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

To assist with transposition and implementation

Asylum-seekers attend a Hungarian language course while accommodated in a reception centre in Debrecen, Hungary. © UNHCR/B. Szandelszky/2010

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Introduction

UNHCR offers these annotated comments on *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection*, (hereafter *recast Reception Conditions Directive*)[1], as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.[2] According to its Statute, UNHCR fulfils its mandate *inter alia* by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto [.]"[3] UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention Relating to the Status of Refugees (hereafter '1951 Convention'). Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ('UNHCR Handbook') and subsequent Guidelines on International Protection.[4] This supervisory responsibility is reiterated in Article 35 of the 1951 Convention, and in Article II of the 1967 Protocol relating to the Status of Refugees.[5] UNHCR's supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union ("TFEU")[6], as well as in Article 18 of the Charter of Fundamental Rights

[1] European Union: Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, L 180/96 , http://www.refworld.org/docid/51d29db54.html
The United Kingdom, Ireland and Denmark are not taking part in the adoption of this Directive and are not bound by it or subject to its application (recitals 33 and 34 of this Directive).

[2] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V),
http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain?docid=3ae6b3628 ("UNHCR Statute").

[3] *Ibid*., paragraph 8(a).

[4] UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3,
http://www.refworld.org/docid/4f33c8d92.html.

[5] According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the 1951 Convention".

[6] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, http://www.unhcr.org/refworld/docid/4b17a07e2.html.

of the European Union ("EU Charter").[7] Declaration 17 to the Treaty of Amsterdam moreover, provides that *"consultations shall be established with the United Nations High Commissioner for Refugees … on matters relating to asylum policy".*[8]

The purpose of these UNHCR annotated comments is to provide advice to law and policy makers in EU Member States on transposition of provisions in the *recast Reception Conditions Directive*).[9] Its focus is specifically on those provisions that are less clear and those that UNHCR considers to be problematic from a refugee and human rights law point of view. The comments also addresses issues relating to implementation where UNHCR anticipates possible problems and gaps arising at national level and where UNHCR has developed policy and guidelines or where other authoritative guidance, including research, is available.

General observations

The recast Reception Conditions Directive in UNHCR's view introduces a number of positive changes, which if correctly transposed and implemented in practice would lead to improved and equal reception standards and treatment for many applicants for international protection throughout the EU.

UNHCR notes that the recast Reception Conditions Directive no longer foresees only ''minimum standards'',[10] but encourages Member States to interpret the provisions in this Directive in a positive and generous spirit, and in accordance with the Charter of Fundamental Rights of the European Union, and the European Convention for the Protection of Human Rights and

[7] European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, at: http://www.refworld.org/docid/3ae6b3b70.html

[8] European Union, *Treaty on European Union (Consolidated Version), Treaty of Amsterdam*, 2 October 1997, Declaration on Article 73k of the Treaty establishing the European Community http://www.refworld.org/docid/3dec906d4.html

[9] European Union: Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, L 180/96 , http://www.refworld.org/docid/51d29db54.html
The United Kingdom, Ireland and Denmark are not taking part in the adoption of this Directive and are not bound by it or subject to its application (recitals 33 and 34 of this Directive).

[10] Art. 78(2)(f), TFEU, http://www.unhcr.org/refworld/docid/4b17a07e2.html

Fundamental Freedoms (ECHR)[11] as well as obligations under instruments of international law, notably the 1951 Convention relating to the Status of Refugees[12] and its 1967 Protocol,[13] the 1989 United Nations Convention on the Rights of the Child (CRC),[14] the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)[15] and the International Covenant on Civil and Political Rights (ICCPR). [16] UNHCR also recalls ExCom Conclusion No. 93 on reception of asylum-seekers in the context of individual asylum systems. [17]

Important improvements are in the new mandatory provisions around the detention of asylum-seekers. Articles 8 to 11 introduce several essential guarantees and procedural safeguards. These include the requirement that detention be both necessary and proportionate, which must be satisfied on an individual basis before resorting to detention; the recognition that detention is an exceptional measure and to be used as a last resort that can only be justified for a legitimate purpose on six defined grounds and after alternative measures have been explored. The recast also demands a number of appropriate conditions in detention, including UNHCR access to detention facilities and crucially, limits the use of detention to exceptional circumstances for vulnerable persons and (unaccompanied and separated) children. However, the full range of acceptable detention conditions are not detailed in the Directive and States therefore need to also refer to other existing international standards.[18] The more extensive guarantees for vulnerable people including the requirement for an assessment of vulnerability and special reception needs, independent representation for

[11] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, http://www.refworld.org/docid/3ae6b3b04.html
[12] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, http://www.refworld.org/docid/3be01b964.html
[13] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, http://www.refworld.org/docid/3ae6b3ae4.html
[14] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, http://www.unhcr.org/refworld/docid/3ae6b38f0.html.
[15] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, http://www.refworld.org/docid/3ae6b36c0.html
[16] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, http://www.refworld.org/docid/3ae6b3aa0.html
[17] UN High Commissioner for Refugees (UNHCR), *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 October 2002, No. 93 (LIII) - 2002, http://www.refworld.org/docid/3dafdd344.html
[18] UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 13, p. 13, http://www.refworld.org/docid/503489533b8.html
UN High Commissioner for Refugees (UNHCR), *Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), Monitoring Immigration Detention: Practical Manual*, 2014, http://www.refworld.org/docid/53706e354.html

unaccompanied children as well as specific procedural and reception guarantees are also of note.

UNHCR further welcomes reduction of the waiting period for access to the labour market from twelve to nine months as earlier access to the labour market promotes the social inclusion and self-reliance of asylum-seekers, and avoids the loss of existing skills and dependency. For the host State, it brings increased tax revenues and savings in accommodation and other support and reduces working in the informal sector and exploitation often associated with this sector. UNHCR recommends, however, that access be granted as soon as practicably possible and within six months following the date when their applications were lodged which corresponds with the timeline for processing applications in first instance pursuant to Article 31 (3) of the recast Asylum Procedures Directive.[19]

Other aspects of the Reception Conditions Directive remain, however, problematic. The possibility, for example, to detain an applicant for international protection in order to decide, in the context of a procedure, on the applicant's right to enter the territory, is problematic, in UNHCR's view, as it could, depending on its implementation and application create the risk of widespread detention in the context of border procedures, and appears to be contradictory with the clearly elaborated position that persons cannot be detained for the sole reason of seeking international protection.

The exclusion of unaccompanied married children whose spouse is not present in the EU Member State from the definition of family members may, in certain cases, run contrary to the best interests of the child principle of Article 3 (1) of the Convention on the Rights of the Child especially where the child is dependent on family for support.

UNHCR is further concerned about the introduction of a merits test as a precondition for free legal assistance and representation in the event of reduction or withdrawal of reception conditions, a provision which may run contrary to Article 47 of the EU Charter, which contains the right to an effective remedy and a fair trial.

UNHCR is also concerned about the provision that for reasons of labour market policies, Member States may give priority to legally resident third-country nationals, could result in discriminatory practices contrary to Article 17 (1) of the 1951 Convention relating to the Status of Refugees, hampering

[19] European Union: Council of the European Union, *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)*, 29 June 2013, L 180/60, http://www.refworld.org/docid/51d29b224.html

effective access as long as objective criteria are not established in national law.[20]

Finally there is the provision in Article 20 (1) c that allows Member States to reduce, or withdraw in exceptional cases, reception conditions in the event of a subsequent application which in UNHCR's view could lead to a violation of one of the main objectives of the Directive, namely ensuring an adequate standard of living for applicants of international protection in case this provision would not be properly implemented in practice.

Annotated comments

1. Definitions

Article 2 UNHCR notes that the notion of ''family members'' in recast Article 2 (c) (i) is still limited to "in so far as the family already existed in the country or origin". This fails to accommodate family ties, which may have been formed during or after flight, or in refugee camps, thus excluding children born from those relationships from the guarantees laid down in the Directive, for example with regard to the maintenance of family unity. UNHCR urges Member States to recognise relationships that were formed during or after flight when implementing this Directive in line with the principle of family unity of Article 8 ECHR.

Likewise, UNHCR urges Member States to interpret the definition of family members generously to interpret as partners same sex couples and to also consider other close relatives when deciding on housing arrangements, taking due account of the best interests of the child, as well as the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State'' (recital 22).

UNHCR is concerned that married minor children are not considered as family members even where they are not accompanied by their spouse and where it is in their best interests to consider them as family members. This is

[20] Article 17(1) sets forth that: The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

equally true for minor siblings of an applicant (including where the applicant or sibling is married, if it is in the best interests of one of them to consider these persons as family members). UNHCR notes that these provisions may in certain instances run counter to the CRC, in particular Article 9,[21] as the child may be dependent on his or her adult family members and encourages Member States to apply the notion of family generously in line with recital 22 of this Directive.[22]

UNHCR welcomes the definition of "minor" in Article 2 (d) to reflect the standard of the CRC, namely to include all persons under 18.[23] Aware that a number of states have used different age limits for children, UNHCR encourages Member States to adopt the 18-year age limit in order to enable all children to benefit from the Directive's safeguards, and as required by international standards.[24]

In this connection, Recital 9, which repeats Member States' obligation to ensure full compliance with the principle of the best interests of the child of Article 3 (1) of the CRC and the importance of family unity in accordance with the CRC, the EU Charter and the ECHR, is also specifically welcomed.

UNHCR equally welcomes that subparagraphs (f) and (g) recognize that reception conditions are not limited to **material conditions** but also include safeguards and recommendations for the management of reception and the monitoring of reception conditions.

Recommendations

Transposition

- UNHCR urges Member States to recognise relationships that were formed during or after flight when implementing this Directive.
- UNHCR encourages Member States to interpret the definition of family member generously in line with recital 22 and Article 4 of this

[21] Article 9 CRC contains the right to family unity.

[22] ''When deciding on housing arrangements, Member States should take due account of the best interests of the child, as well as of the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State.''

[23] The CRC defines a child as "a human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier". The term minor is used to refer to a person under a certain age, the age of majority. The age depends upon national legal jurisdiction and application, but is typically 16, 18, or 21, with 18 being the most common age.

[24] UNHCR recommends that transitional measures be adopted for vulnerable children who turn 18 who may still be in need of special reception needs. See UNHCR, *Unaccompanied and Separated Asylum-seeking and Refugee Children Turning Eighteen: What to Celebrate?* March 2014, http://www.refworld.org/docid/53281a864.html
See also UNHCR, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, p. 50 box 16, http://www.refworld.org/docid/5423da264.html

Directive in order not to exclude from the scope of this Directive child dependents from the right to family unity and family life, especially children, who are married but whose spouse is not present in the Member State, and who are otherwise dependent on their parents.

- When deciding on housing arrangements, Member States should take due account of the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State.
- UNHCR encourages Member States to adopt the 18-year age limit in order to enable all children to benefit from the Directive's safeguards, and as required by international standards.[25]

Implementation

- UNHCR urges Member States to interpret the definition of nuclear family in such a way that the notion ''partners'' can also mean same sex couples.

2. Scope of the Directive

Article 3 UNHCR supports the extension of the scope of the Directive to all applicants for international protection including those in territorial waters or in transit zones of a Member State. This reflects jurisprudence of the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR), which has made clear that Member States' obligations towards persons seeking international protection are fully applicable in such areas including applicants who are awaiting transfer under the Dublin III Regulation,[26] or

[25] UNHCR recommends that transitional measures be adopted for vulnerable children who turn 18 who may still be in need of special reception needs. See UNHCR, *Unaccompanied and Separated Asylum-seeking and Refugee Children Turning Eighteen: What to Celebrate?* March 2014, http://www.refworld.org/docid/53281a864.html
See also UNHCR, *Safe and Sound: what states can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, p. 50, Box 16, http://www.refworld.org/docid/5423da264.html

[26] In line with the ruling of the CJEU in Cimade et GISTI, reception conditions should be maintained pending an actual departure from the territory under a Dublin procedure and until an applicant has actually been transferred. It follows that reception conditions should also be provided during the appeals procedure against a transfer. States have an obligation under the Dublin regulation to arrange the transfer and to provide travel documents and to cover the costs related to the transfer. Member States may also provide for an escort or supervised transfer. CIMADE et Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'intérieur, de l'outre-mer, collectivités territoriales et de l'immigratin, C-179/11, European Union: European Court of Justice, 15 May 2012, http://www.unhcr.org/refworld/docid/4fba44082.html

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.[27]

UNHCR notes paragraph 4, and would encourage Member States to provide reception conditions to stateless persons and victims of human trafficking who are in procedures for kinds of protection other than those emanating from the recast Qualification Directive, such as protection based on their statelessness or on their status as victims of trafficking, where their treatment would otherwise not be the same as that for applicants of international protection.

