European Asylum Support Office

Judicial analysis

Detention of applicants for international protection in the context of the Common European Asylum System

EASO Professional Development Series for members of courts and tribunals

2019

SUPPORT IS OUR MISSION

EASO professional development materials have been created in cooperation with members of courts and tribunals on the following topics:

- introduction to the Common European Asylum System for courts and tribunals;
- qualification for international protection (Directive 2011/95/EU);
- asylum procedures and the principle of non-refoulement;
- evidence and credibility assessment in the context of the Common European Asylum System;
- Article 15(c) qualification directive (2011/95/EU);
- exclusion: Articles 12 and 17 qualification directive (2011/95/EU);
- ending international protection: Articles 11, 14, 16 and 19 qualification directive (2011/95/EU);
- country of origin information;
- detention of applicants for international protection in the context of the Common European Asylum system.

The Professional development series comprises Judicial analyses, Judicial trainers' guidance notes and Compilations of jurisprudence for each topic covered, apart from Country of origin information which comprises a Judicial practical guide accompanied by a Compilation of jurisprudence. All materials are developed in English. For more information on publications, including on the availability of different language versions, please visit www.easo.europa.eu/training-quality/courts-and-tribunals.

European Asylum Support Office

Judicial analysis

Detention of applicants for international protection in the context of the Common European Asylum System

EASO Professional Development Series for members of courts and tribunals

2019

SUPPORT IS OUR MISSION

Manuscript completed in January 2019.

Luxembourg: Publications Office of the European Union, 2019

Print ISBN 978-92-9476-039-5 doi:10.2847/33037 BZ-04-18-656-EN-C
PDF ISBN 978-92-9476-038-8 doi:10.2847/570479 BZ-04-18-656-EN-N

Cover illustration: © baldyrgan/Shutterstock.com

European Asylum Support Office

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

Article 6 of the EASO founding regulation[1] 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 Union's existing cooperation in the field with full compliance with 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, pp. 11-28.

Contributors

The content has been drafted by a working group consisting of judges **Aikaterini Koutsopoulou** (Greece, working group co-coordinator) and **Julian Phillips** (United Kingdom, working group co-coordinator), **Judith Putzer** (Austria), **Dobroslav Rukov** (Bulgaria), **Marie-Cécile Moulin-Zys** (France), **Ulrich Drews** (Germany), **Jure Likar** (Slovenia), legal assistant to the court **Lenka Horáková** (Czech Republic) and, in addition, **Samuel Boutruch**, legal officer (United Nations High Commissioner for Refugees, UNHCR).

They have been invited for this purpose by the EASO in accordance with the methodology set out in Appendix C, p. 70. The recruitment of the members of the working group was carried out in accordance with the scheme agreed between EASO and the members of the EASO network of courts and tribunal members. The working group itself met on four occasions in March, April, June and October 2018 in Malta. Comments on a discussion draft were received from members of the EASO network of courts and tribunals members, namely Judges **Ildiko Figula** (Hungary), **Ana Celeste** Carvalho (Portugal) and **Bostjan Zalar** (Slovenia). Comments were also received from members of the EASO Consultative Forum, namely The Asylum Department, the Danish Refugee Council; the Dutch Central Agency for the Reception of Asylum Seekers; European Council on Refugees and Exiles;EU Fundamental Rights Agency; Hungarian Helsinki Committee; Ministry of the Interior and Administration in Poland; and Association SPReNe. In accordance with the EASO founding regulation, the United Nations High Commissioner for Refugees was invited to express comments on the draft judicial analysis, and duly did so.

The working group were assisted in the preparations by the Statement of the European Law Institute: Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards[2].

This judicial analysis will be updated in accordance with the methodology set out in Appendix C p 70.

[2] European Law Institute, *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards*, 2017.

Contents

List of abbreviations

AEAJ	Association of European Administrative Judges
APD	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
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
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
EU charter	Charter of Fundamental Rights of the European Union
PDS	European Asylum Support Office Professional development series for members of courts and tribunals
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
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 (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)
Returns directive	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
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNHCR	Office of the United Nations High Commissioner for Refugees

Preface

The purpose of this judicial analysis is to put at the disposal of courts and tribunals dealing with detention issues relating to international protection cases a helpful tool for the understanding of the issues involved according to the CEAS and EU law generally. It is recognised that not all Member States have adopted the relevant directives. It is also recognised that detention issues are dealt with in a variety of different ways by Member States. For example, in some Member States all detention issues are dealt with by criminal courts even when the issues relate to administrative detention.

The judicial analysis is primarily intended for use by members of courts and tribunals of EU Member States concerned with hearing appeals or conducting reviews of decisions on applications for international protection. It is assumed that the reader will be familiar with the broad structure of international protection law as interpreted by the CEAS. It is also assumed that the reader will be familiar with national law and practice relating to international protection and detention issues in the Member State in which he/she has jurisdiction. It is however intended to be of use to both those with little or no prior experience of adjudication in this field and to those who are experienced or specialist judges in the field.

The judicial analysis is supported by an appendix listing relevant source material and by a decision tree which is intended to be a quick reference guide to the issues involved when dealing with detention issues. It is also supported by a compilation of Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR) jurisprudence 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 encouraged always to search for the most up-to-date relevant material when considering specific issues.

The judicial analysis aims to set out the current state of the law on the detention of applicants for international protection in a clear, readable and user-friendly format. This 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 regularly updated.

Key questions

This judicial analysis strives to answer the following main questions.

1. What are the major sources of primary and secondary EU law concerning the detention of applicants for international protection?

2. Who is an applicant for international protection?

3. On what grounds and for how long can such a person be detained?

4. What are the alternatives to detention and when do they apply?

5. What specific safeguards are in place, particularly in relation to children and other vulnerable applicants?

1. Detention: Overview of the legal framework of this judicial analysis

Objective: This part aims to present the EU legal instruments which form part of the CEAS or are relevant to the CEAS and are linked to the detention of applicants for international protection.

See EASO material:

An Introduction to the Common European Asylum System - Judicial analysis

Detention is regulated by the following instruments of the CEAS: Asylum procedures directive (recast) (APD (recast)), Reception conditions directive (recast) (RCD (recast)), and Dublin III regulation. Another relevant EU instrument which is not part of the CEAS is the returns directive. In contrast to the previous legal instruments, EU legislation now regulates in detail the detention of applicants for international protection, harmonises the grounds on which an applicant for international protection could be deprived of liberty and extends the protection of the applicant for international protection's right to liberty[1]. The general principles of proportionality, lawfulness, non-arbitrariness, non-discrimination and good faith apply and the relevant sources of law are detailed in Appendix A. Equally, the general principles of EU law as developed by EU jurisprudence such as sincere cooperation effectiveness and equivalence must be used by national courts as a tool to interpret national legislation. This is all the more relevant where EU law offers greater protection.

The various instruments have been examined and interpreted by the CJEU and the ECtHR to create a developing body of jurisprudence. This judicial analysis refers to this jurisprudence where relevant and the individual cases referred to in the analysis are summarised in the compilation of jurisprudence. The national courts and tribunals of the Member States will also have developed jurisprudence applicable within those Member States. This analysis does not seek to provide either an individual or a comparative examination of national jurisprudence. Equally, where Member States have incorporated the provisions of EU instruments into national law this analysis does not seek to provide either an individual or a comparative assessment of national laws.

1.1 Charter of Fundamental Rights of the European Union

With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union (EU charter) became primary European Union law[2]. Its provisions are directly applicable and have primacy over national law. As primary EU law, the EU charter is a guiding

[1] Opinion of Advocate General Saugmandsgaard øe of 10 November 2016, case C-528/15, *Al Chodor*, paras. 48 and 52.

[2] See Article 6 TEU: '… the Charter … shall have the same value as the Treaties'.

principle for the interpretation of secondary law instruments. By the same token, secondary law instruments contain a number of references to EU charter provisions[3]. According to Article 51, the EU charter is only applicable where EU law is applicable[4]. This means that its provisions are binding not only on the EU institutions but also on Member States when they are implementing EU law. The fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of EU law. The CJEU refers to provisions of the Charter in its judgments concerning the interpretation of EU secondary legislation. It is settled case-law that a national court which is called upon to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary by refusing to apply any conflicting provisions of national legislation.

The EU charter has to be seen in its relation to the European Convention of Human Rights (ECHR). According to Article 52(3), the meaning and scope of EU charter rights which correspond to ECHR rights are the same as those latter rights. Therefore, the ECHR (and the jurisprudence of the ECtHR) is relevant in the context of the EU charter. However, EU law is not prevented from providing more extensive protection.

Article 6 (Right to liberty and security) reads as follows: 'Everyone has the right to liberty and security of person.' Until now, reference to Article 6 in the jurisprudence of the Court of Justice of the European Union (CJEU) concerning detention in the asylum context is scarce yet developing. Article 18 (Right to asylum) lays down a 'constitutional' reference to the Refugee Convention. Other important articles when dealing with detention can be found in Appendix A.

The EU charter has binding force and the same status as the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)[5]. The sources that underlie the EU charter are the ECHR, other international human rights treaties, national constitutional traditions and the right to freedom of movement.

The articles of the EU charter that are relevant to EU asylum law and that have the same meaning and scope as the corresponding articles of the ECHR are: Article 2 EU charter and Article 2 ECHR (right to life), as well as Article 4 EU charter and Article 3 ECHR (the prohibition of torture and inhuman or degrading treatment or punishment).

There are also articles in the EU charter relevant for asylum law whose meaning is the same as the corresponding articles of the ECHR, but with wider scope: Article 47 (2) and (3) EU charter (Right to an effective remedy and to a fair trial) correspond to Article 6, para. 1 and Article 13 ECHR, but its limitation to civil rights and obligations and to an indictment does not apply with respect to the implementation of EU law[6]. The application of the EU charter can only be limited under restrictive conditions listed in Article 52 (1) EU charter. The limitation of fundamental rights must be provided by law and respect the essence of the rights and freedoms.

In Article 47 EU charter the right to an effective remedy and to a fair trial in European law has been crystallised as follows.

---

3 See for example Reception Directive; recital 35 stipulates that the directive shall ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 EU charter and has to be implemented accordingly; see also recital 24 returns directive.

4 European Council on Refugees and Exiles, *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*. December 2013.

5 Article 6 TEU.

6 Explanations relating to the EU charter (2007/c 303/02), Article 52.

– 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 insofar as such aid is necessary to ensure effective access to justice.

It focuses both on criminal and civil matters as well as administrative disputes[7].

The rights of the child enshrined in Article 24 EU charter must always be taken into account when dealing with minors[8].

1.2 European Convention on Human Rights

Article 1 (Obligation to respect human rights) lays down the scope of the ECHR's application: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' The ECHR therefore applies not only on the territory of a contracting state; it also may apply at the border or outside the state's territory, where and when the state is exercising jurisdiction (e.g. in the state embassies)[9]. According to the ECtHR, the notion of jurisdiction is not only territorial but also covers situations where the state authorities exercise effective control over an area or at least when the person is under the *de jure* or *de facto* control of the authorities[10].

According to Article 5, interference with the right to personal liberty may only be justified on a number of exhaustive grounds assembled in five paragraphs. Article 5 also contains guarantees for persons deprived of their liberty. Article 5 permits detention in immigration procedures (including applicants for international protection) only if used in order to prevent an unauthorised entry (first limb) or with a view to deportation or extradition (second limb). The ECtHR[11] has ruled that in order to be lawful, detention must fall within one of these limbs and be compatible with and closely connected to the specific purposes of Article 5.

In addition to the right to liberty, other rights relevant in detention cases may include, for example, the right to private and family life (Article 8), and the prohibition of ill treatment (Article 3) when it comes to detention conditions but also when detention is lacking a legitimate ground[12].

---

7 CJEU, judgment of 23 April 1986, case C-294/83, *Les Verts* v *European Parliament*. See also explanations relating to the EU charter (2007/C 303/02), Article 47.

8 See also EASO, *Practical Guide on age assessment*, 2018.

9 ECtHR, judgment of 7 July 2011, Grand Chamber, *Al-Skeini and others* v *the United Kingdom*, application no 55721/07; ECtHR, judgment of 29 March 2010, Grand Chamber, *Medvedyev and others* v *France*, application no 3394/03.

10 ECtHR, Grand Chamber, judgment of 23 February 2012, *Hirsi Jamaa and others* v *Italy*, application no 27765/09, §§ 80, 81.

11 Case-law, binding *stritcu sensu* only on the state(s) involved in the Court procedure, it provides, however, relevant interpretation for all Member States.

12 ECtHR, judgment of 5 April 2011, *Rahimi c Grèce, Requête*, application no 8687/08; ECtHR, judgment of 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga* v *Belgium*, application no 13178/03.

1.3 Reception conditions directive (recast)

The 2003 Reception conditions directive said little about the detention of applicants for international protection. It allowed the confinement of (then) asylum seekers vaguely 'for legal reasons or reasons of public order'[13]. However, its recast contains a detailed new set of detention rules. Detention is permitted exhaustively on six grounds[14]. The grounds for detention must be 'laid down in national law', as well as rules concerning alternatives to detention.

The applicant for international protection may only be detained 'when it proves necessary and on the basis of an individual assessment' of the case and if 'other less coercive alternative measures' do not suffice[15]. The directive being new to EU law in the asylum context, explicitly stipulates 'Guarantees for detained applicants' and lays down 'Conditions of detention' as well as specific provisions on the 'Detention of vulnerable persons and of applicants with special reception needs'.

In the *JN* judgment, the CJEU ruled for the first time on the interpretation of the RCD (recast)'s rules on detention, thereby not only ruling on the public and national security ground for detention but also casting light on the other five grounds specifically with regard to the principle of proportionality and the exceptional nature of detention of asylum seekers[16]. The Court also considered soft human rights law when interpreting the secondary law provisions, namely on the Memorandum to the draft regulation referring, inter alia, to UNHCR's Detention Guidelines[17]. Most importantly, the Court explicitly stated 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.' The RCD (recast) applies to applicants for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State[18].

1.4 Dublin III regulation

The Dublin III regulation establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection and is directly applicable in Member States[19]. The process of determining the Member State responsible should start as soon as an application for international protection is first lodged within the territory of a Member State (Article 20). Detention is regulated in Article 28, however, Article 2(n) together with 28(2) requires Member States to establish in national law objective criteria underlying the reasons for believing that an applicant for international protection who is subject to the Dublin procedure may abscond. As regards the detention conditions and the guarantees applicable to persons detained, the Dublin III regulation states that the RCD (recast) applies.

---

13 Cf. Article 7(3) Directive 2003/9/EC.

14 Article 8(3) RCD.

15 Article 8(2) RCD — proportionality requirement.

16 CJEU, judgment of 15 February 2016, case C-601/15 (PPU) *J.N.* v *Staatsecretariat van Veiligheid en Justitie*.

17 UNHCR, *Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*, 2012.

18 Article 3 RCD recast and Article 9 APD.

19 More on Dublin III regulation can be found in EASO, *An introduction to the Common European Asylum System - Judicial analysis*, 2016, page 34; and EASO, *Asylum procedures and the principle of non-refoulement - Judicial analysis*, 2018.

1.5 Returns directive

The returns directive does not apply to applicants for international protection (asylum seekers). It applies to third-country nationals who are irregularly staying on the territory of a Member State (recital 9 returns directive). The Member State's view of the genuineness of the application should not bring the applicant within the scope of the returns directive. The returns directive can apply to a person who has ceased to be an applicant for international protection (for which see below) but its effect is suspended pending the outcome of any appeal against rejection[20].

