



**Submission by the Office of the United Nations High Commissioner for Refugees  
in the case of *R.R. and Others v. Hungary* (Application No. 36037/17)  
before the European Court of Human Rights**

## **1. Introduction\***

1.1. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for refugees.<sup>1</sup> UNHCR is also responsible for supervising the application of international conventions for the protection of refugees.<sup>2</sup> UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 6 October 2017.

1.2. In this submission, UNHCR addresses the domestic legislative framework and practice applicable to the treatment of asylum-seekers held in transit zones at the border in Hungary, including those with specific needs, and those categorized as 'repeat' or 'subsequent' applicants who have applied for asylum subsequent to the rejection of a prior asylum claim (Part 2). UNHCR further provides its interpretation of the relevant principles of international refugee law and human rights law governing the reception and detention of asylum-seekers, including particularly vulnerable persons and 'subsequent applicants' (Part 3) to assist the Court in its assessment.

## **2. The legislative framework and practice in Hungary regarding the treatment of asylum-seekers with specific needs held in border transit zones**

### ***2.1. Legislative framework regarding the treatment of asylum-seekers with specific needs held in the border transit zones***

2.1.1. In September 2015, the Hungarian Government declared a 'state of emergency due to mass immigration' and subsequently adopted special rules. The state of emergency, which has been in effect ever since, was recently extended until 7 March 2018.<sup>3</sup> The criteria that determine the existence of an 'emergency situation caused by mass immigration' are provided for in the Asylum Act.<sup>4</sup> UNHCR had expressed its concerns about related changes to Hungarian law and practice, including on the treatment and standards applicable to asylum-seekers in the border procedure in transit zones, in a public paper on 'Hungary as a country of asylum' issued in May 2016.<sup>5</sup>

2.1.2. Since 28 March 2017, under the 'state of emergency due to mass immigration', the general rule is that asylum applications may only be submitted in the transit zone.<sup>6</sup> All asylum applicants, except unaccompanied children identified as below the age of fourteen, are obliged to stay in the transit zone until a final decision on their application is issued or in

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\* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

<sup>1</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

<sup>2</sup> *Ibid.* para. 8(a).

<sup>3</sup> Government Decree 247/2017. (VIII. 31.)

<sup>4</sup> Section 80/A (1) of the Asylum Act reads: (1) A crisis situation caused by mass immigration can be declared if:

a) the number of those arriving in Hungary and seeking recognition exceeds

aa) five hundred people a day as a month's average, or

ab) seven hundred and fifty people per day as the average of two subsequent weeks, or

ac) eight hundred people per day as a week's average,

b) the number of people staying in the transit zone in Hungary - not considering those contributing to taking care of the foreigners - exceeds

ba) one thousand people per day as a month's average, or

bb) one thousand five hundred people per day as the average of two subsequent weeks, or

bc) one thousand six hundred people per day as a week's average.

(c) in addition to the cases specified in paragraphs (a) and (b), if any circumstance related to the migration situation occurs that

(ca) directly endangers the protection of the border of Hungary as set out in Article 2 (2) of the Schengen Borders Code,

(cb) directly endangers the public security, public order or public health in a 60 m wide zone of the territory of Hungary measured from the border of Hungary as set out in Article 2 (2) of the Schengen Borders Code and the border mark or in any settlement in Hungary, in particular the outbreak of unrest or the occurrence of violent acts in the reception centre or another facility used for accommodating foreigners located within or in the outskirts of the settlement concerned.

<sup>5</sup> UN High Commissioner for Refugees (UNHCR), *Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, May 2016, available at: <http://www.refworld.org/docid/57319d514.html>

<sup>6</sup> Section 80/J of the Asylum Act.

case a Dublin transfer becomes enforceable. For this purpose the asylum authority, by way of an interim decision, designates the territory of the transit zone as a ‘place of accommodation’ for the asylum-seeker. There is no possibility of challenging this interim decision by way of judicial remedy; it can only be challenged through a judicial review of the final decision of the asylum authority of the asylum application itself.

2.1.3. The Asylum Act interchangeably refers to ‘repeat’ and ‘subsequent’ applications and is understood to reflect the definition of a ‘subsequent application’ as provided in Article 2(q) of the Asylum Procedures Directive. Pursuant to the Asylum Act, ‘where the person seeking recognition submits his/her repeat application following the adoption of a final rejection or termination decision on his/her earlier application, the applicant is not entitled to the following rights’:<sup>7</sup> a) right to stay in the territory of Hungary and to be issued with a permit authorizing stay in the territory of Hungary; b) right to accommodation and care (meals three times a day, washing and toiletry items for personal use or a hygiene allowance in equivalent value, as well as clothes)<sup>8</sup>, services (health care, social care)<sup>9</sup> and benefits; c) to work in the reception centre within nine months of the submission of the asylum application, or at a workplace determined by the public employer, according to the general rules applicable to third-country nationals.<sup>10</sup>

2.1.4. The Asylum Act (Act LXXX of 2007 on Asylum) provides a definition of a ‘person in need of special treatment’<sup>11</sup> and provides that due consideration must be given to the specific needs of such a person.<sup>12</sup> Furthermore, attention must be paid to the particular needs of such a person when providing material reception conditions.<sup>13</sup>

2.1.5. The Government Decree Implementing the Asylum Act (“Decree”) confers a clear obligation on the asylum authority to assess whether the provisions applicable to persons requiring ‘special treatment’ apply. When assessing specific needs, the asylum authority may resort to the assistance of a medical or psychological expert. Such an expert examination can only be conducted with the consent of the person concerned. In case the applicant does not give his/her consent, the provisions do not apply.<sup>14</sup>

