Judicial analysis

Reception of applicants for international protection

(Reception Conditions Directive 2013/33/EU)

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2020

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European Asylum Support Office

The European Asylum Support Office (EASO) is an agency of the European Union that plays a key role in the concrete development of the Common European Asylum System. It was established with the aim of enhancing practical cooperation on asylum matters and helping Member States fulfil their European and international obligations to give protection to people in need.

Article 6 of the EASO founding regulation ([1]) specifies that the agency shall establish and develop training modules and tools available to members of courts and tribunals in the Member States. For this purpose, EASO shall take advantage of the expertise of academic institutions and other relevant organisations and take into account the EU's existing cooperation in the field with full respect to the independence of national courts and tribunals.

([1]) Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (OJ L 132, 29.5.2010, p. 11).

Contributors

The content has been drafted by a working group consisting of Judges **Aikaterini Koutsopoulou** (Greece, working group co-coordinator), **Marie-Cécile Moulin-Zys** (France, working group co-coordinator), **Ute Blum-Idehen** (Germany) and **Otto P. G. Vos** (Netherlands); legal assistants to the court **Thomas Gruber** and **Katharina Pernsteiner** (Austria) and **Marina Pier** (Netherlands); and **Samuel Boutruche**, Judicial Engagement Coordinator at the United Nations High Commissioner for Refugees (UNHCR). Special thanks are extended to **Jeff Walsh**, Liaison Officer at the UNHCR, for his valuable contributions throughout the drafting process.

The members of the working group were invited for this purpose by the European Asylum Support Office (EASO) in accordance with the methodology set out in Appendix C. The recruitment of the members of the working group was carried out in accordance with the process agreed between EASO and the members of the EASO network of court and tribunal members, including the representatives of the International Association of Refugee and Migration Judges (IARMJ) and the Association of European Administrative Judges.

The working group itself met on three occasions in March, June and October of 2019 at EASO's headquarters in Valletta, Malta. A separate meeting of the coordinators of the working group took place in August.

Comments on a discussion draft were received from members of the EASO network of courts and tribunals, namely Judges Jacek Chlebny (Poland), Ildiko Figula (Hungary), Concepción Mónica Montero Elena (Spain) and Bostjan Zalar (Slovenia – President of IARMJ-Europe). Comments were also received from members of the EASO Consultative Forum, namely the European Council on Refugees and Exiles (ECRE), the Dutch Council for Refugees, the Red Cross EU Office and Accem. In accordance with the EASO founding regulation, the UNHCR was invited to express comments on the draft judicial analysis, and duly did so.

Comments on the draft were further received from Judge Lars Bay Larsen of the Court of Justice of the European Union, in his personal capacity.

This judicial analysis will be updated in accordance with the methodology set out in Appendix C.

Preface

This judicial analysis aims to put at the disposal of members of courts and tribunals a practical tool for understanding the provisions of the **Reception Conditions Directive (recast) 2013/33/EU**, which aims to achieve convergence across EU Member States by laying down common standards for the reception of applicants for international protection.

The judicial analysis is primarily intended for members of courts and tribunals of EU Member States concerned with hearing appeals or reviewing decisions on issues pertaining to the reception of applicants for international protection. It is assumed that the reader will be familiar with international protection law as implemented within the Common European Asylum System and with national law and practices relating to the reception of applicants for international protection in the Member State in which they have jurisdiction. This tool, however, is intended to be of use to both those with little or no prior experience of adjudication in this field and those who are experienced or specialist judges in the field.

The judicial analysis is supported by an appendix listing relevant provisions and by a decision tree intended as a quick reference guide to the issues involved when dealing with reception. It is also supported by a compilation of Court of Justice of the European Union and European Court of Human Rights jurisprudence, along with national jurisprudence where relevant. This is referred to in the body of the analysis. This compilation of jurisprudence is not intended to be, and indeed cannot be, exhaustive, and the reader is always encouraged to search for the most up-to-date and relevant material when encountering reception cases.

The field of reception of applicants for international protection is a rapidly evolving area of law, and it is intended that this analysis, as with all of the judicial analyses in the EASO series, will be updated regularly.

Contents

List of abbreviations

AIDA	Asylum Information Database
APD	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ('Asylum Procedures Directive')
APD (recast)	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)
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CRC	United Nations Convention on the Rights of the Child
Dublin II Regulation	Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national
Dublin III Regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
EASO	European Asylum Support Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EJTN	European Judicial Training Network
ELENA	European Legal Network on Asylum
EU Charter	Charter of Fundamental Rights of the European Union
FRA	European Union Agency for Fundamental Rights
IARMJ	International Association of Refugee and Migration Judges
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGO	non-governmental organisation

QD	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ('Qualification Directive')
QD (recast)	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)
RCD	Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers ('Reception Conditions Directive')
RCD (recast)	Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)
Refugee Convention	Convention relating to the Status of Refugees (1951), as amended by its Protocol (1967)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

1. Introduction

1.1. The adoption of the RCD (recast)

As announced in the **policy plan on asylum** ([2]), on 9 December 2008 the European Commission presented a proposal amending Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereinafter 'the original RCD') ([3]).

The proposal was prepared on the basis of an evaluation report on the application of the directive ([4]), which identified a number of deficiencies in Member State law and policy. The original RCD did not always guarantee adequate standards of treatment for asylum seekers, notably in relation to (a) access to the labour market, (b) guarantees regarding the level and form of material reception conditions, (c) the needs of vulnerable persons, (d) detention and (e) the scope of application of the directive. Moreover, it was acknowledged that different standards of treatment between vulnerable asylum seekers and vulnerable nationals could lead to discrimination. The lack of harmonised reception conditions could increase secondary movements of asylum seekers, which would in turn impose an unfair strain on national administrations and on asylum seekers themselves.

The great majority of the proposed amendments were adopted by the European Parliament's position of 7 May 2009 ([5]). Afterwards the Commission presented its modified proposal, with the intention of boosting the work towards achieving a genuinely Common European Asylum System (CEAS), **as envisaged in the Tampere European Council Conclusions of 1999**.

The 2008 proposal and the modified one were part of a legislative package in the area of asylum aiming to establish a CEAS by 2012. This legislative package was in line with the **European Pact on Immigration and Asylum** ([6]), adopted on 16 October 2008, which reconfirmed the objectives of **The Hague programme** ([7]) and called on the European Commission to present proposals for establishing, by 2012 at the latest, a single asylum procedure comprising common guarantees. Within the same framework, the **Stockholm programme** ([8]), adopted by the European Council in its meeting of 10 and 11 December 2009, underlined the need to establish 'a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection', based on 'high protection standards' and 'fair and effective procedures', by 2012. It also provided that individuals, regardless of the Member State in which their application for international protection is made, should be offered an equivalent level of reception conditions.

([2]) European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Policy plan on asylum – An integrated approach to protection across the EU, COM(2008) 360, 17 June 2008.
([3]) Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31, 6.2.2003, p. 18).
([4]) European 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 – Summary of the impact assessment, SEC(2008) 2945, 3 December 2008.
([5]) European Parliament, Minimum standards for the reception of asylum seekers (recast) – European Parliament legislative resolution of 7 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (recast) (COM(2008) 815 – C6-0477/2008 – 2008/0244(COD)) (OJ C 212 E, 5.8.2010, p. 348).
([6]) Council of the European Union, 'European Pact on Immigration and Asylum', 24 September 2008.
([7]) The Hague programme, adopted by the European Council in November 2004, called upon the European Commission to conclude the evaluation of the first-phase instruments and to submit the second-phase instruments to the European Parliament and the Council. European Council, 'The Hague programme: strengthening freedom, security and justice in the European Union' (OJ C 53, 3.3.2005, p. 1).
([8]) European Council, 'The Stockholm programme – An open and secure Europe serving and protecting citizens' (OJ C 115, 4.5.2010, p. 1). See also Council of the European Union, 'The Stockholm programme – An open and secure Europe serving the citizen', 2 December 2009.

The **Reception Conditions Directive (recast)** (hereinafter the 'RCD (recast)') ([9]) was adopted in 2013 and entered into force on 19 July 2013, while the deadline for Member States to transpose it into national law was 20 July 2015.

The RCD (recast) refers to The Hague and Stockholm programmes in recitals 4 and 5, as shown below.

Recital 4 RCD (recast)

'The European Council, at its meeting of 4 November 2004, adopted **The Hague Programme**, which set the objectives to be implemented in the area of freedom, security and justice in the period 2005-2010. In this respect, The Hague Programme invited the European Commission to conclude the evaluation of the first-phase instruments and to submit the second-phase instruments and measures to the European Parliament and to the Council.'

Recital 5 RCD (recast)

'The European Council, at its meeting of 10-11 December 2009, adopted the **Stockholm Programme**, which reiterated the commitment to the objective of establishing by 2012 a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection based on high protection standards and fair and effective procedures. The Stockholm Programme further provides that it is crucial that individuals, regardless of the Member State in which their application for international protection is made, are offered an equivalent level of treatment as regards reception conditions.'

1.2. The structure of the RCD (recast)

The RCD (recast) is structured into seven chapters, which can be described as follows.

Table 1: Structure of the RCD (recast)

Chapter I	**Purpose, definitions and scope**	**Articles 1–4**
Chapter II	**General provisions on reception conditions**	**Articles 5–19**
Chapter III	**Reduction or withdrawal of material reception conditions**	**Article 20**
Chapter IV	**Provisions for vulnerable persons**	**Articles 21–25**
Chapter V	**Appeals**	**Article 26**
Chapter VI	**Actions to improve the efficiency of the reception system**	**Articles 27–29**
Chapter VII	**Final provisions**	**Articles 30–34**

([9]) Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (OJ L 180, 29.6.2013, p. 96).

Chapter I includes the purpose and the scope of the RCD (recast), which are defined in Articles 1 and 3 respectively. Article 2 includes the definitions of the core terms of the directive, such as what comprises 'reception conditions'. Article 4 provides that Member States may introduce or retain more favourable provisions in the field of reception conditions for applicants for international protection and their close relatives under specific restrictions.

Chapter II includes the general provisions on reception conditions, such as the obligation to inform applicants of any established benefits, their rights and obligations and the possibility of assistance (Article 5) and the obligation to provide them with documentation (Article 6). Article 7 deals with residence and the freedom of movement of the applicants, while Articles 8 to 11 refer to the detention of applicants. Article 12 refers to the obligation of the maintenance of family unity. Articles 13 to 19 refer to the specific obligations on behalf of the Member States or on behalf of the applicants, and notably the possibility of medical screening (Article 13), access to schooling and education of minor children (Article 14), access to employment (Article 15) and access to vocational training (Article 16). Article 17 provides the general rules on material reception conditions and health care, Article 18 provides the modalities for material reception conditions and Article 19 ensures the right of access to health care.

Chapter III incorporates the provisions of Article 20 relating to the reduction or withdrawal of material reception conditions.

Chapter IV deals with vulnerable persons. Specifically, Article 21 provides the general principles on vulnerability, while Article 22 describes the assessment of the special reception needs of vulnerable persons. Article 23 deals with minors, Article 24 with unaccompanied minors and Article 25 with victims of torture and violence.

Chapter V refers to appeals procedures (Article 26).

Chapter IV provides for the competent authorities (Article 27), the guidance, monitoring and control system (Article 28) and staff and resources (Article 29).

Chapter VII includes provisions regarding reports (Article 30), transposition (Article 31), repeal (Article 32), entry into force (Article 33) and addressees (Article 34).

1.3. The aim of the RCD (recast)

The core difference between the original RCD and the RCD (recast) is that the recast reinforces the harmonisation of reception conditions within the European Union. This aim manifests itself in the legislator's choice to avoid the expression 'minimum standards'. This is made apparent from the wording of Article 1 RCD (recast).

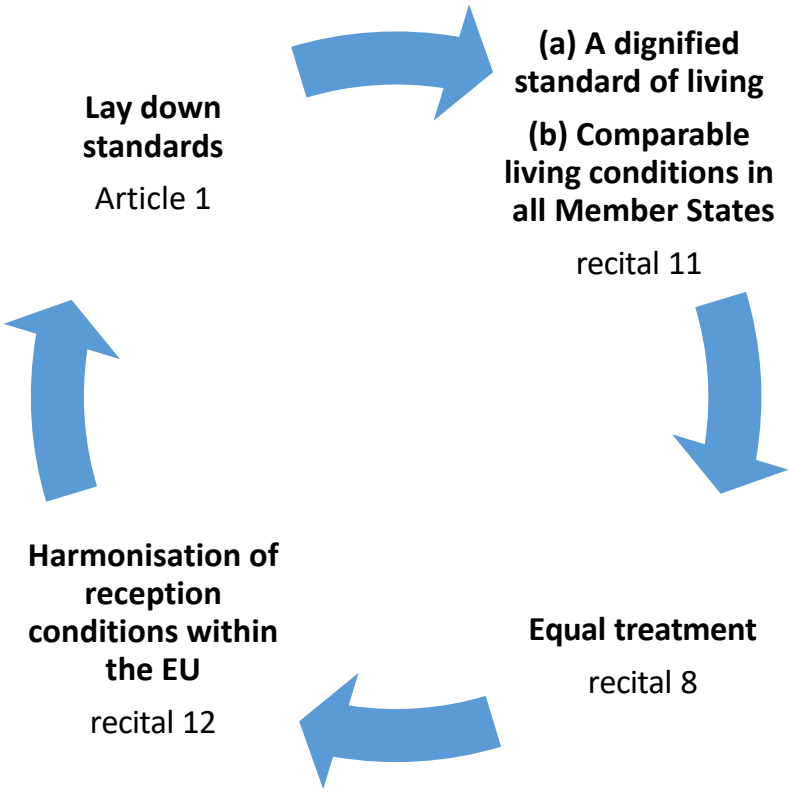
These common standards, as is apparent from recital 11, must suffice to ensure the applicants have (a) a **dignified standard of living** and (b) **comparable living conditions** in all Member States.

By laying down common standards that aim to provide adequate and comparable reception conditions throughout the EU, the RCD (recast) seeks to ensure the equal treatment of applicants, which is stipulated in recital 8. Nevertheless, the Member States maintain the ability to introduce more favourable provisions (Article 4 RCD (recast)).

By ensuring equal treatment for the applicants, the RCD (recast) contributes to achieving a higher degree of **harmonisation** of asylum law within the EU ([10]).

As is apparent from recital 12, the harmonisation of conditions for the reception of applicants should help to limit the **secondary movements** of applicants that could be caused by the variety of conditions for their reception. The term '**secondary movement**' in this context covers, among other things, the phenomenon of third-country nationals who, for various reasons, move from the Member State in which they first arrived, and where they have or could have sought international protection, to other Member States where they may request such protection. Therefore, one of the objectives of the directive is to contribute to a higher degree of harmonisation and improved standards of reception in order to limit secondary movements, which are mainly due to divergent applications across the different Member States of the rules set out by EU law.

Figure 1: The aim of the RCD (recast)



([10]) CJEU, judgment of 7 June 2016, *Mehrdad Ghezelbash* v *Staatssecretaris van Veiligheid en Justitie*, C-63/15, EU:C:2016:409, paragraph 60.

Article 1 RCD (recast)

'The purpose of this Directive is to lay down standards for the reception of applicants for international protection ("applicants") in Member States.'

Recital 11 RCD (recast)

'Standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.'

Recital 8 RCD (recast)

'In order to ensure equal treatment of applicants throughout the Union, this Directive should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain on the territory of the Member States as applicants.'

Recital 12 RCD (recast)

'The harmonisation of conditions for the reception of applicants should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception.'

1.4. Member States bound by the RCD and its recast

The RCD (recast) is binding for **all EU Member States** ([11]) with the exception of Denmark and the United Kingdom.

Denmark does not take part in the adoption of measures based on Article 78 Treaty on the Functioning of the European Union (TFEU) and is therefore not bound by the RCD (recast) as an EU act ([12]).

The **United Kingdom** opted in to the original RCD in 2003 but it did not take part in the adoption of the RCD (recast). The United Kingdom therefore remains bound by the provisions of the original RCD. That said, it should be borne in mind that on 29 March 2017 the United Kingdom notified the European Council, in accordance with Article 50(2) Treaty on European

([11]) Ireland had initially decided not to opt in to the directive but formally opted in July 2018: Ireland, Statutory Instrument, S.I. 230 of 2018, European Communities (Reception Conditions) Regulations 2018.
([12]) Protocol No 22 on the position of Denmark, annexed to the TFEU (OJ C 202, 7.6.2016, p. 298).

Union (TEU), of its intention to withdraw from the European Union ([13]). As the outcome of the negotiations on the United Kingdom's future relationship with the EU is still pending, it is still unclear how its relationship with the CEAS (and specifically in the context of the reception conditions) will be formulated ([14]).

However, it should be noted that the High Court of Ireland referred to the Court of Justice of the European Union (CJEU) for a preliminary ruling regarding, inter alia, Dublin transfers in light of the United Kingdom's withdrawal from the European Union (also known as Brexit) in the context of Article 17 Dublin III Regulation. In essence, the High Court asked whether, in a case where a Member State designated as 'responsible' under the Dublin III Regulation has declared its intention to withdraw from the European Union, Article 17(1) Dublin III obliges the determining Member State to itself examine, under the discretionary clause set out in Article 17(1), the application for protection at issue.

The CJEU, in Case C-661/17, ***M.A. and Others*** ([15]), held that a Member State's notification of its intention to withdraw from the EU pursuant to Article 50 TEU does not have the effect of suspending the application of EU law, which continues to fully apply in that Member State until the date of the actual withdrawal.

1.5. The 2016 European Commission proposal to recast the RCD (recast)

With regard to potential developments in relation to the CEAS that may affect the content of this judicial analysis in the future, it should be noted that on 6 April 2016 the European Commission presented a communication entitled '**Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe**' ([16]). The content of this paper resulted from the findings of the Commission that, notwithstanding the significant progress made in the development of the CEAS, there are still notable differences between the Member States. This is seen both in the reception conditions provided to applicants and in other areas. It was noted that that these divergences contribute to **secondary movements** (sometimes referred to as 'asylum shopping') and ultimately lead to an uneven distribution across the Member States of the responsibility to offer protection to those in need.

On 4 May 2016 the Commission adopted its first package of proposals for CEAS reform, and on 13 July 2016 it put forward the second package.

The package includes, among other things, proposed targeted modifications of the RCD (recast) as a result of the migration crisis of 2015 and 2016 in order to further harmonise reception conditions throughout the EU and to reduce the incentives for secondary movements. The proposal aims to increase applicants' self-reliance and possible integration prospects by reducing the time limit for access to the labour market. It also aims to tackle persistent problems that exist in some Member States with adherence to reception standards and the provision of a dignified standard of living to those applying for international protection.

([13]) European Commission, 'Notification of Article 50 TEU by the United Kingdom', 29 March 2017.
([14]) European Commission, 'Task force for relations with the United Kingdom'.
([15]) CJEU, judgment of 23 January 2019, *M.A. and Others*, C-661/17, EU:C:2019:53, paragraph 54 and first article of the ruling.
([16]) European Commission, Communication from the Commission to the European Parliament and the Council – Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, COM(2016) 197, 6 April 2016.

Therefore, the new proposal **aims** to:

(a) make **the reception conditions more consistent** throughout the European Union;

(b) **reduce the incentives for secondary movements** caused by different standards of reception conditions within the Member States; and

(c) **increase applicants' self-reliance and possible integration prospects** by reducing the time limit for access to the labour market ([17]).

1.6. The interrelation between the RCD (recast) and other sources of law

1.6.1. European sources

With the entry into force of the Lisbon Treaty on 1 January 2009, the Charter of Fundamental Rights of the European Union (hereinafter the 'EU Charter') is regarded as primary EU law and has the same 'legal value as the treaties' ([18]), although its scope in the field of international protection is limited. The EU Charter reinforces the necessity of interpreting EU secondary law in light of fundamental rights.

The RCD (recast) respects fundamental rights and observes the principles recognised in particular by the EU Charter (recital 35), and also stresses the obligation of the Member States to comply fully with the EU Charter (recital 9).

Possible interplay between the EU Charter rights and the provisions of the RCD (recast) might arise regarding the following.

(a) **Detention** (Articles 8–11 RCD (recast)) and the **right to liberty** (Article 6 EU Charter).

(b) The obligation to provide **documentation** to applicants (Article 6 RCD (recast)), **detention** (Article 9 RCD (recast)) or the **assessment of special reception needs** (Article 22 RCD (recast)) and the **right to be heard before any adverse individual measure is taken** as a general principle of EU law.

Regarding the **right to be heard before any adverse individual measure is taken**, the CJEU noted in its judgment of 5 November 2014 in Case C-166/13 ([19]) (hereinafter '***Mukarubega***') that:

> '44. … it is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union ...

([17]) European Commission, Proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465, 13 July 2016, p. 3.
([18]) Article 6(1) Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (OJ C 306, 17.12.2007, p. 1).
([19]) CJEU, judgment of 5 November 2014, *Sophie Mukarubega* v *Préfet de Police et Préfet de la Seine-Saint-Denis*, C-166/13, EU:C:2014:2336, paragraphs 44–46.

> 45. Such a right is however inherent in respect for the rights of the defence, which is a general principle of EU law.
>
> 46. The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely'.

(c) **Detention** (Article 9 RCD (recast)), **appeals** (Article 26 RCD (recast)), **withdrawal of reception conditions** (Article 20 RCD (recast)) and **the right to an effective remedy** (Article 47 EU Charter) ([20]) with its various aspects. These include the right to an effective remedy before a tribunal ([21]) (sentence 1) and the right to a fair and public hearing (sentence 2), including the right to be heard ([22]), and the availability of legal aid (sentence 3) also comes into play.

(d) The **level of material reception conditions** (Article 17 RCD (recast)) and their **withdrawal** (Article 20 RCD (recast)) might also fall within the scope of the **right to dignity** (Article 1 EU Charter) **and freedom from inhuman or degrading treatment** (Article 4 EU Charter) ([23]).

(e) **Minors, unaccompanied minors** (Articles 23 and 24 RCD (recast)) and **the rights of the child** (Article 24 EU Charter).

(f) **Access to employment** and **vocational training** regarding the treatment of the applicants in comparison with that of the nationals and the **principle of non-discrimination** (Article 21 EU Charter).

It should be borne in mind that the CJEU underlined in the joined cases ***N.S., M.E. and Others* v *the UK and Ireland*** that a national court that is called upon to apply provisions of EU law (in this case the EU Charter), is under a duty to give full effect to those provisions ([24]). As the CJEU noted in paragraph 77 of this judgment:

> 'According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28)' ([25]).

([20]) ECRE, *An examination of the Reception Conditions Directive and its recast in light of Article 41 and 47 of the Charter of Fundamental Rights of the European Union*, 2013, p. 16.
([21]) CJEU, judgment of 6 November 2012, *Europese Gemeenschap* v *Otis NV and Others*, C-199/11, EU:C:2012:684, paragraph 49; CJEU, judgment of 19 March 2015, *Földgáz Trade Zrt v Magyar Energetikai és Közmű-szabályozási Hivatal*, C-510/13, EU:C:2015:189.
([22]) CJEU, judgment of 11 December 2014, *Khaled Boudjlida* v *Préfet des Pyrénées-Atlantiques*, C-249/13, EU:C:2014:203, paragraph 45.
([23]) See more in ECRE, *Reception and detention conditions of applicants for international protection in light of the Charter of Fundamental Rights of the EU*, 2015.
([24]) CJEU, judgment of 21 December 2011, *NS, ME and Others* v *the UK and Ireland*, C-411/10 and C-493/10, EU:C:2011:865, paragraphs 119–121.
([25]) CJEU, 2011, *NS*, op. cit., fn. 24, paragraph 77.

It should also be noted that Article 6(3) TEU provides that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the European Union's law ([26]). It does not, however, have the effect of incorporating the provisions of the ECHR into EU law. Article 6(3) codifies the CJEU's case-law that such standards of human rights protection are to be treated by the CJEU as sources of inspiration for EU law relevant to the interpretation of EU legislation.

The ECHR and European Court of Human Rights (ECtHR) case-law constitute important sources of such inspiration. It follows from Article 52(3) EU Charter that the rights contained in the Charter that correspond to the rights guaranteed by the ECHR have the same meaning and scope as those laid down by the ECHR, as interpreted by the case-law of the ECtHR. Article 52(2) EU Charter is intended to ensure consistency between the EU Charter and the ECHR. However, that provision does not preclude the granting of wider protection under EU law.

Examples of possible interplay between the RCD (recast) and the ECHR might arise in the following areas.

(a) **Detention** (Articles 8–11 RCD (recast)) and **reception conditions** (material and non-material) in the RCD (recast) in connection with the **prohibition of torture** as laid out in Article 3 ECHR.

(b) **Detention** (Articles 8–11 RCD (recast)) and **residence and freedom of movement** (Article 7 (RCD (recast) in connection with Article 5 ECHR, **right to liberty and security**, Article 8 ECHR, **right to respect for private and family life**, and Article 2 Protocol 4 ECHR.

(c) **Appeals** (Article 26 RCD (recast)) and Articles 5 and 13 ECHR, **right to an effective remedy**.