1.6 Asylum procedures directive (recast)

The Asylum procedures directive (recast) (APD (recast)) lays down minimum standards for the granting and withdrawing of international protection; it applies to all applications made in the territory, including at the border or in the transit zones of a Member State[21]. The APD (recast) clarifies when a person becomes an applicant for international protection, and when a person ceases to be an applicant for international protection[22]. The APD (recast) guarantees the right of access to a procedure[23] and the right to remain in the Member State pending the examination of the application[24], the latter provision thereby setting out a limited 'freedom of movement'[25].

Consequently, according to Article 26, Member States must not detain a person simply because they are an asylum seeker and where a person is detained the grounds for and conditions of detention and the guarantees available must be in accordance with those under the RCD (recast). Article 26 does not include a reference to Article 11 RCD (recast) (detention of vulnerable persons); however, the two directives are complementary.

1.7 Refugee Convention

All EU Member States are bound by the 1951 Refugee Convention. Article 78 TFEU defines the relationship between EU law and the Refugee Convention and provides that a common policy on asylum, subsidiary protection and temporary protection 'must be in accordance with the Geneva Convention, and other relevant treaties'.

Article 31 is central to the purpose of the 1951 convention, ensuring refugees can effectively gain access to international protection. Article 31 recognises that in exercising the right to seek asylum, refugees are often compelled to arrive, enter or stay in a territory without authorisation or with no, insufficient, false or fraudulent documentation and was designed to protect the rights of those individuals.

---

20 CJEU, judgment of 19 June 2018, case C-181/16, *Gnandi* v *Etat Belge*.

21 Article 3(1) APD.

22 See recital 27, Articles 2(e), 3, 6(2) and 28 APD.

23 Article 6 APD.

24 Article 9 APD.

25 Article 7 RCD (recast).

Article 31 provides, that refugees should not be penalised for their illegal entry or presence, provided they present themselves without delay to the authorities and show a good cause for their illegal entry or presence. It means that asylum seekers should not be detained exclusively on the basis that they are seeking asylum[26].

1.8 Other relevant sources

It should be borne in mind that there are other relevant sources of law (see the relevant general principles of EU law and a non-exhaustive list of international human rights instruments in Appendix A, such as the Convention on the Rights of Persons with Disabilities). Soft law (e.g. UNHCR Detention Guidelines, Council of Europe recommendations on asylum-seekers), as already mentioned, is also of relevance.

[26] UNHCR, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, 2017; CJEU, judgment of 17 July 2014, case C-481/13, *Mohammad Ferooz Qurbani*, highlights that MS have retained certain powers which have not been implemented in EU law.

2. Who is an applicant for international protection?

Objective: This part aims to clearly identify who is to be considered an applicant for international protection with regards to obligations and safeguards relating to detention.

See EASO material:

EASO, *Asylum procedures and the princple of non-refoulement - Judicial analysis*

This is an important question because a different regime applies for persons who have applied for international protection (RCD (recast)) from that which applies to irregular migrants who are those illegally staying in the Member State as defined in the returns directive. This analysis is confined to the detention of applicants for international protection. However, unsuccessful applicants for international protection are likely eventually to become irregular migrants[27] and it is for this reason that the provisions of the returns directive will be dealt with later in this judicial analysis. The term 'applicant for international protection' is used in this analysis in accordance with the recast directives but the term will in general be synonymous with 'asylum seeker'.

2.1 Becoming an applicant for international protection

It is clear that an 'applicant for international protection' must mean a person who has applied for international protection whenever such an application is made but it is perhaps not as straightforward to ascertain precisely when a person becomes such an applicant and equally when they cease to be an applicant. It is therefore central to determine when the application is considered to be made.

According to Article 2(b) APD (recast) 'application for international protection' is defined as:

> 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 [the QD (recast)], that can be applied for separately.

The term 'applicant' is defined in Article 2(c) 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.

[27] CJEU, judgment of 19 June 2018, case C-181/16, *Gnandi* v *Etat Belge*.

Accordingly the act which triggers the initiation of the asylum procedure does not require the fulfilment of any administrative formalities[28]. Recital (27) APD (recast) provides the following.

> 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 [the APD (recast) and RCD (recast)]. To that end, Member States should register the fact that those persons are applicants for international protection as soon as possible.

It can be understood from the above that 'a request' within the meaning of the directives does not mean a formal application, if that were meant to be the case the directives could and would have explicitly said so. This is reinforced by Article 3 APD (recast), which provides: '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.'

Articles 6(2) and 28 APD (recast) show that there is a difference between 'making' and 'lodging' an application, however, the CJEU has noted that the Dublin III Regulation and that the RCD (recast) uses those terms in a variable manner in their various language versions. The combined reading of these provisions confirms that the 'making' of an application is what makes the individual 'an applicant for international protection' not the 'lodging'[29].

In Dublin III, according to Article 20(1), the procedure starts as soon as an application is lodged. When an application is deemed to have been lodged is provided in Article 20(2).

The CJEU ruled in the Grand Chamber case *Mengesteab*:

> Article 20(2) of Regulation No 604/2013 must be interpreted as meaning that an application for international protection is deemed to have been lodged if a written document, prepared by a public authority and certifying that a third-country national has requested international protection, has reached the authority responsible for implementing the obligations arising from that regulation, and as the case may be, if only the main information contained in such a document, but not that document or a copy thereof, has reached that authority.

The CJEU's reasoning was inter alia based on the fact that a strict interpretation of lodging as requiring the submission of a form would extend the period of detention under the Dublin Regulation insofar as the maximum period of detention of an application pending the submission of a take charge request, is calculated from the lodging of an application.

The conclusion is that in line with the definition in Article 2(b) APD (recast), an application is 'made' as soon as a person, who can be understood to seek refugee status or subsidiary protection status, makes a request for or expresses a wish to apply for protection from a Member State. EASO has suggested that:

---

[28] European Commission, Detailed explanation of the amended proposal, accompanying the document Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), 1 June 2011, COM(2011) 319 final Annex, p. 3.

[29] CJEU, judgment of 26 July 2017, case C-670/16, *Tsegezab Mengesteab* v *Bundesrepublik Deutschland*.

> 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[30].

Although not a case directly related to the original RCD, the ECtHR concluded in *Hirsi Jamaa and others* v *Italy* that the responsibility of Member States may extend further and that even where there has been no expression but the intention is obvious the person should be treated as an applicant for international protection:

> … the fact that the parties concerned had failed expressly to request asylum did not exempt Italy from fulfilling its obligations under Article 3 ECHR (133).

The case concerned a group of about two hundred individuals who left Libya in 2009 aboard three vessels with the aim of reaching the Italian coast. On 6 May 2009, when the vessels were within the Maltese Search and Rescue Region of responsibility, they were intercepted by ships from the Italian Revenue Police and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli. The applicants stated that during that voyage the Italian authorities did not inform them of their destination and took no steps to identify them. On arrival in the Port of Tripoli, the migrants were handed over to the Libyan authorities. According to the Applicants, they objected to being handed over to the Libyan authorities but were forced to leave the Italian ships. At a press conference held on the following day, the Italian Minister of the Interior stated that the operations to intercept vessels on the high seas and to push migrants back to Libya were the consequence of the entry into force, in February 2009, of bilateral agreements concluded with Libya, and represented an important turning point in the fight against clandestine immigration.

A) The ECtHR has assessed that the applicants fell within the jurisdiction of Italy for the purposes of Article 1 ECHR. The principle of international law enshrined in the Italian Navigation Code envisages that a vessel sailing on the high seas was subject to the exclusive jurisdiction of the state of the flag it was flying. Accordingly, the events giving rise to the alleged violations fell within Italy's jurisdiction within the meaning of Article 1 ECHR.

B) The ECtHR has assessed that there had been two violations of Article 3 ECHR because the applicants had been exposed to the risk of ill-treatment in Libya and of repatriation to Somalia or Eritrea. Specifically, the Court observed that the existence of domestic laws and the ratification of international treaties guaranteeing respect for fundamental rights were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices which were contrary to the principles of ECHR. The Court noted the obligations of states arising out of international refugee law, including the principle of non-*refoulement*. Furthermore, the Court considered that the shared situation of the applicants and many other clandestine migrants in Libya did not make the alleged risk any less individual and concluded that by transferring the applicants to Libya, the Italian authorities had, in full knowledge of the facts, exposed them to treatment proscribed by the ECHR. The Court also concluded that when the applicants were transferred to Libya, the Italian authorities had or should have known that there were insufficient

[30] EASO and Frontex, *Practical Guide: Access to the Asylum Procedure*, 2016, p. 4.

guarantees protecting them from the risk of being arbitrarily returned to their respective countries of origin.

C) The ECtHR also concluded that there had been a violation of Article 4 of Protocol No 4. Specifically, the Court sought to ascertain whether the transfer of the applicants to Libya had constituted a 'collective expulsion of aliens' within the meaning of that provision. The ECtHR observed that neither Article 4 of Protocol No 4 nor the *travaux préparatoires* of the ECHR precluded extra-territorial application of that Article. Furthermore, limiting its application to collective expulsions from the national territory of Member States would mean that a significant component of contemporary migratory patterns would not fall within the ambit of that provision and would deprive migrants of an examination of their personal circumstances before being expelled. The notion of 'expulsion' was principally territorial, as was the notion of 'jurisdiction'. Where, however, as in the instant case, the ECtHR had found that a contracting state had, exceptionally, exercised its jurisdiction outside its national territory, it could accept that the exercise of extraterritorial jurisdiction by that state had taken the form of collective expulsion. Furthermore, the special nature of the maritime environment could not justify an area outside the law where individuals were covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the ECHR. The transfer of the applicants to Libya had been carried out without any examination of each applicant's individual situation. The applicants had not been subjected to any identification procedure by the Italian authorities, which had restricted themselves to embarking and disembarking them in Libya. The removal of the applicants had been of a collective nature, in breach of Article 4 of Protocol No 4.

The ECtHR finally concluded that there had been a violation of Article 13 taken in conjunction with Article 3 and with Article 4 of Protocol No 4. The ECtHR reiterated the importance of guaranteeing anyone subject to a removal measure, the consequences of which were potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.

There is no provision to exclude from the definition of applicant for international protection a person whose claim fails to be considered under Dublin III by another Member State, so Dublin III cases are covered. This is implicit in the inclusion of Dublin III in grounds for detention (Article 8(3)(f) RCD (recast)) and was confirmed by the CJEU in *Cimade and Gisti* v *France*[31]. However, Article 8(3)(f) RCD (recast) only becomes a ground for detention when the application for international protection has been lodged because the lodging of an application is a requirement before the provisions of the Dublin III regulation can take effect[32].

[31] CJEU, judgment of 27 September 2012, C-179/11, (reference for a preliminary ruling from the Conseil d'Etat — France) — *CIMADE, Groupe d'information et de soutien des immigrés (GISTI)* v *Ministre de l'Intérieur, de l'Outremer, des Collectivités territoriales et de l'Immigration.*

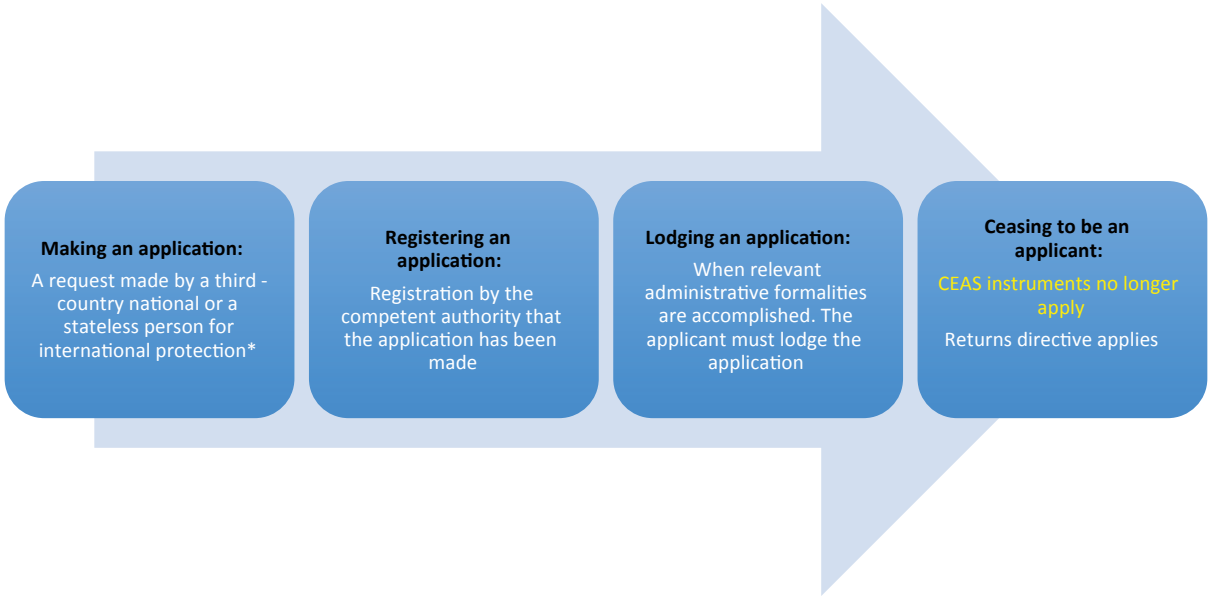
[32] CJEU, judgment of 27 July 2017, C-670/16, *Tsegezab Mengesteab* v *Bundesrepublik Deutschland*: it may, however, be the case that the semantic difference between 'making' and 'lodging' remains open to interpretation.

2.2 Ceasing to be an applicant for international protection

When does an applicant for international protection cease to be an applicant? Referring back to Article 2 RCD (recast) and Article 3 APD (recast), the person remains an applicant until a 'final decision' is made. A 'final decision' is defined by Article 2(e) APD (recast) as a decision on status no longer subject to a remedy. In accordance with Chapter V RCD (recast) a remedy includes an appeal to a Court of Tribunal against any decision, including a decision on admissibility that could be seen as bringing an application to an end. The appeal must provide for a full and *ex nunc* examination of both facts and points of law, including where applicable, an examination of international protection needs pursuant to the Qualification Directive 2011/95/EU[33].

After the application for international protection is made there is provision for the lodging of the application in Article 6(2) APD (recast) and in conjunction with Article 28 APD for the application to be treated as abandoned if not lodged. If the application is treated as abandoned in accordance with this provision (subject to the possibility of reopening or remaking in accordance of Article 28(2)) the person will no longer be an applicant for international protection and so could be subject to the returns directive (including the detention provisions).

The decision *Gnandi* v *État Belge*[34] clarifies the interaction between the RCD (recast) and the returns directive holding that a Member State may take a return decision alongside the rejection of an application for international protection bringing the (former) applicant immediately within the provisions of the returns directive. That said, the judgment goes on to say that the return procedure, and therefore the application of the returns directive (including the detention provisions) will be suspended during the period prescribed for lodging an appeal against the rejection decision and for 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.



[33] Article 46, para 3 APD (recast).

[34] CJEU, judgment of 19 June 2018, case C-181/16, *Gnandi v Etat Belge*.

