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ECRE COMMENTS ON THE DIRECTIVE (EU) 2024/1346 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 14 MAY 2024 LAYING DOWN STANDARDS FOR THE RECEPTION OF APPLICANTS FOR INTERNATIONAL PROTECTION (RECAST)

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Introduction

The reform of the Common European Asylum System (CEAS), the New Pact on Migration and Asylum (the Pact), was adopted in April and May 2024. In 2016, several proposals "towards an integrated, sustainable, and holistic EU migration policy based on solidarity and fair sharing of responsibilities"[1] were launched, including the recast Reception Conditions Directive (RCD or recast RCD), Asylum Procedures Regulation (APR), Union Resettlement Framework (URF), Qualification Regulation (QR), and Eurodac Regulation. In 2020, additional proposals were launched, including amendments to the APR proposal, the Regulation on Asylum and Migration Management (RAMM), the Screening Regulation, and the Regulation for Crisis and Force Majeure (the Crisis Regulation). In April 2024, the European Parliament voted in favour of a package of reforms including ten files, namely: the RCD, URF, QR, Eurodac Regulation, Screening Regulation, Regulation on consistency amendments related to screening, APR, Return Border Procedures Regulation (RBPR), RAMM, and Crisis Regulation.

Based on the overall outcome of the reform, ECRE maintains its position that it will likely result in a reduction of protection standards in Europe. As well as the impact on fundamental rights, ECRE questions the workability of the new common asylum system and the continued uneven division of responsibility among European Union (EU) Member States.

These comments focus on the RCD, the directive laying down standards for the reception of applicants for international protection. Of particular interest are the changes brought about by the 2024 recast, as compared to the 2013 recast RCD, as well as the interaction between the RCD and the other legislation of the CEAS reform.

The 2003 RCD (Directive 2003/9/EC21[2]), part of the first generation of CEAS instruments, concerned the "laying down minimum standards for the reception of asylum seekers".[3] It went through a first recast from 2010 to 2013 which culminated in the 2013 version of the RCD (Directive 2013/33/EU[4]), responsible for "laying down standards for the reception of applicants for international protection", adopted in 2013 and applicable since 2015.

The Commission then proposed a second recast in 2016 as part of the CEAS reform. The 2016 recast proposal highlighted several formal objectives:

- Further harmonisation of reception conditions in the EU;
- Reducing incentives and asserting greater control over secondary movements; and
- Promoting integration and enhancing asylum seekers' self-sufficiency.[5]

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1 European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, COM(2016) 465, 13 July 2016, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0465, p.1.

2 *Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers*, OJ 2003 L31/18, 27 January 2003, available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ%3AL%3A2003%3A031%3A0018%3A0025%3AEn%3APDF.

3 ECRE and others, *Reception Conditions Across the EU (hereafter "Reception Conditions Across the EU")*, 11 November 2023, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2023/755908/IPOL_STU(2023)755908_EN.pdf, p.16.

4 *Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (hereafter "2013 RCD")*, OJ L 180, 29.6.2013, 26 June 2013, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033.

5 European Commission, *Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (hereafter "Explanatory Memorandum"),* COM(2016) 465, 13 July 2016, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0465, p.3-4.

One informal objective, not explicitly stated in the Explanatory Memorandum, but expressed in related proposals, was strengthening the resilience and preparedness of national reception systems.[6]

These objectives directly correspond to the findings of studies on implementation of the RCD, which can be summarised as follows:

- Poor implementation of existing standards.
- A disproportionate burden falling on a few Member States.
- Inadequate respect for reception conditions leading to regular "reception crises".[7]

Interinstitutional discussions on the legislative proposals, including the proposed amendments to the recast RCD, took place from 2016 to 2017 and culminated in an interinstitutional political agreement in 2018. ECRE has previously analysed the content of the recast RCD as agreed in 2018, including as part of a study on the implementation of the RCD commissioned by the European Parliament Committee on Civil Liberties, Justice, and Home Affairs (LIBE) in 2023.[8] Many of the following comments build on these previous analyses.

The 2024 version of the RCD was finally adopted on 14 May 2024 before the end of the mandates of the European Parliament and the European Commission in 2024.

The new RCD brings about positive and negative changes when analysed from the perspective of fundamental rights. As for the other pieces of legislation which were agreed in 2018, the balance is better than for the proposals launched and negotiated between 2020 and 2024. Positive changes include clearer definitions of material reception conditions and strengthened requirements on the standards applicable to all forms of accommodation. In addition, provisions on contingency planning aim to prevent "crises" and challenges in reception systems. In terms of socio-economic rights, access to the labour market must be granted at an earlier stage (six months maximum).

Nonetheless, other changes allow for the withdrawal and reduction of reception conditions in a wider range of circumstances (including absconding), and, notably, removal of entitlement to reception conditions is required when the applicant is not in the Member State responsible, a measure which forms part of the punitive approach that runs through the reforms. Even when reduction and withdrawal are applied, minimum standards must still be ensured.

For these and other reasons, ECRE supported some of the changes and campaigned against or proposed amendments to limit the negative impact of others.[9] The main changes in the content of the Directive are described below, in Comments that follow the structure of the Directive, with reference to implementation considerations and recommendations as relevant.

ECRE's Comments are also strongly informed by the many assessments of the implementation of the 2013 RCD which indicate areas where improvements are necessary. While transposing the new elements of the 2024 recast and planning how to manage these changes, the EU Member States must also tackle the longstanding and well-documented implementation gaps, not least because many have been neglected or de-prioritised during the reform process whereas the legal obligations concerned remain central elements of the recast RCD.

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6 European Commission, *Proposal for a Regulation of the European Parliament and of the Council for a European Union Agency for Asylum*, COM(2016) 271, 4 May 2016, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:ce773c1e-1689-11e6-ba9a-01aa75ed71a1.0001.02/DOC_1&format=PDF.

7 *Reception Conditions Across the EU*, p.19.

8 *Reception Conditions Across the EU*, p.15-16.

9 *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, October 2016, available at: https://ecre.org/wp-content/uploads/2016/10/ECRE-Comments-RCD.pdf.

Analysis of key provisions

Preamble

Recitals 1, 3, and 5

Unlike the APR and QR, transformed from directives into regulations, the RCD remains a directive. The rationale stated in 2016 was as follows:

"Considering the current significant differences in Member States' social and economic conditions, it is not considered feasible or desirable to fully harmonise Member States' reception conditions."[10]

This is reflected in the preamble to the 2024 directive:

"In the interests of clarity [the RCD] should be recast. [...]

Notwithstanding the progress that has been made in the development of the CEAS, there are still notable differences between the Member States with regard to procedures used, reception conditions provided to applicants, recognition rates and type of protection granted to beneficiaries of international protection. Those differences are important drivers of secondary movement and undermine the objective of ensuring that all applicants are equally treated wherever they apply for international protection in the Union. [...]

Reception conditions continue to vary considerably between Member States in particular with regard to the reception standards provided to applicants. More harmonised reception standards set out at an adequate level across all Member States will contribute to more equal treatment and the fairer distribution of applicants across the Union."[11]

Implementation considerations

Implementation gaps

The rationale for maintaining the RCD as a directive lay in the Commission's analysis of implementation in 2016 and its conclusions that the challenges were due to inconsistent and inadequate implementation. An extensive study commissioned by the European Parliament in 2023 reached the same conclusion. The plans for implementation should focus on these longstanding challenges, given that the legal obligations remain part of the recast, and as important as the new elements. Analysis of reception systems across the Member States revealed the following implementation gaps:

- Lack of access to or delays in accessing the asylum procedure itself (which in turn hinders access to reception conditions).[12]
- Material reception conditions not being available from the time of the making of the application (either due to poor transposition, a lack of respect for the provision in practice, or even the aforementioned delays in accessing the asylum procedure).[13]
- Incorrect decisions on ineligibility to access material reception conditions affecting certain categories of asylum applicants.[14]
- Inadequate reception capacities and poor planning leading to reception crises.[15]

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10 *Explanatory Memorandum*, p.6.

11 *Directive (EU) 2024/1346 of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (hereafter "2024 RCD")*, OJ L, 2024/1346, 14 May 2024, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401346, Recital 23.

12 *Reception Conditions Across the EU*, p.38.

13 *Reception Conditions Across the EU*, p.38-41.

14 *Reception Conditions Across the EU*, p.41-43.

15 *Reception Conditions Across the EU*, p.43-45.

- Significant numbers of applicants being reduced to destitution.[16]
- Poor quality of material reception conditions in many Member States.[17]
- Applicants awaiting a Dublin transfer often being denied reception conditions (with obstacles in accessing full material reception conditions and then maintaining access until the transfer is realised).[18]
- Premature withdrawal of reception conditions in practice (although not in law).[19]
- Differential treatment occurring across national territories.[20]

Whole of society approach/ stakeholder involvement

Retaining the RCD's legal form as a directive means that Member States therefore retain the discretion to decide among different options to implement the objectives set out therein. This is of particular importance in relation to the modalities of reception provision, with Member States using different forms of reception centres, and involving different providers of reception.

While different providers are involved in delivering obligations on material reception conditions, this is also the case for the provision of socio-economic rights, where state and non-state providers may be involved. The RCD thus remains the component of the CEAS which allows for the greatest involvement of other state agencies – beyond the asylum authority and law enforcement – and of non-governmental organisations. Retaining the RCD's original legal form enables other stakeholders to play a role in provision of reception. The response to displacement from Ukraine has also led to governmental support for and experimentation with new forms of reception provision, with positive and negative lessons emerging, some of which can be applied to implementation of the RCD.

