



Judicial analysis

# Vulnerability in the context of applications for international protection



*EASO Professional Development Series  
for members of courts and tribunals*

Produced by IARMJ-Europe  
under contract to EASO

2021



**European Asylum Support Office professional development materials have been created in cooperation with members of courts and tribunals on the following topics.**

- Introduction to the Common European Asylum System for courts and tribunals.
- Qualification for international protection (Directive 2011/95/EU).
- Asylum procedures and the principle of *non-refoulement*.
- Evidence and credibility assessment in the context of the Common European Asylum System.
- Article 15(c) Qualification Directive (2011/95/EU).
- Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU).
- Ending international protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU).
- Country of origin information.
- Detention of applicants for international protection in the context of the Common European Asylum System.
- Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU).
- Vulnerability in the context of applications for international protection.

The professional development series comprises judicial analyses, judicial trainer's guidance notes and compilations of jurisprudence for each topic covered, apart from country of origin information, which comprises a judicial practical guide accompanied by a compilation of jurisprudence. All materials are developed in English. For more information on publications, including on the availability of different language versions, please visit the webpage (<https://www.easo.europa.eu/courts-and-tribunals>).



Judicial analysis

# Vulnerability in the context of applications for international protection

*EASO Professional Development Series  
for members of courts and tribunals*

Produced by IARMJ-Europe  
under contract to EASO

2021

Manuscript completed in August 2020.

Neither the European Asylum Support Office (EASO) nor any person acting on behalf of EASO is responsible for the use that might be made of the following information.

Luxembourg: Publications Office of the European Union, 2021

Cover illustration, baldyrgan © Shutterstock

Cover page photo, Vladstudioraw, © iStock, 27 August 2016

Print ISBN 978-92-9476-641-0 doi:10.2847/304033 BZ-03-19-226-EN-C  
PDF ISBN 978-92-9476-638-0 doi:10.2847/2759 BZ-03-19-226-EN-N

© European Asylum Support Office, 2021

Reproduction is authorised provided the source is acknowledged.

For any use or reproduction of photos or other material that is not under the EASO copyright, permission must be sought directly from the copyright holders.

## European Asylum Support Office

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

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

## International Association of Refugee and Migration Judges

The International Association of Refugee and Migration Judges (IARMJ) <sup>2</sup> is a transnational, non-profit association that seeks to foster recognition that protection from persecution on account of race, religion, nationality, membership of a particular social group, or political opinion is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law. Since the foundation of the association in 1997, it has been heavily involved in the training of judges around the world dealing with asylum cases. The European Chapter of the IARMJ (IARMJ-Europe) is the regional representative body for judges and tribunal members within Europe. One of the chapter's specific objectives under its constitution is 'to enhance knowledge and skills and to exchange views and experiences of judges on all matters concerning the application and functioning of the Common European Asylum System (CEAS)'.

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

<sup>2</sup> Formerly known as the International Association of Refugee Law Judges (IARLJ).

# Contributors

This analysis has been developed using a process with two components: a team of researchers drafted it, and an editorial team (ET) of judges and tribunal members took overall responsibility for the final product.

In order to ensure the integrity of the principle of judicial independence and that the EASO professional development series for members of courts and tribunals is developed and delivered under judicial guidance, an ET composed of serving judges, with extensive experience and expertise in the field of asylum law, was selected under the auspices of a joint monitoring group (JMG). The JMG is composed of representatives of the contracting parties: EASO and IARMJ-Europe. The ET reviewed drafts, gave detailed guidance to the drafting team, drafted amendments and was the final decision-making body on the scope, structure, content and design of the work. The work of the ET was undertaken through a combination of face-to-face meetings, in Berlin in May 2019 and in Brussels in June 2019, and regular electronic/telephone communication.

## Editorial team of judges and tribunal members

The members of the ET were judges and tribunal members: **Mona Aldestam** (Sweden, Co-Chair), **Michael Hoppe** (Germany, Co-Chair), **Johan Berg** (Norway), **Katelijne Declerck** (Belgium), **Nadine Finch** (UK), **Florence Malvasio** (France), **Melanie Plimmer** (UK) and **Boštjan Zalar** (Slovenia). The ET was supported and assisted in its task by the project manager, **Clara Odofin**.

## Researchers

The lead expert was a tribunal member, **John Stanley** (International Protection Appeals Tribunal, Ireland), and the other researchers were **Constantin Hruschka** (Max Planck Institute for Social Law and Social Policy, Germany), **Marie-Luise Möller** (Caritas, Austria), **Maria O'Sullivan** (Monash University, Australia), **Jennifer Moore Peterson** (Administrative Court, Gothenburg, Sweden) and **Hugo Storey** (Upper Tribunal, UK). Consultants, **Frances Nicholson** and **Claire Thomas**, provided support with editing and in training techniques respectively.

# Acknowledgements

Comments on the draft were received from **Lars Bay Larsen**, a judge, and **Yann Laurans**, a legal secretary, both of the Court of Justice of the European Union (CJEU), and from the judge **Jolien Schukking** and the lawyers **Elise Russcher** and **Agnes van Steijn** of the European Court of Human Rights (ECtHR) in their personal capacities.

The United Nations High Commissioner for Refugees (UNHCR) also expressed its views on the draft text.

Comments were also received from the following members of the EASO Courts and Tribunals Network and participants in the EASO Consultative Forum: the European Union Agency for Fundamental Rights (FRA); **Anders Bengtsson** (legal expert, Administrative Court in Gothenburg, Sweden); **Volker Ellenberger** (President of the Higher Administrative Court of Baden-Württemberg, Germany); and **Jonas Säfwenberg** (legal expert, Administrative Court in Gothenburg, Sweden). Finally, the Vulnerability Team of the EASO Asylum Cooperation and Guidance Sector commented on the draft.

All these comments were taken into consideration by the ET in finalising the text for publication. The members of the ET and EASO are grateful to all those who have made comments, which have been very helpful in finalising this judicial analysis.

The methodology adopted for the production of this analysis is set out in Appendix A: Methodology.

This judicial analysis will be updated, as necessary, by EASO, in accordance with the methodology for the EASO professional development series for members of courts and tribunals.

Reproduction is authorised provided the source is acknowledged. For any use or reproduction of illustrations or other material that is not under EASO copyright, permission must be sought directly from the copyright holders.

# Contents

<b>Preface .....</b>	<b>12</b>
<b>Key questions .....</b>	<b>14</b>
<b>Part 1. Introduction .....</b>	<b>15</b>
1.1. Structure and scope .....	15
1.2. Note on the relevant EU asylum law .....	18
<b>Part 2. Vulnerability: legal concepts and framework .....</b>	<b>21</b>
2.1. The legal concept of vulnerability in the Common European Asylum System ...	21
2.2. The legal concept of vulnerability under the European Convention for the Protection of Human Rights and Fundamental Freedoms .....	27
2.3. The legal concept of vulnerability in other relevant international treaties and international guidance .....	29
2.4. Best interests of the child .....	32
<b>Part 3. Identification of applicants with special reception needs and/or in need of special procedural guarantees .....</b>	<b>38</b>
3.1. Identification and assessment of applicants with special reception needs (RCD recast) .....	38
3.2. Identification and assessment of applicants in need of special procedural guarantees (APD recast) .....	42
3.3. Indicators of applicants with special reception needs and/or in need of special procedural guarantees .....	47
3.4. Evidence and assessment of special reception needs and/or need for special procedural guarantees .....	49
3.4.1. Medical evidence .....	50
3.4.2. Age assessment .....	51
<b>Part 4. Vulnerable applicants with special reception needs .....</b>	<b>56</b>
4.1. Introduction .....	57
4.2. Coordinated response and provision of information .....	59
4.3. Minors .....	61
4.3.1. Adequate standard of living for minors .....	62
4.3.2. Housing and leisure activities .....	62
4.3.3. Schooling and education of minors .....	63
4.3.4. Ensuring family unity .....	64
4.3.5. Rehabilitation services for minors .....	65
4.3.6. Unaccompanied minors .....	66
4.3.6.1. Appointing a representative for an unaccompanied minor ..	67
4.3.6.2. Accommodation for unaccompanied minors .....	69
4.3.6.3. Tracing of family members .....	71
4.4. Victims of torture and violence .....	72
4.5. Material reception conditions and healthcare .....	74
4.5.1. Healthcare .....	76
4.5.2. Accommodation – modalities and implications for vulnerable persons in general .....	77
4.6. Reduction or withdrawal of material reception conditions and sanctions .....	80
4.7. Appeals .....	83

4.7.1. Requirement and scope .....	83
4.7.2. Free legal assistance and representation .....	83
4.8. Detention .....	84
4.8.1. General principles .....	85
4.8.2. Health as a primary concern .....	88
4.8.3. Detention of minors .....	92
4.8.4. Detention of unaccompanied minors .....	96
4.8.5. Detention of families .....	98
4.8.6. Detention of female applicants .....	100
4.8.7. Derogations from special guarantees in respect of the detention of vulnerable persons .....	100
<b>Part 5. Vulnerable applicants and the Dublin III regulation .....</b>	<b>102</b>
5.1. Introduction .....	102
5.2. Guarantees for (unaccompanied) minors .....	105
5.3. Criteria for determining the Member State responsible .....	108
5.3.1. Minors .....	108
5.3.2. Family life .....	109
5.3.3. Dependent persons .....	112
5.3.4. Residence documents or visas .....	113
5.4. Discretionary clauses .....	113
5.4.1. Article 17(1) .....	114
5.4.2. Article 17(2) .....	116
5.5. Transfers .....	117
5.5.1. Sending requests .....	117
5.5.2. ‘Take back’ procedures and Article 20(5) Dublin III regulation .....	118
5.5.3. Prohibition or suspension of transfer .....	119
5.5.4. Executing a transfer .....	125
5.6. Detention .....	127
5.7. Effective remedy .....	128
5.7.1. Scope of the remedy .....	129
5.7.2. Evidentiary standards .....	130
<b>Part 6. Vulnerability in the context of qualification for and content of international protection under the QD (recast) .....</b>	<b>133</b>
6.1. Introduction .....	134
6.2. Possible impact of vulnerability on evidence and credibility assessment .....	135
6.2.1. The principle of individual assessment .....	135
6.2.2. Substantiation of an application for international protection .....	138
6.2.3. Credibility indicators .....	141
6.3. Persecution and serious harm .....	143
6.3.1. Persecution and serious harm are ‘relative’ .....	144
6.3.2. Vulnerability, armed conflict and indiscriminate violence .....	146
6.4. Applicants who have already been subject to persecution or serious harm ....	147
6.5. Reasons for persecution .....	148
6.6. Actors of protection and vulnerability .....	150
6.7. Internal protection .....	153
6.8. Some specific categories of vulnerability .....	154
6.8.1. Age .....	154

