

Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the proposal to transpose the recast Asylum Procedures Directive in Sweden ("Genomförande av det omarbetade asylprocedurdirektivet, Ds 2015:37")

I. Introduction

1. The United Nations High Commissioner for Refugees (hereafter "UNHCR") Regional Representation for Northern Europe (hereafter "RRNE") is grateful to the Government of Sweden for the invitation to provide observations to the proposal *Genomförande av det omarbetade asylprocedurdirektivet, Ds 2015:37*, (hereafter "the Proposal"), transposing the recast Asylum Procedures Directive (hereafter "recast APD").¹
2. UNHCR has a direct interest in law proposals in the field of asylum, 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 Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,³ whereas the 1951 Convention relating to the Status of Refugees⁴ and its 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as "1951 Convention") oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR's duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). It 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 (hereafter "TFEU").⁵
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. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and

¹ 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)* (hereinafter - *recast Asylum Procedures Directive* or *recast APD*), 29 June 2013, L 180/60, available at: <http://www.refworld.org/docid/51d29b224.html>.

² UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), (hereafter "UNHCR Statute"), available at: <http://www.refworld.org/docid/3ae6b3628.html>.

³ *Ibid*, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR's supervisory function to one or other specific international refugee convention. The UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, *UNHCR's supervisory responsibility*, October 2002, available at: <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the Convention".

⁵ 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, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

subsequent Guidelines on International Protection (hereafter “UNHCR Handbook”).⁶ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

4. UNHCR welcomes and supports the efforts made by the Government of Sweden to adapt the relevant Swedish legislation in the transposition of the second generation of the European Union (hereafter “EU”) asylum *acquis*. This is an opportunity to ensure that the Swedish asylum regulations are fully consistent with the obligations under International Law and, in particular, with the 1951 Convention.
5. UNHCR has in the EU welcomed the adoption of the recast APD, which introduces substantial positive changes and, if applied correctly, would significantly improve the quality and efficiency of the asylum systems in the EU.
6. UNHCR takes note that the recast APD encourages Member States to interpret the provisions of the Directive in a positive and generous spirit, in accordance with the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter “ECHR”),⁷ the 1989 United Nations Convention on the Rights of the Child (hereafter “CRC”),⁸ as well as obligations under instruments of international law, notably the 1966 International Covenant on Economic, Social and Cultural Rights (hereafter “ICESCR”)⁹ and the International Covenant on Civil and Political Rights (hereafter “ICCPR”).¹⁰

II. Observations

7. UNHCR will in these observations follow the order in which the amendments are presented in the Proposal. In the case that articles of the recast APD, which UNHCR considers are relevant are not addressed in the Proposal, we will make our observations concerning these articles following the chronological order of the recast APD.

➤ Access to the procedure (Chapter 5.3.1 of the Proposal)

8. UNHCR agrees that Swedish legislation and practice meet the requirements set forth in Article 6 of the APD concerning access to procedure, as stated in the Proposal. UNHCR also welcomes the suggestion in the Proposal not to utilize the exception in Article 6.5 of the APD. However, UNHCR is of the view that the specific time-frames for registration of an asylum application set out in Article 6.1, albeit clear from Swedish

⁶ 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, (hereafter UNHCR, Handbook”), available at: <http://www.refworld.org/docid/4f33c8d92.html>.

⁷ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, (hereafter “ECHR”), 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>

⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>.

⁹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, at: <http://www.refworld.org/docid/3ae6b36c0.html>.

¹⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

jurisprudence, should be regulated in a suitable legal act. The reason for this is that a regulation would make the legislator's intentions clear, while legal practice is open for interpretation, may be disregarded or changed, for example, citing a high influx of asylum-seekers.

Recommendation:

UNHCR recommends that current Swedish judicial practice is codified through a provision setting out the time-frames for registering an asylum application in Swedish legislation.

➤ **Requirements on the personal interview (Chapter 5.3.10 of the Proposal)**

9. Article 15.3.c of the recast APD, states that Member States shall take appropriate steps to ensure that an asylum interview is conducted in a manner which allows for the applicants to present the grounds for their application in a comprehensive manner, *inter alia*, through selecting an interpreter who can ensure proper communication between the applicant and the person conducting the interview. UNHCR understands this provision as a requirement for the interpreter to be competent. Given the important role of the interpreter in ensuring a legally secure asylum decision, the competence and qualifications of the interpreter is key.
10. Already in 2011, UNHCR stated in its Swedish Quality Initiative report that the interpreter must have the right competence, and noted several gaps in the quality of the interpretation provided at the Swedish Migration Agency (hereafter "SMA").¹¹ In addition, the findings of the 2010 UNHCR study on the first APD also showed shortcomings concerning professional qualifications for the recruitment of interpreters as well as their conduct in practice.¹² In the Swedish Quality Initiative report, UNHCR suggested, among other recommendations, that in order to increase the quality of the interpretation services rendered to asylum-seekers, the SMA should use qualified professional interpreters, the introduction of an ethical behaviour code for interpreters, and the provision of training for interpreters to become familiar with the specific role of the interpreter in the asylum context.¹³
11. Although the SMA has taken measures to increase the quality of the interpretation services that the agency procures, it has proven difficult for the agency to succeed fully. As far as UNHCR understands, one of the challenges for the SMA is that although the Swedish Administrative Procedure Act states that the SMA should strive to use authorized interpreters, such interpreters are not always available, and the SMA is thus obligated to accept interpreters who are less qualified.¹⁴ Therefore, the recommendations in the Swedish Quality Initiative report are still relevant in the context of transposing the recast APD in Sweden.