The CJEU has outlined, in the case ***J.N.* v *Staatssecretaris voor Veiligheid en Justitie***, that:

> '… it should be recalled that, whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of EU law and whilst Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law ... Thus, an examination of the validity of point (e) of the first subparagraph of Article 8(3) of Directive 2013/33 must be undertaken solely in the light of the fundamental rights guaranteed by the Charter … Furthermore, in accordance with a general principle of interpretation, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter' ([27]).

([26]) CJEU, judgment of 26 February 2013, *Åklagaren* v *Hans Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 44.
([27]) CJEU, judgment of 15 February 2016, *J.N.* v *Staatssecretaris voor Veiligheid en Justitie*, C-601/15 PPU, EU:C:2016:84, paragraphs 45, 46 and 48.

1.6.2. The Refugee Convention, the Protocol Relating to the Status of Refugees and the role of the United Nations High Commissioner for Refugees

Article 78(1) TFEU provides that the common policy on asylum, subsidiary protection and temporary protection must be in accordance with the Refugee Convention and its Protocol of 31 January 1967 ([28]), as well as 'other relevant treaties'. Although it does not expressly address reception conditions, the Refugee Convention may be relevant in the context of the RCD (recast). Important elements of the Convention, including the *non-refoulement* provision (Article 33) and the prohibition on punishment for illegal entry (Article 31), are applicable to refugees before formal recognition of their status. At a minimum, the Refugee Convention provisions that are not linked to lawful stay or residence would apply to asylum seekers in so far as they relate to humane treatment and respect for basic rights ([29]). Articles 20 and 22 relating to rationing and education would appear to be most relevant in this regard ([30]).

The CJEU has repeatedly affirmed that the Refugee Convention is the cornerstone of the legal protection of applicants for international protection.

Recital 3 RCD (recast) refers explicitly to the Refugee Convention and its Protocol and underlines the directive's aim to ensure its full and inclusive application.

Article 35 Refugee Convention also specifies the role of the UNHCR and its supervisory responsibility, which 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 Refugee Convention. Such guidelines are included in the UNHCR's *Handbook on procedures and criteria for determining refugee status and guidelines on international protection* ([31]).

Furthermore, The Hague programme, adopted by the European Council on 4 November 2004, outlines the role of the UNHCR regarding the evaluation of the first phase of CEAS instruments ([32]).

With regard to the RCD (recast), in May 2016 the Commission consulted the UNHCR on its main ideas for the reform as set out in a discussion paper. Further to this, the UNHCR issued annotated comments 'to provide advice to law and policy makers in EU Member States on transposition of provisions in the recast Reception Conditions Directive.' Its focus was specifically on those provisions that were less clear and those that the UNHCR considered problematic from a refugee and human rights law point of view. The comments also addressed issues relating to implementation where the UNHCR anticipated possible problems and gaps arising at the national level ([33]).

Article 18(2)(b) and (c) RCD (recast) explicitly addresses the role of the UNHCR.

([28]) Convention Relating to the Status of Refugees, United Nations, Treaty Series, Vol. 189, 28 July 1951; as amended by the Protocol Relating to the Status of Refugees, United Nations, Treaty Series, Vol. 606, 31 January 1967.
([29]) UNHCR, 'Global Consultations on International Protection/Third Track – Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems', 2001, paragraph 3.
([30]) UNHCR, *Reception Standards for Asylum Seekers in the European Union*, 2000.
([31]) UNHCR, *Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 2019.
([32]) European Council, 'The Hague programme: strengthening freedom, security and justice in the European Union' (OJ C 53, 3.3.2005, p. 1).
([33]) 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)*, 2015, p. 4.

1.6.3. Other norms of international law

The RCD (recast) could be interpreted in light of international legal instruments such as the 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of the same date ([34]). It could also be interpreted in light of the 1989 United Nations Convention on the Rights of the Child (CRC) ([35]), along with the interpretation of these instruments by the relevant committees ([36]).

Rights deriving from the ICCPR, the ICESCR and the CRC apply to all asylum seekers who find themselves in the territory of contracting parties, and also extraterritorially if the conditions for extraterritorial application are fulfilled. All three prohibit discrimination in the exercise of the rights enshrined in the covenants on the grounds, among others, of national origin.

Table 2 outlines the provisions of the abovementioned international legal instruments that may be relevant for the interpretation of the reception conditions as laid down in the RCD (recast).

Table 2: Legal provisions relevant for the interpretation of the RCD (recast)

International Covenant on Civil and Political Rights, 1966	Article 7 – Prohibition on torture or cruel, inhuman and degrading treatment or punishment Article 9 – Right to liberty and security of person Article 12 – Freedom of movement Article 13 – Expulsion from the territory of a state Article 17 – Right to privacy, family and home life Article 23 – Family rights Article 24 – Children's rights Article 26 – Equality before the law
International Covenant on Economic, Social and Cultural Rights, 1966	Article 11 – Right to an adequate standard of living Article 12 – Right to adequate health care Article 13 – Right to education Article 15 – Right to cultural life

([34]) UN General Assembly, International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, Vol. 993, 16 December 1966, p. 3; European Committee of Social Rights, decision of 1 July 2014, *Conference of European Churches (CEC)* v *the Netherlands*, Complaint No 90/2013.
([35]) UN General Assembly, Convention on the Rights of the Child, United Nations, Treaty Series, Vol. 1577, 20 November 1989.
([36]) UN General Assembly, International Covenant on Civil and Political Rights, United Nations, Treaty Series, Vol. 999, 16 December 1966, p. 171; UN treaty bodies such as the Committee on the Rights of the Child and the Human Rights Committee.

Convention on the Rights of the Child, 1989	Article 2 – Non-discrimination Article 3 – Best interests of the child Article 9 – Family unity Article 12 – Views of the child Article 13 – Right to information Article 16 – Right to privacy Article 22 – Rights of asylum-seeking and refugee children Article 23 – Rights of disabled children Article 24 – Right to health care Article 26 – Right to social assistance Articles 28 and 29 – Right to education Article 31 – Right to leisure and rest Article 32 – Protection from economic exploitation Article 37 – Prohibition of torture or other cruel, inhuman and degrading treatment; protection during detention; deprivation of liberty

2. Scope

Article 3 RCD (recast) deals with both the substantive and the territorial scope of the directive.

2.1. Substantive scope

Article 2(b) defines the term 'applicant' as a third-country national or a stateless person 'who **has made an application** for international protection in respect of which a final decision has not yet been taken'.

Article 3 provides that the RCD (recast) shall apply to all third-country nationals and stateless persons who make an application for international protection, during all stages and types of procedures concerning such applications as provided for in recital 8 RCD (recast). This applies for as long as they are allowed to remain on the territory as applicants, and also to family members, if they are covered by such applications for international protection according to national law.

From the combined reading of Article 2(b) and Article 3, it is clear that the obligations of the Member States under the RCD (recast) come into force **as soon as** a person 'makes' an application. In its judgment of 12 November 2019 in Case C-233/18 (hereinafter '***Haqbin***'), the CJEU confirmed this statement when underlining that 'Under Article 17(1) and (2) of Directive 2013/33, Member States must ensure that material reception conditions are available to applicants when they make their application for international protection' ([37]). It is thus clear from this that defining when an application is made is crucial in the context of reception.

The moment at which an application is made is clarified in Article 2(b) Asylum Procedures Directive (recast) (hereinafter 'APD (recast)') ([38]), which provides that:

> '… "application for international protection" or "application" means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection outside the scope of Directive 2011/95/EU, that can be applied for separately'.

Similarly to this, Article 2(h) Qualification Directive (hereinafter 'QD (recast)') ([39]) defines that:

> '… "application for international protection" means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not

([37]) CJEU, judgment of 12 November 2019, *Zubair Haqbin* v *Federaal Agentschap voor de opvang van asielzoekers*, C-233/18, EU:C:2019:956, paragraph 33.
([38]) 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) (OJ L 180, 29.6.2013, p. 60).
([39]) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (OJ L 337, 20.12.2011, p. 9).

> explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately'.

Moreover, recital 27 APD (recast) provides that since third-country nationals and stateless persons who have expressed their wish to apply for international protection are applicants for international protection, they should comply with the obligations, and benefit from the rights, under the APD (recast) and the RCD (recast). To that end, Member States should register the fact that those persons are applicants for international protection as soon as possible.

Therefore, it can be concluded that: 'Making an application for international protection means the **act of expressing, in any way and to any authority, one's wish to obtain international protection**. Anyone who has expressed his/her intention to apply for international protection is considered to be an applicant with all the rights and obligations attached to this status' ([40]).

Another relevant issue in this regard is the obligation of Member States to **effectively enable third-country nationals or stateless persons to make a request** for international protection, as the ECtHR stressed in its judgment of 23 February 2012, ***Hirsi Jamaa and Others* v *Italy*** ([41]). In this case the facts are important: a group of 200 individuals left Libya aboard three vessels with the aim of reaching the Italian coast. The vessels were intercepted by Italian ships and the occupants were transferred on board Italian military ships. During their 'rescue' voyage, which lasted no more than 10 hours, the applicants alleged that Italian authorities did not inform them of their real destination: they were convinced that they were being taken to Italy and claim to have been 'deceived' by Italian authorities. Furthermore, the Italian authorities took no steps to identify them nor gather any information about their personal circumstances during the voyage. Therefore, no formal asylum request could be made. They were returned to Libya after 10 hours at sea.

The ECtHR ruled that:

> '… when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by UNHCR … Furthermore, the Court reaffirms that Italy is not exempt from complying with its obligations under Article 3 of the Convention [ECHR] because the applicants failed to ask for asylum or to describe the risks faced as a result of the lack of an asylum system in Libya. It reiterates that the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees … It follows that the transfer of the applicants to Libya also violated Article 3 of the Convention [ECHR] because it exposed the applicants to the risk of arbitrary repatriation.'

([40]) EASO and European Border and Coast Guard Agency, *Practical Guide: Access to the asylum procedure*, 2016, p. 4.
([41]) ECtHR, judgment of 23 February 2012, *Hirsi Jamaa and Others* v *Italy*, No 27765/09, paragraphs 9–11, 85–87 and 156–158.

Providing the opportunity for applicants to make a request for asylum also involves access to adequate information and interpretation ([42]).

It must also be highlighted that **cases under the Dublin III Regulation** fall within the scope of the RCD (recast). In its judgment of 27 September 2012 in Case C-179/11 (hereinafter '***Cimade and GISTI***'), the CJEU ruled that there is no provision to exclude a person whose claim fails to be considered under the Dublin II Regulation by another Member State from the definition of applicant for international protection ([43]). Furthermore, in ***Cimade and GISTI***, the CJEU found that there is no provision to exclude applicants placed under the Dublin procedure from the minimum conditions for reception of asylum seekers provided for in the original RCD.

It should be noted that subsequent applications also fall within the substantive scope of the RCD (recast), since the directive does not differentiate between the initial application for international protection and any subsequent applications. This is defined in Article 2(c) APD (recast). Therefore, making a request or expressing a wish to apply again for international protection might bring a person once more within the scope of the RCD (recast). The Council of State of the Netherlands ([44]) has pointed out that applicants filing a subsequent application are eligible for material reception conditions from the moment they express the wish to make a subsequent application. For this reason it has annulled the decision taken by the COA (Centraal Orgaan opvang asielzoekers – the Dutch agency for the reception conditions of asylum seekers) that the agency is to provide material reception conditions only once the official application is lodged.

The RCD (recast) also applies to **family members**. Article 2(c) defines those to be considered family members of an applicant for international protection for the purposes of the directive. It provides that family members are considered to be:

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

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

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

The first limitation arises from the fact that the family needs **to have already existed** in the country of origin. The RCD (recast) does not take into account family relationships originating outside the country of origin, which may have been formed while applicants for international protection have lived in another state, during their journey or in the Member State of asylum itself. A literal reading of this could also exclude the children born from these relationships from benefiting from those guarantees. This, however, goes against some of the fundamental

([42]) ECtHR, judgment of 21 October 2014, *Sharifi and Others* v *Italy and Greece,* No 16643/09, paragraph 177; ECtHR, judgment of 11 December 2018, *M.A. and Others* v *Lithuania*, No 59793/17, paragraph 108.

([43]) CJEU, judgment of 27 September 2012, *Cimade and Groupe d'information et de soutien des immigrés (GISTI)* v *Ministre de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration*, C-179/11, EU:C:2012:594, paragraph 40.

([44]) Netherlands, Council of State (Raad van State), judgment of 28 June 2018, NL:RVS:2018:2157.

principles of the RCD (recast), such as maintaining family unity as laid out in Article 12 RCD (recast).

According to Article 2(c) RCD (recast), two conditions apply to **unmarried couples**, in order to be considered family members for the application of the RCD (recast):

(a) their relationship has to be stable; and

(b) the law or practice of the Member State must treat unmarried couples in a comparable way to married couples under its law relating to third-country nationals.

Moreover, **registered partnerships** and **same-sex marriages** are not explicitly mentioned. This leaves it up to Member States to recognise them as 'family members' depending on the law and practices of the individual Member State concerned.

Married minors are excluded from the definition of 'family members' of their parents' family. Still, if they are not accompanied by their spouse they could qualify as 'unaccompanied minors' according to the definition in Article 2(e) RCD (recast). In addition, minor siblings are not recognised as 'family members' within the meaning of the RCD (recast) ([45]).

Nevertheless, Article 4 RCD (recast) enables Member States to:

> '… introduce or retain more favourable provisions in the field of reception conditions for applicants and other close relatives of the applicant who are present in the same Member State when they are dependent on him or her, or for humanitarian reasons, insofar as these provisions are compatible with this Directive.'

Under these conditions, national law may also include: (a) relationships that were formed during or after flight; and (b) persons who, by the definition in Article 2(c) RCD (recast), are not 'family members' of their parents' family, such as married children whose spouse is not present in the Member State and who are otherwise dependent on their parents.

The 2016 Commission proposal to recast, again, the RCD (recast) expands the definition of family members:

> 'The definition of family members is extended by including family relations which were formed after leaving the country of origin but before arrival on the territory of the Member State (Article 2(3)). This reflects the reality of migration today where applicants often stay for long periods of time outside their country of origin before reaching the EU, such as in refugee camps. The extension is expected to reduce the risk of irregular movements or absconding for persons covered by the extended rules' ([46]).

([45]) There was originally a Commission proposal that included these groups of persons in certain constellations in the definition of 'family members'. See European Commission, Amended proposal for a directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (recast), COM(2011) 320, Article 2(c), 1 June 2011.

([46]) European Commission, Proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465, 13 July 2016.

It should also be borne in mind that a person continues to be such an applicant, and therefore continues to fall within the scope of the RCD (recast), until a **final decision** is made, as stated in recital 8 RCD (recast). A final decision is defined in Article 2(e) APD (recast) as:

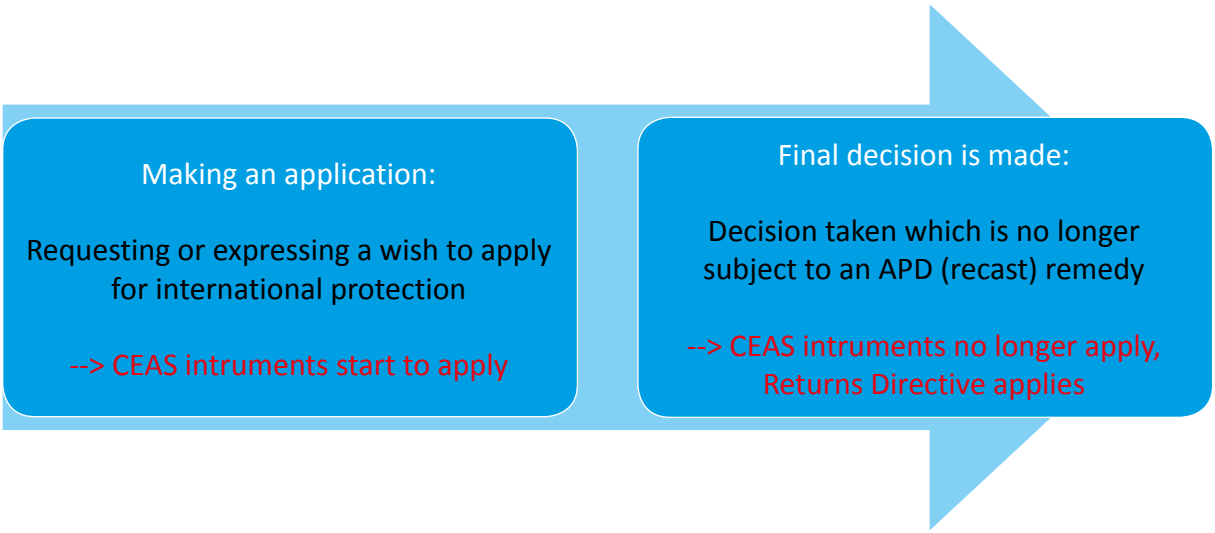
> '… a decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status by virtue of Directive 2011/95/EU and which is no longer subject to a remedy within the framework of Chapter V of this Directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome'.
>
> By contrast, Article 3(1) RCD (recast) states that the scope of this directive is limited to duration for which that the applicants are allowed to remain on the territory as applicants.

The interaction between the RCD (recast) and the Returns Directive ([47]) has been clarified by the CJEU decision in ***Gnandi* v *État Belge***. The Court held that a Member State may take a return decision alongside the rejection of an application for international protection, thus bringing the (former) applicant immediately under the scope of the Returns Directive. However, the Court held that the return procedure, and therefore the application of the Returns Directive, will be suspended during the period prescribed for lodging an appeal against the rejection decision and until the resolution of that appeal. During this period, the person retains the status of an applicant for international protection until the final outcome of the appeal, and 'that applicant is entitled, during that period, to benefit from the rights arising under Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers' ([48]).

In the Netherlands, the District Court of The Hague ruled on 24 January 2018 on a case concerning an asylum seeker whose application for international protection was rejected and who received a return decision accompanied by a 10-year entry ban. He appealed against all three decisions but, pending the outcome of his appeal, he was notified about the withdrawal of reception conditions because Dutch law specifies that such a withdrawal be pronounced after the expiry of the period of voluntary return. The District Court acknowledged that such national provisions were contrary to EU law and therefore not valid. It concluded that while waiting for the outcome of his appeal, the applicant, who had not yet been delivered a final decision within the meaning of Article 2(b) RCD (recast), was eligible to benefit from reception conditions until a decision had been taken on his appeal against the negative decision on both his application for international protection and the return decision. The District Court added that the fact that he could no longer be considered to have 'lawful residence' under Section 8 of the Dutch Alien Act because of the negative asylum decision and the 10-year entry ban was not relevant in these circumstances ([49]). In cases under the **Dublin Regulation procedure**, as follows from the CJEU's judgment in ***Cimade and GISTI*** ([50]), the Member State's obligations under the original RCD only cease when the individual is **actually transferred** to the Member State responsible and therefore no longer has the status of an applicant for international protection in the transferring Member State.

([47]) Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98).
([48]) CJEU, judgment of 19 June 2018, *Sadikou Gnandi* v *État Belge*, C-181/16, EU:C:2018:465, final ruling.
([49]) Netherlands, The Hague District Court (Rechtbank Den Haag), AWB 17/13382, ECLI:NL:RBDHA:2018:655.
([50]) CJEU, 2012, *Cimade and GISTI*, op. cit., fn. 43.

Figure 2: Scope of application of CEAS instruments



2.2. Territorial scope

Article 3 RCD (recast) provides that the 'Directive shall apply to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State'. However, it should be noted that the ECtHR held in the case of ***Hirsi Jamaa*** (see Section 2.1) that the ECHR, unlike the RCD, also applies extraterritorially in so far as the persons concerned are within the jurisdiction of the states parties ([51]).

For further analysis on these terms please refer to EASO, *Asylum procedures and the principle of* non-refoulement – *Judicial analysis*, 2018.

2.3. Situations in which the RCD (recast) does not apply

As stated in Article 3(3) RCD (recast), **the RCD does not apply when the provisions of the Temporary Protection Directive** ([52]) **are applied**. The Temporary Protection Directive makes provision for exceptional measures to be taken in the event of a mass influx. A mass influx means the arrival of a large number of displaced persons who come from a specific country or geographical area, whether their arrival in the EU territory was spontaneous or aided (e.g. through an evacuation programme). The purpose of this directive is to establish minimum standards for giving such temporary protection and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons. This directive has its own provisions about reception conditions. It has never been applied thus far.

Moreover, according to Article 3(2) RCD (recast), the RCD does not apply in cases of requests for **diplomatic or territorial asylum submitted to representations of Member States**. Although the terminology employed in this field lacks uniformity, the term 'diplomatic

([51]) ECtHR, 2012, *Hirsi Jamaa*, op. cit., fn. 41.
([52]) Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212, 7.8.2001, p. 12).

asylum' is generally used to denote protection granted by a state outside its territory, particularly in its diplomatic missions (diplomatic asylum in the strict sense), in its consulates, on board its ships in the territorial waters of another state (naval asylum), on board its aircraft and in its military or paramilitary installations in foreign territory ([53]).

([53]) UN General Assembly, 'Question of Diplomatic Asylum – Report of the Secretary-General', 22 September 1975.

3. Basic principles and definitions

3.1. An adequate and dignified standard of living

Considering the material reception conditions that are laid down in the RCD (recast), it is essential to know the standard the conditions have to meet to comply with this positive obligation.

As noted by the CJEU in the ***Haqbin*** case ([54]):

> 'Member States must ensure that material reception conditions are available to applicants when they make their application for international protection and that the measures adopted for those purposes provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health.'

The 'adequate standard of living' referred to in Article 17(2) RCD (recast) is a reference point for all material reception conditions. It reflects the 'dignified standard of living' (recital 11 RCD (recast)), along with the **fundamental right of human dignity** (Article 1 EU Charter) mentioned in recital 35 RCD (recast). The link between 'adequate' and 'dignified' remains unclear, particularly in light of Article 20(5), whereby the withdrawal of material conditions guaranteeing an 'adequate' standard must ensure that the applicant retains a 'dignified' standard of living.

On the one hand, Article 17(2) RCD (recast) requires an **adequate standard of living** for applicants, which **guarantees their subsistence** and **protects their physical and mental health**. On the other hand, recital 11 RCD (recast) mentions that the standards should suffice to ensure that the applicants have a **dignified standard of living**.

Both are elements of the right to the respect for human dignity. Respect for this core fundamental right is not only enshrined in recital 35 RCD (recast) but is also referred to centrally in decisions on material reception conditions, such as the CJEU decisions in ***Saciri and Others*** and ***Cimade and GISTI*** ([55]).

A 2017 report by the European Union Agency for Fundamental Rights (FRA) concerning the reception facilities of 14 Member States notes that '[t]he question of what constitutes a dignified standard of living and how it should be achieved is up to the discretion of the EU Member States.' As a consequence, the report notes 'significant differences in definitions of national reception standards in terms of their legal nature, level of quality, level of detail regarding these standards and level of fundamental rights compliance outlined' ([56]). The report also shows a strongly divergent regulatory density in the individual Member

([54]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 33.
([55]) CJEU, judgment of 27 February 2014, *Federaal agentschap voor de opvang van asielzoekers* v *Selver Saciri and Others*, C-79/13, EU:C:2014:103, paragraph 35; CJEU, 2012, *Cimade and GISTI*, op. cit., fn. 43, paragraphs 42 and 56.
([56]) FRA, *Current Migration Situation in the EU: Oversight of reception facilities*, September 2017, p. 4.

States ([57]). Given this background, a 'definition' of reception standards that ensures an adequate and dignified standard of living cannot be given.

An understanding of the concept of an 'adequate standard of living' can be found in the definition proposed by the European Commission in 2016, included in the draft of the future reform of the RCD (recast). The proposal suggests defining this term as follows:

> "adequate standard of living": means a quality of life such as to guarantee the health and well-being of the applicant and his or her family, particularly as regards access to the necessary food, clothing, housing, education, health care and social services' ([58]).

Article 11(1) ICESCR also provides useful guidance as it recognises the right of everyone to an adequate standard of living for themselves and for their family, including adequate food, clothing and housing, and to the continuous improvement of living conditions ([59]).

It should also be highlighted that the assessment of this standard must be performed in light of the EU Charter and the ECHR. More specifically, Article 52(3) EU Charter provides that in so far as the EU Charter contains rights that correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR, without preventing states from providing for more extensive protection under the EU Charter.

Table 3: The respective provisions in the ECHR and the EU Charter

Fundamental right	Provision
Human dignity	Article 1 EU Charter
Right to life	Article 2 ECHR
Prohibition of torture and inhuman or degrading treatment or punishment	Article 4 EU Charter Article 3 ECHR
Right to liberty and security	Article 6 EU Charter
Respect for private and family life	Article 7 EU Charter Article 8 ECHR
Non-discrimination	Article 21 EU Charter Article 14 ECHR
Rights of the child	Article 24 EU Charter
Protection of property	Article 1 of Protocol 1 ECHR

([57]) FRA, *Current Migration Situation in the EU: Oversight of reception facilities*, September 2017, p. 2 and p. 7, Table 3: Overview of sources where reception standards are defined.
([58]) Draft European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), Amendment 31, COM(2016) 465 – C8-0323/2016 – 2016/0222(COD).
([59]) UN General Assembly, International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, Vol. 993, 16 December 1966, p. 3.

Adequate living conditions require that they not be in breach of the following articles from the EU Charter, referred to in recital 35 RCD (recast) below.