6.8.1.1. Minors .....	155
6.8.1.2. Elderly persons .....	157
6.8.2. Gender .....	157
6.8.3. Lesbian, gay, bisexual, transgender and intersex persons .....	159
6.8.4. Health .....	162
6.8.5. Disability and mental disorder .....	165
6.9. Vulnerability and the content of the protection granted to beneficiaries of international protection .....	167
6.9.1. Family unity .....	169
6.9.2. Minors .....	169
6.9.3. Accommodation .....	170
6.9.4. Social welfare and healthcare .....	170
6.9.5. Integration facilities and freedom of movement .....	171
6.10. Withdrawal of international protection because of an error when establishing facts on vulnerability .....	172
<b>Part 7. Special procedural guarantees in administrative procedures .....</b>	<b>173</b>
7.1. Introduction .....	173
7.2. Adequate support .....	175
7.3. Exemption from accelerated and border procedures .....	176
7.4. Prioritisation .....	179
7.5. Other special procedural guarantees .....	179
7.5.1. Advice from experts .....	179
7.5.2. Information .....	180
7.5.3. The personal interview .....	181
7.5.4. Considerations specific to indications of torture or other cruel, inhuman or degrading treatment or punishment .....	184
7.5.5. Considerations specific to sexual orientation and gender identity ...	185
7.5.6. Special procedural guarantees specific to minors and unaccompanied minors .....	186
7.5.7. The decision .....	190
7.6. Inadmissibility .....	191
<b>Part 8. Special procedural guarantees in proceedings before courts and tribunals .....</b>	<b>196</b>
8.1. The right to an effective legal remedy .....	197
8.2. Full and ex nunc examination of facts and law .....	200
8.3. Special procedural guarantees at the appeal stage .....	203
8.4. Access to an effective remedy .....	205
8.4.1. Time limits .....	205
8.4.2. Free legal assistance and representation in appeals procedures ....	207
8.5. Right to remain during appeal procedures .....	210
8.5.1. General rule .....	210
8.5.2. Exceptions to the general rule .....	211
<b>Appendix A. Methodology .....</b>	<b>215</b>
<b>Appendix B. Primary sources .....</b>	<b>217</b>
<b>Appendix C. Select bibliography .....</b>	<b>240</b>
<b>Appendix D. Examples of good practice in international protection proceedings before courts or tribunals under the APD (recast) .....</b>	<b>247</b>

## List of abbreviations

AIDA	Asylum Information Database
Anti-Trafficking Convention	Convention on Action against Trafficking in Human Beings (Council of Europe)
anti-trafficking directive	Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA
APD	asylum procedures directive (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status)
APD (recast)	asylum procedures directive (recast) (Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast))
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT Committee	Committee against Torture
CCE	Conseil du contentieux des étrangers (Council for Aliens Law Litigation, Belgium)
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CESEDA	Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the entry and stay of foreigners and asylum law, France)
CJEU	Court of Justice of the European Union
COVID-19	coronavirus disease 2019
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CNDA	Cour nationale de droit d'asile (National Court of Asylum Law, France)
CPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Council of Europe)
CPT Committee	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRPD	Convention on the Rights of Persons with Disabilities
DSSH	difference, stigma, shame, harm

Dublin III regulation	Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
EASO	European Asylum Support Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
ET	editorial team
ETS	European Treaty Series
EU Charter	Charter of Fundamental Rights of the European Union
EWCA	England and Wales Court of Appeal (UK)
EU+ countries	Member States of the European Union and the Associated Countries
family reunification directive	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
FGM	female genital mutilation
FRA	European Union Agency for Fundamental Rights
GC	Grand Chamber (of both CJEU and ECtHR)
Geneva Convention	see Refugee Convention
HRC	Human Rights Committee (UN)
IAC	Immigration and Asylum Chamber (Upper Tribunal, UK)
IARMJ	International Association of Refugee and Migration Judges
ICCPR	International Covenant on Civil and Political Rights
IDC	International Detention Coalition
IEHC	High Court of Ireland decisions
Istanbul Convention	Convention on preventing and combating violence against women and domestic violence (Council of Europe)
Istanbul Protocol	Istanbul Protocol – Manual on the effective investigation and documentation of torture and other cruel, inhuman and degrading treatment or punishment
JMG	joint monitoring group
LGBTI	lesbian, gay, bisexual, transgender and intersex
NGO	non-governmental organisation

OFII	Office français de l'immigration et de l'intégration (French Office for Immigration and Integration)
OPERA	Office français de protection des réfugiés et apatrides (French Office for the Protection of Refugees and Stateless Persons)
Palermo Protocol	Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the UN Convention against Transnational Organized Crime
PTSD	post-traumatic stress disorder
QD	qualification directive (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted)
QD (recast)	qualification directive (recast) (Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast))
RCD	reception conditions directive (Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers)
RCD (recast)	reception conditions directive (recast) (Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection)
Refugee Convention	Convention relating to the Status of Refugees (1951), as amended by its Protocol (1967) [referred to in EU asylum legislation as ‘the Geneva Convention’]
RVV	Raad voor Vreemdelingenbetwistingen (Council for Aliens Law Litigation, Belgium)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UKUT	United Kingdom Upper Tribunal
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children’s Fund
UNTS	United Nations Treaty Series
victims of crime directive	Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

## Preface

This judicial analysis is the product of a project between IARMJ-Europe and EASO. It forms part of the EASO professional development series for members of courts and tribunals.

In close cooperation with courts and tribunals of the EU+ countries, as well as other key players, EASO is continuing to develop a professional development series aimed at providing courts and tribunals with a full overview of the CEAS on a step-by-step basis. Following consultations with the EASO Courts and Tribunals Network, including IARMJ-Europe, it became apparent that there was a need to make available to courts and tribunals judicial training materials on certain core subjects dealt with in their day-to-day decision-making. It was recognised that the process for developing such core materials had to facilitate the involvement of judicial and other experts in a manner that respected the independence of the judiciary as well as accelerating the overall development of the professional development series.

The analysis is intended primarily as a useful point of reference for members of courts and tribunals of EU+ countries concerned with hearing appeals or conducting reviews of decisions on applications for international protection involving vulnerable applicants. It endeavours to keep explanations clear and easy to understand. It is hoped that the material is set out in a user-friendly way that is easily accessible for judges and tribunal members, whether they are international protection law specialists or decision-makers who combine asylum decision-making with other areas of judicial work.

The analysis provides:

- an overview of the legal concepts of and framework for vulnerability in the CEAS ([Part 2](#));
- an explanation of how applicants with special reception needs and/or who need special procedural guarantees are identified in the context of the CEAS ([Part 3](#));
- an analysis of the law in respect of the special reception needs of vulnerable persons ([Part 4](#));
- an analysis of the legal principles applicable to vulnerable applicants in cases under Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III regulation) ([Part 5](#));
- an analysis of vulnerability in the context of qualification for and the content of international protection under Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (QD (recast)) ([Part 6](#));
- an analysis of the special guarantees for vulnerable persons in administrative procedures for international protection ([Part 7](#));
- an analysis of special procedural guarantees for vulnerable persons before courts and tribunals ([Part 8](#)).

The analysis is supported by several appendices. [Appendix A](#) outlines the methodology used. [Appendix B](#) provides a list of relevant primary sources. This lists not only relevant EU primary and secondary legislation, and relevant international treaties of universal and regional scope, but also essential case-law of the CJEU, the ECtHR, and the courts and tribunals of Member States. To ensure that the relevant legislation and case-law are easily and quickly accessible, hyperlinks are provided. [Appendix C](#) provides a select bibliography. [Appendix D](#) provides examples of good practice in international protection proceedings before courts and tribunals under Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (APD (recast)). There is also a separate compilation of jurisprudence that provides extracts of relevant paragraphs of the case-law cited in the judicial analysis.

The analysis endeavours to set out clearly and in a user-friendly format the current state of the law of the CEAS that is of particular importance to vulnerable applicants for international protection. It analyses the law of the CEAS as it stood as of July 2020. Together with other judicial analyses in the professional development series, this analysis will be updated periodically as necessary. Readers should nevertheless check if there have been any changes in the law. The compilation of jurisprudence contains a number of references to sources that will help the reader to do this.

# Key questions

This judicial analysis strives to answer the following main questions:

1. Who should be considered vulnerable in the context of the CEAS ([Part 2](#))?
2. How should vulnerable applicants with special reception needs under Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (RCD (recast)) be identified and assessed ([Part 3](#))?
3. How should vulnerable applicants in need of special procedural guarantees under the APD (recast) be identified and assessed ([Part 3](#))?
4. What special reception needs might apply to vulnerable applicants under the RCD (recast), including, where applicable, in respect of their detention ([Part 4](#))?
5. What guarantees, special reception needs and special procedural guarantees apply to vulnerable applicants in the context of the Dublin III regulation ([Part 5](#))?
6. How might an applicant's vulnerability impact the assessment of their qualification for international protection and the content of international protection, if granted ([Part 6](#))?
7. What special procedural guarantees for vulnerable persons apply in administrative procedures under the APD (recast) ([Part 7](#))?
8. What special procedural guarantees might arise for vulnerable persons in international protection proceedings before courts and tribunals under the APD (recast) ([Part 8](#))?
9. In all of these legal contexts, what principles, needs and guarantees apply to particular categories of vulnerable persons, including:
  - minors, including unaccompanied minors;
  - persons who are vulnerable on account of their sexual orientation or gender identity;
  - persons with a disability;
  - persons with a serious illness;
  - persons with special needs due to their mental health;
  - victims of torture;
  - victims of rape and other forms of sexual violence;
  - victims of other forms of psychological or physical violence;
  - victims of human trafficking?