2.1.6. In relation to children, the Asylum Act and Decree requires that the best interests and rights of the child shall be a primary consideration, including when providing reception.<sup>15</sup> The Decree specifies that food, clothing, hygiene, mental health and physical health care shall be provided, as well as education and care advancing the child's physical, mental, emotional and moral development, adequate for the child's age, health condition and other needs.<sup>16</sup> Pursuant to the Decree, applicants with specific needs, based on a medical expert's opinion, are eligible for free of charge health care services, rehabilitation, psychological and clinical psychological care or psychotherapeutic treatment required by the person's state of health.<sup>17</sup>

2.1.7. The Minister of Justice and Law Enforcement Decree 52/2007 (XII. 11) further sets out specific provisions concerning applicants ‘in need of special treatment’ held in the transit zones. It requires that social care be provided in the transit zones 24/7; besides the basic material reception conditions, accompanied children under the age of fourteen years are to be provided with five meals a day, pregnant women and mothers with small children as well as accompanied children below fourteen years to be provided with additional dairy products and fruit on a daily basis. At least 10 900 Kilojoules of energy should be provided per day for each meal; the medical conditions, age, dietary requirements and religion requirements must also be considered.<sup>18</sup>

## ***2.2. The practice regarding the treatment of asylum-seekers with specific needs held in the border transit zones***

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<sup>7</sup> Section 80/K(11) of the Asylum Act.

<sup>8</sup> Section 21(1) c) of Decree.

<sup>9</sup> Section 26(1) of the Asylum Act: ‘the conditions of reception include the material conditions of reception and all rights and measures determined in the present Act and in the Government Decree in connection with the freedom of movement, health care, social care and education of the applicant.’

<sup>10</sup> Section 5 (1) a) – c) of the Asylum Act.

<sup>11</sup> Section 2 k) of the Asylum Act: ‘person in need of special treatment’ is the unaccompanied minor or a vulnerable person, in particular, a minor, elderly or disabled person, pregnant woman, single parent raising a minor child and a person who has suffered from torture, rape or any other grave form of psychological, physical or sexual violence, found, after proper individual assessment, to have special needs because of his/her individual situation’.

<sup>12</sup> Section 4(3) of the Asylum Act: ‘the provisions of the present Act shall be applied to persons in need of special treatment with due consideration of the specific needs arising from their situation’.

<sup>13</sup> Section 29 of the Asylum Act.

<sup>14</sup> Section 3 (1)-(2) and (4) of Government Decree 301/2007 (XI. 9) on the implementation of the Asylum Act.

<sup>15</sup> Section 4(1) of the Asylum Act.

<sup>16</sup> Section 33(3) of the Implementing Government Decree.

<sup>17</sup> Section 34 of the Implementing Government Decree

<sup>18</sup> Section 4/D of the Minister of Justice and Law Enforcement Decree 52/2007 (XII. 11).

2.2.1. Notwithstanding the obligation on the state authority to assess the existence of special needs, there is no structured and systematic mechanism in place to identify specific needs at an early stage, including no systematic identification of survivors of sexual and gender-based violence.

2.2.2. There is also no adequate support provided for applicants with specific needs, including survivors of sexual and gender-based violence, torture or trauma and women at risk. UNHCR has requested the authorities to allow psychologists and psychiatrists to visit asylum-seekers held at the transit zones. However to date, the authorities have not allowed access and as a result, asylum-seekers do not receive psychological and psychiatric treatment by qualified practitioners. In many cases insufficient information and limited communication also results in inadequate support and counselling for people with medical needs. At the time of the alleged violations under consideration in this application, no maternity nurse visited the transit zone despite the legal obligation to provide access to this service to mothers of newborns,<sup>19</sup> although this service is now being provided in the transit zone.

2.2.3. The transit zones are divided into segregated sectors, limiting the interaction of children across sectors, which in turn limits the possibility for socializing and sharing. The physical setup of the transit zone may have long-term impacts and affect the psycho-social well-being of asylum-seeking girls and boys.<sup>20</sup>

2.2.4. There is no formal, individualized best interest assessment and best interests determination procedures in place. There is little interaction between children and social workers. Children's development, psycho-social and recreational needs are not met, especially in the case of teenage girls and boys who do not have access to age-appropriate leisure activities or psycho-social programmes. An education programme was initiated by the authorities in September 2017, however information is not available as to the methodology applied and the curriculum used. At the time of the detention of the applicants, children were not provided with access to any educational activities. Only simple recreational activities were provided by charitable organisations targeting mainly the youngest children.

2.2.5. Applicants who are considered by the authorities as 'repeat' or 'subsequent' applicants are only provided with accommodation in the transit zone. The authorities do not issue formal decisions on ineligibility for State-provided assistance, as a result of which, no appeal or other effective remedy is possible. 'Repeat' or 'subsequent' applicants detained in the transit zones are allowed to receive assistance from authorized charity organizations, i.e., those who have received authorization to enter and work in the transit zones. These authorized charities are able to provide food assistance to repeat applicants though such assistance is not delivered at all times or in every case. In practice, most of the time, charities provide cold food items to 'repeat' or 'subsequent' applicants which do not include hot meals or fresh fruits and vegetables.

