

## **ECRE Information Note**

### **on the 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)**

##### **1. Introduction**

A common understanding of who qualifies as a beneficiary of international protection and the content of protection granted is central to the establishment of a Common European Asylum System (CEAS). Therefore, the recast of the Qualification Directive was a necessary task for the creation of a uniform status for refugees and for persons eligible for subsidiary protection in accordance with Article 78 TFEU.<sup>1</sup> It constitutes an important step forward in harmonizing eligibility criteria and the content of protection at EU level. The recast Qualification Directive will apply to all EU Member States except the UK, Ireland and Denmark.<sup>2</sup> The Member States bound by it are required to bring into force domestic legislation necessary to comply with the Directive by 21 December 2013.<sup>3</sup> The UK and Ireland will continue to be bound by Directive 2004/83/EC whilst Denmark is not bound to either of these Directives.<sup>4</sup> However, in the interests of homogeneity and to truly achieve the overall objective of a CEAS, ECRE recommends that these Member States opt in to the recast Qualification Directive. This

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<sup>1</sup> According to Article 78 (2)(a) on the Treaty on the Functioning of the European Union (TFEU) the EU is also required to adopt a uniform status of asylum for third country nationals valid throughout the Union. The European Commission's action plan on the Stockholm Programme has scheduled a communication on a framework for the transfer of protection beneficiaries for 2014. For further information see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Delivering an area of freedom, security and justice for Europe's citizens – Action Plan implementing the Stockholm Programme*, COM(2010) 171 final 20.4.2010.

<sup>2</sup> In accordance with Articles 1, 2 and Article 4(a)(1) of the Protocol (No 21) on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and to the TFEU, and without prejudice to Article 4 of that Protocol, the UK and Ireland are not taking part in the adoption of this Directive and are not bound by it or subject to its application (Recital 50). Similarly, Denmark is not taking part in the adoption of this Directive in accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark annexed to the TEU and to the TFEU.

<sup>3</sup> Article 39 of Council 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), OJ 2011 L337/9.

<sup>4</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 2004 L304/12.

information note should be read in light of ECRE's comments on the Commission recast proposal for the Qualification Directive and ECRE's information note on Directive 2004/83/EC.<sup>5</sup> This information note also includes an overview of recommendations for the interpretation of provisions which were not addressed in the recast process but which ECRE remains concerned about and would like to see addressed in Member State practice. Overall, this information note provides information on how to implement the recast Qualification Directive in a manner which ensures full consistency with international human rights and refugee law.

## 2. Background

Following the creation of the first phase of the CEAS, the European Council's Hague Programme invited the Commission to conclude the evaluation of the first-phase legal instruments and to submit the second-phase instruments to the Council and the European Parliament.<sup>6</sup> Therefore, the Commission published a recast proposal of the Qualification Directive in 2009 with the objective of ensuring higher protection standards based on a full and inclusive application of the 1951 Refugee Convention<sup>7</sup> and full respect for the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the EU Charter of Fundamental Rights (EU Charter) as well as to ensure further harmonization of protection standards in order to reduce secondary movements within the European Union.<sup>8</sup> The recast proposal aimed at clarifying the legal concepts in the Directive and thus simplifying their application, approximating the rights granted to the two categories of beneficiaries of protection and aligning the standards of the Directive with the case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).<sup>9</sup> Following substantive negotiations, the final text of the recast Qualification Directive was adopted and published in the official journal of the European Union on 13 December 2011.

The recast Qualification Directive must be interpreted in light of Member States' obligations under the broader international and EU legal framework. The TFEU explicitly obliges the European Union to ensure that a common European asylum policy is developed 'in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties'.<sup>10</sup> Therefore, the recast Qualification Directive should be interpreted and applied in a manner consistent with relevant legal instruments including not only the 1951 Refugee Convention but also international human rights instruments *inter alia* 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, the Convention on the Rights of Persons with Disabilities, the Convention against Torture and the Convention on the Rights of the Child (CRC) and the ECHR. Similarly, given the legally binding nature of the EU Charter, Member States, when implementing this Directive, must do so in a manner which is in compliance with fundamental rights guaranteed under it.<sup>11</sup> For this reason, the provisions of the Directive must be interpreted in the light of its general scheme and purpose in a manner which respects the fundamental rights and the principles recognised by the EU Charter and in accordance

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<sup>5</sup> ECRE, [Information Note on the Qualification Directive](#), ("ECRE Information Note") October 2004; ECRE, [Comments on the Commission Proposal to recast the Qualification Directive](#), ("ECRE Recast Comments"), March 2010.

<sup>6</sup> European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, (2005/C 53/01), 3.3.2005.

<sup>7</sup> 1951 Convention relating to the Status of Refugees 28 July 1951 and Protocol of 31 January 1967 ("1951 Refugee Convention"). In EU legislation this is often referred to as the "1951 Geneva Convention".

<sup>8</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast)*, COM(2009) 551 final 21.10.2009, p. 6.

<sup>9</sup> *Ibid*, p. 4.

<sup>10</sup> Article 78(1) TFEU states that 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.'

<sup>11</sup> By virtue of Article 6 TFEU, the Charter of Fundamental Rights of the European Union has become a legally binding document, a core element of the Union's legal order and having 'the same legal value as the Treaties'.

with the objective of the CEAS as a whole.<sup>12</sup> As to the purpose of the Directive, Recital 16 also provides that the Directive seeks to ensure full respect for human dignity and the right to asylum of applicants and their accompanying family members and to promote the applications of Article 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of the EU Charter and should therefore be implemented accordingly.<sup>13</sup> Similarly, Recital 17 states that Member States are bound by obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination. ECRE would like in particular to highlight that in accordance with Article 3 of the recast Directive Member States have the right to introduce or maintain more favourable standards than those contained in the recast Directive, insofar as those standards are compatible with the Directive.

### 3. Overview of main amendments

The following summarizes the main amendments in the recast Qualification Directive 2011:

- There is an extended definition of the family with the deletion of the requirement that minor children of the beneficiary of international protection are dependent (Art. 2(j));
- The definition of actors of protection is clarified and there is a requirement for such protection to be effective and of a non-temporary nature (Art. 7);
- The internal protection concept is further aligned with the case law of the European Court of Human Rights and the possibility to apply this concept notwithstanding technical obstacles to return has been removed (Art. 8);
- The 'causal link' requirement between acts of persecution and the 1951 Refugee Convention grounds is amended to clarify that this link is fulfilled also where there is a connection between the acts of persecution and the absence of protection against such acts (Art. 9(3));
- There is a new explicit obligation for States to take into consideration gender related aspects, including gender identity for the purposes of defining membership of a particular social group (Art. 10(1)(d));
- The cessation provisions for refugee status and subsidiary protection incorporate an exception to cessation in relation to compelling reasons arising out of previous persecution (Art. 11(3) and Art.16(3));
- The rights for beneficiaries of refugee status and subsidiary protection are approximated with the exception of the duration of residence permits and access to social welfare (Chapter VII);
- Member States are no longer permitted to reduce the content of rights granted to international protection beneficiaries on the grounds that such status was obtained due to activities engaged in for the sole or main purpose of creating the necessary conditions for being recognized as a person eligible for refugee status or subsidiary protection (deletion of Articles 20(6) and 20(7) in Directive 2004/83/EC);
- Family members of subsidiary protection beneficiaries are entitled to the same content of rights granted under Chapter VII in accordance with national procedures and in so far as compatible with the personal legal status of the family member (Art. 23(2));

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<sup>12</sup> CJEU, Joined cases C-175/08, C-176/08, C-178/08, C0179/08, *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland*, 2 March 2010 paras. 52-53; C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, 17 June 2010 paras. 36-38.