¹¹ UNHCR, *Kvalitet i svensk asylprövning – En studie av Migrationsverkets utredning av och beslut om internationellt skydd*, September 2011, (hereafter "The Swedish Quality Initiative report"), pp. 117–126, available at http://www.unhcr-northerneurope.org/fileadmin/user_upload/Documents/PDF/Sweden/2011-Sep-SE-Kvalitet-i-svensk-asylpr%C3%B6vning.pdf.

¹² UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, available at: <http://www.refworld.org/docid/4c63e52d2.html>, pp. 115–127.

¹³ *The Swedish Quality Initiative report*, *op.cit.*, 11, pp. 125–126.

¹⁴ Förvaltningslag (1986:223).

12. UNHCR believes that when implementing Article 15.3.c of the recast APD, the Government should take appropriate measures to ensure higher quality of interpretation services in the asylum procedures. Previous studies and research have suggested, for example, establishing a basic interpreter's programme, which could be made mandatory to pass for interpreters to become qualified to work for the SMA and increased State registration of interpreters, including those who are not authorized interpreters.

Recommendation:

UNHCR recommends that the Government when transposing Article 15.3.c of the recast APD takes measures to enhance the quality of the interpretation services in the asylum procedure, in order to address current gaps, for example by providing for a mandatory basic interpreter's programme.

➤ **Reporting and recording of personal interviews (Chapter 5.3.13 of the Proposal)**

13. UNHCR welcomes the Government's proposal to transpose into national legislation the requirements in Article 17 of the recast APD. Article 17 (2) of the Directive provides the possibility for Member States to use audio recording or audio-visual recording of the personal interview. UNHCR supports the obligation to make the recordings or transcripts thereof available in the applicant's file.
14. In UNHCR's view, the most effective way of making an accurate record of a personal interview is by audio or audio-visual recording.¹⁵ Thereby, the interviewer would be better equipped to efficiently conduct an interview where all material facts are gathered and all relevant elements discussed. Further, employing audio or audio-visual recording helps to eliminate disputes regarding the accuracy of the written report, it may also help in addressing allegations of inaccurate interpretation during the personal interview, and provide a useful evidentiary resource to both the decision-maker and, in the case of any eventual appeal, the adjudicator. UNHCR would therefore recommend that the Government clarifies that the SMA shall use audio or audio-visual recording as the primary method of recording an interview.

Recommendation:

UNHCR recommends that the Government clarifies in a suitable legal act that the Swedish Migration Agency shall use audio or audio-visual recording as the primary method of recording an interview.

➤ **Medical examinations (Chapter 5.3.14 of the Proposal)**

15. Article 18 of the recast APD sets out specific requirements for medical examinations within the framework of the assessment of applications for international protection. It

¹⁵ See UNHCR, *Building in Quality – A Manual on Building in High Quality Asylum System, Further Developing Asylum Quality in the European Union (hereafter the FDQ)*, September 2011, at: <http://www.unhcr.org/refworld/docid/4e85b36d2.html>, pp. 26–27.

is UNHCR's view that a comprehensive credibility assessment in the context of an asylum determination procedure is crucial.¹⁶

16. UNHCR notes with satisfaction that Article 18(3) reflects the principle of “credibility assessment based on the entire evidence”, as submitted by the applicant and gathered by the determining authority. In line with the findings of UNHCR in “Beyond Proof: Credibility Assessment in European Asylum System”,¹⁷ a consideration of all available evidence implies that decision-makers should consider the credibility of a claim in light of all the available evidence relating to the determination of an application for international protection, including both oral and documentary evidence. This parallels UNHCR's guidance provided in its Handbook,¹⁸ and the jurisprudence established by the European Court of Human Rights (hereafter “ECtHR”).¹⁹
17. In support of a credibility assessment, medical examinations could have a role, should other available evidence be insufficient to make an objective and impartial credibility assessment. UNHCR notes that Article 18 (1) of the recast APD offers a new guarantee for the applicants, requiring the determining authority to request a medical examination if deemed relevant for the determination of an application for international protection. This provision mirrors the underlying principle set out in Recital 34 of the recast APD and echoes what the ECtHR has established in its case law, for example, in its judgment in *RC v. Sweden*.²⁰ In this context, UNHCR wishes to reiterate that the judgement in *RC v. Sweden* also underlined that the burden to substantiate the claim is shared between the applicant and the State.²¹ The ECtHR has also affirmed that the State has a duty to carry out a close and rigorous scrutiny of an applicant's claim.²²
18. The Proposal suggests that Swedish law and practice are in accordance with the requirements of Article 18 of the recast APD, referring to the duty placed on the SMA, according to administrative legal practice in Sweden, to substantiate the application to the extent necessary. Although it is correct that such a duty exists, in the view of UNHCR the phrasing of the duty is open to a wide subjective appreciation of the SMA in the assessment of all relevant statements and documentation aimed to

¹⁶ UNHCR, Handbook, op. cit. 6, para. 201.