3. What is meant by detention within the CEAS and how does it relate to other restrictions to liberty?

Objective: This part aims to clearly identify what is meant by detention and will distinguish it from other forms of restrictions of movement or alternatives to detention.

Detention is defined within the CEAS (Article 2(h) RCD (recast)) as:

> 'detention': means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.

Article 5 ECHR provides for the right to liberty and uses 'detention' as an example of deprivation of liberty.

The location of 'detention' does not make any difference to the fact of detention. The ECtHR held as long ago as 1996 that holding applicants for international protection within the international zone of an airport was a violation of Article 5(1). The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance[35]:

> 42. In proclaiming the right to liberty, paragraph 1 of Article 5 (art. 5-1) contemplates the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. On the other hand, it is not in principle concerned with mere restrictions on the liberty of movement; such restrictions are governed by Article 2 of Protocol No 4 (P4-2). In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5 (art. 5), the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance (see *Guzzardi* v *Italy*, Judgment of 6 November 1980, Series A no 39, p. 33 (92).

The application of such criteria raises practical issues for the judge, as illustrated by recent and still pending cases before the ECtHR[36].

---

[35] ECtHR, judgment of 25 June 1996, *Amuur* v *France*, no 19776/92, para 42.

[36] *Z.A. and others* v *Russia*/*Ilias and Ahmed* v *Hungary*/*J.R. and others* v *Greece* (final) (pending cases), including in hotspots (see case-law on VIAL/SOUDA centres (Strasbourg) final or pending).

The UNHCR Detention Guidelines, paragraphs 5-7, are helpful here:

> For the purposes of these Guidelines, **'detention'** refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.
>
> The place of detention may be administered either by public authorities or private contractors; the confinement may be authorised by an administrative or judicial procedure, or the person may have been confined with or without 'lawful' authority. Detention or full confinement is at the extreme end of a spectrum of deprivations of liberty. Other restrictions on freedom of movement in the immigration context are likewise subject to international standards. Distinctions between deprivation of liberty (detention) and lesser restrictions on movement is one of 'degree or intensity and not one of nature or substance'. While these Guidelines focus more closely on detention (or total confinement), they also address in part measures short of full confinement.
>
> Detention can take place in a range of locations, including at land and sea borders, in the 'international zones' at airports, on islands, on boats, as well as in closed refugee camps, in one's own home (house arrest) and even extraterritorially. Regardless of the name given to a particular place of detention, the important questions are whether an asylum-seeker is being deprived of his or her liberty de facto and whether this deprivation is lawful according to international law.

Judgment is expected following the Grand Chamber hearing in *Ilias and Ahmed* v *Hungary* where the Chamber judgment of 14 March 2017 held unanimously that there had been a violation of Article 5 where the applicants were confined for more than 3 weeks in a guarded compound which could not be accessed from the outside even by their lawyer, a situation that amounted to a de facto deprivation of their liberty.

4. Detention grounds: in which cases may applicants for international protection be detained?

Objective: This part aims to clearly identify the legal grounds contained within CEAS based on which an applicant for international protection may be detained. Provisions for specific groups of persons (e.g. children) are not dealt with in this part.

Recital 15 RCD (recast) is the starting point emphasising the provisions of the Refugee Convention, the ECHR and the EU charter.

> The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. 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. Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority.

Unlike Article 5(1)(f) ECHR, EU asylum law requires it to be demonstrated that detention is necessary for and proportionate to any of the purposes/grounds listed below (this requirement is also found in international refugee law and international human rights law).

According to Article 8(3) RCD (recast), an applicant can be detained only on an exhaustive number of grounds[37]. The making of a claim for international protection is not a ground for detention. The fact that a person is subject to the Dublin III procedure is not a ground for detention. The specific grounds on which detention may be considered lawful are as follows.

In order to determine or verify his or her identity or nationality

The directive does not provide further guidance on this detention ground. However, the case of *JN*[38] demonstrates the necessity of looking at the source instruments where interpretation of the RCD (recast) is needed. In this respect, the UNHCR Detention Guidelines state that minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute, or there are indications of security

[37] See Appendix A.

[38] CJEU, judgment of 15 February 2016, case C-601/15 (PPU) *J.N.* v *Staatsecretariat van Veiligheid en Justitie*, paras. 59 and 62, the various grounds on which a Member State may detain an applicant for international protection are listed exhaustively in the first subparagraph of Article 8(3) RCD (recast). Similarly, Article 9(1) RCD (recast) provides that an applicant may be kept in detention only for as long as the grounds set out in Article 8(3) of that directive are applicable.

risk. The source for the UNHCR goes back to the 1983 Conclusion on Detention of Refugees and Asylum Seekers[39]. This became the source for the original Reception conditions directive[40] through the Council of Europe Committee of Minister's recommendation[41] that preceded it:

> Measures of detention of asylum seekers may be resorted to … when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state.

Recital 7 emphasises that the principles underlying the original RCD are confirmed and that the purpose of the RCD (recast) is to ensure improved reception conditions for applicants for international protection.

The duration of detention on these grounds will be discussed later but it is important to note that whereas the RCD (recast) merely states, 'in order to determine or verify his or her identity or nationality' the UNHCR Detention Guidelines add the qualification that detention periods should be 'minimal' and the Committee of Ministers (see above) added an issue of conduct to the consideration.

The matter of whether detention in order to verify nationality or identity is valid in the light of Article 6 EU charter (right to liberty and security) was raised in *K*[42]. The CJEU was asked whether Article 8(3)(a) and (b) RCD (recast) — which provides that an applicant for international protection may be detained in order to verify nationality or identity — is valid in the light of Article 6 EU charter. The CJEU found that such detention is necessary to ensure the proper functioning of the CEAS, namely to contribute to preventing secondary movements. Moreover, under the RCD (recast), detention is subject to compliance with a series of conditions and is only justified under a circumscribed framework. Therefore, the CJEU concluded that this detention ground is in line with the EU charter.

In order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of the applicant absconding:

As with the first ground, this comes from the 1983 UNHCR conclusion endorsed by the Committee of Ministers recommendation. The first part of this ground must, by its nature, be particularly fact sensitive. The UNHCR Detention Guidelines are again helpful at Guideline 4.1 paragraph 28:

> It is permissible to detain an asylum-seeker for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection. However, such detention can only be justified where that

[39] UNHCR, *Detention of Refugees and Asylum-Seekers*, 13 October 1986. No 44 (XXXVII).

[40] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

[41] Recommendation *Rec(2003)5* of the Committee of Ministers to Member States on measures of detention of asylum seekers.

[42] CJEU, judgment of 14 September 2017, case C-18/16, paras. 59 and 60-61, *K* v *Staatssecretaris van Veiligheid en Justitie*.

> information could not be obtained in the absence of detention. This would involve obtaining essential facts from the asylum-seeker as to why asylum is being sought but would not ordinarily extend to a determination of the full merits of the claim. This exception to the general principle — that detention of asylum-seekers is a measure of last resort — cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

Although 'risk of absconding' is a provision it seems likely that in most cases this will be the basis of this ground because if the applicant for international protection is not likely to abscond it is difficult to see in what circumstances the elements of the claim on which the application is based could not be obtained in the absence of detention.

Outside the scope of Dublin III this provision contains the only mention of 'risk of absconding' and is distinguishable from the Dublin provision because of the absence of the further qualification 'significant'.

The *Al Chodor* case, referred to in more detail below, was a Dublin III decision and must have relevance to the consideration of the risk of absconding because if the Member State has provided objective criteria against which to assess a significant risk of absconding those criteria, unless the Member State specifies to the contrary, are likely to have general application[43].

In order to decide, in the context of a procedure, on the applicant's right to enter the territory:

In practice the reference to 'in the context of a procedure' would appear only to apply to border procedures by reference to Article 43 APD (recast). Again, the provision comes from the Council of Ministers' recommendation. The wording of the recommendation is perhaps simpler: 'when a decision needs to be taken on their right to enter the territory of the state concerned'.

This provision does not appear to imply that the applicant must have a right to enter, only that a decision needs to be taken on whether or not they have such right. As a general rule a person seeking international protection will be allowed to enter a Member State in order for that application to be determined. There is, however, no right to enter to claim protection contained in EU charter or the RCD (recast). Conclusion 3 of the Tampere Presidency Conclusions of the European Council states:

> This freedom (a freedom based on human rights, democratic institutions and the rule of law) should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others worldwide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on

[43] This hypothesis could be contradicted by national rules.

> principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union.

When he or she is detained subject to a return procedure under 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 (9), in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision:

The returns directive deals with the detention of irregular migrants pending return to their country of origin and it includes both irregular migrants who have not claimed international protection and also former applicants for international protection (i.e. those whose claims have been finally determined — see above).

This provision creates legal grounds to detain individuals who have just applied for international protection whilst being detained under the returns directive, if they are regarded by the administrative authority and/or the judge, to have done so in order to delay or frustrate the removal.

The definition of an 'application for international protection' is such that a person becomes an 'applicant' whenever they make a protection claim **even if they have previously made an unsuccessful claim that has been finally determined**.

The UNHCR Detention Guidelines provide:

> As a general rule, it is unlawful to detain asylum-seekers in on-going asylum proceedings on grounds of expulsion as they are not available for removal until a final decision on their claim has been made. Detention for the purposes of expulsion can only occur after the asylum claim has been finally determined and rejected. However, where there are grounds for believing that the specific asylum-seeker has lodged an appeal or introduced an asylum claim merely in order to delay or frustrate an expulsion or deportation decision which would result in his or her removal, the authorities may consider detention — as determined to be necessary and proportionate in the individual case — in order to prevent their absconding, while the claim is being assessed.

The CJEU in *Arslan*[44] was asked to rule on two preliminary reference questions relating to the interplay between the APD and the returns directive with regard to a person who applied for international protection after having been first detained for the purpose of removal. The Court considered whether the detention of an individual for purposes of removal under Article 15 returns directive must automatically be terminated if they make an application for international protection: the CJEU examined whether asylum-seekers can be considered to be 'illegally staying' and therefore fall within the scope of the returns directive. The CJEU noted that,

[44] CJEU, judgment of 30 May 2013, case C-534/11, *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie (Czech Republic)*, EU: C:2013:343.

subject to the exceptions stipulated in Article 7(2) of the original APD, Article 7(1) of the original APD provides that applicants have the right to remain in the Member State concerned for the purpose of the asylum procedure until the determining authority has made a decision at first instance on their application[45]. An applicant cannot be considered to be 'illegally staying' within the meaning of the returns directive during the period from making his or her application until at least the rejection of that application at first instance, or, where an appeal against rejection at first instance has suspensive effect, until the outcome of the appeal[46]. The CJEU ruled in *Arslan* that detention of an applicant can be continued only after an assessment on a case-by-case basis of all the relevant circumstances on two conditions: (1) the application is made solely to delay or jeopardise enforcement of the return decision and (2) it is objectively necessary to maintain detention to prevent the applicant from evading return. The CJEU also emphasised that the mere fact that the applicant is detained and subject of a return decision at the moment of making the application, should not lead to automatic presumptions about it being made solely to jeopardise return or that detention is therefore proportionate and necessary *per se*.

Gnandi v *État Belge* (see above) confirms that the application of the returns directive should be suspended whilst a person holds the status of an applicant for international protection. Moreover, it should be noted that in *Hassen El Dridi* the Court ruled that detention under the returns directive is to be used only for purposes of removal and when no other less coercive measures suffice[47].

When protection of national security or public order so requires:

The protection of national security or public order was a matter raised before the Court in *JN.* The CJEU was asked to determine the validity of Article 8(3)(e) RCD (recast) — which provides that an applicant for international protection may be detained when protection of national security so requires — in the light of Article 6 EU charter. The Grand Chamber of the CJEU considered that Article 8(3)(e) was a limitation on the right to liberty guaranteed by Article 6 EU charter (which had the same meaning and scope as Article 5 ECHR). It considered that there were a number of limitations which strictly regulated the use of detention under Article 8(3)(e). As such Article 8(3)(e) was considered to be valid in the light of Article 6 EU charter. Moreover, in the *JN* judgment the CJEU ruled that placing or keeping an applicant in detention is, in view of the requirement of necessity, only justified on grounds of national security or public order if the individual's conduct represents 'a genuine, present and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned'[48].

The UNHCR Detention Guidelines are again helpful:

> Governments may need to detain a particular individual who presents a threat to national security. Even though determining what constitutes a national security threat lies primarily within the domain of the government, the measures taken (such as detention) need to comply with the standards in these Guidelines, in particular that the detention

[45] CJEU, 2013, *Arslan*, paras 45-46.

[46] CJEU, 2013, *Arslan*, paras 48-49.

[47] CJEU, judgment of 28 April, 2011, case C-61/11 PPU, *Hassen El Dridi*.

[48] CJEU, 2011, *Hassen El Dridi*, para 67.

> is necessary, proportionate to the threat, non-discriminatory, and subject to judicial oversight.

In accordance with Article 28 of 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:

Under the Dublin III regulation, it is possible to detain applicants for international protection to secure the transfer procedures to the Member State responsible for processing the application, at all times during the Dublin procedure. However, detention simply because the transfer procedure is underway is not allowed. There is only one ground for detention being that there is a significant risk of absconding. The evaluation of this must be made on individual assessment[49] meaning that all the circumstances of the case must be considered. Detention must be necessary and proportionate and on the basis that less coercive alternative measures cannot be applied effectively (see Alternatives to detention). As the purpose of detention is to secure transfer proceedings detention should not be maintained if carrying out of the transfer is not possible.

The significant risk of absconding: the normative source of the objective criteria

In 2017, the CJEU ruled in *Al Chodor*[50] on the question of whether the sole fact that a national law has not defined objective criteria for assessment of a significant risk that a foreign national may abscond renders detention under Article 28(2) of that regulation inapplicable. The CJEU made clear that Article 2(n):

> Explicitly requires that objective criteria defining the existence of a risk of absconding be 'defined by law'. Since those criteria have been established neither by that regulation nor in another EU legal act, the elaboration of those criteria, in the context of that regulation, is a matter for national law[51].

Furthermore, CJEU came to the conclusion that 'the objective criteria underlying the reasons for believing that an applicant may abscond must be established in a binding provision of general application'[52]. Settled case-law cannot suffice. In the absence of those criteria in such a provision, the detention must be declared unlawful.

CJEU therefore concluded that Article 2(n) and Article 28(2):

> … must be interpreted as requiring Member States to establish, in a binding provision of general application, objective criteria underlying the reasons for believing that an applicant for international protection who is subject to a transfer procedure may abscond. The absence of such a provision leads to the inapplicability of Article 28(2) of that regulation.

---

49 CJEU, judgment of 15 March 2017, case C-528/15, *Al Chodor*, para. 34.

50 *Ibid*.

51 *Ibid*., para. 28.

52 *Ibid*., para. 45.

Individual assessment of each case requires the individual examination of the seriousness of the risk. The level of the risk must be significant, and the burden of proof lies on the state[53].

There is no guidance in the Dublin III regulation nor in CJEU case-law, including *Al Chodor,* as to establishing a list of criteria in order to assess the significant risk of absconding.

Securing the transfer proceedings

Detention under the Dublin III regulation follows a specific aim, to secure the transfer proceedings. In some cases, transfer of the applicant to the Member State responsible is not possible. Under Article 3(2) Dublin III regulation, it is impossible to transfer an applicant for international protection to the Member State primarily designated as responsible if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 EU charter. The CJEU ruled in *CK and others* that transfer can take place only in conditions which exclude the possibility that the transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment[54].