<sup>13</sup> CJEU, Joined cases C- 411/10 *N.S.* & C-493/10 *M.E. & Others*, 21 December 2011, para. 77: "[T]he Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law."

- There is an improved provision on access to employment requiring Member States to ensure that beneficiaries of international protection have access to training courses for upgrading skills and counselling services afforded by employment offices under equivalent conditions as nationals (Art.26(2));
- There is a strengthened provision on access to procedures for recognition of qualifications (Art. 28).

#### 4. Analysis of key components of the recast Qualification Directive

### Chapter I General Provisions

#### Article 2 Definitions

The definition of refugee in the recast Directive, which otherwise broadly reflects Article 1 A(2) of the 1951 Refugee Convention, is still limited to a 'third country national' or a 'stateless person' and does not include nationals of EU Member States.<sup>14</sup> ECRE acknowledges that the TFEU only provides EU competence in relation to third country nationals.<sup>15</sup> However, Member States remain bound by their obligations under international law including the requirement of non-discrimination under Article 3 of the 1951 Refugee Convention.<sup>16</sup> Therefore, ECRE continues to recommend that Member States, in applying this definition, extend it to 'any person' in order to properly reflect the definition under Article 1 A(2) of the 1951 Refugee Convention. For consistency purposes this should also apply to the definition of persons eligible for subsidiary protection.<sup>17</sup>

Article 2(j) defines family members, in so far as the family already existed in the country of origin and who are present in the same Member State in relation to the beneficiary of international protection as the spouse of the beneficiary or his or her unmarried partner in a stable relationship, where the law or the practice of the Member State concerned treats unmarried couples in a comparable way to married couples under its immigration law, minor children of such couples on condition that they are unmarried and irrespective of whether they were born in or out of wedlock or adopted as defined under national law and the father, mother or another adult responsible for the beneficiary of international protection when that beneficiary is a minor and unmarried. ECRE welcomes the fact that the family definition has been extended under the recast Directive. The inclusion of minor children of couples under Article 2(j) is no longer conditional on dependency and parents of beneficiaries of international protection are also included in the definition of family for unmarried minors. However, ECRE regrets the fact that the inclusion of siblings within family definition in the Commission recast proposal was not maintained during the negotiations. According to ECtHR jurisprudence the question of whether there is family life under Article 8 ECHR is essentially a question of fact depending on the reality of close personal ties.<sup>18</sup> Furthermore, ECRE reiterates its regret that the definition of family members is still limited 'in so far as the family already existed in the country of origin'. Such an approach fails to accommodate family ties which have been formed during flight or in the host country and is contrary to UNHCR Ex COM Conclusion No. 24 (XXXII).<sup>19</sup>

<sup>14</sup> Article 2(d) of the recast Directive.

<sup>15</sup> See Article 78 TFEU. In this respect, it should be noted that the EU Protocol No. 24 on Asylum for Nationals of Member States only allows for EU citizens to apply for asylum in another European Member State in limited circumstances.

<sup>16</sup> Article 3 of the 1951 Refugee Convention states that '*The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.*'

<sup>17</sup> Article 2(f) defines a person eligible for subsidiary protection as a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or owing to such risk, unwilling to avail himself or herself of the protection of that country.

<sup>18</sup> See for example, ECHR, *Marckx v Belgium*, Application No. 6833/74, 13 June 1975; ECHR, *K. and T. v Finland*, Application No. 25702/94, 12 July 2001. For further information see Mole, N. and Meredith, C., *Asylum and the European Convention on Human Rights*, Human Rights Files, No. 9, Council of Europe, 2010.

<sup>19</sup> UNHCR, EXCOM Conclusions No. 24, Family Reunification, 21 October 1981.

ECRE is also concerned by the provision in Article 2(j) that unmarried partners will only be recognized as family members where a Member State's law or practice relating to third country nationals treats unmarried couples in a comparable way to married ones. ECRE believes that unmarried couples including same-sex couples, in stable relationships should automatically fall within the family definition. Such an approach would more accurately reflect ECtHR jurisprudence which has held that co-habiting same sex couples living a stable partnership fall within the notion of family life.<sup>20</sup> The current provision has the potential to disproportionately impact persons in same-sex relationships which are not recognized under registered partnerships in a number of Member States.<sup>21</sup>

The fact that parents are excluded from the family definition for married children also raises questions as to the compatibility of this provision with the CRC and in particular Article 2 on the prohibition on discrimination. Although it is a relevant factor, whether a child is married or not may have no central bearing on the final determination as to whether it is in his or her best interests to stay with his or her parents. Member States must always take into account the best interests of the child and the principle of family unity in applying this provision in accordance with Recital 18.<sup>22</sup>

## Chapter II Assessment of Applications for International Protection

### Article 4 Assessment of facts and circumstances

The correct assessment of facts and circumstances plays a central role in the identification of international protection needs. It is also one of the most challenging and complex aspects in the assessment of international protection applications due to a myriad of factors including cross-cultural communication barriers and the impact of trauma and other individual and contextual circumstances of each applicant.<sup>23</sup> Other external factors which may have a bearing on the evidentiary assessment must also be taken into consideration *inter alia* whether the applicant is unrepresented, particularly vulnerable or whether there are short time limits in the procedure.<sup>24</sup> ECRE reiterates the recommendation that asylum seekers be granted reasonable time to prepare and provide all necessary evidence for the determination procedure.<sup>25</sup>

In accordance with Article 4(1), Member States have a shared duty to cooperate actively with the applicant at the stage of determining the relevant elements of an application.<sup>26</sup> Article 4(3) provides a non-exhaustive list of elements including facts, statements and circumstances which must be taken into account in the assessment on an individual, objective and impartial basis.<sup>27</sup> In this respect it is important to recall that personnel examining applications have the possibility to seek advice from experts on particular issues such as medical, cultural, religious, child related or gender issues and issues related to sexual orientation and gender identity.<sup>28</sup> This is particularly relevant in the context of gender-specific asylum claims where there may be a paucity of country of origin information and other

<sup>20</sup> ECHR, *Shalk and Kopf v Austria*, Application No. 30141/04, 24 June 2010.

<sup>21</sup> Tsourdi, L., ILGA-Europe, [Guidelines on the transposition of the Asylum Qualification Directive: protecting LGBTI asylum seekers](#), 2012.

<sup>22</sup> Recital 18 provides that the 'best interests of the child' should be a primary consideration of Member States when implementing this Directive in line with the 1989 United Nations Convention on the Rights of the Child. In assessing the best interests of the child, Member States should in particular take due account of the principle of family unity, the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity.

<sup>23</sup> UNHCR, [Beyond Proof, Credibility Assessment in EU Asylum Systems](#), Summary Report, May 2013, p. 13-16.

<sup>24</sup> IARLJ (International Association of Refugee Law Judges), [Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive – Judicial criteria and standards](#), March 2013.

<sup>25</sup> ECRE, [The Way Forward: Towards Fair and Efficient Asylum Systems in Europe](#), September 2005, p. 40; ECRE, [Comments on the Commission Proposal to recast the Qualification Directive](#), March 2010, p. 14.

<sup>26</sup> CJEU, C-277/11, *M.M. v Minister for Justice, Equality and Law Reform*, paras. 66-68; UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees, 1979, reedited 1992, para. 196. In this context see also ECHR *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011, paras. 358-359; ECHR, *F.H. v Sweden*, Application No. 32621/06, 20 January 2009.