# Part 1. Introduction

## 1.1. Structure and scope

This judicial analysis is concerned with vulnerability under the legal instruments of the CEAS, in particular the reception conditions directive (recast) (RCD (recast))<sup>1</sup>, the Dublin III regulation<sup>2</sup>, the asylum procedures directive (recast) (APD (recast))<sup>3</sup> and the qualification directive (recast) (QD (recast))<sup>4</sup>. The analysis is designed as a helpful tool for judges and tribunal members when taking vulnerability into consideration when making decisions under those legal instruments.

The legal concept of vulnerability in the CEAS has different implications for judges or tribunal members depending on the legal measure under which it is considered. Thus, the RCD (recast) and the APD (recast) refer to vulnerable persons by the distinct, though interrelated, terms applicants with ‘special reception needs’ and applicants in need of ‘special procedural guarantees’ respectively. The Dublin III regulation only explicitly refers to unaccompanied minors as vulnerable and only specifically addresses the situation of minors, applicants in need of healthcare and dependent persons. Nevertheless, at every step of the Dublin procedure, Member States are obliged to take into account any special reception and procedural needs of an applicant, in accordance with the RCD (recast) and APD (recast), giving rise to particular safeguards in such procedures. Finally, distinct from the reception needs and procedural guarantees that arise under the RCD (recast) and APD (recast), vulnerability requires particular considerations to be taken into account when assessing qualification for international protection, and when providing international protection, if granted, under the QD (recast).

Given that the implications for the judge or tribunal member when considering vulnerability will depend on the legislative measure of the CEAS under which they are making a decision, the structure of this judicial analysis is primarily based on legislation. It therefore does not adopt a structure based on various categories of vulnerable persons, which would result in repetition and undue complexity<sup>5</sup>.

The aim of this judicial analysis is to contribute to improved awareness of when and how to take into account the vulnerability of an applicant in the context of an application for international protection. A more detailed explanation of this aim and a full introduction to this judicial analysis from a legal perspective are in Part 2.

<sup>1</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, [2013] OJ L 180/96 (RCD (recast)).

<sup>2</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, [2013] OJ L 180/31 (Dublin III regulation).

<sup>3</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60 (APD (recast)).

<sup>4</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection, and for the content of protection granted, [2011] OJ L 337/9 (QD (recast)).

<sup>5</sup> See Table 2 for references to particular categories of vulnerable persons throughout the judicial analysis.

This judicial analysis has eight parts, in which the concept of vulnerability is analysed primarily in respect of the various legislative instruments in the CEAS (see Table 1). The table also indicates the CEAS legal instruments relevant to each part.

**Table 1: Structure of the judicial analysis**

Part	Title	Relevant CEAS legal instruments	Page
<b>1</b>	Introduction		15
<b>2</b>	Vulnerability: legal concepts and framework	Dublin III regulation; RCD (recast); APD (recast); QD (recast)	21
<b>3</b>	Identification of applicants with special reception needs and/or in need of special procedural guarantees	RCD (recast); APD (recast)	38
<b>4</b>	Vulnerable applicants with special reception needs	RCD (recast)	56
<b>5</b>	Vulnerable applicants and the Dublin III regulation	Dublin III regulation	102
<b>6</b>	Vulnerability in the context of qualification for and content of international protection under the QD (recast)	QD (recast)	133
<b>7</b>	Special procedural guarantees in administrative procedures	APD (recast)	173
<b>8</b>	Special procedural guarantees in proceedings before courts and tribunals	APD (recast)	196

Given that this judicial analysis takes a legislation-based approach to vulnerability, it is useful to set out where in the text particular vulnerable categories of persons are considered. Table 2 identifies those pages of the text that deal with particular vulnerable categories in the contexts of the particular legal measures of the CEAS.

When seeking information in any particular case involving a vulnerable person, the reader should, however, refer to the full table of contents for analysis relating to the relevant legislative provision. This is because the legislative measures and case-law analysed do not exhaustively set out the applicable categories of vulnerable persons. Furthermore, the principles set out in this judicial analysis will often apply to various categories of vulnerable persons, whether or not there is an express reference to those categories in the legislation or case-law. Therefore, the page references provided in Table 2 do not exhaust the parts of the analysis that are relevant to the categories listed.

**Table 2: References to particular categories of vulnerable persons (page numbers)**

Category	RCD (recast)	Dublin III	QD (recast)	APD (recast)
Minors	24; 35-37 (best interests); 38; 41; 49; 57; 61-62; 62-63 (adequate standard of living, housing, leisure); 63-65 (schooling, family unity); 65-66 (rehabilitation); 96, 84, 92-96, 98 and 100 (detention)	35-37 (best interests); 103-105; 108-109 (criteria); 110-111; 127	35 (best interests); 43; 134; 136; 139-140 (credibility); 145; 148; 152; 155-157 (persecution); 159; 168-171 (protection granted); 211	24 (individual assessment); 43; 46 (best interests); 186-191 (procedural guarantees); 194; 203; 248-250
Unaccompanied minors	24; 39; 41; 57; 60; 66-67; 67-69 (representative); 68-71 (accommodation); 71-72 (family tracing); 78 (accommodation); 81-82 (withdrawal of reception conditions); 84-86 and 95-96 (detention)	35 (best interests); 102-104; 105-107 (guarantees); 108-109 (criteria)	35 (internal protection and best interests); 134; 152; 153 (internal protection); 170	24 (individual assessment); 51-55 (age assessment); 177-178 (accelerated/border procedures); 179 (prioritisation); 181-182; 186-191; 209-210; 241
Pregnant women and single parents with minor children	23; 39; 57; 88 and 91 (health); 90 (detention)	23; 105; 127	23; 134; 168; 171; 192	48; 57; 74; 75; 175
Sexual orientation, gender identity and expression, and sexual characteristics (lesbian, gay, bisexual, transgender and intersex persons)	24; 39; 42; 48		50; 136; 138; 141; 139; 148-149; 154; 158; 159-161	24; 43; 46; 47; 48; 50; 137-138; 182; 185-186; 191; 194; 203; 251-252
Persons with disability/ies	23; 39; 42; 43; 48; 49; 57; 60; 75; 87-88; 89; 90-92	15; 105; 108; 112; 113; 127	23; 134-135; 139; 140; 144; 148; 149; 152; 165-167; 168; 171	23; 49; 50; 175; 180; 203; 204-205; 206; 209; 251-252
Elderly persons ('age')	23; 39; 48; 49; 57; 78	23; 105; 108; 112; 127	23; 134; 144; 155; 157; 171	23; 44; 48; 49; 210-211
Persons with a serious illness	23; 39; 48; 49; 57; 76; 81; 88-92; 170	108; 112; 117; 121; 123-127 and 131 (transfer)	161-165	23; 43; 58; 49; 194; 252
Persons with mental health disorders	23; 39; 42; 48; 57; 73; 74; 75; 76; 79; 81; 82; 85-86 and 88-92 (detention)	105; 114; 121; 126-127	23; 134; 135; 139; 140; 141; 139; 140; 144; 147; 149; 165-168; 171	23; 43; 46; 48; 50; 174; 176; 179; 185; 203; 206; 209; 212-213; 252
Victims of torture	23; 39; 42; 49-50; 57; 60-61; 66-67; 72-74; 75; 85, 89 and 92 (detention)	23; 105; 118-119; 121; 127	23; 134; 140; 143; 147; 162-164; 168; 172	23; 43; 46-47; 49-50; 175; 176; 178; 179; 181; 183-185; 192; 194; 203; 204; 252-253

Category	RCD (recast)	Dublin III	QD (recast)	APD (recast)
Persons who have been subjected to rape or sexual violence	23; 39; 57; 60; 72-74; 79; 83; 92 (detention)	23; 106; 127	23; 134; 140; 138; 139; 158; 161; 168; 172; 176	23; 43; 47; 178; 183; 184; 193-194; 197-198; 203; 206; 211; 251; 253-254
Victims of human trafficking	23; 39; 57; 61; 83	23; 115	23; 134; 139; 149-150; 156; 158; 171; 174-175	55; 193-194; 202; 204; 206; 211; 212-213 (suspensive effect); 254-255
Persons who have been subjected to other serious forms of psychological or physical violence	23; 39; 43; 57; 72; 89; 92	23; 105; 121; 127	23; 134; 140; 146; 256; 163; 168; 171	23; 47; 176; 178; 183; 197-198; 203; 252-253

See also Table 6, ‘Overview of examples of categories of vulnerable persons and applicants with special needs in CEAS instruments’.

This judicial analysis covers the impact of vulnerability at all stages of the asylum procedure under the CEAS from the viewpoint of judges and tribunal members. Thus, this judicial analysis should be read in conjunction with the other judicial analyses that provide a general analysis of the provisions of the relevant legal instruments of the CEAS<sup>6</sup>.

## 1.2. Note on the relevant EU asylum law

This judicial analysis is focused on the recast CEAS legal instruments. The reader should nevertheless keep in mind that not all Member States participate in all measures of the CEAS in the same way. In particular, the CEAS in its ‘recast’ form is binding on all Member States with the exception of Denmark and Ireland. Table 3 summarises the instruments of the CEAS relevant to this judicial analysis that were binding on these two Member States at the time of writing. In the table, ‘RCD’ refers to the original reception conditions directive (2003/9/EC), ‘APD’ to the original asylum procedures directive (2005/85/EC) and ‘QD’ to the original qualification directive (2004/83/EC).