### **3. The relevant principles of international and European refugee and human rights law regarding the detention of asylum-seekers, including those with specific needs and 'repeat' or 'subsequent' applicants**

#### **3.1. International refugee law**

3.1.1. The right to seek and enjoy asylum is a basic human right which derives from Article 14(1) of the *Universal Declaration of Human Rights* 1948, and is supported by the legal framework of the 1951 Convention and its 1967 Protocol, to which Hungary is a State party.<sup>21</sup> Seeking asylum is not, therefore, an unlawful act.<sup>22</sup>

3.1.2. Article 31 of the 1951 Convention provides that refugees shall not be penalised for their illegal entry or stay provided they present themselves without delay and show good cause for their illegal entry or stay. It further provides that restrictions on movement shall not be applied to such refugees other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another country.<sup>23</sup> In order to seek asylum, refugees are often forced to arrive at, or enter, a territory without prior authorisation. The position of refugees may thus differ

<sup>19</sup> Section 5(1) d) and 13 of Act CXXIII of 2015 on basic health care and Minister of Health and Family Decree 49/2004 (V. 21) on regional provision of maternity care service.

<sup>20</sup> See in particular: Corlett, D., with Mitchell, G., Van Hove, J., Bowring, L., Wright, K. (2012) *Captured Childhood*: Melbourne, International Detention Coalition, chapter 5, <https://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf>; Human Rights Watch (2016), 'Children Behind Bars: The Global Overuse of Detention of Children', <https://www.hrw.org/world-report/2016/children-behind-bars>; UNHCR's position regarding the detention of refugee and migrant children in the migration context, January 2017, <http://www.refworld.org/docid/5885c2434.html>.

<sup>21</sup> *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

<sup>22</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, ('Guidelines on Detention') 2012, Guideline 1, para. 11, <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

<sup>23</sup> Article 31 reads as follows:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

fundamentally from that of migrants in that they may not be in a position to comply with legal formalities for entry. They may, for example, be unable to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure.<sup>24</sup> The drafters of the 1951 Convention were aware of such difficulties<sup>25</sup> and the Executive Committee of the High Commissioner's Programme ("ExCom")<sup>26</sup> itself recognised "the importance (...) to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens".<sup>27</sup>

3.1.3. The benefits provided under Article 31 are also applicable to asylum-seekers by virtue of the fact that recognition of refugee status does not make a person a refugee, but only declares the person to be one.<sup>28</sup> In this regard UNHCR supports the view that the requirement in Article 31 to have come directly from a territory where life or freedom was threatened should be interpreted to apply only to those persons who have found secure asylum elsewhere, taking into consideration the drafting history of the Convention and the purpose and intent of Article 31.<sup>29</sup>

3.1.4. Regarding the material scope of Article 31, it is generally accepted that the term "penalties" as referred to in this article are to be broadly understood<sup>30</sup> as including administrative detention in the immigration context.<sup>31</sup> Moreover, a penalty in the context of Article 31 may also include the denial of economic and social rights if linked to the irregular entry or presence of an applicant for asylum. Similarly, disadvantages in the asylum procedure as a consequence of irregular entry or presence may also amount to a "penalty" within the meaning of Article 31, particularly where procedural safeguards are not met. It should be further noted that the material scope of Article 31 extends to the territory under a State's control, which would include border crossings. In UNHCR's view, holding applicant in a transit zone without permission to enter the territory severely restricts the freedom of movement and can be qualified as detention.<sup>32</sup> Article 31 is therefore aimed at reinforcing the rights contained in the 1951 Convention through safeguarding access to asylum.

3.1.5. Detention of asylum-seekers is subject to specific limits and safeguards in international law, as articulated and elaborated in UNHCR's Guidelines on Detention, which reflect the state of international law on detention for immigration-related purposes of asylum-seekers. They stipulate that the fact that asylum-seekers have often experienced traumatic events also needs to be taken into account in determining any restrictions on freedom of movement based on irregular entry or presence.<sup>33</sup> Restrictions on movement that amount to a deprivation of liberty, for instance through the immigration-related detention of refugees and asylum-seekers, must be necessary, reasonable and proportionate<sup>34</sup> and can

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<sup>24</sup> UNHCR, 2012 Guidelines on Detention, Guideline 1, para. 11.

<sup>25</sup> UNHCR intervention before the European Court of Human Rights in the case of *Saadi v. United Kingdom* (no. 13229/03), 30 March 2007, para. 25, <http://www.refworld.org/docid/47c520722.html>.

<sup>26</sup> ExCom was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions; the latter includes issuing Conclusions on International Protection (referred to as "ExCom Conclusions"). ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 101 States are Members of the Executive Committee, including Hungary which has been a member since 1993.

<sup>27</sup> ExCom Conclusion No 44, Detention of Refugees and Asylum-Seekers No. 44 (XXXVII) - 1986, para. (d), <http://www.unhcr.org/excom/exconc/3ae68c43c0/detention-refugees-asylum-seekers.html>.

<sup>28</sup> Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature. It follows that the prohibition of refoulement applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined. UNHCR Handbook, para 28. See also, ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); ExCom Conclusion No. 81 (XLVII), 1997, para. (i), <http://www.unhcr.org/pages/49e6e6dd6.html>. See also, *Note on International Protection*, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>.

<sup>29</sup> UNHCR, *Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees - Revised* (Geneva Expert Roundtable, 8-9 November 2001) [*Global Consultations on International Protection/Second Track*], 9 November 2001, <http://swigea56.hcrnet.ch/refworld/docid/3bf90d2e4.html>.

<sup>30</sup> For an analysis of the scope of Article 31 see: Cathryn Costello (with Yulia Ioffe and Teresa Büchsel) Article 31 of the 1951 Convention Relating to the Status of Refugees, July 2017, PPLA/2017/01, <http://www.refworld.org/docid/59ad55c24.html>.