The risk of inhuman or degrading treatment may result from systemic deficiency alone when it is of exceptional gravity[55]. However, even when there are no systemic deficiencies, such risk may also result from the individual circumstances only e.g. the particularly serious state of health[56].

If the state authorities are aware of the problematic situation in the Member State responsible, they should not rely on the silence of the applicant or shift the burden of proof entirely on them[57]. Diplomatic assurances given by the Member State responsible, which use stereotyped terms and are merely referring to the applicable legislation, do not amount to a sufficient guarantee against the risk of inhuman or degrading treatment when reliable sources have reported opposite practices[58]. More on Article 3(2) Dublin III regulation can be found in the EASO Judicial analysis on Asylum procedures and the principle of *non-refoulement*[59].

If transfer is not possible the applicant for international protection should not be detained. When issuing the detention order, the administrative authority or the court should examine whether the transfer is not *a priori* excluded under Article 3(2) Dublin III regulation[60].

---

53 European Law Institute, *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards*, 2017, page 70.

54 CJEU, judgment of 16 February 2017, case C-578/16 PPU, *C.K. and others*.

55 CJEU, judgment of 21 December 2011, cases C-411/10 and C-493/10, *N.S. and others*, paras. 84-94

56 CJEU, 2017, *C.K. and others*, paras. 66-69

57 Compare ECtHR, Grand Chamber, judgment of 21 January 2011, *M.S.S.* v *Belgium and Greece*, application no 30696/09, paras. 346 and 352.

58 ECtHR, 2011, *M.S.S.* v *Belgium and Greece*, para. 354.

59 EASO, *Judicial analysis: Asylum procedures and the principle of non-refoulement*, page 64.

60 The extended chamber of Supreme Administrative Court of the Czech Republic dealt with the question whether consideration of the risk of systematic flaws must explicitly appear in the written reasoning of each decision on detention under Dublin III regulation. The extended chamber of the court came to the conclusion that the administrative authority does not have to explicitly deal with the question of systematic flaws in the Member State responsible, if the three following conditions are fulfilled: 1. such objection was not raised in front of the administrative authority; 2. the administrative authority, after having dealt with this question, came to conclusion that there are no systematic flaws in the Member State responsible; and 3. there is no reasonable doubt on the non-existence of such systematic flaws, Supreme Administrative Court, judgment of 17 April 2018, *IYH* v *Police Force of the Czech republic*, 4 Azs 73/2017-29.

5. Alternatives to detaining applicants for international protection

Objective: In this part, thorough examination of alternatives to detaining applicants for international protection will be addressed and how such alternatives impact the legality of detention itself.

5.1 Legal provisions

The RCD (recast) requires Member States to consider alternatives to detention before subjecting asylum seekers to detention (recital 15). The RCD (recast) emphasises that 'applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principles of necessity and proportionality with regard to both to the manner (sic) and the purpose of such detention' (recital 15). Article (8)(2) states that 'When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively'. Moreover, Article 8(4) adopts an open list of alternative measures such as 'regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place'. Article 8(4) provides that Member States shall ensure that the rules concerning alternatives to detention are laid down in national law.

Under the Dublin III regulation (Article 28(2)) a person might be detained 'only insofar as detention is proportional and other less coercive alternative measures cannot be applied effectively'.

Another legal instrument relating to detention of migrants in the framework of a return procedure is the returns directive. This directive is not part of the CEAS legal instruments. Unlike the RCD (recast)[61], the returns directive, despite adopting an exhaustive list of detention grounds, guarantees for detained returnees and rules for detention conditions, does not explicitly require Member States to establish national rules concerning alternative measures, nor does it provide for a list of alternative measures. However, even without this explicit obligation, and given that Article 15(1) of this directive provides for the possibility to keep in detention a third-country national 'unless other sufficient coercive measures can be applied effectively in a specific case', Articles 6, 52(3) and 53 EU charter obliges Member States to apply the principles of necessity and proportionality and therefore examine alternatives, in order to avoid arbitrary detention.

[61] Article 8(4).

Table 1: Legal provisions

Reception Conditions Directive 2013/33/EU	**Recital 15**	'Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principles of necessity and proportionality with regard to both to the manner and the purpose of such detention.'
	Article 8(2)	'When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.'
	Article 8(4)	'Regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place.'
Dublin Regulation (EU) No 604/2013	**Article 28(2)**	A person might be detained 'only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.'
Asylum Procedures Directive 2013/32/EU	**Article 26**	'1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU.'
Returns Directive 2008/115/EC	**Article 15**	'1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process. Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence'.
	Article 17	'1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time'.

5.2 Alternatives to detention — general principles

'Alternatives to detention' is not defined. It refers to any legislation, policy or practice that allows asylum-seekers to reside in the community subject to a number of conditions or restrictions on their freedom of movement but does not reach the threshold of detention[62].

However, these measures impose restrictions, having an impact on the person's human rights[63], and they are subject to human rights standards. Therefore, these measures have to be imposed, on a case-by-case basis, by taking into consideration individual factors, after assessing the necessity, reasonableness and proportionality. As a general principle, the use of alternatives is only relevant when there are legitimate grounds to detain - even if secondary Union law does not establish such a clear rule and consequently, this question could be regarded as relying essentially on national law - otherwise the use of such measures would be in fact alternatives to release or alternative forms of detention. The importance of the principle of

[62] UNCHR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.

[63] These other rights could include: the rights to family life (Article 8 ECHR), prohibition of torture (Articl 3 ECHR) the right to privacy (Article 8 ECHR, Article 7 CFREU), the right to family life (Articles 2 and 8 ECHR, Article 9 CFREU Article 12(2) 1951 Refugee Convention), the prohibition on inhuman or degrading treatment (Article 3 ECHR, Article 4 CFREU).

proportionality together with the principle of necessity have been subjected to a reiterated study under international human rights law[64]. For instance, the UNHCR maintained that these fundamental rules are an essential component in order to guarantee that the detention measure is relevant and sufficient in cases where public policy is at stake.

For that purpose, the UNHCR Detention Guidelines state that:

> [T]he general principle of proportionality requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights. […]The necessity and proportionality tests further require an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case[65].

The consideration of alternatives is only relevant when there are legitimate grounds to detain[66]. In addition to legitimate grounds to detention, an assessment of necessity and proportionality is required at every stage of the procedure, including at the judicial review. Whether the judge has jurisdiction to decide which alternatives should be applied is a matter of national law.

This entails that among different possible effective measures, in any individual case the less intrusive has to be chosen and moreover any measure applied to an individual person has to be constantly monitored and subject to a periodic review. Moreover, they need to be governed by laws and regulations in order to avoid the arbitrary imposition of restrictions on liberty or freedom of movement[67]. Such alternatives should in themselves be subject to proportionality/necessity tests and should not amount to a form of disguised detention[68].

Finally, since minors are detained only as a measure of last resort, a possible alternative to detention could be accommodation in residential homes or foster placements or where provided for by national legislation appointment of legal guardians within the shortest possible time. In any case they should not be separated from their parents, nor from other adults responsible for them whether by law or custom and they must not be placed in prison-like conditions.

---

64 Sampson R. & Grant M., '*Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*', Journal on Migration and Human Security (2013) 1(3).

65 UNHCR, *Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*, 2012.

66 Even if secondary Union law does not establish such a clear rule and consequently, this question could be regarded as relying essentially on national law.

67 UNHCR and the Office of the High Commissioner for Human Rights (OHCHR), *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, May 2011 (Global Roundtable Summary Conclusions), para 2.

68 British Institute of International and Comparative Law, *Immigration Detention and the Rule of Law: Safeguarding Principles*, 2013; European Parliament, *Impact de la jurisprudence de la CEJ et de la CEDH en matière d'asile et d'immigration*, 2012.

5.3 Alternatives to detention — listed measures

Alternatives to detention may take various forms depending on the circumstances of the applicant for international protection and national law and practice. Alternative measures may be used alone or in combination and some will impose greater restrictions than others. The nature of alternatives to detention cannot be specific – it is the duty to consider alternatives that is required. Article 8(4) RCD lists three potential measures but these are not exhaustive[69].

Regular reporting to the authorities:

During the asylum determination procedure, an applicant for international protection may be obliged to periodically report to immigration or other public authorities such as the police or the competent asylum service[70]. This could be scheduled periodically, after considering the individual circumstances of the person and ensuring that any conditions imposed continue to meet the necessity, reasonableness and proportionality tests. For example, the imposition of reporting to the authorities that requires a person and their family to travel long distances and/or at their own expense could lead to non-cooperation through inability to fulfil the conditions, and unfairly discriminate on the basis of economic position and would not pass the proportionality test. Any increase in reporting conditions should be justified due to an objective and individual assessment of a risk of absconding and be proportionate to the objective pursued.

Obligation to stay at an assigned place:

Asylum seekers may be required to reside at a specific address[71] or within a particular administrative region until their status has been determined. If they wish to change address within the same administrative region they might be obliged to inform the authorities. If they wish to travel or move out of the region they might be required to obtain prior approval. They might be obliged to reside at a designated *open* or *semi-open* reception centre, subject to the rules and regulations of those centres. However, the general freedom of movement within and outside the centre must be respected and in any case cannot take the form of detention.

Deposit of a financial guarantee/bond:

A financial guarantee or a bond payment may be required. In such cases, the amount specified should be tailored to individual circumstances, and therefore be reasonable given the particular situation of asylum seekers, and not so high as to lead to discrimination against persons with limited funds. Any failure to be able to do so resulting in detention (or its continuation), would suggest that the system is arbitrary. There is no reason why a financial guarantee or bond should not be provided by a third party.

---

69 Odysseus Academic Network, *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation*, (Odysseus Network 2015); UNHCR's Option Paper no 1, Options for governments on care arrangements and alternatives to detention for children and families, and no 2, Options for governments on open reception and alternatives to detention, 2015.

70 Council of State (Greece), judgment no 97/2018, para 21.

71 *Ibid*.

Other alternative measures[72]:

Filing or delivery of documents

Asylum seekers may be required to hand over identity and/or travel documents such as passports. In these cases, they should be provided with replacement documents enabling them to remain in the territory and/or their release within the community.

Electronic monitoring

Electronic monitoring or 'tagging' is rarely used in Europe[73] and refers to a form of surveillance meant to monitor or restrict a person's movements based on technology, such as GPS-enabled wrist or ankle bracelets. Electronic monitoring is primarily used in the context of criminal law[74]. The UNHCR[75] considers it as the most intrusive of the various alternative measures, especially given the criminal stigma involved, and discourages its use. In France, parents of minors can be placed under house arrest with electronic surveillance in cases where standard house arrest is considered insufficient[76]. In Portugal, it is used alongside the prohibition against leaving the house. In this case, as third-country nationals are not allowed to leave the house, this represents an alternative form of detention and not an alternative to detention. In the United Kingdom, electronic monitoring may be used in the case of third-country nationals subject to residence restrictions.

Given the specific situation of minors, pregnant women, the elderly or those with mental health problems, the latter should not be covered by this alternative, *de lege ferenda*. Electronic monitoring has not been found to be very effective in reducing the number of absconders in Member States; nevertheless, it is considered a useful way to increase contact with individuals, to monitor compliance with reporting restrictions and to provide an early warning in case of an attempt to abscond.

Personal guarantor

A guarantor is a person who ensures that the third-country national attends hearings, official appointments and meetings, etc. A citizen with permanent residence (HR, LT), a lawfully residing third-country national (LT), an international organisation dedicated to the protection of human rights (HR) or a 'person of trust' (DE, in two Federal *Länder* (Bremen and Brandenburg)) can act as a guarantor[77].

---

[72] The type of 'other alternative measures' that can be adopted relies essentially on national law.

[73] Communication from the Commission to the Council and the European Parliament on EU Return Policy, COM(2014) 199 final, 28.3.2014, p. 16

[74] European Union Agency for Fundamental Rights, *Alternatives to detention for asylum seekers and people in return procedures*, 2015, p. 2

[75] UNHCR, *Detention Guidelines*, 2012, Guideline 4.3: 40. See also, UNHCR, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, July 2011, summary conclusion no 21.

[76] European Migration Network, *The use of detention and alternatives to detention in the context of immigration policies*, 2014.

[77] Country codes of EU+ States: AT (Austria), BE (Belgium), BG (Bulgaria), CY (Cyprus), CZ (Czech Republic), DE (Germany), EE (Estonia), EL (Greece), ES (Spain), FI (Finland), FR (France), HR (Croatia), HU (Hungary), IE (Ireland), LT (Lithuania), LU (Luxemburg), LV (Latvia), NL (Netherlands), NO (Norway), PL (Poland), PT (Portugal), SE (Sweden), SI (Slovenia), SK (Slovakia), UK (United Kingdom).

Table 2: Alternatives to detention in EU Member States plus Norway[78]

Reporting obligations (e.g. reporting to the police or immigration authorities at regular intervals)	AT, BE, BG, CY, CZ, DE, DK, EE, ES, FI, FR, HR, HU, IE, LT, LV, NL, PL, PT, SE, SI, SK, UK, NO,
Residence requirements (e.g. residing at a particular address)	AT, BE, CZ DE, DK, EE, ES, FI, FR, HR, HU, IE, LU, NL, PL, PT, SI, UK, NO
Obligation to surrender a passport or a travel document	CY, DE, DK, EE, ES, FI, FR, HR, HU, IE, LV, NL, PL, SE, NO
Release on bail (with or without Sureties)	AT, BE CZ DE, FI, HR, HU, IE, NL, PL, PT, SK, UK
Electronic monitoring (e.g. tagging)	FR IE, PT, UK
Guarantor requirements	DE, HR, LT
Release to care worker or under a care plan	DE
Seizure of money for travel documents and tickets	HU
Accommodation in open reception centres for asylum seekers	LT
Prohibition of work/study	UK

[78] European Migration Network, *The use of detention and alternatives to detention in the context of immigration policies*, 2014; International Detention Coalition, *Alternatives to Detention in Greece*; Global Detention Project: https://www.globaldetentionproject.org/

6. Duration of detention

6.1 Length of detention

According to Article 9(1) subparagraph 1 RCD (recast), the length of detention shall be for as short a period as possible and 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 CJEU emphasises Article 9(1) RCD (recast) as a provision[79] but does not define the meaning of 'as short a period as possible'. What is as short a period as possible and what period is reasonable will depend on the specific circumstances of each case. But the ECtHR gives guidance in various cases including *Rahimi* v *Greece*, where 2 days was considered too long considering the vulnerability of a 15-year-old, and *JR and others* v *Greece*, where 1 month was considered reasonable for adult male applicants for international protection. More examples can be found in 'Selected relevant international provisions'.

Under the returns directive, detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence (Article 15(1)). Detention is subject to review at reasonable intervals of time and is to be terminated when it appears that a reasonable prospect of removal no longer exists (Article 15(3) and (4)). The maximum length of detention is 6 months, subject to prolongation for 12 months under specific circumstances (Article 15(5) and (6)). The CJEU in *Achughbabian* noted that Article 15 of the returns directive can be extended by an additional period of detention of 12 months being capable of being added only where non-implementation of the return decision during the said 6 months is due to a lack of cooperation from the person concerned or delays in obtaining the necessary documentation from third countries[80].