Recommendations

- In national implementation plans for the Pact, the implementation gaps for the Member State in question should be explicitly included, along with measures for addressing them.
- EU support from the Commission, EUAA and EU funds should prioritise multi-stakeholder provision of reception conditions, drawing on evidence on RCD modalities and lessons from response to displacement from Ukraine.
- Contingency planning should draw on quantitative evidence of historical reception shortages in order to serve as a crisis prevention measure.

16 *Reception Conditions Across the EU*, p.45-46.
17 *Reception Conditions Across the EU*, p.46-48.
18 *Reception Conditions Across the EU*, p.48-49.
19 *Reception Conditions Across the EU*, p.49-50
20 *Reception Conditions Across the EU*, p.50.

Chapter I: Subject-matter, definitions, and scope

Article 2: Definitions

The definition of "absconding" is introduced into EU law for the first time: "'absconding' means the action by which an applicant does not remain available to the competent administrative or judicial authorities, such as by leaving the territory of the Member State without permission from the competent authorities, for reasons which are not beyond the applicant's control".[21] Recital 23 explains that "absconding should be defined in view of encompassing both a deliberate action and the factual circumstance, which is not beyond the applicant's control, of not remaining available to the competent administrative or judicial authorities".[22] Recital 23 also acknowledges "the serious consequences" of absconding or of being at risk of absconding.[23]

The definition of "risk of absconding" is also included: "'risk of absconding" means the existence of specific reasons and circumstances in an individual case, which are based on objective criteria defined by national law, to believe that an applicant might abscond".[24] The definition remains faithful to the codification in the Dublin III Regulation where the "'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".[25]

The Article introduces a new type of family member by defining the term as encompassing not only the "minor children of couples" (as it did in the 2013 RCD) but also the "adult dependent children of the couples".[26]

The definition of "representative", (then) a person or an organisation assisting and representing unaccompanied minors, is absent from the 2024 RCD.[27] More information is nevertheless provided in the APR where it is written that the representative is someone who "should assist and guide the minor through the procedure with a view to safeguarding the best interests of the child and should, in particular, assist with the lodging of the application and the personal interview" (including, if needed, on behalf of the minor).[28] Other provisions also describe the duties of representatives.[29]

It should be noted that the applicant not being available is a ground for implicit withdrawal of their application under the APR – in line with a general approach that imposes punitive consequences on a lack of compliance with obligations. The obligatory decision of the authorities to declare the application as implicitly withdrawn has serious procedural consequences.[30]

<u>Implementation considerations</u>

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21 *2024 RCD*, Article 2(12).

22 *2024 RCD*, Recital 23.

23 *2024 RCD*, Recital 23.

24 *2024 RCD*, Article 2(11).

25 *Regulation (EU) No 604/2013 of the European Parliament and of the Council 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) (hereafter "Dublin III")*, OJ L, 180/31, 26 June 2013, available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ%3AL%3A2013%3A180%3A0031%3A0059%3Aen%3APDF, Article 2(n).

26 *2024 RCD*, Article 2(3)(b).

27 See *2013 RCD*, Article 2(j).

28 *Regulation (EU) 2024/1348 of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (hereafter "APR")*, OJ L, 2024/1348, 14 May 2024, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202401348, Recital 35.

29 *2024 RCD*, Article 27.

30 *APR*, Articles 40-41.

The definition of "absconding", by only applying when an applicant is unavailable "for reasons which are not beyond the applicant's control", limits to some extent the discretion accorded to Member States in defining absconding, which has often been subject to "conceptual stretching". Recital 23 further reinforces the restriction, with the reference that absconding shall encompass "both a deliberate action and the factual circumstance", thus confirming the requirement to demonstrate the intentions of the person to be unavailable.[31] In general, the use of the term absconding and the framing of the Article maintains the connotation of morally blameworthy conduct and inappropriate integration of the language and concepts of criminal law in the asylum context (which often happens without the safeguards afforded to defendant within the criminal justice system).

The definition of "risk of absconding" does not change the status quo as there is no exhaustive list of objective criteria that Member States must lay down in national law.[32] Member States tend to take a range of often broad approaches to finding a risk of absconding. Examples of criteria in national law include: the existence of social ties or resources in Austria, the payment of significant amounts of money to irregularly enter the country in Germany, or the demonstration of conduct in the country or abroad that allows the authorities to believe that a person will not comply with orders in Switzerland.[33] Experience from the implementation of the Dublin system has shown that the wide margin of discretion left to Member States, which led to expansive lists of the criteria for determining the "risk of absconding", increased the arbitrary deprivation of liberty.[34]

Recommendations

- For all actors monitoring the implementation of the RCD, a priority should be ensuring that the definition of absconding is respected, and notably that the assessment of the intentions of the applicant is carried out. Otherwise, there is a strong risk that Member States systematically find that applicants have absconded in certain circumstances without regard to the definition in the RCD.
- Legal practitioners providing legal assistance for remedies against decisions of implicit withdrawal should note the requirement to show the intention of the applicant before deciding that they have absconded.

31 *Reception Conditions Across the EU*, p.11.

32 *Reception Conditions Across the EU*, p.11.

33 ECRE, *Boundaries of Liberty: Asylum and de facto detention in Europe*, 19 November 2020, available at: https://asylumineurope.org/2018-2/.

34 *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, October 2016, available at: https://ecre.org/wp-content/uploads/2016/10/ECRE-Comments-RCD.pdf, p.9.

Chapter II: General provisions on reception conditions

Article 9: Restrictions of freedom of movement

The focus of Article 9 underwent a significant change. It is notable too that the new article has been renamed, shifting from "freedom of movement" to "*restrictions* on freedom of movement".[35]

Whereas its former iteration underlined the right to freedom of movement of the applicant, stating that "applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State [...]",[36] Article 9(1) now provides enhanced discretion to Member States, stating that "where necessary, Member States may decide that an applicant is allowed to reside only in a specific place that is adapted for housing applicants, for reasons of public order or to effectively prevent the applicant from absconding [...]".[37] In the proposal, this was an obligation, with the clause stating that, where necessary, Member States "shall", rather than "may", decide on the residence of an applicant.[38]

The requirements were also softened, with Member States having to decide that an applicant is allowed to reside only in a specific place only for reasons of "public order"[39] rather than "public interest or public order",[40] and "to effectively prevent the applicant from absconding where there is a risk of absconding"[41] rather than "for the swift processing and effective monitoring of his or her application for international protection",[42] as was the case in the proposal. In addition, the specific place should be one "that is adapted for housing applicants".[43]

The Article also allows the use of restrictions on freedom of movement in cases where there is a risk of absconding, in particular with regard to applicants who are required to be present in – or have been transferred to – another Member State, "in accordance with Article 17(4) of [the RAMM]",[44] which stipulates that the applicant is required to be present in:

- The Member State of first entry[45] or the Member State that issued their valid residence document or visa, should they be in possession of such papers,[46] pending the determination of the Member State responsible and, where applicable, the implementation of the transfer procedure;
- The Member State responsible;

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35 See and compare *2013 RCD*, Article 7 and *2024 RCD*, Article 9.

36 *2013 RCD*, Article 7(1).

37 *2024 RCD*, Article 9(1).

38 European Commission, *Proposal for a Regulation of the European Parliament and of the Council for a European Union Agency for Asylum*, COM(2016) 271, 4 May 2016, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:ce773c1e-1689-11e6-ba9a-01aa75ed71a1.0001.02/DOC_1&format=PDF, p.38.

39 *2024 RCD*, Article 9(1).

40 European Commission, *Proposal for a Regulation of the European Parliament and of the Council for a European Union Agency for Asylum*, COM(2016) 271, 4 May 2016, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:ce773c1e-1689-11e6-ba9a-01aa75ed71a1.0001.02/DOC_1&format=PDF, p.38.

41 *2024 RCD*, Article 9(1).

42 European Commission, *Proposal for a Regulation of the European Parliament and of the Council for a European Union Agency for Asylum*, COM(2016) 271, 4 May 2016, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:ce773c1e-1689-11e6-ba9a-01aa75ed71a1.0001.02/DOC_1&format=PDF, p.38.

43 *2024 RCD*, Article 9(1).

44 *2024 RCD*, Article 9(1)(a) and 9(1)(b).

45 *Regulation (EU) 2024/1351 of the European Parliament and of the Council on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 (hereafter "RAMM")*, OJ L, 2024/1351, 14 May 2024, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202401351, Article 17(1).

46 *RAMM*, Article 17(2).

- The Member State of relocation following a transfer.[47]

Article 9(2) goes on to state that "Member States may, where necessary, require applicants to report to the competent authorities at a specified time or at reasonable intervals" albeit provided that this does not have a disproportionate impact on the rights of applicants under this Directive.