**Table 3: The positions of Denmark and Ireland in respect of the CEAS**

Member State	Dublin II regulation	Eurodac regulation	RCD	APD	QD	Dublin III regulation	Eurodac regulation (recast)	RCD (recast)	APD (recast)	QD (recast)
Denmark										
Ireland	✓	✓		✓	✓	✓	✓	✓		

<sup>6</sup> See EASO, *An introduction to the Common European Asylum System for courts and tribunals – Judicial analysis*, 2016; EASO, *Article 15(c) Qualification Directive (2011/95/EU) – Judicial analysis*, 2014; EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016; EASO, *Ending international protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) – Judicial analysis*, 2016; EASO, *Asylum procedures and the principle of non-refoulement – Judicial analysis*, 2018; EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*, 2018; EASO, *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial analysis*, 2019; EASO, *Exclusion: Articles 12 and 17 Qualification Directive – Judicial analysis*, 2nd ed., 2020; EASO, *Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU) – Judicial analysis*, 2020.

**Denmark** has consistently opted out of any treaty provisions under the Treaty on the Functioning of the European Union (TFEU)<sup>7</sup> in the field of justice and home affairs, including issues concerning asylum (Article 78 TFEU). Consequently, Denmark does not participate in the CEAS, and is not bound by the treaty provisions or any secondary legislation relating to it.

**Ireland** is not bound by any instrument adopted pursuant to the Treaties in the field of asylum but can opt into any such instrument if it so decides. Ireland opted into the APD and the QD, as well as both the original and recast versions of the Dublin regulation. Ireland has not, however, opted into the QD (recast) or the APD (recast), although it continues to be bound by the provisions of the earlier instruments<sup>8</sup>. Ireland decided not to participate in Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (RCD) and initially decided not to participate in the RCD (recast), but decided later to opt into the RCD (recast). It is therefore bound by its provisions in accordance with Commission Decision (EU) 2018/753 of 22 May 2018<sup>9</sup>.

The **United Kingdom** exited the European Union on 31 January 2020. Up until that date it was not bound by any instrument adopted pursuant to the Treaties in the field of asylum but could opt into any such instrument if it so decided. It opted into Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (APD) and Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (QD), as well as both the original and recast versions of the Dublin regulation. The UK did not opt into the QD (recast) or the APD (recast), although it continued to be bound by the provisions of the earlier instruments<sup>10</sup>. The UK did not participate in the RCD (recast), but was bound by the original RCD. The European Union (Withdrawal) Act 2018<sup>11</sup> repealed the European Communities Act 1972. Section 2 of the 2018 Act nevertheless retained provisions of EU law that had previously had effect in domestic law and remained law on exit day. Section 3 of the 2018 Act also incorporated EU legislation that had previously had direct effect and remained operative immediately before exit day. Section 5(4) of the 2018 Act explicitly states that the Charter of Fundamental Rights is no longer part of UK law, but Section 5(5) confirms that domestic law will respect fundamental legal rights or principles that still exist irrespective of the Charter.

Section 6(1) of the 2018 Act states that ‘A court or tribunal — (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and (b) cannot refer any matter to the European Court on or after exit day.’ With regard to retained EU law, Section 6(2) of the 2018 Act confirms that a UK court or tribunal may have regard to anything done on or after exit day by the CJEU, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal. Section 6(3) also states that any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified after exit day, in accordance with any retained case-law and any retained general principles of EU law.

<sup>7</sup> Treaty on the Functioning of the European Union (TFEU), consolidated version as amended by the Lisbon Treaty, [2012] OJ C 326/47 (entry into force: 1 December 2009).

<sup>8</sup> Notwithstanding the differences applicable to Denmark, Ireland and the UK, the analysis in this manual is prepared by reference to the completed second phase of the CEAS.

<sup>9</sup> Commission Decision (EU) 2018/753 of 22 May 2018 confirming the participation of Ireland in Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection, [2018] OJ L 126/8.

<sup>10</sup> Notwithstanding the differences applicable to Denmark, Ireland and the UK, the analysis in this manual is prepared by reference to the completed second phase of the CEAS.

<sup>11</sup> UK Parliament, European Union (Withdrawal) Act 2018.

This judicial analysis refers to judgments of UK courts and tribunals prior to 31 January 2020 as judgments on Union law, as these are likely to remain relevant to the interpretation of EU law for other Member States.

See EASO, *An introduction to the Common European Asylum System for courts and tribunals – Judicial analysis*, 2016, pp. 18–23, for further information on this system as it evolves and applies to the various Member States.

## Part 2. Vulnerability: legal concepts and framework

The aim of this judicial analysis is primarily to contribute to improving the awareness of judges and tribunal members of when and how to take into account the vulnerability of an applicant in the context of applications for international protection. Although there is a broad everyday meaning to the term ‘vulnerability’, this judicial analysis is specifically concerned with the legal concept of vulnerability. This legal concept is not explicitly defined in any of the legal acts within the framework of the CEAS<sup>12</sup>. A legal concept may, however, be derived from the CEAS instruments, read and interpreted in the light of the broader legal context. This includes, in particular, the Charter of Fundamental Rights of the European Union (EU Charter)<sup>13</sup>, as well as a range of international treaties.

Part 2 is structured as shown in Table 4.

**Table 4: Structure of Part 2**

Section	Title	Page
<b>2.1</b>	The legal concept of vulnerability in the CEAS	21
<b>2.2</b>	The legal concept of vulnerability under the ECHR	27
<b>2.3</b>	The legal concept of vulnerability in other relevant international treaties and international guidance	29
<b>2.4</b>	Best interests of the child	32

### 2.1. The legal concept of vulnerability in the Common European Asylum System

European asylum law has included special guarantees for vulnerable persons since the first-generation instruments of the CEAS<sup>14</sup>. The approach of EU law and policy to vulnerability is rooted in the principle of equality before the law. It constitutes a cornerstone of EU law enshrined in both the Treaty on European Union (TEU) (Article 2)<sup>15</sup> and the EU Charter (Article 20). Therefore, vulnerable applicants should be able to benefit from the rights and comply with the obligations provided for in the instruments of the CEAS on an equal footing with applicants who are unhindered by such vulnerabilities.

<sup>12</sup> For more on the CEAS generally, see EASO, *An introduction to the Common European Asylum System for courts and tribunals – Judicial analysis*, 2016.

<sup>13</sup> Charter of Fundamental Rights of the European Union of 7 December 2000 (EU Charter or Charter), [2012] OJ C 326/391 (entry into force: 1 December 2009).

<sup>14</sup> See, for these first-generation CEAS instruments, Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Articles 13(2), second subparagraph, 14(8), 15(2) and 17–20; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Articles 13(3)(a) and 23(3); Council Directive 2004/83/EC of 29 April 2004 on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Article 20(3); and Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Articles 6 and 15. For an overview of the concept of vulnerability in the first-generation CEAS instruments, see Asylum Information Database (AIDA) and European Council on Refugees and Exiles (ECRE), *The Concept of Vulnerability in European Asylum Procedures*, 2017, pp. 12–13.

<sup>15</sup> Treaty on European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)), [2012] OJ C 326/13.

In addition to the principle of equality, the concept of vulnerability is also based on the principle of non-discrimination (Article 21(1) EU Charter)<sup>16</sup>. Article 21(1) reads:

**EU Charter  
Article 21(1)**

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

All the CEAS instruments must be applied and interpreted in the light of the EU Charter, as it is part of primary Union law<sup>17</sup>. The fundamental rights and principles recognised by the EU Charter that are most commonly referred to in the recitals of the CEAS instruments are Articles 1 (human dignity), 4 (prohibition of torture and inhuman or degrading treatment or punishment), 7 (respect for private and family life), 18 (right to asylum), 21 (non-discrimination), 24 (the rights of the child) and 47 (right to an effective remedy and to a fair trial).

It should also be noted that the UN Convention on the Rights of Persons with Disabilities (CRPD) was approved by the EU by means of Decision 2010/48<sup>18</sup>. The provisions of this Convention are thus, from the time of that decision's entry into force, an integral part of the EU legal order<sup>19</sup>.

The RCD (recast) and the APD (recast) refer to 'vulnerability' by using two distinct but interrelated notions: 'special reception needs' and 'special procedural guarantees' respectively. The **RCD (recast)** sets out the general principle that Member States must take into account the specific situation of vulnerable persons, and recognises that vulnerable persons may have special reception needs<sup>20</sup>. When a vulnerable person is found to have special reception needs, the directive sets out the obligation for Member States to ensure that 'reception is specifically designed to meet their special reception needs'<sup>21</sup>. This is so that the applicant may benefit from the rights and comply with the obligations provided for in the directive throughout the duration of the asylum procedure (see Section 3.1 and Part 4).

The **APD (recast)** recognises that the ability of certain applicants to benefit from the rights and comply with the obligations provided for in the directive may be limited by their individual circumstances<sup>22</sup>. Such applicants are described as applicants 'in need of special procedural guarantees'. Member States must ensure that these applicants are given adequate support in order to allow them to benefit from the rights and comply with the obligations of the directive throughout the duration of the asylum procedure (see Section 3.2).

<sup>16</sup> See European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers*, COM(2008) 815 final, p. 8.

<sup>17</sup> Article 6(1), TEU and CJEU (GC), judgment of 21 December 2011, joined cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865, para. 77.

<sup>18</sup> Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 2010/48/EC, approving on behalf of the Community the Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entry into force: 3 May 2008).

<sup>19</sup> CJEU, judgment of 11 September 2019, *DW v Nobel Plastiques Ibérica SA*, C-397/18, EU:C:2019:703, para. 39. See also Section 2.3 below.

<sup>20</sup> Recital 14, Articles 2(k), 21 and 22 RCD (recast), cited in Section 3.1 below.

<sup>21</sup> Recital 14 RCD (recast).

<sup>22</sup> Article 2(d) APD (recast).

and Part 7) <sup>23</sup>. The notion under the APD (recast) of applicants in need of special procedural guarantees also applies to procedures under the Dublin III regulation (see Part 5) <sup>24</sup>.

