



**UNHCR Comments on the European Commission’s Proposal
for a recast of the Directive laying down minimum standards
for the reception of asylum-seekers
(COM (2008)815 final of 3 December 2008)**

1. Introduction

On 3 December 2008, the European Commission presented its proposal¹ for amending the Directive of the European Parliament and the Council laying down minimum standards for the reception of asylum-seekers² (hereafter: “the Directive” or “RCD”). The Office of the United Nations High Commissioner for Refugees (hereafter: “UNHCR” or “the Office”) has consistently emphasized that appropriate reception conditions for asylum-seekers are essential to ensure a fair and effective examination of protection needs.³ In its 2007 evaluation⁴ of the implementation of the Directive, the European Commission identified wide disparities in Member States’ practice, notably in the Directive’s application to: persons in detention and/or falling within the scope of the Dublin II Regulation⁵; the level and form of reception support, including health care; access to employment; free movement rights; identification of vulnerable persons and provision of care to meet their needs. These and other issues relating to the implementation of the RCD have also been documented in

¹ *Proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum-seekers (Recast)*, COM(2008) 815 final, 2008/0244(COD), {SEC(2008)2944}, {SEC(2008)2945}, 3 December 2008, available at <http://www.unhcr.org/refworld/docid/493e8ba62.html>.

² *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers*, available at <http://www.unhcr.org/refworld/docid/3ddcfda14.html>.

³ See relevant Conclusions of UNHCR’s Executive Committee, in particular ExCom Conclusions No. 93 “Conclusion on reception of asylum-seekers in the context of individual asylum systems”, No. 44 “Detention of refugees and asylum-seekers” and No. 47 “Refugee children”, No. 105 “Conclusion on Women and Girls at Risk”, No. 107 “Conclusion on Children at Risk”, all available at <http://www.unhcr.org/refworld/type/EXCONC.html>.

⁴ *Report from the European Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers*, 26 November 2007, available at <http://www.unhcr.org/refworld/docid/48abd56cd.html>.

⁵ *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (“Dublin II Regulation”)*, available at <http://www.unhcr.org/refworld/docid/3e5cf1c24.html>.

the “Comparative overview of the implementation of the Directive 2003/9 of 27 January 2003” issued by the Odysseus Academic Network (hereafter: “Odysseus report”) in 2006.⁶

In the explanatory memorandum to the recast RCD, the European Commission explains that the aim of the proposed amendments is “*to ensure higher and more equal standards of treatment of asylum-seekers with regard to reception conditions that would guarantee a dignified standard of living, in line with international law*”. UNHCR supports this aim, and believes that many of the proposed amendments, if adopted, would strengthen the applicable legal standards and address identified gaps.

However, many shortcomings in reception conditions for asylum-seekers result from Member States’ interpretation and implementation of the RCD, rather than from inadequate standards, although certain standards lack specificity, which leaves room for diverging interpretations. UNHCR therefore welcomes the Commission’s proposal to strengthen its monitoring role, as well as efforts to clarify and strengthen standards. Further convergence of practice, with a view to adequate and more consistent standards of treatment, should also be pursued through practical cooperation.

In the paragraphs below, UNHCR comments on specific proposed amendments and, in some cases, suggests that different wording may be more effective to achieve the aim of the recast Directive.

2. Definitions of “family members” and of “minors”

UNHCR supports the proposed extension of the definition of **family members** in recast article 2(c)(ii) to include unmarried minor children regardless of whether they are dependent on the applicant; in subparagraph (iii) to include married minor children, where it is in their best interests to reside with the adult applicant; and in subparagraph (iv) to include parents or guardians of a minor applicant who is married, where it is in the minor applicant’s best interests to reside with the parent or guardian. A further important proposal in subparagraph (v) would amend the definition to include minor siblings of the applicant (including where the applicant or sibling is married, if it is in the best interests of one of them that they stay together). These proposals are consistent with the UN Convention on the Rights of the Child (CRC).

UNHCR welcomes the proposed definition of ‘**minor**’ in recast article 2(e) to reflect the standard of the CRC, namely to include all persons under 18. This definition was endorsed by the UNHCR’s Executive Committee in 2007.⁷ Aware that a number of States have used different age limits for children, UNHCR encourages Member States to adopt the 18-year limit under the RCD, to enable all children to benefit from the Directive’s safeguards.