¹⁷ UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, (hereafter “UNHCR, Beyond Proof”), at: <http://www.refworld.org/docid/519b1fb54.html>, p. 45.

¹⁸ UNHCR, Handbook, op. cit. 6, para 201.

¹⁹ *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, at: <http://www.refworld.org/docid/4f4507942.html>, para. 116.

²⁰ *R.C. v. Sweden*, Application no. 41827/07, Council of Europe: European Court of Human Rights, 9 March 2010, at: <http://www.refworld.org/docid/4b98e11f2.html>, para. 53.

²¹ For further information concerning the principle of the shared duty to substantiate the claim, see the recast Qualification Directive, European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at: <http://www.refworld.org/docid/4f197df02.html>, Article 4(1), (2) and (5). See also UNHCR Handbook, op. cit.6, para. 196, and UNHCR, *Beyond Proof*, op. cit. 17, Chapter 4.

²² See e.g., *Singh et autres c. Belgique*, Requête no 33210/11, Council of Europe: European Court of Human Rights, 2 October 2012, available at: <http://www.refworld.org/docid/506c63bf2.html>. For further information concerning the principle of *close and rigorous scrutiny*, see UNHCR, *Beyond Proof*, op. cit. 17, p. 48.

establish the existence of a well-founded fear of persecution by the applicant.²³ It is UNHCR's position that it would be more predictable and fair, if the situations in which a medical examination should be requested by the SMA would be specified in a legal act.

19. The Proposal further suggests that a medical examination does not need to be carried out by the SMA, but can simply be initiated by the Agency through advice to the applicant for international protection that a medical examination would be useful as documentary evidence. It is UNHCR's understanding that in practice, the SMA rarely requests of an applicant to obtain a full medical examination which would be paid for by the State. UNHCR further understands that such full medical examinations are requested and paid for by the SMA normally only if an applicant is able to provide initial medical evidence indicating past persecution, and thus showing a need for a more thorough examination. According to information UNHCR has received from legal representatives of asylum applicants in Sweden, it is often difficult for applicants to obtain the initial medical evidence on their own motion, as general medical practitioners often decline, or are unable, to issue medical reports of the kind needed by the applicant, such as a report indicating that scarring on an individual applicant could suggest past persecution. Some general medical practitioners are of the opinion that they are not qualified to express themselves on how scarring or other physical evidence of possible past persecution could have occurred. As such, the applicants and their legal representatives find themselves in a situation where they cannot obtain an initial medical examination for the applicant, but have to order and pay for a full medical examination, with the risk of not being reimbursed by the State. UNHCR finds this situation unfortunate.
20. UNHCR further notes that the Proposal, similar to Article 18 (1) of the recast APD, intends to narrow the scope of the medical examination to signs that might indicate past persecution or serious harm. UNHCR observes that asylum-seekers in Sweden are offered a medical examination shortly after registering their application. The medical examination offered could also serve the purpose of assisting the asylum-seeker in gathering documentary evidence of possible past persecution, as well as to facilitate the early and timely recognition of the need for special procedural guarantees for the applicant, in line with Article 24 of the recast APD. However, in this case, the medical assessment would need to be expanded beyond the scope of Article 18 and the current Proposal. In this regard, UNHCR wishes to remind of Recital 31 of the recast APD, which refers to the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter the "Istanbul Protocol").²⁴ The Istanbul Protocol can serve as a tool for the dual purposes of documenting past persecution, as well as defining and identifying individual circumstances indicating a need for special procedural guarantees (please see further below, paragraphs 28–36).

²³ Article 4(3) of the recast Qualification Directive stipulates: "*the assessment of an application takes into account ... (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm*".

²⁴ 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 (hereafter the Istanbul Protocol)*, 2004, HR/P/PT/8/Rev.1, at: <http://www.refworld.org/docid/4638aca62.html>.

Recommendation:**UNHCR recommends that**

- a) the shared duty to substantiate an asylum claim is further strengthened through legislation, clarifying that while the relevant facts in the first place have to be furnished by the applicant, the process of gathering information with respect to the application is thereafter collaborative;
- b) the offering of a thorough medical examination at the start of the asylum procedure with the extended purposes of documenting signs of past persecution, and assisting in identifying special procedural needs, regulated in law;
- c) reference is made to Recital 31 and 34 of the recast APD, when regulating the right to a medical examination.

➤ **Free legal assistance and representation in appeals procedures (Chapter 5.3.16 of the Proposal)**

21. Article 20(1) of the recast APD affirms the obligation of Member States to provide, upon request, applicants for international protection with free legal assistance and representation in the appeals procedures. In UNHCR's view, the right to legal assistance and representation is an essential safeguard, especially in complex European asylum procedures.
22. UNHCR appreciates that the Swedish Government wishes to introduce a possibility for asylum-seekers appealing a decision not to grant them a reopening of their case to be granted free legal assistance as per their request. However, UNHCR regrets that the Proposal suggests to utilize the "merits test" as provided for in Article 20 (3) of the recast APD, and make the provision of free legal assistance conditional. UNHCR would urge the Government to consider unconditional access to legal aid also at this stage of the asylum procedure. In UNHCR's view, exceptions to the provision of free legal aid should be made only where the applicant has adequate financial means.²⁵
23. Free legal assistance is particularly important in situations where there has arisen *sur place* reasons. In many instances, it is difficult for an asylum applicant to unaided articulate the new reasons. In many instances, UNHCR RRNE has observed that applicants, who turn to our Office for assistance have tried to apply for a reopening of their case but without the support of a legal representative, have failed to properly put forward their reasons, leading to an erroneous rejection of their application. A further consequence is that the new reason sought to be put forward has been consummated and no longer qualifies as new, which in turn hinders a reopening of the case on that ground. It is thus crucial that such applicants at least at the appeal stage have the benefit of free legal assistance, even for a limited number of hours.
24. Further, UNHCR is concerned that the conditionality as worded in the Proposal, is open for interpretation. It is unclear if the word "obvious" as used in the Proposal has the