<sup>31</sup> UNHCR, Detention Guidelines ("Guidelines on Detention"), Guideline 4.1.4 para. 32. See also, UN Working Group on Arbitrary Detention, *Report to the Seventh Session of the Human Rights Council*, A/HRC/7/4/, 10 January 2008, which states: "criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention." At para. 53, <http://www.unhcr.org/refworld/docid/502e0eb02.html>.

<sup>32</sup> See UNHCR, *Hungary as a country of asylum*, 2016, para 19. See also UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, paras. 5-7, <http://www.refworld.org/docid/503489533b8.html>. See also, *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, <http://www.refworld.org/docid/3ae6b76710.html>, in which the European Court of Human Rights held that despite its name the international transit zone of an airport does not have extraterritorial status, and that the holding of asylum-seekers in such a zone can amount to a deprivation of liberty within the meaning of Article 5 of the ECHR even if they are free to leave for another country. Note further that the applicants in that case were less restricted in their freedom of movement in the transit zone at Paris-Orly Airport than asylum-seekers who are held in the transit zones in Hungary.

<sup>33</sup> UNHCR, 2012 Guidelines on Detention, Guideline 1, para. 11.

<sup>34</sup> *Ibid.*, Guideline 4 para. 18.

only be justified by a limited number of grounds, namely public order<sup>35</sup>, public health or national security.<sup>36</sup>

3.1.6. The above grounds reflect the intention of the drafters of the 1951 Convention<sup>37</sup> as well as further guidance provided by ExCom<sup>38</sup> and are elaborated in UNHCR's Guidelines on Detention.<sup>39</sup> They also provide that maximum limits on detention need to be established in law to protect the individual from arbitrary<sup>40</sup> detention and that once the initial justification to detain is no longer valid, the asylum-seeker should be released immediately.<sup>41</sup> The Guidelines on Detention further provide that decisions to detain or to extend detention must be subject to minimum procedural safeguards.<sup>42</sup>

3.1.7. These safeguards include:

- The right to be informed at the time of arrest or detention of the reasons for their detention, and their rights in connection with the order, including review procedures, in a language and in terms which they understand;
- The right to be informed of the right to legal counsel. Lawyers need to have access to their client, to records held on their client, and be able to meet with their client in a secure, private setting;
- The right to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release;
- Following the initial review of detention, the right to benefit from a regular periodic review of the necessity for the continuation of detention before a court or an independent body, which the asylum-seeker and his/her representative would have the right to attend;
- The right to challenge the lawfulness of detention before a court of law at any time. In this regard, the authorities need to establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less intrusive means of achieving the same objectives have been considered in the individual case;
- To contact and be contacted by UNHCR.

3.1.8. These safeguards also include access to a fair and efficient asylum procedure<sup>43</sup> in order to ensure that persons in need of international protection are properly identified. Access to asylum procedures must be realistic and effective, including that timeframes for lodging supporting materials are appropriate for someone in detention, and access to legal and linguistic assistance should be made available. It is also important that asylum-seekers in detention are provided with accurate legal information about the asylum process and their rights.<sup>44</sup>

3.1.9. Furthermore, in light of existing international and European human rights standards outlined below, detention conditions should be humane and dignified.<sup>45</sup> In UNHCR's view, detention conditions that do not meet international standards may also infringe on the procedural fairness of the asylum procedures, in particular, the ability of an asylum-seeker to submit and substantiate an asylum claim in a fair and efficient asylum procedure. Material destitution may also undermine the ability of the person concerned to pursue and to substantiate his/her claim.<sup>46</sup>

3.1.10. These safeguards are particularly important when asylum is requested at the border, including in international transit zones, because of the particular vulnerability of all asylum-seekers in this context.<sup>47</sup>

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<sup>35</sup> The notion of 'public order' encompasses the following purposes: to prevent absconding and/or in cases of likelihood of non-cooperation; in connection with accelerated procedures for manifestly unfounded or clearly abusive claims; for initial identity and/or security verification; and in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention. UNHCR, 2012 Detention Guidelines, Guideline 4.1.

<sup>36</sup> UNHCR, 2012 Guidelines on Detention, Guideline 4.1 para. 21.

<sup>37</sup> UNHCR intervention before the European Court of Human Rights in the case of *Saadi v. United Kingdom* (no. 13229/03), 30 March 2007, para. 26, <http://www.refworld.org/docid/47c520722.html>.

<sup>38</sup> ExCom Conclusion No 44, para. (b).

<sup>39</sup> UNHCR, 2012 Guidelines on Detention, Guideline 4.1.

<sup>40</sup> In *Saadi v. United Kingdom*, the Court emphasized that "detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no one should be dispossessed of his or her liberty in an arbitrary fashion." The Court held that "to avoid being branded as arbitrary, [...] detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate [...] and the length of the detention should not exceed that reasonably required for the purpose pursued." *Saadi v. United Kingdom* (no. 13229/03), paras 66 and 74.

<sup>41</sup> UNHCR, 2012 Guidelines on Detention, Guideline 6.

<sup>42</sup> *Ibid.*, Guideline 7 para. 47.

<sup>43</sup> *Ibid.*, Guideline 7, para. 47(vi).

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, Guideline 8, para 48.

<sup>46</sup> UNHCR public statement before the Court of Justice of the European Union in the case of *Cimade and GISTI v. Ministry of the Interior*, C-179/11, 1 August 2011, para. 1.6, <http://www.refworld.org/docid/4e37b5902.html>.