Implementation considerations

While the final text's provisions are milder than those of the proposal, the content of Article 9 still significantly alters the balance between the autonomy granted to applicants and the restrictions Member States are allowed or required to impose, compared to the 2013 RCD.[48] This is concerning in that deciding on an applicant's residence "in a specific place", albeit one that is "adapted for housing applicants", is liable to amount to deprivation of liberty for the purposes of Article 5 ECHR if the applicant is not allowed to freely leave that designated place.[49]

Article 9 should be analysed in the context of the increasing use what is known as "de facto detention" – situations which are not officially described as detention but which may in fact amount to it. The ECtHR has affirmed that, in the context of migration control measures, individuals who are not officially deemed to be "detained" under national law, but who are placed in facilities labelled as "reception," "holding," "accommodation," or "foreigners registration" centres, may still be considered deprived of their liberty under Article 5 ECHR due to the nature of the restrictions on their freedom of movement, as well as "the type, duration, effects, and manner of implementation" of such placement.[50]

In the recent judgment in the case of B.A. v. Cyprus, the Court noted that the applicant's detention, issued on national security grounds, was not linked to preventing unauthorised entry, and even if it were, the length of detention being over two years and nine months, would render it arbitrary.[51] Furthermore, the ECtHR has emphasised that any deprivation of liberty must be preceded by a decision that clearly informs the detained person of the legal grounds and factual reasons for their detention.[52] The reasons for detention must be communicated in an accessible manner, and the detained individual must have the opportunity to challenge its legality.[53]

In another recent judgment, K.A. v. Cyprus, the Court emphasised the strict standards to be met to ensure state compliance with the requirement of a rapid review of the lawfulness of detention. It found that the nine-month delay from the applicant's appeal to his release, with no significant activity in the proceedings, did not meet the rapidity standard outlined in Article 5(4), resulting in a violation of that provision.[54]

Article 10: Detention

As per the 2013 RCD[55] – and in line with relevant jurisprudence – Article 10(1) states that "Member States shall not hold a person in detention for the sole reason that that person is an applicant […]".[56]

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47 *RAMM*, Article 17(4).

48 *Reception Conditions Across the EU*, p.12.

49 *Reception Conditions Across the EU*, p.12.

50 See: ECtHR, Abdolkhani and Karimnia v. Turkey, App No. 30471/08, Judgment of 22 September 2009, para 125-127 ; ECtHR, Amuur v France, App No. 19776/92, Judgment of 25 June 1996, para 43; ECtHR, Riad and Idiab v. Belgium, App. Nos. 29787/03 and 29810/03, Judgment of 24 January 2008, para 68.

51 ECtHR, B.A. v. Cyprus, App. No. 24607/20, Judgment of 2 July 2024, paras. 60-66.

52 ECtHR, R.M. and others v. Poland, App No. 11247/18, Judgment of 9 February 2023, par. 29.

53 ECtHR, Louled Massoud v Malta, App No.24340/08, Judgment of 27 July 2010, paras 43 -47, 71.

54 ECtHR, K.A. v. Cyprus, App. no. 63076/19, Judgment of 2 July 2024, paras. 41-43.

55 *2013 RCD*, Article 8(1).

56 *2024 RCD*, Article 10(1).

It is then amended to also exclude detention solely on the basis of nationality.[57] It further adds that such detention cannot be punitive.[58]

Conditions for the use of detention are maintained, again in line with case law[59] and with the provisions of international law, specifically that detention can onnly be applied "[1] Where necessary and [2] on the basis of an individual assessment of each case, [...] [3] if other less coercive alternative measures cannot be applied effectively".[60]

As an additional safeguard, a new paragraph requires that, when detaining an applicant, "Member States shall take into account any visible signs, statements, or behaviour indicating that the applicant has special reception needs […]".[61]

The exhaustive list of grounds for detention in Article 10(4) (then RCD Article 8(3)) retains most elements of the 2013 law. The two differences are two additional grounds for detention:

- "(c) to ensure compliance with legal obligations imposed on the applicant through an individual decision in accordance with Article 9(1) in cases where the applicant has not complied with such obligations and there continues to be a risk of absconding";[62] and
- "(d) to decide, in the context of a border procedure in accordance with [the APR] on the applicant's right to enter the territory".[63]

Implementation considerations

Interaction with the APR

The new grounds for the use of detention will have a significant impact on applicants for international protection in Europe should Member States decide to use them. Article 10(4)(c) allows for the use of detention as a punitive measure when the applicant is not respecting requirements relating to restriction of movement.

Article 10(4)(d) should be read in conjunction with the APR and specifically the provisions on the asylum border procedure. Article 43(2) of the APR makes it mandatory for border procedures to take place under a "fiction of non-entry": the pretence that the applicant "has not been authorised" to enter – rather than "has not" entered – the territory of the state carrying out the procedure.[64] Claiming that the person has not been authorised to enter then allows for the use of detention because applicants who have not been authorised to enter fall within the scope of RCD Article 10(4)(d) which allows for

57 *2024 RCD*, Article 10(1).

58 *2024 RCD*, Article 10(1).

59 For example, in Dshijri v. Hungary, the ECtHR emphasized that asylum detention cannot be imposed solely on the basis of an asylum application. The authorities were found to have violated Article 5(1) as their reasoning for the detention lacked sufficient individualization to justify the measure. ECtHR, Dshijri v. Hungary, App No. 21325/16, Judgment of 23 February 2023, par. 15. Similarly, the CJEU has underlined that Member States are required to conduct an individual assessment, ensuring that detention is used only as a last resort and remains proportionate to the objectives pursued. See: CJEU, Judgment of 25 June 2020, VL v. Ministerio Fiscal, C-36/20 PPU, ECLI:EU:C:2020:495, paras 101-102. CJEU, Judgment of 14 September 2017, K v. Staatssecretaris van Veiligheid en Justitie, C-18/16, ECLI:EU:C:2017:680, par. 48. CJEU, Judgment of 14 May 2020, FMS and others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóságup, C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, par. 258.

60 *2024 RCD*, Article 10(2).

61 *2024 RCD*, Article 10(3).

62 *2024 RCD*, Article 10(4)(c).

63 *2024 RCD*, Article 10(4)(d).

64 *APR*, Article 43(2).

– but does not require – the use of detention to assess whether authorisation to enter should be granted.[65]

Jurisprudence of the CJEU

The CJEU previously ruled on the use of detention stemming from Article 8(3) of the RCD and the judgments remain instructive for the implementation of the recast. In *J.N*[66] and *K.*,[67] the Court found that the provision is in line with the CFREU because its strictly circumscribed framework fulfils the requirements of proportionality. In *Arslan*, [68] the Court clarified the relationship for the legal basis of detention under the Return Directive and the Reception Conditions Directive, emphasising the requirement for individual and comprehensive assessment of every case when a detention measure is imposed. The same requirements persist under the recast RCD.

The legal basis for detention was clarified by the Court in two important cases. In *Ministerio Fiscal*,[69] the Court found that a third-country national without a legal right of residence who has expressed a wish to apply for international protection before an authority that is not designated to receive asylum applications can only be detained on the basis of the RCD provisions. Regarding the possibility to disregard the detention grounds of Article 8 in situations of emergency, the Court confirmed in M.A.[70] that even in a situation of mass influx an asylum seeker cannot be placed in detention solely because they are illegally staying in the territory of the Member State.

The concept of detention was clarified in a landmark judgment in *Commission v Hungary*,[71] where the Court ruled that the confinement of asylum seekers in the Hungarian transit zones constituted detention under Article 8 RCD. The judgment departed from the ECtHR judgment in *Ilias and Ahmed v Hungary*,[72] where the ECtHR did not find that the confinement constituted detention. In practical terms, the CJEU's judgment led to the closure of the country's transit centres.

Lastly, in terms of the review of the lawfulness of detention, the CJEU considered in *C, B and X*[73] that a national authority can raise of its own motion, on the basis of the case files, any failure of the authorities to comply with the rules on immigration detention even if the person has not invoked it. The Court also emphasised that if the conditions for lawful detention are not satisfied or no longer apply, the individual must be released immediately.[74]This decision concerned any EU law basis for immigration detention, including RCD, the Dublin III Regulation and the Return Directive.

Recommendations

- Member States should avoid the use of detention wherever possible, given the immense harm and cost it entails. This should include not using detention as the standard form of reception during border procedures by not invoking Article 10(4)(d).

65 *ECRE Comments on the Regulation (EU) 2024/1348 of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU,* June 2024, available at: https://ecre.org/wp-content/uploads/2024/06/ECRE_Comments_Asylum-Procedures-Regulation.pdf, p.64.

66 CJEU, J. N. v Staatssecretaris voor Veiligheid en Justitie, C-601/15 PPU, Judgment of 15 February 2016, ECLI:EU:C:2016:84.

67 CJEU, K. v Staatssecretaris van Veiligheid en Justitie, Case C-18/16, Judgment of 14 September 2017, ECLI:EU:C:2017:680.

68 CJEU, Mehmet Arslan v Policie ČR, Case C-534/11, Judgment of 30 May 2013, ECLI:EU:C:2013:343.

69 CJEU, Ministerio Fiscal, Case C-36/20 PPU, Judgment of 25 June 2020, ECLI:EU:C:2020:495.

70 CJEU, M.A., Case C-72/22 PPU, Judgment of 30 June 2022, ECLI:EU:C:2022:505, par. 92, 93.

71 CJEU, Commission v Hungary, Case C-808/18, Judgment of 17 December 2020, ECLI:EU:C:2020:1029, par. 186.

72 ECtHR, Case of Ilias and Ahmed v. Hungary, App. no. 47287/15, Judgment of 21 November 2019.

73 CJEU, C, B and X, Joined Cases C 704/20 and C 39/21, Judgment of 8 November 2022, ECLI:EU:C:2022:858.

74 Ibid., paras 79, 80.

Article 11: Guarantees for detained applicants

Guarantees for detained applicants are reinforced.