²⁵ UNHCR regrets that Article 20(3) of the recast APD reintroduced the "merit test" as a means to limit access to free legal assistance and representation in the appeals procedures, albeit effective access to legal aid and justice should not be arbitrarily restricted. See further, UNHCR, *UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final*, (hereafter UNHCR comments to the European Commission's Amended Proposal), January 2012, p. 6, available at: <http://www.refworld.org/docid/4f3281762.html>.

same meaning as in Chapter 8, Section 19 of the Swedish Aliens Act. UNHCR thus recommends that the term is clearly defined.²⁶

Recommendation:

UNHCR recommends that

- a) all applicants appealing a decision not to grant a reopening of their case are unconditionally provided free legal aid;**
- b) if free legal aid is not provided, a definition of the term “obvious” is provided.**

➤ **Applicants in need of special procedural guarantees (Chapter 5.3.20 of the Proposal)**

25. The recast APD, Article 24, read in conjunction with Article 2(d) of the same Directive, has introduced a category of applicants with special procedural needs that may be different from those with special reception needs as set out in the recast Reception Conditions Directive (hereafter “RCD”).²⁷
26. In the view of UNHCR, the concept of applicants in need of special procedural guarantees in the recast APD is not limited to vulnerable persons, as the definition of applicants with special reception needs, set out in Article 2(k) of the recast RCD,²⁸ and should therefore be interpreted to extend to a broader group of persons. Indeed, applicants with special reception needs may or may not necessarily have special procedural needs and vice versa.²⁹ UNHCR recommends that the Government explains the broader scope of the recast APD as compared to the recast RCD, particularly as reference is made to the latter Directive in the Proposal, albeit without clearly defining the correlation between the two different definitions in the two Directives.
27. As the Proposal also notes, the recast APD, while leaving open the definition of applicants in need of special procedural guarantees, provides an exemplification in its Recitals. However, UNHCR recommends that it is clarified in the preparatory works that the list of criteria that should be taken into account when identifying individual circumstances that may cause an applicant to require special procedural guarantees in Recital 29 is non-exhaustive. As stated above, UNHCR would further recommend a reference to Recital 31 as well as the Istanbul Protocol which can serve as a tool for the purposes of defining and identifying relevant individual circumstances.³⁰
28. Article 24(1) lays down an obligation for Member States to identify, within a reasonable period of time after an application is made, whether the applicant is in need of special procedural guarantees. UNHCR cautions that the wording of Article 24(1)

²⁶ Utlänningslag 2005:716, available at: https://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Utlanningslag-2005716_sfs-2005-716/

²⁷ 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, (hereafter recast RCD), at: <http://www.refworld.org/docid/51d29db54.html>.

²⁸ Ibid. .

²⁹ UNHCR, *UNHCR comments on the European Commission's Amended Proposal*, op. cit., p. 25, p. 6, available at: <http://www.refworld.org/docid/4f3281762.html> . See further: UNHCR, *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)*, April 2015, <http://www.refworld.org/docid/5541d4f24.html> , in particular the UNHCR comments to Article 21 and 22 of the recast RCD. (Hereafter *UNHCR Recast APD Annotated Comments*).

³⁰ *UNHCR Recast RCD Annotated Comments*.

of the recast APD, stating that the identification of persons with specific needs must be undertaken “*within a reasonable period of time after an application for international protection is made*”, is open to interpretation. There is a risk that the procedure may not be applied in a way which ensures that the special procedural guarantees are timely granted to the applicants who are entitled to benefit from them, thus preventing such applicants from equally accessing a fair asylum procedure.

29. In view of the above, it is crucial to initiate the assessment of special procedural needs at an early stage of the procedure. In this context, UNHCR observes that the Swedish Government does not intend to incorporate in Swedish legislation the time-frames provided for in Article 6 of the recast APD, which the Government considers irrelevant in the Swedish context.
30. However, UNHCR wishes to draw the Government’s attention to the UNHCR Executive Committee Conclusion No. 91, which states that special protection or assistance needs of asylum applicants should be recorded at the registration.³¹ It is UNHCR’s understanding that whenever possible, at least the initial assessment to identify the need for special procedural guarantees should take place at the time of registration.³² The needs assessment could also, as proposed above in para. 20, be linked to the medical examination offered to asylum-seekers at the early stages of the asylum procedure.
31. Once the needs are assessed, the specific support and procedural needs should be communicated to the case workers and addressed in agreement with the applicant.³³ Thus in UNHCR’s view, the aim of the assessment is dual: (1) to identify the specific needs of the applicant, and (2) to assess what will be the adequate support in order to allow the applicant to benefit from the rights and to comply with his obligations under the recast APD.
32. UNHCR notes that the Proposal refers to the SMA’s shared duty to substantiate the application, without any explanation offered as to how and when in the procedure the assessments according to the recast APD and recast RCD shall be carried out. The Proposal only states that the assessments are made as an integral part of the current procedure. It is however unclear when and how the assessments are made. This is unfortunate, and UNHCR recommends that a time-frame is set out as per the above.
33. In UNHCR’s view, the assessment of special procedural needs should be systematically carried out on an individual basis. Article 24(2) of the recast APD suggests that Member States may integrate the assessment of special procedural needs into the assessment of special reception needs of vulnerable persons provided for in Article 22 of the recast RCD, as the Proposal also suggests. UNHCR believes that the assessment of special procedural needs could be part of the existing national procedures, as long