<sup>27</sup> See also 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) ("recast Asylum Procedures Directive"), OJ 2013 L180/60, Recital 17 and Article 10(3)(a) which both provide that applications are examined and decisions are taken individually, objectively and impartially.

<sup>28</sup> See also Article 10(3)(d) of the recast Asylum Procedures Directive which provides a non-exhaustive list of issues upon which experts can be consulted in the examination of applications.

evidence available.<sup>29</sup> For example, the ECtHR has held in one case that the national administrative authority ought to have requested an expert opinion on the probable cause of an applicant's scars where the applicant had made out a *prima facie* case concerning their origin by providing consistent medical evidence.<sup>30</sup>

Only once there has been a specific evaluation of the facts and circumstances of a case in accordance with this provision can national authorities make an assessment of the extent of risk of persecution and/or serious harm, all of which must be carried out with due vigilance and care and under close and rigorous scrutiny.<sup>31</sup> For example, with respect to supporting documentary evidence provided by applicants, the ECtHR has held that if administrative authorities reject such evidence without sufficient investigation as to their authenticity then this is at variance with the requirement to conduct a close and rigorous scrutiny.<sup>32</sup>

Article 4(4) provides that if a person has suffered past persecution this is to be interpreted as strongly indicative of future risk.<sup>33</sup> Similarly, Article 4(5) reflects the acknowledgment that owing to the special situation that asylum seekers often find themselves in, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof.<sup>34</sup> However, ECRE remains concerned about Article 4(5)(b) and (d) respectively, requiring the applicant to justify the absence of relevant evidence or failure to apply for protection at the 'earliest possible time', as they fail to take into consideration the fact that asylum seekers often have to flee their country without an opportunity to collect documentary evidence and may equally have valid reasons for not immediately applying for asylum. In applying Article 4(5)(d) Member States should not place too onerous a requirement on the ability to demonstrate good reason for not having applied early and in principle, failure to apply at the earliest possible time should not impact upon the application of the 'benefit of the doubt' principle.

#### **Article 7 Actors of protection**

Recast Article 7 amends the concept of actors of protection in so far as it clarifies that protection against persecution or serious harm can only be provided by the actors indicated in this provision, as well as by requiring that protection against persecution or serious harm must be effective and of a non-temporary nature and that the State, parties or organizations in question should be able and willing to offer protection and that the applicant has access to such protection.<sup>35</sup> Whilst these amendments are positive, ECRE regrets the fact that the opportunity was lost to remove non-State actors of protection from this provision, a notion which has proved problematic in practice.<sup>36</sup> From both a principled and

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<sup>29</sup> For further information on the treatment of gender-related asylum claims see European Parliament, Directorate General for Internal Policies, Department of Citizens' Rights and Constitutional Affairs, [Gender Related Asylum Claims in Europe: A Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine EU Member States](#), November 2012.

<sup>30</sup> ECHR, *R.C. v Sweden* Application No. 41827/07, 9 March 2010, para. 53; See also UNHCR, [Beyond Proof. Credibility Assessment in EU Asylum Systems](#), Full Report, May 2013, Chapter 3.

<sup>31</sup> CJEU, Joined cases C-175/08, C-176/08, C-178/08, C0179/08, *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland*, 2 March 2010, para 90; ECHR, *Singh and Others v Belgium*, Application No. 33210/11, 2 October 2012; ECHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 293.

<sup>32</sup> ECHR, *Singh and Others v Belgium*, Application No. 33210/11, 2 October 2012; ECHR, *R.J. v France*, Application No. 10466/11, 19 September 2013; ECHR, *R.C. v Sweden*, Application No. 41827/07, 9 March 2010.

<sup>33</sup> Reports on previous Member State practice show that Article 4(4) which confirms that past instances of persecution are to be interpreted as strongly indicative of future risk has either not been transposed in a number of Member States or has been transposed incorrectly. See for example European Commission, *Report on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection*, 16 June 2010, COM(2010)314 final. It is recommended that Member States take the opportunity to transpose and apply this provision appropriately when transposing the recast Directive.

<sup>34</sup> ECHR, *Salah Sheekh v. the Netherlands*, Application No. 1948/04, 11 January 2007, para. 148; ECHR, *R.C. v. Sweden*, Application No. 41827/07, 9 March 2010, para. 50.

<sup>35</sup> See also Recital 26.

<sup>36</sup> UNHCR, [Asylum in the European Union: A Study of the Implementation of the Qualification Directive](#), November 2007; ECRE/ ELENA, [The Impact of the EU Qualification Directive on International Protection](#), October 2008; European Commission, *Report on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection*, 16 June 2010, COM(2010)314 final, p.6.

practical point of view, non-State actors should never be considered as actors of protection.<sup>37</sup> Non-State actors cannot be held accountable under international law and are often only able to provide protection which is limited in duration and scope.<sup>38</sup> Given the inclusion of the requirements to provide protection which is effective and non-temporary it is extremely unlikely that non-State actors will be able to fulfill this requirement in practice.

As for Article 7(2), the CJEU has previously interpreted the concept of non-temporary in the context of cessation cases to conclude that non-temporary means that ‘the factors which formed the basis of the refugee’s fear of persecution may be regarded as having been permanently eradicated’ in that, ‘there are no well-founded fears of being exposed to acts of persecution amounting to severe violations of basic human rights within the meaning of Article 9(1) of the Directive’.<sup>39</sup> The CJEU in that case also provided further guidance which is also relevant for the interpretation and assessment of Article 7(2) to require:

“The competent authorities [to] assess, in particular, the conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country. In accordance with Article 4(3) of the Directive, relating to the assessment of facts and circumstances, those authorities may take into account, *inter alia*, the laws and regulations of the country of origin and the manner in which they are applied, and the extent to which basic human rights are guaranteed in that country.”<sup>40</sup> [Own emphasis added].

In order to be in compliance with the 1951 Refugee Convention it is insufficient to merely hold that ‘reasonable steps’ are taken to prevent the persecution but an assessment must be made as to whether protection will be ensured in practice.<sup>41</sup> Overall, the central focus in assessing the availability of protection should be on the effectiveness and durability of any protection measures in place, whether the actors in question are willing and able to enforce the rule of law and whether the applicant can access the protection in reality.

### Article 8 Internal protection

ECRE welcomes the amendments to this provision on internal protection which provides clarity on the applicability of this provision and further aligns this provision with ECtHR jurisprudence.<sup>42</sup> Article 8 now provides that Member States may determine that an applicant is not in need of international protection if in a part of the country of origin, he or she has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or has access to protection against persecution or serious harm; and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there. This reflects the ECtHR case of *Salah Sheekh v the Netherlands*, albeit imperfectly, in that the requirement in that judgment is that the person is ‘able to settle there’ as opposed to the diminished standard of ‘reasonably being expected to settle there.’<sup>43</sup> ECRE is of the view that the word ‘settle’ itself implies an assessment of different factors, *inter alia* the possibility for economic survival in the area taking into consideration the personal circumstances of the

<sup>37</sup> ECRE Recast Comments p. 7.

<sup>38</sup> On the issue of non-State actors of protection see O’ Sullivan. M., *Acting the Part: Can Non-State Entities Provide Protection under Refugee Law?* Int J Refugee Law (2012) 24 (1), 85-110.