First, the requirement to provide reasons "why less coercive alternative measures cannot be applied effectively" alongside written reasons for detention is added.[75]

Second, the judicial review of the lawfulness of detention is now subject to time limits of "no later than 15 days or, in exceptional situations, no later than 21 days from the beginning of detention"[76] and to the requirement that applicants shall be released if said time limits are not respected.[77]

Finally, the rules on further judicial reviews now include a requirement for regular automatic reviews of the detention of unaccompanied minors.[78]

The guarantees and conditions for detention otherwise remain faithful to the 2013 RCD.

Implementation considerations

Work on alternatives to detention becomes even more important with the changes to Article 11. In the short-term, it will be necessary to demonstrate that alternative measures are available and can be used effectively, thus rendering it unlawful to detain applicants. In the longer-term, the challenge will be to ensure greater availability of alternatives to detention, thus maintaining the illegality of its use.

Recommendations

- The EUAA should prioritise its work on alternatives to detention in order to provide Member States with concrete evidence and examples of good practice for use in all contexts.

Article 13: Detention of applicants with special reception needs

The RCD strengthens some guarantees for vulnerable applicants while unfortunately falling far short of allowing general or automatic exemption from harmful measures such as the use of detention.

Among the changes in the recast RCD should be noted the general substitution of the term "applicants with special reception needs"[79] for the term "vulnerable person"[80], in Article 13 and throughout the entire recast RCD.[81]

Article 13(1) added some details to on detention: it forbids the detention of applicants with special reception needs where detention "would put their physical and mental health at serious risk"[82] and specifies that Member States shall consider the "physical and mental"[83] health of applicants with special reception needs.

Article 13(2) creates additional protection for minors. It calls for respect for "the principle of family unity"[84] and for "the right to education". [85] It further allows that minors be detained only either "where

75 *2024 RCD*, Article 11(2).
76 *2024 RCD*, Article 11(3).
77 *2024 RCD*, Article 11(3).
78 *2024 RCD*, Article 11(5).
79 *2024 RCD*, Article 13.
80 *2013 RCD*, Article 11.
81 *2024 RCD*, Articles 13, 19(2), 20(3), 24, 25(1), 25(4), and 33.
82 *2024 RCD*, Article 13(1).
83 *2024 RCD*, Article 13(1).
84 *2024 RCD*, Article 13(2).
85 *2024 RCD*, Article 13(2).

the minor's parent or primary care-giver is detained" for accompanied minors or "where detention safeguards the minor" for unaccompanied minors (in addition to the pre-existing requirement in the 2013 RCD that such detention must be a measure of last resort and that no other less coercive alternative measures can be applied).[86]

Article 13(6) nevertheless maintains the 2013 RCD derogations permitting lower reception standards, including the detention of applicants with special reception needs in situations that fall short of the standard of meeting special reception needs, if "justified" and "for a reasonable period of time".[87]

Implementation considerations

The implications of the replacement of "vulnerable person" with "applicants with special reception needs" is elaborated upon in the comments on Article 24: Applicants with special reception needs.

The derogations allowed by Article 13(6) mean that, if justified and for a reasonable period of time, minors can be detained in unsuitable accommodation, families need not be detained in separate accommodation, and the detention of male and female applicants in the same facilities is allowed.[88] It is important to note that, under Article 13(6), these derogations are intended for "exceptional situations" and that the Commission and EUAA must be informed.[89] Article 13(6) also excludes the use of these derogations in "the cases referred to in Article 43 of [the APR]"[90] (when applying the asylum border procedure).[91] These derogations thus apply to individuals in a border setting but not in the asylum border procedure. Therefore, while the removal of the possibility to detain persons with special reception needs in an asylum border procedure is welcome, the provision regrettably maintains that possibility in a border context.

The use of detention in cases of vulnerable applicants is tightly circumscribed by the European courts. For example, in its ruling in *O.M. v Hungary*, the ECtHR pays due regard to the "person being detained" in the assessment of legality of detention to fulfil an obligation prescribed by law.[92] In the case of LGBT+ persons, for example, the Court noted that detention bears a risk of reproducing "the plight that forced these persons to flee in the first place."[93] In respect of children, the "best interests of the child" principle militates strongly against any resort to detention, whatever the context.[94] The ECtHR's rulings in *A.B. v France* and related cases have confirmed that the conditions inherent in detention facilities are a source of anxiety and exacerbate the vulnerability of children leading to a violation of Article 3 ECHR.[95]

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86 *2024 RCD*, Article 13(2).

87 *2024 RCD*, Article 13(6).

88 *Reception Conditions Across the EU*, p.13.

89 *2024 RCD*, Article 13(6).

90 *2024 RCD*, Article 13(6).

91 *Reception Conditions Across the EU*, p.13.

92 *O.M. v Hungary*, Application No 9912/15, para 44, Judgment of 5 July 2016.

93 *O.M. v Hungary*, para 53.

94 See ECRE, AIRE Centre, and ICJ, *Third Party Intervention in ShD v Greece*, 12 August 2016, available at: http://goo.gl/u07J9l, para 21; Inter-American Court of Human Rights*, Advisory Opinion OC-21/14*, 19 August 2014, para 157.

95 ECtHR, *A.B. v France*, Application No 11593/12, Judgment of 12 July 2016. In several other cases, including *HA and Others v. Greece*, the ECtHR underlined that national law requires the detention of minors to be a last resort and for the shortest time possible, highlighting that authorities must consider the best interests of the child. ECtHR, HA and others v. Greece, App No. 19951/16, Judgment of 28 February 2019, para 205. In *Rahimi v. Greece* and *Housein v. Greece*, the Court found that the detention of unaccompanied minors without considering these interests, especially in adult facilities, violated the Convention. ECtHR, Rahimi v. Greece, para 108-110. ECtHR, Housein v. Greece, App No. 71825/11, Judgment of 24 October 2013, paras 76-78. The Court further established in *Darboe and Camara v. Italy* that in age-disputed cases, the presumption of minority should apply, ensuring the individual is

A number of Member States have also introduced exemptions from detention for persons presenting vulnerabilities – now categories of applicants with special reception needs – in their national law.

- Detention of unaccompanied children is prohibited in Belgium[96], France (in law but not in practice)[97], Hungary (in law but not in practice)[98], Ireland[99], Italy (in law but with exceptions in practice due to wrong age assessment)[100], Romania (except when age assessment is required)[101] and Spain.[102]
- Detention of children (conditional) is prohibited in Austria (for children under 14)[103] and Switzerland (for children under 15)[104]
- Detention of children (while they have the status of asylum seekers) is prohibited in Cyprus[105] and Germany[106]
- Detention of children, victims of violence is prohibited in The Netherlands[107]
- Detention of children, victims of violence or disabled applicants is prohibited in Poland[108]

Special attention should be given to the respect of human rights requirements as is already the case in many Member States.[109]

Recommendations

- Member States should maintain existing provisions on the prohibition or limitation of the use of detention for applicants with special reception needs.

treated as a child and receives the appropriate protections. ECtHR, Darboe and Camara v. Italy, App No. 5797/17, Judgment of 21 July 2022, paras 153-154. Additionally, the Court ruled that even when a child is detained with a parent, authorities are still obligated to protect the child's rights under Article 3 of the Convention. See: ECtHR, R.M. and Others v. France, 2016, para. 71; S.F. and Others v. Bulgaria, 2017, para. 79; R.R. and Others v. Hungary, 2021, para. 49. 134 See EDAL case summaries available at: http://goo.gl/rW2hTh.

96 AIDA, *Country Report: Belgium – Update on the year 2023*, May 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/05/AIDA-BE_2023-Update.pdf, p.155.

97 AIDA, *Country Report: France – Update on the year 2023*, May 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/05/AIDA-FR_2023-Update.pdf, p.143.

98 AIDA, *Country Report: Hungary – Update on the year 2023*, July 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/07/AIDA-HU_2023-Update.pdf, p.102.

99 AIDA, *Country Report: Ireland – Update on the year 2023*, May 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/05/AIDA-IE_2023-Update.pdf, p.136.

100 AIDA, *Country Report: Italy – Update on the year 2023*, July 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/07/AIDA-IT_2023-Update.pdf, p.202.

101 AIDA, *Country Report: Romania – Update on the year 2023*, August 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/07/AIDA-RO_2023-Update.pdf, p.151.

102 AIDA, *Country Report: Spain – Update on the year 2023*, May 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/05/AIDA-ES_2023-Update.pdf, p.144.

103 AIDA, *Country Report: Austria – Update on the year 2023*, June 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/06/AIDA-AT_2023-Update.pdf, p.143.

104 AIDA, *Country Report: Switzerland – Update on the year 2023*, July 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/07/AIDA-CH_2023-Update.pdf, p.125.

105 AIDA, *Country Report: Cyprus – Update on the year 2023*, May 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/05/AIDA-CY_2023-Update.pdf, p.126.

106 AIDA, *Country Report: Germany – Update on the year 2023*, June 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/06/AIDA-DE_2023-Update.pdf, p.186.

107 AIDA, *Country Report: Netherlands – Update on the year 2023*, May 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/04/AIDA-NL_2023-Update.pdf, p.145.