³¹ UNHCR, *Conclusion on Registration of Refugees and Asylum-seekers*, 5 October 2001, No. 91 (LII) - 2001, available at: <http://www.refworld.org/docid/3bd3e1d44.html>.

³² On the need to identify promptly asylum seekers who may have special protection or assistance needs see: UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate*, 20 November 2003, available at: <http://www.refworld.org/docid/42d66dd84.html>, paras. 3.1.2 and 3.4.

³³ See UNHCR, *Response to Vulnerability in Asylum: Project Report*, December 2013, Dr. Chrystalla Katsapaou, Recommendation No. 2, (hereafter the Response to Vulnerability Project), available at: <http://www.unhcr-centraleurope.org/pdf/what-we-do/caring-for-vulnerable-groups/response/response-to-vulnerability-in-asylum-project-report.html>.

as it is ensured that applicants with such needs are identified at an early stage of the asylum procedure and that their needs are properly addressed. UNHCR considers that the assessment must be conducted by qualified personnel that have been properly trained and receive adequate guidance.³⁴

34. The recast APD is silent on the methods and methodologies to be used for conducting the assessment of special procedural needs, leaving it up to the Member States to define the means to be used for the assessment. The Proposal, as stated above, does not present any suggestions as to the methodologies to be used, neither in connection to assessing the special procedural needs, nor the assessment of special reception needs. UNHCR recommends that the Government sets out in legislation who shall be responsible to carry out the procedural and reception needs assessments, as well as identifies the methodology to be used for carrying out the assessments.
35. UNHCR suggests the introduction of a multi-disciplinary and holistic assessment that can take place at various stages of the asylum procedure. As suggested above, the initial assessment could take place at the registration, to be followed by a fuller assessment supported by the medical examination offered at the start of the asylum process. Following the initial assessment, a referral mechanism should be in place, to allow for a more in-depth assessment and follow-up treatment where necessary. Referrals could include referrals to special procedures in line with Article 31 (7) b of the recast APD.³⁵
36. UNHCR further suggests that the assessment should be conducted by qualified health and social workers, complying with deontological principles, the principles of confidentiality and informed consent as well as other guarantees. In this connection, UNHCR also wishes to remind of the reference in Recital 31 of the recast APD to the Istanbul Protocol, which UNHCR considers a useful tool to assess some of the special procedural needs of the applicants.
37. Finally, whilst special needs resulting from traumatic experiences should ideally be identified at an early stage of the process, there are cases where these needs cannot be identified early in the procedure. UNHCR therefore sees the provision of Article 24(4) as an obligation for Member States to ensure an on-going assessment of applicants' special needs at regular intervals and at key moments such as the period prior to the asylum interview, after the interview, and before the asylum decision is taken.³⁶ The systematic and ongoing assessment of special needs should be formulated in legislation.

Recommendations:

UNHCR recommends that

- a) the Government explains in the preparatory works the broader scope of the recast APD as compared to the recast RCD;**
- b) it is clarified in the preparatory works that the list of criteria that should be taken into account when identifying individual circumstances that may cause an applicant to require special procedural guarantees in Recital 29 is non-exhaustive;**
- c) reference is made in the preparatory works to Recital 31 and the Istanbul Protocol;**

³⁴ *Ibid.*

³⁵ *UNHCR Recast RCD Annotated Comments, pages 51-53.*

³⁶ See, the Response to Vulnerability project, *Op. cit.* 33

- d) the Government legislates that the initial assessment to identify the need for special procedural guarantees should take place at the time of registration;**
- e) the Government sets out in legislation who shall be responsible to carry out the procedural and reception needs assessments;**
- f) that the Government identifies the methodology to be used for carrying out the assessments, ensuring that the assessment is holistic and multi-disciplinary.**

➤ **Guarantees for unaccompanied or separated children (Chapter 5.3.21 of the Proposal)**