<sup>47</sup> UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 21-23, <http://www.refworld.org/docid/3b36f2fca.html>. In *Amuur v. France*, the Court recognised expressly that holding asylum-seekers in the transit zone of an airport is "acceptable only in order to enable States to prevent unlawful immigration while

3.1.11. These rights taken together - the right to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of person and freedom of movement – mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.<sup>48</sup> This approach is also supported by ExCom which underlined that “(...) in view of the hardship which it involves, detention should normally be avoided”.<sup>49</sup>

3.1.12. Specific considerations apply to the detention of asylum-seekers with specific needs<sup>50</sup> including in particular victims of trauma or torture,<sup>51</sup> children<sup>52</sup> and women.<sup>53</sup>

3.1.13. In view of the experience of seeking asylum, and the often traumatic events precipitating flight, asylum-seekers may present with psychological illness, trauma, depression, anxiety, aggression, and other physical, psychological and emotional consequences. Such factors need to be weighed in the assessment of the necessity to detain.<sup>54</sup> Survivors of torture and other serious physical, psychological or sexual violence also need special attention and should generally not be detained. Detention can and has been shown to aggravate and even cause the aforementioned illnesses and symptoms.<sup>55</sup> This can be the case even when individuals present no symptoms at the time of detention.<sup>56</sup> Because of the serious consequences of detention, initial and periodic assessments of detainees’ physical and mental state are required, carried out by qualified medical practitioners. Appropriate treatment needs to be provided to such persons, and medical reports presented at periodic reviews of their detention.

3.1.14. An ethic of care – not detention or enforcement – needs to govern all interactions with asylum-seeking children, with the best interests of the child a primary consideration.<sup>57</sup> Moreover, UNHCR’s position is that children should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interests.<sup>58</sup>

3.1.15. Studies have indicated that detention of children can undermine their psychological and physical well-being and compromise their cognitive development. Furthermore, children held in detention are at risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder such as insomnia, nightmares and bedwetting.<sup>59</sup> There is indeed strong evidence that detention has a profound and negative impact on children’s health and

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complying with their international obligations”<sup>47</sup>, particularly the 1951 Convention and the ECHR, highlighting that “States’ legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions”.<sup>47</sup> Of particular relevance in this regard is Article 31(2) of the 1951 Convention, prohibiting States to restrict the freedom of movement of refugees unlawfully at their border or in their territory, unless necessary and until their status is regularized. *Amuur v. France* (no. 19776/92), para. 43.

<sup>48</sup> UNHCR, 2012 Guidelines on Detention, Guideline 2, para. 14.

<sup>49</sup> ExCom Conclusion No. 44 (XXXVII) (1986), para. (b), *supra*, note 14.

<sup>50</sup> The Court emphasized, specifically in the detention context, that asylum-seekers are “particularly vulnerable because of everything [they] had been through during [their] migration and the traumatic experiences [they were] likely to have endured previously”. ECtHR, *M.S.S. v. Belgium and Greece*, para. 232.

<sup>51</sup> UNHCR, 2012 Guidelines on Detention, Guideline 9.1.

<sup>52</sup> *Ibid.*, Guideline 9.2.

<sup>53</sup> *Ibid.*, Guideline 9.3.

<sup>54</sup> *Ibid.*, Guideline 4.

<sup>55</sup> UNHCR and the Office of the High Commissioner for Human Rights (OHCHR), Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions, May 2011, para 10, <http://www.unhcr.org/refworld/docid/4e315b882.html>.

<sup>56</sup> See, Jesuit Refugee Service - Europe (JRS-E), *Becoming Vulnerable in Detention*, June 2010, <http://www.unhcr.org/refworld/docid/4ec269f62.html>.

<sup>57</sup> *Ibid.*

<sup>58</sup> UNHCR’s position regarding the detention of refugee and migrant children in the migration context, January 2017, <http://www.refworld.org/docid/5885c2434.html>. See also, UN Human Rights, OHCHR, ‘Children and families should never be in immigration detention’, which states: ‘Let us be clear: immigration detention is never in the best interests of the child’. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21026&LangID=E#sthash.fwKB9IJR.dpuf>. See also, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 28 September 2012, <http://www.refworld.org/docid/51efb6fa4.html>. Similarly, the UN Special Rapporteur on the human rights of migrants, Jorge Bustamante, A/HRC/11/7, 14 May 2009, para. 62. See also CoE Special Representative of the SG on migration and refugees, Thematic Report on migrant and refugee children, SG/Inf(2017)13, 10 March 2017; Speech at the High-level meeting on Europe’s challenge to ensure a rights perspective for children in migration, 24 April 2017; Secretary General of the Council of Europe, State Of Democracy, Human Rights and the Rule of Law, Populism – How strong are Europe’s checks and balances?, Report by the Secretary General of the Council of Europe, April 2017, p. 108.

<sup>59</sup> Human Rights Watch (HRW) has documented, over more than 10 years in Europe and beyond, serious violations of children’s rights arising from immigration detention of children; highlighting that children may be arbitrarily detained, held in cells with unrelated adults, and subjected to brutal treatment by police, guards and other authorities and are often held in poor conditions that fall far short of international standards governing appropriate settings for children deprived of their liberty. See: <https://www.hrw.org/topic/childrens-rights/refugees-and-migrants>.



development, regardless of the conditions in which children are held, and even when detained for short periods of time or with their families.<sup>60</sup> The risk of exposure to others forms of harm, including sexual and gender-based violence, are also significant in many detention contexts. Additionally, there is no evidence that detention of children serves the aim of deterring refugee movements or irregular migration.<sup>61</sup>

3.1.16. Furthermore, children should never be criminalised or subject to punitive measures because of their parents' migration status.<sup>62</sup> Alternatives to detention should be explored, preferably through family-based alternative care options or other suitable alternative care arrangements.<sup>63</sup> This is in accordance with international standards.<sup>64</sup>

3.1.17. As a general rule, pregnant women and nursing mothers, who both have specific needs, should not be detained.<sup>65</sup> Alternative arrangements should also take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation. Alternatives to detention would need to be pursued in particular when separate facilities for women and/or families are not available.