Recommendation

Transposition

UNHCR encourages Member States to provide Directive reception conditions to victims of human trafficking and stateless persons who do not apply for international protection, where standards for such categories would otherwise be lower under national law.

3. More favorable provisions

Article 4

UNHCR notes that the recast Reception Conditions Directive no longer foresees ''minimum standards'' in line with Article 78 (2)(f), TFEU[28] and encourages Member States to interpret the provisions in this Directive in a positive and generous spirit in accordance with Article 28 TFEU which requires interpretation to be in line with the Charter of Fundamental Rights of the European Union, the 1951 Convention and its 1967 Protocol, the 1989 United Nations Convention on the Rights of the Child and the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as obligations under instruments of international law to which they are party, notably the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) as mentioned in recitals 9 and 10 respectively of the Directive.

[27] *Ibid*.
See also Amuur v. France, Application no. 17/1995/523/609, Council of Europe: European Court of Human Rights, 25June 1996, http://www.unhcr.org/refworld/docid/3ae6b76710.html
[28] TFEU, http://www.unhcr.org/refworld/docid/4b17a07e2.html

4. Information

Article 5 Asylum-seekers often do not understand their rights and obligations in relation to reception conditions because they were not explained to them in a language and manner they understand or taking into account their individual circumstances in particular their age and gender. Providing information in a language that applicants ''are reasonably supposed to understand'' may undermine this right and hamper access to rights granted under this Directive.

Recommendation

Implementation

In order to ensure that information is effectively provided in practice in ways that can ensure full comprehension of and engagement in the asylum procedure, information on reception conditions should be provided in a language that the applicants actually understand and in a manner which considers their individual circumstances including in particular their age and gender.

5. Documentation

Article 6 UNHCR welcomes the obligation for Member States in Article 6 (1) to issue documents to applicants within three days of the lodging of an application for international protection, certifying his or her status as an applicant and testifying that he or she is allowed to stay on the territory of the Member State while his or her application is pending or being examined.

Whilst there is a maximum timeline of three-six working days between the making and the registration of an application provided for in Article 6 (1) of the recast Asylum Procedures Directive, there is no timeline for lodging the application, only a requirement for Member States to ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. This could mean that there could be delays between the registration and the lodging of the claim. Given effective access to reception conditions may be difficult, if not impossible, if the applicant is not provided with the necessary documentation in a timely manner, UNHCR recommends that documentation be provided as early as practicable, and as a minimum requirement, temporary documentation (e.g. in the form of an appointment slip) starting from the moment a person makes an application.

UNHCR further recommends that documentation certifying the status of asylum-seekers includes also information on the holder's entitlements and benefits. If such information is lacking, neither the asylum-seekers nor the service providers may be fully aware of these rights and benefits. Alternatively, brochures setting out the asylum-seeker's entitlements and benefits could be shared upon issuance of the documentation; and otherwise be easily available at relevant offices and online.

As regards providing evidence equivalent to documents to applicants in detention or in border procedures in paragraph 2, UNHCR recommends that Member States always provide evidence of registration as an applicant for international protection in order to ensure applicants are entitled to the benefits under this Directive and protected against *refoulement.*

As regards paragraph 5, compelling humanitarian reasons may arise in which applicants should be allowed to travel to another EU Member State and UNHCR urges Member States to issue such documents to applicants in a timely manner when necessary that also permit their re-entry.

UNHCR welcomes the wording of paragraph 6, exempting asylum-seekers from any documentary or other administrative requirements that Member States could impose before granting the rights to which they are entitled under the Directive, and notes this provision may even be more important in the event of stateless applicants. Paragraph 6 is considered to be in line with Article 6, 1951 Convention.

Finally, UNHCR notes that Article 6 applies to all applicants, regardless of their age. Member States would need to issue documents at least in respect of all adult family members, male and female, in line with ExCom Conclusion 93 paragraph b (v) in order to ensure that dependents are able to benefit from the provisions of this Directive.

Recommendations

Transposition

- Without prejudice to Article 6 (1) and (2) of the recast Asylum Procedures Directive, UNHCR urges Member States to issue documentation as early as possible following the making of the application with a view to preventing e.g. detention or *refoulement* and ensuring access to reception arrangements and asylum procedures as soon as possible. Where this is not possible UNHCR recommends that temporary documentation be issued.
- UNHCR recommends Member States include in their national legislation the possibility to provide travel documents in a timely

manner to applicants for international protection when serious humanitarian reasons arise that require their temporary presence in another State and that also allow their re-entry.

Implementation

- UNHCR recommends that documentation certifying the status of asylum-seekers includes information on the holder's entitlements and benefits. Brochures setting out the asylum-seeker's entitlements and benefits could be shared upon issuance of the documentation; and otherwise be easily available at relevant offices and online.
- UNHCR encourages Member States to issue documents at least in respect of all adult family members, female and male in line with ExCom Conclusion 93 paragraph b (v) in order to ensure access to reception conditions under this Directive and to prevent *refoulement*.

6. Residence and freedom of movement

Article 7 Article 26 of the 1951 Refugee Convention provides for the right to freedom of movement and choice of residence for refugees and asylum-seekers, regardless of whether they entered the territory with or without authorization.[29] Similarly, Article 12 (1) of the ICCPR provides for the right to liberty of movement and freedom to choose one's place of residence for those 'lawfully' within the territory of a State. In exercising their internationally recognized right to seek asylum, asylum-seekers are considered to be ''lawfully' in" the territory once they have been admitted to a status determination process, such access not being delayed unreasonably. UNHCR's interpretation of Article 26 of the 1951 Convention is supported by the United Nations Human Rights Committee which has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be ''lawfully within the territory''.[30]

[29] Each Contracting State shall 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 26, 1951 Convention relating to the Status of Refugees). Restrictions on movement shall not be applied to such refugees (or asylum-seekers) other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another country. UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 13, p. 13, http://www.refworld.org/docid/503489533b8.html

[30] UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para 4, http://www.refworld.org/docid/45139c394.html

UNHCR recognises that there are circumstances, however, in which the freedom of movement or choice of residence of applicants for international protection may need to be restricted, subject to relevant safeguards under international law.

Article 12 (3) ICCPR for instance allows restrictions where this is necessary to protect national security, public order *(ordre public),* public health or morals or the rights and freedoms of others.

UNHCR welcomes that paragraph 2 of Article 7 imposes a necessity test before deciding on the residence of an applicant in case of designated residence for the swift processing and effective monitoring of their application. From the construction of the paragraph, it appears that the same necessity test is, however, not required where residence is designated ''for reasons of public interests, or public order''. This is not considered in line with general rules regarding freedom of movement and choice of residence and UNHCR would seek that states incorporate necessity as the overarching guiding principle.

A refusal to allow an applicant to leave the designated place of residence will have to be reasoned by the relevant authority. Pursuant to Article 26 of this Directive there is a requirement that decisions taken under Article 7 which affect applicants individually may be the subject of an appeal within the procedures laid down in national law. At least in the last instance the possibility of an appeal or a review, in fact and in law, before a judicial authority shall be granted. This will provide a safeguard against arbitrariness.

Recommendations

Transposition

- Restrictions on movements of applicants must not be imposed unlawfully or arbitrarily and the criteria must be established by law**.**
- A necessity test should underlie a decision to restrict the freedom of movement of applicants for international protection in line with general rules regarding freedom of movement and choice of residence.
- Where an applicant has an alternative to public accommodation facilities, such as living with friends or relatives, restrictions should in principle not be imposed.[

Implementation

- Where living in collective accommodation is made mandatory this should generally only be for a limited period of time and be linked to a

certain stage in the procedure allowing applicants to move to smaller scale housing as soon as possible. Living in the community should be the norm.

- Failure to comply with reporting requirements or simply being late for a reporting time should not lead to detention and a certain degree of flexibility would need to be applied. It can only lead to a reduction or in exceptional and duly justified circumstances to withdrawal of reception conditions in line with Article 20 of this Directive.
- Where applicants are accommodated in (a) specific area (s) b) and or/ location (s) UNHCR recommends that the relevant national policy takes into account the following factors for determining the area or location where applicants may be requested to reside during the asylum procedure:
    - the presence of NGOs, legal aid providers, language training facilities and, where possible, an established community of the asylum-seekers' national or ethnic group;
    - the possibilities for harmonious relations between the asylum-seekers and the surrounding communities;
    - the need for supplementary financial support to cover the cost which the asylum-seekers will incur when they have to travel to the assigned area.
    - the close proximity to asylum procedures.

7. Detention

Article 8 Article 8 protects against the arbitrary deprivation of liberty of asylum-seekers. UNHCR welcomes in particular:

- that no one shall be held for the sole reason that s/he has applied for asylum (para. 1), which recognises the lawful right to seek asylum[31].

[31] UDHR Art. 14(1); 1951 Convention, Arts, 1, 31, 33; Art. 18, EU Charter.

- the introduction of a necessity test bringing the RCD in line with international human rights and refugee law (para. 2) as well as regional case law.[32]

- the requirement to consider less coercive means first (para. 2), and that such alternatives must be laid down in national law (para. 4) in line with regional case law.[33]

- the requirement of an individual assessment (para. 2)[34]

- that detention is only justified in relation to six explicit grounds (para. 3), to be laid down in national law.[35]

UNHCR welcomes these safeguards compared to the Directive of 2003/9/EC laying down minimum standards for the reception of asylum seekers.

The provision of six grounds for detention taken in conjunction with other guarantees, such as the necessity and proportionality test to be applied in each case, should discourage the systematic detention of asylum-seekers while ensuring it is used as a measure of last resort.

However, UNHCR has some concerns in relation to the grounds themselves:

Article 8 (3) a, stipulates that Member States may detain applicants for international protection to determine or verify an applicant's identity or nationality. UNHCR acknowledges that minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute.[36] However, the examination of nationality can be a complex and lengthy process, especially for stateless applicants, and thus special safeguards will need to be put in place to

[32] This makes it explicit that a necessity assessment is required, going beyond Saadi v. UK and UNHCR particularly welcomes this change. *Saadi v. United Kingdom*, 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008, http://www.refworld.org/docid/47a074302.html. See also UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4.2, http://www.refworld.org/docid/503489533b8.html. See, also, *Rusu v. Austria*, Application no. 34082/02, Council of Europe: European Court of Human Rights, para. 582 October 2008, http://www.refworld.org/docid/496361e02.html.

[33] See Rusu v Austria (2008) Application no. 34082/02. See too *Louled Massoud v. Malta*, Application no. 24340/08, Council of Europe: European Court of Human Rights, 27 July 2010, http://www.refworld.org/docid/4c6ba1232.html
Popov c. France, Requêtes nos 39472/07 et 39474/07, Council of Europe: European Court of Human Rights, 19 January 2012, http://www.refworld.org/docid/4f1990b22.html

[34] UNHCR Detention Guidelines, Guideline 4.1 para.

[35] See also Suso Musa v. Malta, Application no. 42337/12, Council of Europe: European Court of Human Rights, 23 July 2013, http://www.refworld.org/docid/52025a8f4.html

[36] UNHCR detention Guidelines, Guideline 4.1.1. paras. 24 and 25.

safeguard against arbitrary detention, including prolonged or indefinite, in such cases.[37] In using the ground of verifying identity or nationality under Article 8(3) a, special procedures may need to be introduced with respect to stateless persons who apply for international protection to avoid their possible indefinite detention.[38]

As regards the ground in **Article 8 (3) b**, which allows detention in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant, UNHCR stresses that strict maximum time limits are to be observed in line with Article 9, to ensure that detention on the basis of this ground is not used for purposes of administrative convenience for the whole duration of the asylum procedure.[39] Clear criteria need to be developed in order to assess the risk of absconding to avoid any arbitrary application of this ground.[40] Factors to balance in an overall assessment of the necessity of detention could include, but are not limited to: family or community links or other support networks in the country of asylum, willingness or refusal to provide information about the basic elements of their claim, or whether the claim is considered manifestly unfounded or abusive[41]. Of note is that Article 3 (7) of the Returns Directive describes the "risk of absconding'' as meaning the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national, who is the subject of return procedures may abscond.[42] Likewise, Article 2(n) of the Dublin III Regulation contains a similar definition.[43] In developing objective criteria to assess a risk

[37] UNHCR detention Guidelines, Guideline 4.1.1. para. 26.
[38] UNHCR detention Guidelines, Guideline 4.1.1. para. 27.
[39] UNHCR Detention Guidelines, Guideline 4.1.1, para. 28 and UNHCR Detention Guidelines, Guideline 6.
[40] In *A v Australia*, the UN Human Rights Committee clarified that assertions about a general risk of absconding cannot legitimise detention: *[T]he burden of proof for the justification of detention lies with the State authority in the particular circumstances of each case; the burden of proof is not met on the basis of generalized claims that the individual may abscond if released, A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, http://www.refworld.org/docid/3ae6b71a0.html.
[41] UNHCR Detention Guidelines, Guideline 4.1.1, para. 22.