- 38.** UNHCR acknowledges with satisfaction that most of the requirements of Article 25 of the recast APD are based on the principle of the best interest of the child in line with the CRC. UNHCR is also pleased that the provision of Article 25 (1) of the recast APD significantly raises the procedural standards regarding the qualification and the duties of the guardian of unaccompanied or separated children (hereafter “UASC”).
- 39.** The Proposal suggests a number of guarantees for UASC, which should be incorporated in legal acts. UNHCR welcomes the Proposal in this part. UNHCR would, however, like to add that given the significant role of the guardian, teamed with the requirements regarding the qualifications of the guardian put forth both in the recast APD and Swedish legislation, it is important to further ensure that guardians in Sweden are provided a mandatory training programme equipping them to competently assist and guide the child in their care.
- 40.** In this regard, UNHCR wishes to draw the attention of the Government to the handbook of the EU Fundamental Rights Agency (hereafter “FRA”) concerning the reinforcement of guardian systems.³⁷ In the handbook, FRA points out that several safeguards should be provided for in legislation. For example, FRA recommends the establishment of training requirements, monitoring and oversight procedures, including an accessible individual complaint mechanism for children. It is also important to ensure the right of children to express their views at different stages of the procedure and that the competent authorities take such views into consideration and give them due weight.³⁸ Such safeguards are particularly important in the current situation, where the number of UASC arriving in Sweden has increased, leading to the cadre of guardians growing fast.
- 41.** UNHCR supports the reasoning in the Proposal around the guarantees provided in Article 25(5) of the recast APD concerning age assessments and the application of the principle of the benefit of the doubt. The Position Paper on Age Assessment of the Separated Children in Europe Programme, endorsed by UNHCR and UNICEF, emphasizes that pending the result of an age assessment, the individual whose age is disputed should in principle be considered and treated as a child.³⁹ In this context, UNHCR also wishes to remind of the EU Directive on Preventing and Combating Trafficking in Human Beings, which in Article 13(2) states that when the age of a

³⁷ See, particularly 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, available at: <http://www.refworld.org/docid/53b14fd34.html>.

³⁸ See e.g. CRC, Articles 3 and 12.

³⁹ Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012, p. 12, available at: <http://www.refworld.org/docid/4ff535f52.html>.

persons subjected to trafficking is uncertain, and there are reasons to believe the person to be a child, that the person is presumed to be a child.⁴⁰

42. Further, the Position Paper of the Separated Children in Europe Programme recommends that age assessments should only be undertaken as a measure of last resort when there are grounds for serious doubt about the applicant's age and where other approaches have failed to establish the applicant's age.⁴¹ In this respect, UNHCR recalls that it is widely acknowledged by experts that age assessments are subject to a considerable margin of error. As UNHCR has also maintained in its Executive Committee Conclusion on Children at Risk in 2007, UNHCR considers that the margin of appreciation inherent to all age-assessment methods needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child.⁴²
43. In UNHCR's view, age assessment should be part of a comprehensive evaluation that takes into account both physical appearance and the psychological maturity of the individual, and should be carried out with the support of a multidisciplinary team. It is important that such assessment is conducted in a safe, child- and gender-sensitive manner with due respect for human dignity.⁴³ UNHCR further encourages the Government to take into regard the standards presented in the United Nations Children's Fund, UNICEF, Technical Note on age assessment, released in 2013, which, for example, underlines that age assessments should only be conducted if it would be in the best interest of the child.⁴⁴
44. As noted above, UNHCR considers that the duty to substantiate an asylum claim is normally shared between the applicant and the State.⁴⁵ In UNHCR's view, it may be necessary for an examiner to assume a greater burden of proof in children's claims,

⁴⁰ See: European Union: Council of the European Union, *Directive 2011/36/EU of the European Parliament and of 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*, 15 April 2011, OJ L. 101/1-101/11; 15.4.2011, 2011/36/EU, available at: <http://www.refworld.org/docid/50ec1e172.html>; see further UNHCR, OHCHR, UNICEF, UNDOC, UN Women and ILO Joint Commentary on the EU Directive; UNHCR, *Prevent. Combat. Protect: Human Trafficking*, November 2011, available at: <http://www.refworld.org/docid/4edcbf932.html>.

⁴¹ *Ibid.*

⁴² UNHCR, *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII) - 2007, (hereafter "Conclusion on Children at Risk"), available at: <http://www.refworld.org/docid/471897232.html>. See further about age assessments, and ensuring the best interest of the child in the joint UNHCR and UNICEF publication "Safe and Sound": UNHCR, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: <http://www.refworld.org/docid/5423da264.html>. See also UNHCR, *The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the European Union*, December 2014, (hereafter "UNHCR, The Heart of the Matter"), available at: <http://www.refworld.org/docid/55014f434.html>, pp. 102–103.

⁴³ See further 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, (hereafter "UNHCR, Guidelines on Child Asylum Claims"), available at: <http://www.refworld.org/docid/4b2f4f6d2.html>, para. 75.

⁴⁴ UNICEF, *Age Assessment: A Technical Note*, January 2013, available at: <http://www.refworld.org/docid/5130659f2.html>.

⁴⁵ See UNHCR, Handbook, paras. 195 and 203. The Court of Justice of the European Union has explained the 'shared duty' in the following terms: "if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant ... so that all elements needed to substantiate the application may be assembled.", see *M.M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, CJEU, 22 November 2012, para. 65.

especially if the child concerned is unaccompanied.⁴⁶ Further, it needs to be recalled that age is not calculated in the same way universally, or given the same degree of importance. The statement of an incorrect medical age should not have an adverse impact on the credibility of the child.⁴⁷ A child is moreover likely to have more difficulty than an adult substantiating his or her application with elements that are ‘complete, up to date and relevant’, especially if the child left his country of origin at a young age and/or has an incomplete understanding of events there.⁴⁸