3.1.18. Where detention is unavoidable for women seeking asylum, facilities and materials are required to meet women's specific needs and risk factors that they are exposed to.<sup>66</sup> It is the State's responsibility to ensure safe environments to prevent incidents of SGBV, identify survivors and ensure that appropriate and prompt services are provided to them.<sup>67</sup> For example, it is crucial to have both female and male security personnel in the detention centers to ensure the safety of the women.<sup>68</sup> All staff assigned to work with women detainees should receive training relating to the gender-specific needs

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For more information on the negatives effects of detention on children, see: <http://endchilddetention.org/impact/> and also <http://www.fmreview.org/detention/farmer.html>.

<sup>60</sup> 'Children's emotional and behavioral responses to separation and to detention suggest that the experience is acutely stressful and, in some cases, traumatic-even when detention is brief. Distress and impairment may persist months after release.' See Kronick, Rousseau and Cleveland, *American Journal of Orthopsychiatry* 85(3):287-294 · May 2015, [https://www.researchgate.net/publication/276849648\\_Asylum-Seeking\\_Children%27s\\_Experiences\\_of\\_Detention\\_in\\_Canada\\_A\\_Qualitative\\_Study](https://www.researchgate.net/publication/276849648_Asylum-Seeking_Children%27s_Experiences_of_Detention_in_Canada_A_Qualitative_Study)

<sup>61</sup> UNHCR's position regarding the detention of refugee and migrant children in the migration context, January 2017, p. 2, <http://www.refworld.org/docid/5885c2434.html>

<sup>62</sup> See UN Committee on the Rights of the Child (CRC), *Report on the 2012 Day of General Discussion: The rights of all children in the context of international migration*, paragraph 78: 'Children should not be criminalized or subject to punitive measures because of their or their parents' migration status'. See also, *A home away from home for refugee and migrant children*, Advocacy Brief, UNICEF, August 2016, [http://www.unicef.org/ceecis/A\\_home\\_away\\_from\\_home\\_29\\_08\\_2016.pdf](http://www.unicef.org/ceecis/A_home_away_from_home_29_08_2016.pdf).

<sup>63</sup> Regarding alternatives to detention, see UNHCR, 2012 Detention Guidelines, Annex A.

<sup>64</sup> Inter-American Court of Human Rights (IACtHR), Advisory Opinion (OC-21/14) on the "Rights and guarantees of children in the context of migration and/or in need of international protection", see paragraph 6, [http://www.corteidh.or.cr/docs/opiniones/seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf); UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, <http://www.refworld.org/docid/42dd174b4.html>; UN Committee on the Rights of the Child (CRC), Report on the 2012 Day of General Discussion: The rights of all children in the context of international migration, para. 78, <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>; UN Special Rapporteur on Torture, Thematic Report on torture and ill-treatment of children deprived of their liberty, 5 March 2015 (A/HRC/28/68), para. 80, <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx>. Moreover, this Court's jurisprudence refers extensively to the vulnerability of children. The Court has highlighted the "extreme vulnerability" of children and their specific needs: *Tarakhel v. Switzerland* [GC] (no. 29217/12), § 99. A child's "extreme vulnerability" not only engages States' positive obligations under Article 3 of the Convention but also "takes precedence over considerations relating to the [child's] status as an illegal immigrant."; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (no. 13178/03), § 55; *Muskhadzhiyeva and Others v. Belgium* no. 41442/07), §§ 56-58; *Popov v. France*, § 91. In a number of judgments, the Court has further held that the State's failure to verify that the detention of children, whether accompanied (see *Popov v. France* (nos. 39472/07 and 39474/07), para. 119; *A.B. and Others v. France* (no. 11593/12), *R.M. and M.M. v. France* (no. 33201/11), *A.M. and Others v. France* (no. 24587/12), *R.K. v. France* (no. 68264/14) and *R.C. v. France* (no. 76491/14)) or not (*Yoh-Ekale Mwanje v. Belgium* (no. 10486/10), para. 124) was a measure of last resort and to consider less severe alternatives deemed such detention arbitrary in breach of Article 5 (1) ECHR. In addition, the Court repeatedly found a violation of Article 3 ECHR regarding the administrative detention of foreign national children (*Popov v. France* (nos. 39472/07 and 39474/07), *Muskhadzhiyeva and Others v. Belgium* (no. 41442/07), *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (no. 13178/03), *Rahimi v. Greece* (8687/08), *Kanagaratnam v. Belgium* (no. 15297/09).) The fact that children are accompanied by their parents or one of their parents does not release the authorities from their positive obligation to protect children under Article 3 (*R.M. v. France*, § 71; *Muskhadzhiyeva and Others v. Belgium* (no. 41442/07), §§ 57- 58; *Popov v. France* (nos. 39472/07 and 39474/07), § 91.). The Court reiterated that the child's extreme vulnerability has to be the decisive factor and has to take precedence over considerations relating to the status of an irregular immigrant. In addition, asylum seeking children have specific needs that are related in particular to their age, lack of independence, and status. In a series of judgments against France, the Court noted that, even where the material conditions in certain detention centres were appropriate, the conditions inherent in establishments of this type were a source of anxiety for young children, in breach of Article 3 ECHR (*A. B. and Others v. France* (no. 11593/12); *A.M. and Others v. France* (no. 24587/12); *R.C. and V.C. v. France* (no. 76491/14); *R.K. and Others v. France* (no. 68264/14); *R.M. and Others v. France* (no. 33201/11)).