⁶ Odysseus Academic Network, *Comparative overview of the implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum-seekers in the EU Member States*, October 2006, available at <http://www.unhcr.org/refworld/docid/484009fc2.html>.

⁷ See ExCom Conclusion No. 107 (LVIII), *Children at Risk*, 5 October 2007, available at <http://www.unhcr.org/refworld/docid/471897232.html>.

Definitions of “family members” and of “minor”:

- UNHCR supports the proposed amendment of the definition of “family member” in recast article 2(c), to take account of children’s best interests and the dependency upon parents/guardians/other relatives that may remain even where children are married. These changes reflect international law and the specifically vulnerable situation of children.
- UNHCR supports the proposed changes to the definition of “minor” as a person under 18 years (recast art 2(e)).

3. Scope of the RCD

Recital 8 of the recast RCD states that the Directive should “apply during all stages and all types of procedures concerning applications for international protection and in all locations and facilities hosting asylum-seekers”. This important clarification endorses the interpretation adopted by many Member States, namely that the Directive does apply to asylum-seekers who are awaiting transfer under the Dublin II Regulation or who are in admissibility procedures, border procedures or any other distinct procedure, or in immigration detention or otherwise kept in a distinct location at a land border, airport, police station or elsewhere. The Odysseus report highlighted that a number of Member States had different views on the RCD’s applicability in such cases.⁸

Scope: UNHCR supports the explicit mention in recast recital 13 that the Directive should “apply during all stages and all types of procedures concerning applications for international protection and in all locations and facilities hosting asylum-seekers”.

4. Information

Recast article 5(2) requires that information on benefits and obligations relating to reception conditions be provided “in writing and, as far as possible, in a language that the applicants are reasonably supposed to understand. Where appropriate, this information may also be supplied orally.” The current version reads “in a language the applicants *may be* supposed to understand”.

The stipulation that information is to be provided “(...) as far as possible, in a language that the applicants are reasonably supposed to understand” is inadequate. The Odysseus report found serious shortcomings in a number of Member States in the implementation of the current obligation to provide information.⁹ According to that report, at least in one Member State, no interpreter is made available to asylum-seekers who cannot understand one of the languages in which written material is provided.¹⁰ The Odysseus report indicates that other

⁸ Odysseus report, see above footnote 6, p. 9.

⁹ Odysseus report, see above footnote 6, p. 38 and 39.

¹⁰ According to the Odysseus report, information is made available in France in written form in only six languages, while no interpreter is made available if there is no translation of the written material available in the language used by the asylum-seeker. See: Odysseus report, see above footnote 6, page 39, Q.17 C.

Member States do make interpreters available, but it is unclear if this is done systematically.

UNHCR has also learned through its monitoring work and during participatory assessments that asylum-seekers often do not understand the asylum procedure, because it was not explained to them in a language they understand or in a culturally appropriate manner.

Information: UNHCR proposes to amend recast article 5(2) to read: “Member States shall ensure that the information referred to in paragraph 1 is in writing and **in a language the applicants understand**. Where appropriate, this information may also be supplied orally.” UNHCR proposes the same wording for recast article 10(3), which refers to the obligation to inform detained asylum-seekers of the rules applicable in the detention facility.

5. Detention

Freedom from arbitrary detention is a corollary of the fundamental human right of liberty and security of the person.¹¹ UNHCR supports the proposals in the recast RCD to regulate and limit detention of persons applying for international protection, in particular by reiterating the principle that Member States shall not hold a person in detention “for the sole reason that he/she is an applicant for international protection (...)” (recast article 8(1)). UNHCR recalls Article 31 of the 1951 Convention relating to the Status of Refugees (hereafter: “the 1951 Convention”), which stipulates that penalties¹² shall not be imposed on refugees and asylum-seekers for unauthorized entry or stay, provided they present themselves without delay and show good cause for their illegal entry or presence, save under exceptional circumstances.¹³