45. In a precedent-setting judgement concerning an UASC applicant, the Swedish Migration Court of Appeal held in February 2014 that it is the duty of the child to establish her or his age, and that it is mainly through written evidence, possibly supplemented by oral evidence, that age is established.⁴⁹ The SMA adopted a Legal Commentary to the same effect in September 2015, providing guidance for its asylum determination officers.⁵⁰ UNHCR understands both these instruments to depart from UNHCR’s position of the extended duty of the State to assist an UASC applicant in substantiating her or his asylum claim. In this context, UNHCR wishes to reiterate that the UNHCR Executive Committee, of which Sweden is a member, has recommended States to develop adapted evidentiary requirements for children in the asylum procedure.⁵¹ UNHCR therefore finds that it would be necessary for the Government to explain its position concerning the duty of the State concerning UASC applicants to substantiate the claim. Such an explanation would in the view of UNHCR best be achieved by incorporation in a legal act.

Recommendations:

UNHCR recommends that

- a) **a mandatory training programme is introduced for guardians;**
- b) **the Government provides for in legislation that age assessment shall be holistic and carried out by a multidisciplinary team;**
- c) **children shall be given clear information about the purpose and process of the age-assessment procedure;**
- d) **the Government legislates the shared duty to substantiate the asylum claim, including the age of a child applicant.**

➤ **The concept of first country of asylum (Chapter 5.4.5 of the Proposal)**

46. Article 35 of the recast APD regulates the concept of first country of asylum. UNHCR welcomes that in the last indent of the Article, the applicant is provided with the possibility to rebut the presumption of safety on the ground that the first country of asylum is not safe in his/her particular circumstances. It is UNHCR’s understanding that Swedish practice also provides this possibility, which is positive.

47. However, UNHCR regrets that the Swedish Government is proposing to maintain the term “*sufficient protection*” in Swedish legislation, on par with the terminology used

⁴⁶ UNHCR, Guidelines on Child asylum Claims, op. cit 42, para. 73.

⁴⁷ Ibid, para. 75.

⁴⁸ See, UNHCR, The Heart of the Matter, op. cit. 41, pp. 90–91.

⁴⁹ Migrationsöverdomstolen, UM 2437-13.

⁵⁰ Migrationsverket, *Rättslig kommentar angående bedömning av ålder i asylärenden*, SR 35/2015, available at: <http://lifos.migrationsverket.se/dokument?documentSummaryId=35592>.

⁵¹ Conclusion on Children at Risk, op.cit. 41, para. (g)(viii).

in Article 35(b) of the recast APD, instead of replacing it by “effective protection”. UNHCR reiterates its view that sufficient protection does not present an adequate standard when determining whether an asylum-seeker may be returned safely to a first country of asylum and that any protection in that country should be available in practice.⁵² This is supported by the case law of the ECtHR, according to which, a theoretical right of *non refoulement* is not sufficient, for example.⁵³

48. UNHCR believes that criteria should be developed and used to define the notion of “effective protection” in line with the 1951 Convention and the Lisbon Conclusions on “effective protection”.⁵⁴ If the lower standard is maintained, the notion of “*sufficient protection*” should be defined Swedish national legislation.

Recommendations:

UNHCR recommends the Government to change the wording in the Swedish legislation concerning the concept of first country of asylum, so that the term “sufficient protection” is replaced with “efficient protection”.

➤ **The concept of safe country of origin**

49. In view of the current discussions within the EU about the concept of safe country of origin, as regulated in Article 36 in the recast APD, UNHCR wishes to clarify its position concerning this concept despite the fact that the issue is not raised in the Proposal.
50. UNHCR notes that an asylum claim lodged by an applicant from a country designated as safe country of origin may be channeled into accelerated procedures pursuant to Article 31(8)(b) of the recast APD. In this respect, UNHCR wishes to reiterate its understanding that the concept of safe country of origin may serve as a case management tool, for instance, to assign applications to fast track procedures, but with no negative impact on the procedural safeguards provided for in the recast APD.⁵⁵
51. UNHCR does not object to the designation of countries as safe countries of origin *per se*, provided that the decision has been preceded by a thorough assessment of the situation of that country. Further, UNHCR considers that the presumption that a country of origin is safe must be rebuttable both in law and practice. There must also be a mechanism in place to quickly remove the designation of a country as safe, if the country would cease to meet the criteria for a safe country of origin.
52. In the individual case management, UNHCR wishes to underline that an application should be assigned to the safe country of origin procedure on a case-by-case basis, taking into account the specific circumstances of the case. It should only be applied to

⁵² UNHCR, *UNHCR comments on the European Commission's Proposal*, *op. cit.* 25, pp. 32–33.

⁵³ See, *inter alia*, *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, at: <http://www.unhcr.org/refworld/docid/4ab8a1a42.html>, para. 88: “*The Court reiterates in this connection that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention*”.

⁵⁴ UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9–10 December 2002)*, February 2003, at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>.

⁵⁵ UNHCR, *UNHCR comments on the European Commission's Proposal*, *op. cit.* 25, p. 24.

persons who are nationals of the country in question, or in cases concerning stateless persons, if the person was habitually resident in the country in question.

53. Should Sweden wish to regulate in law the safe country of origin concept, UNHCR recommends that the above-mentioned safeguards are incorporated in the legislation.