Recital 35 RCD (recast)

'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly.'

Referring to the original RCD ([60]), the CJEU emphasised the observance of those fundamental rights in the judgment of ***Cimade and GISTI*** ([61]).

The case-law of the CJEU establishes a close connection between Article 4 EU Charter, Article 3 ECHR and the respect for human dignity ([62]). Even so, the RCD (recast) repeatedly refers to 'human dignity' ([63]). Yet Article 1 EU Charter imposes more extensive obligations on the Member States than Article 4 EU Charter, regarding the Member States' positive obligation under the RCD (recast), which, according to recital 35, 'seeks to ensure full respect for human dignity'. From the case-law of the CJEU, however, it becomes clear that, in order to respect their human dignity, applicants must not be deprived of the benefit of the minimum standards laid down in the directive, even for a temporary period of time ([64]).

3.2. The concepts of vulnerability and special reception needs

The first generation of legislative instruments under the CEAS did acknowledge the existence of a specific group of asylum seekers considered to be vulnerable. In this first generation, however, vulnerability was not extensively regulated. The original RCD did not include a definition of vulnerability. It was, however, one of the first generation of EU asylum legal instruments that devoted substantive attention to the situation of vulnerable asylum seekers. It established that 'special treatment must be given' to asylum seekers identified as vulnerable persons with special needs. The original RCD only required Member States to take into account, in national legislation, the specific situation of vulnerable persons, who were non-exhaustively listed ([65]).

Vulnerability was primarily considered from the perspective of the applicant's physical and mental integrity, as the scope of Member States' obligations was limited to those provisions of the directive that concern material reception conditions and health care. Moreover, the personal scope of the obligation to take the special situation of such asylum seekers into account was further limited in the original RCD to those who have been found to have

([60]) Recital 5 original RCD has content similar to recital 35 RCD (recast), although apart from the general reference to the EU Charter and human dignity, only Articles 1 and 18 EU Charter were explicitly mentioned. Recital 35 RCD (recast) is more expansive than recital 5 original RCD.
([61]) CJEU, 2012, *Cimade and GISTI*, op. cit., fn. 43, paragraph 42.
([62]) CJEU, judgment of 19 March 2019, *Abubacarr Jawo* v *Bundesrepublik Deutschland*, C-163/17, EU:C:2019:218, paragraph 78.
([63]) Recitals 11 and 35, for example.
([64]) CJEU, 2014, *Saciri and Others*, op. cit., fn. 55, paragraph 35; with reference to CJEU, 2012, *Cimade and GISTI*, op. cit., fn. 43, paragraph 56.
([65]) The following are mentioned as vulnerable persons: minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

special needs after 'an individual evaluation of their situation' ([66]). Furthermore, there was no consistency in the original RCD, as throughout the text it either referred to applicants' 'vulnerability' or to asylum seekers who have 'special needs'.

The EU's Stockholm programme back in 2010 called for better protection of vulnerable persons. This has been set as a central priority of EU policies by the European Council. Specific reference was made to 'unaccompanied minors' who 'represent a particularly vulnerable group which requires special attention and dedicated responses' especially in the case of minors at risk ([67]). As a result, the second phase of the CEAS instruments, concluded in June 2013, was further adapted to these challenges by adopting specific provisions with regard to applicants with special procedural guarantees and special/specific needs, and by providing strengthened procedural guarantees for vulnerable persons.

The RCD (recast) contains a non-exhaustive definition of vulnerable persons. As is apparent from the wording of Article 21, where the expression 'such as' is used, an indicative list of groups of people who are vulnerable is provided. These are:

- minors;
- unaccompanied minors;
- disabled people;
- elderly people;
- pregnant women;
- single parents with minor children;
- victims of human trafficking;
- persons with serious illnesses;
- persons with mental disorders;
- 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.

The rationale behind the expression '**such as**' is to underline that the list of persons considered to be vulnerable is **non-exhaustive**. This is because vulnerability may arise from many factors such as personal characteristics, health conditions, social status and past experiences. This therefore enables Member States to include other categories ([68]).

Moreover, Article 21 RCD (recast) obliges Member States to take the specific situation of the applicant for international protection into account. In order to allow for the full implementation of this to occur, the Member State is required, in accordance with Article 22 RCD (recast), to assess whether the **applicant has special reception needs**. While Article 21 RCD (recast) non-exhaustively lists groups of vulnerable persons, Article 2(k) RCD (recast) defines a person with special reception needs as a 'vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.'

The combined reading of the above articles confirms that **any person with special reception needs is a fortiori a vulnerable person** for the purposes of the RCD (recast). However, it may happen that a vulnerable person may not have special reception needs.

([66]) Article 17(2), Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31, 6.2.2003, p. 18).
([67]) Council of the European Union, 'The Stockholm programme – An open and secure Europe serving the citizen', 2 December 2009.
([68]) 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)*, 2015, p. 50.

As mentioned above, the list of persons considered to be vulnerable and with special reception needs is non-exhaustive ([69]). In recital 29 APD (recast) there is the notion of persons 'in need of special procedural guarantees', where the specific groups mentioned are not similar to those specified in the original RCD. A strict literal comparative reading of Article 21 RCD (recast) and recital 29 APD (recast) might lead to the erroneous assumption that persons fleeing their country of origin for reasons relating to sexual orientation or gender identity may require special attention in the asylum procedure but do not straightforwardly present vulnerability factors that require special attention as regards their reception conditions. This interpretation should be avoided as both lists are non-exhaustive, and also because the same assessment mechanism can be used to identify special reception and procedural needs under the RCD (recast) and the APD (recast) ([70]).

The **UNHCR** encourages Member States to take advantage of the non-exhaustive nature of the list and to expand upon it when transposing the Directive in their national legislation, so as to include other potentially vulnerable groups such as LGBTI persons and persons with a hearing or visual impairment or applicants who are illiterate, dyslectic or mentally challenged ([71]).

The ECtHR recognised the compounded vulnerability of some asylum seekers. The court recognised that there are individuals among groups of asylum seekers that belong to several vulnerable groups. This was expressly so in the ***Tarakhel*** case, which concerned the proposed return of a family of eight, including six children, to Italy from Switzerland. The ECtHR concluded, with reference to its judgment in Case No 30696/09, ***M.S.S.* v *Belgium and Greece*** (hereinafter '*M.S.S.*') ([72]), that the Swiss authorities were under the obligation to secure individual guarantees for the applicants adapted to their ages. In deciding the case, the ECtHR paid specific attention to the children's 'extreme vulnerability' and specific needs, as defined based on both their age and lack of independence and their status as asylum seekers ([73]).

The RCD (recast) also includes specific provisions for vulnerable persons:

(a) on the **reception and on the material reception** conditions of vulnerable persons and of persons with special needs (Articles 12-19);

(b) on **detention** of vulnerable persons and of applicants with special reception needs (Article 11);

(c) on **minors**, **unaccompanied minors** and **victims of torture and violence** (Articles 23, 24 and 25);

(d) on **withdrawal** or **reduction** of reception conditions from, and sanctions for, vulnerable persons, along with an **effective remedy** in respect of decisions refusing, withdrawing or reducing reception benefits for vulnerable persons (Article 20).

([69]) For a comparison of definitions of vulnerable groups in national practice, see ECRE/(Asylum Information Database), *The Concept of Vulnerability in European Asylum Procedures*, 2017, pp. 15 and 16.
([70]) ECRE/AIDA, *The Concept of Vulnerability in European Asylum Procedures*, 2017, p. 16.
([71]) 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)*, 2015, pp. 50-51.
([72]) ECtHR, judgment of 21 January 2011, *M.S.S.* v *Belgium and Greece*, No 30696/09, ECLI:CE:ECHR:2011:0121JUD003069609.
([73]) ECtHR, judgment of 4 November 2014, *Tarakhel* v *Switzerland*, No 29217/12, paragraph 99.

The concept of vulnerability is of vital importance. The early assessment of vulnerability and the acknowledgment that specific care should be given to vulnerable persons achieves, in practice, de facto equality among applicants for international protection.

The connection between vulnerability and the adequate standard of living has been examined by the CJEU in the ***Haqbin*** case, where the Court stressed that:

> '… in the specific situation of "vulnerable persons" within the meaning of Article 21 of the directive, which include unaccompanied minors... the second subparagraph of Article 17(2) of the directive states that Member States must ensure that such a standard of living is "met"' ([74]).

3.3. Assessing vulnerability

There is a wide range of **indicators of vulnerability**. Both EASO ([75]) and the UNHCR ([76]) have developed indicators to be used as screening tools. Some examples are **age, sex, family status** and **psychosocial indicators**.

Special protective regimes or instruments have been adopted in relation to **women** (e.g. the Convention on the Elimination of All Forms of Discrimination against Women ([77])), **children** (e.g. the CRC ([78])) and **individuals with disabilities** (e.g. the Convention on the Rights of Persons with Disabilities ([79])). Their aim is to address vulnerability by providing special safeguards and measures to enable such groups to enjoy all their human rights to the full.

3.4. Minors and unaccompanied minors

The definition of a **minor** is provided in **Article 2(d)** RCD (recast).

Article 2(d) RCD (recast)

'… a third-country national or stateless person **below the age of 18 years**'.

The definition of an **unaccompanied minor** is provided in **Article 2(e)**.

Article 2(e) RCD (recast)

'… a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such

([74]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 34.
([75]) EASO, 'Tool for identification of persons with special needs', 2016.
([76]) UNHCR and International Detention Coalition, *Vulnerability Screening Tool – Identifying and addressing vulnerability: a tool for asylum and migration systems,* 2016.
([77]) UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979.
([78]) UN General Assembly, Convention on the Rights of the Child, United Nations, Treaty Series, Vol. 1577, 20 November 1989.
([79]) UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106.

a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States'.

The definition is similar to that provided by the UNHCR ([80]). A minor is 'unaccompanied' irrespective of whether they entered the Member State's territory unaccompanied or were left behind by the person responsible for them. A similar definition has been adopted for other relevant EU texts. It is notable that the EU legislation does not provide a distinction between separated children and unaccompanied minors.

3.5. The best interests of the child

The best-interests-of-the-child principle ([81]) is reiterated in **Article 24(2) EU Charter**.

Article 24(2) EU Charter

'In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.'

The CJEU explicitly mentions this principle in its decision of June 2013 in Case C-648/11 (hereinafter '***MA and Others***'), stating that Article 24(2) of the Charter contains an obligation 'whereby in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be a primary consideration' ([82]).

The best interests of the child is a 'general principle' guiding the interpretation of the entire CRC. It is mentioned in several articles of the CRC. The key formulation, however, is found in the first paragraph of **Article 3 CRC**.

Article 3(1) CRC

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

Article 3 CRC can only be fully understood by studying its precise formulation. It refers to executive authorities, legislative and judicial bodies. It applies to all actions by these authorities and by relevant private institutions. Importantly, it also concerns 'children' in the plural. The UN Committee on the Rights of the Child has interpreted this wording to mean that the article is applicable both in individual cases and in relation to groups of children or children in general – which makes it even more relevant in political and policy terms ([83]).

([80]) UNHCR, *Guidelines on policies and procedures in dealing with unaccompanied children seeking asylum*, 1997, p. 1.
([81]) EASO *guidance on reception conditions for unaccompanied children: Operational standards and indicators*, 2018.
([82]) CJEU, judgment of 6 June 2011, *The Queen, on the application of MA and Others* v *Secretary of State for the Home Department,* C-648/11, EU:C:2013:367, paragraph 57.
([83]) UN Committee on the Rights of the Child, '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)', paragraph 32, 29 May 2013.

All the CEAS instruments in both phases pay specific attention to the best interests of the child – which must be taken into account as a primary consideration at all times – and commit Members States to adhere to the principle.

The CJEU had the occasion to highlight the importance of the protection provided to children in its judgment of 27 June 2006 in Case C-540/03, ***European Parliament* v *Council of the European Union*** ([84]). The Court underlined the importance of the CRC, stating that it is 'one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law' ([85]).

This guiding principle is incorporated into the RCD (recast) in **Article 23(1)**.

Article 23(1) RCD (recast)

'The best interests of the child shall be **a primary consideration** for Member States when implementing the provisions of this Directive that involve minors. Member States shall **ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development**.'

Moreover, recital 9 RCD (recast) emphasises that Member States 'should seek to ensure full compliance with the principles of the best interests of the child and of family unity', in accordance with the EU Charter, the CRC and the ECHR, when applying the RCD (recast).

The best interests of the child cannot normally be the only consideration, but should be among the **first aspects** to be considered. The best interests of the child should be given considerable weight in all decisions taken with respect to the reception of minors in national asylum systems. This principle guides the interpretation of the RCD (recast) and its overall implementation.

As to the **meaning of 'best interests'**, neither the RCD (recast) nor other CEAS instruments offer any definite statement of what is in the best interests of an individual child in a given situation. It should be borne in mind, however, that this principle requires that, in all actions concerning children, the best interests of the child be a primary consideration, and that the concept be a rights-based one. Therefore an action cannot be considered to be in the best interests of the child if it runs counter to a relevant right of the child.

One of the goals of the best-interests principle is to ensure a **standard of living adequate for the minor's physical, mental, spiritual, moral** and **social development**.

In ***Saciri and Others*** the CJEU held that the 'amount of those allowances must be sufficient to enable minor children to be housed with their parents, so that the family unity of the asylum seekers may be maintained' ([86]).

([84]) CJEU, judgment of 27 June 2006, *European Parliament* v *Council of the European Union,* C-540/03, EU:C:2006:429.
([85]) CJEU, 2006, *European Parliament* v *Council of the European Union,* op. cit., fn. 84, paragraph 37.
([86]) CJEU, 2014, *Saciri and Others*, op. cit., fn. 55, paragraphs 45–46.

In ***MA and Others*** the CJEU held that Dublin procedures should not be prolonged 'more than is strictly necessary' in the case of unaccompanied minors, whom it considered to constitute 'a category of particularly vulnerable persons' ([87]).

These principles for children under the Dublin procedure have readily been taken into consideration for the recast of the Dublin Regulation. Dublin III states in Article 6(4) that Member States should act swiftly in relation to family reunification. Family reunification is currently the only grounds for transferring minors under the Dublin III Regulation.

The ECtHR has established case-law on the specific needs of asylum-seeking children.

In ***Rahimi*** ([88]), which concerned a minor who had been held in an adult detention centre in Greece, the ECtHR interpreted the applicant's 'extreme' vulnerability, arising from his age and personal circumstances as an unaccompanied minor, as a factor intensifying the harm caused to him through detention. While it acknowledged that the length of the detention was only 2 days, the ECtHR found the personal circumstances of the applicant to be such that the severe shortcomings in the detention conditions in terms of hygiene, accommodation and infrastructure amounted to degrading treatment as defined under Article 3 ECHR. Referring to its earlier case-law, the ECtHR pointed out that the assessment of severity of ill treatment under Article 3 is relative in essence and shall take account of different circumstances, including the context, duration and physiological and mental effects of such treatment, along with, where relevant, the age, gender and state of health of the victim.

In ***Sh.D. and Others* v *Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*** (hereinafter '*Sh.D. and Others*'), the ECtHR emphasised the positive obligations of the state to protect and take care of unaccompanied migrant children under Article 3, as well as under Article 20 CRC, according to which a state must provide alternative care for a child when they are deprived of their family environment. The case concerned five Afghan unaccompanied minors, born between 1999 and 2001, who lived in the Idomeni camp for 1 month in March 2016. The ECtHR recognised that the Idomeni camp was a makeshift camp made by the occupants themselves, where they lived in extreme precariousness and were helped only by non-governmental organisations (NGOs). It noted that there was no element indicating that the prosecutor had been informed by the authorities of the presence of these minors on national soil ([89]).

In ***Mubilanzila Mayeka and Kaniki Mitunga***, a case related to the detention of minors, the ECtHR held that reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not create for them a situation of stress and anxiety, with particularly traumatic consequences ([90]).

ECtHR case-law suggests that a vulnerability assessment is one of the elements to be included in the proportionality analysis that the states have to conduct when making use of their margin of appreciation under the ECHR.

([87]) CJEU, 2013, *MA and Others,* op. cit., fn. 82, paragraph 55.
([88]) ECtHR, judgment of 5 April 2011, *Rahimi* v *Greece*, No 8687/08, ECLI:CE:ECHR:2011:0405JUD000868708.
([89]) ECtHR, judgment of 13 June 2019, *Sh.D. and Others* v *Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, No 14165/16, ECLI:CE:ECHR:2019:0613JUD001416516, paragraphs 48–62.
([90]) ECtHR, judgment of 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga* v *Belgium*, No 13178/03.

3.6. Best-interests assessment: minors and family unity

The RCD (recast) provides a normative framework that defines these interests to some extent as regards the reception conditions of the child.

The requirement for a best-interests assessment for children is incorporated into **Article 23(2)**.

Article 23(2) RCD (recast)

'2. In assessing the best interests of the child, Member States shall **in particular** take due account of the following factors:

(a) family reunification possibilities;

(b) the minor's well-being and social development, taking into particular consideration the minor's background;

(c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;

(d) the views of the minor in accordance with his or her age and maturity.'

Recital 9 RCD (recast) provides as follows.

Recital 9 RCD (recast)

'In applying this Directive, Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity, in accordance with the Charter of Fundamental Rights of the European Union, the 1989 United Nations Convention on the Rights of the Child and the European Convention for the Protection of Human Rights and Fundamental Freedoms respectively.'

As a general principle, Article 12 RCD (recast) requires Member States to:

> '… take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the applicant's agreement'.

Accordingly, recital 22 RCD (recast) emphasises 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.'

The obligation to carry out a best-interests assessment ensures that Member States' practices and treatment of children are in line with their obligations under Article 3(1) CRC and Article 24(2) EU Charter.

The list of factors for assessing the best interests of the child in Article 23(2) is non-exhaustive, and therefore Member States should consider additional factors in their national legislation, or at least in their practice. Some examples of additional factors taken into consideration by general comment No 14 of the Committee on the Rights of the Child are: 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 ([91]).

The right to **family unity** must be a primary consideration, as ruled by the CJEU in ***Saciri and Others*** relating to the original RCD ([92]):

> 'In the context of setting the material reception conditions in the form of financial allowances, pursuant to the second subparagraph of Article 13(2) of Directive 2003/9, the 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 directive. Accordingly, the financial allowances must be sufficient to preserve family unity and the best interests of the child which, pursuant to Article 18(1), are to be a primary consideration.'

The requirement that states parties ensure a minor's right to life, survival and development is enshrined in Article 6 CRC.

Safety and security considerations must be taken into account in every decision involving minors. Among the numerous threats and risks involving children is that of being or becoming a victim of trafficking ([93]).

For the best interests of the child to be determined, it is important that the child himself or herself be heard**.** With increased age and maturity, the child's wishes and views should carry more weight in the decision.

([91]) UN Committee on the Rights of the Child, '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.
([92]) CJEU, 2014, *Saciri and Others*, op. cit., fn. 55, paragraph 41.
([93]) See for instance: United Nations Office on Drugs and Crime, *Global Report on Trafficking in Persons 2018*, 2018.

4. Residence and freedom of movement

4.1. Moving freely within the territory of the host state

Article 7(1) RCD (recast)

'Applicants may move freely within the territory of the host Member State …'

Article 26 Refugee Convention

'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.'

The applicant's right to free movement has its origins in Article 26 Refugee Convention, entitled 'Freedom of movement'. It should be noted here that the Refugee Convention allows for this right regardless of whether an asylum seeker entered the state lawfully or unlawfully. Similarly, Article 12(1) 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 Member State ([94]). Moreover, Article 2(1) Protocol 4 ECHR provides that 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and **freedom to choose his residence**' ([95]).

However, it should be noted that while this right exists explicitly in the Refugee Convention, it cannot be determined, purely from a literal reading of Article 7 RCD (recast), whether asylum seekers must be allowed to move freely within the territory of the Member State nor whether the applicants must be able to choose their place of residence in that territory. The fact that Article 7 RCD (recast) is entitled 'Residence and freedom of movement' is not sufficient to dispel the ambiguities arising from its wording. Firstly, the expression 'freedom of movement' is not always used uniformly in EU law. Certain provisions of EU law explicitly distinguish between the freedom of movement and the freedom to choose the place of residence. Others use the expression 'freedom of movement' in a way that also encompasses the right to choose the place of residence.

However, in contrast to Article 7(1) RCD (recast), Article 7(2) provides that 'Member States may decide on the residence of the applicant', a wording that leads to the assumption that both the right to freedom of movement and the right to choose the place of residence are included in Article 7(1). It has to be noted that the obligation to reside in a specific place, under Article 7(2), does not, however, preclude the applicant from moving freely within the host Member State, unless a specific restriction of freedom of movement under Article 7(1) applies.

([94]) 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)*, 2015, p. 13.
([95]) Article 2(1) Protocol 4 ECHR.

4.2. Assigned area

Article 7(1) RCD (recast)

'Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.'

Similarly, under the Refugee Convention, persons who entered irregularly and reported without delay to the authorities, showing good cause for their entry such as fear of persecution in their own country, can be subject to a restriction of freedom of movement to an 'area assigned to them'.

The wording of Article 7(1) and the use of the word 'applicants' instead of 'the applicant', which is used in other articles of the RCD, could be interpreted as assigning a group of applicants to a specific area.

Article 7(1) does not provide for criteria, but for safeguards, to be taken into account for imposing restrictions on the free movement of applicants for international protection and assigning them to a specific area. This is contrary to Article 7(2), which provides that the host state may make decisions on the residence of applicants for international protection where there are reasons of public interest or public order, or, when necessary, for the swift processing and effective monitoring of their application for international protection ([96]).

Article 7(1) also provides for specific safeguards related to the assigned place, which must 'not affect the unalienable sphere of private life'. Moreover, the assigned place must allow sufficient scope for guaranteeing access to the benefits of the directive, since otherwise it would lead to a violation of fundamental rights. Therefore, this assigned place must not be isolated, in terms of distance and access to transport, since it would prevent the applicants from accessing the benefits of the RCD (recast), for example a child's access to education, attending medical appointments, legal aid or psychosocial support.

4.3. Place of residence

Article 7(2) RCD (recast)

'Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection.'

([96]) Greece, Greek Council of State, judgment of 17 April 2018, No 805/2018, paragraph 18.

The wording of the provision and the use of 'the applicant' instead of 'the applicants' implies an **individualised assessment** of the applicant's circumstances prior to deciding on their residence on the aforementioned grounds.

Moreover, the CJEU has developed, as a general principle, the right of every person **to be heard** before any individual measure that may adversely affect them is taken ([97]) (see Section 9 'Procedural guarantees and the right to appeal'). Since the right to be heard does not impose an obligation to provide for a formal hearing, in order for the right to be applied effectively it suffices that the applicant is given forewarning and the chance to make their views known by submitting written observations. Therefore, it can reasonably be assumed that before adopting a decision on residence, the authorities have the duty to notify the applicant so that they may submit their observations.

Article 7(2) RCD (recast) outlines two grounds for deciding on the applicant's residence: (i) public interest and public order; and (ii) when it is necessary for the swift processing and effective monitoring of the application for international protection.

It has to be noted that Article 7(2) RCD (recast) explicitly imposes a **necessity test** before deciding on the residence of an applicant in the case of a designated residence for the swift processing and effective monitoring of their application. 'Necessary' measures can only be imposed after a case-by-case examination, in line with international human rights law. It is also required that the measure not be arbitrary or disproportionate.

However, the same necessity test is not required where residence is designated 'for **reasons of public interest**, [or] public order.' However, every decision restricting the freedom of movement must be individualised ([98]). Therefore this basis has to be interpreted in view of: (i) Article 31(2) Refugee Convention, which provides that the refugees may not be penalised but their freedom of movement may be restricted 'if necessary'; and (ii) Articles 6, 18 and 52 EU Charter, which provide that restrictions of freedom of movement can be imposed only if they are necessary and genuinely meet objectives of general interest, and therefore a necessity test must be incorporated before invoking the grounds of public interest or public order ([99]).

For a more detailed explanation on the distinction between restriction of freedom of movement and detention, refer to Section 3 of the judicial analysis on detention ([100]).

Articles 27 and 28 **Family Reunification Directive (Directive 2004/38)** ([101]) also deal with restrictions on freedom of movement for reasons of public policy, public security or public health and may, in the absence of effective jurisprudence, be useful to the interpretation of the provisions of the RCD (recast). With regard to residence permits, in joined cases ***K. and H.F.*** the CJEU, referring to a previous decision in Case C-430/10, ***Gaydarov,*** held that proportionality refers to 'determining whether that measure is appropriate to ensure the

([97]) CJEU, judgment of 11 December 2014, *Khaled Boudjlda* v *Préfet des Pyrénées-Atlantiques*, C-249/13, EU:C:2014:2431, paragraph 36; CJEU, 2014, *Mukarubega*, op. cit., fn. 19, paragraph 46.

([98]) Noll, G., 'Article 31 (Refugees unlawfully in the country of refuge), in Zimmermann, A. (ed.), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol – A commentary*, Oxford University Press, 2011, pp. 1243–1276, paragraph 98; ECRE, *Information note on Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 2015.

([99]) To assist with transposition and implementation: 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)*, 2015.

([100]) EASO, *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial analysis*, 2019, p. 22.