5.1 Grounds for detention

The proposal would further limit detention of asylum-seekers by introducing in recast article 8.2 a *necessity test* (“When it proves necessary and on the basis of an individual assessment of each case” and “if other coercive measures cannot be applied effectively”) and limiting the permitted *grounds for detention* (recast article 8.2). These provisions would replace current article 7(3) permitting confinement of an asylum-seeker for undetermined legal reasons or reasons of public order. UNHCR would welcome the insertion of these safeguards which reflect international refugee and human rights law

¹¹ See, *inter alia*, Article 9 of the Universal Declaration of Human Rights, available at <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>, Article 9 of the International Covenant on Civil and Political Rights, available at <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>, Article 37(b) of the CRC, available at <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>, Article 14 of the Convention on the Rights of Persons with Disabilities, available at <http://www.unhcr.org/refworld/docid/4680cd212.html>, and Article 5 of the European Convention on Human Rights, available at <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>.

¹² Although “detention” is not explicitly mentioned in Article 31(1) of the 1951 Convention, the term “penalties” was meant by the drafters to include detention. Article 31(2) only authorizes detention when it is necessary and under specific conditions. See para. 29 of Goodwin-Gill’s study available at <http://www.unhcr.org/refworld/docid/3bf9123d4.html>.

¹³ See also ExCom Conclusion No. 44 (XXXVII), *Detention of refugees and asylum-seekers*, 13 October 1986, available at <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>.

standards. The necessity requirement is clearly established in Article 31(2) of the 1951 Convention,¹⁴ Conclusion No. 44(XXXVII) of UNHCR's Executive Committee and "UNHCR's Revised Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers" (hereafter: "UNHCR detention guidelines")¹⁵ as well as by the UN Human Rights Committee in its General Comment No. 8¹⁶ and a number of its decisions.¹⁷ Several instruments further recommend that detention should only be resorted to as a measure of last resort.¹⁸

The proposed grounds for detention (recast article 8(2)) reflect in part the UNHCR detention guidelines and could, if adopted, contribute to more consistency and legal certainty in the use of detention. The grounds expressed in (b) and (c), however, go beyond the permissible grounds in the UNHCR guidelines and could potentially allow for detention of significant numbers of asylum-seekers for long periods. Paragraph (b) permitting detention "in order to determine the elements on which his application for asylum is based which in other circumstances could be lost" could be interpreted as covering the whole asylum procedure. UNHCR suggests changing the wording to bring this provision in line with the spirit of UNHCR's detention guidelines: "in order to determine *within the context of a preliminary interview* the elements on which his application for asylum is based which *in the absence of detention* could be lost".

Paragraph (c) of recast article 8(2) would allow for detention "in the context of a procedure, to decide on his right to enter the territory". This could potentially create the risk of widespread and systematic detention of asylum-seekers in the context of border procedures, and is at odds with the UNHCR detention guidelines. Depending on its implementation and interpretation, it could result in penalization of asylum-seekers who enter the EU in an

¹⁴ Article 31(2) of the 1951 Convention: "The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country".

¹⁵ ExCom Conclusion No. 44, see above footnote 13, para. (b); *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, February 1999, Guideline 3, available at <http://www.unhcr.org/refworld/docid/3c2b3f844.html>.

¹⁶ UN Human Rights Committee, General Comment No. 8: *Right to liberty and security of persons (Article 9)*, 30 June 1982, available at <http://www.unhcr.org/refworld/docid/4538840110.html>.

¹⁷ This approach has been consistently applied in the following cases: *A v. Australia* (CCPR/C/59/D/560/1993) (30 April 1997, <http://www.unhcr.org/refworld/docid/3ae6b71a0.html>); *C v. Australia* (CCPR/C/76/D/900/1999) (13 November 2002, <http://www.unhcr.org/refworld/docid/3f588ef00.html>); *Jalloh v. Netherlands* (CCPR/C/74/D/794/1998) (15 April 2002, <http://www.unhcr.org/refworld/docid/3f588ef3a.html>); *Baban v. Australia* (CCPR/C/78/D/1014/2001) (18 September 2003, <http://www.unhcr.org/refworld/docid/404887ee3.html>); *Shafique v. Australia* (CCPR/C/88/D/1324/2004) (13 November 2006, <http://www.unhcr.org/refworld/docid/47975af921.html>).