<sup>39</sup> CJEU, Joined cases C-175/08, C-176/08, C-178/08, C0179/08, *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland*, 2 March 2010, para. 73. The Court held, amongst other findings, that refugee status ceases to exist when, having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the person’s fear of persecution for one of the reasons referred to in Article 2(c) of the Directive, on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being ‘persecuted’ within the meaning of Article 2(c) of the Directive.

<sup>40</sup> *Ibid.*, para. 71.

<sup>41</sup> European Parliament, [Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system](#), 2010, p. 178.

<sup>42</sup> See ECHR, *Salah Sheekh v Netherlands*, Application No. 1948/04, 11 January 2007; ECHR, *Sufi and Elmi v United Kingdom*, Application Nos. 8319/07 and 11449/07, 28 June 2011.

<sup>43</sup> ECHR, *Salah Sheekh v Netherlands*, Application No. 1948/04, 11 January 2007, para. 141.

applicant.<sup>44</sup> In considering internal relocation and IDP camps, the ECtHR has also held that there must be an individualized assessment having regard to the applicant's ability to cater for his or her most basic needs, such as food, hygiene and shelter and his/her vulnerability to ill treatment.<sup>45</sup>

Recital 27 which provides that there is a presumption against the availability of effective protection when the State or agents of the State are the actors of persecution or serious harm alleviates a long-standing concern of ECRE in applying the internal protection alternative.<sup>46</sup> ECRE also welcomes the fact that when the applicant is an unaccompanied child, Recital 27 provides that the availability of appropriate care and custodial arrangements, which are in the best interests of the minor, shall form part of the assessment as to whether protection is available.

In applying this provision, the burden of proof is on the Member State to establish whether there is an internal protection alternative in a part of the country of origin.<sup>47</sup> This requires taking into account the general circumstances prevailing in that part of the country as well as the personal circumstances of the applicant and obtaining up-to-date information from relevant sources such as UNHCR and the European Asylum Support Office.<sup>48</sup>

The possibility to apply the internal protection alternative notwithstanding technical obstacles to return has been removed. Therefore, it is clear that Member States cannot apply the concept of internal protection alternative when there are obstacles to return to the part of the country of origin designated. This will also require a legislation amendment at the national level to remove this provision in national law where necessary.

#### **Article 9 Acts of Persecution**

ECRE welcomes the amendment to Article 9(3) which clarifies that absence of protection from persecution for one of the 1951 Refugee Convention grounds – that is, on account of race, religion, nationality, membership of a particular social group or political opinion - is a causal link for the purposes of qualifying for refugee status. This amendment significantly strengthens the protection of persons in situations where the risk of persecution emanates from non-State actors which may often be the case, for example, in situations of gender-based persecution. Member States should also take necessary measures to ensure that gender-based violence against women may be recognized as a form of persecution within the meaning of the refugee definition.<sup>49</sup> It should be recalled that the causal nexus only requires that the 1951 Refugee Convention ground is a contributing factor to the well-founded fear of persecution, it need not be the sole or dominant cause.<sup>50</sup>

#### **Article 10 Reasons for persecution**

ECRE welcomes the amendment to recast Article 10(1)(d) which provides that gender-related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group. Issues arising from an applicant's gender, gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilization or forced abortion, should also be given due consideration in so far as they relate to the applicant's well-founded

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<sup>44</sup> UNHCR, *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 23 July 2003, p. 5-7.

<sup>45</sup> ECHR, *Sufi and Elmi v United Kingdom*, Application Nos. 8319/07 and 11449/07, 28 June 2011; ECHR, *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 254.

<sup>46</sup> This reflects the Michigan Guidelines on the International Protection of Refugees, [the Michigan Guidelines on the Internal Protection Alternative](#) 1999, paras. 15-16.

<sup>47</sup> UNHCR, [Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A\(2\) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees](#), 23 July 2003, para. 34.

<sup>48</sup> Article 8(2) of the recast Qualification Directive. The requirement to obtain precise and up-to-date information from relevant sources including international human rights organisations is also reflected in Article 10(3) of the recast Asylum Procedures Directive.

<sup>49</sup> This is a requirement for Member States who are State parties to the Council of Europe Convention on preventing and combating violence against women and domestic violence in accordance with Article 60 therein.

<sup>50</sup> UNHCR [Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A\(2\) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees](#), 23 October 2012, para. 38.



fear of persecution.<sup>51</sup> Member States should equally take a gender-sensitive approach to the interpretation of other grounds in Article 10 bearing in mind that a claim may be based on one or more grounds.<sup>52</sup>

Despite these improvements, the approach to the definition of membership of a particular social group in the recast Directive still does not accurately reflect international refugee law.<sup>53</sup> In accordance with the objective of this provision, the concept of a 'particular social group' should be interpreted in an inclusive manner by determining that it exists on the basis of either an innate or common characteristic of fundamental importance i.e. the protected characteristics approach ('*ejusdem generis*') or social perception, rather than requiring both. ECRE recommends that Member States, for the purpose of defining a particular social group, apply the protection characteristics approach and social perception test alternatively instead of cumulatively.

For the purposes of determining whether persecution is for reasons of religion, the CJEU has also provided further guidance in the case of C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y & Z*.<sup>54</sup> The Court held that it is unnecessary to distinguish acts that interfere with the 'core areas' ('*forum internum*') of the basic right to religion, which do not include religious acts in public ('*forum externum*'), from acts which do not affect those purported 'core areas' given the broad definition of religion.<sup>55</sup> Furthermore, the focus in such cases is that acts of persecution should be identified not on the basis of the particular aspect of religious freedom that is being interfered with but on the basis of the nature of the repression inflicted on the individual and its consequences.<sup>56</sup> The Court also explicitly stated that Member States cannot expect applicants to abstain from certain practices in order to avoid persecution.<sup>57</sup> Accordingly, a person cannot be denied protection based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution.<sup>58</sup> This approach is applicable not only in the context of religious claims but in all other 1951 Refugee Convention grounds.<sup>59</sup> This is particularly relevant in the context of asylum claims based on sexual orientation and/or gender identity where Member States have frequently in practice imposed a discretion requirement on applicants in order to avoid persecution in the country of origin.<sup>60</sup> Such practice is now clearly contrary to the jurisprudence of the CJEU in C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y & Z*.

#### **Article 11 and Article 16 Cessation**

ECRE welcomes the inclusion of the humanitarian exception to the cessation provisions in the Directive when there are 'compelling reasons arising out of previous persecution'. These recast articles now more accurately reflect the content of Articles 1C(5) and (6) of the 1951 Refugee Convention. The CJEU has also held that refugee status ceases to exist when, having regard to a change in circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the person's fear of persecution, on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being persecuted within the

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<sup>51</sup> Recital 30 of the recast Qualification Directive.

<sup>52</sup> See also Article 60 Council of Europe Convention on prevention and combating violence against women and domestic violence. For further information on the treatment of gender-related asylum claims in Europe see European Parliament, Directorate General for Internal Policies, Department of Citizens' Rights and Constitutional Affairs, [Gender Related Asylum Claims in Europe: A Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine EU Member States](#), November 2012.

<sup>53</sup> ECRE Recast Comments, p. 10.

<sup>54</sup> CJEU, C-71/11 & C-99/11, *Bundesrepublik Deutschland v Y & Z*, 5 September 2012.

<sup>55</sup> *Ibid*, paras. 62-63.

<sup>56</sup> *Ibid*, para. 65.

<sup>57</sup> *Ibid*, para. 80.

<sup>58</sup> UNHCR, [Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A\(2\) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees](#), 23 October 2012, paras. 30-33.