➤ **Subsequent applications and Exceptions from the right to remain in case of subsequent applications (Chapters 5.4.7 and 5.4.8 of the Proposal)**

54. Article 40 of the recast APD clarifies the concept of and specifies the rules applying to subsequent applications. UNHCR appreciates the requirement in Article 40(2) of the recast APD that a preliminary examination must take place to verify if new elements or findings have arisen before certifying a subsequent application as inadmissible.

55. Article 40(2) of the recast APD refers back to Article 33(2)(d), which clarifies the concept of and rules on inadmissibility especially in regard to the notion of subsequent application defined by Article 2(q) of the recast APD. UNHCR fully supports the wording of Article 33(2)(d), that Member States may consider a subsequent application inadmissible only “where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection” under the recast Qualification Directive have been presented by the applicant, which is consistent with the concept of a single procedure.

56. As shown above, the recast APD intends the subsequent application to mean an application for international protection, as defined in Article 2(q) of the recast APD. An application for international protection is defined in the recast Qualification Directive Article 2(h) to mean an application for refugee status or subsidiary protection, which in the Swedish legislation is equivalent to an asylum application. Applications for asylum are examined under Chapter 4 of the Aliens Act, while the examination undertaken under Chapter 12 of the Alien’s Act concerns impediments to the execution of a return decision; thus two substantially different examinations.

57. In UNHCR’s understanding, currently when an applicant makes a subsequent application, the preliminary examination is made in relation to Chapter 12 of the Aliens Act. Despite the above, the Proposal states that the current practice in Sweden is in accordance with the provisions of the recast APD. UNHCR, however, suggests that the current Swedish practice as regards the preliminary examination of a subsequent applications is incompatible with the recast APD, as the preliminary examination, within the meaning of the recast APD, must be made using the provisions in Chapter 4 of the Aliens Act.

58. Further, UNHCR has noted with concern the provision of Article 40(4) of the recast APD, which allows for a new application to be made only if the applicant through no fault of his or her own was incapable of presenting the new facts. The correlating provision in the Swedish law, Chapter 12, Section 19 of the Aliens Act, maintains the same requirement. UNHCR considers that the requirement in Article 40(4) of the recast APD and the correlating Chapter 12, Section 19 of the Aliens Act, requiring an applicant to show a valid excuse for why a relevant fact was not presented earlier in order to be granted a new application, could give rise to *refoulement*.⁵⁶

⁵⁶ UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection

59. The ECtHR, has continuously held that, given the importance of Article 3 of the ECHR⁵⁷ and the irreversible nature of the harm likely to be caused in the event of ill-treatment, it is the duty of national authorities to conduct a thorough and rigorous assessment to dispel any doubt regarding the ill-foundedness of the claim.⁵⁸ The Court has also held that Article 13 of the ECHR requires independent and rigorous review of any grievance under which there is a reason to believe a risk of treatment contrary to Article 3 of the ECHR exists.⁵⁹
60. UNHCR wishes to reiterate that under the *non-refoulement* principle, States have an absolute duty to establish, prior to implementing any removal measure that the person whom they intend to remove from their territory or jurisdiction is not at risk of such harm covered by the prohibition on *refoulement*. The examiner is thus expected to assess all the relevant elements that are material to a determination of an asylum claim, even if, for example, the applicant has withheld relevant information for reasons that can be considered to be his or her own fault. It could be situations where, for example, an asylum applicant during the course of the proceedings converts to a different religion, which could give cause to persecution upon return to the home country. If the applicant fails to inform the determining authority of his or her conversion, considering his or her religious beliefs to be a private matter, he or she could be considered to have withheld relevant information by choice. This could in turn lead to the rejection of a subsequent application, even if removing the applicant would amount to *refoulement*.
61. Article 41 of the recast APD allows Member States to derogate from a series of procedural guarantees in case of subsequent applications, including the exception from the right to remain in the territory as well as derogations from time-limits and the non-automatic suspensive effect rule, however, with the safeguard that the removal will not result in direct or indirect *refoulement* of the applicant.
62. The Proposal refers to the safeguards provided for in Chapter 12, section 19 of the Aliens Act as providing for a protection against *refoulement*. As stated above, the requirement of a valid excuse in Chapter 12, section 19, could give rise to *refoulement*.

Recommendation: UNHCR recommends that

- a) the Government introduces a possibility for applicants to submit a subsequent application as provided for in Article 40(2) of the recast APD which is examined within the broader scope of Chapter 4, rather than within the more limited scope of Chapter 12.**
- b) the Government removes the requirement of a valid excuse in Chapter 12, section 19 of the Aliens Act, so as to remove the risk of *refoulement*.**

status (Recast) COM (2011) 319 final, January 2012, pp. 36-37, at: <http://www.refworld.org/docid/4f3281762.html>; see also UN HCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, p. 74, March 2010, at: <http://www.unhcr.org/refworld/docid/4bab55752.html>

⁵⁷ ECHR, *op.cit.* 7

⁵⁸ ECtHR, *Singh and Others v. Belgium*, No. 33210/11, 2 October 2012, para. 103; *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011, para. 387: “the Court reiterates that it is also established in its case-law [...] that any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny.”;

⁵⁹ ECtHR, *Singh and others v. Belgium*, No. 33210/11, 2 October 2012, paras. 103–104.

**UNHCR Regional Representation for Northern Europe
9 October 2015**