¹⁸ See, for example, UN Sub-Commission on Promotion and Protection of Human Rights, *Resolution 2000/21 on the detention of asylum-seekers*, 18 August 2000, <http://www.unhcr.org/refworld/docid/3dda66394.html>. See also the recommendation of the UN Working Group on Arbitrary Detention that "alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention"; UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention : addendum : report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers*, 18 December 1998, E/CN.4/1999/63/Add.3, para. 33. See also: Article 37(b) of the CRC.

irregular manner. In UNHCR's view, it is important for national legislation and/or administrative practice to make the necessary distinction between the situation of asylum-seekers, who are claiming the fundamental right to seek and enjoy asylum, and that of other aliens.¹⁹

Grounds for detention (recast article 8): UNHCR proposes to amend article 8(2)b to read: “in order to determine within the context of a preliminary interview the elements on which his application for asylum is based which in the absence of detention could be lost”.

5.2 Obligation to inform of the reasons for detention

The obligation in recast article 9(4) to inform detained asylum-seekers immediately of “the reasons for detention (...) in a language they are reasonably supposed to understand” is not in line with article 5(2) of the European Convention on Human Rights (hereafter: “ECHR”) which states “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.” This provision has been interpreted by the European Court of Human Rights (hereafter: “ECtHR”) as meaning that the person must be told in simple and non-technical language about the reasons for detention so that he/she can, if necessary, challenge its lawfulness before a court²⁰ and that, for instance, general statements are not sufficient.²¹ Provision of information in a language that the person does not necessarily understand may therefore not meet the requirement of Article 5(2) ECHR.

Information on reasons for detention: UNHCR proposes to word recast article 9(4) as follows: “Detained asylum-seekers shall immediately be informed of the reasons for detention, the maximum duration of the detention and the procedures laid down in national law for challenging the detention order, in a language they understand.”

5.3 Judicial review

UNHCR supports the strengthened requirements for regular judicial review of detention (recast article 9), to ensure on the one hand that detention is proportionate, only imposed or prolonged when necessary and in line with the permissible grounds; and on the other hand, that all procedural safeguards are respected. The proposed requirement for detention to be ordered or confirmed within 72 hours by judicial authorities (recast article 9(2)) should offer an adequate safeguard to prevent arbitrary detention.²²

UNHCR considers it important that the asylum-seeker is entitled to request judicial review of his/her detention whenever new circumstances arise or information becomes available

¹⁹ ExCom Conclusion No. 44 (XXXVII), see above footnote 13, para. (d).

²⁰ ECtHR, *Fox, Campbell and Hartley v the United Kingdom*, Applications Nos 12244/86, 12245/86 and 12383/86, judgment of 30 August 1990, available at <http://www.unhcr.org/refworld/docid/3ae6b6f90.html>.

²¹ ECtHR, *Saadi v the United Kingdom*, Application No. 13229/03, judgment of 29 January 2008, available at <http://www.unhcr.org/refworld/docid/47a074302.html>, para. 85.

²² See e.g. Odysseus report (see above footnote 6) on the systematic detention policy as applied by Malta, in chapter II “Vertical ‘concerns’ about reception conditions in some Member States”, p. 10.

which may affect the lawfulness of the detention. Such wording would be in accordance with article 5(4)²³ of the ECHR.

The reference to possibilities for judicial review of “continued” detention in recast article 9(5) may give rise to misunderstanding. UNHCR understands this is intended to cover both the legality of detention during the initial period for which detention has been ordered and prolongation. For reasons of clarity, UNHCR therefore proposes to delete the term “continued”.