In addition to this, characteristics or circumstances that may render applicants vulnerable may have an impact on the assessment of whether or not they are considered to qualify for international protection (see Part 6). That assessment also forms an integral part of the status determination procedure.

Table 5 sets out where references to vulnerabilities or special needs are found in the CEAS instruments.

**Table 5: References to vulnerabilities or special needs in CEAS instruments**

CEAS instrument	Provisions
RCD (recast)	Recital 14, Arts. 2(k), 11, 17(2), 18(3) and (5), 19(2) and 21–25
Dublin III regulation	Recital 13, Arts. 6, 8, 31 and 32
APD (recast)	Recitals 29 and 30, Arts. 2(d), 15(3)(a), 24, 25 and 31(7)(b)
QD (recast)	Recitals 19, 28 and 41, Arts. 4(3)(c), 9(2)(f), 20(3) and (4), 30(2) and 31

In order to illustrate who may be considered vulnerable, **non-exhaustive examples** are provided in the CEAS instruments, as set out in Table 6.

**Table 6: Overview of examples of categories of vulnerable persons and applicants with special needs in CEAS instruments**

Vulnerable categories	EU Charter	RCD (recast)	Dublin III regulation	APD (recast)	QD (recast)
Minors ('age')	Art. 24	Art. 21	Recital 13, Arts. 6 and 8	Recital 29, Arts. 7 and 15(3)(e)	Art. 20(3)
Unaccompanied minors	Art. 24	Art. 21	Recital 13, Arts. 6 and 8	Recital 29, Art. 25	Art. 20(3)
Single parents with minor children	Art. 24	Art. 21	–	–	Art. 20(3)
Pregnant women	–	Art. 21	Art. 32	–	Art. 20(3)
Persons with a serious illness	Art. 35 (healthcare)	Art. 21	–	Recital 29	–
Persons with a mental disorder	Art. 35 (healthcare)	Art. 21	–	Recital 29	Art. 20(3)
Victims of human trafficking	Art. 5	Art. 21	Art. 6(3) (children)	–	Art. 20(3)
Victims of rape	Art. 4	Art. 21	Art. 32	Recital 29, Art. 24(3)	Art. 20(3)
Victims of torture	Art. 4	Art. 21	Art. 32	Recital 29, Art. 24(3)	Art. 20(3)

<sup>23</sup> Recital 29 and Articles 2(d) and 24 APD (recast).

<sup>24</sup> Recital 12 Dublin III regulation.

Vulnerable categories	EU Charter	RCD (recast)	Dublin III regulation	APD (recast)	QD (recast)
Victims of other serious forms of psychological, physical or sexual violence, e.g. victims of female genital mutilation	Art. 4	Art. 21	Art. 32	Recital 29, Art. 24(3)	Art. 20(3)
Disabled persons	Art. 26	Art. 21	Art. 32	Recital 29	Art. 20(3)
Elderly persons ('age')	Art. 25	Art. 21	Art. 32	Recital 29	Art. 20(3)
Gender; sexual orientation and gender identity (lesbian, gay, bisexual, transgender and intersex persons)	Art. 7	Art. 18(3) and (4)	–	Recital 29	–

The fact that **examples** are set out in the CEAS instruments does not exclude the possibility that other or additional categories may be considered vulnerable. Neither does it exclude the possibility that individuals who are not part of one of the stated vulnerable categories may have special needs that need to be addressed. For example, at the time of writing during the coronavirus disease 2019 (COVID-19) pandemic, those applicants belonging to groups at risk of COVID-19 may have special reception needs. The Commission stated, *inter alia*, 'As many persons as possible belonging to COVID-19 at-risk groups could be transferred to more individualised reception locations or grouped together in a separate corridor away from the residents not belonging to at-risk groups. Vulnerable groups should also be given special protection, for example during the delivery of food, pocket money payments etc.'<sup>25</sup>. In addition, it should be noted that, for example, the CRPD acknowledges that disability is an evolving concept<sup>26</sup>.

Although the CEAS instruments provide examples of categories of vulnerable persons, an individualised approach is required. With the exception of minors, whether they are unaccompanied or not, the mere fact that an applicant falls within a category of vulnerable persons does not automatically trigger specific entitlements or guarantees applicable to that category as a whole or in general. Instead, in accordance with the RCD (recast) and APD (recast), the Member State must conduct an individual assessment of whether or not the applicant has special reception needs and/or is in need of special procedural guarantees. The Member State's obligations with respect to that individual applicant are determined by the outcome of that individual assessment and by the nature of any identified needs<sup>27</sup>. By applying such a broad and individualised approach, the legal concept of vulnerability in the CEAS obliges Member States both to identify applicants with special reception needs and/or applicants in need of special procedural guarantees and to ensure that their special need(s) is/are met<sup>28</sup>.

In order to guarantee the principle of equality and non-discrimination as well as the fairness of procedures, the obligation to identify and adequately address special needs is primarily an obligation on the competent authorities. Judges and tribunal members, in appeal or review proceedings, may nevertheless need to reflect on whether or not all the necessary measures have been taken to identify a vulnerable applicant and if their special needs have

<sup>25</sup> Commission communication – COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement (COM(2020/C 126/02)), 17 April 2020.

<sup>26</sup> See CRPD, recital e, as referred to in CJEU, judgment of 11 April 2013, *HK Danmark v Dansk almennyttigt Boligselskab and Dansk Arbejdsgiverforening*, joined cases C-335/11 and C-337/11, EU:C:2013:222, para. 37.

<sup>27</sup> See more specifically on this in Part 3.

<sup>28</sup> See recital 29 and Article 24(1) APD (recast) as well as Article 22(1) RCD (recast).

been taken into account by the determining authority and/or lower courts and tribunals (see Article 46(1)(a) APD (recast)). Moreover, judges and tribunal members may have to reflect on whether or not aspects of vulnerability must be taken into account in their own judicial proceedings as well as in their assessment of the merits of an application under the QD (recast).

For an overview of relevant EU instruments, see Appendix B: Primary sources<sup>29</sup>.

As regards the case-law of the CJEU, these judgments seldom use the term ‘vulnerability’, in relation to either procedural law or material law. Although preliminary questions submitted to the CJEU have not expressly referred to vulnerability, the CJEU has nevertheless taken the opportunity to refer to, and to provide some guidance on, the issue of vulnerability.

The CJEU used the term ‘vulnerability’ in the case of *M* in the context of the right to be heard and the obligation to conduct an interview with an applicant for subsidiary protection<sup>30</sup>. The CJEU answered the preliminary question, which did not refer to the issue of vulnerability, in the following way.

An interview must also be arranged if it is apparent – in the light of the personal or general circumstances in which the application for subsidiary protection has been made, in particular any specific vulnerability of the applicant, due for example to his age, his state of health or the fact that he has been subjected to serious forms of violence – that one is necessary in order to allow him to comment in full and coherently on the elements capable of substantiating that application.

Consequently, the referring court has the task of establishing whether in the main proceedings there are specific circumstances that render an interview with the applicant for subsidiary protection necessary in order that his right to be heard is effectively observed<sup>31</sup>.

In the joined cases of *A, B and C*, where the referring court also did not refer to the issue of vulnerability in its question, the CJEU used the term ‘vulnerability’ in a context more related to its material law aspects. The CJEU stated in *A, B and C*:

it must be observed that the obligation laid down by Article 4(1) of Directive 2004/83 to submit all elements needed to substantiate the application for international protection ‘as soon as possible’ is tempered by the requirement imposed on the competent authorities, under Article 13(3)(a) of Directive 2005/85 and Article 4(3) of Directive 2004/83 to conduct the interview taking account of the personal or general circumstances surrounding the application, in particular, the vulnerability of the applicant, and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant<sup>32</sup>.

The case of *A and S* shows clearly that vulnerability has a concrete impact on the substantive rights of persons granted refugee status. The question referred to the court was whether or not Article 2(f) of the family reunification directive<sup>33</sup> must be interpreted as meaning

<sup>29</sup> See also EASO, *An introduction to the Common European Asylum System for courts and tribunals – Judicial analysis*, 2016, Part 2.

<sup>30</sup> CJEU, judgment of 9 February 2017, *M v Minister for Justice and Equality, Ireland, and the Attorney General*, C-560/14, EU:C:2017:101.

<sup>31</sup> Ibid., paras 51–52.

<sup>32</sup> CJEU (GC), judgment of 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, joined cases C-148/13 to C-150/13, EU:C:2014:2406, para. 70.

<sup>33</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, [2003] OJ L 251/12.

that a third-country national or stateless person who is below the age of 18 at the time of their asylum application in a Member State, but who, in the course of the asylum procedure, attains the age of majority and is, thereafter, granted asylum with retroactive effect to the date of their application must be regarded as a minor for the purposes of that provision. With regard to refugees who are unaccompanied minors, the EU legislature has, in Article 10(3)(a) of that directive, imposed a positive obligation on Member States to ‘authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying conditions laid down in Article 4(2)(a)’<sup>34</sup>. By contrast, under Article 4(2)(a) of the family reunification directive, the possibility of family reunification is, in principle, left to the discretion of each Member State. In addition, Article 4(2)(a) makes this possibility subject, in particular, to the condition that first-degree relatives in the direct ascending line are dependent upon the sponsor and do not enjoy proper family support in the country of origin. As the CJEU ruled:

Article 10(3)(a) of that directive lays down, by way of exception to that principle, a right to such reunification for refugees who are unaccompanied minors which is not subject to a margin of discretion on the part of the Member States nor to conditions laid down in Article 4(2)(a)<sup>35</sup>.

In the opinion of the CJEU, the family reunification directive:

pursues not only, in a general way, the objective of promoting family reunification and granting protection to third-country nationals, in particular minors ... but, by Article 10(3)(a) thereof, seeks specifically to guarantee an additional protection for those refugees who are unaccompanied minors<sup>36</sup>.