<sup>59</sup> Such an approach was also confirmed in the context of asylum claims related to sexual orientation by Advocate General Sharpston in the CJEU joined cases of C-199/12, C-200/12 & C-201/12, *X, Y, and Z v Minister voor Immigratie, Integratie en Asiel*, paras. 63-64.

<sup>60</sup> For further information on Member State practice in this regard see Vrije Universiteit Amsterdam and COC Nederland, [Fleeing Homophobia: Asylum Claims related to Sexual Orientation and Gender Identity in Europe](#), September 2011. See also the UK Supreme Court decision of *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, (2010) UKSC 31; (2011) 1 AC 596 which held that a person cannot be denied refugee status on the basis of a discretion requirement.

meaning of Article 2(c) of the Directive.<sup>61</sup> The burden of proof is on the State in establishing and demonstrating on an individual basis whether refugee status or subsidiary protection should cease.<sup>62</sup> It is important to note that for cessation mere absence of risk of persecution is not enough, effective protection must also be available and accessible both in law and in practice.<sup>63</sup>

### Article 12 Exclusion

ECRE has consistently reiterated that the Qualifications Directive provisions on exclusion are not fully in compliance with international human rights and refugee law.<sup>64</sup> Therefore, it is unfortunate that the European Commission did not introduce the necessary amendments to this provision in the recast process. The CJEU has provided further instruction on aspects of this provision falling within the scope of Article 1(D) of the 1951 Refugee Convention<sup>65</sup> and Article 12(2) of the Directive which partially reflects Article 1(F) of the 1951 Refugee Convention.<sup>66</sup> In this context, the CJEU has declared that Article 12(1)(a) must be construed narrowly.<sup>67</sup> Similarly, given the potential serious consequences of exclusion from international protection for the person concerned, the exclusion provisions under Article 12(2) must be interpreted in a restrictive manner.<sup>68</sup>

In light of the particular situation of Palestinian refugees, Article 12(1)(a) reflects Article 1(D) of the 1951 Refugee Convention. The CJEU has confirmed that this provision should be interpreted as meaning that the ceasing of protection or assistance from UNRWA 'for any reason' includes the situation in which a person who, after actually availing himself or herself of such protection or assistance, ceases to receive it for a reason beyond his control and independent of his volition. It is then for the Member State to ascertain on an individual basis whether that person was forced to leave the area of operations of UNRWA, which will be the case where that person's personal safety was at serious risk. Once this has been established the person concerned is 'ipso facto' entitled to the benefits of the directive meaning that the person must automatically be granted refugee status and receive all the rights connected to that status.<sup>69</sup>

As regards Article 12(2), the CJEU has held that mere membership of a terrorist organization does not automatically constitute a ground for exclusion and confirmed that exclusion from refugee status is not conditional on the person posing an ongoing threat to the host Member State nor on an assessment of proportionality in relation to the particular case.<sup>70</sup> Member States are required to examine all the relevant individual circumstances of a case in accordance with Article 4 of the Directive before taking a decision to exclude a person under Article 12(2).

It is important to note that the exclusion of a person from refugee status pursuant to Article 12(2) does not necessarily imply the adoption of a position on the separate question of whether that person can be returned to his/her country of origin.<sup>71</sup> Such a question needs to be addressed in light of the

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<sup>61</sup> CJEU, Joined cases C-175/08, C-176/08, C-178/08, C0179/08, *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland*, 2 March 2010.

<sup>62</sup> The burden rests on the country of asylum to demonstrate that there has been a fundamental, stable and durable change in the country of origin and that invocation of Article 1C(5) or (6) is appropriate. See UNHCR [Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C\(5\) and \(6\) of the 1951 Convention relating to the Status of Refugees \(the "Ceased Circumstances" Clauses\)](#), 10 February 2003. See also European Commission, *Report on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection*, 16 June 2010, COM(2010)314 final, p. 10.

<sup>63</sup> European Parliament, [Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system](#), 2010, p. 186; UNHCR, [Statement on the "Ceased Circumstances" Clause of the EC Qualification Directive](#), August 2008, p.12.

<sup>64</sup> ECRE Recast Comments, p. 17.

<sup>65</sup> CJEU, C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, 17 June 2010; CJEU, C-364/11, *Mostafa Abed El Karem El Kott, Chadi Amin A Radi, Hazem Kamel Ismail v Bevándorlási és Állampolgársági Hivatal*, 19 December 2012.

<sup>66</sup> CJEU, Joined Cases C-57/09 & C-101/09, *Bundesrepublik Deutschland v B & D*, 9 November 2010.

<sup>67</sup> CJEU, C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal*, 17 June 2010.

<sup>68</sup> ECRE, [Position on Exclusion from Refugee Status](#), March 2004.

<sup>69</sup> CJEU, C-364/11, *Mostafa Abed El Karem El Kott, Chadi Amin A Radi, Hazem Kamel Ismail v Bevándorlási és Állampolgársági Hivatal*, 19 December 2012.

<sup>70</sup> CJEU, Joined Cases C-57/09 & C-101/09, *Bundesrepublik Deutschland v B & D*, 9 November 2010.

<sup>71</sup> *Ibid*, Para 110.

Member States obligations under human rights law and the Returns Directive bearing in mind the absolute nature of Article 3 ECHR and Article 4 of the EU Charter irrespective of the person's conduct.<sup>72</sup>

#### **Article 14 Revocation of, ending of or refusal to renew refugee status**

Article 14 provides for the revocation, ending of or refusal to renew refugee status on a number of grounds including whether there are reasonable grounds for regarding the applicant as a danger to the security of the Member State in which he or she is present or, having been convicted by a final judgment of a particularly serious crime, the applicant constitutes a danger to the community of that Member State. Article 14(5) provides that in such situations Member States may decide not to grant status to a refugee, where such a decision has not been taken and in doing so this provision creates confusion as to its relationship to the exclusion clauses in Article 12. ECRE reiterates its regret that the opportunity was not seized by the Commission to amend Article 14 to ensure compatibility with international law.<sup>73</sup> As the text stands now Article 14(4) - (5) conflate the 1951 Refugee Convention grounds for exclusion (Article 1F) with expulsion (Articles 32 and 33) and are in breach of the 1951 Refugee Convention. The provision is also misleading in making no meaningful distinction between revocation and exclusion. It is important to note that persons whose status is revoked, ended or not renewed in accordance with this provision are entitled to their rights under the 1951 Refugee Convention including Articles 3, 4, 16, 22, 31, 32, 33 therein (Article 14(6)).

#### **Article 15 Serious harm**

ECRE regrets that the option was taken not to amend Article 15(c) Qualification Directive relating to serious harm due to indiscriminate violence in an international or internal armed conflict. This was omitted, notwithstanding the fact that even after the judgment of the CJEU in the case of C- 465/07 *Elgafaji*,<sup>74</sup> Courts and national authorities still appear to have very divergent interpretations as to key concepts in this provision, such as 'civilian' and 'armed conflict', and as to more generally when a person fleeing generalised violence qualifies for subsidiary protection under the Qualification Directive.<sup>75</sup> The CJEU may provide further guidance in the near future on the interpretation of 'armed conflict' under this provision in the pending case of C-285/12, *Aboubacar Diakité contre Commissaire general aux réfugiés et aux apatrides*.<sup>76</sup>

Research indicates that the terms of Article 15(c) are often interpreted in a restrictive and technical manner to the detriment of the applicant concerned.<sup>77</sup> As stated by the Commission, the original intention of this provision was to provide protection to persons fleeing situations similar to those covered by the Temporary Protection Directive, but on an individual basis.<sup>78</sup> Accordingly, ECRE

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<sup>72</sup> 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.