Guarantees for detained asylum-seekers (recast article 9): a) UNHCR proposes to amend recast article 9(4) to bring it in line with ECHR obligations and ECtHR caselaw: “Detained asylum-seekers shall immediately be informed of the reasons for detention, the maximum duration of the detention and the procedures laid down in national law for challenging the detention order, **in a language they understand**”.

b) UNHCR proposes to amend the wording of recast article 9(5) to read: “The detention shall be reviewed **ex officio** by a judicial authority at reasonable intervals of time **and on request of the asylum-seeker concerned, whenever circumstances arise or new information becomes available which affects the lawfulness of detention.**”

5.4 Conditions of detention

Conditions of detention should ensure humane treatment with respect for the inherent dignity of the person.²⁴ UNHCR’s detention guidelines recommend separate detention facilities for asylum-seekers; co-mingling of asylum-seekers and convicted criminals or prisoners on remand should be avoided.²⁵ This recommendation is based on the premise that most asylum-seekers have committed no crime and may need international protection

²³ Article 5(4) ECHR: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

²⁴ See Universal Declaration of Human Rights (Article 10), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 11), International Covenant on Civil and Political Rights (Article 10), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 17), and CRC (article 37 (c)). See also: UN Human Rights Committee, General Comment No. 21: *Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, available at <http://www.unhcr.org/refworld/docid/453883fb11.html>, and UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment : resolution / adopted by the General Assembly*, 9 December 1988, A/RES/43/173, available at <http://www.unhcr.org/refworld/docid/3b00f219c.html>.

²⁵ See ExCom Conclusion No. 44, see above footnote 13, para. (f); UNHCR detention guidelines, Guideline 10 iii, see above footnote 15); UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, 28 December 1999, E/CN.4/2000/4, Annex II: Deliberation No. 5, “Situation regarding immigrants and asylum-seekers”, Principle 9, available at <http://www.unhcr.org/refworld/docid/3b00f25a6.html>; Council of Europe: Committee of Ministers, *Recommendation Rec(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers*, 16 April 2003, para. 10, available at <http://www.unhcr.org/refworld/docid/3f8d65e54.html>; United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, para. 8, available at <http://www.unhcr.org/refworld/docid/3ae6b36e8.html>; UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, see above footnote 24.

under law, rather than penalization. The specific situation of asylum-seekers was recognized, *inter alia*, by the ECtHR in *Saadi v. UK*.²⁶

This consideration is reflected in the present proposal, which in recast article 10(1) prohibits the use of prison accommodation to detain asylum-seekers, and limits their confinement to “specialized detention facilities”.²⁷

5.5 Detention of vulnerable groups

UNHCR welcomes the proposed prohibition of detention of unaccompanied minors (recast article 11(1)) and supports the primacy of the “best interests of the child” principle as regards the detention of minors²⁸ (recast articles 11(1) and 22).

UNHCR supports the proposed confirmation that persons with special needs shall in principle not be detained (recast article 11(5)). The requirement for an individual examination by a qualified professional certifying that the individual’s health and well-being will not significantly deteriorate as a result of detention (recast article 11(5)) would be a further safeguard.

In order to avoid the detention of asylum-seekers with special needs, UNHCR supports recast article 21(2) on the obligation for Member States to establish procedures in national law for the early identification of special needs.

Detention of vulnerable groups: UNHCR welcomes the prohibition on detention of unaccompanied minors (recast article 11(1)) and supports the confirmation that persons with special needs shall in principle not be detained (in recast article 11(5)).

6. Medical screening

Although the EC has not proposed amendments to article 13 which allows Member States to require medical screening of applicants on public health grounds, UNHCR wishes to recall that mandatory HIV testing violates a number of human rights, in particular the right to privacy.²⁹ Testing should not be a precondition for allowing entry to territory or asylum procedures of persons seeking international protection. More generally, medical screening should be accompanied by appropriate information provided in a language the applicant

²⁶ In its judgment *Saadi v UK*, the ECtHR recalled that “the place and conditions of detention should be appropriate, bearing in mind that ‘the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country’ (see *Amuur*, § 43)”; see above footnote 21, para. 74.

²⁷ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *The CPT standards, “Substantive” sections of the CPT’s General Reports*, October 2006, in particular p. 40, para. 28, available at <http://www.cpt.coe.int/en/documents/eng-standards-scr.pdf>.

²⁸ In its judgment *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (Application No. 13178/03, 12 October 2006, available at <http://www.unhcr.org/refworld/docid/45d5cef72.html>), which concerned the detention of an asylum-seeking five year old girl together with adults, the ECtHR noted that this was not in the best interest of the child.

²⁹ As laid down amongst others in ECHR article 8.

understands and should provide guarantees for consent, counseling and confidentiality, as well as appropriate medical follow-up and treatment.