[42] European Union: Council of the European Union, 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, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, http://www.refworld.org/docid/496c641098.html

[43] European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a*

of absconding in the case of applicants for international protection the same approach should be adopted.

Article 8 (3) c allows detention where it is necessary (para. 2) in order to decide, in the context of a procedure, on the applicant's right to enter the territory. UNHCR is concerned that, wrongly interpreted or applied, this provision could create the risk of widespread detention in the context of border procedures and result, contrary to Article 31 (1) of the 1951 Convention[44] in the penalization of asylum-seekers who enter the EU in an irregular manner. In UNHCR's view, it is important for national legislation and administrative practice to recognize the specific legal situation of asylum-seekers, who are claiming the fundamental human right to asylum, which entitles them to safeguards additional to those of other aliens, who enter or are otherwise present in an EU Member State in an irregular manner. Detention under this ground should be as short as possible and only for as long as the ground applies. Subsection (c) should be read in conjunction with Article 43 (1) (a) or (b) and paragraph 2 of the recast Asylum Procedures Directive in order to establish in which instances an applicant may be detained at the border or transit zone, in order to decide, in the context of a procedure, on his or her right to enter the territory.[45] Of note in this regard is that the decision on access to the territory under Article 43(2) should be taken within 4 weeks.

Article 8(3) d allows for detention of an applicant who is subject to a return procedure in order to prepare the return and/or carry out the removal process and who makes an application for international protection from detention. Such situations may arise where a person has a *sur place* claim or where the person files a subsequent application. UNHCR acknowledges that detention may be justified in individual cases where it can be shown that the

stateless person (recast), 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, http://www.refworld.org/docid/51d298f04.html

[44] Article 31(1) provides that: "The Contracting states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

[45] Paragraph (a) refers to Article 33 APD, which defines as inadmissible applications when an applicant comes from a safe country of origin, where another country has granted international protection, is considered as a safe third country or where a subsequent application does not contain new elements. Paragraph (b) refers to Article 31 (8) APD, which sets out nine different reasons for accelerating procedures or deciding on applications at the border including in the event of manifestly unfounded or abusive applications including those which aim to frustrate the removal process, where the applicant refuses to be fingerprinted or where s/he is considered to be danger to the national security or public order.

person applies for international protection solely to frustrate an ongoing removal process and in addition where it can be established that the person had an effective possibility to apply for international protection previously in that Member State.[46] In all such cases, however, the removal must be reasonably likely to take place. UNHCR emphasizes the vital role of courts in overseeing the proper implementation of this provision and related safeguards.[47]

As regards **Article 8(3) e** which allows Member States to detain an applicant to protect public order, UNHCR notes that this ground needs to be carefully circumscribed otherwise the risks of arbitrary detention are clear. For example, in UNHCR's Detention Guidelines, public order is the broad heading to cover detention for the purposes of preventing absconding, if there is a likelihood that the applicant will not cooperate, in connection with accelerated procedures for manifestly unfounded or clearly abusive claims or for initial identity and/or security verification.[48] Minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security risks. At the same time, the detention must last only as long as reasonable efforts are being made to establish identity or to carry out the security checks, and within strict time limits established in law. Appropriate screening and assessment methods need to be in place in order to ensure that persons who are *bona fide* asylum-seekers are not wrongly detained.
This ground may overlap with the grounds listed under Article 8(3)(a) (b) and (c). Careful judicial scrutiny would be required where several grounds for detention are applied in succession, as this is likely to become arbitrary.

Governments may need to detain a particular individual who presents a threat to national security. Even though determining what constitutes a national security threat lies primarily within the domain of the government, detention has to be necessary, proportionate to the threat, non-discriminatory, and subject to judicial oversight.[49] Inability to produce

[46] UNHCR Detention Guidelines, Guideline 4.1.4, para. 33.
[47] The wording in this provision follows the ruling in Arsalan (Czech Republic) (C-534/11), Judgment of the Court of 30 May 2013, where the CJEU stated that, a third-country national who has applied for international protection from pre-removal detention, may be kept in detention on the basis of a provision of national law, where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardize the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return (para 63) http://www.refworld.org/pdfid/51a88fc04.pdf
[48] UNHCR Detention Guidelines, Guideline 4.1.1 paras. 22-25.
[49] UNHCR Detention Guidelines, Guidelines 7.

documentation should not automatically lead to an adverse security assessment.[50]

Article 8(3) f should be read in conjunction with Article 28 of the Dublin III Regulation. UNHCR welcomes the safeguards in Article 28(1) Dublin III Regulation that an applicant cannot be solely detained based on the fact that s/he is in the Dublin procedure and only to secure a transfer under Dublin when there is a ''significant risk of absconding''. Article 2(n) of the Dublin III Regulation defines a significant risk of absconding as "the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond". This definition is almost identical to that contained in the 2008 Return Directive.[51]

Article 28 (2) Dublin III Regulation restates the safeguards in Article 8(2) of this Directive, namely the requirement of an individual assessment, proportionality, and the need to explore less coercive alternative measures first. In UNHCR's view it is necessary to establish clear and objective criteria in law of what a ''significant risk of absconding' means, a threshold which seems higher than under Article 8(3) b.

UNHCR welcomes the obligation in **Article 8 (4)** for rules at national level providing for alternatives to detention. Recital 20 helpfully explains that alternative or less coercive measures mean non-custodial measures and that they must respect the fundamental human rights of applicants. This is in line with UNHCR's definition of alternatives to detention.[52] UNHCR recalls that reception in the community should be the norm and preferably individual housing; that alternatives to detention should be applied first and detention should only be used as a last resort. Moreover, where alternatives to detention are laid down in national legislation, authorities need to ensure through administrative measures their effective implementation in practice.

[50] UNHCR Detention Guidelines, Guideline 4.1.3.
[51] EU Return Directive 2008/115/EC, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF;
[52] "Alternatives to detention" is not a legal term but is used as short-hand to refer to any legislation, policy or practice that allows asylum-seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement. As some alternatives to detention also involve various restrictions on movement or liberty, they are also subject to human rights standards.

Alternatives should not be used as alternative forms of detention; nor should alternatives to detention become alternatives to release[53] as liberty should be the default position in most cases. Furthermore, they should not become substitutes for normal open living possibilities that do not involve restrictions on the freedom of movement of asylum-seekers. They should also be adapted to the special needs of vulnerable applicants.[54]

Recommendations

Transposition

- In using the ground of verifying identity or nationality under Article 8(3) a, special procedures may need to be introduced with respect to stateless persons who apply for international protection to avoid their possible indefinite detention.
- In order to avoid arbitrary application of the ground mentioned in Article 8 (3) b, UNHCR urges Member States to develop clear and objective criteria in law or policy to assess the risks of absconding. Also this ground should not apply for the duration of the asylum procedure nor for administrative convenience.
- UNHCR urges Member States to read Article 8 (3) c in conjunction with Article 43 of the recast Asylum Procedures Directive in order to establish in which instances an applicant may be detained at the border or transit zone, in order to decide, in the context of a procedure, on his or her right to enter the territory in order to avoid widespread detention of asylum-seekers contrary to inter alia Article 31(1) of the 1951 Convention relating to the Status of Refugees.

Implementation

- Appropriate screening or assessment tools need to be in place in order to ensure that persons who are asylum-seekers are not wrongly detained.
- Alternatives to detention should be accessible in practice and different options made available which can be adapted to the special needs of vulnerable applicants. Further exploration in Europe of community-

[53] UNHCR Detention Guidelines, Guideline 4.3, para. 38

[54] UNHCR Detention Guidelines, Guideline 4.3, paragraph 39.

based alternatives to detention, building on good practices, would be encouraged.[55]

- UNHCR cautions against application of several grounds for detention in succession as this is likely to be arbitrary and urges a rigorous application of the safeguards in Article 8 (2) and Article 9 of this Directive in each individual case.

8. Guarantees for detained applicants

Article 9 UNHCR welcomes the wording of **Article 9 (1)**, which limits the period of detention to the shortest possible duration and only as long as the ground(s) apply based on the principle of proportionality. Recent ECtHR case law underlines the requirement for proportionality, supported by the limited duration of detention, maximum limits on detention, and used only for permitted purposes in law under Article 9.[56] UNHCR also welcomes the fact that Member States are under an obligation to observe due diligence (recital 16) guaranteeing that delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

In order to guard against arbitrariness, maximum periods of detention should be set in national legislation. It is UNHCR's experience that, without maximum periods, detention can become prolonged, and in some cases indefinite, particularly for stateless asylum-seekers.[57]

UNHCR notes that the detention grounds of Article 8 (3) relate principally to preliminary procedures, e.g. procedures to carry out initial identity and security checks or to decide on admissibility or the substance of an application in border or accelerated procedures. In such cases detention should be as short as possible and last only as long as reasonable efforts are being made to establish identity or to carry out the security checks, or to decide on the admissibility or the substance of the claim and within strict time limits established in law.

[55] UNHCR Detention Guidelines, Annex A.

[56] Lokpo et Touré v. Hungary, Application no. 10816/10, Council of Europe: European Court of Human Rights, 20 September 2011, http://www.unhcr.org/refworld/docid/4e8ac6652.html.

[57] UNHCR Detention Guidelines, Guideline 6.

Article 43 (1) of the recast Asylum Procedures Directive (APD) allows Member States to provide for procedures to decide at the border or in transit zones on (a) the admissibility of an application, pursuant to Article 33 APD or (b) the substance of an application in a procedure pursuant to Article 31 (8) APD. Article 43 (2) of the APD states that in case a decision cannot be made within 4 weeks the applicant should be granted access to the territory for further processing. Whereas Article 43 APD does not regulate detention, given that in practice such decisions are awaited in transit zones or at borders where the issue of deprivation of liberty may arise, UNHCR urges Member States to apply the safeguards of Article 9 requiring a speedy judicial review where an applicant is detained based on Article 8 (3) a, b, c or e and that decisions be taken within the four week mark in accordance with the principle of due diligence.

Article 8 (3) f refers to Article 28 of the Dublin III Regulation. Article 28 (3) addresses the duration of detention. Two different situations can be discerned. The first situation is the case where an applicant is in detention and does not appeal the transfer decision. In the second scenario, the applicant is in detention, and does appeal the decision to transfer. When a transfer decision is taken that the applicant does not appeal, then the maximum detention period is approximately 3 months, calculated as of the lodging of the application. In the second scenario, where the applicant does appeal the transfer decision, the transfer of that person from the requesting Member State to the Member State responsible is carried out at the latest within six weeks of the moment when the appeal or review no longer has a suspensive effect. In UNHCR's view, if detention is found necessary, applicants should be detained for the shortest possible period of time only, including where an applicant appeals a transfer decision. Detention should further be in line with the principle of due diligence and respect the safeguards set forth in Article 9. Carrying out the actual transfer as soon as possible could furthermore considerably reduce the time an applicant spends in detention.

Article 9 (3) provides for a ''speedy judicial review'' requiring Member States to define in national law the period within which the judicial review *ex officio* and/or the judicial review at the request of the applicant shall be conducted. Whilst this provision is in line with Article 5 (4) of the ECHR, which requires a speedy judicial review by a Court, UNHCR notes that this provision leaves room for interpretation by Member States and if not properly transposed or implemented may lead to arbitrariness. UNHCR understands the "ex officio" requirement for judicial review to mean that such reviews are automatic,

and based on State practice, would recommend that they take place in the first instance within 24-48 hours of the initial decision to hold the applicant.[58] Fourteen days without the possibility to challenge detention in the courts as currently applied in some Member States in the case of new arrivals would be out of step with existing international legal standards including those developed by the UN Human Rights Committee and the UN Working Group on Arbitrary Detention.[59] In the same vein, blanket application of detention to certain groups or categories of applicants would be in violation of the prohibition to arbitrary detention as it is not based on an examination of the necessity of the detention in the individual case.

UNHCR welcomes the requirement in **Article 9 (2)** that the detention order be in writing, specifying the grounds and that information be provided to the applicant regarding the reason for the detention and the ways to challenge the detention order including how to seek free legal assistance under **Article 9 (4)**; an arrangement which would allow effective exercise of the right to an effective remedy where needed.[60] The requirement for immediate release of the asylum-seeker in case of unlawful detention as foreseen in **Article 9 (3)** last indent, is essential to prevent arbitrary detention and uphold basic principles of fundamental rights.[61]

UNHCR observes, however, that the requirement to inform detained asylum-seekers immediately of "the reasons for detention (…) in a language they understand *or are reasonably supposed to understand"* is only partially in line with Article 5(2) of the European Convention on Human Rights ("ECHR"), which states that "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 ECtHR in

[58] UNHCR Detention Guidelines, Guideline 7, para. 47 (iii).