108 AIDA, *Country Report: Poland – Update on the year 2023*, June 2024, available at: https://asylumineurope.org/wp-content/uploads/2024/06/AIDA-PL_2023-Update.pdf, p.90.

109 *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, October 2016, available at: https://ecre.org/wp-content/uploads/2016/10/ECRE-Comments-RCD.pdf. P.15.

Article 17: Employment

Article 17(1) reduces the time limit for granting access to the labour market from nine to six months.[110] This adjustment represents a compromise between the European Parliament's proposal of a two-month limit and some Member States' desire to retain the current nine-month period. Nonetheless, this Article also adds the obligation to refuse or withdraw access to the labour market for those in accelerated application procedures.[111] This provision should be read in conjunction with the APR which expands the categories of applicants subject to the accelerated procedure.[112]

Article 17(2) now requires that applicants who have access to the labour market "*shall* enjoy equal treatment", rather than "*may* be given priority", compared to nationals, in certain respects listed exhaustively.[113] However, this article also provides allowable restrictions on the right to equal treatment.[114]

Article 17(8) stipulates that Member States shall facilitate, to the extent possible, access to recognition procedures for applicants lacking documentary evidence of their qualifications.[115]

Implementation considerations

The reduction of the deadline to offer access to the labour market to six months embodies a welcome effort to ensure more rapid and effective integration of refugees into host societies. It should be noted that a number of Member States offer access to the labour market earlier than six months.

Nonetheless, removal of the right to employment for those in accelerated application procedures means that the recast RCD read in conjunction with the APR will probably entail a significant increase in applicants without the right to work.[116] The harsher treatment of applicants in accelerated procedures, combined with the increased use of border procedures for certain categories of applicant subject to the accelerated procedure, means that there is a risk of applicants in isolated situations with limited contact with service providers or other networks.

It should be noted that in *K.S. and others*,[117] the CJEU interpreted Article 15 of the RCD as precluding EUMS from excluding applicants from accessing the labour market solely on the basis that a Dublin transfer decision had been made. Thus, where applicants are awaiting transfer under the AMMR, this alone cannot be used a reason for denying access to the labour market.

Recommendations

- Member States which offer earlier and wider access to the labour market should maintain these practices, given the great advantages to the state and to applicants alike, such as a dignified standard of living, self-sufficient applicants, sustainable long-term integration, stability and upward mobility, addressing labour shortages, etc.[118]

110 *2024 RCD*, Article 17(1).
111 *2024 RCD*, Article 17(1).
112 *APR*, Article 42(1)(a)-(f).
113 *2024 RCD*, Article 17(2).
114 *2024 RCD*, Article 17(2).
115 *2024 RCD*, Article 17(8).
116 *ECRE Legal Note on The Right to Work for Asylum Applicants in the EU*, January 2024, available at: https://ecre.org/wp-content/uploads/2024/01/ECRE-Policy-Paper-12_The-Right-to-Work-for-Asylum-Applicants-in-the-EU.pdf, p.5 and 12.
117 CJEU, K.S. and others, Joined Cases C-322/19 and C-385/19, Judgment of 14 January 2021, ECLI:EU:C:2021:11, par. 73.
118 *2024 RCD*, Article 17(8).

Article 18: Language courses and vocational training

Article 18 now states that Member States "shall ensure" or "facilitate" (depending on the national system) access to "language courses, civic education courses, or vocational training",[119] rather than "may allow" access to "language courses and vocational training",[120] irrespective of whether applicants have access to the labour market. It adds that this new obligation applies "in order to help enhance applicants' ability to act autonomously, to interact with competent authorities, or to find employment".[121]

Implementation considerations

The new obligation to provide access to language courses and vocational training is very welcome. It should be noted that these obligations are also applicable for applicants in the accelerated procedure in a context where the rights of these applicants are severely restricted and access to them for service providers may be challenging.

Recommendations

- EU funding should prioritise support for the obligation to provide access to language courses and vocational training. use should be made of statutory and non-governmental providers.

Article 19: General rules on material reception conditions and health care

A reference to the CFREU is added. Member States "shall ensure that material reception conditions and health care [...] provide an adequate standard of living for applicants which [...] *respects their rights under the Charter*".[122]

Equal treatment of applicants in comparison to nationals in refunding healthcare is added. Member States can require applicants "to cover or contribute to the cost of the health care received where those applicants have sufficient means to do so *except where the health care is provided free of charge to the nationals of those Member States*".[123]

Additional protections for applicants in the assessment of their resources are added as well. Member States remain able to require applicants to refund the cost of material reception conditions or health care, if it transpires that said applicants had sufficient means to cover the cost at the time,[124] however, it is added that "they shall now respect the principle of proportionality"[125] and "shall also take into account the individual circumstances of the applicant and the need to respect his or her dignity or personal integrity, including the applicant's special reception needs",[126] when assessing the resources of an applicant.

Implementation considerations

In the seminal case *Cimade*,[127] the CJEU held that the obligation on the Member State in receipt of an asylum claim to grant those minimum reception conditions begins as soon as the applicant

119 *2024 RCD*, Article 18.
120 *2013 RCD*, Article 16.
121 *2024 RCD*, Article 18.
122 *2024 RCD*, Article 19(2).
123 *2024 RCD*, Article 19(4).
124 *2024 RCD*, Article 19(5).
125 *2024 RCD*, Article 19(6).
126 *2024 RCD*, Article 19(6).
127 CJEU, CIMADE, GISTI v. Ministre de l'Intérieur, Case C-179/11, Judgment of 27 September 2012, ECLI:EU:C:2012:594.

"applies for asylum", even if the state is not itself the Member State responsible for the examination of the application for asylum pursuant to the criteria laid down by the Dublin II Regulation. Following the reform, the APR sets out that the application is made as soon as the person expresses a wish to benefit from international protection. From that point on, he/she is an applicant and as such is entitled to reception conditions. In practice, evidence shows that there are often significant delays in access to reception conditions.

Recommendations

- National implementation plans should enumerate and prioritise longstanding gaps in respect for provision of material reception conditions.

Article 20: Arrangements for material reception conditions

Article 20 introduces several significant changes, as listed below paragraph by paragraph.

In a non-material change, the title of the article is changed from "Modalities for material reception conditions"[128] to "Arrangements for material reception conditions".[129]

Article 20(1) then adds new requirements for Member States when providing housing:

- It adds an indirect reference to the CFREU, stating that the housing provided should provide the applicant "with an adequate standard of living *in accordance with Article 19(2)*",[130] which in turn includes a new reference to the CFREU.[131]
- It requires that the housing provided should "account for applicants' special reception needs".[132]

Articles 20(3) and 20(10) are among the provisions which have replaced references to "vulnerable persons" with "applicants with special reception needs":

- Rather than requiring that Member States "take into consideration gender and age-specific concerns and the situation of *vulnerable persons*",[133] Article 20(3) now requires that Member States "take into consideration gender and age-specific concerns and the situation of *applicants with special reception needs*".[134]
- Rather than demanding an "an assessment of the *specific needs* of the applicant",[135] Article 20(10)(a) now demands "an assessment of *special reception needs* of the applicant".[136]

Article 20(4) provides new grounds for outlawing discrimination based on (1) race and (2) religion.[137]

Article 20(5) now requires that Member States provide a separate sanitary facility for female applicants.[138]

128 *2013 RCD*, Article 18.
129 *2024 RCD*, Article 20.
130 *2024 RCD*, Article 20(1).
131 *2024 RCD*, Article 19(2).
132 *2024 RCD*, Article 20(1).
133 *2024 RCD*, Article 18(3).
134 *2024 RCD*, Article 20(3).
135 *2024 RCD*, Article 18(9)(a).
136 *2024 RCD*, Article 20(10)(a).
137 *2024 RCD*, Article 20(4).
138 *2024 RCD*, Article 20(5).

Article 20(9) now allows applicants to perform volunteer work outside of the accommodation.[139]

Most notably, Article 20(10)(b) expands the circumstances under which "different material conditions" (i.e. lower standards) are permitted. It maintains the RCD 2013 provision that different material conditions are allowed when (1) "housing capacities normally available are temporarily exhausted"[140] while adding that different material conditions are now also allowed when (2) "housing capacities normally available are temporarily unavailable" due to "a disproportionate number of persons to be accommodated or a man-made natural disaster".[141]

Article 20(10) expands upon the previous threshold for different material conditions, even in exceptional circumstances, which was the obligation to "cover" "basic needs".[142] It now states that Member States must "ensure" "access to health care" as well as "a standard of living in accordance with EU and international law"[143] when different standards are in place. Article 20(10) also requires that Member States which decide to provide different material conditions keep the Commission and the EUAA informed "without delay [...] on the activation of [their] contingency plan" and to do so "as soon as the reasons for providing those different material conditions have ceased to exist".[144]

Implementation considerations

Implementation gaps

While Article 20 clarifies and introduces requirements for Member States in the provision of material reception conditions, it is an area where the lack of implementation of existing obligations is of most relevance, as demonstrated by the inadequate provision of material reception conditions by Member States, in particular regarding:

- Access to basic utilities (e.g. running water, showers);
- Sleeping quarters (forcing persons to sleep outside in extreme temperatures);
- Adequate heating or air conditioning;
- Adequate quality and quantity of food;
- Overcrowding (significantly hindering privacy);
- Sanitation (including vermin infestations such as bedbugs, lice, cockroaches, rats);
- Personal safety and security (conflicts with staff, residents, assaults inside and outside the reception centre, racism, etc);
- Prison-like conditions;
- Isolation and remoteness of centres (in turn affecting access to services and rights, such as the right to education, health, etc, coupled with a lack of transportation or when available lack of resources to use it).