<sup>73</sup> ECRE Recast Comments, p. 17; European Parliament, *Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system*, 2010, p.187- 190.

<sup>74</sup> CJEU, C-465/07, *Elgafaji v Staatssecretaris van Justitie*, 17 February 2009.

<sup>75</sup> On the application of Article 15(c) in Member State practice see UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011 and ECRE/ ELENA, *The Impact of the EU Qualification Directive on International Protection*, October 2008. On divergence in the implementation of asylum related judgments of the CJEU, including *Elgafaji*, see Hungarian Helsinki Committee, *The Luxembourg Court: Conductor for a Disharmonious Orchestra? Mapping the national impact of the four initial asylum-related judgments of the EU Court of Justice*, 2012.

<sup>76</sup> Recently the Advocate General M. Paolo Mengozzi issued his opinion on this question stating that the application of Article 15(c) is not subject to the fact that the conflict is defined as an internal armed conflict under international humanitarian law. Advocate General M. Paolo Mengozzi held that the notion of internal armed conflict in Article 15(c) must be the subject of an autonomous interpretation. See Conclusions de Avocat Général M. Paolo Mengozzi, Affaire C-285/12, *Aboubacar Diakité contre Commissaire general aux réfugiés et aux apatrides*, 18 juillet 2013 (available in French only).

<sup>77</sup> UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011.

<sup>78</sup> European Commission, *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, 12 September 2001, COM(2001) 510 final, p.26. In this context please note that in accordance with Article 2(c)(i) of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L212/12,

recommends that Member States apply this provision in a protection orientated manner in line with the objective and purpose of the Directive.

## Chapter VII Content of International Protection

The implementation of the content of rights granted for international protection beneficiaries must be approached in a holistic manner given that the ability to integrate is inextricably linked to the additional rights accorded upon recognition of their international protection needs. For example, access to some rights such as employment may be dependent on securing other rights like access to accommodation and health care. The best interests of the child are a primary consideration of Member States when implementing this Directive (Recital 18) and when deciding on entitlements to benefits Member States should also take into account the best interests of married children who are not accompanied by their spouse and the fact that their best interests may lie with the original family (Recital 38). Member States should also apply this Directive in a manner compatible with the revised European Social Charter and decisions of the Council of Europe Committee of Social Rights in this field which may be applicable in securing the content of rights for international protection beneficiaries.<sup>79</sup>

In general, the content of rights for both refugees and subsidiary protection beneficiaries has been approximated with the exception of distinctions made in relation to the duration of residence permits and social welfare. Aligning the content of rights granted to subsidiary protection beneficiaries with refugees reflects the fact that such persons often have similar protection and social needs and ensures compliance with the principle of non-discrimination as interpreted by the ECtHR.<sup>80</sup> The provision of social rights is crucial to promote the speedy and successful integration of international protection beneficiaries in their host societies. Recital 41 correctly recognizes that 'in order to enhance the effective exercise of the rights and benefits laid down in this Directive by beneficiaries of international protection, it is necessary to take into account their specific needs and the particular integration challenges with which they are confronted.' The content of rights granted to beneficiaries of international protection also brings the EU closer to achieving the objective under the Stockholm Programme of a 'more vigorous integration policy [which] should aim at granting them [third country nationals] rights and obligations comparable to those of EU citizens'.<sup>81</sup>

ECRE welcomes the fact that Member States must take into account the specific situation of vulnerable persons in implementing the rights and entitlements granted by this Directive (Article 20(3)). The recast Directive provides a non-exhaustive list of certain vulnerable persons which includes victims of human trafficking and persons with mental disorders. The requirement to undertake an individual evaluation of the specific needs of beneficiaries also reflects the requirement to assess specific needs in other aspects of the EU asylum acquis for example under the provisions of the recast Reception Conditions Directive.<sup>82</sup>

ECRE would also like to highlight that Member States no longer have the possibility to reduce the benefits of Chapter VII in cases where international protection was granted on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognized as a refugee or as a person eligible for subsidiary protection.<sup>83</sup>

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("Temporary Protection Directive"). The Directive applies to persons who have fled armed conflict or endemic violence and persons at serious risk of systemic and generalized violations of their human rights.

<sup>79</sup> See for example European Committee of Social Rights decisions which have extended the scope of the Charter with respect to undocumented migrant children, for instance, *International Federation of Human Rights Leagues (FIDH) v France*, 7 September 2004 and *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, 20 October 2009.

<sup>80</sup> ECHR, *Niedzweicki v Germany*, Application No. 58453/00 and ECHR, *Okpisz v Germany*, Application No. 59140/00, 25 October 2005.

<sup>81</sup> Council of the European Union, *The Stockholm Programme – An open and secure Europe serving the citizen*, 2 December 2009 (final version), p. 64.

<sup>82</sup> See for example Article 22 in 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) ("recast Reception Conditions Directive") OJ 2013 L180/96.

<sup>83</sup> Articles 20(6) and 20(7) in Directive 2004/83/EC were deleted in the recast Directive. The Commission acknowledged that the limited use of these provisions in practice pointed to their limited added value; See European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum*

### **Article 23 Maintaining family unity**

ECRE welcomes the fact that Member States recognize the importance of maintaining family unity and the requirement for Member States to provide family members with the same entitlements to claim the benefits under Chapter VII as beneficiaries of international protection. Such an approach is in accordance with Article 8 ECHR. ECRE recommends that Member States also apply this provision under Article 23(5) to other close relatives dependent on the beneficiary of international protection, irrespective of when and where they formed part of the family unit.<sup>84</sup>

Although this provision does not entail a right to family reunification to beneficiaries of international protection with family members outside the EU, ECRE maintains the view that beneficiaries of subsidiary protection should be entitled to family reunification rights under the same conditions as refugees. There is no objective justification as to why both groups should be treated differently with regards to their fundamental right to respect for their family life.<sup>85</sup> In terms of the Family Reunification Directive, ECRE reiterates that nothing prevents those Member States that do not already ensure the right to family reunification to beneficiaries of subsidiary protection, from doing so as the Directive allows the adoption of more favourable provisions.<sup>86</sup>

### **Article 24 Residence permits**

Refugees shall continue to receive a renewable residence permit valid for at least three years. However, this provision provides that subsidiary protection beneficiaries and their family members will receive a renewable residence permit which must be valid for at least one year and, in case of renewal, for at least two years. Similarly, under Article 24(1) the residence permit issued to family members of refugees may be valid for less than three years and renewable. ECRE regrets that during the recast negotiations the opportunity was lost to align the duration of residence permits for refugees and subsidiary protection beneficiaries. Such an approach would be in line with the principle of non-discrimination as required under the EU Charter and interpreted by the ECtHR.<sup>87</sup> The protection needs of beneficiaries of subsidiary protection are equally compelling and generally as long in duration as those of refugees so any distinction between the duration of their residence permits is not objectively justifiable. The perception of the status of beneficiaries of international protection being temporary in nature has in practice proven to be incorrect. There are already a significant number of States that provide residence permits to beneficiaries of subsidiary protection that are valid for three years, a practice which ECRE believes must be maintained under the recast Directive.<sup>88</sup> From a perspective of efficiency, the alignment of rights would also assist national authorities to streamline procedures and reduce administrative costs in the process. Administrative processing of multiple renewals of residence permit applications adds unnecessary costs to the asylum system. In addition, the negative impact of short term residence permits on access to employment should not be overlooked.<sup>89</sup> ECRE recommends that Member States issue to subsidiary protection beneficiaries' residence permits valid for at least three years and renewable.