([101]) Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158, 30.4.2004, p. 77).

achievement of the objective it pursues and does not go beyond what is necessary to attain it'. The CJEU ruled that:

> '… in accordance with the principle of proportionality, the competent authorities of the host Member State must, in addition, weigh the protection of the fundamental interest of society at issue, on the one hand, against the interests of the person concerned in the exercise of his right to freedom of movement and residence as a Union citizen and in his right to respect for private and family life... Article 28(1) of Directive 2004/38 must be interpreted as meaning that, where the measures envisaged entail the expulsion of the individual concerned from the host Member State, that State must take account of, inter alia, the nature and gravity of the alleged conduct of the individual concerned, the duration and, when appropriate, the legality of his residence in that Member State, the period of time that has elapsed since that conduct, the individual's behaviour during that period, the extent to which he currently poses a danger to society, and the solidity of social, cultural and family links with that Member State' ([102]).

It should also be noted that according to Article 20(1)(a) RCD (recast), material reception conditions can be **reduced 'or, in exceptional and duly justified cases, withdraw[n]'** when an applicant abandons the place of residence determined by the competent authority without informing it or without permission. For further analysis of the relevant provisions on the withdrawal and reduction of material reception conditions, see Section 7 'Reduction and withdrawal of material reception conditions: Article 20 RCD (recast))'.

4.4. Temporary permission to leave

Article 7(4) RCD (recast)

'Member States shall provide for the possibility of granting applicants temporary permission to leave the place of residence mentioned in paragraphs 2 and 3 and/or the assigned area mentioned in paragraph 1. Decisions shall be taken individually, objectively and impartially and reasons shall be given if they are negative.'

A **refusal to allow an applicant to leave the designated place of residence** will have to be justified by the relevant authority. Pursuant to Article 26 RCD (recast), decisions taken under Article 7 that 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.

([102]) CJEU, judgment of 2 May 2018, *K.* v *Staatssecretaris van Veiligheid en Justitie* and *H.F.* v *Belgische Staat*, C-331/16 and C-366/16, EU:C:2018:296.

4.5. Provision of the material reception conditions subject to actual residence

Article 7(3) RCD (recast)

'Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. Such a decision, which may be of a general nature, shall be taken individually and established by national law.'

It should be noted that, under Article 7(3), an individual assessment is explicitly required with regard to the possibility to make the provision of material reception conditions subject to actual residence in a specific place. Decisions under this provision should provide the applicant with the possibility to state their observations. An example of the practical implications of this provision could be the placement of a person with a particular health condition close to health facilities where treatment is more readily available.

5. Non-material reception conditions

5.1. Legal provisions, terms and scope

Recital 11 RCD (recast)

'Standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.'

According to Article 2(g) RCD (recast), **material reception conditions** 'means the reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance'. Therefore, although not specifically defined in Article 2 RCD (recast), reception conditions enumerated in the RCD (recast) falling outside this explicit 'material' definition can be classified as **non-material reception conditions**. These additional conditions allow for the 'dignified standard of living' as stated in recital 11 RCD (recast) and give effect to the right to dignity protected by Article 1 EU Charter. Within the directive, a number of rights and entitlements that can be classified as non-material reception conditions are included: **education, health care, vocational training** and **access to the labour market**.

In particular, within the concept of non-material reception conditions, a number of provisions pertain directly to vulnerable persons. As already mentioned, Member States are obliged, under Article 21 RCD (recast), to take the specific situation of the applicant for international protection into account. For this to happen, the Member State must assess whether such an applicant has special reception needs. It is envisaged that such special reception needs will likely fall into the non-material reception conditions category – particularly the education of minors and access to health care.

Table 4: Non-material reception conditions and their respective provisions in the RCD (recast)

Non-material reception condition	Provision in the RCD (recast)
Schooling and education of minors	Article 14
Employment	Article 15
Vocational training	Article 16
Health care	Article 17 and 19

5.2. Education and schooling

5.2.1. Introduction: the right to education for minors

The right to education for minors is protected under several international human rights instruments. Article 28(1)(a) CRC specifically makes the right to primary education free and

available for all. Furthermore, Article 22(1) CRC refers specifically to children seeking refugee status. It demands that states parties make all rights available to nationals under the CRC and other international instruments available to children seeking refugee status.

The right to education is also contained in Article 2 Protocol 1 ECHR. According to the ECtHR, this right 'guarantees access to elementary education which is of primordial importance for a child's development' ([103]). In addition, Article 14 ECHR prohibits discrimination on the basis of national origin.

5.2.2. The right to education in the RCD (recast)

Article 14 RCD (recast)

'Schooling and education of minors

1. Member States shall grant to **minor children** of applicants and to applicants who are minors **access to the education system under similar conditions as their own nationals** for so long as an expulsion measure against them or their parents is not actually enforced. Such education may be provided in accommodation centres.

The Member State concerned may stipulate that such access must be confined to the State education system.

Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority.

2. Access to the education system shall not be postponed for more than three months from the date on which the application for international protection was lodged by or on behalf of the minor.

Preparatory classes, including language classes, shall be provided to minors where it is necessary to facilitate their access to and participation in the education system as set out in paragraph 1.

3. Where access to the education system as set out in paragraph 1 is not possible due to the specific situation of the minor, the Member State concerned shall offer other education arrangements in accordance with its national law and practice.'

It is clear from a reading of Article 14 RCD (recast), and indeed Article 14 EU Charter, that this right of access to education is not limited to primary education as with other international human rights instruments.

Once a minor in the asylum procedure reaches the age of majority, the right to education shall not be taken away. A literal reading of Article 14 RCD (recast) would tend to preclude adults, i.e. anyone over the age of 18, from accessing the education system. No provision

([103]) ECtHR, judgment of 13 December 2005, *Timishev* v *Russia*, Nos 55762/00 and 55974/00, CE:ECHR:2005:1213JUD005576200, paragraph 64.

is made in the RCD (recast) for the education of adults who are illiterate or those with learning disabilities.

Article 14(1) RCD (recast) also provides that education can only be discontinued once an expulsion order has been enforced against the minors concerned or their parents. It therefore stands to reason that even if an expulsion order has been issued, education must continue until the minor has been removed from the territory of the Member State.

Article 14(2) RCD (recast) also includes a binding time limit on the provision of access to the education system. Member States shall provide such access within 3 months from the date on which the application for international protection was lodged. In addition, Article 14(1) RCD (recast) provides that 'access to the education system' can also mean that education of minors in the asylum procedure can take place in the reception centres (under similar conditions, e.g. with the same curriculum) rather than within the regular national school system.

Article 14(2) RCD (recast) obliges Member States to provide preparatory classes, including language classes, to enable access to the education system for minors where such preparations are required. Sometimes the special or specific situation of the underage applicant for international protection excludes the possibility to participate in the usual education system (for example in the case of physical disability). In such cases, Article 14(3) RCD (recast) obliges Member States to 'offer other education arrangements in accordance with [their] national law and practice'. In a detention case, the ECtHR has held that the circumstances in which a 5-year-old child was detained, which included a delay of 2 months in accessing counselling or schooling, was in violation of Article 3 ECHR ([104]).

Within the RCD (recast) there is no recognisable right, for those in the asylum procedure, of access to tertiary or higher education beyond secondary-level education. This is separate from vocational education, which is discussed below.

5.3. Employment and access to the labour market

5.3.1. General principles of access to the labour market

Article 15 RCD (recast)

'Employment

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

([104]) ECtHR, judgment of 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga* v *Belgium*, No 13178/03.

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

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

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

For states parties to the Refugee Convention, the relevant obligations are contained in Articles 17, 18 and 19, read together with Article 3 (non-discrimination). To comply with Refugee Convention obligations, no distinction can be made between applicants for international protection who are lawfully staying and other lawfully staying individuals ([105]).

5.3.1.1. Access to the labour market no later than 9 months after the application for international protection is lodged

Applicants should have effective access to the labour market no later than 9 months from the date the application for international protection was lodged. This provision applies as long as no first instance decision has been taken by the competent authority and as long as the applicant is not responsible for the delay.

According to Article 15(3) RCD (recast), even when the request for international protection has received a negative first instance decision, the applicant's access to the labour market remains open as long as the appeal is in progress, provided that they have the right to remain and that the appeal has a suspensive effect.

The access to the labour market has to be effective for the applicant; the concrete form and structure can be chosen in accordance with the existing national law. A special or exact legal requirement is not provided ([106]). If conditions effectively hinder an applicant from seeking employment, the access may not be considered effective.

5.3.1.2. Less favourable treatment: Article 15(2) RCD (recast)

Article 15(2) RCD (recast) provides that Member States can, for reasons of 'labour market policies', 'give priority to Union citizens and nationals of States parties to the Agreement on the European Economic Area, and to legally resident third-country nationals.' The second sentence of this provision is not presented as an exception to the first sentence, but rather as an independent measure.

([105]) 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)*, 2015, p. 39.
([106]) Article 15(2), subparagraph 2 RCD (recast).

Applicants cannot be deprived by law of effective access to the labour market, but in practice one applicant might be excluded from one specific job because the Member State gives priority to a national or EU citizen or legally resident third-country national. The RCD (recast) does not provide for the balancing of Member States' labour market interests, and therefore it is for the Member State to give reasons for labour market policies in order to take a measure under Article 15(2) RCD (recast). Other legal substantiations are not mentioned in Article 15(2) RCD (recast) and therefore cannot justify restricted access to the labour market for applicants ([107]).

5.3.1.3. Additional considerations

Article 26 QD (recast) further requires Member States to ensure that activities such as employment-related education for adults and vocational training (including training courses for upgrading skills, practical workplace experience and counselling services that employment offices provide) are offered to beneficiaries of international protection under the same conditions as nationals ([108]).

Article 15 RCD (recast) does not mention anything as to the removal of obstacles to accessing the labour market. In particular, it does not impose obligations on the Member State to provide education where the adult applicant may have a low level of education, including in language skills, or even be illiterate. Nor does the RCD (recast) make reference to the recognition of foreign qualifications that may facilitate the applicants' access to the labour market.

5.3.2. Vocational training

Article 16 RCD (recast)

'**Vocational training**

Member States may allow applicants access to vocational training irrespective of whether they have access to the labour market.

Access to vocational training relating to an employment contract shall depend on the extent to which the applicant has access to the labour market in accordance with Article 15.'

In contrast to Articles 14 and 15 RCD (recast), the legal regulation of 'vocational training' in Article 16 RCD (recast) is not an obligation on Member States.

Article 16 RCD (recast) enables Member States to limit equal treatment concerning vocational training to training directly linked to a specific employment activity. Access to vocational training relating to an employment contract shall depend on whether the

([107]) Poland, Voivodeship Administrative Court in Warsaw (Sąd Administracyjny), judgment of 7 October 2016, I SA/Wa 1197/16.
([108]) FRA, *Current Migration Situation in the EU: Education*, May 2017.

applicant for international protection has access to the labour market in accordance with Article 15 RCD (recast).

5.4. Health care

Article 13 RCD (recast)

'**Medical screening**

Member States may require medical screening for applicants on public health grounds.'

Article 17 RCD (recast)

'**General rules on material reception conditions and health care**

…

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

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

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

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

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

Article 19 RCD (recast)

‘**Health care**

1. Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders.

2. Member States shall provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.’

Articles 17 and 19 RCD (recast) oblige Member States to grant applicants for international protection free access to medical care. The absolute minimum standard has to be the access to necessary health care – at least emergency care and essential treatment of illnesses and serious mental health conditions ([109]).

5.4.1. Scope of medical screening

Medical screening, referred to in Article 13 RCD (recast), is an issue related to health care, but not a reception condition per se. The goal of ‘medical screening’ may be to detect infectious deceases such as tuberculosis, hepatitis, etc., to identify specific needs or even to set up a quarantine. Member States are free to decide on the type and scope of medical screening they want to implement.

5.4.2. Accessing health care

Access to health care must be unrestricted, and health care facilities must be easily accessible to applicants for international protection. This is especially important in emergency cases. A French tribunal ruled in 2015 that ‘both transport to access necessary health care and the provision of prescribed medication should be free of charge’ ([110]). Article 19 RCD (recast) ensures that the necessary health care is extended to the treatment of mental disorders and that special mention is made of the treatment of applicants who have special reception needs. Member States also have to provide medical advice for applicants for international protection with specific vulnerabilities, especially survivors of trafficking, and for survivors of torture or other forms of psychological and physical violence, including gender-based violence.

5.4.3. Financial contribution to health care

Article 17(3) RCD (recast) provides that Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their

([109]) Article 19 RCD (recast).
([110]) France, Administrative Tribunal of Lille (Tribunal administratif de Lille), judgment of 2 November 2015, *Association Médecins du Monde et autres*, No 1508747.

health and to enable their subsistence. Article 17(4) RCD (recast) further provides that Member States may require applicants to cover or contribute to the cost of the health care provided for in the directive. The provision mentions that if it 'transpires', or is brought to the knowledge of the authorities, that an applicant for international protection has sufficient means to cover the costs of health care, then they may ask for a refund.

As discussed in more detail in Section 7 'Reduction and withdrawal of material reception conditions: Article 20 RCD (recast)', the CJEU has yet to rule on the provisions in Article 17 as they pertain to contributions. In the case of material reception conditions, the CJEU's judgment in ***Saciri and Others*** may be informative. However, the manner in which the provision of money/vouchers for material reception conditions relates to health care is unclear. The Member State would require a means test, including a proportionality test, to establish the amount that an applicant for international protection would have to contribute to their health care costs.

6. Material reception conditions: Article 2(g) RCD (recast)

Adequate reception conditions are a precondition for the effective presentation of an application for international protection and should be provided as soon as an applicant shows their intent to apply for international protection ([111]).

6.1. Legal provisions, term and scope

'Material reception conditions' refers to conditions that include those laid out in Article 2(g) RCD (recast). They are defined in Article 2(f) and (g) RCD (recast) as meaning the full set of measures that Member States, in accordance with the directive, grant to applicants ([112]).

Article 2(g) RCD (recast)

'… housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance'.

This provision stipulates both the components and the means for granting material reception conditions: housing, food and clothing may be granted in one of the forms mentioned or a combination thereof, while a daily expenses allowance aims to ensure that any other purchases beyond housing, food and clothing can be obtained.

The daily allowance covers miscellaneous items such as sanitary items, medical devices or education materials, and monetary allowances for unspecified purposes, such as 'pocket money'. The 2017 proposal for recasting the RCD (recast) suggests a more extensive definition, including not only housing, food and clothing, but also 'other essential non-food items matching the needs of the applicants in their specific reception conditions, such as sanitary items, medical devices or education material … and a daily expenses allowance' ([113]).

Recital 11 RCD (recast)

Standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.'

([111]) 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)*, 2015, p. 41.
([112]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 32.
([113]) Draft European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (COM(2016) 465 – C8-0323/2016 – 2016/0222(COD)), 10 May 2017, Amendment 30, Article 2 paragraph 1, point 7.

Recital 24 RCD (recast)

'To ensure that the material support provided to applicants complies with the principles set out in this Directive, it is necessary that Member States determine the level of such support on the basis of relevant references. That does not mean that the amount granted should be the same as for nationals. Member States may grant less favourable treatment to applicants than to nationals as specified in this Directive.'

The RCD (recast) provides both mandatory and optional provisions on the granting of material reception conditions.

6.2. Mandatory provisions

Article 17 RCD (recast) sets out the following general mandatory rules on the availability of material reception conditions ([114]).

Article 17 RCD (recast)

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

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

...

5. Where Member States provide material reception conditions in the form of financial allowances or vouchers, the amount thereof shall be determined on the basis of the level(s) established by the Member State concerned either by law or by the practice to ensure adequate standards of living for nationals. ...'

In addition, Article 17 RCD (recast) lays down mandatory provisions for the specific situation of vulnerable persons and the situation of persons in detention ([115]).

Article 17(1) RCD (recast) clarifies the temporal scope specifically regarding material reception conditions as it confirms the need to make material reception conditions available to applicants for international protection as soon as they make their application.

([114]) The provisions in Article 17 RCD (recast), relating specifically to vulnerable persons or providing conditions and those relating to non-material conditions (e.g. health care), are illustrated in the respective sections of this judicial analysis.

([115]) EASO, *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial analysis*, 2019.

6.3. Optional provisions

In addition to the abovementioned mandatory provisions, Article 17 RCD (recast) contains optional provisions regarding conditions for granting material reception conditions (Article 17(3) and (4)) and for granting less favourable treatment to applicants compared with nationals in the case of financial allowances (second sentence of Article 17(5)).

6.4. Positive obligation

The Member States have a positive obligation to ensure that the material reception conditions (housing, food and clothing, and a daily expenses allowance) laid down in the RCD (recast) are provided.

As all EU Member States are contracting states of the ECHR, failure to provide adequate living conditions for an applicant for international protection may also amount to a breach of the obligations under the ECHR.

In ***M.S.S.*** the ECtHR pointed out that:

> '… the obligation to provide accommodation and decent material conditions to impoverished asylum-seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law, namely Council Directive 2003/9/EC laying down minimum standards for the reception of asylum-seekers in the member States ("the Reception Directive") …' ([116]).

Although this judgment concerns the original RCD, it is also applicable to the RCD (recast).

Member States must have due regard to an applicant's vulnerability as an applicant for international protection ([117]). It is the responsibility of the Member States to assume that an applicant for international protection is homeless ([118]) and to find the proper solution. It is not the responsibility of the applicant for international protection to ensure that they are provided with adequate material reception conditions by the authorities. Accordingly, the Member States' authorities should not simply wait for an applicant for international protection to take the initiative to turn to the authorities responsible to provide for their basic needs ([119]).

The obligation for prompt examination of the application for international protection is intended to shorten the period during which the applicant is subject to potentially inadequate reception conditions ([120]).

Therefore, Member States also fail to comply with their positive obligations under the RCD (recast) when the only way to remove an applicant for international protection from

([116]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraph 250.
([117]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraph 263.
([118]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraph 258.
([119]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraph 259.
([120]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraph 262.

a situation of extreme poverty rests on the back of a diligent examination of the asylum claim ([121]).

Member States may also have, based on Article 3 ECHR, a (positive) protection obligation in cases of extreme vulnerability, independently of the applicability of the RCD (recast) and the status of a person. In ***Khan* v *France*** ([122]) the ECtHR recognised the existence of an obligation for Member State authorities to identify unaccompanied minors among the people living in the 'Calais jungle' in a makeshift camp built by the asylum seekers themselves. It also acknowledged the complexity of this task, because there were thousands of people in the 'Calais jungle' at the time, and it was very difficult to identify isolated minors and provide a structure suitable for their situation. Furthermore, these unaccompanied minors were not always willing to move to such a structure, either because it was too far away from the 'jungle' or, as in the case of the applicant, they expressed the wish to go to the United Kingdom and not to stay in France ([123]).

The case of ***Sh.D. and Others*** ([124]) concerned, among other issues, the living conditions in Greece for unaccompanied minors. The five Afghan applicants, born between 1999 and 2001, arrived in Greece in February 2016 and lived for 1 month in the Idomeni camp in March 2016, a makeshift camp built by the migrants themselves for 1 500 persons but occupied by more than 13 000. They were also detained for short periods before arriving in Athens, where they lived in an abandoned hotel in a room with a bed and a bathroom. In July 2016 they applied for asylum at the Asylum Service in Athens and were placed in the Faros specialised shelter for unaccompanied minors. The ECtHR referred to the ***Rahimi*** case and stressed that the government should have promptly taken the required measures to protect these unaccompanied minors, and should have informed a prosecutor of their situation. As a result, they were obliged to live for a long period in the overcrowded Idomeni camp with scarce food, no hygiene and no effective access to medical care ([125]). Given the facts of the case, the ECtHR concluded that this environment was unsuited to their status as minors in terms of security, housing, hygiene and access to food and care. In view of this finding, the ECtHR was not convinced that the authorities had done all that could have reasonably been expected of them to meet the obligation of care and protection of the applicants – the obligation of the respondent state in respect of persons who are particularly vulnerable due to their age ([126]).

Admittedly, as the ECtHR recalled in ***Pančenko* v *Latvia***, the ECHR 'does not guarantee, as such, socio-economic rights, including the right to **charge-free dwelling**, the right to work, the right to free medical assistance, or the right to **claim financial assistance** from a State to maintain a certain level of living' ([127]). However, under certain circumstances, inadequate living conditions may come within the scope of the ECHR, as discussed above, and particularly Articles 3 and 8 ECHR. The RCD (recast) nonetheless covers many socioeconomic rights that the ECHR does not cover explicitly.

The question of the fulfilment of the positive obligation under the RCD (recast) to provide applicants for international protection with material reception conditions, along with the question of inadequacy of material reception conditions amounting to a breach of the

([121]) ECtHR, judgment of 4 February 2016, *Amadou* v *Greece*, No 37991/11, ECLI:CE:ECHR:2016:0204JUD003799111, paragraph 61.
([122]) ECtHR, judgment of 28 February 2019, *Khan* v *France*, No 12267/16, ECLI:CE:ECHR:2019:0228JUD001226716.
([123]) ECtHR, 2019, *Khan*, op. cit., fn. 122, paragraphs 90 and 91.
([124]) ECtHR, 2019, *Sh.D. and Others,* op. cit., fn. 89.
([125]) ECtHR, 2019, *Sh.D. and Others,* op. cit., fn. 89, paragraphs 14, 56 and 57.
([126]) ECtHR, 2019, *Sh.D. and Others,* op. cit., fn. 89, paragraph 61.
([127]) ECtHR, decision of 28 October 1998, *Pančenko* v *Latvia*, No 40772/98, ECLI:CE:ECHR:1999:1028DEC004077298, p. 6.

abovementioned fundamental rights under the EU Charter and the ECHR, arise on two occasions. These are:

(a) when a Member State examines its own material reception conditions; and

(b) within the Dublin procedures when deciding, under Article 3(2) Dublin III Regulation, on whether the examining Member State should be precluded from returning an applicant to the Member State responsible due to inadequate material reception conditions prevailing in the Member State responsible ([128]).

6.5. Basis of information and legal criteria for assessing infringements of material reception conditions

The CJEU's judgment in the case of ***Abubacarr Jawo*** ([129]) does not specifically concern the RCD (recast), but rather the living conditions regarding beneficiaries of international protection. Jawo, a national of The Gambia, applied for international protection in Germany and Italy. The German authorities rejected his application as inadmissible and ordered the applicant's transfer to Italy. In the appeal proceedings, the applicant argued, among other things, that he could not be transferred to Italy due to the systemic deficiencies and living conditions faced by beneficiaries of international protection in Italy.

The judgment gives guidance on the **basis of information** and **legal criteria** that should guide the national court's assessment of the living conditions in a Member State. Furthermore, the judgment addresses the question of living conditions amounting to situations incompatible with Article 4 EU Charter (and, similarly, Article 3 ECHR), a matter closely linked to the respect for human dignity (Article 1 EU Charter) and to the 'adequate standard of living'.

According to the judgment of the CJEU in the case ***CK* v *Slovenia***, this adequate standard of living has to be assessed not only in regard to systemic flaws in the reception system of a Member State but also in relation to the individual situation of the applicant ([130]).

Regarding the **basis of information** needed to assess living conditions, the CJEU held that, where evidence is provided before courts or tribunals by the person concerned to establish the existence of infringements of the EU Charter, they are obliged to:

> '… assess, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, whether there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people' ([131]).

As regards the **legal criteria** that should guide the competent national authorities in carrying out that assessment, in the case of ***Abubacarr Jawo*** the CJEU notes that those deficiencies, 'in order to fall within the scope of Article 4 of the Charter, which corresponds to Article 3 ECHR …, must attain a particularly high level of severity, which depends on all

([128]) See ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraph 367.
([129]) CJEU, 2019, *Jawo*, op. cit., fn. 62.
([130]) CJEU, judgment of 16 February 2017, *C.K. and Others* v *Slovenia*, C-578/16 PPU, EU:C:2017:127, paragraphs 43–44.
([131]) CJEU, 2019, *Jawo*, op. cit., fn. 62, paragraph 90.

the circumstances of the case' ([132]). Here, the CJEU refers to the ECtHR's ***M.S.S.*** judgment, which dealt with the reception conditions / living conditions of an asylum seeker under the original RCD. This referral draws a parallel between the criteria in the assessment of the living conditions of beneficiaries of international protection (case of ***Abubacarr Jawo***) and the reception conditions for applicants for international protection (case of ***M.S.S.***).

The guiding criterion in carrying out this assessment, and coincidentally the threshold for a violation of Article 4 EU Charter, is a 'particularly high level of severity, which depends on all the circumstances of the case' ([133]).

The CJEU also emphasises that 'Article 4 of the Charter … corresponds to Article 3 ECHR', and that 'the meaning and scope are therefore' the same as those laid down by the ECHR.

It should be noted that the CJEU refers to a **particularly high level of severity** that deficiencies must attain in order to fall within the scope of Article 4 EU Charter, while the ECtHR refers to a **minimum severity** of ill treatment in order to violate Article 3 ECHR. Notwithstanding, both approaches lead to the same threshold.