7. Access to the labour market

In its explanatory memorandum, the European Commission expresses the aim of facilitating access to the labour market and emphasizes the benefits of employment for both the asylum-seeker and host States. The proposed reduction to six months of the maximum period after which Member States shall provide access to the labour market to asylum-seekers is in line with UNHCR's proposal in its response to the Green Paper.³⁰ UNHCR's Executive Committee, as well as the Global Consultations on International Protection, have recognized that reception arrangements can be beneficial both to the State and to the asylum-seeker where they provide an opportunity for the asylum-seeker to attain a degree of self-reliance.³¹

The Commission's evaluation³² of the implementation of the RCD found that additional limitations imposed on asylum-seekers who have in principle been granted access to the labour market might considerably hinder such access in practice. Examples of such limitations include the requirement to apply for work permits, restriction of access to certain sectors of the economy and on the amount of authorized working time. The proposed article 15(2) clarifies that the permissible limits on access to the labour market are those which are in accordance with national law, and which do not unduly restrict access.³³

Access to the labour market: UNHCR supports the proposed amendment of recast article 15 to enable earlier access to the labour market for asylum-seekers and to clarify permissible limitations on such access.

³⁰ UNHCR Green Paper response, (op.cit. footnote 8), p. 21.

³¹ See UNHCR, *Reception of asylum-seekers, including standards of treatment in the context of individual asylum systems*, Global Consultations on International Protection, 4 September 2001, EC/GC/01/17, available at <http://www.unhcr.org/refworld/docid/3bfa81864.html>, and ExCom Conclusion No. 93 (LIII) – 2002) on reception of asylum-seekers in the context of individual asylum systems, 8 October 2002, available at <http://www.unhcr.org/refworld/docid/3dafdd344.html>.

³² EC Report on application of RCD, (op.cit. footnote 2), page 8, para. 3.4.3.

³³ Examples of conditions which can be considered to unduly restrict access to the labour market can be found in the Odysseus network synthesis report, e.g.

- the practice in Luxembourg: "l'autorisation d'occupation temporaire, une fois délivrée, est limitée à un employeur déterminé et pour une seule profession". See Odysseus network country report Luxembourg (Luxembourg response to question 28c), available at http://ec.europa.eu/justice_home/doc_centre/asylum/studies/docs/luxembourg_2007_en.pdf;
- the Dutch practice: "After these six months an asylum-seeker can work for a maximum of 12 weeks every 52 weeks. (...) this limitation of 12 weeks per year in practice seriously impedes the possibilities of an asylum-seeker to take up work". See Odysseus network country report The Netherlands (Netherlands response to question 28c), available at http://ec.europa.eu/justice_home/doc_centre/asylum/studies/docs/netherlands_2007_en.pdf. Reportedly, the maximum period has now been extended to 24 weeks out of 52;
- the practice in Cyprus: "asylum-seekers are only allowed to work in the agricultural sector, as the Labour Office of the Ministry of Labour and Social Insurance does not give them access to any other sector or industry". See Odysseus network country report Cyprus (Cyprus response to question 28c), available at http://ec.europa.eu/justice_home/doc_centre/asylum/studies/docs/cyprus_2007_en.pdf.

8. Access to material reception conditions

The Commission evaluation and the Odysseus report reveal that a number of Member States currently provide financial allowances too low to cover subsistence; the amounts are only rarely commensurate with the minimum social support to nationals.³⁴ Article 17(5) of the recast RCD proposes to strengthen access to material assistance which provides an adequate standard of living, in particular by imposing an obligation for Member States to ensure that “the total value of material reception conditions is equivalent to the amount of social assistance granted to nationals requiring such assistance”. The second sentence of article 17(5) states that any differences in this respect should be duly justified. UNHCR understands this to relate *only* to situations where the value of material reception conditions provided to asylum-seekers is *higher* than the minimum social support granted to nationals.³⁵ Such a situation may arise as a result of the fact that asylum-seekers, unlike nationals, as a rule do not have alternative support systems in their country of residence. In such situations, additional support to asylum-seekers, above the level made available to nationals, may be necessary.