As the duration of detention is strictly dependent on the grounds of Article 8(3) RCD (recast) and in accordance with Article 5(1)(f) ECHR, detention must be carried out in good faith and the length of detention should not exceed the time reasonably required for the purpose pursued[81].

The deprivation of liberty under Article 5(1)(f) ECHR will therefore be justified only for as long as removal proceedings are in progress and executed with due diligence[82]. The fact that the removal proceedings are in progress is not sufficient unless a reasonable prospect of removal exists[83]. The length of removal proceedings therefore depends on the particular circumstances of each case[84] and is independent of time limits laid down in domestic law. Consequently, even where domestic law does lay down time limits, compliance with those time limits cannot

[79] CJEU, judgment of 14 September 2017, C-18/16, *K.* v *Staatssecretaris van Veiligheid en Justitie*, para. 45.
[80] CJEU, judgment of 6 December 2011, C-329/11, Alexandre Achughbabian v Préfet du Val-de-Marne, para. 36.
[81] ECtHR, judgment of 20 September 2011, *Lokpo and Touré* v *Hungary*, application no 10816/10, § 22.
[82] ECtHR, judgment of 26 April 2007, *Gebremedhin (Gaberamadhien)* v *France*, application no 25389/05, § 74.
[83] CJEU, judgment of 30 November 2009, C-357/09, *Said Shamilovich Kadzoev (Huchbarov)*.
[84] ECtHR, judgment of 19 May 2016, *J.N.* v *the United Kingdom*, application no 37289/12, para. 83.

be regarded as automatically bringing the applicant's detention into line with Article 5(1)(f) ECHR[85].

6.2 Duration of detention under RCD (recast) in relation to individual detention grounds

The justified length of detention will differ depending on the detention ground and the objective of the detention. In *K,* the CJEU confirmed that each of the grounds under Article 8(3) RCD (recast) meets a specific need and is self-standing[86]. Therefore:

> [I]t is apparent from the wording of the first subparagraph of Article 8(3)(a) of that directive that an applicant may be subject to such a measure only where he has failed to communicate his identity or nationality or the identification papers justifying that, notwithstanding his obligation to cooperate. Likewise, it results from the first subparagraph of Article 8(3)(b) of that directive that an applicant may be detained only where certain elements on which his application for international protection is based could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant[87].

In a case before the Czech court, it was found that in order to determine or verify the identity of the applicant, detention is possible only during the period in which the administrative authority takes concrete steps to fulfil this detention ground. The detention for 110 days was found to be unlawful in the case where the applicant for international protection fulfilled his obligation to communicate his identity or nationality by presenting declaration of his identity and it was not clear which further concrete steps for determination or verification of his identity would be undertaken by the administrative authority[88].

Pursuant to Article 8(3)(c) RCD (recast) it is possible to detain the applicant for international protection in order to decide on their right to enter the territory. Under Article 43(2) APD (recast), dealing with border procedures, the applicant shall be granted entry to the territory when a decision has not been taken within 4 weeks.

The reasonable length of detention under Article 8(1)(d) RCD (recast) will depend on the length of the asylum procedure and related legal acts. The problem of calculating the maximum length of detention might arise in cases when the application for international protection is made while being detained under the returns directive. The CJEU made clear in *Kadzoev*[89] 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 within the Article 15 returns directive[90]. Moreover, the Court noted that 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[91], and that Article 15(4) and

---

85 *Ibid*.

86 CJEU, judgment of 14 September 2017, case C-18/16, *K.* v *Staatssecretaris van Veiligheid en Justitie*, para. 42.

87 *Ibid*.

88 Supreme Administrative Court, judgment of 27 July 2017, *AS* v *Ministry of Interior*, 6 Azs 128/2016-44.

89 CJEU, judgment of 30 November 2009, case C-357/09, *Kadzoev*, para. 67.

90 *Ibid*., para. 48.

91 *Ibid*., para. 63.

(6) of Directive 2008/115 must be interpreted as not allowing, where the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose[92].

The returns directive does not apply to a third-country national who has applied for international protection[93], therefore when detention grounds change from the returns directive to detention under the RCD (recast), the reasonableness of detention needs to be reconsidered.

6.3 The prolongation of detention

The initial detention and prolongation of detention both deprive the applicants for international protection of their liberty and therefore are similar in nature. The CJEU expressed this while interpreting the returns directive in *Mahdi*[94] but this conclusion is applicable also in detention of applicants for international protection cases. In the case of an expiry of the initial detention period and the authorities' decision on the prolongation of detention, the length of the prolonged detention must be, as in the case of the initial detention, proportionate to the aim pursued and respect all the above-mentioned principles.

6.4 Duration of detention under the Dublin III regulation

The RCD (recast) and the principle that detention should be as short as possible applies also to applicants for international protection under the Dublin III regulation. The only difference is that the aim of detention is to secure Dublin proceedings. The Dublin III regulation lays down the specific periods for carrying out the transfer if the person is detained. As implied in recital 20 Dublin III regulation, the procedures in respect of a detained person should be applied as a matter of priority within the shortest possible deadlines. The periods for procedures can be found in Article 28(3) Dublin III regulation and limit the duration of detention[95]:

> When the requesting Member State fails to comply with the deadlines for submitting a take charge or take back request or where the transfer does not take place within the period of six weeks referred to in the third subparagraph, the person shall no longer be detained.

The calculation of the time limits is prescribed in Article 42 Dublin III regulation. The time limits are set out in Table 3.

---

92 *Ibid*., para. 71.

93 CJEU, judgment of 30 May 2013, case C-534/11, *Arslan*.

94 CJEU, judgment 5 June 2014, case C-146/14, *Mahdi*, para. 44.

95 In case *FK* v *Police Force of the Czech Republic*, the Supreme Administrative Court stated that in the first phase of the transfer proceedings (until the request for take charge or take back is made) the period of detention can be maximum 1 month from the lodging of the application for international protection. Supreme Administrative Court, (CZ) judgment of 19 February 2015, *F.K.* v *Police Force of the Czech Republic*, 7 Azs 11/2015-32.

Table 3: Time limits in Dublin procedures if the person is detained##96

Request to take charge or take back	1 month from the lodging of the application ([97]).
Reply to take charge or take back request	2 weeks of receipt of the request.
Transfer to the Member State responsible	6 weeks of the implicit or explicit acceptance of the request/the moment when the appeal or review no longer has a suspensive effect.

Accepted length of detention is closely connected to the above-mentioned Dublin procedures.

In *Khir Amayry* v *Migrationsverket*[97], the CJEU drew a distinction between the situation where the person was already detained when the request to take charge or take back was accepted and the situation where detention started after the requested Member State had accepted the take charge or take back request. The CJEU pointed out that none of the periods in the third subparagraph of Article 28(3) Dublin III regulation relates to the beginning of detention and took into consideration that the significant risk of absconding can sometimes become apparent in later stages. The CJEU refused the interpretation under which detention must end 6 weeks after the acceptance of the take charge or take back request, in the case of detention just beginning after the acceptance[98]. The CJEU came to conclusion that:

> … the period no longer than six weeks within which the transfer of a detained person must be carried out, laid down by that provision, applies only in the situation where the person concerned is already detained when one of the two events covered by that provision takes place[99].

In cases of detention beginning after the acceptance of the take charge or the take back, the duration is circumscribed only from the date on which the appeal or review loses its suspensive effect[100]. The CJEU stated:

> Failing any maximum duration of detention being set out in the Dublin III Regulation, such detention must nonetheless be compatible with, first of all, the principle laid down by the first subparagraph of Article 28(3) of that regulation that the detention be for as short a period as possible and not for longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer is carried out[101].

The CJEU made clear that each case is specific, and the basic principle is that the detention should be as short as possible, should not be extended beyond what is necessary and the detention period should not be 'vastly in excess of 6 weeks during which the transfer could be reasonably carried out'[102]. In such a case when detention started only after acceptance of take

---

96 Article 24 Dublin III regulation should continue to apply accordingly. Therefore, when no new application has been lodged in the requesting Member State, it might be argued that the starting point for calculating the time limit is the date on which the Member State becomes aware that another Member State might be responsible. Compare *Judicial analysis: Asylum procedures and the principle of non-refoulement, p. 51-52.*

97 CJEU, judgment of 13 September 2017, case C-60/16, *Khir Amayry* v *Migrationsverket*.

98 *Ibid*., paras. 33-38

99 *Ibid*., para. 39.

100 *Ibid*., para 40.

101 *Ibid*., para 41.

102 *Ibid*., para. 45.

back or take charge from the Member State, 3 or 12 months of detention were already too much. The Court's reasoning is based on the purpose of the regulation, which is to ensure the transfer of third-country nationals to the Member State responsible and the Court's consideration that any other interpretation would reduce the possibility of states to make maximum use of the time limits for identifying the responsible Member State and carrying out the transfer. The ruling should not be used to justify the use of maximum detention periods.

Table 4: Case *Khir Amayry* v *Migrationsverket*

Question 1: person is already detained when the request to take charge or take back is accepted	Maximum period of 6 weeks applies
Question 2: detention begins only after the request to take charge or take back is accepted	The detention period should not be vastly in excess of 6 weeks: after the review or the appeal loses its suspensive effect the maximum period of 6 weeks applies

The CJEU further stated that the number of days during which the person concerned was already detained after a Member State has accepted the take charge or take back request need not be deducted from the 6-week period established by Article 28(3), from the moment when the appeal or review no longer has suspensive effect. It means that if a transfer procedure recommences after an appeal or a review no longer has suspensive effect, a new period of 6 weeks for implementation of the transfer begins. This applies no matter whether the suspension is automatic or whether it has been granted by the judicial decision on request by the applicant for international protection.

7. Other guarantees for applicants for international protection in detention

7.1 Due diligence requirement

According to Article 9(1) subparagraph 2 RCD (recast), administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant for international protection shall not justify a continuation of detention.

As laid down in recital 16 RCD (recast) the notion of 'due diligence' at least requires Member States to take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time, so that detention shall not exceed the time reasonably needed to complete the relevant procedures.

If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f) ECHR[103].

7.2 Requirement of a written detention order

According to Article 9(2) RCD (recast) 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. This requirement also applies to Dublin cases as mentioned in Article 28(4) Dublin III regulation. According to Article 9(4) RCD (recast), this notification has to be done immediately, in writing in the 'language which they understand or are reasonably supposed to understand, of the reasons for detention' as well as the remedies available.

This requirement corresponds to Article 5(2) ECHR, which lays down an elementary safeguard: any person who has been detained should know why they are being deprived of their liberty. They must be told, in simple, non-technical language that they can understand, the essential legal and factual grounds for the deprivation of liberty, so they are able to apply to a court to challenge its lawfulness[104]. Whilst this information must be conveyed 'promptly', it need not be related in its entirety at the very moment of the detention[105]. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case

[103] ECtHR, judgment of 22 September 2015, *Nabil and others* v *Hungary*, application no 62116/12, para. 29; ECtHR judgment of 3 May 2016, *Abdi Mahamud* v *Malta*, application no 56796/13.

[104] ECtHR, judgment of 15 December 2016, *Khlaifia and others* v *Italy*, application no 16483/12, para. 115.

[105] *Ibid*.

according to its special features[106]. Where such information is not given the right of appeal has no effective substance[107].

7.3 Aspects of right for judicial review

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 recital 16 RCD (recast), the judicial review of the lawfulness of detention obliges Member States to take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible and that there is a real prospect that such verification can be carried out successfully in the shortest possible time.

This leads to Article 5(4) ECHR, which also proclaims the right to a speedy judicial decision concerning the lawfulness of detention, which must be terminated if proved unlawful[108]. The above cited regulations lead to three aspects: firstly, the remedy must be made available during a person's detention to allow that person to obtain speedy review of its lawfulness: secondly, that review must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question: thirdly, the review should also be capable of leading, where appropriate, to release[109].

The question whether the principle of speedy proceedings has been observed has to take into account the circumstances and the complexity of the case, any specificities of the domestic procedure and the applicant's behaviour in the course of the proceedings[110]. Although the number of days taken by the relevant proceedings is obviously an important element, it is not necessarily in itself decisive for the question of whether a decision has been given with the requisite speed[111]. In this sense, Member States have to organise their legal systems so as to enable the courts to comply with its various requirements[112].

---

106 ECtHR, 2016, *Khlaifia and others* v *Italy*, para. 115; examples: ECtHR, judgment of 23 July 2013, *M.A.* v *Cyprus*, application no 41872/10, para. 228: delays of 76 hours or 4 days or 10 days as a violation.

107 ECtHR, 2016, *Khlaifia and others* v *Italy*, para. 132.

108 ECtHR, judgment 17 April 2014, *Gayratbek Saliyev* v *Russia*, application no 39093/13, para. 76.

109 ECtHR, judgment of 19 May 2016, *J.N.* v *the United Kingdom*, application no 37289/12, para. 88. In the cases of *Kadem* v *Malta*, application no 55263/00, paras. 44-45, and *Rehbock* v *Slovenia*, application no 29462/95, paras. 82-86, the ECtHR considered periods of 17 and 26 days excessive for deciding on the lawfulness of the applicant's detention. In *Mamedova* v *Russia*, application no 7064/05, para. 96, the length of appeal proceedings lasting, inter alia, 26 days was found to be in breach of the speediness requirement. In *Karimov* v *Russia*, application no 12535/06, the ECtHR established that delays of 13) to 20 days in examining the appeals against detention order may be incompatible with the 'speediness' requirement of Article 5(4) of the ECHR.

110 ECtHR, 2016, *Khlaifia and others* v *Italy*, para. 131.

111 Example: ECtHR, judgment 17 April 2014, *Gayratbek Saliyev* v *Russia*, application no 39093/13, paras. 77-79: appeals against the first instance detention orders took 47 and 51 days; further examples: ECtHR, judgment of 23 July 2013, *Aden Ahmed* v *Malta*, application no 55352, para. 115.

112 ECtHR, judgment of 29 August 1990, *E.* v *Norway*, application no 11701/85, para. 66.

On the other hand, neither the RCD (recast) nor Article 5(4) ECHR compel the establishment of a second level of jurisdiction for the examination of the lawfulness of detention[113]. However, where domestic law provides for an appeal, the appellate body must also comply with the requirements of Article 5(4) ECHR. The standard of 'speediness' is less stringent when it comes to proceedings before a court of appeal[114].

Furthermore, the ECtHR has not, to date, held that Article 5(1)(f) ECHR requires automatic judicial review of detention pending removal, as the existence of such a remedy will not guarantee that a system of immigration detention complies with the requirements of Article 5(1)(f) ECHR[115].

Nevertheless, under Article 9(5) RCD (recast) detention shall be reviewed by a judicial authority at reasonable intervals of time, ex officio and/or at the request of the applicant for international protection concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention. This regulation requires that a control must take place if any new circumstances arise on the grounds of detention that might have an influence on the upholding of the detention order. Such facts can be based on new findings made by the authorities or on new allegations made by the applicant for international protection. Article 5(4) ECHR does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority[116]. The review should, however, be wide enough to bear on those conditions which are essential for the 'lawful' detention of a person according to Article 5(1) ECHR[117]. The reviewing 'court' must not have merely advisory functions but must have the competence to 'decide' the 'lawfulness' of the detention and to order release if the detention is unlawful[118].

The judgement or order for release must be executed fully and exhaustively and not just partially and may not be prevented, invalidated or unduly delayed[119].