In Spain, the Superior Court of Madrid dealt with the case of an applicant who introduced an asylum request in Spain but then left for Germany. When transferred back to Spain under the Dublin Regulation, he was denied reception conditions by the Spanish authorities, who claimed that he had renounced his right to reception by exiting the country. He was living in a shelter for homeless persons. The Superior Court, in its ruling of 7 December 2018, referred to the ***M.S.S.*** case and found no violation (of Article 15 Spanish Constitution) of his moral and physical integrity, because he could sleep and had access to food distributions at the homeless shelter. However, it concluded that his right to judicial protection (Article 24.1 Spanish Constitution) had been breached because the authorities had denied him access to the reception system even though he was still an applicant for international protection ([134]).

6.6. Assessing the 'level of severity' depending on all circumstances of the case

The ECtHR, in ***M.S.S.***, held that:

> '… to fall within the scope of Article 3 [ECHR] the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim' ([135]).

This has been upheld on other occasions by the court.

A distinction needs to be made between legal standards under the ECHR on the 'minimum level of severity', which protects human dignity in the sense of inhuman or degrading

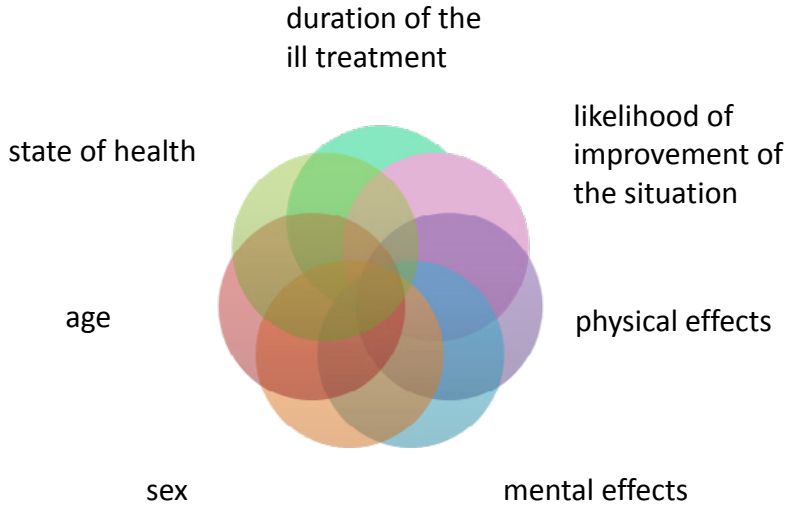
([132]) CJEU, 2019, *Jawo*, op. cit., fn. 62, paragraph 91.
([133]) CJEU, 2019, *Jawo*, op. cit., fn. 62, paragraph 91.
([134]) EDAL, 'Spain – Superior Court of Madrid reinstates access to reception for Dublin returnee, finding a violation of the right to judicial protection', 7 December 2018.
([135]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraph 219.

treatment set out under Article 3 ECHR, and reception standards from the RCD (recast). The applicant has a right to effective legal remedy to protect their rights under Article 3 ECHR (or Article 4 EU Charter), and also to protect their reception rights under the RCD (recast). The level of protection of those rights may be higher than the level protected by Article 3 ECHR.

Another aspect considered when assessing the minimum level of severity is the applicants' prospects of seeing their situation improve. In the ***N.T.P.*** case ([136]), for example, the ECtHR concluded that the applicants were not deprived of all prospects of improvement as one of them had already been summoned by the Prefecture of Côte-d'Or in order to examine her application for a residence permit and also to formally lodge her application for international protection. The ECtHR also examined the applicants' overall situation. The applicants, a Congolese mother and her three children, had been accommodated in an associative shelter financed entirely by state funds, where they could stay overnight and have breakfast and evening meals. Two of the children attended nursery school during the day. Furthermore, all of them received publicly funded medical care and were assisted by NGOs. The ECtHR concluded that they were able to attend to their basic needs and that, under these circumstances, their situation did not reach the level of severity required under Article 3 ECHR.

From the abovementioned examples it can be concluded that the factors that are decisive when assessing 'the minimum level of severity' are as follows.

Figure 3: Decisive factors when assessing 'the minimum level of severity'



Regarding living conditions for beneficiaries of international protection, in the case of ***Abubacarr Jawo*** the CJEU held that **a particularly high level of severity** is attained where:

> '… the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding [herself/] himself, irrespective of [her/] his wishes and personal choices, in a situation of extreme material poverty that does not allow [her/] him to meet [her/]his most basic needs, such as, inter alia, food, personal

([136]) ECtHR, judgment of 24 May 2018, *N.T.P. and Others* v *France*, No 68862/13, ECLI:CE:ECHR:2018:0524JUD006886213, paragraph 48.

> hygiene and a place to live, and that undermines [her/] his physical or mental health or puts [her/] him in a state of degradation incompatible with human dignity' ([137]).

The CJEU refers to the ECtHR's ***M.S.S.*** judgment ([138]) and again draws a parallel with the reception conditions for applicants for international protection.

Simultaneously, in the case of ***Abubacarr Jawo*** the CJEU defines another demarcation criterion for the assessment of a 'particularly high level of severity':

> 'That threshold cannot therefore cover situations characterised even by a high degree of insecurity or a significant degradation of the living conditions of the person concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment' ([139]).

Additionally, the CJEU held that the mere fact that living conditions are more favourable in the requesting Member State than in the Member State normally responsible for examining the application does not necessarily lead to the conclusion that the applicant 'would be exposed, in the event of transfer to the latter Member State, to a real risk of suffering treatment contrary to Article 4 of the [EU] Charter' ([140]). A treatment can be described as 'degrading' within the meaning of Article 3 ECHR if it humiliates or degrades an individual, if it shows a lack of respect for, or diminishes, their dignity or if it arouses feelings of fear, anguish or inferiority that could break their moral and physical resistance ([141]).

It should be noted, however, that the ECtHR does not deal with reception conditions but rather with Article 3 ECHR. Nevertheless, the ECtHR's findings when assessing the violation of Article 3 may set standards for interpreting the dignified standard of living, a term that is crucial within the framework of the RCD (recast). Moreover, in the CJEU cases, several factors have been decisive for assessing adequate reception conditions. These are not only material (e.g. housing and food) but also non-material (e.g. health care) reception conditions, and, within the material reception conditions, are not just an isolated component but rather the interplay of several components. In addition, in some cases, special circumstances such as vulnerability (e.g. of minors) or family unity had to be taken into consideration. The reader should therefore keep in mind that the various aspects presented in the individual subsections are not to be considered in isolation, but are rather to be seen in conjunction with other key factors of the respective case.

([137]) CJEU, 2019, *Jawo*, op. cit., fn. 62, paragraph 92.
([138]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraphs 252–263.
([139]) CJEU, 2019, *Jawo*, op. cit., fn. 62, paragraph 93.
([140]) CJEU, 2019, *Jawo*, op. cit., fn. 62, paragraph 97.
([141]) ECtHR, 2018, *N.T.P. and Others*, op. cit., fn. 136, paragraph 43, unofficial translation of original French: '*Un traitement peut être qualifié de «dégradant» au sens de l'article 3 s'il humilie ou avilit un individu, s'il témoigne d'un manque de respect pour sa dignité, voire la diminue, ou s'il suscite chez lui des sentiments de peur, d'angoisse ou d'infériorité propres à briser sa résistance morale et physique*.

6.7. Housing

6.7.1. Forms of housing

Where Member States provide housing in kind, Article 18(1) RCD (recast) requires that it take one or a combination of the following forms.

Article 18(1) RCD (recast)

'... (a) premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones;

(b) accommodation centres which guarantee an adequate standard of living;

(c) private houses, flats, hotels or other premises adapted for housing applicants.'

The term 'accommodation centre' is defined as follows, according to Article 2(i) RCD (recast).

Article 2(i) RCD (recast)

'... any place used for the collective housing of applicants'.

Where Member States do not provide housing in kind but by any other means (financial allowances or vouchers), there are no provisions in the RCD (recast) concerning the form thereof. Indeed, the CJEU held in the case of ***Saciri and Others*** that when a Member State opts to provide the material reception conditions in the form of financial allowances they must be sufficient to enable applicants to obtain housing, if necessary, on the private rental market ([142]).

6.7.2. General principles regarding housing

6.7.2.1. Where housing is provided exclusively in kind by a Member State

As a general principle, Article 12 RCD (recast) lays down requirements for Member States regarding family unity and housing.

([142]) CJEU, 2014, *Saciri and Others*, op. cit., fn. 55, paragraph 42.

Article 12 RCD (recast)

'Member States shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the applicant's agreement.'

Accordingly, recital 22 RCD (recast) emphasises the following.

Recital 22 RCD (recast)

'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.'

Article 18(2) RCD (recast) stipulates that, without prejudice to any specific conditions of detention as provided for in Articles 10 and 11, in relation to all forms of housing referred to in the abovementioned paragraph 1, namely (a) premises at the border or transit zone, (b) accommodation centres and (c) private houses, flats, hotels or adapted premises, Member States shall ensure the following.

Article 18(2) RCD (recast)

'... (a) applicants are guaranteed protection of their family life;

(b) applicants have the possibility of communicating with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non- governmental organisations and bodies;

(c) family members, legal advisers or counsellors, persons representing UNHCR and relevant non-governmental organisations recognised by the Member State concerned are granted access in order to assist the applicants. Limits on such access may be imposed only on grounds relating to the security of the premises and of the applicants.'

In addition to these general rules applying to all the forms of housing mentioned in Article 18(1) RCD (recast), there are further provisions applying only to the two forms of housing referred to in paragraph 1(a) and (b), respectively named premises and accommodation centres.

Article 18(3) RCD (recast) lays down certain considerations.

Article 18(3) RCD (recast)

'Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b).'

Article 18(4) RCD (recast) provides the following.

Article 18(4) RCD (recast)

'Member States shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres referred to in paragraph 1(a) and (b).'

6.7.2.2. Where housing is not or is not exclusively provided in kind

The wording of Article 18 RCD (recast) confines its provisions to where housing is provided 'in kind'. Thus, the material reception conditions laid down in Article 18 RCD (recast) do not apply to Member States when they have opted to grant housing benefits in the form of financial allowances or vouchers only. Nevertheless, when Member States provide housing with financial allowances or vouchers they must make sure that the amount of these means is sufficient to enable applicants for international protection to find accommodation that meets the standards set by the RCD (recast) ([143]).

6.7.2.3. 'Family unity' and 'family life' regarding housing

The RCD (recast) emphasises 'family' in connection with housing in several instances, for example in terms of 'family unity' or 'protection of family life'.

The question of which persons fall within the scope of housing benefits and should therefore be accommodated together is particularly relevant for the material reception condition of housing. It should be noted that a definition of 'family members' is provided in Article 2(c) RCD (recast), but, as already mentioned, the scope of 'family members' is narrow in this definition. It may preclude an applicant from enjoying the benefit of housing under the RCD (recast) based on the fact that they are not considered to be a family member.

On the other hand, the ECtHR endorses a broader definition of family under Article 8 ECHR. In ***Tarakhel* v *Switzerland*** the court found that there would be a violation of Article 3 ECHR if the Swiss authorities were to send the applicants back to Italy under the Dublin Regulation without having first obtained individual guarantees, from the Italian authorities, that the applicants would be taken charge of in a manner 'adapted to the age of the children and **that the family would be kept together**' ([144]).

([143]) See Article 17 RCD (recast).
([144]) ECtHR, 2014, *Tarakhel*, op. cit., fn. 73, paragraph 122.

Even though married minors, minor siblings and dependent adults are not considered to be 'family members' of their parents' family, attention should be paid to their situation when deciding on housing arrangements as mentioned in recital 22 ([145]).

Article 18(5) RCD (recast) mentions the following.

Article 18(5) RCD (recast)

'Member States shall ensure, as far as possible, that dependent adult applicants with special reception needs are accommodated together with close adult relatives who are already present in the same Member State and who are responsible for them whether by law or by the practice of the Member State concerned.'

Under these aspects, national law concerning housing of applicants for international protection may also include persons who, by definition of Article 2(c) RCD (recast), are not 'family members'.

6.7.2.4. 'Communication' versus 'access'

The scope of Article 18(2)(b) RCD (recast), which defines the persons with whom the applicants must be given the possibility to communicate, is different from the scope of Article 18(2)(c) RCD (recast), which concerns persons granted **access** to assist the applicants.

Table 5: Comparison of the scope of those persons granted either the possibility to communicate with applicants or access to applicants for international protection under Article 18(2)(b) and (c) RCD (recast)

Persons allowed to communicate	Persons allowed access
Relatives	Family members
Legal advisers or counsellors	Legal advisers or counsellors
Persons representing the UNHCR	Persons representing the UNHCR
Other relevant national, international or non-governmental organisations and bodies	Relevant NGOs recognised by the Member State concerned

6.7.3. Housing in the case-law of the European Court of Human Rights and the Court of Justice of the European Union

While under the RCD (recast) there is a right to a physical home for applicants for international protection, under the ECHR there is no such right ([146]). However, in ***M.S.S.*** the ECtHR clarified the obligation for Member States to provide housing when legally bound to do so ([147]).

([145]) Recital 22 RCD (recast): '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.'
([146]) ECtHR, judgment of 18 January 2001, *Chapman* v *The United Kingdom*, No 27238/95, ECLI:CE:ECHR:2001:0118JUD002723895, paragraphs 99 and 100.
([147]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraph 250.

In an extreme situation, such as that of ***M.S.S.***, the ECtHR found the living conditions for an asylum seeker to be so insufficient as to constitute inhuman and degrading treatment in violation of Article 3 ECHR. Given the facts of the case, the ECtHR found that the violation of Article 3 ECHR was due, in particular, to the lack of basic needs such as food, hygiene and a place to live over a period of several months. The latter circumstances specifically relate to the material reception condition of **housing**. The ECtHR considered that:

> '… In the light of the above and in view of the obligations incumbent on the Greek authorities under the Reception Directive … the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention' ([148]).

The ECtHR did not find such a violation in all other cases concerning the question of whether Italy had violated the ECHR as regards the living conditions of applicants for international protection ([149]). Again, as in the case of ***M.S.S.***, a variety of factors of reception conditions played a role, but one of the central aspects in each case was whether the applicants were provided with the material reception condition of housing, along with the quality of such housing.

In the case ***Mohammed Hussein and Others* v *the Netherlands and Italy*** it was decisive that the female applicant was provided with reception facilities for asylum seekers in a reception centre 3 days after having arrived in Italy and 1 day before filing an application for international protection. Additionally, she was allowed to work in Italy soon after ([150]), and was granted subsidiary protection around 5 months after her arrival. Despite the confirmation of some shortcomings in the general situation and living conditions for asylum seekers in Italy, the ECtHR did not 'find it established that the applicant's treatment in Italy … as an asylum seeker … can be regarded as having attained the minimum level of severity required for treatment to fall within the scope of Article 3 [ECHR]' ([151]).

In other cases, the ECtHR reiterated that the Italian reception schemes do not demonstrate a systematic failure to provide housing accommodation for asylum seekers. Although the ECtHR assessed that 'the general situation and living conditions in Italy of asylum seekers is certainly far from ideal and may disclose some shortcomings', it concluded in each case that there was no violation of Article 3 ECHR ([152]).

([148]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraph 263.
([149]) See ECtHR, judgment of 27 August 2013, *Naima Mohammed Hassan* v *the Netherlands and Italy and nine other applications,* No 40524/10, ECLI:CE:ECHR:2013:0827DEC004052410, paragraph 176; see also ECtHR, judgment of 18 June 2013, *Mohammed Abubeker* v *Austria and Italy*, No 73874/11, ECLI:CE:ECHR:2013:0618DEC007387411, paragraph 72.
([150]) Non-material reception condition.
([151]) ECtHR, judgment of 2 April 2013, *Mohammed Hussein and Others* v *the Netherlands and Italy*, No 27725/10, ECLI:CE:ECHR:2013:0402DEC002772510, paragraph 75.
([152]) See ECtHR, 2013, *Naima Mohammed Hassan*, op. cit., fn. 149, paragraph 176; see also ECtHR, 2013, *Mohammed Abubeker*, op. cit., fn. 149, paragraph 72.

Additionally, in the case ***N.T.P. and Others* v *France***, which concerned a Congolese woman and her three young children, accommodation was a crucial criterion, besides food and sanitation, as was receiving publicly funded medical care and assistance from NGOs. Their applications for international protection were not registered after their arrival in France, and as a consequence they were ineligible for any material or financial assistance from the French state. Given that the applicants had been accommodated overnight in an association financed entirely by state funds and that two of the children attended nursery school, the ECtHR held that it could not be said that the French authorities had ignored their most basic needs (food, hygiene and a place to live). Furthermore, the likelihood that the applicants' situation would improve shortly, since they had been able to make an appointment to lodge their application, was decisive. Therefore, the ECtHR found that the applicants' situation did not reach the level of severity required to find a violation under Article 3 ECHR ([153]).

6.7.4. Different modalities

When housing capacities that are normally available are temporarily exhausted, Article 18(9) (b) RCD (recast) provides the possibility of departing exceptionally from the general rules of Article 18 RCD (recast) in duly justified cases. Setting different modalities has to be limited to 'a reasonable period which shall be as short as possible', and is further more based on the premise that the different conditions 'in any event cover basic needs'.

The CJEU emphasises in ***Saciri and Others*** that saturation of the reception system is no justification for any derogation from meeting the standards laid down in the original RCD ([154]).

Furthermore, the CJEU acknowledged, in view of the overcrowded accommodation facilities, that:

> 'Given that the Member States have a certain margin of discretion as regards the methods by which they provide the material reception conditions, they may thus make payment of the financial allowances using the bodies which form part of the general public assistance system as intermediary, provided that those bodies ensure that the minimum standards laid down in that directive as regards the asylum seekers are met' ([155]).

In light of this, the term 'different modalities' is not to be seen as a possibility to grant lower standards of material reception conditions, since the minimum standards of the RCD (recast) must be met. The term 'basic needs' is therefore to be interpreted on the premise of the 'adequate standard of living', which does not allow any downward deviation.

6.8. Food

According to Article 2(g) RCD (recast), Member States can provide applicants for international protection with food in kind or in the form of financial allowances or vouchers.

([153]) ECtHR, 2018, *N.T.P. and Others*, op. cit., fn. 136, paragraphs 6 and 49.
([154]) CJEU, 2014, *Saciri and Others*, op. cit., fn. 55, paragraph 50. See a summary of the case in Section 6.10 'Financial allowance, vouchers and daily expenses allowance'.
([155]) CJEU, 2014, *Saciri and Others*, op. cit., fn. 55, paragraph 49.

Food is one of the 'basic needs' the ECtHR mentioned in the case of ***N.T.P. and Others* v *France*** ([156]). Given the fact that the applicants had been accommodated, including the provision of a warm evening meal and breakfast, and received medical care and assistance by NGOs, the ECtHR found that the applicants' situation did not reach the level of severity required to find a violation of Article 3 ECHR ([157]).

6.9. Clothing

According to Article 2(g) RCD (recast), Member States can provide applicants for international protection with clothing in kind or in the form of financial allowances or vouchers.

6.10. Financial allowance, vouchers and daily expenses allowance

Article 2(g) RCD (recast) introduces the concepts of 'financial allowances', 'vouchers' and a 'daily expenses allowance' as means to provide reception conditions.

The terms 'financial allowances' and 'vouchers' clearly refer to financing food, housing and clothing (whenever not provided in kind), and are both forms of providing the aforementioned material reception conditions.

As a distinction, a 'daily expenses allowance' covers the basic needs of applicants for international protection that go beyond housing, food and clothing and aims to ensure their subsistence. The publication *EASO Guidance on Reception Conditions: Operational standards and indicators* explains the term 'daily expenses allowance' as follows:

> '... the term "daily expenses allowance" refers to any other allowance provided to applicants for international protection, including allowances for specific purposes other than housing, food and clothing or other non-food items when they are not provided in kind as well as monetary allowances for an unspecified purpose (at the free disposal of the applicant, also referred to as "pocket money")' ([158]).

Table 6: Types of reception needs and means for their provision ([159])

Type of reception needs	Reference in the RCD	Means for provision of reception conditions
Food, housing, clothing	Article 2(g)	**Financial allowance**
		In kind
		Vouchers
Other essential needs (e.g. hygiene products, school items, wheel chair, etc.)	Not explicitly mentioned by RCD	**Daily expenses allowance**
		In kind
		Vouchers
Items of personal choice	Article (2(g)	**Daily expenses allowance**

([156]) ECtHR, 2018, *N.T.P. and Others*, op. cit., fn. 136, paragraph 47.
([157]) ECtHR, 2018, *N.T.P. and Others*, op. cit., fn. 136, paragraphs 6 and 49.
([158]) EASO, *EASO Guidance on Reception Conditions: Operational standards and indicators,* 2016, p. 12.
([159]) Table taken from EASO, *EASO Guidance on Reception Conditions: Operational standards and indicators*, 2016, p. 12.

According to the EASO guidance:

> '… the concept of "daily expenses allowance" should be understood as having three different purposes, namely:
>
> - to allow applicants to reach a minimum level of physical subsistence, beyond the basic necessities of housing, food or clothing;
> - to ensure a minimum standard of participation of applicants in the socio-cultural life of the Member State they are residing in;
> - to enable applicants to enjoy a certain degree of autonomy' ([160]).

Article 17(5) RCD (recast) indicates how the amount of financial allowances or vouchers is to be defined.

Article 17(5) RCD (recast)

'… the amount thereof shall be determined on the basis of the level(s) established by the Member State concerned either by law or by the practice to ensure adequate standards of living for nationals.'

In the case of ***Saciri and Others***, regarding the original RCD ([161]), the CJEU analysed the amount of the financial allowances that a Member State must grant applicants for international protection when it has opted to provide material reception conditions not in kind but in the form of financial allowances or vouchers.

The CJEU reached the following conclusions. Where a Member State has opted to grant the material reception conditions in the form of financial allowances or vouchers, the CJEU deduced from the 2003 RCD that the financial aid granted must meet the minimum standards set out in Article 13(2) thereof. Thus, the total amount of the financial aid covering the material reception conditions must be 'sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence', regardless of the fact that the respective amount is to be determined by each Member State ([162]).

In the context of setting the material reception conditions in the form of financial allowances, the CJEU pointed out that the Member States are required to adjust the material reception conditions – and thus also the amount of the allowances – to the situations of persons with specific needs ([163]). This leads to three conclusions. Firstly, the allowances must be sufficient to cover those specific needs. In the case of ***Saciri and Others*** the allowances had to be sufficient to preserve family unity and the best interests of the child. Accordingly, the amount of the allowances must be such that they enable minor children to be lodged with their parents ([164]). Secondly, where housing is not provided in kind, those allowances must be 'sufficient to … enabl[e] them to obtain housing, if necessary, on the private rental

([160]) EASO, *EASO Guidance on Reception Conditions: Operational standards and indicators*, 2016, p. 31.
([161]) CJEU, 2014, *Saciri and Others*, op. cit., fn. 55.
([162]) CJEU, 2014, *Saciri and Others*, op. cit., fn. 55. 'Financial aid' is an umbrella term for 'financial allowances and vouchers'.
([163]) See CJEU, 2014, *Saciri and Others*, op. cit., fn. 55, paragraph 41. Here the CJEU refers to Article 17 original RCD, which names vulnerable persons, such as minors and disabled people; cf. the more comprehensive provision of Article 21 RCD (recast).
([164]) CJEU, 2014, *Saciri and Others*, op. cit., fn. 55, paragraph 41.

market' ([165]). Thirdly, the provisions laid down as regards housing provided in kind must not be disregarded when a Member State has opted to grant the material reception conditions **exclusively** in the form of **financial allowances**.

6.11. Less favourable treatment

Where Member States provide material reception conditions in the form of financial allowances or vouchers, the first sentence of Article 17(5) RCD (recast) provides a benchmark for the determination of the amount thereof.

Article 17(5) RCD (recast)

'… the level(s) established by the Member State concerned either by law or by the practice to ensure adequate standards of living for nationals. …'

The second sentence of Article 17(5) RCD (recast), however, provides as follows.

Article 17(5) RCD (recast)

'… Member States may grant less favourable treatment to applicants compared with nationals in this respect, in particular where material support is partially provided in kind or where those level(s), applied for nationals, aim to ensure a standard of living higher than that prescribed for applicants under this Directive.'

Accordingly, recital 24 RCD (recast) emphasises the following.

Recital 24 RCD (recast)

'To ensure that the material support provided to applicants complies with the principles set out in this Directive, it is necessary that Member States determine the level of such support on the basis of relevant references. That does not mean that the amount granted should be the same as for nationals. Member States may grant less favourable treatment to applicants than to nationals as specified in this Directive.'

In the case of ***Abubacarr Jawo***, the CJEU, referring to ***M.S.S.***, compared the living conditions of beneficiaries of international protection and living conditions of nationals with regard to the Italian social system in light of the rights under the EU Charter and the ECHR.

Given the facts of the case, the CJEU held the fact that:

([165]) CJEU, 2014, *Saciri and Others*, op. cit., fn. 55, paragraph 42.

> '… the forms of support in family structures, available to the nationals of the Member State … to deal with the inadequacies of that Member State's social system, are generally lacking for the beneficiaries of international protection ... is not sufficient ground for a finding that an applicant for international protection would … be faced with such a situation of extreme material poverty' ([166]).

6.12. The 'sufficient means' condition to provide material reception conditions and health care

The application of Article 17(3) RCD (recast) should take into account other relevant standards. The preamble of the RCD (recast) further reflects this in recitals 11, 16 and 21, requiring standards for reception of asylum seekers in all cases that suffice 'to ensure them a dignified standard of living and comparable living conditions' ([167]).