[59] UNHCR Detention Guidelines, para. 17. See also UN WGAD, Report to the 13th Session of the Human Rights Council, 18 January 2010, para. 61; see, too, Principle 7, UN Doc. E/CN.4/2000/4, 28 December 2009.
See, too, *Massoud v. Malta* (2010), ECtHR, Application No. 24340/08, http://www.unhcr.org/refworld/docid/4c6ba1232.html.

[60] UNHCR Detention Guidelines, Guideline 7. See also. *Rahimi c. Grèce*, Requête no. 8687/08, Council of Europe: European Court of Human Rights, 5 April 2011, http://www.refworld.org/docid/4d9c3e482.html. See too, *Saadi v. United Kingdom*, 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008, where the ECtHR ruled that information was to be provided as soon as possible as well as reasons given as regards the ground for detention.

[61] 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". See also UNHCR Detention Guidelines, Guideline 3.

several cases.[62] It would not be sufficient to only provide the reasons for detention in a language that the applicant is "*reasonably supposed to understand*".

The entitlement for asylum-seekers to request judicial review of detention whenever relevant circumstances arise or information becomes available, under **Article 9 (5),** provides a further safeguard to ensure its ongoing lawfulness. UNHCR would recommend that following the initial review of detention, regular periodic reviews of the necessity and proportionality of the continuation of detention before a court or an independent body be conducted, which the asylum-seeker and his/her representative would have the right to attend. Good practice furthermore indicates that *following an initial judicial confirmation of the right to detain*, review would take place every seven days until the one month mark and thereafter every month until the maximum period set by law is reached.[63] In larger detention facilities, good practice could be that the detention reviews are held at the detention facility, allowing for easy access of applicants to the hearings.

UNHCR welcomes the provision in **Article 9 (6)** which foresees independent free legal assistance and representation, in cases of appeal or review of a detention order, where asylum-seekers cannot afford the costs involved and in so far it is necessary to ensure their effective access to justice, as well as the requirement for such arrangements for access to assistance to be laid down in national law. This provision is also in line with ECtHR case law[64] as well as Article 47 of the EU Charter, which provides for the right to an effective remedy and to a fair trial.

Finally, UNHCR emphasises that alternatives to detention that restrict the liberty of asylum-seekers may impact on their human rights and are subject to human rights standards, including periodic review in individual cases by an independent body. Individuals subject to alternatives need to have timely access to effective complaints mechanisms as well as remedies, as applicable.[65]

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[62] *Fox, Campbell and Hartley v. The United Kingdom*, Application nos. 12244/86; 12245/86; 12383/86, Council of Europe: European Court of Human Rights, 30 August 1990, http://www.unhcr.org/refworld/docid/3ae6b6f90.html. See too, *Saadi v. United Kingdom*, 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008.

[63] UNHCR Detention Guidelines, Guideline 7, para. 47 (iv).

[64] See para. 301 in M.S.S. v. Belgium and Greece, in which the ECtHR noted a lack of legal aid effectively depriving the asylum seekers of legal counsel. M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, http://www.refworld.org/docid/4d39bc7f2.html.

[65] UNHCR Detention Guidelines, Guideline 4.3.

Recommendations

Transposition

- UNHCR would recommend that maximum periods for detention are laid down in national law in order to prevent arbitrariness.

- UNHCR recommends that a ''speedy judicial review'' required by Article 9 (3) takes place within 24-48 hours *of the initial decision* to hold the asylum-seeker. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release.

- Regular periodic reviews of the necessity to continue detention before a court or an independent body must be in place, which the asylum-seeker and his/her representative would have the right to attend. Good practice indicates that following an initial judicial confirmation of the right to detain, review would take place every seven days until the one month mark and thereafter every month until the maximum period set by law is reached.

- Alternatives to detention that impose restrictions on liberty of applicants should also be subject to judicial or independent review.

Implementation

- In the context of Dublin transfers, applicants should be detained for the shortest possible period of time only, including where an applicant appeals a transfer decision. Detention should further be in line with the principle of due diligence and respect the safeguards set forth in Article 9. Carrying out the actual transfer as soon as possible could furthermore considerably reduce the time an applicant may spend in detention.

9. Conditions of detention

Article 10 Conditions of detention should ensure humane treatment with respect for the dignity of the person.[66] UNHCR welcomes the general rule in Article 10 that Member States are to use separate detention facilities for asylum-seekers apart from convicted criminals or prisoners on remand.[67] Even where separate facilities are not possible, UNHCR notes the requirement to separate applicants for international protection from the ordinary prison population in Article 10(1) and that they are to enjoy the standards in the RCD, notwithstanding that they are housed in prisons.

UNHCR welcomes the guarantee in Article 10 (3) of access to asylum-seekers in detention to UNHCR, or its partners, and in Article 10 (4) for legal advisors and NGOs, in the latter case subject to security or public safety, provided that access is thereby not severely limited or rendered impossible.[68]

It is important to provide information in detention including in detention like situations such as border points and transit zones, in line with Article 10 (5), in situations arising under Article 43 of the recast Asylum Procedures Directive. Information should be provided on rights and entitlements as well as obligations of applicants in such places including and crucially on (access to) the asylum procedure, in a manner and language the individual actually understands.

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[66] UNHCR DG, Guideline 8, paragraph 48 (ii). See also UN High Commissioner for Refugees (UNHCR), Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), *Monitoring Immigration Detention: Practical Manual*, 2014, http://www.refworld.org/docid/53706e354.html
See also Amuur v. France, Application no. 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996.
See also Suso Musa v. Malta, Application no. 42337/12, Council of Europe: European Court of Human Rights, 23 July 2013.
See also ECtHR, *Kanagaratnam v. Belgium,* app. n° 15297/09, §§ 94-95, http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3779616-4323893#{"itemid":["003-3779616-4323893"]}.

[67] UNHCR Detention Guidelines, Guideline 8, paragraph 48 (i) and (iii).
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, 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, http://www.unhcr.org/refworld/docid/3f8d65e54.html; See too, United Nations, Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955, para. 8, http://www.unhcr.org/refworld/docid/3ae6b36e8.html; See also UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. http://www.un.org/documents/ga/res/43/a43r173.htm

[68] UN High Commissioner for Refugees (UNHCR), *Detention of Refugees and Asylum-Seekers*, 13 October 1986, No. 44 (XXXVII) - 1986, para. (g): http://www.refworld.org/docid/3ae68c43c0.html

Member States should establish clear criteria for determining in which cases it would be ''duly justified'' for there to be a derogation from the rule to provide information to an applicant, where he or she is detained at a border post or in a transit zone.

Article 17 of this Directive specifies that Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health including in relation to the situation of persons who are in detention. This is in line with UNHCR's 2012 Detention Guidelines, in particular Guideline 8 which states that conditions of detention must be humane and dignified.

Although welcomed in general, UNHCR notes that the conditions laid down in Article 10 are limited in scope, and do not outline the range of conditions required under international human rights law.[69] UNHCR draws attention in this regard to Guideline 8 of its Detention Guidelines as well as its Monitoring Immigration Detention: Practical Manual, where the main standards in relation to conditions of detention for immigration related purposes are set out.[70]

Also, immigration detention centres should be open to scrutiny and monitoring by independent national and international institutions and bodies including UNHCR.[71]

Recommendations

Transposition

- Member States should establish clear criteria in law and/or policy for determining when it would be ''duly justified'' for there to be a derogation from the rule to provide information on applicable

[69] See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 11), International Covenant on Civil and Political Rights (Article 10), 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, http://www.unhcr.org/refworld/docid/453883fb11.html. See too, 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, http://www.unhcr.org/refworld/docid/3b00f219c.html.
See also *Saadi v. United Kingdom*, 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008, para 74, where 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".

[70] UN High Commissioner for Refugees (UNHCR), Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), *Monitoring Immigration Detention: Practical Manual*, 2014, http://www.refworld.org/docid/53706e354.html.

[71] UNHCR Detention Guidelines, Guideline 10.

reception conditions to an applicant, where he or she is detained at a border post or in a transit zone, subject to the non-application of Article 43 of Directive 2013/32/EU.

Implementation

- The conditions laid down in Article 10 are limited in scope, and UNHCR recommends that Member States adopt those standards set out under international human rights law and as also reflected in Guideline 8 of UNHCR's Detention Guidelines and the UNHCR Monitoring Manual.

- Member States should furthermore facilitate regular inspection by independent bodies as recommended in the UNHCR Monitoring Manual and UNHCR's Detention Guidelines.

- Member States should also develop detailed instructions and guidelines for detention centre staff in line with the standards outlined in the UNHCR Monitoring Manual.

10. Detention of vulnerable groups

Article 11 Because of the experience of seeking asylum, and the often traumatic events precipitating flight, asylum-seekers may suffer from psychological illness, trauma, or depression.

Detention can and has been shown to aggravate and even cause the aforementioned illnesses and symptoms.[72] This can be the case even if individuals present no symptoms at the time of detention.[73] In UNHCR's view victims of torture and other serious physical, psychological or sexual violence, children including unaccompanied and separated children, and pregnant women and nursing mothers, need special attention and should in principle not be detained at all.[74]

[72] Conclusion 10, Global Roundtable Summary Conclusions. UN High Commissioner for Refugees (UNHCR), Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions, July 2011, http://www.refworld.org/docid/4e315b882.html.

[73] Jesuit Refugee Service - Europe (JRS-E), Becoming Vulnerable in Detention, June 2010, http://www.unhcr.org/refworld/docid/4ec269f62.html.

[74] UNHCR Detention Guidelines, Guidelines 9.1, 9.2 and 9.3. See also *Rahimi c. Grèce*, Requête no. 8687/08, European Court of Human Rights, 5 April 2011.

Psychological illness, trauma, or depression including other identified special needs need to be weighed in the assessment of the necessity to detain and consideration of alternatives to detention.[75] In addition to better suiting the special needs of such applicants, alternatives would also reduce costs in terms of accommodation as well as costs flowing from the treatment of the effects of detention in applicants after their release.

Where vulnerable applicants are nevertheless detained, because of the serious consequences of detention, initial and periodic assessments of detainees' physical and mental state are required, carried out by qualified medical practitioners. Appropriate treatment also needs to be provided to such persons, and medical reports presented at periodic reviews of their detention.[76]

UNHCR welcomes in this regard the specific section on the detention of vulnerable groups in Article 11, including the requirement for Member States to regularly monitor their situation and provide adequate support, but notes that the conditions laid down in Article 11 are limited in scope, and do not outline the range of conditions under international human rights law.[77]

Whereas the requirement in Article 22 of this Directive to carry out assessments of possible special reception needs seems to entail that a mechanism be put in place for evaluating special reception needs, UNHCR is concerned that victims of torture and trauma may still end up in detention. This may be the case when individual circumstances of the applicant including possible special needs or vulnerabilities, particularly those that are not visible, are not systematically assessed or properly identified prior to a decision to detain, or not appropriately or sufficiently considered in the necessity and proportionality test of Article 8 (2) and the identification of appropriate alternatives to detention or not (properly) considered during the periodic review of the detention.

Detention of children including unaccompanied and separated children cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status or that of his or her parents.[78] UNHCR welcomes the limits on the detention of

[75] UNHCR Detention Guidelines, Guideline 4.
[76] UNHCR Detention Guidelines, Guideline 9.1, and Guideline 8 (vi).
[77] UNHCR Detention Guidelines, Guidelines 8, 9 and 10. See also UNHCR *Monitoring Immigration Detention: Practical Manual*, section 4.8.
[78] Article 37 CRC. See also UNHCR 2012 Detention Guidelines, Guideline 9.2. See also paragraph 61-63 UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, http://www.refworld.org/docid/42dd174b4.html.

children in Article 11 ensuring detention is used only as a last resort after alternatives have been considered not to be effective, for the shortest period possible and while ensuring their best interests are taken as a primary consideration,[79] and the requirement that they are not detained in prison accommodation as per paragraph 3. All appropriate alternative care arrangements should be considered in the case of children accompanying their parents and unaccompanied children, not least because of the well-documented deleterious effects of detention on children's well-being, including on their physical and mental development. The detention of children with their parents or primary caregivers needs to balance, *inter alia,* the right to family and private life of the family as a whole, the appropriateness of the detention facilities for children, and the best interests of the child.[80]

Where children are in detention, regardless of their status or length of stay, they should have a right to access at least primary education. Preferably children should be educated offsite in local schools.[81]

Ensuring accurate age assessments for unaccompanied children where there is doubt about their age is a specific challenge, which requires the use of appropriate assessment methods that respect human rights standards. Inadequate age assessments can lead to the arbitrary detention of children.[82] UNHCR would like to refer to its International Guidelines on Child Asylum claims,[83] UNICEF's Technical Note on Age assessment,[84] and the SCEP

[79] Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 13178/03, Council of Europe: European Court of Human Rights, 12 October 2006, http://www.unhcr.org/refworld/docid/45d5cef72.html, where the ECtHR held that the detention of a five year old child amounted to a breach of Article 3 of the ECHR and also took into account Articles 3, 10, 22 and 37 of the CRC. In particular it held that "other measures could have been taken that would have been more conducive to the best interests of the child guaranteed by Article 3 of the Convention on the Rights of the Child. These included her placement in a specialized centre or with foster parents". See also recent case law of the ECtHR on the undesirability of detention of children in families which has found that detention of children, including with their parent(s) may amount to inhuman and degrading treatment (see for example Kanagaratnam and others v. Belgium, Application no. 15297/09, 13 December 2011.