Moreover, it aims to grant ‘a specific protection to refugees, in particular unaccompanied minors’<sup>37</sup>. This judgment mentions the term ‘particular vulnerability’ of unaccompanied minors, along with Article 24(2) of the EU Charter. The CJEU stated that, if the right to family reunification under Article 10(3)(a) of the family reunification directive were made dependent upon the moment when the competent national authority formally adopts the decision recognising the refugee status of the person concerned:

instead of prompting national authorities to treat applications for international protection from unaccompanied minors urgently in order to take account of their particular vulnerability, a possibility which is already explicitly offered by Article 31(7) (b) of Directive 2013/32, such an interpretation could have the opposite effect, frustrating the objective pursued both by that directive and by Directives 2003/86 and 2011/95 of ensuring that, in accordance with Article 24(2) of the Charter of Fundamental Rights, the best interests of the child is in practice a primary consideration for Member States in the application of those directives<sup>38</sup>.

In the case of *MP*, the Grand Chamber of the CJEU linked the term ‘vulnerability’ with Article 4 EU Charter. It stated:

<sup>34</sup> CJEU, judgment of 12 April 2018, *A and S v Staatssecretaris van Veiligheid en Justitie*, C-550/16, EU:C:2018:248, para. 11.

<sup>35</sup> Ibid., para. 34.

<sup>36</sup> Ibid., para. 44.

<sup>37</sup> Ibid., para. 55.

<sup>38</sup> Ibid., para. 58.

given the fundamental importance of the prohibition of torture and inhuman and degrading treatment laid down in Article 4 of the Charter, particular attention must be paid to the specific vulnerabilities of persons whose psychological suffering, which is likely to be exacerbated in the event of their removal, is a consequence of torture or inhuman or degrading treatment in their country of origin<sup>39</sup>.

In the case of *Jawo*, vulnerability is a factor that is taken into account when deciding if the transfer of an applicant for international protection, under the Dublin III regulation, to the Member State normally responsible for processing their application should be precluded. In that case, this was recognised as being possible, if ‘the applicant would be exposed to a substantial risk of suffering human or degrading treatment [in that Member State] on account of the living conditions that he could be expected to encounter as a beneficiary of international protection’ if he were granted such protection<sup>40</sup>. The CJEU stated that:

it cannot be entirely ruled out that an applicant for international protection may be able to demonstrate the existence of exceptional circumstances that are unique to him and mean that, in the event of transfer to the Member State normally responsible for processing his application for international protection, he would find himself, because of his particular vulnerability, irrespective of his wishes and personal choices, in a situation of extreme material poverty meeting the criteria set out in paragraphs 91 to 93 of this judgment after having been granted international protection<sup>41</sup>.

## 2.2. The legal concept of vulnerability under the European Convention for the Protection of Human Rights and Fundamental Freedoms

The EU is not a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>42</sup>. Nevertheless, according to Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union’s law. Moreover, as stated above, all the CEAS instruments must be applied and interpreted in the light of the EU Charter<sup>43</sup>. According to Article 52(3) of the EU Charter, insofar as the Charter contains rights that correspond to rights guaranteed by the ECHR, ‘the meaning and scope of those rights shall be the same as those laid down by [the ECHR]. This provision shall not prevent Union law providing more extensive protection’. The CEAS instruments also refer to the ECHR<sup>44</sup>. In addition, recital 32 Dublin III regulation refers explicitly to the case-law of the

<sup>39</sup> CJEU Grand Chamber (GC), judgment of 24 April 2018, *MP v Secretary of State for the Home Department*, C-353/16, EU:C:2018:276, para. 42. For more on this case, see Sections 4.4, 5.5.3, 6.4 and 6.8.4.

<sup>40</sup> CJEU (GC), judgment of 19 March 2019, *Abubacarr Jawo v Bundesrepublik Deutschland*, C-163/17, EU:C:2019:218, para. 98.

<sup>41</sup> Ibid., para. 95; see also CJEU, judgment of 16 February 2017, *C.K. and Others v Republika Slovenija*, C-578/16 PPU, EU:C:2017:127, paras 73, 77, 81–90, which does not explicitly mention the term ‘vulnerability’ but deals with particular standards and precautionary measures in the case of an asylum seeker whose state of health is ‘particularly serious’.

<sup>42</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, ETS no 5, 4 November 1950 (entry into force: 3 September 1953).

<sup>43</sup> Article 6(1) TEU, also discussed in the text at fn. 17.

<sup>44</sup> See recital 9 RCD (recast) and recital 14 Dublin III regulation as well as Article 39 APD (recast) (dealing with the prerequisites for the designation of European safe third countries).

ECtHR. Thus, judges and tribunal members dealing with cases under the CEAS in which aspects of vulnerability are of relevance may find guidance in the case-law of the ECtHR<sup>45</sup>.

In its seminal ruling in *M.S.S. v Belgium and Greece*, the ECtHR stated that it:

attaches considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection ... It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive<sup>46</sup>.

This has been reiterated in the ECtHR's *N.H.* judgment<sup>47</sup>. This issue was further developed in the *Tarakhel* judgment, where the court stated that this 'requirement of "special protection" of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability'<sup>48</sup>.

In the later judgment in the case of *J.K. and Others v Sweden*, the ECtHR Grand Chamber set out the main legal standards and practice, as established in its case-law, under the ECHR concerning the protection of asylum seekers<sup>49</sup>. This was notwithstanding the fact that the government had argued that the first applicant and his family would not find themselves in a particularly vulnerable situation upon returning to Baghdad<sup>50</sup>. Yet the ECtHR did not mention the term 'vulnerability' of asylum seekers. Instead, it stated that owing to the 'special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof'<sup>51</sup>.

It is clear from these judgments that the general notion of vulnerability in the jurisprudence of the ECtHR could be considered to differ from the concept of vulnerability applied in the CEAS<sup>52</sup>. It is much broader and it is rather used to describe the position of asylum seekers generally in the host country and their need for special care and/or protection in comparison with people already legally residing in the host country with a settled status. This can be seen in the Grand Chamber judgment in the case of *Ilias and Ahmed v Hungary*, in which the court compared general vulnerability with individual vulnerability and stated that:

The Grand Chamber endorses the Chamber's view that while it is true that asylum-seekers may be considered vulnerable because of everything they might have been through during their migration and the traumatic experiences they were likely to have endured previously ..., there is no indication that the applicants in the present case

<sup>45</sup> For some aspects of the principle of positive discrimination in favour of disadvantaged persons in relation to Article 14 ECHR, see, for example, ECtHR, judgment of 6 April 2000, *Thlimmenos v Greece*, 34369/97, para. 44, in which the court stated: 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'. See also ECtHR, judgment of 24 September 2002, *Posti and Rahko v Finland*, 27824/95, paras 82–87; ECtHR, judgment of 28 May 1985, *Abdulaziz, Cabales and Balkandali v UK*, nos 9214/80, 9473/81 and 9474/81, para. 82; and ECtHR, judgment of 24 January 2017, *Khamtokhu and Aksenchik v Russia*, nos 60367/08 and 961/11, para. 82. For more on the interplay between the interpretation of EU law and the ECHR, see EASO, *An introduction to the Common European Asylum System for courts and tribunals – Judicial analysis*, 2016, Section 3.4.

<sup>46</sup> ECtHR (GC), judgment of 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09, para. 251. See also, regarding the detention of asylum seekers, ECtHR, judgment of 11 June 2009, *S.D. c Grèce*, no 53541/07.

<sup>47</sup> ECtHR, judgment of 2 July 2020, *N.H. et autres c France*, no 28220/13, para. 162.

<sup>48</sup> ECtHR (GC), judgment of 4 November 2014, *Tarakhel v Switzerland*, no 29217/12, para. 119. See also para. 99: 'With more specific reference to minors, the Court has established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant'.

<sup>49</sup> ECtHR (GC), judgment of 23 August 2016, *J.K. and Others v Sweden*, no 59166/12, paras 77–105.

<sup>50</sup> Ibid., para. 72.

<sup>51</sup> Ibid., para. 93.

<sup>52</sup> See Section 2.1.

were more vulnerable than any other adult asylum-seeker confined to the Röszke transit zone in September 2015<sup>53</sup>.

In the case of *V.M. and Others v Belgium*, the Grand Chamber decided by 12 votes to 5 to strike the application out of its list<sup>54</sup>. Four judges in their dissenting opinion thought that the Grand Chamber should have taken advantage of the opportunity provided by this case ‘to define or adjust the concept of “vulnerability”’<sup>55</sup>.

However, there is also relevant jurisprudence of the ECtHR on specific categories of persons who are considered vulnerable under the CEAS. These judgments relate to, inter alia, the treatment of minors as asylum seekers<sup>56</sup> and the detention of asylum seekers with specific vulnerabilities<sup>57</sup>. This jurisprudence will be addressed in the relevant parts of this judicial analysis.

## 2.3. The legal concept of vulnerability in other relevant international treaties and international guidance

The interpretation and application of the legal concept of vulnerability in the CEAS instruments are also influenced by other international treaties and international guidance. There are four main ways international law can have an influence on the legal concept of vulnerability in the CEAS.

The first (and most important) is that EU primary law itself refers to other international treaties. This is the case for the Convention relating to the Status of Refugees (1951), as amended by its Protocol (1967) (Refugee Convention)<sup>58</sup>, as the cornerstone of international refugee protection<sup>59</sup>. The 1951 Refugee Convention is referred to in both Article 18 EU Charter and Article 78 TFEU. The former states that the right to asylum ‘shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees’. Thus, it is an important reference when interpreting the provisions of EU law<sup>60</sup> and the CEAS instruments, in particular the QD (recast). The QD (recast) must, for instance, ‘be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU’<sup>61</sup>. The 1951 Refugee Convention is cited in the recitals of all of the CEAS instruments, in particular in the QD (recast) and the APD (recast), where references to this convention are also to be found in the relevant articles.

<sup>53</sup> ECtHR, judgment of 21 November 2019, *Ilias and Ahmed v Hungary*, no 47287/15, para. 192.

<sup>54</sup> ECtHR (GC), judgment of 17 November 2016, *V.M. and Others v Belgium*, no 60125/11, para. 41.