Different standards

Jurisprudence of the CJEU requires that Member States provide standards that ensure the right to dignity under the CFREU even when invoking the provisions that allow for application of different standards. Effectively, the Court has determined the threshold through cases generally where Member States fell short of the requirements of EU law. Notably, in M.A.[145] the Court confirmed that even in a situation of mass influx an asylum seeker cannot be placed in detention solely because

139 *2024 RCD*, Article 20(9).
140 *See 2013 RCD*, Article 18(9)(b), *2024 RCD*, Article 20(10)(b).
141 *2024 RCD*, Article 20(10)(b).
142 *2024 RCD*, Article 18(9).
143 *2024 RCD*, Article 20(10).
144 *2024 RCD*, Article 20(10).
145 CJEU, M.A. v. Valstybės sienos apsaugos tarnyba, op. cit., par. 92, 93.

they are illegally staying in the territory of the Member State. This strand of jurisprudence must be applied in implementation of the RCD.

It should be noted that when the switch is made from standard to reduced reception conditions, the provider of reception may switch, for instance switching from central to regional governments, or from federal providers to city providers. It may be the case that emergency accommodation is largely provided by humanitarian providers. These providers tend to be over-stretched and not always specialised in providing assistance for asylum applicants (as they focus on emergency provision for cities' homeless populations as a whole).

Overall, contingency planning – and related EU assistance, be it support from the EUAA or funding – should focus on building adequate capacity into the mainstream reception system and avoiding the use and dependence on emergency provisions.

The CJEU has set the standard for provision of reception conditions in judgments that remain applicable. Notably in *Saciri*, [146] the Court held that, if a Member State chooses to provide material reception to asylum applicants in the form of a financial allowance rather than direct public services, the allowance must be enough to ensure a dignified standard of living, must be provided from the time at which the asylum application is made and should ensure that it is sufficient to enable minor children to be housed with their parents in order to maintain the family unity of the asylum seekers. The Directive does not preclude EUMS from referring asylum applicants to bodies within the general public assistance system if reception facilities are overloaded. The latter point relates to the discussion of different standards above – the impact of referral or de facto switch to other providers should be assessed.

Recommendations

- Member States must fully assess the implications of invoking provisions allowing different (lower) standards of reception to be provided.
- Local authorities and non-governmental providers of emergency accommodations should be involved in development of national implementation plans for the Pact and in contingency planning
- A central aim of obligatory contingency planning under the Pact should be avoidance of the invocation of measures allowing provision of different reception standards. As well as the impact on applicants, the administrative, political and legal consequences are often significant.

Article 21: Reception conditions in a Member State other than the one in which the applicant is required to be present

One of the most significant changes from the 2013 RCD is the new Article 21 which allows for the removal of reception conditions if the applicant is subject to a transfer decision under the RAMM.

Member States are obliged to withdraw the reception conditions set out in Articles 17 to 20 "from the moment" that applicants have been notified of their transfer decision in accordance with the RAMM.[147] The applicants shall not be entitled to reception conditions "in any Member State other than the one where they are required to be" (i.e. the responsible Member State under the RAMM).[148]

146 CJEU, Saciri and Others, Case C-79/13, Judgment of 27 February 2014, ECLI:EU:C:2014:103, paras. 34-35. In Ministero dell'Interno C 422/21, the CJEU emphasised the principle of non-discrimination, stating that access to dignified living standards, basic needs, and protection of dignity must be provided to "any applicant for international protection and not only to those applicants who are 'vulnerable persons' within the meaning of Article 21 of Directive 2013/33" par. 53-55. CJEU, Case of Ministero dell'Interno, Case C422/21, Judgment of 1 August 2022, ECLI:EU:C:2022:616, par. 46. See by analogy: CJEU, Haqbin, Judgment of 12 November 2019, op. cit., par. 53-55.

147 *2024 RCD*, Article 21.

148 *2024 RCD*, Article 21.

The transfer decision should state that reception conditions have been withdrawn, unless a separate decision is issued, and the applicant shall be informed of their rights and obligations regarding that decision.[149] The Article also states that the withdrawal should be "without prejudice to the need to ensure a standard of living in accordance with Union law, including the Charter, and international obligations".

The time period during which the applicant is not entitled to reception conditions pending a transfer depends on the RAMM, under which transfers must be carried out within six months of the acceptance of the request, extended to one year for detained applicants or up to three years for cases in which the applicant resists the transfer through various means (including absconding).[150]

Failure to complete the transfer in time means that the transferring Member State becomes responsible and reception conditions should be re-instated.[151] The Council's position was that the transferring Member State should have six months to effect a transfer, extended to one year in a range of circumstances including absconding while the European Parliament's position was that the transferring Member State should have three months to effect a transfer, extended to one year in case the person is in prison or non-compliant.[152] The final text reflects the Council's position on the deadline; the extension to three years in case of the applicant resisting the transfer is a significant punitive measure, along with others that characterise the reforms and fail to take into account the valid reasons an applicant might have for resisting obligations.

Implementation considerations

The provision that the withdrawal of reception conditions should be "without prejudice to the need to ensure a standard of living in accordance with Union law, including the Charter, and international obligations" means that minimum standards must be guaranteed in practice.[153] Nonetheless the language is weaker compared to the 2013 RCD's more specific threshold of access to health care "under all circumstances" and "a dignified standard of living".[154] The right to dignity is now merely implicit.[155]

The fact that the time limits can be extended one year or three years depending on the situation makes the removal of reception conditions an additional provision directed at discouraging and sanctioning onward movement.[156] Whether these provisions actually work as a deterrent to secondary movement in practice remains to be seen. Governments' perception that asylum policies on access to social assistance significantly encourages secondary movements does not correspond to findings from research.[157]

149 *2024 RCD*, Article 21.

150 *RAMM*, Article 46(2).

151 *ECRE Comments on the Regulation of the European Parliament and of the Council on Asylum and Migration Management amending Regulation (EU) 2021/1147 and Regulation (EU) 2021/1060 and repealing Regulation (EU) 604/201*, May 2024, available at: https://ecre.org/wp-content/uploads/2024/05/ECRE_Comments_Asylum-and-Migration-Management-Regulation.pdf, p.52.

152 *Reception Conditions Across the EU*, p.15.

153 *Reception Conditions Across the EU*, p.15.

154 *2014 RCD*, Article 20(5).

155 *Reception Conditions Across the EU*, p.15.

156 *ECRE Comments on the Regulation of the European Parliament and of the Council on Asylum and Migration Management amending Regulation (EU) 2021/1147 and Regulation (EU) 2021/1060 and repealing Regulation (EU) 604/201*, May 2024, available at: https://ecre.org/wp-content/uploads/2024/05/ECRE_Comments_Asylum-and-Migration-Management-Regulation.pdf, p.52.

157 The Advisory Committee on Migration Affairs (ACVZ), *Secondary Movements of Asylum Seekers in the EU*, November 2019, p.5.

Tackling onward movement is likely to require a consistent approach on implementation of the CEAS across the EU rather than the present unilateral focus on deterrence and sanctioning.[158] Overall, it is unlikely that onward movement in the EU will be reduced unless its underlying causes are addressed. These include poor reception conditions in the country of arrival, low chances of successful applications even when applicants are likely to have protection needs, inconsistent decision-making, poor integration prospects, failed family reunion, and so on.[159]

If – as is likely – secondary movement continues, at least to some extent, and transfers back to the responsible Member State are only partially successful, then the impact of Article 21 will be large-scale destitution.

In terms of interaction with other instruments and the relevant jurisprudence, allowing Member States to derogate from obligations to provide reception conditions on the basis that the applicant is subject to a transfer decision under the RAMM appears to contradict the reasoning of the CJEU in *Cimade and Gisti*,[160] as it attempts to exclude certain asylum seekers from benefits which are made available by the Directive, as a corollary of asylum seeker status.[161] Besides *Cimade and Gisti*, the provision contradicts the overall spirit of the "common procedure for international protection in the Union" under the APR, since it would fragment the individual's legal status depending on whether the applicant has reached the Member State designated as responsible.[162]

Recommendations

- Member States should assume responsibility for asylum applicants using the discretionary clauses under the AMMR whenever it is likely that transfers will fail.
- Member States' national authorities, local authorities and emergency providers need to build into planning and resource allocation minimum standards of provision for applicants awaiting AMMR transfers, for whom the standards required by the CFREU apply but who will potentially be excluded from mainstream provision at the moment that transfer decisions are issued. Continuity of provision needs to be ensured when applicants invoke their right to a remedy against a transfer decision and transitional arrangements need to be in place so that applicants facing withdrawal of reception conditions are not evicted from one day to the next.

Article 22: Health care

Article 22 expands the right to health care compared to the 2013 RCD.

Article 22(1) stipulates that heath care should be provided "irrespective of where [the applicants] are required to be present in accordance with [the RAMM]".[163] It now specifies that generalist and specialist healthcare should be provided[164] and includes a new example: sexual and reproductive healthcare.[165]

158 The Advisory Committee on Migration Affairs (ACVZ), *Secondary Movements of Asylum Seekers in the EU*, November 2019, p.5.