In the ***M.S.S.*** case the ECtHR stated that the government, which 'acknowledge [d] that there are fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum-seekers', could not have 'failed to notice or to assume that the applicant was homeless' in Greece. It added that:

> 'it is a well-known fact that at the present time an adult male asylum-seeker has virtually no chance of getting a place in a reception centre and that according to a survey carried out from February to April 2010, all the "Dublin" asylum-seekers questioned by the UNHCR were homeless. Like the applicant, a large number of them [were living] in parks or disused buildings' ([168]).

Furthermore, in ***Amadou* v *Greece*** the ECtHR reaffirmed that the RCD binds EU Member States to a higher standard of protection than Article 3 ECHR. In this case, the applicant applied for international protection in Greece on 22 September 2010 and his request was still pending on 3 December 2013. The ECtHR, in line with the original RCD, observed that the only remedy for this 'temporary inability' to provide accommodation would have been a diligent examination of the application for international protection. The failure to do so exposed the applicant to a degrading situation contrary to Article 3 ([169]).

Article 17(4) RCD (recast) further provides that:

> 'Member States may require applicants to cover or contribute to the cost of the material reception conditions and of the health care provided for in this Directive, pursuant to the provision of paragraph 3, if the applicants have sufficient resources, for example if they have been working for a reasonable period of time.
>
> If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when those basic needs were being covered, Member States may ask the applicant for a refund.'

([166]) CJEU, 2019, *Jawo*, op. cit., fn. 62, paragraph 94.
([167]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraphs 252–263: 'The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and … considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 [ECHR].'
([168]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraph 258.
([169]) ECtHR, 2016, *Amadou*, op. cit., fn. 121.

The CJEU has not yet ruled on the above provisions, and notably on the notion of 'sufficient means' and the circumstances under which it could be applied to refuse to provide all or some of the material reception conditions and health care to an asylum seeker.

However, the ***Saciri and Others*** judgment may inform the understanding of the notion of sufficient means. This is seen in so far as the CJEU ruled that if a Member State chooses to provide material reception conditions to asylum seekers in the form of a financial allowance rather than direct public services, such an allowance must be adequate for the maintenance of the health of the applicants. Their adequate subsistence must be ensured, and it also must enable them to find housing, if necessary on the private rental market ([170]).

([170]) CJEU, 2014, *Saciri and Others*, op. cit., fn. 55.

7. Reduction and withdrawal of material reception conditions: Article 20 RCD (recast)

7.1. Introduction

The objective of this section is firstly to identify the grounds laid down in the RCD (recast) that allow for the reduction or withdrawal of material reception conditions. Secondly, this section sets out to identify the standards required in order for those decisions to be taken.

Article 20 RCD (recast) deals with the reduction or withdrawal of **material** reception conditions. These are defined in Article 2(g) as reception conditions that include housing, food and clothing (provided in kind, as financial allowances or in vouchers, or as a combination thereof) and a daily expenses allowance. As stressed by the CJEU in the ***Haqbin*** case:

> '… the requirement for Member States to ensure that material reception conditions are available to applicants is not absolute. The EU legislature laid down, in Article 20 of Directive 2013/33, which is in Chapter III thereof, both of which are entitled "Reduction or withdrawal of material reception conditions", the circumstances in which those conditions may be reduced or withdrawn' ([171]).

It should also be stressed that the non-material reception conditions such as **health care, education and access to the labour market** cannot be reduced or withdrawn. This is explicitly mentioned concerning health care in Article 20(5): 'Member States shall under all circumstances ensure access to health care in accordance with Article 19.'

Article 20 aims to prevent the abuse of the reception system. Recital 25 RCD (recast) provides that:

> 'The possibility of abuse of the reception system should be restricted by specifying the circumstances in which material reception conditions for applicants may be reduced or withdrawn while at the same time ensuring a dignified standard of living for all applicants.'

It should also be borne in mind that adequate reception conditions are considered to be a precondition to an applicant's ability to duly present an application for international protection ([172]).

Article 20(1), (2) and (3) states the circumstances that allow for the 'reduction or withdrawal' of material reception conditions, while Article 20(4) mentions that Member States may

([171]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 35.
([172]) 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)*, 2015, p. 47.

determine 'sanctions' that apply to serious breaches of the rules of the accommodation centres and seriously violent behaviour. As noted by the CJEU in the ***Haqbin*** case:

> 'Since the concept of "sanction" referred to, in particular, in Article 20(4) of Directive 2013/33 is not defined in the directive and since the nature of the sanctions that may be imposed on an applicant under that provision is not specified, Member States are given some latitude in determining those sanctions' ([173]).

Regarding decisions on the withdrawal or reduction of material benefits, as provided for in a non-mandatory clause in Article 20 RCD (recast), Member States are allowed, under limited conditions, to define to what extent material benefits may be reduced or withdrawn in cases where applicants do not comply with procedural or other rules. Nevertheless, Article 20 sets limits on the autonomy of national authorities with an exhaustive list of the circumstances under which a reduction or withdrawal of material benefits is permitted (Article 20(1) (a) to (c)). In addition, Article 20(5) expressly provides for the use of the principle of proportionality, with consideration for the general obligation to ensure that the dignity of individuals seeking protection is respected (Article 1 CFR), while recital 35 RCD (recast) provides that the directive seeks to ensure full respect for human dignity.

The 2016 Commission proposal to recast the RCD (recast) suggests interesting changes to the current provisions. The proposed Article 19 (correlating with the present Article 20) is entitled 'Replacement, reduction and withdrawal of material reception conditions', and the term 'sanctions' no longer appears in the wording of the article. It provides for the possibility to:

'(a) replace accommodation, food, clothing and other essential non-food items provided in the form of financial allowances and vouchers, with material reception conditions provided in kind; or

(b) reduce or, in exceptional and duly justified cases, withdraw the daily allowances' ([174]) (instead of all material reception conditions).

The situation of an applicant who has seriously breached the rules of the accommodation centre or behaved in an overly violent way is added to the other existing grounds for reduction or withdrawal (together with other new grounds) ([175]).

It is not possible to anticipate a recast RCD being enacted from the current 2016 Commission proposal, as the legislative negotiations are still ongoing, but it is relevant to recognise that two aspects arising from the RCD (recast) will most likely be clarified in the future.

1. As the 2016 proposal limits reduction and withdrawal to just the daily allowances instead of all material reception conditions, it clarifies that accommodation, food, clothing and other essential non-food items may not, in any circumstances, be reduced or withdrawn.

([173]) 2019, *Haqbin*, op. cit., fn. 37, paragraph 41.

([174]) Proposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final, 13 July 2016.

([175]) The new grounds inserted into Article 19 of the roposal for a directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final, 13 July 2016 read as follows: '(e) has seriously breached the rules of the accommodation centre or behaved in a seriously violent way; or (f) fails to attend compulsory integration measures; or (g) has not complied with the obligation set out in Article [4(1)] of Regulation (EU) No XXX/XXX [Dublin Regulation] and has travelled to another Member State without adequate justification and made an application there; or (h) has been sent back after having absconded to another Member State.'

2. The lack of clarity of the present RCD about the definition of 'sanctions' is resolved by making clear that serious breaches of the rules of the accommodation centre and seriously violent behaviour are grounds for replacement, reduction and withdrawal and have the same status as the other grounds.

7.2. Grounds for reduction and withdrawal

7.2.1. Abandonment of place and failure to comply with reporting duties

The first two grounds of Article 20(1) allow Member States to reduce or withdraw material reception conditions in two situations: firstly when the applicant abandons the accommodation facility without informing the authorities, and secondly when an applicant does not comply with reporting duties or requests to provide information or to appear for personal interviews. The reception conditions should be restored promptly upon the return of the applicant or when they voluntarily report to the authorities once again. The RCD (recast) itself provides no definition for 'abandonment', and national practice varies greatly with regard to how long an absence from a reception centre must be in order to constitute abandonment ([176]). This varies from one overnight absence (e.g. in Italy and Slovenia) to 15 days (Hungary) ([177]).

In Italy the Regional Administrative Court of Piedmont ruled, on 31 December 2018, on a case concerning the withdrawal of an applicant's reception conditions on the grounds that this person was absent from the reception facility for two nights and without authorisation. The director invoked repeated violation of the rules of the centre. However, the court, after reviewing medical documents produced by the applicant concerning, among other things, his condition consisting of pulmonary tuberculosis and a depressive state, considered that the prefecture failed to properly evaluate his health condition prior to the revocation of his reception benefits ([178]).

7.2.2. Subsequent application

As reported by the European Migration Network ([179]), some Member States withdraw applicants reception facilities from who, after receiving a negative decision, have lodged a subsequent application, in the period between the receipt of the negative decision and the subsequent application being considered admissible. One of the countries mentioned in the European Migration Network report is the Netherlands, where the policy of excluding applicants from material reception conditions in the period between making and receiving approval of subsequent application was changed after a judgment of the Council of State in 2018 ([180]). The Council of State interpreted Article 20(1)(5) RCD (recast) to mean that decisions to withdraw material reception conditions from subsequent applicants shall only

([176]) ECRE/AIDA, *Withdrawal of Reception Conditions of Asylum Seekers – An appropriate, effective or legal sanction?*, 2018, p. 8.
([177]) ECRE/AIDA, *Withdrawal of Reception Conditions of Asylum Seekers – An appropriate, effective or legal sanction?*, 2018, p. 8.
([178]) Italy, Regional Administrative Court of Piedmont (Il Tribunale Amministrativo Regionale per il Piemonte (Sezione Prima)), Decision No 01383/2018, 31 December 2018.
([179]) European Migration Network, *The organisation of reception facilities for asylum seekers in different Member States*, 2014, p. 8.
([180]) Netherlands, Council of State (Raad van State), judgment of 28 June 2018, NL:RVS:2018:2157.

be taken individually, objectively and impartially, and reasons shall be given. Therefore, excluding applicants for subsequent applications from material reception conditions **on a general basis** is not allowed ([181]).

The UNHCR recommends that material 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. When the claim is considered to be a subsequent application following an explicit withdrawal of the application in line with Article 27 APD (recast), reduction or withdrawal should be possible only if the applicant has been informed of the consequences of the explicit withdrawal ([182]).

7.2.3. Failure to lodge an application for international protection as soon as possible

Article 20(2) provides for the possibility to reduce material reception conditions where the applicant, for no justifiable reason, has not lodged the application for international protection as soon as reasonably practicable after arrival in the Member State. The UNHCR noted that this provision is open to interpretation, and may result in arbitrariness and eventually lead to inadequate living standards ([183]). This may especially be true for applicants suffering from trauma or dyslexia, or those with intellectual disabilities or who are illiterate.

7.2.4. Concealment of financial resources

Article 20(3) provides for the possibility to 'reduce or withdraw material reception conditions where an applicant has concealed financial resources, and has therefore unduly benefited from material reception conditions'. The element of bad faith, where resources are actively 'concealed', might be the core element that differentiates this situation from circumstances where it merely transpires that an applicant had available resources, in which case a Member State is entitled to ask for a refund for costs outlaid, but not to reduce or withdraw existing material reception conditions ([184]). The obligation of the applicants to declare their resources should be clearly stated by the Member State, otherwise 'concealment' cannot be proven.

7.2.5. Serious breach of accommodation centre rules / seriously violent behaviour

As mentioned in the introduction, the wording of Article 20(4) is vague and it is unclear to what extent sanctions can include expulsion from accommodation centres.

([181]) See also Belgium, Liège Labour Court (Cour du travail de Liège), Decision of 14 May 2019, RG No 17/858/A, paragraph 6; Mons Labour Court (Cour du travail de Mons) (Ch.7), Decisions of 2 April 2014, RG Nos 2013/AM/110 and 2013/AM/112, 2013/AM/119 and 2013/AM/114.

([182]) 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)*, 2015, pp. 48–49.

([183]) 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)*, 2015, p. 48.

([184]) 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)*, 2015, p. 5.

The CJEU has clarified this in the ***Haqbin*** case ([185]). The case concerned an applicant of Afghan nationality who arrived in Belgium as an unaccompanied minor and lodged an application for international protection on 23 December 2015. A guardian was appointed for him and he was hosted at various reception centres. In the last centre, on 18 April 2016, he was involved in a brawl between residents of various ethnic origins. The police had to intervene to put an end to the disturbance and arrested Mr Haqbin on the grounds that he was allegedly one of the instigators of the brawl. Mr Haqbin was released the following day. By decision of the director of the reception centre of 19 April 2016, confirmed by decision of the director-general of Fedasil of 21 April 2016, Mr Haqbin was excluded, for a period of 15 days, from material support in a reception facility and spent the nights from 19 to 21 April and from 24 April to 1 May 2016 in a park in Brussels, staying with friends or acquaintances on the other nights. On 25 April 2016 Mr Haqbin's guardian lodged before the Labour Court of Antwerp, Belgium, an application to suspend the exclusion measure. That application was dismissed for lack of extreme urgency, since Mr Haqbin had failed to show that he was homeless. From 4 May 2016 Mr Haqbin was assigned to a different reception centre. Mr Haqbin's guardian brought an action before the Dutch-speaking Labour Court of Brussels, Belgium, seeking the cancellation of the decisions of 19 and 21 April 2016 and compensation for the damage suffered. By judgment of that court on 21 February 2017 the action was dismissed as unfounded. On 27 March 2017 Mr Haqbin's guardian brought an appeal against that judgment before the Higher Labour Court of Brussels, Belgium.

As regards the term 'sanctions' the CJEU stressed that:

> 'In particular, with regard to the question whether a "sanction" within the meaning of Article 20(4) of Directive 2013/33 may relate to "material reception conditions", it is appropriate to note, first, that a measure for reduction or withdrawal of material reception conditions in respect of an applicant on account of serious breaches of the rules of the accommodation centres or seriously violent behaviour constitutes, in the light of the aim and the detrimental consequences thereof for the applicant, a "sanction" in the ordinary meaning of that word and, secondly, that that provision is included in Chapter III of the directive, which is dedicated to the reduction and withdrawal of such conditions' ([186]).

As regards the connection between sanctions and material reception conditions, the CJEU also accepted the relevant Commission submissions that:

> '… inter alia, if Member States can adopt measures concerning those conditions in order to protect themselves against the possibility of abuse of the reception system, **they must also be able to do so in the event of serious breaches of the rules of the accommodation centres or seriously violent behaviour, since they are capable of disrupting public order and the safety of persons and property**' ([187]).

([185]) CJEU, 2019, *Haqbin*, op. cit., fn. 37.
([186]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 43.
([187]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 44.

It also noted that '[i]t follows that **the sanctions envisaged in the directive may, in principle, concern material reception conditions**' ([188]), and that:

> '… the possibility for Member States to reduce or withdraw … material reception conditions is explicitly provided for only in Article 20(1) to (3) of Directive 2013/33, which, as is apparent from recital 25 of the directive, concerns essentially the possibility of abuse, by applicants, of the reception system established by the directive. **However, Article 20(4) of the directive does not explicitly preclude a sanction from concerning material reception conditions**' ([189]).

Furthermore, regarding the content of the sanctions, the Court observed that:

> '… in accordance with Article 20(5) of Directive 2013/33, **any sanction** within the meaning of Article 20(4) thereof must be **objective, impartial, reasoned and proportionate** to the particular situation of the applicant and must, under all circumstances, ensure access to health care and a dignified standard of living for the applicant' ([190]).

The Court, however, **balanced on one hand the requirement of a dignified standard of living and on the other hand the right of the Member States to impose sanctions**. The CJEU stressed that:

> 'With regard specifically to the requirement to ensure a dignified standard of living, it is apparent from recital 35 of Directive 2013/33 that the directive seeks to ensure full respect for human dignity and to promote the application, inter alia, of Article 1 of the Charter of Fundamental Rights and has to be implemented accordingly. In that regard, respect for human dignity within the meaning of that article requires the person concerned not finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity … A sanction that is imposed exclusively on the basis of one of the reasons mentioned in Article 20(4) of Directive 2013/33 and consists in **the withdrawal, even if only a temporary one, of the full set of material reception conditions** or of material reception conditions relating to housing, food or clothing would be irreconcilable with the requirement, arising from the third sentence of Article 20(5) of the directive, to ensure a dignified standard of living for the applicant, since it would preclude the applicant from being allowed to meet his or her most basic needs such as those mentioned in the previous paragraph' ([191]).

The Court further concluded that:

> 'Such a sanction would also amount to a failure to comply with the proportionality requirement under the second sentence of Article 20(5) of Directive 2013/33, in so far as even the most stringent sanctions, whose objective is to punish, in criminal law, the

([188]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 43.
([189]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 44.
([190]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 45.
([191]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraphs 46–47.

> breaches or behaviour referred to in Article 20(4) of the directive, cannot deprive the applicant of the possibility of meeting his or her most basic needs' ([192]).

The Court further highlighted that:

> 'In the case of a sanction based on a reason set out in Article 20(4) of Directive 2013/33 and consisting in the reduction of material reception conditions, **including the withdrawal or reduction of the daily expenses allowance**, it is for the competent authorities to ensure under all circumstances that, in accordance with Article 20(5) of the directive, such a sanction, having regard to the particular situation of the applicant as well as all of the circumstances of that case, complies **with the principle of proportionality and does not undermine the dignity of the applicant**' ([193]).

The Court concluded that:

> '… in the cases envisaged in Article 20(4) of Directive 2013/33, depending on the circumstances of the case and subject to the requirements set out in Article 20(5) of the directive, Member States may impose sanctions **that do not have the effect of depriving the applicant of material reception conditions**, such as being held in a separate part of the accommodation centre as well as being prohibited from contacting certain residents of the centre or being transferred to another accommodation centre or to other housing within the meaning of Article 18(1)(c) of the directive. Similarly, Article 20(4) and (5) of Directive 2013/33 does not preclude a measure to hold the applicant in detention pursuant to Article 8(3)(e) of the directive in so far as the conditions laid down in Articles 8 to 11 thereof are satisfied' ([194]).

Regarding vulnerable persons, the Court stressed that:

> '… it is important to note that, where the applicant … is an unaccompanied minor, that is to say a "vulnerable person" within the meaning of Article 21 of Directive 2013/33, the authorities of the Member States, when imposing sanctions pursuant to Article 20(4) of the directive, must especially take into account, according to the second sentence of Article 20(5) thereof, of [*sic*] the particular situation of the minor and of the principle of proportionality' ([195]).

In relation to the specific vulnerability of the applicant (minor) the Court stressed that:

> '… according to Article 23(1) of Directive 2013/33 the best interests of the child are a primary consideration for Member States when implementing the provisions of the directive that involve minors. Under Article 23(2) of the directive, in assessing those best interests, Member States must in particular take due account of factors such as the minor's well-being and social development, taking into particular consideration the minor's background, such as safety and security considerations. Recital 35 of the directive also underlines that the latter seeks to promote the application, inter alia, of Article 24 of the Charter of Fundamental Rights and has to be implemented

([192]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 48.
([193]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 51.
([194]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 52.
([195]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 53

> accordingly. … In that context, beyond the general considerations set out in paragraphs 47 to 52 above, the minor's situation must, under all circumstances, be taken into particular consideration when a sanction is imposed pursuant to Article 20(4) of Directive 2013/33, read in conjunction with Article 20(5) thereof. Furthermore, neither of those provisions precludes the authorities of a Member State from deciding to entrust the care of the minor concerned to child protection services or to the judicial authorities responsible therefor' ([196]).

The CJEU further elaborated on the fact, mentioned by the referring court, that an applicant excluded by way of a sanction from an accommodation centre is said to be provided, upon the imposition of that sanction, with **a list of private centres for the homeless likely to host them**. The Court stressed that:

> '… first[ly], the obligation to ensure a dignified standard of living, provided for in Article 20(5) of Directive 2013/33, requires Member States, by the very fact that the verb "ensure" is used therein, to guarantee such a standard of living continuously and without interruption. Secondly, it is for the authorities of the Member States to ensure, under their supervision and under their own responsibility, the provision of material reception conditions guaranteeing such a standard of living, including when they have recourse, where appropriate, to private natural or legal persons in order to carry out, under their authority, that obligation' ([197]).

After the abovementioned reflections the CJEU replied that:

> 'In the light of all of the foregoing, the answer to the questions referred is that Article 20(4) and (5) of Directive 2013/33, read in the light of Article 1 of the Charter of Fundamental Rights, must be interpreted as meaning that a Member State cannot, among the sanctions that may be imposed on an applicant for serious breaches of the rules of the accommodation centres as well as seriously violent behaviour, provide for a sanction consisting in the withdrawal, even temporary, of material reception conditions, within the meaning of Article 2(f) and (g) of the directive, relating to housing, food or clothing, in so far as it would have the effect of depriving the applicant of the possibility of meeting his or her most basic needs. The imposition of other sanctions under Article 20(4) of the directive must, under all circumstances, comply with the conditions laid down in Article 20(5) thereof, including those concerning the principle of proportionality and respect for human dignity. In the case of an unaccompanied minor, those sanctions must, in the light, inter alia, of Article 24 of the Charter of Fundamental Rights, be determined by taking particular account of the best interests of the child' ([198]).

Currently, there is a pending case before the CJEU from 22 November 2018 in the case ***FW, GY* v *UTG***. The Tribunale Amministrativo Regionale per la Toscana (the referring court) addressed the following questions to the CJEU:

> 'Does Article 20(4) of Directive 2013/33/EU preclude an interpretation of Article 23 of Legislative Decree No 142/2015 as meaning that conduct that infringes general rules of national law, not specifically reproduced in reception centre rules, may also

([196]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraphs 54 and 55.
([197]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 50.
([198]) CJEU, 2019, *Haqbin*, op. cit., fn. 37, paragraph 56.

> constitute a serious breach of those rules if it potentially disrupts life within the reception centres? … In the event of an affirmative answer, the following further question is referred to, and requires an answer by, the Court: … Does Article 20(4) of Directive 2013/33/EU preclude an interpretation of Article 23 of Legislative Decree No 142/2015 as meaning that conduct on the part of the applicant for international protection that does not constitute a criminal offence punishable under the laws of the Member State may also be taken into consideration for the purpose of withdrawing reception measures, if that conduct might nevertheless potentially disrupt life within the centre in which the persons concerned are placed?' ([199]).

At a national level, in Italy, the Regional Administrative Court of Tuscany ruled on 11 December 2018 on a case concerning the withdrawal of reception conditions for two applicants for international protection who lived in a reception centre. The withdrawal was decided on the following grounds: they had staged a protest at the reception centre, threatening the manager and blocking his exit out of the building. More generally, they disregarded the staff members' remarks and refused to sign the centre's regulatory framework imposing evening hours of return and Italian classes. The court stresses that the protest alone, without any further elaboration on the actual situation, could not constitute legitimate grounds for withdrawal of reception conditions. It added that the authorities should have consulted with representatives of the reception facility in order to understand the overall context of this tense situation in the centre ([200]).

7.3. Standards for decisions

As provided under Article 20(5) RCD (recast), the reduction or withdrawal of material reception conditions can only take place after a decision has been taken that is individual, objective and impartial, and reasons should be given. As mentioned above in the relevant judgment of the Dutch Council of State, with regard to subsequent applications, this means that excluding certain groups of applicants on a general basis is not allowed.

When taking decisions to reduce or withdraw material reception conditions, Member States must ensure a dignified standard of living for all applicants. This generally implies that Member States can only reduce or withdraw material reception conditions where it is shown that the applicant has sufficient means to support themselves ([201]). The UNHCR concurs, and notes that maintaining an adequate standard of living will not be feasible in a situation in which reception conditions are withdrawn when the individual has insufficient financial means ([202]).

([199]) CJEU, request for preliminary ruling (pending), *FW, GY* v *U.T.G.*, C-726/18, lodged on 22 November 2018.
([200]) Italy, Administrative Court of Tuscany (Il Tribunale Amministrativo Regionale per la Toscana), Decision No 1128/2018, 11 December 2018 (case available in Italian).
([201]) See also Velluti, S., 'The revised Reception Conditions Directive and adequate and dignified material reception conditions for those seeking international protection', *International Journal of Migration and Border Studies*, Vol. 2, No 3, 2016, p. 6.
([202]) 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)*, 2015, p. 49.

8. Detention

Further information and discussion concerning the detention of asylum seekers under the RCD (recast) can be found in EASO, *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial analysis*, 2019.

The RCD (recast) contains a detailed set of detention rules.

The starting point is recital 15 RCD (recast), which emphasises that a person 'should not be held in detention for the sole reason that he or she is seeking international protection' and that 'applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention.' These principles echo the legal obligations established in the Refugee Convention, which provides for protection against penalisation of refugees and the rights laid down in Article 6 ECHR. Moreover, where an applicant is held in detention, they should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority.

Detention is permitted exhaustively on six grounds that must be 'laid down in national law' (Article 8(3)). In ***J.N.*** the CJEU shed light on the grounds for detention, specifically with regard to the principle of proportionality and the exceptional nature of the detention of asylum seekers. It explicitly ruled that detention is to be used only as a last resort, when it is determined to be necessary, reasonable and proportionate to a legitimate purpose ([203]).