Asylum-seekers’ access to material reception conditions: UNHCR supports the recast article 17(5), which should raise the standard of material reception conditions in those Member States where current levels are insufficient.

9. Reduction or withdrawal of material reception conditions

The European Commission proposes significantly to reduce the possibilities for withdrawing reception conditions, by permitting this only in case of concealment of financial resources (recast article 20(2)). It is proposed that other more problematic grounds for reduction or withdrawal be deleted.³⁶ In addition, the provision for ensuring that minimal material reception conditions are provided to all asylum-seekers has been strengthened, by requiring Member States to ensure under all circumstances “subsistence, access to emergency health care and essential treatment of illness or mental disorder” (recast article 20(4)). UNHCR welcomes these proposed amendments which should help to prevent destitution among asylum-seekers.

³⁴ The EC Report on the application of the RCD mentions the following Member States which provide financial allowances which are “very often too low to cover subsistence”: CY, FR, EE, AT, PT, and SI; see above footnote 4, under 3.3.2 on page 6.

³⁵ See General Comment No. 19 adopted by the UN Committee on Economic, Social and Cultural Rights on the right to social security, which in paragraph 38 states, based on the principle of non-discrimination, that asylum-seekers “should enjoy equal treatment in access to non-contributory social security schemes including reasonable access to health care and family support consistent with international standards”. See: E/C.12/GC/19, available at <http://www.unhcr.org/refworld/docid/47b17b5b39c.html>, para. 38.

³⁶ In particular, the provision that Member States may refuse conditions in cases where an asylum-seeker has failed to demonstrate that the claim was made as soon as reasonably practicable after arrival (...) was heavily criticized by UNHCR. See: *UNHCR Annotated Comments on Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers*, July 2003, available at <http://www.unhcr.org/refworld/docid/3f3770104.html>.

Reduction or withdrawal of material reception conditions: UNHCR welcomes the proposals to reduce the possibilities for withdrawing reception conditions in recast article 20(2) and the proposal to strengthen the provision for ensuring that minimal material reception conditions are provided to all asylum-seekers in recast article 20(4).

10. Persons with special needs

UNHCR welcomes the proposal in recast article 21(1) to include victims of trafficking and persons with mental health problems in the list of vulnerable persons. UNHCR notes that this list is not intended to be exhaustive.

Recast article 21(2) imposes an obligation for Member States to establish procedures in national legislation for identifying, as soon as an application for international protection is lodged, whether the applicant has special needs and the nature of such needs. UNHCR welcomes this provision, which addresses one of the main identified shortcomings in the implementation of the RCD. The Commission's report on the application of the RCD identifies nine Member States which do not have an identification procedure in place and states: "Identification of vulnerable asylum-seekers is a core element without which the provisions of the RCD aimed at special treatment of these persons will lose any meaning."³⁷ The inclusion of the words "as soon as an application for international protection is lodged" is critical, as certain special needs, such as trauma, may affect the asylum-seekers' ability to participate coherently in the asylum interviews.

It should be acknowledged, however, that for a number of reasons, including shame or lack of trust, asylum-seekers may be hesitant to disclose certain experiences immediately. This may be the case, amongst others, of persons who have suffered torture, rape or other forms of psychological, physical or sexual violence. Special needs resulting from such experiences may therefore go undiscovered at an early stage of the process. Later disclosure of such experiences should not be held against asylum-seekers, nor inhibit their access to any special support measures or necessary treatment. For this reason, UNHCR proposes to clarify the identification obligation in recast article 21(2), by amending the last sentence.

Provisions for persons with special needs: UNHCR welcomes the obligation to identify persons with special needs as proposed in article 21(2) and suggests to strengthen this by amending the last sentence: "Member States shall ensure support for persons with special needs throughout the asylum procedure and shall provide for appropriate monitoring of their situation, ***regardless of when those needs are identified.***"

11. Separated or unaccompanied minors

The Odysseus report states that "the practical implementation of the legal provisions [relating to the legal representation of unaccompanied minors] creates a problem in several Member States, resulting either from the absence of a legal guardian or from the role that is

³⁷ EC Report on application RCD, see above footnote 4, p. 9.