159 The Advisory Committee on Migration Affairs (ACVZ), *Secondary Movements of Asylum Seekers in the EU*, November 2019, p.5.

160 CJEU, *Case C-179-12 Cimade and Gisti v Ministre de l'Intérieur*, paras 76 and 80, Judgment of 27 September 2012.

161 *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, October 2016, available at: https://ecre.org/wp-content/uploads/2016/10/ECRE-Comments-RCD.pdf, p.6.

162 *APR*.

163 *2024 RCD*, Article 22(1).

164 *2024 RCD*, Article 22(1).

165 *2024 RCD*, Article 22(1).

Article 22(2) now requires that minor applicants receive the same healthcare as nationals[166] and that necessary healthcare should continue without interruption when a minor reaches the age of majority.[167]

Article 22(3) provides examples of medical assistance, "rehabilitation and assistive medical devices",[168] for applicants who have special reception needs, including those who require mental health care.[169]

166 *2024 RCD*, Article 22(2).
167 *2024 RCD*, Article 22(2).
168 *2024 RCD*, Article 22(3).
169 *2024 RCD*, Article 22(3).

Chapter III: Reduction or withdrawal of material reception conditions

Article 23: Reduction or withdrawal of material reception conditions

Whereas Article 21 concerns the obligation to withdraw reception conditions when the applicant is not in the Member State deemed responsible according to the RAMM, Article 23 sets out the circumstances under which the responsible Member State can reduce or withdraw reception conditions.

Article 23(2) adds a new circumstance which allows for reduction of reception conditions and expands the consequences of an existing circumstance so that it now allows for withdrawal – instead of mere reduction – of reception conditions:

- The failure to participate in compulsory integration unless beyond the applicant's control is a new circumstance allowing for reduction of reception conditions.[170]
- Serious or repeated breaches of the rules of the accommodation centre or violent or threatening behaviour now allows for withdrawal – instead of mere reduction – of reception conditions.[171]

Article 23(3) adds that, where material reception conditions were reduced or withdrawn due to one of the circumstances which was in place but no longer is, the Member State "shall consider" whether to reinstall some or all of the conditions.[172] Where not all material reception conditions are reinstated, Member States must justify their decision and notify the applicant.[173] In the 2013 RCD, this was the case only for two circumstances,[174] and conditional upon the applicant being traced or voluntarily reporting to the competent authority.[175]

Implementation considerations

Given the serious impact on the applicant and on other authorities and service providers of reduction or withdrawal of material reception conditions should always be assessed before any action is taken. As described above, the jurisprudence of the European courts should instruct the development of plans for implementation of these provisions.[176]

The jurisprudence of the CJEU sets the threshold for provision even in the case of justified withdrawal or reduction of reception conditions. In *Haqbin,*[177] the Court found that a sanction imposed in response to serious breaches of the rules of the accommodation centre or seriously violent behaviour cannot include withdrawal of material reception conditions relating to housing, food or clothing, even if temporary.

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170 *2024 RCD*, Article 23(2)(f).

171 *2024 RCD*, Article 23(2)(e).

172 *2024 RCD*, Article 23(3).

173 *2024 RCD*, Article 23(3).

174 *2024 RCD*, Article 20(1)(c).

175 *2024 RCD*, Article 20(1)(c).

176 For example, In V.M. and others v. Belgium, the ECtHR underlined the obligation to provide a dignified standard of living, noting that Belgium's exclusion of families from the reception system after their order to leave had expired left them in particularly severe conditions, with no assistance for basic needs. The Court rejected the government's argument that the applicants could have sought aid elsewhere, highlighting that any appeals would have been ineffective due to prolonged delays. ECtHR, V.M. and others v. Belgium, App. No. 60125/11, Judgment of 17 November 2016, par. 149, 159. In H. and others v. France, the Court found that authorities breached their obligations by failing to meet the basic needs of asylum seekers, leaving them in conditions that caused fear, despair, and degrading treatment, violating their dignity. The Court held that the severity of their living conditions met the threshold of Article 3 and rejected the argument regarding "*the competent bodies' lack of resources as seen against the fact that the applicants were young, single adults in good health with no dependent family members*." It emphasized that the applicants, being wholly dependent on state support, suffered due to official indifference in a situation incompatible with human dignity. ECtHR, H. and others v. France, App. No. 28820/13, Judgment of 2 July 2020, par. 184.

177 CJEU, Zubair Haqbin, Case C233/18, Judgment of 12 November 2019, ECLI:EU:C:2019:956, par. 50.

Authorities should take into particular consideration any such sanction in cases of vulnerable applicants including unaccompanied minors.

A summary of provisions on withdrawal and reduction appears in the table below.

Grounds for reduction or withdrawal of material reception conditions under the RCD		
Ground	**Sanction**	**Present in RCD 2013**
Present in Member State which is not responsible under the AMMR and issued with a transfer decision. Article 21	Withdrawal of reception conditions.	No
Abandons geographic area (under redistribution scheme) or place of residence determined by the authorities without permission Absconds Article 23(2)(a)	Reduction or (exceptionally) withdrawal of daily allowance. Reduction of other material reception conditions.	Yes, but now expanded.
Non-cooperation with the authorities or non-compliance with procedural obligations (APR), e.g. reporting duties, request to provide info or appear for personal interviews in asylum procedure Article 23(2)(b)	Reduction or (exceptionally) withdrawal of daily allowance. Reduction of other material reception conditions.	Yes, but now expanded.
Lodged a subsequent application Article 23(2)(c)	Reduction or (exceptionally) withdrawal of daily allowance. Reduction of other material reception conditions.	Yes
Concealed financial resource and thus unduly benefited from MRC Article 23(2)(d)	Reduction or (exceptionally) withdrawal of daily allowance. Reduction of other material reception conditions.	Yes
Seriously or repeatedly breaches rules of accommodation centres or behaved in a violent or threatening manner in the accommodation centre. Article 23(2)(e)	Reduction or withdrawal of daily allowance. Reduction or withdrawal of other material reception conditions. The CJEU established the sanction cannot be withdrawal, even if temporary.	Yes
Fails to participate in compulsory integration measures, where provided or facilitated by the Member State, unless there are circumstances beyond the applicant's control. Article 23(2)(f)	Reduction or (exceptionally) withdrawal of daily allowance. Reduction of other material reception conditions.	No

Chapter IV: Provisions for applicants with special reception needs

Article 24: Applicants with special reception needs

While the guarantees for vulnerable applicants are strengthened in some regards, the recast falls far short of automatically exempting such applicants from harmful and punitive measures, an approach which would have better supported the rights of these applicants, as well as reducing the administrative burden on the Member States.

The concept "vulnerable persons" has, as mentioned previously, been replaced throughout the directive with that of "applicants with special reception needs",[178] the latter defined in Article 2(14) as: "an applicant who is in need of special conditions or guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive".[179]

Compared to the previous list of vulnerable persons[180] there are two new groups of applicants with special reception needs mentioned: LGBTI applicants[181] and persons with mental disorders "including post-traumatic stress disorder".[182] The list nevertheless remains non-exhaustive.

Implementation considerations

The implications of the change from "vulnerable persons" to "applicants with special reception needs" are uncertain.[183] Given the jurisprudence in the area of vulnerability, it is unlikely that applicants can be considered vulnerable without being classified as needing special reception conditions and therefore benefiting from the protections provided.[184] Nonetheless, Recital 47 talks about having due regard to the "inherent vulnerabilities" of the person as applicant for international protection[185] and the Explanatory Memorandum for the proposal clarifies that "persons with special reception needs are persons who are in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in the Reception Conditions Directive, *regardless of whether these persons are considered vulnerable*".[186] It therefore appears that these concepts are not equivalent.

The interaction between the RCD and APR means that the implications of identification of special reception needs is even more important than before. If applicants' special reception needs cannot be met in a border procedure then the applicant must be transferred to a regular procedure.

Article 25: Assessment of special reception needs

Article 25 adds several safeguards for the assessment of special reception needs, as described here.

Article 25(1) adds a time requirement for assessing special reception needs, to be started "as early as possible after an application is made",[187] and to be completed "within 30 days from the making of the application for international protection or, where it is integrated into the assessment referred to in Article 20 of [the APR], within the timeframe set out in that Regulation".[188] That is, "as early as

178 *2024 RCD*, Article 24.
179 *2024 RCD*, Article 2(14).
180 *2013 RCD*, Article 21.
181 *2024 RCD*, Article 24(f).
182 *2024 RCD*, Article 24(j).
183 *Reception Conditions Across the EU*, p.16.
184 *Reception Conditions Across the EU*, p.16.
185 *2024 RCD*, Recital 47.
186 *Explanatory Memorandum*, p.12.
187 *2024 RCD*, Article 25(1).
188 *2024 RCD*, Article 25(1).

possible after an application is made", and to be concluded "as soon as possible and, in any event, within 30 days".[189]

It further specifies that the assessment must be individual[190] and requires Member States to provide oral translation when needed.[191] It then lists new ways to identify applicants with special reception needs, "based on visible signs or on the applicants' statements or behaviour or, where applicable, statements of the parents or the representative of the applicant".[192]

Finally, the Article also sets out several requirements for appropriate training and regulation of actions of the staff assessing special reception needs which are then reiterated in the following articles dedicated to specific categories of applicants with special reception needs.[193]

Implementation considerations

Despite the aforementioned questions about the potential narrowed scope of certain provisions, the amendments seem to mirror and seek to universalise good practice in the management of vulnerable groups, and to ensure that their special reception needs are identified and then respected.

