace family members and relatives to assess whether Dublin may be applied. The fulfilment of these duties would require national authorities to trace the child's family members *and* relatives as soon as the applicant makes the claim for international protection. ECRE thus urges Member States to transpose into their national law an obligation to trace both family members and relatives.

ECRE believes that the provision in Article 24(2) of the recast Reception Conditions Directive bears important consequences on the lawfulness of detention of unaccompanied children. Given that unaccompanied children must be placed with adult relatives, a foster family or in accommodation specially designed for minors or at least suitable for minors, the scope left for detention seems highly restricted. Member States would have to demonstrate that detention constitutes "accommodation suitable for minors", in addition to being in the child's best interests. Accordingly, Article 24(2) of the recast Reception Conditions Directive lends further support to ECRE's views against the detention of unaccompanied children elaborated above.

8. Appeals (Article 26)

1. Member States shall ensure that decisions relating to the granting, withdrawal or reduction of benefits under this Directive or decisions taken under Article 7 which affect applicants individually may be the subject of an appeal within the procedures laid down in national law. At least in the last instance the possibility of an appeal or a review, in fact and in law, before a judicial authority shall be granted.

2. In cases of an appeal or a review before a judicial authority referred to in paragraph 1, Member States shall ensure that free legal assistance and representation is made available on request in so far as such aid is necessary to ensure effective access to justice. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant.

¹⁵⁶. FRA, *Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, June 2014, available at: <http://bit.ly/1x48yFz>.

¹⁵⁷. See ECRE, *Information Note on Directive 2013/32/EU*, 30-33.

¹⁵⁸. Although the term is not defined in the recast Reception Conditions Directive, Article 2(h) Dublin III Regulation provides that "relative" means the applicant's adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law". The definition is therefore broader than that of "family members".

¹⁵⁹. Article 6(4) Dublin III Regulation.

Free legal assistance and representation shall be provided by suitably qualified persons, as admitted or permitted under national law, whose interests do not conflict or could not potentially conflict with those of the applicant.

3. Member States may also provide that free legal assistance and representation are granted:

(a) only to those who lack sufficient resources; and/or

(b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.

Member States may provide that free legal assistance and representation not be made available if the appeal or review is considered by a competent authority to have no tangible prospect of success. In such a case, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

4. Member States may also:

(a) impose monetary and/or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to legal assistance and representation;

(b) provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

5. Member States may demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.

6. Procedures for access to legal assistance and representation shall be laid down in national law.

Article 26 of the recast Reception Conditions Directive provides more detailed rules on the content of free legal assistance during appeals, compared to the 2003 Reception Conditions Directive. ECRE is particularly concerned with the possibility for Member States to restrict legal assistance where the appeal has no tangible prospect of success.¹⁶⁰ If such restrictions are applied, they will have to comply with Article 47 of the EU Charter of Fundamental Rights. In *DEB*,¹⁶¹ the Court listed some of the factors that would be need to be examined when assessing the legitimate aim of such restriction. These included the nature of the right in question, the complexity of the law and procedure as well as the ability of the applicants to represent themselves effectively.

In ECRE's view, it is undisputed that the procedures in question are complex for asylum seekers in view of their disadvantaged procedural position, resulting from their lack of knowledge of the host countries' language and legal framework or the traumatic experiences they have gone through. Given the severity of the consequences of decisions taken with regard to their entitlement to reception conditions, in particular in case of withdrawal or reduction of reception conditions, any restriction of access to free legal assistance would have to be restrictively interpreted.

As ECRE has previously warned,¹⁶² the merits test applied under Article 26(3) to assess tangible prospects of success runs the risk of arbitrarily leaving asylum seekers without legal assistance, particularly when applicants are challenging decisions restricting or withdrawing their access to material reception conditions. Therefore, ECRE calls on Member States to refrain from refusing access to legal assistance and representation on the basis that the appeal has no tangible prospect of success.