It should also be noted that according Article 15 (3) of the returns directive, detention is reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio, and that in the case of prolonged detention periods, reviews are subject to the supervision of the judicial authority.

---

[113] However, there is a preliminary question lodged on 15 December 2017 by the Supreme Administrative Court (the Czech republic) in case C-704/17 *D.H.* v *Ministerstvo vnitra*: *Does the interpretation of Article 9 of Directive 2013/33/EU (…) in conjunction with Articles 6 and 47 of the Charter of Fundamental Rights of the European Union preclude national legislation which does not allow the Nejvyšší správní soud (Supreme Administrative Court) to review a judicial decision concerning detention of a foreign national after the foreign national has been released from detention?*

[114] ECtHR, 2014, *Gayratbek Saliyev* v *Russia*, paras. 77-79.

[115] ECtHR, 2016, *J.N.* v *the United Kingdom*, para. 87.

[116] ECtHR, judgment of 15 December 2016, *Khlaifia and others* v *Italy*, application no 16483/12, para. 128.

[117] *Ibid*.

[118] *Ibid*.

[119] ECtHR, judgment of 28 July 1999, *Immobiliare Saffi* v *Italy*, application no 22774/93, para. 74, not regarding applicants for international protection but general aspect.

7.4 Right to free legal assistance and representation

According to Article 9(6) RCD (recast) subparagraph 1, in cases of a judicial review of the detention order provided for in paragraph 3, Member States shall ensure that applicants for international protection who lack sufficient resources have access to free legal assistance and representation[120]. Article 26(2) RCD (recast) extends the access to free legal assistance and representation on request to cases of appeal or review before a judicial authority, insofar as such aid is necessary to ensure effective access to justice. In both cases, the legal help should be provided by suitably qualified persons. According to recital 21 RCD (recast), in order to ensure compliance with the procedural guarantees requiring the opportunity to contact organisations or groups of persons that provide legal assistance, information should be provided on such organisations and groups of persons.

This leads to Article 47 EU charter, which states that 'everyone shall have the possibility of being advised, defended and represented' and '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'. According to the ECtHR the accessibility of a remedy implies that the circumstances voluntarily created by the authorities must be such as to afford applicants for international protection a realistic possibility of using a remedy[121]. In the context of detention proceedings, however, the ECtHR ruled in that although there is no obligation to provide free legal aid, the lack thereof, particularly where legal representation is required in the domestic context for the purposes of Article 5(4), may raise an issue as to the accessibility of such a remedy[122]. Member States have the possibility to restrict legal assistance where the appeal has no tangible prospect of success. Such restrictions will have to be in compliance with Article 47 EU charter. Articles 9(7)-(9) and 26(3)-(5) RCD (recast) allow Member States to implement requirements for granting free legal assistance and representation, as the treatment of applicants for international protection should not be more favourable than the treatment generally accorded to their nationals[123].

The ECtHR has found that a lack of legal aid can render remedy under Article 13 ECHR inaccessible[124].

7.5 The right to an effective remedy

The applicant for international protection has a right to an effective judicial remedy against detention deriving from Article 47 EU charter. Article 26(1) RCD (recast) sets the grounds on which applicants for international protection may challenge decisions relating to reception conditions, by extending their appeals against all decisions relating to 'withdrawal or reduction' of reception conditions. In addition, paragraph 2 provides for legal assistance free of charge where the applicant for international protections cannot afford the costs and 'in so far as it is necessary to ensure their effective access to justice'. This provision reflects a similar guarantee for detained applicants as in Article 9(6) RCD (recast). In line with the Article 13

120 ECtHR, judgment of 9 October 1979, *Airey* v *Ireland*, application no 6289/73, para. 26.

121 ECtHR, judgment of 5 February 2002, *Čonka* v *Belgium*, application no 51564/99, para. 46.

122 ECtHR, judgment of 23 July 2013, *Suso Musa* v *Malta*, application no 42337/12, para. 61.

123 Example: to the German law, free financial aid is only to be granted if there is a prospect of success in challenging the detention order: Federal Court of Justice (Germany), judgment of 20 May 2016 — V ZB 140/15, para. 17.

124 ECtHR, judgment of 21 January 2011, *M.S.S.* v *Belgium and Greece*, application no 30696/09.

ECHR and the EU charter, these measures improve the likelihood of access to an effective remedy, which is essential to ensure consistent adherence to the entitlements set out in the RCD (recast).

In *Mahdi* the Court developed standards for an effective judicial remedy. A judicial authority must be able to rule on all relevant matters of fact and of law in order to determine whether a detention is justified. This requires an in-depth examination of the matters of fact specific to each individual case. Where detention is no longer justified, the judicial authority must be able to substitute its own decision for that of the administrative authority and to make a decision on whether to order an alternative measure or to release the third-country national concerned. To that end, the judicial authority must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by a third-country national. Furthermore, a judicial authority must be able to consider any other elements that are relevant for its decision should it so deem necessary. Accordingly, the powers of the judicial authority in the context of an examination can under no circumstances be confined only to the matters adduced by the administrative authority concerned. Any other interpretation would result in an ineffective examination by the judicial authority and would thereby jeopardise the achievement of the objectives pursued. The reviewing court must have jurisdiction to decide on whether or not deprivation of liberty has become unlawful in the light of new factors, which have emerged subsequently to the initial decision depriving a person of their liberty[125].

7.6 The possibility to contact UNHCR

The APD (recast) provides for a guarantee for asylum seekers not to be denied the opportunity to communicate with UNHCR throughout the asylum procedure (Article 12(1)(c) APD (recast)). Besides this general safeguard, pursuant to Article 18(2)(b) RCD (recast), Member States shall also ensure that while in detention applicants for international protection have the possibility of communicating notably with 'persons representing UNHCR and other relevant national, international and non-governmental organisations and bodies'. This is further developed in UNHCR Detention Guidelines which provides that access to and by UNHCR must be assured and that facilities should be made available to enable such visits (para. 48(vii)).

[125] For more information, see European Law Institute, *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards*, 2017.

8. Detention conditions

According to recital 18 RCD (recast) applicants for international protection who are in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs in their situation[126]. An applicant may not be deprived — even for a temporary period of time after the making of the application for international protection and before being actually transferred to the responsible Member State — of the protection of the minimum standards laid down by the RCD (recast)[127]. Recital 20 RCD (recast) stipulates detention as a measure of last resort. Article 28(4) Dublin III regulation provides that Articles 9, 10 and 11 RCD (recast) apply in detention cases under the Dublin III regulation.

8.1 Specialised detention facilities

As laid down in Article 10(1) RCD (recast) 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. The separation of applicants for international protection and ordinary prisoners is an unconditional obligation and must be obeyed even if the person concerned wishes to be detained together with ordinary prisoners[128]. The ECtHR provides that detention in police facilities should be kept to an absolute minimum[129]. Furthermore, Article 21(1) RCD (recast) and recital 14 RCD (recast) provide that the situation of applicants with special reception needs has to be taken into account. Such vulnerable applicants might include 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 and 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 status of being an asylum seeker causes the applicant for international protection to be a member of a particularly underprivileged and vulnerable group in need of special protection[130]. However, it has to be borne in mind that the ECtHR in *M.S.S* did not explicitly interpret vulnerability in the sense of the RCD (recast)[131].

Article 3 ECHR prohibits torture and inhuman or degrading treatment or punishment and requires Member States to ensure that detention conditions are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their

[126] Article 1 EU charter.

[127] CJEU, judgment of 27 September 2012, case C-179/11, *Cimade v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, para. 56.

[128] CJEU, judgment of 17 July 2014, case C-474/13, *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik*, § 17, para. 23, regarding Article 16(1) of returns directive 2008/115.

[129] ECtHR, judgments of 13 April 2010, *Charahili v Turkey*, application no 46605/07; *Keshmiri v Turkey*, application no 36370/08, *Ranjbar and others v Turkey,* application no 37040/07, *Tehrani and others v Turkey*, application nos 32940/08, 41626/08 and 43616/08.

[130] ECtHR, judgment of 21 January 2011, *M.S.S. v Belgium and Greece*, application no 30696/09, para. 251.

[131] ECtHR, 2011, *M.S.S. v Belgium and Greece*.

health and well-being are adequately secured[132]. Nevertheless, the ill-treatment of Article 3 must attain a minimum level of severity; the assessment of that level is relative and depends on all the circumstances of the case, principally the duration of the treatment, its physical or mental effects, the sex, age and state of health of the person concerned[133].

Holding applicants for international protection in a transit zone obliges Member States to comply with its international obligations, particularly under the Geneva Convention and the ECHR[134].

8.2 Special requirements

Article 10 RCD (recast) 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. The conditions of detention must fulfil special requirements that may concern the question of overcrowding, ventilation, access to open-air spaces, the quality of heating, the health requirements and treatment, and the basic sanitary and hygiene standards. Furthermore, the protection of family unity has to be respected.

8.2.1 Overcrowding, ventilation, access to open-air spaces, quality of heating, hygienic requirements

In general, the question of a violation of Article 3 ECHR has to consider the following three elements: (a) each detainee must have an individual sleeping place in a cell; (b) each detainee must have at least three square metres of floor space; (c) the overall surface area of the cell must be such as to allow the detainees to move freely between the furniture items[135]. The prisons standards developed by the Committee for the Prevention of Torture is a basic safeguard of prisoners' well-being[136].

Overcrowding is a violation of Article 3 ECHR. There is the general requirement of having three square metres of floor surface per detainee (including space occupied by furniture but not counting the in-cell sanitary facility) in multi-occupancy accommodation[137]. But the lack of space can be compensated for by other aspects of the conditions of detention[138]. So in a case where overcrowding is not significant enough to raise itself an issue under Article 3, for example if personal space measures in the range of three to four square metres per inmate, other aspects have to be taken into account, such as access to outdoor exercise, natural light or air, availability of ventilation, adequacy of heating arrangements, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements[139].

---

132 *Ibid*., para. 221.

133 ECtHR, judgment of 15 December 2016, *Khlaifia and others* v *Italy*, application no 16483/12, paras. 158-159.

134 ECtHR, judgment of 25 June 1996, *Ammur* v *France*, application no 19776/92, para. 43.

135 ECtHR, judgment of 23 July 2013, *Aden Ahmed* v *Malta*, application no 55352/12, para. 87.

136 ECtHR, judgment of 22 November 2016, *Abdullahi Elmi and Aweys Abubakar* v *Malta*, nos 25794/13 and 28151/13, para. 102.

137 ECtHR, 2016, *Khlaifia and others* v *Italy*, para. 166.

138 *Ibid*.

139 ECtHR, judgment of 10 January 2012, *Ananyev and others* v *Russia*, application no 42525/07, para. 149-159.

8.2.2 Healthcare

The RCD (recast) also sets out provisions in relation to healthcare. The health of vulnerable persons shall be a primary concern (Article 11(1) RCD (recast)) and according to Article 19 RCD (recast), Member States shall ensure that applicants for international protection receive the necessary healthcare which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders. In cases where applicants for international protection have special reception needs, necessary medical or other assistance, including appropriate mental healthcare, must be provided. Furthermore, according to Article 25(1) RCD (recast) victims of torture and violence shall have access to appropriate medical and psychological treatment or care. There are in general three particular elements to be considered in relation to the compatibility of an applicant's health with the stay in detention: (a) the medical condition of the applicant, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of the applicant[140]. In this sense, keeping a woman in an advanced stage of pregnancy in an overcrowded detention facility or a lack of female staff is a violation of Article 3 ECHR[141]. As a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained[142]. Where authorities decide to place and keep a person with a disability in detention, they need to take special care in guaranteeing conditions corresponding to the special needs resulting from that disability[143]. When the authorities are aware of an applicant's serious or incurable disease, they must act with due diligence in taking all measures that can be reasonably expected to protect the applicant's health and prevent its deterioration whilst being detained[144]. Persons with mental health problems should be detained in establishments suitable for the mentally-ill[145].

8.2.3 Families

Families as defined in Article 2(c) RCD have to be protected, even though detained. Therefore, Article 12 RCD obliges Member States to maintain, as far as possible, the family unit. This corresponds to Article 8(1) ECHR, as to which everyone has the right to respect for private and family life. Therefore, Member States are under an obligation to act in a manner that allows those concerned to lead a normal family life[146]. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life[147]. In each case, it must be determined whether the family's placement in detention, especially regarding the duration of detention, is necessary within the meaning of Article 8(2) ECHR, that is to say, whether it is justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued[148]. In the case of families accompanied by minor children detention must

[140] ECtHR, judgment of 20 January 2009, *Slawomir Musial* v *Poland*, application no 28300/06, para. 88.

[141] ECtHR, judgment of 24 October 2012, *Mahmundi and others* v *Greece*, application no 14902/10, para. 70; ECtHR, judgment of 9 December 2013, *Aden Ahmed* v *Malta*, application no 55352/12, para. 92.

[142] ECtHR, judgment of 21 April, 2011, *Nechiporuk and Yonkalo* v *Ukraine*, application no 42310/04, para. 156. *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*, October 2010, rule 42.

[143] ECtHR, judgment of 8 November 2012, *Z.H.* v *Hungary*, application no 28973/11, para. 29.

[144] ECtHR, judgment of 20 December 2011, *Yoh-Ekale Mwanje* v *Belgium*, application no 10486/10, para. 94.

[145] ECtHR, judgment of 20 January 2009, *Slawomir Musial* v *Poland*, application no 28300/06, para. 94.

[146] ECtHR, judgment of 10 April 2018, *Bistieva and others* v *Poland*, application no 75157/14, para. 72.

[147] *Ibid*., para. 73.

[148] *Ibid*., para. 77.

be kept to a strict minimum[149]. The authorities must, in assessing proportionality, take account of the child's best interests[150]. This means keeping the family together, as far as possible, and considering alternatives so that the detention of minors is only a measure of last resort[151]. Detained families shall be provided with separate accommodation guaranteeing adequate privacy, Article 11(4) RCD (recast) in conjunction with Article 28(4) Dublin III regulation. Finally, Article 10(4) RCD (recast) stipulates the detained families' right to communicate within the family, with legal advisers or counsellors and persons representing relevant non-governmental organisations in conditions that respect privacy.

8.2.4 Minors

According to Article 2(d) RCD (recast) a minor is a person below the age of 18 years. The requirement addressed to the Member States in Article 23 RCD (recast) is to primarily consider the minor's best interest. The principle of the best interests of the child extends beyond the requirements of legal representation of an unaccompanied minor, family reunification, well-being and social development of a minor, their safety and security, respect of their opinion and the need to identify the family members, siblings or relatives of the unaccompanied minor[152]. Minors shall be detained only as a measure of last resort and after it has been established that other less coercive alternative measures cannot be applied effectively[153]. In general, several aspects have to be taken into consideration in cases concerning the detention of children: whether the child is accompanied or not; the age of the child, the state of health, including eventual feelings of fear, anguish, inferiority; the duration of detention and its physical and mental effects; the particular circumstances in the detention centre, including circumstances of the surrounding area[154]. Detention shall be for the shortest period of time and all efforts shall be made to release a detained minor as soon as possible[155]. Furthermore, the second sentence of recital 18 RCD (recast) states that Member States should in particular ensure that Article 37 of the 1989 United Nations Convention on the Rights of the Child is applied. All in all it has to be taken into account that children seeking asylum are extremely vulnerable and it has always to be considered whether alternatives to detention are available[156]. If minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age (Article 11(2) subparagraph 3 RCD (recast)). The conditions of detention should not create a situation of stress and anxiety, with potentially traumatic consequences[157]. The duration of the detention and the children's health status have to be taken into consideration[158]. The fact that legal assistance can be received and daily telephone contact with relatives is possible cannot be regarded as sufficient to meet all the

[149] ECtHR, judgment of 17 November 2016, *V.M. and others* v *Belgium*, application no 60125/11, para. 217.