<sup>65</sup> UN, Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), A/C.3/65/L.5, 6 October 2010, available at: <http://www.unhcr.org/refworld/docid/4dcbb0ae2.html>. This Court has also held that women in an advanced stage of pregnancy are in a particularly vulnerable position (*Nechiporuk and Yonkalo v. Ukraine* (no. 42310/04), § 156.). In the migration context, the detention of a pregnant woman in inappropriate conditions without specific supervision of her particular situation led the Court to conclude that the minimum level of severity under Article 3 had been attained (*Mahmundi and Others v. Greece* (no.14902/10), § 70.)

<sup>66</sup> Rule 5, Bangkok Rules.

<sup>67</sup> Article 18 par.4, Article 20 of the Reception Directive, see also Article 60 par.1 and par.2, Article 44 Istanbul Convention.

<sup>68</sup> Rule 19, Bangkok Rules.

and vulnerabilities of women.<sup>69</sup>

### 3.2. International human rights law

3.2.1. Liberty of the person is a fundamental right proclaimed in the Universal Declaration of Human Rights (UDHR). Its importance is underpinned by the guarantee given in three specific provisions in the UDHR, namely Article 3 (right to life, liberty and security); Article 9 (right against arbitrary arrest, detention or exile); and Article 13 (right to freedom of movement and residence). These fundamental rights are also guaranteed in Articles 9 and 12 of the *International Covenant of Civil and Political Rights* (ICCPR).<sup>70</sup> In its General Comment No. 8 (1982) on Article 9, the Human Rights Council (HRC) made it clear that Article 9(1) “is applicable to all deprivations of liberty, whether in criminal cases or in others cases such as ... immigration control etc.”<sup>71</sup>

3.2.2. The Human Rights Committee considered the application of Article 9 in *A v. Australia* (1997).<sup>72</sup> The case concerned the prolonged detention of an asylum-seeker. The HRC, while agreeing that there was no basis for the claim that it is per se arbitrary to detain individuals requesting asylum, observed that the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of co-operation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.<sup>73</sup>

3.2.3. The Convention on the Rights of the Child (‘CRC’) sets out a number of principles regarding the protection of children which apply throughout all stages of displacement,<sup>74</sup> including:

- The best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children (Article 3 in conjunction with Article 22);
- There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status, or on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians or family members (Article 2);
- Each child has a fundamental right to life, survival and development to the maximum extent possible (Article 6);
- Children should be assured the right to express their views freely and their views should be given “due weight” in accordance with the child’s age and level of maturity (Article 12);<sup>75</sup>
- States Parties shall, in accordance with their national laws, ensure alternative care for a child. Such care could include, inter alia, foster placement or, if necessary, placement in suitable institutions for the care of children. When considering options, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background (Article 20(2) and (3));
- Asylum-seeking and refugee children are entitled to receive appropriate protection and humanitarian assistance in line with the CRC and other international instruments (Article 22).

<sup>69</sup> Rule 33(1), Bangkok Rules.

<sup>70</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <http://www.refworld.org/docid/3ae6b3aa0.html>. Article 9(1) ICCPR, provides that “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.” Article 12 ICCPR provides that “1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country”.

<sup>71</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, No. 8, para. 1, <http://www.refworld.org/docid/4538840110.html>.

<sup>72</sup> *UNHCR intervention before the European Court of Human Rights in the case of Saadi v. United Kingdom* (no. 13229/03), 30 March 2007, <http://www.refworld.org/docid/47c520722.html>.

<sup>73</sup> See: *C. v. Australia*, CCPR/C/76/D/900/1999; *Samba Jalloh v. Netherlands*, CCPR/C/74/D/794/1998; *Omar Sharif Baban v. Australia*, CCPR/C/78/D/1014/2001; *Danyal Shafiq v. Australia*, CCPR/C/88/D/1324/2004

<sup>74</sup> UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, paras. 12-30, <http://www.unhcr.org/refworld/docid/42dd174b4.html>. In its reasoning the Court refers regularly to the best interests of the child as a primary consideration in all actions concerning children. (*Rahimi v. Greece* (no. 8687/08), § 108; *Popov v. France* (nos. 39472/07 and 39474/07), § 140) Moreover, reference is made in (*Muskhadzhiyeva and Others v. Belgium* (no. 41442/07), § 62; *Popov v. France* (nos. 39472/07 and 39474/07), § 91) to the obligation to adopt appropriate measures to ensure that refugee and asylum seeking children benefit from the protection and humanitarian assistance in line with Article 22 of CRC.

<sup>75</sup> UNHCR, *Best Interests Determination Children – Protection and Care Information Sheet*, June 2007, <http://www.unhcr.org/refworld/docid/46a076922.html>; UNHCR Guidelines on Determining the Best Interests of the Child, May 2008, para. 20, <http://www.unhcr.org/refworld/docid/48480c342.html>; UNHCR, *Field Handbook for the Implementation of UNHCR BID Guidelines*, November 2011, <http://www.unhcr.org/refworld/docid/4e4a57d02.html>; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, paras. 5, 22 December 2009, HCR/GIP/09/08, <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>.