The RCD continues to omit the applicant's right to be heard in the assessment of special reception needs. The applicability of the right to be heard, under Article 41 of the Charter and as a general principle of EU law, entails the possibility for the applicant to submit observations during the identification process so as to explain why they should benefit from special reception conditions.[194] The absence of a right of the applicant to submit observations may lead to assessments of special reception needs which neglect important vulnerabilities and thus deprive asylum seekers of necessary support.[195] At the same time, officials should be sufficiently trained to detect signs of vulnerability, notwithstanding the applicant's ability to self-identify those signs.[196]

Recommendations

- Member States and the European Commission should integrate the extensive evidence on poor implementation of requirements on vulnerability assessments into national implementation plans. The failure to carry out timely and thorough assessment is widespread across the EU.
- Member States should charge specialist teams within determining authorities with the task of carrying out the assessments, while all authorities in contact with applicants should have the necessary training to identify signs of applicants with special reception needs and make referrals immediately.

189 *APR*, Article 20.

190 *2024 RCD*, Article 25(1).

191 *2024 RCD*, Article 25(1).

192 *2024 RCD*, Article 25(1).

193 *2024 RCD*, Article 25(1), Articles 26-28.

194 The CJEU has affirmed that this right requires authorities to consider the observations made by individuals, examine all relevant aspects of the case impartially, and provide clear reasons for their decisions. See: CJEU, Boudjlida v Préfet des Pyrénées-Atlantiques, Case C-249/13, Judgment of 11 December 2014, ECLI:EU:C:2014:2431, par. 36, 38. In MM v. Minister for Justice, the Court stated that this right applies broadly across EU legal proceedings, even when not explicitly required by legislation, allowing affected individuals to present their perspectives on evidence influencing contested decisions. CJEU, M. M. v Minister for Justice, Equality and Law Reform, Case C-277/11, Judgment of 22 November 2012, ECLI:EU:C:2012:744, par. 85.

195 Case law regarding vulnerable applicants is included in: ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the union and repealing Directive 2013/32/Eu, https://ecre.org/wp-content/uploads/2024/06/ECRE_Comments_Asylum-Procedures-Regulation.pdf, p. 4-6.

196 *ECRE Comments on the Commission Proposal to recast the Reception Conditions Directive*, October 2016, available at: https://ecre.org/wp-content/uploads/2016/10/ECRE-Comments-RCD.pdf, p.20.

Article 26: Minors

The provisions on reception conditions for minors remain largely faithful to those of the 2013 RCD.

Article 26(3) adds that "Member States shall ensure that minors [also] have access to [...] to school materials where needed".[197]

A new paragraph, Article 26(6), stipulates the appropriate profile in terms of crime or offence record, training, and duties, for persons working with minors (including representatives and persons suitable to act as provisional representatives).[198]

Article 27: Unaccompanied minors

Article 27 provides an overall similar procedure for appointing and reviewing representatives and provisional representatives as under the 2013 RCD.

Article 27(1) adds a time limit: Member States must designate a representative by a date "no later than 15 working days from the date on which the application is made".[199] It also requires the representative and the provisional representative to "take into account the minor's own views about his or her needs".[200]

Implementation considerations

The requirements on representatives should be read in conjunction with the APR which sets out further information on the role of representatives. Member States need to identify, train, deploy and supervise adequate numbers of representatives for the number of unaccompanied children arriving.

Article 28: Victims of torture and violence

The changes to the provisions on reception conditions for victims of torture and violence are quite significant. Article 28(1) now lists "trafficking in human beings"[201] as an explicit act of violence. It specifies that the category of "other acts of violence" includes those of a "psychological, physical, or sexual"[202] nature. It adds a reference to the prohibition of discrimination, stating that such violence includes "violence committed with a sexual, gender, racist, or religious motive".[203] It underlines the specific treatments and care that may be required, including "rehabilitation services and counselling".[204] It states that such applicants shall be provided, where needed, with oral translation.[205] It finally requires that access to such treatment and care be provided "as early as possible after those persons' needs have been identified".[206]

Implementation considerations

The strengthened obligations in regard to victims of torture and violence will require Member States to expand the services available for such applicants in many cases given the paucity of provision.

The improved vulnerability assessment should strongly focus on identifying applicants in this category.

197 *2024 RCD*, Article 26(3).
198 *2024 RCD*, Article 26(6).
199 *2024 RCD*, Article 27(1).
200 *2024 RCD*, Article 27(1).
201 *2024 RCD*, Article 28(1).
202 *2024 RCD*, Article 28(1).
203 *2024 RCD*, Article 28(1).
204 *2024 RCD*, Article 28(1).
205 *2024 RCD*, Article 28(1).
206 *2024 RCD*, Article 28(1).

Chapter V Remedies

Article 29: Appeals

The Article preserves the basic provisions of the 2013 RCD which set out the right to appeal decisions granting, withdrawing, or reducing reception conditions, and the right to free legal assistance and representation.

Two changes are introduced. While the Article preserves the possibility for Member States to deny free legal assistance if the applicant has their own resources or when the appeal is considered to have no tangible prospect of success:

- Applicants "shall have the right to an effective remedy before a court or tribunal against that decision".[207]
- Applicants "shall be entitled to request free legal assistance and representation" in pursuit of said remedy.[208]

In this case, the legal assistance is "granted only by legal advisers or other counsellors who are specifically designated under national law to assist and represent applicants or by non-governmental organisations accredited under national law".[209]

Implementation considerations

Although the legal assistance and representation provided for remedies includes accredited organisations, it allows states to limit the provision of legal assistance and representation to state providers without references to avoiding conflicts of interest, in contrast to the reference to legal assistance at Article 29(2). In that regard, ECRE has published a legal note analysing the right to legal aid and legal counselling for asylum applicants under the APR, where Article 16 APR "legal counselling" and Article 17 APR "legal assistance and representation" are analysed, including with a view to understanding the legal standards that should inform their implementation.[210]

Recommendations

- The guarantees provided for by EU primary law, notably in the CFREU, as interpreted by the CJEU should be respected in the provision of legal assistance as a guarantee under the recast RCD.

207 *2024 RCD*, Article 29(3).

208 *2024 RCD*, Article 29(3).

209 *2024 RCD*, Article 29(3).

210 *ECRE Legal Note on The Guarantees of the EU Charter of Fundamental Rights in Respect of Legal Counselling, Assistance and Representation in Asylum Procedures*, August 2024, available at: https://ecre.org/wp-content/uploads/2024/08/ECRE_Legal-Note-16_The-Guarantees-of-the-EU-Charter-of-Fundamental-Rights-in-Respect-of-Legal-Counselling-Assistance-and-Representation-in-Asylum-Procedures.pdf.

Chapter VI: Actions to improve the efficiency of the reception system

Article 32: Contingency planning

A final and significant new element of the recast RCD is the introduction of Article 32 on contingency planning. The Article obliges Member States to draw up a contingency plan with local and regional authorities, civil society, and international organisations "as appropriate"[211] to set out measures which would ensure Member States meet the obligations set out in the Directive, when confronted with "a disproportionate number of applicants for international protection, including of unaccompanied minors".[212] The plan should be prepared within 10 months of the coming into effect of the recast and reviewed at least every three years, with the EUAA to be notified if updates are made, and the EUAA and the Commission to be informed if the plan is activated.[213]

Implementation considerations

While it appears a rather technical provision, the requirements on contingency planning are highly important as they push Member States to proactively assess the capacity of their reception systems and the plan serves as a useful tool to support better compliance by encouraging Member States to address implementation gaps.

The provision on contingency planning should also allow states to avoid "reception crises" that arise when they do not allocate adequate resources to reception. Its purpose is to ensure that Member States continue to meet obligations under the RCD despite increased arrivals.

Proper use of contingency planning will also help limit the use of special regimes under the Crisis Regulation because the first step should be activation of the contingency plan rather than invoking the special regimes under the Crisis Regulation, which will not be possible if the contingency plan is not in place or if it has not first been used before the proposal to use the Crisis Regulation. The plans are thus linked in law to the authorisation of the crisis (mass influx) and instrumentalisation regimes which is not allowed if Member States cannot demonstrate adequate preparedness.

The Contingency Plans have to be developed by April 2025 using a template to be developed by the EUAA. Consultation with relevant actors, including civil society, is required.

Recommendations

- All actors involved in the provision of reception should contribute to contingency planning, with the aim of ensuring that plans lead to the allocation of consistent and adequate resources to reception systems based on realistic assessment of numbers of arrivals.
- The plans should allow for rapid injection of new resources should arrivals unexpectedly increase.
- The plans should seek to avoid a switch to different (lower) standards in the case of increased arrivals given the administrative, political and legal consequences, as well as the humanitarian impact.
- The Commission should strictly ensure the correct interaction between the provisions on contingency planning under the RCD and the Crisis Regulation, namely, that activating a contingency plan takes precedence over invoking the special regimes under the Crisis Regulation. In addition, the measures requested as derogations or solidarity under the Crisis Regulation should only be permitted if efforts under contingency plans can be shown not to have worked.

211 *2024 RCD*, Article 32(1).
212 *2024 RCD*, Article 32(1).
213 *2024 RCD*, Article 32(2).

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