[150] ECtHR, 2018, *Bistieva and others* v *Poland*, para. 78.

[151] *Ibid.*

[152] Article 23 RCD and Articles 6(2), 6(3)(a), (b), (c) and (d) and 6(4) of the Dublin III regulation.

[153] European Union Agency for Fundamental Rights, *European legal and policy framework on immigration detention of children*, 2017.

[154] ECtHR, judgment of 12 July 2016, *A.B. and others* v *France*, application no 11593/12, para. 109.

[155] ECtHR, Grand Chamber, judgment of 4 November 2014, *Tarakhel* v *Switzerland*, application no 29217/12, para. 99.

[156] ECtHR, judgment of 19 January 2012, *Popov* v *France*, application nos 34972/07 and 34974/07, paras. 91 and 119.

[157] ECtHR, judgment of 22 November 2016, *Abdullahi Elmi and Aweys Abubakar* v *Malta*, application nos 25794/13 and 28151/13, para. 104.

[158] *Ibid*., para. 112.

needs of a young child[159]. Measures have to be taken to ensure that the minor receives proper counselling and educational assistance from qualified personnel specially mandated for that purpose[160]. When minors are detained, they shall have the right to prompt legal and other appropriate assistance[161].

UNHCR's position is that children should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents and detention is never in their best interest[162]. In this respect, the ECtHR has ruled on a number of occasions that detention was indeed not in the best interest of a child[163].

8.2.5 Unaccompanied minors

Under the RCD (recast) 'unaccompanied minor' means a minor who arrives on the territory of the Member State 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 they are not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after they entered the territory of the Member State (Article 2(e) RCD (recast)). Unaccompanied minors shall be detained only in exceptional circumstances. Article 11(3) RCD (recast) sets up requirements, as all efforts shall be made to release the detained unaccompanied minor as soon as possible, that they have to be accommodated separately from adults, that they shall never be detained in prison accommodation and, as far as possible, they shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. Very young children are usually mostly dependent on adults and may have little ability to look after themselves and are likely to need special care[164]. Measures should be taken that are conducive to the best interests of the child, such as the placement in a specialised centre or with foster parents[165], as provided for in Article 24(2) RCD (recast).

8.2.6 Other vulnerable persons

When female applicants for international protection are detained, Member States shall ensure that 'they are accommodated separately from male applicants, unless the latter are family members and all individuals concerned consent thereto' (Article 11(5) RCD (recast)). Exceptions may apply to the use of common spaces designated for recreational or social activities, including the provision of meals.

---

159 ECtHR, judgment of 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga* v *Belgium*, application no 13178/03, para. 52.

160 *Ibid*., paras. 50-59.

161 Article 37(c)-(d) of the Convention on the Rights of the Child.

162 UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, 2017.

163 ECtHR, judgment of 5 April 2011, *Rahimi* v *Greece*, application no 8687/08; ECtHR, judgment of 19 January 2010, *Muskhadzhiyeva and others* v *Belgium*, application no 41442/07; ECtHR, 2006, *Mubilanzila Mayeka and Kaniki Mitunga* v *Belgium*; ECtHR, 2012, *Popov* v *France*, paras. 91 and 119.

164 ECtHR, judgment of 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga* v *Belgium*, application no 13178/03, para. 51.

165 *Ibid.*

If the applicant claims to be a part of a vulnerable group in the sense of Article 21 RCD (recast) in the country which they had to leave, the authorities should exercise particular care in order to avoid situations in which the applicant is unsafe in custody among other detained persons. In the case of lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons, the authorities failed to do that when they ordered the LGBTI person to be detained without considering the extent to which vulnerable individuals, such as LGBTI, are safe or unsafe in custody among other detained persons, many of whom had come from countries with widespread cultural or religious prejudice against such persons[166].

8.2.7 Right to communication and information in detention

Article 10(3) RCD (recast) provides that representatives of the UNHCR or of an organisation which 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. Article 10(4) RCD (recast) obliges Member States to ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Restrictions on access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible. In addition, according to Article 10(5) RCD (recast) Member States shall ensure that applicants in detention are systematically provided with information that explains those rules, rights and obligations. They must be informed in a language which they understand or are reasonably supposed to understand. Member States may derogate from this obligation in duly justified cases and for a reasonable period which shall be as short as possible, in the event that the applicant is detained at a border post or in a transit zone[167]. But not every lack of adequate information affects an applicant excessively in terms of Article 3 ECHR as the length of detention has to be taken into consideration[168].

[166] ECtHR, judgment of 5 July 2016, *O.M.* v *Hungary*, application no 9912/15, para. 53.

[167] Article 10(5) RCD refers to Article 43 of Directive 2013/32/EU.

[168] ECtHR, judgment of 25 January 2018, *J.R. and others* v *Greece*, application no 22696/16, paras. 144-147.

9. Burden of proof/standard of proof

Detention decisions are based on an assessment of the necessity and proportionality of the measure in light of the application of legitimate and lawful grounds.

The burden of proof for determination of a ground for detention, including an eventual risk of absconding, is on the state (Articles 8(2)(3) and 9(1)(2)). For example, before ordering detention based on Article 8(3)(e) of the RCD (recast) the competent authority must determine on a case-by-case basis whether the threat that the person concerned represents to national security or public order corresponds at least to the gravity of the interference with the liberty of that person that such measure entails (C-601/15 (PPU) *J.N.*, para. 69)[169].

The common factor which must always be taken into account is that there is a major asymmetry of status and means between the detained applicant for international protection and the Member State detaining them, with respect to the possibility to access information establishing unlawful detention or conditions of detention. Such cases, especially with straight contradictions between the declarations of the applicant for international protection and of the respondent government[170], do not lend themselves to a rigorous application of the *affirmanti incumbit probatio* principle (he who alleges something must prove that allegation).

[169] European Law Institute, *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards*, 2017.

[170] ECtHR, judgment of 31 July 2012, *Mahmundi and others* v *Greece*, application no 14902/10, para. 60.

Appendix A — Selected 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

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.

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 6
Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

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.

Convention Relating to the Status of Refugees

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 refugee

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 authorisation, 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 regularised 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.

Universal Declaration of Human Rights

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

United Nations Convention on the Rights of the Child

Article 37

States Parties shall ensure that:

a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Asylum Procedures 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.

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;

(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;

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 6
Access to the procedure

1. When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made. If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.

Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged.

2. Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. Where the applicant does not lodge his or her application, Member States may apply Article 28 accordingly.

3. Without prejudice to paragraph 2, Member States may require that applications for international protection be lodged in person and/or at a designated place.

4. Notwithstanding paragraph 3, an application for international protection shall be deemed to have been lodged once a form submitted by the applicant or, where provided for in national law, an official report, has reached the competent authorities of the Member State concerned.

5. Where simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it very difficult in practice to respect the time limit laid down in paragraph 1, Member States may provide for that time limit to be extended to 10 working days.

Article 9
Right to remain in the Member State pending the examination of the application

1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. That right to remain shall not constitute an entitlement to a residence permit.

2. Member States may make an exception only where a person makes a subsequent application referred to in Article 41or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third country or to international criminal courts or tribunals.

3. A Member State may extradite an applicant to a third country pursuant to paragraph 2 only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect *refoulement* in violation of the international and Union obligations of that Member State.

Article 12
Guarantees for applicants

1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees:

(c) they shall not be denied the opportunity to communicate with UNHCR or with any other organisation providing legal advice or other counselling to applicants in accordance with the law of the Member State concerned;

Article 26
Detention

1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU.

Article 28
Procedure in the event of implicit withdrawal or abandonment of the application

1. When there is reasonable cause to consider that an applicant has implicitly withdrawn or abandoned his or her application, Member States shall ensure that the determining authority takes a decision either to discontinue the examination or, provided that the determining authority considers the application to be unfounded on the basis of an adequate examination of its substance in line with Article 4 of Directive 2011/95/EU, to reject the application. Member States may assume that the applicant has implicitly withdrawn or abandoned his or her application for international protection in particular when it is ascertained that: (a) he or she has failed to respond to requests to provide information essential to his or her application in terms of Article 4 of Directive 2011/95/EU or has not appeared for a personal interview as provided for in Articles 14 to 17 of this Directive, unless the applicant demonstrates within a reasonable time that his or her failure was due to circumstances beyond his or her control;

Article 43
Border procedures

2. Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 1 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of this Directive.

Reception Conditions Directive 2013/33/EU

Recitals

- **Recital (9)** — 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.
- **Recital (15)** — The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. 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. Where an applicant is held in detention he

or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority.

- **Recital (16) —** With regard to administrative procedures relating to the grounds for detention, the notion of 'due diligence' at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures.
- **Recital (17) —** The grounds for detention set out in this Directive are without prejudice to other grounds for detention, including detention grounds within the framework of criminal proceedings, which are applicable under national law, unrelated to the third-country national's or stateless person's application for international protection.
- **Recital (18) —** Applicants who are in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs in that situation. In particular, Member States should ensure that Article 37 of the 1989 United Nations Convention on the Rights of the Child is applied.
- **Recital (19) —** There may be cases where it is not possible in practice to immediately ensure certain reception guarantees in detention, for example due to the geographical location or the specific structure of the detention facility. However, any derogation from those guarantees should be temporary and should only be applied under the circumstances set out in this Directive. Derogations should only be applied in exceptional circumstances and should be duly justified, taking into consideration the circumstances of each case, including the level of severity of the derogation applied, its duration and its impact on the applicant concerned.
- **Recital (20) —** In order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants.
- **Recital (21)** — In order to ensure compliance with the procedural guarantees consisting in the opportunity to contact organisations or groups of persons that provide legal assistance, information should be provided on such organisations and groups of persons.
- **Recital (22) —** When deciding on housing arrangements, Member States should take due account of the best interests of the child, as well as of the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State.

Article 2
Definitions

For the purposes of this Directive:

(a) 'Application for international protection': means an application for international protection as defined in Article 2(h) of Directive 2011/95/EU. (b) 'Applicant': means 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.

(c) 'Family members': means, in so far as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for international protection:

— 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.

(d) 'Minor': means a third-country national or stateless person below the age of 18 years.

(e) 'Unaccompanied minor': means 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 a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States.

(f) 'Reception conditions': means the full set of measures that Member States grant to applicants in accordance with this Directive.

(h) 'Detention': means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.

(i) 'Accommodation centre': means any place used for the collective housing of applicants.

(j) 'Representative': means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive.

(k) 'Applicant with special reception needs': means 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.

Article 8
Detention

1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with 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.

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

3. An applicant may be detained only:

   (a) in order to determine or verify his or her identity or nationality;

   (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

   (c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;

   (d) when he or she is detained subject to a return procedure under 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, in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

   (e) when protection of national security or public order so requires;

   (f) in accordance with Article 28 of 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.

Article 9
Guarantees for detained applicants

1. An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable.

Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.

2. Detention of applicants 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.

3. Where detention is ordered by administrative authorities, 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. When conducted ex officio, such review shall be decided on as speedily as possible from the beginning of detention. When conducted at the request of the applicant, it shall be decided on as speedily as possible after the launch of the relevant proceedings. To this end, Member States shall define in national law the period within which the judicial review ex officio and/or the judicial review at the request of the applicant shall be conducted. Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.

4. Detained applicants shall immediately be informed in writing, in a language which they understand or are reasonably supposed to understand, of the reasons for detention and the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation.

5. Detention shall be reviewed by a judicial authority at reasonable intervals of time, ex officio and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention.

6. In cases of a judicial review of the detention order provided for in paragraph 3, Member States shall ensure that applicants have access to free legal assistance and representation. 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.

7. 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.

8. Member States may also:

   (a) impose monetary and/or time limits on the provision of free legal assistance and re presentation, 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 favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

9. 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.

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

Article 10
Conditions of detention

1. Detention of applicants shall take place, as a rule, in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners and the detention conditions provided for in this Directive shall apply. As far as possible, detained applicants shall be kept separately from other third-country

nationals who have not lodged an application for international protection. When applicants cannot be detained separately from other third-country nationals, the Member State concerned shall ensure that the detention conditions provided for in this Directive are applied.

2. Detained applicants shall have access to open-air spaces.

3. Member States shall ensure that persons representing the United Nations High Commissioner for Refugees (UNHCR) have the possibility to communicate with and visit applicants in conditions that respect privacy. That possibility shall also apply to an organisation which is working on the territory of the Member State concerned on behalf of UNHCR pursuant to an agreement with that Member State.

4. Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.

5. Member States shall ensure that applicants in detention are systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations in a language which they understand or are reasonably supposed to understand. Member States may derogate from this obligation in duly justified cases and for a reasonable period which shall be as short as possible, in the event that the applicant is detained at a border post or in a transit zone. This derogation shall not apply in cases referred to in Article 43 of Directive 2013/32/EU.

Article 11
Detention of vulnerable persons and of applicants with special reception needs

1. The health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities. Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health.

2. Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors. The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States. Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.

3. Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible. Unaccompanied minors shall never be detained in prison accommodation. As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. Where

unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

4. Detained families shall be provided with separate accommodation guaranteeing adequate privacy.

5. Where female applicants are detained, Member States shall ensure that they are accommodated separately from male applicants, unless the latter are family members and all individuals concerned consent thereto. Exceptions to the first subparagraph may also apply to the use of common spaces designed for recreational or social activities, including the provision of meals.

In duly justified cases and for a reasonable period that shall be as short as possible Member States may derogate from the third subparagraph of paragraph 2, paragraph 4 and the first subparagraph of paragraph 5, when the applicant is detained at a border post or in a transit zone, with the exception of the cases referred to in Article 43 of Directive 2013/32/EU.

Dublin III Regulation (EU) No 604/2013

Recital

- **Recital (20)** The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection. Detention should be for as short a period as possible and subject to the principles of necessity and proportionality. In particular, the detention of applicants must be in accordance with Article 31 of the Geneva Convention. The procedures provided for under this Regulation in respect of a detained person should be applied as a matter of priority, within the shortest possible deadlines. As regards the general guarantees governing detention, as well as detention conditions, where appropriate, Member States should apply the provisions of Directive 2013/33/EU also to persons detained on the basis of this Regulation.

Article 2
Definitions

For the purposes of this Regulation:

(i) ‘minor’ means a third-country national or a stateless person below the age of 18 years;

(j) ‘unaccompanied minor’ means 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 an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Member States;

(n) ‘risk of absconding’ means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond.

Article 28
Detention

1. Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation.

2. When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.

3. Detention shall be for as short a period as possible and shall be for no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer under this Regulation is carried out. Where a person is detained pursuant to this Article, the period for submitting a take charge or take back request shall not exceed one month from the lodging of the application. The Member State carrying out the procedure in accordance with this Regulation shall ask for an urgent reply in such cases. Such reply shall be given within two weeks of receipt of the request. Failure to reply within the two-week period shall be tantamount to accepting the request and shall entail the obligation to take charge or take back the person, including the obligation to provide for proper arrangements for arrival. Where a person is detained pursuant to this Article, the transfer of that person from the requesting Member State to the Member State responsible shall be carried out as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of the request by another Member State to take charge or to take back the person concerned or of the moment when the appeal or review no longer has a suspensive effect in accordance with Article 27(3). Articles 21, 23, 24 and 29 shall continue to apply accordingly.