[80] UNHCR Detention Guidelines, Guideline 9.2, para. 53. See too, Special Rapporteur on Torture on Children deprived of their liberty (A/HRC/28/68) : http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx, See also, UN High Commissioner for Refugees (UNHCR), *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2018*, 2014, Goal 1 : end child detention, http://www.refworld.org/docid/536b564d4.html

[81] UNHCR Detention Guidelines, Guideline 8, paragraph 48 (xiii).

[82] UNHCR Detention Guidelines, Guideline 9, p. 36, para. 55.

[83] UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, http://www.refworld.org/docid/4b2f4f6d2.html.

[84] UN Children's Fund (UNICEF), Age Assessment: A Technical Note, January 2013, http://www.refworld.org/docid/5130659f2.html.

Statement of good practice,[85] which lay out safeguards for age assessment and suggest a step by step, multi-disciplinary approach in assessing age, departing from a presumption of minority and applying the benefit of the doubt in age assessment outcomes. Of note is also the European Asylum Support Office (EASO)'s Age Assessment Practice in Europe publication, which records the most commonly used age assessment methods in EU Member States and assesses their strengths and weaknesses.[86]

Despite the safeguards in this Directive, which should lead to very few instances where detention of (unaccompanied) children is necessary, UNHCR notes that Article 11 (2) which provides that unaccompanied children can only be detained in ''exceptional circumstances'' may be interpreted broadly by Member States. Proper assessments and judicial review in instances of detention and alternatives that limit freedom of movement of (unaccompanied and separated) children are thus essential to ensure respect for their best interests in practice, as would training of relevant decision makers.

In the case of child victims of human trafficking, UNHCR cautions that the prevention of trafficking or re-trafficking cannot be used as a blanket ground for detention, recommending alternatives to detention, including safe houses and other care arrangements, in particular for children while solutions are being found for them.[87]

Practice in some Member States suggests that safe houses specially designed for the purpose of keeping unaccompanied and separated children victims of human trafficking safe, limiting their freedom of movement only to the extent necessary would be more effective and respect the best interest of the child. The same would apply to adult victims. UNHCR recommends that where risks are assessed to be minimal,[88] unaccompanied and separated children applicants for international protection should be released into the care of appropriately-screened relatives with residency within the asylum country. Where this is not possible, the competent child protection authorities should make alternative care arrangements, such as foster

[85] Separated Children in Europe Programme, *SCEP Statement of Good Practice*, P. 25, 26, March 2010, 4th Revised Edition (endorsed by UNHCR and UNICEF), http://www.refworld.org/docid/415450694.html
[86] EASO Age Assessment Practice in Europe, http://easo.europa.eu/wp-content/uploads/EASO-Age-assessment-practice-in-Europe.pdf.
[87] UNHCR Detention Guidelines, Guideline 9.4, para. 62. See also UN High Commissioner for Refugees (UNHCR), *Prevent. Combat. Protect: Human Trafficking*, November 2011, p. 38, http://www.refworld.org/docid/4edcbf932.html.
[88] Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Article 12 (3), http://www.refworld.org/pdfid/50ec1e172.pdf.

placement or living in residential homes. Appropriate supervision and support notably from an independent professional representative who has experience in working with child victims of human trafficking should accompany such arrangements. A primary objective must be the best interests, and in this case the safety, of the child.[89]

Generally, practice suggests that alternatives to detention when applied correctly and in combination with proper case management in the form of counselling and support results in lower absconding or disappearance rates.[90] In the case of unaccompanied or separated children such measures may lead to less onward movement and reduce the risk of destitution and abuse and in some instances (re)trafficking.

UNHCR welcomes Article 11 (4) which foresees that detained families shall be provided with separate accommodation guaranteeing adequate privacy.

UNHCR equally supports Article 11 (5), which requires accommodation and common space for female applicants, which are separate from those for men to prevent possible incidents of sexual and gender based violence.[91]

UNHCR further welcomes the exclusion of unaccompanied children from the derogation of Article 11(6)(a), which stipulates that applicants for international protection can be put for a reasonable period, which will be as short as possible, in prison accommodation if accommodation in specialized detention facilities is temporarily not available and based on Article 8 (2) and (4) are deemed not effective in the individual case. This is also in line with Article 11 (3) of this Directive, which prescribes that unaccompanied children should never be detained in prison accommodation.

Recommendations

Implementation

- As a fundamental right, decisions to detain should be based on a detailed and individualized assessment of the necessity to detain in line with a legitimate purpose.

[89] European Union: European Agency for Fundamental Rights, *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, June 2014, ISBN 978-92-9239-464-6, pp. 78 and 79, http://www.refworld.org/docid/53b14fd34.html.

[90] C. Costello and E. Kaytaz, *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva*, June 2013, UNHCR Legal and Protection Policy Research Series, PPLA/2013/02, http://www.refworld.org/docid/51a6fec84.html.

[91] UNHCR 2012 Detention Guidelines, Guideline 9.3.

- Appropriate screening or assessment tools can guide decision makers and should take into account the special circumstances and needs of particular categories of asylum-seekers. These factors may include, but are not limited to:
    - Psychological illness, trauma, age, gender and sexual orientation, and should pay particular attention to the special needs of victims of torture, violence and exploitation.
- UNHCR recommends that vulnerability factors are considered as part of the necessity and proportionality test of Article 8 (2). This would imply that an assessment of special needs would be conducted systematically and take place *prior to or as part of* the decision whether or not to detain an applicant or to apply alternatives to detention in the individual case. It would also aid the identification of an alternative suitable to the individual.
- In principle children, including unaccompanied and separated children as well as victims of torture and trauma, should not be detained. Alternative care should be made available following an individual risk assessment in case of indications or suspicion of human trafficking.
- Regular independent reviews of alternatives including stay in safe houses which restrict freedom of movement, need to be carried out.

11. Families

Article 12 UNHCR welcomes the requirement to ensure as far as possible family unity in providing housing and this with the applicant's agreement.

Recommendations

Implementation

- UNHCR recommends a generous interpretation of the definition of family members when housing family members, to include married children if they are not accompanied by their spouse and so request to be accommodated together with their families as well as other close relatives in line with recital 22 which specifies that: ''when deciding on housing arrangements, Member States should take due account of the best interests of the child, as well as of the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State''.
- Likewise, UNHCR recommends that Member States consider family ties formed during and after flight when defining family members, in line with the principle of family unity and the best interests of the child principle in the Convention on the Rights of the Child, the EU Charter.

12. Medical screening

Article 13 Article 13 sets forth that Member States *may* require medical screening for applicants on public health grounds.

UNHCR acknowledges that there may be situations where there is a need for medical screening of applicants on public health grounds.

Medical screening should, however, be accompanied with appropriate counselling in a language applicants can understand to explain the reason for the medical screening in a gender and age appropriate manner. The least invasive method should be used and respect human dignity as well as age and gender. After care or treatment should be made available and counselling as needed. UNHCR does not support compulsory or mandatory

HIV testing of individuals on public health grounds or for any other purpose.[92] Systematic screening of applicants on HIV/AIDS could be discriminatory and have a stigmatising effect. UNHCR further notes that positive HIV status alone should not adversely affect a person's right to seek asylum, to access protection, or to avail oneself of appropriate durable solutions.

As regards the results of medical screening UNHCR notes that in principle, personal data is confidential and should not be shared without the consent of the individual concerned; this includes data on the health status of the person. Those who have access to the health status of persons of concern must take appropriate measures to maintain its confidential nature.[93]

Recommendations

Transposition

- UNHCR does not support compulsory or mandatory HIV testing of individuals on public health grounds or for any other purpose. Therefore, countries should review and, if necessary, change their laws, regulations, policies and practices to prohibit mandatory or compulsory HIV testing of persons of concern to UNHCR, including children.

- All HIV testing and counselling of persons of concern to UNHCR should ensure that confidentiality and informed consent are ensured.

Implementation

- Medical screening should be accompanied with appropriate counselling in a language applicants can understand to explain the reason for the medical screening in a gender and age appropriate manner.

- The least invasive method should be used and respect human dignity as well as age and gender.

[92] UN High Commissioner for Refugees (UNHCR), *Note on HIV/AIDS and the Protection of Refugees, IDPs and Other Persons of Concern*, 5 April 2006, http://www.refworld.org/docid/4444f0884.html.

[93] *Ibid.* See also Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), notably Article 81 which obliges Member States, further to the conditions for special categories of data, to ensure specific safeguards for processing for health purposes, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0011:FIN:EN:PDF

- After care or treatment should be made available and counselling as needed.

13. Schooling and education of minors

Article 14 While paragraph 1 allows Member States to offer education in reception centres, UNHCR encourages Member States to ensure access to education outside reception centres in national facilities as this would help children acquire national language skills and offer better integration prospects to those finally granted international protection.

UNHCR welcomes the requirement that education is granted for the duration of the asylum procedure and only ends when an expulsion order is enforced and that education is not terminated, for example when the child turns 18.

UNHCR equally welcomes the obligation for Member States to provide preparatory classes, including language classes, where it is necessary to facilitate the access to and participation of these children in the education system. These provisions equally recognize their right to education in line with relevant international human rights instruments including the ICESCR and the CRC.

As regards timelines for access to education, UNHCR would recommend that access is granted as soon as possible following the lodging of the application for international protection in order to avoid further interruptions in education, unless the best interests of the child would suggest otherwise. Where children (and their parents) are in a Dublin procedure the three month maximum period for granting access to education should not start anew following transfer to another Member State.

Recommendation

Implementation

Access to education should be granted as soon as practicably possible and the three month maximum period not applied anew following a transfer under Dublin.

14. Access to the labour market

Article 15 States taking part in UNHCR's Executive Committee, as well as in 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.[94] Moreover, in cases where an applicant is ultimately granted protection, earlier access to the labour market can facilitate the integration process and his/her earlier positive contribution to society.[95] Earlier access to the labour market promotes the social inclusion and self-reliance of asylum-seekers, and avoids the loss of existing skills and dependency. For the host State, it brings increased tax revenues and savings in accommodation and other support and reduces illegal working. While welcoming the reduction from 12 to 9 months, UNHCR recommends that access to the labour market be granted no later than 6 months from the date of lodging the application or sooner when the applicant is granted international protection within the 6 month period. This timeline would coincide with Article 31 (3) of the recast Asylum Procedures Directive, which foresees a six month maximum timeline (save for exceptional cases/circumstances) for processing applications for international protection.

Article 15 (2) states that Member States ''shall decide the conditions for granting access to the labour market (…) while ensuring effective access''. The Commission's evaluation of the implementation of the 2003 Reception Conditions Directive 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.[96] 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[97].

[94] UNHCR, Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems, 4 September 2001, EC/GC/01/17, http://www.unhcr.org/refworld/docid/3bfa81864.html and UNHCR, Conclusion No. 93 on reception of asylum-seekers in the context of individual asylum systems

[95] Commission staff working document accompanying the proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers - Impact Assessment {COM(2008) 815 final} {SEC(2008) 2945} (3 December 2008, SEC/2008/2944 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:2944:FIN:EN:PDF)

[96] European Commission, Report from the Commission to the Council and 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, COM(2007) 745 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0745:FIN:EN:PDF.