The RCD (recast) requires Member States to consider alternatives before subjecting asylum seekers to detention (Article (8)(2)). Moreover, Article 8(4) adopts an open list of alternative measures and provides that Member States shall ensure that the rules concerning alternatives to detention are laid down in national law.

Article 9(1) RCD (recast) emphasises that the length of detention shall be for as short a period as possible and that the applicant for international protection shall be kept in detention only for 'as long as the grounds set out in Article 8(3) are applicable.' The justified length of detention will differ depending on the grounds for detention and the objective of the detention. In ***K.*** the CJEU confirmed that each of the grounds under Article 8(3) meets a specific need and is self-standing ([204]). Moreover, in ***Kadzoev*** ([205]) the CJEU made it clear that the detention period based on the law concerning applicants for international protection may not be regarded as the detention for the purpose of removal under Article 15 Returns Directive. It ruled that this detention ceases to be justified and the person concerned must be released immediately when it appears that, for legal or other considerations, a reasonable prospect of removal no longer exists. It should also be noted that both the initial detention and the prolongation of detention deprive the applicants for international protection of their liberty, and therefore they are similar in nature.

([203]) CJEU, 2016, *J.N.*, op. cit., fn. 27.
([204]) CJEU, judgment of 14 September 2017, *K.* v *Staatssecretaris van Veiligheid en Justitie*, C-18/16, EU:C:2017:680, paragraph 42.
([205]) CJEU, judgment of 30 November 2009, *Kadzoev*, C-357/09, EU:C:2009:741, paragraph 67.

The directive, being new to EU law in the asylum context, explicitly stipulates 'Guarantees for detained applicants'. According to Article 9(1)(2) RCD (recast), administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with 'due diligence.' The notion of 'due diligence' is laid down in recital 16. Delays in administrative procedures that cannot be attributed to the applicant for international protection shall not justify a continuation of detention. According to Article 9(2), the detention of applicants for international protection shall be ordered in writing by judicial or administrative authorities. The detention order shall state the reasons in fact and in law on which it is based. Under Article 9(3) RCD (recast) Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted *ex officio* and/or at the request of the applicant for international protection. According to Article 9(6)(1), in cases of a judicial review of the detention order provided for in Article 9(6)(3), Member States shall ensure that applicants for international protection who lack sufficient resources have access to free legal assistance and representation. Article 26(2) extends the access to free legal assistance and representation on request to cases of appeal or review before a judicial authority, in so far as such aid is necessary to ensure effective access to justice.

The RCD (recast) also lays down 'Conditions of detention', along with specific provisions on the 'Detention of vulnerable persons and of applicants with special reception needs'. As specified in Article 10(1), the detention of applicants for international protection shall take place, as a rule, in specialised detention facilities. If this is not possible, a detained applicant shall be kept separately from ordinary prisoners and from other third-country nationals who have not lodged an application for international protection. Furthermore, Article 21(1) and recital 14 provide that the situation of applicants with special reception needs has to be taken into account. Article 10 sets up special requirements in the case of detaining applicants for international protection, depending upon their status as a member of a specific vulnerable group. Furthermore, family unity should be maintained as far as possible (Article 12). Article 10(3) and (4) provides that representatives of the UNHCR or of an organisation that is working on the territory of the Member State concerned on behalf of the UNHCR pursuant to an agreement with that Member State shall have the possibility to communicate with and visit applicants for international protection in conditions that respect privacy.

9. Procedural guarantees and the right to appeal

Article 5 RCD (recast)

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

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

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

Article 6 RCD (recast)

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

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

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

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

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

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

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

Article 26 RCD (recast)

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

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

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

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

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

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

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

4. Member States may also:

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

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

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

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

9.1. Introduction

The RCD (recast) provides applicants for international protection with several procedural guarantees, along with a right to an effective legal remedy. The guarantees include the right to information to access the benefits of reception conditions (Article 5 RCD (recast)) and the provision of a document certifying the status of the applicant (Article 6 RCD (recast)). The judicial guarantees also include the possibility of an appeal or a review, at least in the last instance, before a judicial authority, with the additional possibility of having free legal assistance and representation (Article 26 RCD (recast)).

9.2. Access to reception conditions – procedural guarantees

9.2.1. The obligation to inform the applicant

9.2.1.1. Within 15 days of lodging the application

Article 5(1) RCD (recast)

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

The RCD (recast) specifies no timeline for lodging the application. However, in the APD (recast), Article 6 provides for a timeline of 3–10 working days between the making and the registration of the application for international protection.

With regard to these different wordings, the CJEU explained in the ***Mengesteab*** case that:

> 'Indeed, Article 18(1) of the Dublin III Regulation refers, in several language versions, in an undifferentiated way, to lodging and making an application for international

protection, whereas in other language versions, it refers exclusively either to lodging or making such an application. Similarly, Directive 2013/33 uses those terms in a variable manner in the various language versions of Article 6(1), Article 14(2) and Article 17(1)' ([206]).

9.2.1.2. Information provided in writing, in a language that the applicant understands

Article 5(2) RCD (recast) provides that Member States shall ensure that 'the information referred to in paragraph 1 is in writing and, in a language that the applicant understands or is reasonably supposed to understand.' This provision also allows for the supply of this information orally, where appropriate.

Asylum seekers often do not understand their rights and obligations in relation to reception conditions, for multiple reasons: illiteracy, language barriers, wording or other individual circumstances related in particular to their age and gender ([207]).

In ***M.S.S.*** the ECtHR highlighted the fact that the applicant was not duly informed about available accommodation, resulting in a prolonged state of material destitution, which itself was a violation of Article 3 ECHR. The ECtHR underlined that the information brochure given to asylum seekers in Germany does not state that asylum seekers can tell the police they are homeless, nor does it contain any information about accommodation. The court further remarked that the notification the applicant received about the obligation to register his address with the police was 'ambiguous and cannot reasonably be considered as sufficient information.' It concluded that the applicant was not duly informed at any time of the possibilities of accommodation that were available to him, assuming that there were any ([208]).

Article 5 RCD (recast)

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

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

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

([206]) CJEU, judgment of 26 July 2017, *Mengesteab v Germany*, C-670/16, EU:C:2017:587, paragraph 100.
([207]) 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,* 2012, p. 5.
([208]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraph 257.

Article 5 RCD (recast) should be read in conjunction with recital 21 RCD (recast).

9.2.2. The obligation to provide the applicant with a document related to their status

Article 6(1) RCD (recast) provides for an obligation for Member States to issue documents to applicants within 3 days of the lodging of an application for international protection. This document must certify their status as an applicant and that they are allowed to stay on the territory of the Member State while their application is pending or being examined.

Article 6(2) RCD (recast) allows Member States to derogate from the obligation provided for in Article 6(1) when the applicant is in detention and during the examination of an application for international protection made at the border or within the context of a procedure to decide on the right of the applicant to enter the territory of a Member State. This article further provides that 'in specific cases, during the examination of an application for international protection, Member States may provide applicants with other evidence equivalent to the document referred to in paragraph 1.'

Article 6(4) imposes an obligation on the Member States to ensure that the document provided to the asylum seekers is 'valid for as long as they are authorised to remain on the territory of the Member State concerned.'

Providing evidence of registration as an applicant for international protection is a necessary step in order to ensure that the applicants are entitled to the benefits under the RCD (recast). However, such a document is not sufficient to ensure effective access to all reception conditions. In ***M.S.S.*** the ECtHR noted that the document given to the applicant, a pink card, was not of 'any practical use whatsoever', given in particular the 'administrative obstacles' and his 'personal difficulties due to his lack of command of the … language, the lack of any support network and the generally unfavourable economic climate' ([209]). In particular, the ECtHR noted that while 'the law does provide for asylum-seekers who have been issued with "pink cards" to have access to the job market … in practice access to the job market is so riddled with administrative obstacles that this cannot be considered a realistic alternative'.

Article 6(6) RCD (recast) provides that Member States:

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

This provision is considered to be in line with Article 6 Refugee Convention ([210]).

([209]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72, paragraph 261.
([210]) 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)*, 2015, p. 12.

9.3. Special procedural guarantees for vulnerable persons

9.3.1. The identification of persons with special needs

The identification of special needs is not a procedural guarantee. Nevertheless, Article 21 RCD (recast) provides for the obligation to 'take into account' the specific situation of vulnerable persons, while Article 22 RCD (recast) sets out how this assessment shall be conducted 'in order to effectively implement Article 21'. According to Article 22 RCD (recast), this assessment shall be initiated within a reasonable period of time after an application for international protection has been made.

Assessment of special reception needs of vulnerable persons is a necessary prerequisite for them to benefit from the special guarantees laid out in the RCD (recast). It is a core element without which the provisions of the RCD (recast) aimed at the special treatment of these persons would lose any meaning ([211]).

Recital 14 RCD (recast)

'The reception of persons with special reception needs should be **a primary concern** for national authorities in order **to ensure** that such reception is **specifically designed to meet their special reception needs**.'

Article 22(1) RCD (recast)

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

The aim of this assessment is to establish whether an applicant for international protection is a person who is entitled to special guarantees and to formally 'identify' them. This formal 'identification' means that the reception conditions provided to the applicants can be tailored to their vulnerability.

Article 22 imposes three obligations on Member States:

1. to '**assess**' whether the applicant is an applicant with special reception needs by establishing needs assessments (procedures);

2. to '**indicate the nature of special reception needs**' of vulnerable applicants;

3. to ensure appropriate monitoring of the reception situation, taking into account the possibly changing needs of vulnerable persons as regards reception conditions.

([211]) Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, COM(2007) 745, 26 November 2007, p. 9.

Article 22(1) provides that this assessment may be integrated into existing national procedures, or as indicated in Article 22(2) need not take the form of an administrative procedure. Nevertheless, according to Article 22(4) this assessment shall be without prejudice to the assessment of international protection needs pursuant to the QD (recast).

9.3.2. Guarantees regarding the timing and the monitoring of the vulnerability assessment

Article 22(1) RCD (recast)

'… assessment shall be initiated within **a reasonable period of time** after an application for international protection **is made**… .'

This assessment must be conducted **as soon as possible** after an application is made with a view to ensuring that people are immediately accommodated in reception facilities suited to their specific needs.

The meaning of a '**reasonable**' period has not yet been considered by the CJEU. Special needs should be identified at an early stage of the process, as they may otherwise severely inhibit the applicant's ability to communicate effectively and the authorities' ability to gather evidence, or may put applicants at risk in collective accommodation.

There is a strong connection as regards early identification of vulnerable persons under the RCD (recast) and the APD (recast). Article 31(7)(b) APD (recast) permits Member States to use the assessment of Article 22(1) RCD (recast) to identify applicants in need of special procedural guarantees and to prioritise their application.

The ECtHR has emphasised that Member States are obliged to ensure that persons lacking legal capacity can make an application.

In ***Rahimi* v *Greece*** ([212]) the ECtHR found that the respondent state's reluctance to appoint a guardian, inter alia, to support a minor in applying for international protection and to ensure effective reception of this unaccompanied minor, amounted to a violation of Article 3 ECHR.

In ***A.E.A.* v *Greece*** ([213]), a judgment dealing with a minor, the ECtHR referred to the linguistic obstacles and the obstacles to accessing necessary information, expert advice and the material conditions that an applicant may encounter. It underlined that it was not possible for this unaccompanied minor to apply for international protection over a long period of time, between April 2009 and March 2012, mainly because access to the asylum procedure was extremely restricted, if not impossible.

([212]) ECtHR, 2011, *Rahimi* v *Greece*, op. cit., fn. 88.
([213]) ECtHR, judgment of 15 March 2018, *A.E.A.* v *Greece*, No 39034/12, ECLI:CE:ECHR:2018:0315JUD003903412, paragraph 84.

Article 22(1) RCD (recast)

'Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they **become apparent at a later stage in the asylum procedure**.'

The obligation to ensure that the special reception needs are addressed '**if they become apparent at a later stage in the asylum procedure**' is important because for a number of reasons, including shame or lack of trust, applicants for international protection 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, and their capacity to present their case may be greatly diminished as a consequence ([214]).

The CJEU, in ***A, B and C* v *Staatssecretaris van Veiligheid en Justitie***, noted that:

> '… to hold that an applicant for asylum is not credible, merely because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution, would be to fail to have regard to the requirement referred to in the previous paragraph [relating to the need to take account of the personal or general circumstances surrounding the application, in particular the vulnerability of the applicant]' ([215]).

The **UNHCR** also notes that:

> '… later disclosure of such experiences should not be held against asylum-seekers, nor inhibit their access to any special support measures or necessary treatment. Special needs resulting from such experiences 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' ([216]).

Moreover, **Article 22(1) RCD (recast)** provides the following.

Article 22(1) RCD (recast)

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

([214]) 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*, 2012, paragraph 59.

([215]) CJEU, judgment of 2 December 2014, *A, B, C* v *Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-148/13 to C-150/13, EU:C:2014:2406, paragraph 71. See also paragraph 72: '… Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding, in the context of that assessment, the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution.'

([216]) 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*, 2012, pp. 16–17.

Regardless of when such needs are identified, Member States shall ensure support for persons with special needs throughout the asylum procedure, and shall provide for appropriate monitoring of their situation.

9.3.3. Procedural guarantees for minors

Article 23(5) imposes a specific procedural obligation upon Member States during the period in which minors are in reception. Specifically, it provides that Member States shall ensure that minor children of applicants or applicants who are minors are lodged with their parents, with their unmarried minor siblings or with the adult responsible for them whether by law or by the practice of the Member State concerned, provided it is in the best interests of the minors concerned.

9.4. Scope of the right to appeal under Article 26 RCD (recast)

The RCD (recast) provides a right to an effective legal remedy, in line with the guarantees provided by Article 47 EU Charter, which include:

- the right of access to a court;
- the right to equality of arms and adversarial proceedings;
- the right to legal aid;
- the right to have one's affairs handled impartially;
- the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Article 26(1) RCD (recast) provides the right to appeals against the following decisions, in so far as they affect applicants individually:

- decisions relating to the granting, withdrawal or reduction of benefits under the RCD (recast); or
- decisions taken under Article 7 RCD (recast), entitled 'Residence and freedom of movement'.

9.4.1. Decisions relating to the granting, withdrawal or reduction of benefits

With precise wording, Article 26(1) RCD (recast) refers to material and non-material guarantees, as well as procedural guarantees and the level of the obligations of the Member States in ensuring asylum applicants a 'dignified standard of living' ([217]). It should be noted that this notion is legally vague and allows Member States to define the scope and level of their obligations ([218]). If the required standard is not achieved by the benefits Member States

([217]) CJEU, 2014, *Saciri and Others*, op. cit., fn. 55; CJEU, 2019, *Jawo*, op. cit., fn. 62. For more on the principle of a dignified standard of living see Section 3 'Basic principles and definitions'.

([218]) Tsourdi, E., 'EU reception conditions: a dignified standard of living for asylum seekers?', in Chetail, V., De Bruycker, P. and Maiani, F. (eds), *Reforming the Common European Asylum System – The new European refugee law*, Brill Nijhoff, Boston, 2016, p. 310.

provide, the applicant can claim an infringement of Article 1 EU Charter in connection with Article 3 ECHR.

Regarding the **period during which material benefits must be granted**, recital 8 RCD (recast) mentions that the directive 'should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants'. The CJEU has pointed out repeatedly that the purpose of the RCD (recast) precludes the applicant from being deprived of the standards laid down in that directive, even for a temporary period of time after making the application ([219]).

9.4.2. Decisions taken under Article 7 RCD (recast) concerning 'Residence and freedom of movement'

Article 7 RCD (recast) contains only non-mandatory provisions, but, since it allows Member States to restrict the freedom of movement of applicants, the decisions taken by the Member States under these provisions do affect the applicants individually and therefore fall within the scope of Article 26 RCD (recast). Under Article 7 RCD (recast), Member States may assign an applicant to a specific area (Article 7(1)), to a specific residence (Article 7(2)) or to a specific place (Article 7(3)). Member States may also refuse temporary permission to leave the place of residence. Further more, Member States shall require applicants to inform the authorities of their current address and update them quickly about any change of address (Article 7(5)). However, applicants do not have to ask permission to keep appointments with authorities and courts if their appearance is necessary (Article 7(4)).

9.5. Conditions of appeal

While the original RCD provided for 'an appeal or a review before a judicial body', the RCD (recast) extends this remedy by providing, in Article 26(1), for '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.'

9.5.1. 'Review in fact and in law' from Article 26(1) RCD (recast)

This term 'in fact and in law' is also used in Article 9(2) RCD (recast), applicable to detention cases. Additionally, Article 46(3) APD (recast) provides a guarantee for applicants by stating 'an effective remedy provides for a full and *ex nunc* examination of both facts and points of law'. Article 9(2) RCD (recast), however, does not provide for a full and *ex nunc* examination. According to existing CJEU case-law, the aspect of reviewing 'both facts and law', or even conducting an 'exhaustive examination of all facts and circumstances', is a central element for granting 'effective judicial protection' as required by Article 47 EU Charter.

([219]) CJEU, 2012, *Cimade and GISTI*, op. cit., fn. 43, paragraphs 36, 37 and 51; CJEU, 2014, *Saciri and Others*, op. cit., fn. 55, paragraph 46.

9.5.2. 'Hearing before a judicial authority' from Article 26(1) and (2) RCD (recast)

Article 26(1) RCD (recast) and Article 9(2) and 9(5) use the term 'judicial authority' in the context of appeals or reviews, whereas Article 47(1) EU Charter explicitly guarantees a remedy 'before a tribunal'. A similar wording is found in Article 46(1) APD (recast).

Article 26(2) RCD (recast), which provides for legal assistance and representation 'in so far as such aid is necessary to ensure effective access to justice', reflects the principle of an effective remedy as in Article 47 EU Charter, which guarantees the right to a fair and public hearing 'by an independent and impartial tribunal previously established by law'. Although independence and impartiality are not mentioned in the RCD (recast), the term 'before a judicial authority' can be considered to include the elements 'independent and impartial', since they are formal requirements for an effective remedy ([220]). In order to assess whether a reviewing body is a court or a tribunal in compliance with Article 47 EU Charter, the CJEU examines whether it is 'established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent' ([221]).

9.6. Article 26(1) RCD and the procedural autonomy of Member States

Article 26 RCD (recast) does not lay down standards for the procedure of the judicial review or appeal. However, such standards are provided for in the APD (recast) in Articles 19 to 23. Rather, the RCD (recast) confers the margin of appreciation upon Member States by outlining that appeals are 'within the procedures laid down in national law' (Article 26(1) RCD (recast).

According to the case-law of the CJEU, the procedural autonomy of the national legislators is restricted in particular by the governing principles of equivalence and effectiveness:

> '… while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection... It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right... In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)' ([222]).

An example of procedural autonomy is the **level of jurisdiction**. As stated above, Article 26(1) RCD (recast) mentions that 'at least in the last instance the possibility of an appeal or a review … before a judicial authority' must be granted. Neither the original RCD nor the RCD (recast) require that there must be more than one level of jurisdiction, and in particular they

([220]) CJEU, judgment of 22 December 2010, *RTL Belgium*, C-517/09, EU:C:2010:821, paragraph 38.
([221]) CJEU, judgment of 31 January 2013, *H.I.D., B.A.* v *Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-175/11, ECLI:EU:C:2013:45, paragraphs 78–105.
([222]) CJEU, judgment of 13 March 2007, *Unibet* v *Justitiekanslem*, C-432/05, EU:C:2007:163, paragraphs 42 and 43.

do not provide for the benefit of two levels of jurisdiction. In ***Diouf***, a case related to the original APD, which guarantees 'the right to an effective remedy before a court or tribunal', the CJEU held that '[t] he principle of effective judicial protection affords an individual a right of access to a court or tribunal but not to a number of levels of jurisdiction' ([223]).

Time limits for lodging an appeal can also be implemented by national procedural rules, in so far as 'such time-limits are not liable to render practically impossible or excessively difficult the exercise of rights conferred by [EU] law' ([224]). On the other hand, shortened time limits are required, in accelerated procedures, in order to ensure a speedy judicial review in cases of detention, for example ([225]).

9.7. Free legal assistance and representation

Article 26(3) RCD (recast) provides that Member States shall ensure free legal assistance and representation. Although the RCD (recast), unlike Article 23 APD (recast), does not clearly define the terms 'legal assistance and representation', the second sentence of Article 26(2) provides a minimum standard by stating that it '… shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant', during the abovementioned appeal procedure.

9.7.1. Free legal assistance and representation granted 'on request'

Article 26(2) RCD (recast) provides that 'free legal assistance and representation is made available on request in so far as such aid is necessary to ensure effective access to justice.' The person in need of legal aid must lodge such a 'request', and therefore free legal assistance and representation are not granted *ex officio*. In order to comply with the principle of effectiveness of EU law in general and the right of access to a judicial review, the barriers for such a 'request' must not be too high. According to the case-law of the CJEU, as ruled in Case C-104/10, national legislation generally may not impose rules which 'could risk compromising the achievement of the objective pursued by that directive and thus depriving that provision in particular of its effectiveness' ([226]). This principle limits the autonomy of Member States in this aspect of procedural provisions.

9.7.2. How must free legal assistance and representation be granted?

Article 26(6) RCD (recast) explicitly states that the procedures for access to legal assistance and representation shall be laid down in national law. This provides Member States the discretion to regulate the provision of legal assistance and representation. However, the mechanisms of access must be enumerated in national law.

Article 26(3) to (5) RCD (recast) describes certain conditions Member States may implement in their national provisions for granting free legal assistance and representation. The

([223]) CJEU, judgment of 28 December 2011, *Brahim Samba Diouf* v *Ministre du Travail, de l'Emploi et de l'Immigration*, C-69/10, EU:C:2011:524, paragraph 69.
([224]) CJEU, judgment of 29 October 2009, *Virginie Pontin* v *T-Comalux SA*, C-63/08, EU:C:2009:666, paragraph 48.
([225]) ECtHR, judgment of 29 February 1988, *Bouamа* v *Belgium*, No 9106/80, ECLI:CE:ECHR:1988:0229JUD000910680, paragraphs 60–63.
([226]) CJEU, judgment of 21 July 2011, *Patrick Kelly* v *National University of Ireland*, C-104/10, ECLI:EU:C:2011:506, paragraph 34.

non-mandatory clauses in Article 26(3)(a) and (b) RCD (recast) name two conditions concerning the personal scope and the handling of the **free legal assistance** that Member States can use to provide free legal aid:

- in personal terms: 'only to those who lack sufficient resources' ('means test');
- in terms of the handling: limitation to 'services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants'.

9.7.2.1. 'Means test'

The means test includes, in particular, the assessment of the applicant's available means and shall respect the privacy of the applicant, family, friends and other persons involved. In Case No 8398/78, ***Pakelli* v *Germany***, the ECtHR held that, when applying the means test, the person requesting free legal assistance bears the burden of proving that they have insufficient means. However, indigence does not need to be proved 'beyond all reasonable doubt': although the applicant had not presented clear evidence of his lack of financial resources, the ECtHR found that there had been a series of indicators that made it highly probable that he was indeed financially incapable of assuming the cost of legal assistance ([227]).

In Case C-279/09, ***DEB* v *Bundesrepublik Deutschland***, the CJEU made reference to the case-law of the ECtHR ([228]) regarding legal aid in the form of dispensation:

> 'As regards legal aid in the form of dispensation from payment of the costs of proceedings or from provision of security for costs before an action is brought, the European Court of Human Rights has similarly examined all the circumstances in order to determine whether the limitations applied to the right of access to the courts had undermined the very core of that right, whether those limitations pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved' ([229]).

Finally, Articles 9(9) and 26(5) RCD (recast) provide that Member States may also impose a reimbursement clause, 'if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.'

9.7.2.2. 'Specifically designated to assist and represent applicants'

Article 26(3)(b) RCD (recast), concerning the handling of legal assistance through specialised legal advisers or counsellors reflects the mandatory provision of Article 26(2). Article 26(2) states that: 'Free legal assistance and representation shall be provided by suitably qualified persons, as admitted or permitted under national law, whose interests do not conflict or could not potentially conflict with those of the applicant.' The requirement ensures a certain degree of quality in assisting or representing applicants, which is particularly important

([227]) ECtHR, judgment of 25 April 1983, *Pakelli* v *Germany,* No 8398/78, ECLI:CE:ECHR:1983:0425JUD000839878, paragraph 34.
([228]) ECtHR, judgment of 13 July 1995, *Tolstoy-Miloslavsky* v *the United Kingdom*, Series A No 316-B, ECLI:CE:ECHR:1995:0713JUD001813991, paragraphs 59–67; and ECtHR, judgment of 19 June 2001, *Kreuz* v *Poland*, ECHR 2001-VI, ECLI:CE:ECHR:2001:0619JUD002824995, paragraphs 54 and 55.
([229]) CJEU, judgment of 22 December 2010, *DEB* v *Bundesrepublik Deutschland*, C-279/09, paragraph 47.

when vulnerable applicants are concerned. For example, the Constitutional Court of Czechia considered that the presence of NGOs in detention centres did not suffice to fulfil the state's obligation to guarantee access to legal advice and representation ([230]).

9.7.2.3. 'Merits test'

Article 26(2) RCD (recast) provides that free legal assistance and representation have to be made available 'in so far as such aid is necessary to ensure effective access to justice.' However, fulfilling this condition is not enough to be granted free legal aid.