<sup>55</sup> Ibid., dissenting opinion of Judge Ranzoni, joined by judges López Guerra, Sicilianos and Lemmens, para. 5.

<sup>56</sup> See, for example, ECtHR (GC), 2014, *Tarakhel v Switzerland*, op. cit. (fn. 48 above).

<sup>57</sup> See, for example, ECtHR, judgment of 5 July 2016, *O.M. v Hungary*, no 9912/15.

<sup>58</sup> Convention and Protocol Relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954), and 606 UNTS 267, 31 January 1967 (entry into force: 4 October 1967).

<sup>59</sup> See, for example, recital 4 QD (recast); CJEU, judgment of 1 March 2016, *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, joined cases C-443/14 and C-444/14, EU:C:2016:127, para. 28.

<sup>60</sup> For an overview of the relationship between EU law and the 1951 Refugee Convention and the ECHR, see EASO, *An introduction to the Common European Asylum System for courts and tribunals – Judicial analysis*, 2016, Part 3.

<sup>61</sup> CJEU, 2016, *Alo and Osso*, op. cit. (fn. 59 above), para. 29. See also CJEU, judgment of 21 November 2018, *Ayubi v Bezirkshauptmannschaft Linz-Land*, C-713/17, EU:C:2018:929, para. 24.

Second, the CEAS instruments explicitly refer to particular international treaties. An example of this is the Convention on the Rights of the Child (CRC)<sup>62</sup>. The CRC and the principle of the best interests of the child are referred to in the recitals of all the CEAS instruments<sup>63</sup>.

Third, the EU is a party to international treaties that deal with topics that are relevant to the concept of vulnerability in the CEAS. The UN CRPD is one example of an international treaty of relevance in the context of vulnerability to which the EU is a party<sup>64</sup>. Following the EU's ratification of the CRPD, the CJEU has held that the CRPD may be relied upon for the purposes of interpreting secondary EU law, which must, as far as possible, be interpreted in a manner that is consistent with the CRPD<sup>65</sup>. Accordingly, the CRPD obligations are of particular potential importance for the present purposes, since the CRPD may be relied upon when interpreting the CEAS legislation insofar as it applies to persons with disabilities and/or serious physical and/or mental illness.

Fourth, Member States are themselves parties to international treaties. All the CEAS instruments note the fact that 'Member States are bound by obligations under instruments of international law to which they are party'<sup>66</sup>. Depending on the way national law deals with public international law, judges and tribunal members may also need to take other international treaties into account<sup>67</sup>.

Some of the categories of persons defined as vulnerable in the CEAS may consequently also be entitled to specific guarantees under international public law and Council of Europe instruments (see Tables 7 and 8).

<sup>62</sup> Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entry into force: 2 September 1990).

<sup>63</sup> See recitals 9 and 18 RCD (recast); recital 18 QD (recast); recital 33 APD (recast); and recital 13 Dublin III regulation. See also Section 2.4 for more on the best interests of the child.

<sup>64</sup> For the CRPD and the Council Decision approving the CRPD in the European Community, see op. cit. (fn. 18 above). The EU is responsible for implementation of the Convention to the extent of its competences that are defined in Council Decision 2010/48/EC and in the Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the EU relating to the CRPD.

<sup>65</sup> CJEU, judgment of 1 December 2016, *Mohamed Daoudi v Bootes Plus SL and Others*, C-395/15, EU:C:2016:917, paras 40 and 41, and the case-law cited; CJEU, judgment of 9 March 2017, *Petya Mikova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, C-406/15, EU:C:2017:198.

<sup>66</sup> See recital 10 RCD (recast); recital 17 QD (recast); recital 15 APD (recast); and recital 32 Dublin III regulation.

<sup>67</sup> See also EASO, *Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU) – Judicial analysis*, 2020, for further information on relevant international treaties referring explicitly to the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights.

**Table 7: Protection of vulnerable groups under public international law**

Vulnerable group	Protection under public international law
<b>Unaccompanied minors</b>	CRC
<b>Single parents with minor children</b>	CRC
<b>Minors ('age')</b>	CRC
<b>Pregnant women</b>	International humanitarian law and the Geneva Conventions <sup>68</sup>
<b>Persons with serious illnesses</b>	(Potentially) CRPD
<b>Persons with mental disorders</b>	CRPD
<b>Victims of trafficking</b>	UN protocol to prevent, suppress and punish trafficking in persons, especially women and children, also known as the Palermo Protocol
<b>Victims of torture or rape</b>	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) <sup>69</sup>
<b>Victims of other serious forms of violence</b>	Convention on the Elimination of all forms of Discrimination against Women (CEDAW) (women and girls) <sup>70</sup>
<b>Disabled persons</b>	CRPD
<b>Elderly persons ('age')</b>	No specific instrument <sup>71</sup>
<b>Gender, women and girls</b>	CEDAW (women and girls)
<b>Sexual orientation and gender identity</b>	Yogyakarta Principles <sup>72</sup>

<sup>68</sup> See, for example, Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287, 12 August 1949 (entry into force: 21 October 1950), Arts. 89, 91, 127 and 132; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977 (entry into force: 7 December 1978), Art. 76(2). For further details see, for example, F. Krill, 'The protection of women in international humanitarian law', *International Review of the Red Cross*, No 249, 1985.

<sup>69</sup> See also *Istanbul Protocol – Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment*, 2004. As the EASO judicial analysis on evidence and credibility assessment notes, the Istanbul Protocol is 'very relevant, although it is not legally binding on Member States' (p. 99). See EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*, 2018, pp. 99–101.

<sup>70</sup> Convention on the Elimination of all forms of Discrimination against Women, 1249 UNTS 1, 18 December 1979 (entry into force: 3 September 1981); see also *Istanbul Protocol – Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment*, op. cit. (fn. 69 above), which, according to recital 31 APD (recast), is highly relevant in cases of sexual violence.

<sup>71</sup> Please see nonetheless the non-binding UN Principles for Older Persons, adopted by General Assembly resolution 46/91 of 16 December 1991.

<sup>72</sup> International Panel of Experts in international human rights law and on sexual orientation and gender identity, *The Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007; Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles (Yogyakarta Principles plus 10), 10 November 2017. In her opinion in *A, B, and C*, Advocate General Sharpston states that the Yogyakarta Principles 'are not legally binding, but they nevertheless reflect established principles of international law'. See CJEU, Opinion of Advocate General Sharpston of 17 July 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, joined cases C-148/13 to C-150/13, EU:C:2014:2111, para. 47. For resolutions of the UN Human Rights Council on human rights, sexual orientation and gender identity, and Council of Europe recommendations and resolutions on the issue, see Appendix B: Primary sources.

**Table 8: Protection of vulnerable groups under Council of Europe instruments**

Vulnerable group	Protection under Council of Europe instruments
<b>Unaccompanied minors</b>	No specific instrument
<b>Single parents with minor children</b>	No specific instrument
<b>Minors ('age')</b>	European Social Charter (revised) <sup>73</sup>
<b>Pregnant women</b>	European Social Charter (revised) <sup>74</sup>
<b>Persons with serious illnesses</b>	No specific instrument
<b>Persons with mental disorders</b>	European Social Charter (revised) <sup>75</sup>
<b>Victims of trafficking</b>	Council of Europe Convention on Action against Trafficking in Human Beings, also known as the Anti-Trafficking Convention
<b>Victims of torture or rape</b>	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) <sup>76</sup> ; Istanbul Convention (women and girls) <sup>77</sup>
<b>Victims of other serious forms of violence</b>	Istanbul Convention (women and girls)
<b>Disabled persons</b>	European Social Charter (revised) <sup>78</sup>
<b>Elderly persons ('age')</b>	European Social Charter (revised) <sup>79</sup>
<b>Gender, women and girls</b>	Istanbul Convention (women and girls)
<b>Sexual orientation and gender identity</b>	Istanbul Convention <sup>80</sup>

## 2.4. Best interests of the child

Minors form a group that must be considered particularly vulnerable in any context of the CEAS. There are provisions in every instrument of secondary legislation of the CEAS dealing with the special vulnerability of minors, whether they are accompanied or not. The overarching rule<sup>81</sup> is established in Article 24 EU Charter, which sets out the fundamental rights of the child as follows:

<sup>73</sup> Council of Europe, European Social Charter (revised), adopted 3 May 1996 (entry into force: 1 July 1999), Article 17 concerning children and young persons.

<sup>74</sup> Ibid., Article 8.

<sup>75</sup> Ibid., Article 15 concerning persons with disabilities.

<sup>76</sup> Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS 126, 26 November 1987 (entry into force: 1 February 1989).

<sup>77</sup> Council of Europe, Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), ETS no 210, 11 May 2011 (entry into force: 1 August 2014). Note that this convention has not been ratified by all Member States. See chart of ratifications and signatures.

<sup>78</sup> European Social Charter (revised), 1996, op. cit. (fn. 73 above), Article 15.

<sup>79</sup> Ibid., Article 23.

<sup>80</sup> Istanbul Convention, op. cit. (fn. 77 above), Article 4(3). For resolutions of the Council of Europe Committee of Ministers and the Parliamentary Assembly of the Council of Europe relevant to sexual orientation and gender identity, see Appendix B: Primary sources.

<sup>81</sup> CJEU, judgments of 23 December 2009, *Detiček v Segulia*, C-403/09 PPU, EU:C:2009:810, para. 53, and of 23 January 2018, *Dawid Piotrowski*, C-367/16, EU:C:2018:27, para. 49; Federal Administrative Court (Germany), judgment of 8 May 2019, 8 C 3.18, para. 19.

## Article 24 EU Charter The rights of the child

- (1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
- (2) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
- (3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 24 EU Charter is based on the CRC, particularly Articles 3, 9, 12 and 13 thereof<sup>82</sup>.