3.2.4. The Committee on the Elimination of Discrimination against Women recommended that, as a general rule, pregnant women and nursing mothers, who both have special needs, should not be detained. Where detention of women asylum-seekers is unavoidable, separate facilities and materials are required to meet the specific hygiene needs of women. The Committee further underlined that the use of female guards and warders should be promoted and that all staff assigned to work with women detainees should receive training relating to the gender-specific needs and human rights of women.<sup>76</sup>

### 3.3. Relevant EU standards

3.3.1. Article 18 of the Charter of Fundamental Rights of the European Union (the Charter)<sup>77</sup> provides for the right to asylum. Article 6 emphasizes that “everyone has the right to liberty and security of person” while Article 24 (2) of the Charter highlights that “in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.” Article 52 specifies the necessity and proportionality requirements applicable in relation to “any limitation on the exercise of the rights and freedoms recognized by this Charter”.<sup>78</sup> Article 52(3) further provides that “in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention”<sup>79</sup> while this provision “shall not prevent Union law providing more extensive protection.”

3.3.2. The Reception Conditions Directive (recast) provides for special guarantees for the detention and reception of vulnerable asylum-seekers including children and victims of torture and violence.<sup>80</sup> In addition to the general obligation “to take into account the specific situation of vulnerable persons such as minors, (...) pregnant women (...) persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence”,<sup>81</sup> the following guarantees are of particular relevance in the present case:<sup>82</sup>

- The health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities and, where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health;
- Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors;
- The minor’s best interests shall be a primary consideration for Member States;
- Detained families shall be provided with separate accommodation guaranteeing adequate privacy;
- Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health. Member States shall ensure that that standard of living is met in the specific situation of vulnerable persons as well as in relation to the situation of persons who are in detention;
- Member States shall assess whether the applicant is an applicant with special reception needs. That assessment shall be initiated within a reasonable period of time after an asylum application is made;
- Member States shall ensure that persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care. Member States are obliged to take SGBV prevention measures at reception and accommodation centres, including separate accommodation in reception facilities for vulnerable women, information and awareness-raising sessions, security measures and the possibility of referring survivors to specialised women’s shelters.<sup>83</sup>
- Member States are required to provide access to appropriate medical and psychological treatment or care for SGBV survivors.<sup>84</sup>

<sup>76</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, para. 34, CEDAW/C/GC/32, <http://www.refworld.org/docid/54620fb54.html>.

<sup>77</sup> Charter of Fundamental Rights of the European Union, [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf).

<sup>78</sup> Article 52 of the Charter Fundamental Rights of the European Union provides that:

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

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

<sup>79</sup> Article 52(3) of the Charter. Emphasis added.

<sup>80</sup> Article 2(k) and Chapter IV RCD (recast).

<sup>81</sup> Article 21 RCD (recast).

<sup>82</sup> Articles 11, 17, 22 and 23 RCD (recast).

<sup>83</sup> Article 18(4) RCD (recast).

<sup>84</sup> Article 20 RCD (recast).

3.3.3. The Court of Justice of the EU (CJEU) highlighted the importance of the principles of proportionality and necessity in applying the relevant provisions of the RCD (recast), with reference notably to UNHCR's 2012 Detention Guidelines.<sup>85</sup> In a recent judgment, the CJEU found in relation to Article 6 of the Charter and Article 5 of the ECHR, that "if the execution of a measure depriving a person of liberty is to be in keeping with the objective of protecting the individual from arbitrariness, pursuant to, this means, in particular, that there can be no element of bad faith or deception on the part of the authorities."<sup>86</sup> According to the CJEU, it follows that "the detention of applicants, constituting a serious interference with those applicants' right to liberty, is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness."<sup>87</sup>

3.3.4 The EU Asylum Procedures Directive<sup>88</sup> establishes a category of 'subsequent applications', defined as 'a further application for international protection made after a final decision has been taken on a previous application'. The RCD provides in its Art. 20(1) that that Member States may 'reduce or, in exceptional and duly justified cases, withdraw material reception conditions', including where an applicant has filed a subsequent application.<sup>89</sup> However, Art. 20(5) of the RCD requires that a formal decision on such reduction or withdrawal of reception conditions should be taken before conditions may be reduced or withdrawn. Moreover, Article 20(5) provides that 'Member States shall under all circumstances ensure access to health care in accordance with Article 19 and shall ensure a dignified standard of living for all applicants.' This would require at a minimum access to the means of subsistence, accommodation in decent conditions and support to address specific needs.

#### 4. Conclusion

4.1. UNHCR considers that the right to seek asylum should not be hindered or applicants penalized through measures to prevent and deter irregular entry and freedom of movement, contrary to Article 31 of the 1951 Convention, including through the use of border procedures in transit zones.

4.2. International and European refugee and human rights law provide specific safeguards regarding the reception and detention of asylum-seekers, including those with specific needs, regardless of their procedural categorization, which must be observed.

4.3. Finally, in UNHCR's view, international refugee and human rights law suggest that children should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interest.

**UNHCR**  
**3 November 2017**

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<sup>85</sup> CJEU, *J.N.*, C-601/15, paras 54, 56 and 63.

<sup>86</sup> *Al Chodor*, C-528/15, para. 39.

<sup>87</sup> *Ibid.*, para. 40.

<sup>88</sup> Directive 2013/32/EU of 26 June 2014, Article 2(q)

<sup>89</sup> *Ibid.*, Article 20(1)(c)