9. Guidance, monitoring and control system (Article 28)

According to Article 28 Member States have a duty to report to the Commission on the implementation of (1) vulnerability assessments, (2) documentation, (3) conditions for access to the labour market, (4) the forms of material reception conditions and the level of financial allowance granted, and (5) the point of reference for determining the level of financial allowance.

ECRE is concerned by the absence of reporting duties related to detention of asylum seekers from Annex I

¹⁶⁰. Article 26(3) recast Reception Conditions Directive.

¹⁶¹. CJEU, Case C-279/09 *DEB*, Judgment of 22 October 2010, par. 61.

¹⁶². ECRE, *RCD in light of Article 41 and 47 of the Charter*, 22.

of the recast Reception Conditions Directive. Detention remains the most problematic and ‘costly’ aspect of the Reception Conditions Directive. This cost needs to be unpacked in two respects. On one hand, a large evidence-base supports the position that detention adds substantial financial and administrative costs to the asylum system.¹⁶³

On the other hand, the human dimension of detention must be understood in all its different dimensions. Detention not only *per se* deprives asylum seekers of a human right ubiquitous to any society respective of fundamental freedoms, but often exposes them to inhuman or degrading conditions and precludes them from accessing employment and education, thereby only exacerbating the vulnerability of what is recognised as an already vulnerable group of persons as asylum seekers.¹⁶⁴ Finally, detention directly undermines the relationship between the Member State and the asylum seeker, as it undermines applicants’ trust in the asylum system and is likely to produce disaffection and unwillingness to cooperate with asylum authorities.¹⁶⁵

Moreover, the detention provisions in Articles 8-11 of the recast Reception Conditions Directive uncontestedly form some of the most substantial amendments brought about by the directive. As the legality of detention regimes across the EU has become much more closely regulated, the transposition of detention standards will be a crucial element in assessing the success of the Directive.

Against that backdrop, the overall lack of transparency in detention practice across the EU is striking. Access to information is particularly difficult for NGOs. Even from the viewpoint of official EU reports, however, the only available indicators on the detention of asylum seekers are those provided by the EMN in its 2014 comparative study on detention.¹⁶⁶ Yet the findings of the comparative report cannot comprehensively document the full extent of detention practices EU-wide. Firstly, the EMN study provides overall figures for detained third-country nationals, without specifying how many detainees are applicants for international protection. Secondly, it does not provide information on the number of asylum seekers detained per detention ground so as to allow for an assessment of the frequency with which the legal bases for detention are applied in practice.

ECRE therefore urges the Commission to request detailed and up-to-date information from Member States on the number of applicants for international protection detained, the reasons for detention and its duration, as well as detailed information on the detention of vulnerable applicants. In the absence of such data, any effective assessment of the detention provisions of the recast Reception Conditions Directive is severely hampered in practice.

163. E Thielemann *et al.*, ‘What System of Burden-Sharing between Member States for the Reception of Asylum Seekers?’, January 2010, PE419.620, 146; A. Edwards, ‘Back to Basics: The Right to Liberty and Security of the Person and “Alternatives to Detention” of Asylum seekers, Refugees, Stateless Persons and Other Migrants’, 2011, UNHCR Legal and Protection Policy Research Series, available at: <http://bit.ly/1CnbBdB>; R. Sampson *et al.*, ‘There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention’; JRS, ‘From Deprivation to Liberty: Alternatives to Detention in Belgium, Germany and the United Kingdom’, December 2011, available at: <http://bit.ly/1MZJxCE>; E Guild *et al.*, ‘New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection’, 18.

164. See to that effect ECtHR, *MSS v Belgium and Greece*, par. 233.

165. Guild *et al.*, ‘New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection’, 19.

166. Note that EASO also intends to initiate data collection of monthly reports on Member States’ stock of first instance cases where applicants are in detention: EASO, *Annual Report on the Situation of Asylum in the European Union 2013*, 90. However, these statistics will not record the full number of applicants in detention.

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