[97]Examples of conditions which can be considered to have unduly restricted access to the labour market can be found in the Odysseus network synthesis report. For example: - 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 Academic Network, Country Report Luxembourg, 2006, p. 34, http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/luxembourg_2007_en.pdf; - the practice in the Netherlands: "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 Academic Network, Country Report

UNHCR is concerned that the provision in paragraph 2 which foresees that ''for reasons of labour market policies, Member States give priority to EU citizens and nationals of States parties to the Agreement on the EEA and legally resident third-country nationals'', may result in *de facto* discriminatory practices hampering effective access in practice, especially where such reasons are not specified in national law or policy.[98] For States Parties to the 1951 Convention, the relevant obligations are contained in Articles 17, 18 and 19 of the 1951 Convention, read together with Article 3 (non-discrimination). To comply with 1951 Convention obligations, no distinction can be made between applicants for international protection who are lawfully staying and other lawfully staying individuals.

Recommendations

Transposition

- While welcoming the reduction from 12 to 9 months, UNHCR recommends that access to the labour market be granted no later than 6 months from the date of lodging of the application or as soon as applicants are granted international protection. This timeline would agree with article 31 (3) of the recast Asylum Procedures Directive, which provides a six month maximum timeline (safe for exceptional cases/circumstances) for processing applications for international protection.

- UNHCR recommends that Member States in their national law and / or policy set out clear criteria for establishing when ''for reasons of labour market policies'', they may give priority to legally resident third-country nationals'' in order to avoid discriminatory practices contrary to Article 17 (1) of the 1951 Convention relating to the status of refugees.

Implementation

- Conditions, practices and support during the asylum procedure should promote dignity and aim at empowering the individual

The Netherlands, p. 48, http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/netherlands_2007_en.pdf. 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 Academic Network, Country Report Cyprus, p. 29, http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/cyprus_2007_en.pdf.

[98] Article 17 (1) of the *1951 Convention relating to the status of refugees* on wage earning employment sets forth that: The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

applicant. This should include preparing the individual for future integration for those in need of protection, or for return. As such, ways in which asylum-seekers could be brought into the employment market or benefit from language or vocational training should be considered by Member States.

15. Vocational Training

Article 16 UNHCR cautions that the second indent of this Article allows substantial scope for exceptions and adjustment by Member States. Access to vocational training relating to an employment contract may be a necessary step in maximizing the prospects of future employment. UNHCR therefore recommends that applicants for international protection be granted access to vocational training as soon as reasonably possible and in any event within the 6 month period pursuant to Article 31 (3) of the recast Asylum Procedures Directive or earlier if they are granted international protection within this period.

Recommendations

Transposition

- UNHCR recommends that Member States make provision in their national legislation allowing applicants access to vocational training relating to an employment contract even before they have access to the labour market as a necessary step in maximizing the prospects of future employment in the host society in case of recognition, or back home in case of rejection.
- As regards the timelines, UNHCR recommends that asylum-seekers be granted access to vocational training as soon as reasonably possible and at least within six months following the lodging of their application in line with Article 31 (3) of the recast Asylum Procedures Directive or from the moment when they are granted international protection within this 6 months period.

16. General Rules on material reception conditions and health care

Article 17 UNHCR welcomes that Article 17 (1) requires that material reception conditions be provided from the moment of the making of the application.

Adequate reception conditions are a precondition for the effective presentation of an asylum claim and should be provided as soon as an applicant shows his or her intent to apply for international protection.

UNHCR equally welcomes the fact that Article 17 (2) provides that reception conditions provide for an ''adequate standard of living'' guaranteeing the subsistence of applicants and protecting their physical and mental health and that this standard also covers vulnerable persons, in accordance with Article 21, as well as persons who are in detention.[99]

As regards what constitutes an ''adequate standard of living'' UNHCR refers to Article 11 (1) of the CESCR.[100] Pursuant to Article 11 (1) of the Covenant, States Parties recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

This provision is further elaborated in General Comment 4 of the Committee on Economic, Social and Cultural Rights which cites both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 as saying that: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure (…).[101] Similarly, according to the Committee, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.[102] Individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with Article 2 (2) of the Covenant, not be subject to any form of discrimination.[103]

[99] See *Rahimi v Greece* and *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, http://www.refworld.org/docid/4d39bc7f2.html
[100] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, http://www.refworld.org/docid/3ae6b36c0.html.
[101] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23, para. 7, http://www.refworld.org/docid/47a7079a1.html.
[102] CESCR, *General Comment No. 4: The Right to Adequate Housing,* para. 9.
[103] *Ibid,* para. 6.

CESCR General Comment No. 19 on the right to social security states in paragraph 38 that based on the principle of non-discrimination, 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". [104]

UNHCR refers to its Conclusion on Reception of Asylum-Seekers in the Context of Individual Asylum Systems,[105] which contains important conclusions by members of its Executive Committee for the implementation of adequate reception conditions including that the various reception measures should respect human dignity and applicable international human rights law and standards.

Article 17 (5) allows Member States to grant less favourable treatment to applicants compared with nationals, in particular where material support is partially provided in kind or where those level(s), applied for nationals, aim to ensure a standard of living higher than that prescribed for applicants under this Directive. In order to ensure an adequate standard of living Member States could in such cases use as national point of reference unemployment benefits or social welfare benefits for destitute nationals, and deduct or add additional material support depending on what they provide to applicants in kind, while ensuring an adequate standard of living.

UNHCR country reports as well as a report from the European Commission on application of the 2003 Reception Conditions Directive,[106] and a report from the Odysseus network,[107] have found that a number of Member States have provided financial allowances which are too low to cover subsistence. In some instances the amounts have only rarely been commensurate with the minimum social support provided to nationals and oftentimes lower.

UNHCR recalls the CJEU's preliminary ruling in Saciri,[108] where the Court ruled that the amount of the financial aid granted must be sufficient to

[104] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Article 9 of the Covenant), 4 February 2008, E/C.12/GC/19, http://www.unhcr.org/refworld/docid/47b17b5b39c.html.

[105] UN High Commissioner for Refugees (UNHCR), Conclusion on reception of asylum-seekers in the context of individual asylum systems, 8 October 2002, No. 93 (LIII) - 2002, http://www.refworld.org/docid/3dafdd344.html.

[106] European Commission, *Report from the Commission to the Council and 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, COM(2007) 745 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0745:FIN:EN:PDF

[107] 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, http://www.unhcr.org/refworld/docid/484009fc2.html

[108] CJEU, C-79/13 *Saciri and others,* lodged on 17 February 2013 http://curia.europa.eu/juris/document/document.jsf?text=&docid=148395&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=161686.

ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence and that 'material reception conditions' is to be understood as meaning the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance. As the Court pointed out, although the amount of the financial aid granted is to be determined by each Member State, it must be sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence.

Best practice suggests that adequate reception conditions in fact reduce the likelihood of absconding and onward movement. Moreover, if asylum procedures can be operated swiftly and efficiently, with the requisite safeguards in place, reasonable levels of material assistance should not represent an excessive burden on the asylum state, nor an incentive for misuse of the system.

Recommendation

Transposition

UNHCR encourages Member States to include in their national legislation a national point of reference such as unemployment benefits or social welfare benefits for destitute nationals in order to ensure an adequate standard of living for applicants.

17. Modalities for material reception conditions

Article 18

Applicants who have the opportunity to stay with relatives or friends or who have sufficient economic means should not be required to live in collective accommodation centres unless this is a condition of their release from detention and/or foreseen as a form of "directed residence" foreseen in Article 7, but enabled to stay with their relatives or friends or on their own.

UNHCR welcomes the provisions in Article 18 (2) guaranteeing protection of family life of applicants but notes that the privacy requirement mentioned in Article 11 (4) is not explicitly mentioned. UNHCR recommends Member States observe the right to privacy in practice given shortcomings that have been observed in some Member States in this respect.[109] Guaranteeing privacy would also ensure that risks of certain forms of Sexual and Gender

[109] *Tarakhel v. Switzerland*, Application no. 29217/12, Council of Europe: European Court of Human Rights, 4 November 2014, http://www.refworld.org/docid/5458abfd4.html.

Based Violence (SGBV) would be reduced as required in paragraph 4 of this Article.

UNHCR welcomes the requirement that Member States consider gender and age when accommodating applicants for international protection.

UNHCR also welcomes Article 18 (4), which sets out an obligation of Member States to prevent incidences of sexual and gender-based violence. While existing criminal law provisions would be expected to provide similar safeguards for those at risk of such crimes, this provision recognizes the particular vulnerability of asylum-seekers and recalls the importance of proactive steps to prevent this form of serious harm.[110]

UNHCR welcomes the requirement in Article 18 (5) that dependent adult applicants with special reception needs are accommodated together with close adult relatives who are already present in the same Member State and who are responsible for them whether by law or by the practice of the Member State concerned as this will ease their adaptation process and reduce their vulnerability and dependency on outside support.

UNHCR welcomes the provision in Article 18 (7) on mandatory training, and recommends that staff working in reception centres be specifically trained in the field of preventing and responding to Sexual and gender Based Violence (SGBV), responding to possible needs of lesbian, gay, bisexual, transgender, and/or intersex (LGBTI) persons, responding to and preventing Female Genital Mutilation (FGM), carrying out best interests assessment for children as required by Article 23 of this Directive as well as cultural orientation, conflict resolution, and empowering communities. This training should be continuous, allowing for building more in-depth expertise while at the same time continuing induction training sessions for new staff.

The wording of Article 18 (9) affirms that in duly justified cases, Member States *may* exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, a) when an assessment of the specific

[110] European Union: Council of the European Union, *Directive 2012/29/EU of the European Parliament and of the Council of October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, 14 November 2012, L 315/57, http://www.refworld.org/docid/52eb66354.html. The Directive contains provisions relating to information, support and protection and participate in criminal proceedings of victims of gender based violence.
See too, Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011, which establishes the obligation to introduce gender-sensitive procedures, guidelines and support services in the asylum process http://www.refworld.org/docid/4ddb74f72.html.

needs of the applicant is required, in accordance with Article 22 or b) when housing capacities normally available are temporarily exhausted. Such different conditions shall in any event cover basic needs.

Since it not clear what ''different'' modalities may mean, UNHCR suggests that for persons with apparent specific needs under Article 22, including e.g. families with children, unaccompanied children, pregnant women or persons with physical disabilities, ''different'' should not be interpreted as "lesser" reception entitlements. UNHCR refers again to the ruling in Saciri v Belgium, which in relation to vulnerable applicants found that Member States are required to adjust the reception conditions to the situation of persons having specific needs, as referred to in Article 17 of the (2003) Directive. According to the Court, financial allowances where these are provided must be sufficient to preserve family unity and the best interests of the child which, (...) are to be a primary consideration, and pending the outcome of such assessment reception conditions should still guarantee an adequate standard of living. [111]

With regard to the second condition, while UNHCR recognises it may not be possible to instantly provide all reception conditions including for applicants with specific needs in times of pressure on reception systems, noteworthy is that in Saciri v. Belgium the Court ruled that the saturation of the reception network would not be a justification for any derogation from meeting an adequate standard of living as set forth in the Directive.[112] The principle of an adequate standard of living principle thus is the norm. Member States will therefore need to guarantee these in all circumstances and they are understood to be higher than basic needs.

The EMN Synthesis report identifies as good practice the development of a strategy to prepare, mitigate and respond to pressure on reception conditions by means of an emergency plan and creating a buffer capacity, putting in place an early warning system coupled with budgetary flexibility and management of reception as a chain (i.e. from inflow, reception, procedure, outflow, to return/integration), recommendations which UNHCR supports.[113]

[111] CJEU, C-79/13 *Saciri and others,* para.41 and para.46.
[112] *Ibid.*, para. 50.
[113] EMN Synthesis Report – The Organisation of Reception Facilities for Asylum Seekers in different Member States, pp. 33 and 34.

Recommendations

Implementation

- Where practicable, the delivery of basic services to applicants should not be self-contained, but integrated into existing community services. This should be supplemented, as required, by targeted support structures that address the special needs of asylum-seekers (e.g., language training, orientation and cultural awareness programs, social and legal counselling, community development etc.)

- As a rule, centres should be as small as economically feasible. In order to allow for the respect of cultural and religious customs, asylum-seekers should be given the necessary means to prepare their own food.

- Residents should be allowed to participate in the management of material resources and aspects of life in the centre. Good practice suggests that involvement of residents through e.g. advisory boards or councils representing residents with a proper gender distribution, can greatly enhance awareness about and prevent incidents of violence including sexual and gender based violence and reduce tensions in centres.

- Applicants with specific reception needs such as families with children, pregnant women, the elderly, those with disabilities or unaccompanied children should not be granted different reception modalities where this would mean ''lesser'' conditions.

- Pending the assessment of specific reception needs of applicants without apparent special needs pursuant to Article 22 of this Directive, clear criteria should be developed according to which it would be ''duly justified'' to apply (temporarily) ''different'' reception modalities.