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*standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast)*, COM (2009) 551 final 21.10.2009, p. 9.

<sup>84</sup> Due to the specific context of the refugee experience a broader interpretation of dependency is also recommended which encompasses dependency whether this is physical, financial, social or emotional. For further information see ECRE, [Submission in response to the Commission's Green Paper on the right to family reunification of third country nationals living in the European Union \(Directive 2003/86/EC\)](#), 2012.

<sup>85</sup> ECRE, [Submission in response to the Commission's Green Paper on the right to family reunification of third country nationals living in the European Union \(Directive 2003/86/EC\)](#), 2012..

<sup>86</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ 2003 L251/12, ("Family Reunification Directive"), Art. 3(5); See also Council of Europe Parliamentary Assembly, Recommendation 1684 (2004), [Human mobility and the right to family reunion](#), 2004.

<sup>87</sup> See ECHR, *Niedzweicki v Germany*, Application No. 58453/00 and ECHR, *Okpiz v Germany*, Application No. 59140/00, 25 October 2005.

<sup>88</sup> For example Ireland, Bulgaria and Slovenia grant residence permits to subsidiary protection beneficiaries for three years whilst Hungary, Latvia, the Netherlands and the United Kingdom grant such beneficiaries residence permits for a duration of four years or more. See European Commission, *Report on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection*, 16 June 2010, COM(2010)314 final.

<sup>89</sup> Pro Asyl, [the Resource Project, Refugees' contribution to Europe. country report: Germany](#), January 2004, p. 24; UNHCR, [A New Beginning: Refugee Integration in Europe](#), September 2013, p. 85.

### **Article 25 Travel document**

ECRE welcomes the deletion of Member State discretion to only issue a travel document to subsidiary protection beneficiaries when serious humanitarian reasons arise that require their presence in another State. Now Member States must issue travel documents to beneficiaries of subsidiary protection who are unable to obtain a national passport and States can only refrain from issuing such travel documents for compelling reasons of national security or public order.

### **Article 26 Access to employment**

ECRE welcomes the fact that this provision provides that both refugees and subsidiary protection beneficiaries can take employment immediately after protection has been granted. As the Commission has acknowledged, participating in the labour market is one of the best and most concrete ways to integrate in society and therefore efforts to reduce gaps must target both labour migrants and migrants who come to the EU in other contexts including beneficiaries of international protection.<sup>90</sup> Recent research shows that specific barriers exist for refugees in entering the labour market in addition to challenges other migrants face.<sup>91</sup> The ability to engage in employment of their choice also empowers refugees, enabling self-reliance and contribution to the economy and society.<sup>92</sup> ECRE also welcomes the emphasis on ensuring that employment-related opportunities including training courses for upgrading skills and counseling services afforded by employment offices are available to beneficiaries of international protection, under equivalent conditions as nationals. This provision reflects the principle of anti-discrimination and equality of opportunity. As stated in Recital 42 efforts should be made in particular to address obstacles to effective access to employment-related educational opportunities and vocational training, inter alia, relating to financial constraints.

### **Article 28 Access to procedures for recognition of qualifications**

ECRE welcomes this provision which is a prerequisite to equality of opportunity for employment. Recital 44 acknowledges that special measures need to be considered to address the practical difficulties encountered by beneficiaries of international protection concerning recognition of their qualifications. In particular, given the forced nature of their departure from their country of origin or habitual residence, beneficiaries of international protection may have left behind their diplomas and certificates and be unable to provide documentary evidence of their qualifications. Therefore, it is welcomed that Article 28(2) requires Member States to endeavour to facilitate full access for such persons to appropriate schemes for the assessment, validation and accreditation of their prior learning in compliance with Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications. Facilitating such access may also require Member States to waive costs which may be prohibitive to recognizing such person's professional qualifications. Lack of recognition of qualifications is often a key barrier to accessing the labour market and certain groups are particularly disadvantaged in practice, such as women.<sup>93</sup> Therefore, when implementing this provision, Member States should also respect their obligations under other relevant instruments such as Racial Equality Directive (2000/43/EC) and the Gender Equality Directive (2006/54/EC) given the fact that beneficiaries of international protection may be more vulnerable to multiple discrimination on the grounds of their identity, ethnic origin, gender, age and/or situation.<sup>94</sup>

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<sup>90</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, [European Agenda for the Integration of Third Country Nationals](#), COM(2011) 455 final 20.7.2011.

<sup>91</sup> UNHCR, [A New Beginning: Refugee Integration in Europe](#), September 2013.

<sup>92</sup> The Michigan Guidelines on the International Protection of Refugees, [The Michigan Guidelines on the Right to Work](#), 16 March 2010.

<sup>93</sup> European Social Platform, [Position Paper on Migration, an Opportunity for the EU](#), 13 June 2013; See also European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, [European Agenda for the Integration of Third Country Nationals](#), COM(2011) 455 final 20.7.2011, p. 5.

<sup>94</sup> Council Directive 2000/43/EC Of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L180; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L204/23. See also the European Social Platform, [Position Paper on Migration, an Opportunity for the EU](#), 13 June 2013.

### **Article 29 Social welfare**

ECRE welcomes the general recognition contained in this provision that all beneficiaries of international protection should receive the necessary social assistance as provided to nationals of that Member State. However, ECRE regrets the possibility to derogate from this general rule whereby 'Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits'. Recital 45 states that the possibility of limiting such assistance to core benefits is to be understood as 'covering at least minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, in so far as these benefits are granted to nationals under national law.' This derogation must be interpreted in a restrictive manner in light of Member State's obligations under international law including the EU Charter and ICESCR. In accordance with general human rights law, any such restriction must follow procedural safeguards such as demonstrating that it serves a legitimate purpose and is proportionate and non-discriminatory.

### **Article 30 Healthcare**

ECRE welcomes the fact that beneficiaries of subsidiary protection now have access to healthcare under the same eligibility conditions as refugees and nationals. This reflects the right to healthcare under Article 35 of the EU Charter. Recital 46 and Article 30 of the recast Directive require Member States to ensure access to healthcare which includes both physical and mental healthcare as well as the treatment of mental disorders when needed. The provision of appropriate mental health care is consistent with the requirement under Article 19 of the recast Reception Conditions Directive.<sup>95</sup> International protection beneficiaries who have been subjected to torture, rape or other serious acts of violence should continue to receive the necessary treatment for the damage caused by such acts provided under Article 25(1) of the recast Reception Conditions Directive, after having been granted status as well as access to appropriate rehabilitation services, medical and psychological treatment or care. As required under the recast Reception Conditions Directive, personnel working with victims of torture, rape or other serious acts of violence shall continue to receive appropriate training concerning their needs and shall be bound by confidentiality rules in relation to any information they obtain in the course of their work.<sup>96</sup>

### **Article 31 Unaccompanied minors**

ECRE welcomes the obligation to trace the family members of unaccompanied children as soon as possible whilst protecting the best interests of the child. This reflects the obligations under Article 9, Article 10 and Article 22(2) of the CRC in relation to family unity and the best interests of the child. There should be continuity in the tracing process as Member States are also obliged under the recast Reception Conditions Directive to start the tracing process as soon as possible after an application for international protection is made.<sup>97</sup> The requirement that those working with unaccompanied children receive continuous training is welcomed by ECRE. Such personnel should also be bound by confidentiality rules in relation to any information they obtain in the course of their work as is required under the recast Reception Conditions Directive.<sup>98</sup>

### **Article 32 Access to accommodation**

This provision requires Member States to ensure that beneficiaries of international protection have access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories. Access to adequate housing is a prerequisite for any integration process.<sup>99</sup> The conditions in place must not be discriminatory or obstruct in practice the achievement of this right.<sup>100</sup> ECRE also urges Member States to provide accommodation under the same conditions as nationals.