assigned to him.”³⁸ In order to remedy these problems and in light of the decisive role guardians can play in ensuring the protection of unaccompanied children, UNHCR would suggest the inclusion in the RCD of a provision defining qualifications and role for a guardian,³⁹ who should be a different person than the legal adviser representing the child in the asylum procedure.⁴⁰

Unaccompanied minors: UNHCR suggests to amend recast article 23(1) to include the following: “Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship. “A guardian should be appointed to advise and protect the child and to ensure that all decisions are taken in the child’s best interests. A guardian should have the necessary expertise in the field of childcare so as to ensure that the interests of the child are safeguarded and that the child’s legal, social, health, psychological, material and educational needs are appropriately covered. Agencies or individuals whose interests could potentially be in conflict with those of the child’s should not be eligible for guardianship. Regular assessments shall be made by the appropriate authorities”.

12. Appeals

Recast article 25(1) strengthens the grounds on which asylum-seekers may challenge decisions relating to reception conditions by extending their appeal rights to include all decisions relating to “withdrawal or reduction” of reception conditions. In addition, recast article 25(2) provides for legal assistance free-of-charge where the asylum-seeker cannot afford the costs. This last provision is mirrored for detained asylum-seekers in recast article 9(6). UNHCR welcomes the inclusion of this important new safeguard.

Appeals: UNHCR supports the strengthening of the grounds for appeal by including in recast article 25(1) decisions relating to the withdrawal or reduction of reception conditions as possible subject of appeal. UNHCR also welcomes the newly introduced safeguard in recast article 25(2) and mirrored in recast article 9(6) for asylum-seekers in detention, of free legal assistance.

³⁸ Odysseus Report, p. 82, (op. cit. footnote 6), specific problems relating to the appointment and/or role of guardians are reported in UK, HU, CZ.

³⁹ See “Save the Children comments on the revision of the reception directive”, November 2008, available at http://www.savethechildren.net/alliance/europegroup/SC_Submissions_on_the_Revision_ofthe_ECreception_Directive.pdf. The proposed definition and role is based on:

- Committee on the Rights of the Child, General Comment No. 6: “Treatment of unaccompanied and separated children outside their country of origin”, CRC/GC/2005/6, 1 September 2006, available at <http://www.unhcr.org/refworld/docid/42dd174b4.html>; and
- Separated Children in Europe Programme, *Statement of Good Practice*, Third edition, 2004, available at <http://www.unhcr.org/refworld/docid/415450694.html>.

⁴⁰ See also: CRC General Comment No. 6 see above footnote 39, para. 36: “In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.”

13. Guidance, monitoring and control

The continuing disparities in Member States' implementation of the RCD highlight the need to strengthen reporting and monitoring. The reports of the European Parliament's LIBE delegation on their visits to reception and detention centres in many Member States⁴¹ have documented these divergences.

Recast article 27 proposes to strengthen existing monitoring provisions through the insertion of a national monitoring mechanism and an annual reporting obligation to the European Commission. UNHCR considers that annual reporting would provide the European Commission with an important tool to enable it to carry out its responsibility to ensure compliance with Community Law.

More harmonized interpretation and implementation of the RCD standards should further be pursued through practical cooperation between Member States, with input from other relevant stakeholders.

Guidance, monitoring and control system: UNHCR supports the introduction of national monitoring and of annual reporting obligations in recast article 27.

14. Concluding remarks

UNHCR acknowledges that many problems with respect to reception of asylum-seekers relate to non-implementation of existing provisions of the RCD. However, there are also areas where the current provisions merit clarification or strengthening. Many of the proposed amendments would reduce the scope for divergent interpretation of the existing standards, or improve certain standards. The expressed aim of the proposed amendments, to “ensure higher standards of treatment for asylum-seekers with regard to reception conditions that would guarantee a dignified standard of living, in line with international law”,⁴² underlines this ambition. UNHCR hopes that negotiations on the proposed amendments, as well as efforts to promote practical cooperation in the field of reception of asylum-seekers, remain focused on this protection objective.

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⁴¹ The reports are available at different sections of <http://www.europarl.europa.eu>.

⁴² Proposal for RCD, recast, see above footnote 1, Explanatory Memorandum, p. 4.