- Reception capacity should be flexible and adjusted to the needs and be informed by regular contingency planning exercises in case numbers of applications are expected to significantly increase in order to meet the requirement in the CJEU ruling in Saciri v. Belgium to grant an ''adequate standard of living'' to all applicants in all circumstances.

18. Health care

Article 19 Article 12 of the 1966 CESCR recognizes the right of everyone to enjoyment of the highest attainable standard of physical and mental health. UNHCR welcomes Article 19 which ensures that the necessary healthcare is extended to treatment of mental disorders and that special mention is made of the treatment of applicants who have special reception needs.[114]

Recommendations

Transposition

Standards of health incorporated into national legislation should also contain the following:

- Counselling on reproductive health matters and FGM;
- Confidentiality requirements for medical examination and psychological counselling, in particular concerning voluntary HIV testing and results;
- Availability of psychological care and counselling free of charge;
- Training and sensitization for relevant authorities and medical personnel dealing with patients of different cultural backgrounds.

19. Reduction of withdrawal of material reception conditions

Article 20 UNHCR reiterates that adequate reception conditions are a precondition to an applicant's ability to present his or her application for international protection. Reception conditions may only be withdrawn temporarily in the individual case where the applicant abandons his or her place of residence in the circumstances described in paragraph 1 and should be restored promptly upon his or her return subject to conditions set out in the last part of paragraph 1. According to the EMN Synthesis report, currently some

[114] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Article 9 of the Covenant), 4 February 2008, E/C.12/GC/19, para. 38 states that based on the principle of non-discrimination, 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", http://www.unhcr.org/refworld/docid/47b17b5b39c.html. See too, UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August, 2000, E/C.12/2000/4, http://www.refworld.org/docid/4538838d0.html.

Member States withdraw reception conditions because of violations of the reception facilities' internal rules, a practice which may run contrary to paragraph 1 (a), (b) and (c) of this Article. [115]

The EMN report further mentions that some Member States may withdraw certain categories of applicants from reception facilities, for example applicants receiving a negative decision but then lodging a subsequent application in which case they are excluded from reception conditions in the period between the receipt of the negative decision and a subsequent application being considered admissible. In UNHCR's view, reception benefits should not be reduced or withdrawn during the preliminary examination period of a subsequent application in line with Article 40 (2) of the recast Asylum Procedures Directive.[116]

When the claim is considered as a subsequent application following an explicit withdrawal of the application in line with Article 27 of the recast Asylum Procedures Directive, reduction or withdrawal of material reception conditions should be possible only if the applicant has been informed of the consequences of the explicit withdrawal.[117]

UNHCR is concerned about the possibility Member States have to reduce reception conditions in the event the applicant cannot justify not having lodged an application for international protection as soon as reasonably practicable after arrival in that Member State as the provision in paragraph 2 is open to interpretation and may result in arbitrariness and eventually substandard reception conditions/inadequate standard of living in contravention of (the very aim of) this Directive. This may be especially true where an applicant suffers from trauma, dyslexia or has a hearing impairment or is intellectually challenged or illiterate and may not have been able, as a consequence, to lodge an application without delay and to justify it.

As regards Article 20 (4), UNHCR recommends that Member States lay down clear criteria for sanctions and the kind of sanctions applicable to serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour where such behaviour is not covered by criminal law provisions. Sanctions are not to include detention unless the relevant criteria for lawful and non-arbitrary detention are met, determined in a proper

[115] EMN Synthesis Report – The Organisation of Reception Facilities for Asylum Seekers in different Member States, p.11.

[116] Article 40 (2) refers to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant.

[117] Article 12 (1)(a) Asylum Procedures Directive (recast).

procedure as laid down in Article 8. Member States should also establish clear provisions explaining the rules and procedures governing access to the appellate process. The administration of the centre should maintain a full record of all decisions imposing disciplinary measures. Such records shall be available to senior managers and monitoring bodies.

UNHCR welcomes the requirement in Article 20 (5) that Member States must not withdraw provision of health care. UNHCR notes, however, that maintaining an adequate standard of living for all applicants will not be feasible when reception conditions are withdrawn in an individual case and where this was not done because the applicants has sufficient financial means. At all times applicants and in particular applicants with special needs who are vulnerable, need to be treated in a humane and dignified manner and protected against inhumane and degrading treatment.[118]

Recommendations

Transposition

- UNHCR recommends that withdrawal of material reception conditions only be considered in exceptional and duly justified cases, namely when an applicant has abandoned the place of residence. Reception conditions should be restored upon return and if the applicant shows good cause for his or her absence.
- Reduction or withdrawal should not affect dependents of the applicant where they are not at fault.
- Detention for violating curfews or failure to return within a set time to the centre is not in line with the exhaustive list of grounds in Article 8 (3) and would thus be unlawful/arbitrary.
- UNHCR recommends that reception conditions not be withdrawn or reduced pending a decision on the admissibility of a subsequent application and that this be explicitly stated in national legislation and only after a decision in line with Article 40 (2) of the recast Asylum Procedures Directive is made.
- It is recommended to specify in national law or policy the sanctions for serious breaches of the rules of the centre including seriously violent behaviour and to ensure information is readily available about the appellate process.

[118] UNHCR, Executive Committee of the High Commissioner's Programme (ExCom), *Conclusion on Reception of Asylum-seekers in the Context of Individual Asylum Systems,* No. 93 (LIII) – 2002, http://www.unhcr.org/refworld/docid/3dafdd344.

Implementation

- The possibility for Member States to reduce reception conditions in the event the applicant cannot justify not having lodged an application for international protection as soon as reasonably practicable after arrival should be applied sparingly keeping in mind an applicant's inability e.g. due trauma, reduced intellectual capacity, visibility or hearing impairment or illiteracy to lodge an application without delay and to justify such delay.

20. Provisions for vulnerable persons; general principle

Article 21 UNHCR welcomes the addition of victims of human trafficking and persons with mental disorders including persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation to the list of vulnerable persons.[119] UNHCR notes that Lesbian, Gay, Bisexual, Transgender and Intersex individuals (LGBTI) are not explicitly mentioned in the list.[120] The same applies to applicants with hearing or visual impairments, or illiterate or dyslectic applicants, who may experience difficulties in accessing their rights under this Directive. Given the list is non-exhaustive UNHCR encourages Members States to consider the specific vulnerability and specific reception needs of such persons as well when making reception arrangements.

Recommendation

Implementation

UNHCR encourages Members States to consider the specific vulnerability of persons not listed including LGBTI persons and persons with a hearing or visual impairment or applicants who are illiterate, dyslectic or mentally

[119] UNHCR, Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked, 7 April 2006, HCR/GIP/06/07, http://www.refworld.org/docid/443679fa4.html.
UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, http://www.refworld.org/docid/3d36f1c64.html.

[120] 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, HCR/GIP/12/01, http://www.refworld.org/docid/50348afc2.html.

challenged, or persons otherwise vulnerable, when making reception arrangements.

21. Assessment of the special reception needs of vulnerable persons

Article 22

The Commission's 2007 report on the Directive's application,[121] listed nine Member States which did not have an identification procedure in place and added that "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." According to the 2014 EMN report, three Member States do not have standard practices in place to conduct a vulnerability assessment while methods and timing for assessing special needs where these are in place continue to differ across Member States.[122]

Given the assessment provides a valuable tool for ensuring in practice that the claims of vulnerable asylum-seekers can be presented effectively, with all information and evidence required enabling the authorities to render an informed and accurate decision UNHCR strongly recommends that such (initial) assessments take place as soon as possible, that they be conducted systematically and as such are integrated into existing national procedures to ensure hidden vulnerabilities such as trauma can be effectively identified at an early stage.

UNHCR notes 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 for persons who have suffered torture, rape or other forms of psychological, physical or sexual violence but also for LGBTI persons who do not self-identify. UNHCR notes that later disclosure should not be held against asylum-seekers, nor inhibit their access to any special support measures or necessary treatment. Special needs should ideally be identified at an early stage of the process, as they may otherwise inhibit severely the applicant's ability to communicate effectively, and the authorities' ability to gather evidence, or put applicants at risk in collective accommodation. UNHCR welcomes the wording of the last sentence in Article 22 (1), which foresees that regardless of when such needs are identified, Member States

[121] European Commission, *Report from the Commission to the Council and 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, COM(2007) 745 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0745:FIN:EN:PDF

[122] EMN Synthesis Report – The Organisation of Reception Facilities for Asylum Seekers in different Member States, p. 15.

shall ensure support for persons with special needs throughout the asylum procedure, and shall provide for appropriate monitoring of their situation.

Proper identification is even more crucial as only applicants who are identified as vulnerable may have special reception needs according to paragraph 3 of Article 22.

The EASO module on interviewing vulnerable applicants may help caseworkers to detect signs of vulnerabilities during the asylum interview/procedure.

Several tools exist for identifying vulnerable applicants. The UNHCR Heightened Risk Identification Tool (HRIT) and User Guide[123] has been developed to enhance UNHCR's and its partners' effectiveness in identifying refugees at heightened risk primarily in refugee camps, but could potentially be adapted to be used in countries with more developed systems as well. The tool assists in the early identification of persons at heightened risk where further referral, in-depth assessment and evaluation will normally be needed. As such it can be used by persons who are not experts in making assessments. UNHCR notes that in order to establish the level of risk, it is important to consider past experiences and trauma as well as an individual's coping mechanisms, his or her resilience and presence or lack of support mechanisms In addition, the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol),[124] while primarily intended to serve as international guidelines for the assessment of persons who allege torture and ill-treatment for investigating cases of alleged torture and for reporting findings to the judiciary or any other investigative body, may also offer useful guidance to professionals. Lastly, the UNHCR led project Response to Vulnerability in Asylum (RVA),[125] produced some important recommendations including the need for applicants to have early access to information about the asylum procedure, their rights, support services and procedural guarantees, the need for frontline and registration staff to be sensitized to recognize factors of vulnerability including trauma, the need for early assessment of special needs preferably by *qualified health and social workers* and the need to develop an *action plan* including *referrals* to

[123] UNHCR, The Heightened Risk Identification Tool (User Guide), June 2010, Second Edition, http://www.refworld.org/docid/46f7c0cd2.html.

[124] UN Office of the High Commissioner for Human Rights (OHCHR), *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Istanbul Protocol")*, 2004, HR/P/PT/8/Rev.1, http://www.refworld.org/docid/4638aca62.html.

[125] UNHCR ERF funded project: *Response to Vulnerability in Asylum*, http://www.unhcr-centraleurope.org/pdf/what-we-do/caring-for-vulnerable-groups/response/response-to-vulnerability-in-asylum-project-report.html.

relevant services including to asylum services for e.g. *prioritized processing*. One other important recommendation was that assessments should happen *regularly and at key parts of the procedure*; *prior to, during* the asylum procedure and *at the decision making stage*.

Identification of vulnerability and special needs, at the earliest practicable stage, is critical to the quality of the asylum determination. In this context, UNHCR welcomes that Article 31 (7) b of the recast Asylum Procedure Directive permits Member States to use the assessment of Article 22 (1) to identify applicants in need of special procedural guarantees and to prioritize their application.

Recommendations

Transposition

- UNHCR recommends that Member States, in transposing this provision in national law, ensure that mechanisms are in place for the early detection of indicators of vulnerability/special reception needs including an onward referral system for more in-depth assessments and provision of special assistance where required.
- Referrals could also include referral to special procedures in line with Article 31 (7) b of the recast Asylum Procedures Directive and Member States are encouraged to make provision for this in national law and / or policy, while respecting data protection provisions and /or using the informed consent of the applicant when for example sharing medical information.

Implementation

- UNHCR recommends that Member States adopt an individual rather than a group approach considering different categories to identify vulnerable applicants with special reception needs given vulnerabilities may be multiple.
- Member States should develop appropriate methods for identifying applicants with invisible vulnerabilities including victims of torture and trauma, LGTBI and applicants with a hearing or a visibility impairment as well as illiterate applicants or applicants with mental health needs.
- UNHCR recommends that assessments are conducted by qualified personnel including social and / or health workers whilst the initial

identification (screening) of possible vulnerability indicators and referral could be done by general service staff.