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<sup>95</sup> Article 19 of the recast Reception Conditions Directive provides that Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders.

<sup>96</sup> See Article 25(2) of the recast Reception Conditions Directive.

<sup>97</sup> Ibid, Article 24(3).

<sup>98</sup> Ibid, Article 24(4).

<sup>99</sup> ECRE Task Force on Integration, [Good Practice Guide on the Integration of Refugees in the European Union – Housing](#), September 1999.

<sup>100</sup> Recent reports indicate that refugees may experience problems in relation to the quality of accommodation available and barriers to accessing housing. For further information see for example UNHCR, [A New Beginning: Refugee Integration in Europe](#), September 2013; Freedom from Torture, [The Poverty Barrier: The Right to Rehabilitation for Survivors of Torture in the UK](#), July 2013; UNHCR Central Europe, [Where is my Home? Homelessness and Access to Housing among Asylum Seekers, Refugees and Persons with International Protection in Bulgaria](#), 2013; Similar reports from UNHCR are available on homelessness in Poland and Slovakia.

Such an approach would be consistent with the Long Term Residence Directive which enables long term residents including refugees and subsidiary protection beneficiaries to access housing on an equal basis with nationals.<sup>101</sup> Equally, this suggested approach would be in compliance with the 1951 Refugee Convention which calls for a 'treatment as favourable as possible' under Article 21. Article 32(3) of the recast Qualification Directive requires Member States to endeavour to implement housing policies aimed at preventing discrimination including within the private housing sector and at ensuring equal opportunities regarding access to accommodation. In this regard, Member States should also be aware of their obligations under the Racial Equality Directive to prevent racial discrimination in access to housing.<sup>102</sup> Art. 32(3) of the recast Qualification Directive states that such policies should be implemented 'while allowing for national practice of dispersal of beneficiaries of international protection'. ECRE is concerned about the discretion afforded to Member States in relation to the use of national dispersal mechanisms. In particular, ECRE is concerned about the compatibility of such mechanisms with the inherent right to freedom of movement and their right to choose their place of residence within the host State as enshrined in Article 26 of the 1951 Refugee Convention.<sup>103</sup> In addition, national dispersal mechanisms may have a detrimental impact on access to the labour market, employment opportunities and integration more generally for beneficiaries of international protection. Housing can influence access to employment and training opportunities because resources and support services may be limited in areas where refugees are able to secure housing.<sup>104</sup> It may also be contrary to the objective of implementing policies aimed at preventing discrimination of beneficiaries of international protection and at ensuring equal opportunities regarding access to accommodation.

#### **Article 34 Access to integration facilities**

ECRE welcomes the fact that access to integration facilities for subsidiary protection beneficiaries has been aligned with refugees. Recast Article 34 creates a clear obligation for Member States to not only ensure access to appropriate integration programmes but also to ensure that such programmes address the specific needs of beneficiaries of international protection. Due to the forced nature of their migration and their experiences, compared with other migrant groups, refugees and subsidiary protection beneficiaries will often have specific needs that have to be met in order to support their integration.<sup>105</sup> Recital 47 acknowledges this in stating that the specific needs and particularities of the situation of beneficiaries of international protection should be taken into account as far as possible, in the integration programmes provided to them including language training. For example, national integration policies should incorporate an age perspective aimed at meeting the particular needs of refugee children, young people and older refugees. Similarly, a gender perspective should be employed to meet the particular needs of refugee women, whilst recognising the difficulties faced by refugee men. Member States should also ensure the involvement of all appropriate stakeholders in the design, implementation and evaluation of integration programmes.<sup>106</sup> As regards the reference to the possibility to create pre-conditions, this provision must only be applied in a manner which guarantees real access to such programmes in accordance with the overall objective of the provision. The success of any integration facilities will also be dependent on the ability of international protection beneficiaries to assert the content of rights granted under this Directive in practice. The rapid and effective

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<sup>101</sup> Article 11(1)(f) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long term residents, OJ 2004 L16/44 now amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ 2011 L132/1.

<sup>102</sup> Article 3 of the Racial Equality Directive indicates that housing comes within the scope of the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L180.

<sup>103</sup> Article 26 of the 1951 Refugee Convention obliges each Contracting State to 'accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances'. Article 31(2) of the 1951 Refugee Convention is also relevant in the context of restrictions on movement placed on refugees who arrive in an irregular manner as it only allows such restrictions on movement within a country pending regularization of the refugees' status or if they obtain admission into another country. See also Article 12 of the ICCPR which holds that everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his/her residence. Such a right is only subject to restrictions which are provided by law and are demonstrated to be necessary to protect national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognised in the ICCPR.

<sup>104</sup> For further information see UNHCR, [A New Beginning: Refugee Integration in Europe](#), September 2013, p. 86.

<sup>105</sup> ECRE, [Position on the Integration of Refugees in Europe](#), 2002.

<sup>106</sup> ECRE, [The Way Forward: Towards the Integration of Refugees in Europe](#), July 2005.



integration of international protection beneficiaries carries social, cultural and economic benefits for the EU, Member States and local communities, as well as for the individuals concerned.

## **Chapter IX Final Provisions**

### **Article 38 Reports**

ECRE welcomes the fact that this provision provides for a review by the Commission of the application of this recast Directive by June 2015. This is also reflected in Recital 48 which states that the 'implementation of this Directive should be evaluated at regular intervals, taking into consideration in particular the evolution of the international obligations of Member States regarding *non-refoulement*.' Member States are required to send the Commission all the information that is appropriate for the drawing up of such a report by December 2014. ECRE hopes that the Commission will also take the opportunity afforded at that time to consider the concerns raised in this paper that were not addressed in this recast and in further research conducted by civil society on national practices and policies relevant to the implementation of this Directive. In particular, ECRE welcomes the fact that priority is given to Articles 2 and 7 in proposing any amendments that are necessary to this Directive. ECRE believes that the criteria for evaluating this Directive must primarily be based on the importance of safeguarding fundamental rights, ensuring the effective recognition of those in need of international protection and access to the content of rights granted under the Directive.

### **Article 39 Transposition**

Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with this recast Directive by 21 December 2013. The obligation to transpose the Directive into domestic legislation is confined to those provisions that represent a substantive change as compared with Directive 2004/83/EC.<sup>107</sup> In doing so, national authorities are obliged to inform the Commission of the text of the main provisions of national law covered by this Directive. ECRE encourages Member States to engage in dialogue with non-governmental organisations in a transparent and inclusive manner when transposing and implementing this recast Directive at the national level.

### **Concluding Remarks**

The recast Qualification Directive represents a significant improvement in the compliance of EU law standards with international human rights and refugee law obligations and the case law of the CJEU and ECtHR. However, depending on its interpretation and application, the recast Directive may still allow for gaps in the protection of applicants and beneficiaries of international protection. Therefore, in accordance with this information note and the continuing evolution of international and European asylum law jurisprudence, Member States should ensure that they utilise their power to adopt more favourable standards under Article 3 of the recast Directive.

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<sup>107</sup> See recital 52.