4. As regards the detention conditions and the guarantees applicable to persons detained, in order to secure the transfer procedures to the Member State responsible, Articles 9, 10 and 11 of Directive 2013/33/EU shall apply.

Returns Directive 2008/115/EC

Article 15
Detention

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process. Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

Article 17
Detention of minors and families

1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.

Appendix B — Decision tree

1. IS THE APPLICANT (OR WAS THE APPLICANT AT THE RELEVANT TIME) DETAINED?

2. IS THE APPLICANT (OR WAS THE APPLICANT AT THE RELEVANT TIME) AN APPLICANT FOR INTERNATIONAL PROTECTION? If not move to step 8.

3. HAS A WRITTEN DETENTION ORDER (ARTICLE 9(2) RCD (RECAST)) BEEN GIVEN?

- Does the detention order state reasons in fact and in law on which it is based?

4. WHAT ARE THE REASONS FOR DETENTION?

5. DO THOSE REASONS FALL WITHIN ONE OR MORE OF THE GROUNDS FOR DETENTION SPECIFIED (ARTICLE 8(3) RCD)?

5.1 Determination/verification of identity or nationality

- Has the applicant failed to communicate their identity or nationality?
- Is the state taking active steps to determine/verify the identity or nationality?

5.2 Determining the basis of application

- Why is detention necessary to determine the basis of the application?
- Is there a risk of absconding?
- On what criteria is that risk assessed?

5.3 Deciding right to enter

- Are border procedures being progressed?
- Has detention exceeded, or is it likely to exceed, 4 weeks?

5.4 Making a protection claim following detention under the returns directive

- Was the protection claim indicated (not lodged) after detention under the returns directive (the reason for initial detention is crucial)?
- Did the applicant have the opportunity to access the asylum procedure prior to such detention?
- Are there reasonable grounds to believe that the application is made merely in order to delay or frustrate removal?

5.5 National security or public order

- Has the state demonstrated that a threat exists?
- Is detention necessary and proportionate to the threat?

5.6 Dublin III

- Has an application for protection been lodged?
- Has the Dublin III transfer procedure been commenced?
- Is there a significant risk that the applicant will abscond?
- Are objective criteria for assessment of a risk that an applicant may abscond established in national law?
- Has the take charge request been accepted?
- Have the Dublin III time limits been observed?
- Is transfer possible?

6. HOW LONG HAS THE APPLICANT BEEN DETAINED AND WHAT IS THE LIKELY FUTURE DURATION OF DETENTION?

- Taking into account the reasons and grounds for detention has the applicant been detained for the shortest possible period?
- Is the state exercising due diligence (where the grounds fall within 1, 2, 3 & 6 above?)

7. ARE THERE LESS COERCIVE MEASURES AVAILABLE?

- What alternative measures have been considered?

8. WHERE THE APPLICANT IS DETAINED UNDER THE RETURNS DIRECTIVE:

- Are return procedures being progressed with due diligence?
- Is there a risk of absconding?
- Has the applicant avoided or hampered the preparation of the returns process?
- Has the applicant been detained for the shortest possible period?
- Are less coercive measures available?

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[171] (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 Union'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 harmonisation of decisions across the EU, and in line with its legal mandate, EASO provides for two main components of training support that include 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.

In undertaking these tasks, EASO is committed to follow the approach and principles outlined in the field of EASO's cooperation with courts and tribunals as adopted in 2013[172]. A first version of this methodology was adopted in 2015[173]. Following consultation with the EASO network of courts and tribunal members, amendments have been made to this methodology so that is 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 a **Professional development series** for members of courts and tribunals (hereafter **PDS**) aimed at providing courts and tribunal members with a full overview of the Common European Asylum System (hereafter **CEAS**). This series consists, inter alia, of a number of **Judicial analyses** and **Compilations of jurisprudence** that will be accompanied in turn by **Judicial trainers' 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.

The detailed content of the **PDS** as well as the order in which the subjects are developed was established following a needs assessment exercise conducted in cooperation with the EASO network of courts and tribunals (hereafter the **EASO network**) which presently comprises EASO national contact points in the Member State's courts and tribunals, the Court of Justice of the

[171] 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, pp. 11-28 (hereinafter the regulation).

[172] Note on EASO's cooperation with Member State's courts and tribunals, 21 August 2013.

[173] EASO methodology for professional development activities available to members of courts and tribunals, adopted on 29 October 2015.

EU (CJEU), the European Court of Human Rights (ECtHR) as well as the two judicial bodies with whom EASO has a formal exchange of letters: the International Association of Refugee Law Judges (hereafter IARLJ) and the Association of European Administrative Judges. In addition, other partners including UNHCR, EU Agency for Fundamental Rights, European Judicial Training Network (EJTN) and Academy of European Law are also 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 structure agreed with the stakeholders.

In the meantime, a number of events have occurred, which 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 others, 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, Judicial practical guide on country of origin information. 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 IARLJ-Europe for the provision of professional development materials on certain core subjects: Introduction to the Common European Asylum System (CEAS), Qualification for international protection, Evidence and credibility assessment in the context of the Common European Asylum System, 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 being 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 for a reassessment of this methodology. In order to increase the foreseeability of the manner in which remaining chapters will be dealt with and to provide a more reliable roadmap for the future, a reassessment exercise is carried out annually, whereby members of the EASO network of court and tribunal members provide an opinion on the order in which chapters were to be developed.

Completed thus far:
- Article 15(c) Qualification Directive (2011/95/EU) — Judicial analysis [BG] [DE] [EN] [EL] [ES] [FR] [IT];
- Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU) — Judicial analysis [DE] [EN] [ES] [FR] [IT] [RU];
- Ending international protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) — Judicial analysis [DE] [EN] [EL] [ES] [FR] [IT];
- Judicial practical guide on country of origin Information [EN];
- Detention of applicants for international protection in the context of the CEAS.

Completed thus far produced by the IARLJ-Europe under contract to EASO:
- Introduction to the Common European Asylum System for Courts and Tribunals — Judicial analysis [BG] [DE] [EN] [ES] [FR] [IT];
- Qualification for international protection (Directive 2011/95/EU) — Judicial analysis [BG] [DE] [EN] [EL] [ES] [FR] [IT] [RU];
- Evidence and credibility assessment in the context of the Common European Asylum System — Judicial analysis [EN] [DE] [ES] [FR] [IT];

• Asylum procedures and the principle of *non-refoulement* — Judicial analysis [EN].

Remaining chapters to be developed:
• Vulnerability in international protection cases;
• Legal standards for the reception of applicants for international protection, Reception Conditions Directive (2013/33/EU);
• The substantive content of international protection including access to rights and to an effective remedy as well as fundamental rights.

Involvement of experts

Drafting teams — The **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 of the PDS with the exception of those subjects being developed under the auspices of the contract concluded with IARLJ. 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 for the identification of experts who are interested and available to contribute to the development of the chapter.

Based on the nominations received, EASO shares with the EASO network a proposal for the establishment of the drafting team. This proposal will be elaborated by EASO in line with the following criteria:

1. Should the number of nominations received be equal to or 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 make 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 a 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 when nominations were received (earlier ones would be prioritised) as well as EASO's interest in ensuring a wide regional representation.

EASO will also invite UNHCR to nominate one representative to join the drafting team.

Consultative group — In line with the regulation, EASO will seek the engagement of a consultative group for each set of PDS material developed composed of representatives from civil society organisations and academia.

For the purpose of establishing the consultative group, EASO launches calls for expression 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, as well as the selection criteria of the EASO consultative forum, EASO will make a motivated proposal to the EASO network that will ultimately confirm the composition of the group for each subject.

The EU Agency for Fundamental Rights will be invited to join the consultative group.

PDS development

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 — PDS compilation of jurisprudence.

Along with the EASO network of court and tribunal members[174], 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 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 which will then be shared with the respective drafting team.

Drafting process — EASO will organise at least two (but possibly more where necessary) working meetings for each set of EASO PDS development. In the course of the first meeting, the drafting team will:

- nominate a coordinator(s) 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.

[174] UNHCR will also be consulted.

In the course of the second meeting, the group will:

- review the preliminary draft and agree on the content;

- ensure 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 the organisation of additional meetings 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, 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, the coordinator may suggest the organisation of an additional meeting to consider the suggestions when these are particularly extensive or would considerably affect the structure and content of the chapter.

On behalf of the drafting team, the coordinator will then share the chapter with EASO.

Updating process — EASO will contract a service provider with the capacity to conduct a regular review of a judicial character of the existing PDS and to recommend updates to be implemented where necessary in full consideration of the specialised nature 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 PDS

In cooperation with the EASO network members and the EJTN, EASO will support the use of the PDS by national courts and national training institutions. EASO's support in this regard will involve the following.

Judicial trainers' guidance note — The guidance note serves as a practical reference tool to judicial trainers and provides assistance with regard to the organisation and implementation of practical workshops on the PDS. In line with the same procedure outlined for the development of the different chapters composing the PDS, EASO will establish a drafting team to develop a Judicial trainers' guidance note. It is established practice that this drafting team may include one or more members of the drafting team, which 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 PDS, EASO will organise workshops for national judicial trainers that provides an in-depth overview of the chapter as well as 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

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 suggestions.

- **Selection of participants —** EASO sends an invitation to the EASO network for the identification of a number of potential judicial trainers with specific expertise in the area, who are interested and available to organise workshops on the PDS at the national level. Should the nominations exceed the number specified in the invitation, EASO will make a selection that prioritises a wide geographical representation as well as the selection of those judicial trainers who are more likely to facilitate the implementation of the 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 the organisation of additional workshops for judicial trainers.

- Whenever a set of materials on a new subject has been developed EASO will organise a **pilot professional development workshop** on the subject which will inform the finalisation of the relevant **Judicial trainers' guidance note** before sending it is considered final and made available.

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 court and tribunal members who contributed to the development of the 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 further organise high-level events on a bi-yearly basis in cooperation with the ECtHR, the CJEU 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 as well as UNHCR and members of the consultative group to make suggestions for potential areas of interest. Based on these suggestions, EASO will make a proposal to the EASO network that will finally take a decision on the area to be covered by the following workshop. Whenever relevant, the workshops will lead to the development of a chapter of specific focus within the PDS.

Methodology — For the preparation of the workshops, EASO will seek the support of the EASO network, which will contribute to the development of the workshop methodology (e.g. case discussions, moot court sessions, etc.) and preparation of 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, the EU Agency for Fundamental Rights and UNHCR.

Prior to the organisation of each workshop, EASO will launch an open invitation to the EASO network and the above referred organisations specifying the focus of the workshop, methodology, maximum number of participants and registration deadline. The list of participants will ensure a good representation of court and tribunal members and 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, 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 can potentially improve the quality of its activities.

Furthermore, EASO will develop evaluation questionnaires that will be distributed at its professional development activities. Minor suggestions for improvement will be directly incorporated by EASO that will inform the EASO network of the general evaluation of its activities in the context of its annual planning and coordination meeting.

On an annual basis, EASO will also provide the EASO network with an overview of its activities as well as 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 in due regard EASO's public accountability and principles applicable to public expenditure.

- EASO and the courts and tribunals of the EU+ States will have a joint responsibility for the Professional development series. Both partners shall strive to agree on the content of each of its chapters so as to assure '*judicial auspices*' of the final product.

- The resulting chapter will be part of the PDS, including copyright and all other related rights. As such, EASO will update it when necessary and fully involve the courts and tribunals of the EU+ States in the process.

- All decisions related to the implementation of the PDS and selection of experts will be undertaken by agreement of all partners.

The drafting, adoption and implementation of the 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

Appendix D — Select bibliography

British Institute of International and Comparative Law, *Immigration Detention and the Rule of Law: Safeguarding Principles,* 2013.

Council of Europe: Committee of Ministers, *Recommendation Rec(2003) 5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers*, 16 April 2003, Rec(2003)5.

EASO, *An Introduction to the Common European Asylum System for courts and tribunals – Judicial analysis*, 2016.

EASO, *Asylum procedures and the principle of non*-refoulement - *Judicial analysis*, 2018.

EASO*, Practical Guide on age assessment*, 2018.

EASO and Frontex, *Practical Guide: Access to the Asylum Procedure*, 2016.

European Law Institute, *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards*, 2017.

European Commission, Communication from the Commission to the Council and the European Parliament on EU Return Policy, 28 March 2014, COM(2014) 199 final.

European Commission, Detailed explanation of the amended proposal, accompanying the document Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), 1 June 2011, COM(2011) 319 final.

European Council on Refugees and Exiles, *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*, December 2013.

European Migration Network, *The use of detention and alternatives to detention in the context of immigration policies*, 2014.

European Parliament, *Impact de la jurisprudence de la CEJ et de la CEDH en matière d'asile et d'immigration,* 2012.

European Union Agency for Fundamental Rights, *Alternatives to detention for asylum seekers and people in return procedures*, 2015

European Union Agency Fundamental Rights, *European legal and policy framework on immigration detention of children*, 2017.

Global Detention Project, available at: https://www.globaldetentionproject.org/

International Detention Coalition, *Alternatives to Detention in Greece*, n.d., https://idcoalition.org/alternatives-to-detention-in-greece/

Odysseus Academic Network, *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation – Time for implementation*, (Odysseus Network 2015).

Sampson R. & Grant M., '*Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*', Journal on Migration and Human Security (2013) 1(3).

UNHCR and the Office of the High Commissioner for Human Rights (OHCHR), *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, (Global Roundtable Summary Conclusions), May 2011.

UNHCR, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*, October 2010, rule 42.

UNHCR, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, 2017.

UNHCR, *Detention of Refugees and Asylum-Seekers*, 13 October 1986, No 44.

UNHCR, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, July 2011.

UNHCR, *Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*, 2012.

UNHCR, *Option Paper no 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015.

UNHCR, *Option Paper no 2: Options for governments on open reception and alternatives to detention*, 2015.

UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, 2017.

Getting in touch with the EU

In person
All over the European Union there are hundreds of Europe Direct information centres. You can find the address of the centre nearest you at: http://europa.eu/contact

On the phone or by email
Europe Direct is a service that answers your questions about the European Union. You can contact this service:
– by freephone: 00 800 6 7 8 9 10 11 (certain operators may charge for these calls),
– at the following standard number: +32 22999696 or
– by email via: http://europa.eu/contact

Finding information about the EU

Online
Information about the European Union in all the official languages of the EU is available on the Europa website at: http://europa.eu

EU publications
You can download or order free and priced EU publications from EU Bookshop at: http://publications.europa.eu/eubookshop. Multiple copies of free publications may be obtained by contacting Europe Direct or your local information centre (see http://europa.eu/contact).

EU law and related documents
For access to legal information from the EU, including all EU law since 1951 in all the official language versions, go to EUR-Lex at: http://eur-lex.europa.eu

Open data from the EU
The EU Open Data Portal (http://data.europa.eu/euodp) provides access to datasets from the EU. Data can be downloaded and reused for free, both for commercial and non-commercial purposes.

BZ-04-18-656-EN-C