22. Minors

Article 23 UNHCR welcomes that the best interests of the child is taken as a guiding principle for the implementation of the provisions in this Directive. The incorporation in Article 23 (2) of a requirement for a Best Interests Assessment (BIA) for children setting out four elements to be considered as a means to operationalize the first paragraph of this Article, is welcomed. Carrying out best interests assessments (BIA) will help ensure that Member States' practices and treatment of children including unaccompanied or separated children, are in line with their obligations under Article 3 (1) of the UN Convention of the Rights of the Child and Article 24 (2) of the EU Charter. General Comment Number 14 of the Committee on the Rights of the Child,[126] provides further guidance on who should actually carry out the assessment recommending that it be done – if possible by a multidisciplinary team. It also provides guidance on how such best interest assessments may be conducted.[127] Given the list of factors to assess best interests is non-exhaustive, UNHCR encourages Member States to consider additional factors as set forth in General Comment No. 14 of the Committee on the Rights of the Child for assessing the best interests of the child taking as point of departure the child's individual characteristics, including age, sex, gender and gender identity, sexual orientation, religion, upbringing, level of physical and intellectual maturity, and level of (physical, psychological and/or emotional) vulnerabilities, so as to ensure the child benefits from all the conditions in this Directive.[128]

Given that many children arriving in Europe are traumatized by experiences in their home country or during the journey, UNHCR welcomes the provision in Article 23 (4), which requires Member States to ensure access to rehabilitation services of children who have been victim of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts as this would recognize their special needs and could enable them better to articulate their claim. This would include physical and mental traumatization caused, for

[126] UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, notably in paras, 46 and 47, http://www.refworld.org/docid/51a84b5e4.html

[127] *Ibid.*, para. 47. See also UNHCR *Safe and Sound*, box 9, p. 35.

[128] General Comment No. 14 (2013) paras. 52-79. See also UNHCR *Safe and Sound*, boxes 12 and 13, pp. 42-43.

example by FGM. UNHCR's recent Statistical Overview ''Too much Pain'' on female applicants, including girls from FGM practising countries, gives an overview of the number of women and girls who are likely to have undergone FGM or are at risk of FGM and describes the need for proper reception conditions and preventive measures in relation to FGM in EU Member States.[129]

Recommendations

Implementation

- UNHCR recommends that Member States in implementing Article 23 (2) carry out (a) best interests assessment(s) using the criteria set out in this Article supplemented, as appropriate, with the criteria and factors outlined by the Committee on the Rights of the Child in CRC General Comment No. 14, in particular in paragraphs 52-79.
- UNHCR recommends that such best interests assessments be carried out by relevant child protection professionals including social workers and health workers as also recommended in General Comment No. 14, specifically paragraph 47. Capacity building would be important to ensure proper best interests assessments.
- UNHCR's urges Member States to take appropriate measures to prevent and respond to FGM affecting girls coming from FGM practising countries, notably those with high prevalence rates.

23. Unaccompanied minors

Article 24

UNHCR welcomes the wording of Article 24 (1), which requires the appointment as soon as possible of a qualified guardian or representative for an unaccompanied or separated child, who acts in the child's best interests and whose interests do not conflict or could potentially conflict with those of the unaccompanied child.

This provision addresses concerns highlighted previously in the 2007 Odysseus report, which pointed out 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

[129] UNHCR, Too Much Pain: Female Genital Mutilation & Asylum in the European Union; A Statistical Overview, February 2013, http://www.refworld.org/docid/512c72ec2.html.

the absence of a legal guardian or from the role that is assigned to him''[130] and also tallies with UNHCR recommendations in the 2008 Commission Green Paper.[131] Guardians or representatives play a vital role in ensuring the best interests of unaccompanied and separated children are a primary consideration. UNHCR supports the recommendations in the Handbook developed by the EU Agency for Fundamental Rights (FRA) on Guardianship systems of child victims of human trafficking,[132] which will be of significant benefit to Member States who do not have guidance in place at present nationally and which recommendations also regard unaccompanied and separated children seeking asylum.

As regards the possibility to place unaccompanied and separated children aged 16 and above in adult accommodation pursuant to Article 24 (2), UNHCR notes that boys or girls should in principle not be accommodated with adults who are not related to them as this may put them at risk of Sexual and Gender Based Violence (SGBV). This paragraph seems therefore incompatible with the best interests of the child referred to in this Article as well as Articles 17 and 23 (1) and recitals 9 and 22 of this Directive.

When placing a separated child with an adult relative, the child's views as well as the safety and security of the child should be considered, along with the willingness of the relative to take care of the child, in a best interests assessment (BIA) including where necessary a risk assessment, in particular where there is an indication that the child may have been a victim of human trafficking and the relative may have been involved in the trafficking.[133]

UNHCR welcomes the provision in paragraph 3 of this Article regarding tracing which should only be initiated following a best interests assessment and after the child has been counselled and consulted on the purpose of

[130] 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, http://www.unhcr.org/refworld/docid/484009fc2.html
See also CRC General Comment No. 6 which states in paragraph 36 that: "Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship". UN Committee on the Rights of the Child (CRC), CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, http://www.refworld.org/docid/42dd174b4.html.
See also UNHCR, *UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers*, July 2012, (COM (2011) 320 final, 1 June 2011), footnote 81 p. 17, http://www.refworld.org/docid/500560852.html
[131] UNHCR's Response to the European Commission's Green Paper on the Future Common European Asylum System, September 2007, http://www.unhcr.org/refworld/docid/46e159f82.html.
[132] European Union: European Agency for Fundamental Rights, *Guardianship for children deprived of parental care : A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, June 2014, ISBN 978-92-9239-464-6, http://www.refworld.org/docid/53b14fd34.html
[133] *Ibid*, para. 6.1, p. 75.

tracing and only when tracing will not put the child and / or his or her family (in the country of origin) at risk.[134]

UNHCR equally welcomes the requirement in paragraph 4 for continuous training of those working with unaccompanied children.

Recommendations

Implementation

- Unaccompanied children including those aged 16 and above should not be placed in accommodation with adults who are unrelated to them as this may put them at risk of SGBV and thus violate their best interests.
- In order to ensure the child's safety and well-being, and more broadly to safeguard the child's best interests, UNHCR recommends that a best interests assessment be conducted prior to placing a child with a relative and that the child's views as well as the willingness and capability of the relative to take care of the child are considered in such assessment.
- UNHCR recommends that a best interests assessment be carried out prior to initiating family tracing in order to ensure the child's or the family's safety are not jeopardized as a consequence of the tracing and in order to ensure restoring family links is in the best interests of the child.

24. Victims of Torture and Violence

Article 25 UNHCR welcomes Article 25 (1), providing that victims of torture, rape or other serious acts of violence shall have access to rehabilitation services that will enable them to obtain medical and psychological treatment respecting the principle of confidentiality. When applied in conjunction with Articles 21, 22 and 23 of this Directive, further exacerbation of trauma including among children could be prevented and its manifestations treated and possibly mitigated. UNHCR also welcomes the obligation to ensure access to appropriate medical and psychological treatment or care.[135]

[134] UNHCR *Safe and Sound,* box 5 (building trust), p. 30 and box 7 (family tracing), p. 32.

[135] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3 of the Committee against Torture; Implementation of Article 14 by States parties, in particular paragraphs 11-15, http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf.

25. Appeals

Article 26 Article 26 (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. The right to appeal also pertains to decisions relating to restrictions on freedom of movement under Article 7 of this Directive, which UNHCR welcomes.

In addition, Article 26 (2) provides for legal assistance free of charge where the applicant cannot afford the costs and "in so far as it is necessary to ensure their effective access to justice" and contains a guarantee similar to the one for detained asylum-seekers under Article 9 (6) of this Directive. UNHCR welcomes the inclusion of this important safeguard. In line with the case law of the ECtHR,[136] and the EU Charter,[137] these measures improve the likelihood of access to an effective remedy, which is essential to ensure consistent adherence to the entitlements set out in the Directive.

UNHCR cautions against making free legal assistance and representation subject to a so-called '' merits test'' as implied in paragraph 3. It is only through assessing the merits of an appeal that its prospect of ''success'' can be properly assessed.

Recommendation

Transposition

UNHCR recommends that paragraph 3 be transposed in a manner that does not lead to the arbitrary restriction of an applicant's effective access to justice in contravention with this Directive, the EU Charter and the ECHR.

26. Guidance, monitoring and control

Article 28 The EMN report has highlighted a lack of standardized approaches to collect and use statistics to monitor and report in the field of 1) pressure/capacity; 2) inflow/outflow of applicants from reception facilities, and 3) the costs of reception facilities. Likewise, the report states that coordination, implementation and control mechanisms could be further developed, as not

[136] M.S.S. v. Belgium and Greece, para. 301 in which the ECtHR noted a lack of legal aid effectively depriving the asylum seekers of legal counsel. M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011.

[137] Article 47 of the EU Charter sets out the right to an effective remedy and to a fair trial and sets forth that: ''everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice''.

all Member States have such mechanisms in place (e.g. guidelines) and only few apply (external) control mechanisms (e.g. checks in reception facilities performed by independent authorities). More could also be done, according to the report, to supplement formal coordination mechanisms (e.g. agreements, conventions) with informal instruments such as network/platform meetings between all actors involved in the provision of reception.[138] UNHCR supports these findings based on its monitoring work and would welcome that in addition to the measures proposed above, individual independent complaints mechanisms be made available to applicants especially, but not only, in all collective accommodation facilities and private accommodation.

Article 28 strengthens existing monitoring provisions through the insertion of a national monitoring mechanism and a specific obligation to report to the European Commission. UNHCR considers that such a requirement for systematic reporting would enable the European Commission to carry out its responsibility to ensure compliance with EU law more effectively. Practical cooperation initiatives – including in situations of particular pressure, as defined in the Regulation establishing the EASO- would also be a potentially important way to help Member States maintain and improve the quality of reception in line with their *acquis* obligations. Efforts by EASO, including in Greece and Bulgaria through the deployment of Asylum Support Teams, have demonstrated concretely the positive potential that expert advice and support on reception issues – including, in Greece's case, design and operation of reception facilities – can achieve. In addition to Member States' seconded experts, other stakeholders – including UNHCR and civil society organizations – have experience and knowledge that could contribute significantly to this work.

The development and application of standardized approaches to collect and use statistics to monitor and report as well as the development of coordination, implementation and control mechanisms could be undertaken with support of the EASO and methodologies and approaches included in its forthcoming reception training module and/or through the exchange of expertise between Member States in order to help them better manage reception capacity, improving current reception standards and matching capacity to demand for reception places.

[138] EMN Synthesis report: the Organisation of Reception Facilities for Asylum Seekers in different Member States; European Migration Network Study 2014, p. 32.

Recommendation

Implementation

UNHCR recommends that individual and independent complaints mechanisms be made available to applicants in all accommodation including private accommodation.

27. Staff and resources

Article 29

UNHCR reiterates the need for those providing reception conditions to applicants to receive not only basic training but specialized training including on the rights and needs of male and female applicants, (unaccompanied and separated) children, assessing their best interests, and the identification of vulnerable applicants with special reception (and/or procedural) needs especially in the case of victims of torture and trauma. In addition, more awareness is needed to properly respond to FGM, human trafficking and other forms of SGBV so that special reception needs of these applicants are assessed and addressed in a timely manner. Training on cultural orientation and conflict management would also be recommended for management of centres. A gender balance among reception centre staff is important to ensure access and support to applicants based on their age and gender, and gender identity.

UNHCR encourages Member States to prioritise requests for financial support under the new EU financial instrument AMIF to ensure sufficient and adequate reception conditions for applicants for international protection in line with their obligations under Article 29 (2) and recital 6 of this Directive.

Recommendations

Implementation

- UNHCR recommends extensive basic and more advanced training for staff working in reception centres.
- UNHCR equally recommends a proper gender balance among staff in reception centres in order to ensure persons with special needs can be properly identified and their needs addressed taking into account their age, gender and gender identity.
- UNHCR encourages Member States to prioritise requests for financial support under the new EU Asylum Migration and Integration Fund (AMIF) to ensure sufficient and adequate reception conditions for applicants of international protection, notably

applicants with special reception needs, in line with obligations under Article 29(2) and recital 6 of this Directive.

28. Conclusion

UNHCR notes that many current challenges with respect to reception of asylum-seekers relate to a failure to effectively implement existing provisions of the Reception Conditions Directive. Whereas many of the new provisions reduce the scope for divergent interpretation of the existing standards, or improve certain standards where needed to ensure conditions that facilitate effective presentation and pursuit of asylum claims, some provisions still merit clarification or remain problematic. The expressed aim of the recast Directive, 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", underlines this ambition and should be the objective of all EU Member States in transposing and implementing this Directive.

Given the critical importance of adequate reception conditions to the process of presenting a claim comprehensively and accurately – and, in turn, to reaching a correct and high quality asylum determination – UNHCR urges EU Member States and the European Commission to ensure proper transposition in line with the EU Charter and relevant refugee and human rights law standards as well as implementation in practice. This is in the interest of Member States, applicants, and the success of the Common European Asylum System as a whole.

UNHCR Bureau for Europe

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