The other condition for receiving legal aid is the non-mandatory implementation of a 'merits test', provided for in Article 26(3)(2) RCD (recast), under which 'Member States may provide that free legal assistance and representation not be made available if the appeal or review is considered by a competent authority to have no tangible prospect of success.'

In the case ***DEB* v *Bundesrepublik Deutschland***, the CJEU, referring to the ECtHR case-law, stated:

> '… the European Court of Human Rights has held that the question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively … Account may be taken, however, of the financial situation of the litigant or his prospects of success in the proceedings' ([231]).

According to the case-law of the ECtHR, national rules must ensure that merits tests do not result in depriving applicants for international protection of procedural guarantees or effective access to a judicial review. The ECtHR has found that a lack of legal aid can render remedies under Article 13 ECHR inaccessible ([232]). In ***A.A.* v *Greece***, the ECtHR ruled that the lack of legal aid for a detained Palestinian asylum seeker made the legal remedy purely theoretical, amounting to a violation of Article 5(4) ECHR ([233]). The CJEU has also considered that access to legal aid is an important aspect of the general principle of effective judicial protection under EU law and Article 47 EU Charter:

> 'In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve' ([234]).

([230]) Czechia, Constitutional Court (Ústavní soud), I. ÚS 630/16, 29 November 2016.
([231]) CJEU, 2010, *DEB*, op. cit., fn. 229, paragraph 46.
([232]) ECtHR, 2011, *M.S.S.*, op. cit., fn. 72.
([233]) ECtHR, judgment of 22 July 2010, *A.A.* v *Greece*, No 12186/08, paragraph 78.
([234]) CJEU, 2010, *DEB*, op. cit., fn. 229, paragraph 60.

Appendix A – Relevant international provisions

Charter of Fundamental Rights of the European Union

Article 1
Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 3
Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.

…

Article 4
Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 6
Right to liberty and security

Everyone has the right to liberty and security of person.

Article 14
Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.

2. This right includes the possibility to receive free compulsory education.

3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

Article 21
Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties [the Treaty establishing the European Community and the TEU] and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 24
The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 47
Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. 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.

Article 52
Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

…

European Convention on Human Rights

Article 3
Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5
Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

…

   (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

   …

   (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. 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.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. 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.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 8
Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13
Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14
Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 2, Protocol 1
Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 2, Protocol 4
Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Convention Relating to the Status of Refugees

Article 3
Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 17
Wage-earning employment

1. The Contracting State 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.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

   (a) He has completed three years' residence in the country;

   (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse;

   (c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Article 18
Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 19
Liberal professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practicing a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

Article 20
Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 22
Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 26
Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

Article 31
Refugees unlawfully in the country of refuge

1. 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.

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

Article 33
Prohibition of expulsion or return ('refoulement')

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Convention on the Rights of the Child

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering

solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

…

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

   (a) Make primary education compulsory and available free to all;

…

International Covenant on Civil and Political Rights

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

…

International Covenant on Economic, Social and Cultural Rights

Article 11

1. The States Parties to the present Covenant 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. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Qualification Directive (Directive 2011/95/EU)

Article 2
Definitions

For the purposes of this Directive the following definitions shall apply:

…

(h) 'application for international protection' means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

…

Article 26
Access to employment

1. Member States shall authorise beneficiaries of international protection to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after protection has been granted.

2. Member States shall ensure that activities such as employment-related education opportunities for adults, vocational training, including training courses for upgrading skills, practical workplace experience and counselling services afforded by employment offices, are offered to beneficiaries of international protection, under equivalent conditions as nationals.

3. Member States shall endeavour to facilitate full access for beneficiaries of international protection to the activities referred to in paragraph 2.

4. The law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.

Asylum Procedures Directive (Directive 2013/32/EU)

Recital 27. Given that third-country nationals and stateless persons who have expressed their wish to apply for international protection are applicants for international protection, they should comply with the obligations, and benefit from the rights, under this Directive and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. To that end, Member States should register the fact that those persons are applicants for international protection as soon as possible.

Recital 29. Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.

Article 2
Definitions

For the purposes of this Directive:

…

(b) ‘application for international protection’ or ‘application’ means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection outside the scope of Directive 2011/95/EU, that can be applied for separately;

(c) ‘applicant’ means a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken;

…

(e) ‘final decision’ means a decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status by virtue of Directive 2011/95/EU and which is no longer subject to a remedy within the framework of Chapter V of this Directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome;

…

(q) ‘subsequent application’ means a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where

the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1).

Article 3
Scope

1. This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection.

2. This Directive shall not apply to requests for diplomatic or territorial asylum submitted to representations of Member States.

3. Member States may decide to apply this Directive in procedures for deciding on applications for any kind of protection falling outside of the scope of Directive 2011/95/EU.

Article 22
Right to legal assistance and representation at all stages of the procedure

1. Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision.

2. Member States may allow non-governmental organisations to provide legal assistance and/or representation to applicants in the procedures provided for in Chapter III and Chapter V in accordance with national law.

Article 23
Scope of legal assistance and representation

1. Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, who assists or represents an applicant under the terms of national law, shall enjoy access to the information in the applicant's file upon the basis of which a decision is or will be made.

   Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the Member States would be compromised. In such cases, Member States shall:

   (a) make access to such information or sources available to the authorities referred to in Chapter V; and

   (b) establish in national law procedures guaranteeing that the applicant's rights of defence are respected.

In respect of point (b), Member States may, in particular, grant access to such information or sources to a legal adviser or other counsellor who has undergone a security check, insofar as the information is relevant for examining the application or for taking a decision to withdraw international protection.

2. Member States shall ensure that the legal adviser or other counsellor who assists or represents an applicant has access to closed areas, such as detention facilities and transit zones, for the purpose of consulting that applicant, in accordance with Article 10(4) and Article 18(2)(b) and (c) of Directive 2013/33/EU.

3. Member States shall allow an applicant to bring to the personal interview a legal adviser or other counsellor admitted or permitted as such under national law.

   Member States may stipulate that the legal adviser or other counsellor may only intervene at the end of the personal interview.

4. Without prejudice to this Article or to Article 25(1)(b), Member States may provide rules covering the presence of legal advisers or other counsellors at all interviews in the procedure.

   Member States may require the presence of the applicant at the personal interview, even if he or she is represented under the terms of national law by a legal adviser or counsellor, and may require the applicant to respond in person to the questions asked.

   Without prejudice to Article 25(1)(b), the absence of a legal adviser or other counsellor shall not prevent the competent authority from conducting a personal interview with the applicant.

Article 27
Procedure in the event of withdrawal of the application

1. Insofar as Member States provide for the possibility of explicit withdrawal of the application under national law, when an applicant explicitly withdraws his or her application for international protection, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or to reject the application.

2. Member States may also decide that the determining authority may decide to discontinue the examination without taking a decision. In that case, Member States shall ensure that the determining authority enters a notice in the applicant’s file.

Article 46
The right to an effective remedy

1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

   (a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;

(ii) considering an application to be inadmissible pursuant to Article 33(2);

(iii) taken at the border or in the transit zones of a Member State as described in Article 43(1);

(iv) not to conduct an examination pursuant to Article 39;

(b) a refusal to reopen the examination of an application after its discontinuation pursuant to Articles 27 and 28;

(c) a decision to withdraw international protection pursuant to Article 45.

…

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance. ...

Appendix B – Decision tree

Note that Article 4 RCD (recast) enables Member States to:

> '… introduce or retain more favourable provisions in the field of reception conditions for applicants and other close relatives of the applicant who are present in the same Member State when they are dependent on him or her, or for humanitarian reasons, insofar as these provisions are compatible with this Directive.'

Given the variety of individual circumstances that may be encountered at the appeal level in the field of reception conditions, note that the purpose of this decision tree is to list the most frequent ones.

A. Is the applicant (or was the applicant at the relevant time) an applicant for international protection?

'Family member' of an applicant includes the following (Article 2(C) RCD (recast)).

- **A spouse or unmarried partner in a stable relationship.**

  For unmarried couples:

  A2.1.a. is their relationship stable?

  A2.1.b. does the law or practice of the Member State concerned treat unmarried couples in a comparable way to married couples under its law on third-country nationals?

- **Minor unmarried children.**

- **Father, mother or another adult responsible for an unmarried minor** (a minor being a third-country national or stateless person below the age of 18 years).

B. Has the applicant been informed about the reception benefits and obligations with which he or she must comply (Article 5(1) RCD (recast))?

C. Was the information provided (Article 5 RCD (recast)):

- within 15 days after lodging the application?
- in writing?
- in a language that the applicant understands or is reasonably supposed to understand?

D. Was the applicant requested to remain in an assigned area and, if so, does the assigned area affect his or her unalienable sphere of private life and does it allow sufficient scope for guaranteeing his or her access to all benefits under the RCD (Article 7(1) RCD (recast))?

Was the decision on the applicant's residence based one of the criteria of Article 7(2) RCD (recast) and necessary?

E. Is the applicant a vulnerable person (Article 21 RCD (recast))?

F. If so, does the applicant have special reception needs (Article 22 RCD (recast))?

- Have these special reception needs been assessed within a reasonable time?
- Have these special reception needs been addressed throughout the asylum procedure (Article 22(1) RCD (recast))?

G. Have the reception conditions granted to the applicant been sufficient to ensure him or her a dignified standard of living and access to health care (Article 17(2) RCD (recast))?

H. Was the decision to reduce or withdraw material reception conditions based on one of the grounds listed in Article 20(1) RCD (recast)?

I. Was the decision to reduce or withdraw material reception conditions or impose sanctions applicable to serious breaches of the rules of the accommodation centres or to seriously violent behaviour (Article 20(5) RCD (recast)):

- reasoned?
- taken individually, objectively and impartially?
- based on the particular situation of the person concerned, especially with regard to vulnerable persons, taking into account the principle of proportionality?

When taking decisions to reduce or withdraw material reception conditions, Member States shall under all circumstances ensure access to health care in accordance with Article 19 RCD (recast) and a dignified standard of living for all applicants.

J. Has the applicant concealed financial resources and therefore unduly benefited from material reception conditions (Article 17(3) and (4) RCD (recast))?

Has the applicant been informed about the obligation to declare his or her resources?

Appendix C – Methodology

EASO methodology for professional development activities available to members of courts and tribunals.

Background and introduction

Article 6 of the EASO founding regulation ([235]) (hereinafter 'the **regulation**') specifies that the agency shall establish and develop training available to members of courts and tribunals in the Member States. For this purpose, EASO shall take advantage of the expertise of academic institutions and other relevant organisations, and take into account the EU's existing cooperation in the field with full respect to the independence of national courts and tribunals.

With the purpose of supporting the enhancement of quality standards and the harmonisation of decisions across the EU, and in line with its legal mandate, EASO provides for two main components of training support: the development and publication of professional development materials and the organisation of professional development activities. With the adoption of this methodology, EASO aims to outline the procedures that will be followed for the implementation of its professional development series for members of courts and tribunals (hereinafter **'EASO PDS'**).

In undertaking these tasks, EASO is committed to following the approach and principles outlined in the field of EASO's cooperation with courts and tribunals as adopted in 2013 ([236]). The first version of this methodology was adopted in 2015 ([237]). Following consultation with the EASO network of courts and tribunal members (hereinafter **'the EASO network'**), amendments have been made to this methodology so that it better reflects developments that have occurred in the meantime.

Professional development series

Content and scope. In line with the legal mandate provided by the regulation, and in cooperation with courts and tribunals, it was established that EASO will adopt an '**EASO PDS**' aimed at providing courts and tribunal members with a full overview of the Common European Asylum System (hereinafter '**CEAS**'). This series consists, inter alia, of a number of **judicial analyses and compilations of jurisprudence** that will be accompanied in turn by **judicial trainer's guidance notes**. The former will elaborate on substantive aspects of the subject matter from the judicial perspective, whereas the latter will serve as a useful tool for those charged with organising and conducting professional development workshops.

([235]) Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (OJ L 132, 29.5.2010, p. 11).
([236]) EASO, 'Note on EASO's cooperation with Member States' courts and tribunals', 21 August 2013.
([237]) EASO and EASO network of courts and tribunals, Methodology for professional development activities available to members of courts and tribunals, adopted on 29 October 2015.

The detailed content of the EASO PDS and the order in which the subjects are developed was established following a needs assessment exercise conducted in cooperation with the EASO network, which presently comprises EASO national contact points in the Member States' courts and tribunals, the Court of Justice of the European Union, the European Court of Human Rights and the two judicial bodies with which EASO has a formal exchange of letters: the International Association of Refugee and Migration Judges (IARMJ) and the Association of European Administrative Judges. In addition, other partners – including the United Nations High Commissioner for Refugees (UNHCR), the European Union Agency for Fundamental Rights (FRA), the European Judicial Training Network (EJTN) and the Academy of European Law – are to be consulted as appropriate. The outcome of the exercise is also reflected in the annual work plan adopted by EASO within the framework of EASO's planning and coordination meetings. Taking into consideration the needs communicated by the EASO network, European and national jurisprudential developments, the level of divergence in the interpretation of relevant provisions and developments in the field, professional development materials will be developed in line with the structure agreed with the stakeholders.

In the meantime, a number of events have occurred that have created the need for a reassessment of both the list of subjects and the order in which they ought to be dealt with. Among other things, work has been started, and in some cases completed, on certain chapters (subsidiary protection: Article 15(c) QD; exclusion: Articles 12 and 17 QD; ending international protection: Articles 11, 14, 16 and 19 QD; judicial practical guide on country of origin information; and detention of applicants for international protection). In addition, other chapters that were included on the original list have since been set aside for completion within the framework of a contract concluded between EASO and IARMJ-Europe for the provision of professional development materials on certain core subjects (introduction to the CEAS; qualification for international protection; evidence and credibility assessment in the context of the CEAS; and asylum procedures and the principle of *non-refoulement*). This was done with a view to accelerating the process for the development of the materials, and was conducted with the involvement of the members of the EASO network. In that context, they were afforded an opportunity to comment on drafts of the materials being developed. In light of these developments there is a need to reassess this methodology. In order to increase the foreseeability of the manner in which the remaining chapters will be dealt with, and to provide a more reliable roadmap for the future, a reassessment exercise was carried out in autumn of 2015 whereby members of the EASO network provided an opinion on the order in which chapters were to be developed.

Completed thus far

- *Article 15(c) Qualification Directive (2011/95/EU) – A judicial analysis* [BG] [DE] [EL] [EN] [ES] [FR] [IT].
- *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) – A judicial analysis* [BG] [DE] [EL] [EN] [ES] [FR] [IT] [RU].
- *Ending International Protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) – A judicial analysis* [BG] [DE] [EL] [EN] [ES] [FR] [IT].
- *Judicial Practical Guide on Country of Origin Information* [DE] [EN] [ES] [FR] [IT].
- *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial analysis* [DE] [EN] [ES] [FR] [IT].

Completed thus far, produced by IARMJ-Europe under contract to EASO

- *An Introduction to the Common European Asylum System for Courts and Tribunals – A judicial analysis* [BG] [DE] [EL] [EN] [ES] [FR] [IT].
- *Qualification for International Protection (Directive 2011/95/EU) – A judicial analysis* [BG] [DE] [EL] [EN] [ES] [FR] [IT] [RU].
- *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis* [DE] [EN] [ES] [FR] [IT].
- *Asylum procedures and the principle of* non-refoulement – *Judicial analysis* [DE] [EN] [ES] [FR] [IT].

Chapters still to be developed

- Vulnerability in international protection cases.
- The substantive content of international protection including access to rights and to an effective remedy as well as fundamental rights.
- Determining the Member State responsible for examining an application for international protection, Dublin (III) Regulation (604/2013).

Involvement of experts

Drafting teams. The EASO PDS will be developed by EASO in cooperation with the EASO network through the establishment of specific working groups (drafting teams) for the development of each subject in the EASO PDS, with the exception of those subjects being developed under the auspices of the contract concluded with the IARMJ. The drafting teams will be composed of experts nominated through the EASO network. In line with EASO's work programme and the concrete plan adopted at the annual planning and coordination meetings, EASO launches calls for experts for the development of each subject.

Calls are sent to the EASO network specifying the scope of the chapter to be developed, the expected timeline and the number of experts that will be required. EASO national contact points for members of courts and tribunals are then invited to liaise with national courts and tribunals to identify experts who are interested in contributing to the development of the chapter and available to do so.

Based on the nominations received, EASO shares with the EASO network a proposal to establish the drafting team. This proposal will be drafted by EASO in line with the following criteria.

1. Should the number of nominations received equal or be below the required number of experts, all nominated experts will automatically be invited to take part in the drafting team.

2. Should the nominations received exceed the required number of experts, EASO will carry out a motivated preselection of experts. The preselection will be undertaken as follows.

- EASO will prioritise the selection of experts who are available to participate throughout the whole process, including participation in all expert meetings.

- Should there be more than one expert nominated from the same Member State, EASO will contact the focal point and ask him/her to select one expert. This will allow for wider Member State representation in the group.

- EASO will then propose the prioritisation of court and tribunal members over legal assistants or rapporteurs.

- Should the nominations continue to exceed the required number of experts, EASO will make a motivated proposal for a selection that takes into account the date on which nominations were received (earlier ones will be prioritised), along with EASO's interest in ensuring wide regional representation.

EASO will also invite the UNHCR to nominate one representative to join the drafting team.

The EASO network will be invited to express their views and/or make suggestions on the proposed selection of experts within a maximum period of 10 days. The final selection will take into account the views of the EASO network and confirm the composition of the drafting team.

Consultative group. In line with the regulation, EASO will seek to engage a consultative group for each set of EASO PDS materials developed, composed of representatives from civil-society organisations and academia.

For the purpose of establishing the consultative group, EASO launches calls for expressions of interest addressed to the members of the EASO Consultative Forum and other relevant organisations, experts or academics recommended by the EASO network.

Taking into consideration the expertise and familiarity with the judicial field of the experts and organisations who respond to the call, along with the selection criteria of the EASO Consultative Forum, EASO will make a motivated proposal to the EASO network, which will ultimately confirm the composition of the group for each subject.

FRA will be invited to join the consultative group.

Development of the EASO professional development series

Preparatory phase. Prior to the initiation of the drafting process, EASO will prepare a set of materials, including but not restricted to:

1. a bibliography of relevant resources and materials available on the subject;

2. a compilation of European and national jurisprudence on the subject to be published as a separate document: *EASO Professional Development Series Compilation of Jurisprudence.*

Along with the EASO network ([238]), the consultative group will play an important role in the preparatory phase. For this purpose, EASO will inform the consultative group and the EASO network of the scope of the subject, and will share a draft of the preparatory materials together with an invitation to provide additional information that is deemed of relevance to the development. This information will be reflected in the materials that will then be shared with the respective drafting team.

Drafting process. EASO will organise at least two (but possibly more where necessary) working group meetings for the development of each set of EASO PDS materials. In the course of the first meeting, the drafting team will:

— nominate one or more coordinators for the drafting process;

— develop the structure of the chapter and adopt the working methodology;

— distribute tasks for the drafting process;

— develop a basic outline of the content of the chapter.

Under the coordination of the team coordinator, and in close cooperation with EASO, the team will proceed to develop a preliminary draft of the respective chapter.

In the course of the second meeting, the group will:

— review the preliminary draft and agree on the content;

— ensure the consistency of all parts and contributions to the draft;

— review the draft from a didactical perspective.

On a needs basis, the group may propose to EASO that additional meetings be organised to further develop the draft. Once completed, the draft will be shared with EASO.

Quality review. EASO will share the first draft completed by the drafting team with the EASO network, the UNHCR and the consultative group that will be invited to review the materials with a view to assisting the working group in enhancing the quality of the final draft.

All suggestions received will be shared with the coordinator of the drafting team, who will coordinate with the drafting team to consider the suggestions made and prepare a final draft. Alternatively, when the suggestions are particularly extensive or would considerably affect the structure and content of the chapter, the coordinator may suggest that an additional meeting be organised to consider them.

On behalf of the drafting team, the coordinator will then share the chapter with EASO.

Updating process. EASO will contract a service provider to conduct a regular review, of a judicial nature, of the existing EASO PDS. The service provider will also recommend updates to be implemented, where necessary, in full consideration of the specialised nature

([238]) The UNHCR will also be consulted.

of the information to be provided and of the need to ensure the utmost respect for the independence of national courts and tribunals.

Implementation of the EASO professional development series

In cooperation with the EASO network members and the EJTN, EASO will support the use of the EASO PDS by national courts and national training institutions. EASO's support in this regard will involve the following.

Judicial trainer's guidance notes. The guidance notes serve as a practical reference tool for judicial trainers and provide assistance with regard to the organisation and implementation of practical workshops on the EASO PDS. In line with the procedure outlined for the development of the different chapters that make up the EASO PDS, EASO will establish drafting teams to develop *judicial trainer's guidance notes*. It is established practice that these drafting teams may include one or more members of the drafting team that was responsible for drafting the judicial analysis on which the guidance note will be based.

Workshops for national judicial trainers. Furthermore, following the development of each chapter of the EASO PDS, EASO will organise workshops for national judicial trainers to provide an in-depth overview of the chapter and the methodology suggested for the organisation of workshops at national level.

Nomination of national judicial trainers and preparation of the workshop. EASO will seek the support of at least two members of the drafting team to support the preparation of and facilitate the workshop. EASO will select the judicial trainers through the judicial trainers' pool of the EASO network, taking into account the selection committee's suggestions.

Selection of participants. EASO sends an invitation to the EASO network to identify a number of potential judicial trainers with specific expertise in the area who are interested in organising workshops on the EASO PDS at national level, and are available to do so. Should the nominations exceed the number specified in the invitation, EASO will make a selection that prioritises wide geographical representation and the selection of those judicial trainers who are most likely to facilitate the implementation of the EASO PDS at national level. On a needs basis and in line with its work programme and the annual work plan, as adopted within the framework of EASO's planning and coordination meetings, EASO may consider organising additional workshops for judicial trainers.

Pilot professional development workshop. Whenever a set of materials on a new subject is developed EASO will organise a pilot professional development workshop on the subject, which will serve to update, when needed, the related ***judicial trainer's guidance note*** before sending it for publication.

National workshops. In close cooperation with the EASO network and relevant judicial training institutions at the national level, EASO will promote the organisation of workshops at the national level. In doing so EASO will also support the engagement of those court and tribunal members who contributed to the development of the EASO PDS or participated in EASO's workshops for judicial trainers.

EASO's advanced workshops

EASO will also hold an annual advanced workshop on selected aspects of the CEAS with the purpose of promoting practical cooperation and judicial dialogue among court and tribunal members. EASO will organise further high-level events on a biennial basis in cooperation with European courts and judicial associations.

Identification of relevant areas. EASO's advanced workshops will focus on areas with a high level of divergence in national interpretation or areas where jurisprudential development is deemed relevant by the EASO network. In the context of its annual planning and coordination meetings, EASO will invite the EASO network, along with the UNHCR and members of the consultative group, to suggest potential areas of interest. Based on these suggestions EASO will make a proposal to the EASO network, which will finally take a decision on the area to be covered by the following workshop. Where relevant, the workshops will lead to the development of a chapter of specific focus within the EASO PDS.

Methodology. For the preparation of the workshops EASO will seek the support of the EASO network, which will contribute to developing the workshop methodology (e.g. case discussions, moot court sessions, etc.) and preparing materials. The methodology followed will determine the maximum number of participants for each workshop.

Participation in EASO's advanced workshops. Based on the methodology, and in consultation with the judicial associations, EASO will determine the maximum number of participants at each workshop. The workshop will be open to members of European and national courts and tribunals, the EASO network, the EJTN, FRA and the UNHCR.

Prior to the organisation of each workshop, EASO will launch an open invitation to the EASO network and the abovementioned organisations specifying the focus of the workshop, the methodology, the maximum number of participants and the registration deadline. The list of participants will ensure a good level of representation of court and tribunal members, and will prioritise the first registration request received from each Member State.

Monitoring and evaluation

In developing its activities EASO will promote an open and transparent dialogue with the EASO network, individual court and tribunal members, the UNHCR, members of the consultative group and participants in EASO's activities, who will be invited to share with EASO any views or suggestions that could improve the quality of its activities.

Furthermore, EASO will develop evaluation questionnaires that will be distributed during its professional development activities. Minor suggestions for improvement will be incorporated directly by EASO, which will inform the EASO network of the general evaluation of its activities in the context of its annual planning and coordination meeting.

EASO will also provide the EASO network with an overview of its activities on an annual basis, along with relevant suggestions received for further developments, which will be discussed at the annual planning and coordination meetings.

Implementing principles

— In undertaking its professional development activities, EASO will take into account its public accountability and principles applicable to public expenditure.

— EASO and the courts and tribunals of the EU+ countries will have joint responsibility for the EASO PDS. Both partners shall strive to agree on the content of each of its chapters so as to ensure the 'judicial auspices' of the final product.

— The resulting chapter will be part of the EASO PDS, including the copyright and all other related rights. As such EASO will update it when necessary, and will involve the courts and tribunals of the EU+ countries fully in the process.

— All decisions related to the implementation of the EASO PDS and the selection of experts will be made with the agreement of all of the partners.

— The drafting, adoption and implementation of the EASO PDS will be undertaken in accordance with the methodology for professional development activities available to members of courts and tribunals.

Grand Harbour Valletta, 18 January 2018

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