### Article 3(1) Convention on the Rights of the Child

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

The CRC is referred to in the recitals of all the CEAS instruments<sup>83</sup>. It may, therefore, be understood as a relevant treaty within the meaning of Article 78(1) TFEU. The CJEU has already had occasion to point out that the ICCPR is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law, and this 'is also true of the [CRC] which, like the Covenant, binds each of the Member States'<sup>84</sup>. To what extent the CRC Committee's general comments will provide guidance as a persuasive authority for the interpretation of the provisions of the CEAS remains to be seen. For example, General comment no 6 might be seen as of importance, as it deals with the treatment of unaccompanied and separated children outside their country of origin<sup>85</sup>.

The CRC also explicitly refers to the child's best interests in several of its articles<sup>86</sup>. The working group drafting the CRC did not discuss any further definition of 'best interests'<sup>87</sup>. According to the CRC Committee's General comment no 14, the child's best interests is a threefold concept as indicated in Table 9.

<sup>82</sup> See Explanations relating to the Charter of Fundamental Rights, 14 December 2007 (2007/C303/02), prepared by the Bureau of the Convention, Article 24.

<sup>83</sup> See recitals 9 and 18 RCD (recast); recital 18 QD (recast); recital 33 APD (recast); and recital 13 Dublin III regulation.

<sup>84</sup> CJEU (GC), judgment of 27 June 2006, *European Parliament v Council of the European Union*, C-540/03, EU:C:2006:429, para. 37. For the concrete effect of this interplay between the CRC and EU law, see para. 57 of the same judgment.

<sup>85</sup> Committee on the Rights of the Child (CRC Committee), General comment no 6 (2005) – Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CRC/GC/2005/6.

<sup>86</sup> Article 9, separation from parents; Article 10, family reunification; Article 18, parental responsibilities; Article 20, deprivation of family environment and alternative care; Article 21, adoption; Article 37(c), separation from adults in detention; Article 40(2)(b)(iii), procedural guarantees, including presence of parents at court hearings for penal matters involving children in conflict with the law.

<sup>87</sup> UNICEF (R. Hodgkin and P. Newell), *Implementation Handbook for the Convention on the Rights of the Child*, 3rd ed., 2007, p. 37.

**Table 9: The threefold concept of the child's best interests**

<b>The threefold concept of the child's best interests</b>
<ul style="list-style-type: none"> <li>• a substantive right to have their best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake,</li> <li>• a fundamental, interpretative legal principle,</li> <li>• a rule of procedure as a decision-making process concerning children, which must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned<sup>88</sup>.</li> </ul>

There is no (other) single and abstract definition of the ‘best interests of the child’, as this legal concept is strongly linked to the individuality of each minor concerned. As set out in General comment no 14:

The concept of the child’s best interests is complex and its content must be determined on a case-by-case basis. ... It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs<sup>89</sup>.

On the one hand, ‘The expression “primary consideration” means that the child’s best interests may not be considered on the same level as all other considerations.’ On the other hand, the general comment notes that there is a:

need for a degree of flexibility in its application. The best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.). Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise<sup>90</sup>.

References to the best interests of the child can be found in both the EU Charter and all the secondary EU legislation of the CEAS. Table 10 lists the references to the best interests of the child in the EU Charter and CEAS instruments.

**Table 10: The best interests of the child in the EU Charter and CEAS instruments**

<b>Instrument</b>	<b>References to best interests of the child</b>
EU Charter	Article 24(2)
RCD (recast)	Recitals 9 and 22; Articles 2(j), 11(2), 23(1), (2) and (5), and 24(1), (2) and (3)
Dublin III regulation	Recitals 13, 16, 24 and 35; Articles 2(k), 6, 8 and 20(3)
APD (recast)	Recital 33; Articles 2(n) and 25(1)(a) and (6) <sup>91</sup>
QD (recast)	Recitals 18, 19, 27 and 38; Articles 20(5) and 31(4) and (5)

<sup>88</sup> CRC Committee, General comment no 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14, Introduction.

<sup>89</sup> Ibid., Section IV A 3, first para.

<sup>90</sup> Ibid., Section IV A 4, second and fourth paras.

<sup>91</sup> For more on procedural guarantees for minors, see Section 7.5.6.

In the context of the **APD (recast)**, the binding rule of Article 24(2) of the EU Charter is reflected in recital 33<sup>92</sup>, Article 2(n)<sup>93</sup> and Article 25(1)(a)<sup>94</sup>. It is furthermore explicitly referred to in Article 25(6) APD (recast)<sup>95</sup>.

With regard to qualification for international protection, recital 18 **QD (recast)** states that the “best interests of the child” should be a primary consideration of Member States when implementing [the QD (recast)]. Recital 19 acknowledges that it is ‘necessary to broaden the notion of family members, taking into account the different particular circumstances of dependency and the special attention to be paid to the best interests of the child’. It applies to the assessment of an application and the content of international protection granted. Recital 27, which refers to internal protection, states: ‘When the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interests of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available.’

In Chapter VII QD (recast), which sets out the general rules for the content of international protection, Article 20(5) reiterates: ‘The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.’ Recital 38 states that ‘When deciding on entitlements to the benefits included in this Directive, Member States should take due account of the best interests of the child’. Furthermore, it is explicitly referred to in Article 31(4) and (5) on unaccompanied minors<sup>96</sup>.

The **RCD (recast)** refers explicitly to the best interests of the child in recitals 9 and 22, and Articles 2(j), 11(2), 23(1), (2) and (5), and 24(1), (2) and (3)<sup>97</sup>.

Recital 13 and Article 6(1) of the **Dublin III regulation** reiterate the binding rule of Article 24(2) of the EU Charter. The regulation also refers to the best interests of the child in recitals 16, 24 and 35 and Articles 2(k), 6(1) and (3), 8 and 20(3)<sup>98</sup>.

The Grand Chamber of the CJEU noted in *SM* that Article 7 EU Charter<sup>99</sup>, which guarantees the right to respect for private and family life, ‘must ... be read in conjunction with the obligation to take into consideration the best interests of the child, which are recognised in Article 24(2) thereof’<sup>100</sup>. This judgment, concerning family reunification of EU citizens, could serve as a source of inspiration as regards the method of interpretation and application of Article 24(2) of the Charter in relation to secondary EU law. The judgment stated that, in exercising discretion provided by Directive 2004/38, national authorities must make a ‘balanced and reasonable assessment of all the current and relevant circumstances of the

<sup>92</sup> Cited in full in Section 7.5.6.

<sup>93</sup> Article 2(n) APD (recast): “representative” means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child’.

<sup>94</sup> Article 25(1)(a) APD (recast): ‘The representative shall perform his or her duties in accordance with the principle of the best interests of the child and shall have the necessary expertise to that end.’

<sup>95</sup> Cited in Section 7.5.6.

<sup>96</sup> Article 31(4) QD (recast): ‘As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned’. Article 31(5) QD (recast): ‘If an unaccompanied minor is granted international protection and the tracing of his or her family members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, whilst protecting the minor’s best interests.’

<sup>97</sup> These provisions of the RCD (recast) are cited below as follows: recital 9 in Section 4.3.4; recital 22 in Section 4.5.2; Article 2(j) in Section 4.3.6.1; Article 11(2) in Section 4.8.3; Article 23(1) and (2) in Section 4.3; Article 23(5) in Section 4.3.2; Article 24(1) in Section 4.3.6.1; Article 24(2) in Section 4.3.6.2; and Article 24(3) in Section 4.3.6.3.

<sup>98</sup> These provisions of the Dublin III regulation are cited below as follows: recital 13 in Section 5.1; recital 16 in fn. 384; recital 24 in Section 5.5.4; recital 35 in fn. 127; Articles 2(k) and 6 in Section 5.2; Article 8 in Section 5.3.1; and Article 20(3) in Section 5.3.2.

<sup>99</sup> Article 7 EU Charter reads: ‘Everyone has the right to respect for his or her private and family life, home and communications.’

<sup>100</sup> CJEU (GC), judgment of 26 March 2019, *SM v Entry Clearance Officer, UK Visa Section*, C-129/18, EU:C:2019:248, para. 67.

case, taking account of all the interests in play and, in particular, of the best interests of the child concerned’<sup>101</sup>.

In the case of *A and S*, the CJEU ruled that the objective pursued by the APD (recast), QD (recast) and family reunification directive is to ensure that, in accordance with Article 24(2) of the Charter of Fundamental Rights, the best interests of the child is in practice a primary consideration for Member States in the application of those directives<sup>102</sup>.

The court also ruled that, whereas, under Article 4(2)(a) of the family reunification directive, the possibility of reunification with first-degree relatives in the direct ascending line of the refugee ‘is, in principle, left to the discretion of each Member State’, Article 10(3)(a) ‘lays down, by way of exception to that principle, a right to such reunification for refugees who are unaccompanied minors which is not subject to a margin of discretion on the part of the Member States nor to conditions laid down in Article 4(2)(a)’<sup>103</sup>. Referring to the promotion of family reunification, the vulnerability of unaccompanied minors, the principles of equal treatment and legal certainty, and Article 24(2) of the EU Charter, the CJEU rejected the submission that the relevant moment for determining whether a refugee must be regarded as an unaccompanied minor was when the application for family reunification was submitted. It also rejected the alternative submission that it was when the decision on that application is adopted<sup>104</sup>. Instead, it held that the age at the time of entry into the territory of the Member State and of the introduction of the asylum application is decisive<sup>105</sup>.

In the case of *E*, which also concerned family reunification and the best interests of a child, the CJEU stated that the authority must take due account of the ‘nature and solidity of the person’s family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his country of origin’<sup>106</sup>. Consequently, it is for the competent national authorities, when implementing the Family Reunification Directive, to take into account all the relevant aspects of the case. ‘In particular, circumstances such as the age of the children concerned, their circumstances in the country of origin and the extent to which they are dependent on relatives are liable to influence the extent and intensity of the examination required’<sup>107</sup>.

In assessing the best interests of the child in the context of the CEAS, Member States should, *inter alia*, take due account of the following factors: family reunification possibilities, the minor’s well-being and social development, safety and security considerations, and the views of the minor, in accordance with their age and maturity<sup>108</sup>.

In *MA, BT and DA*, the CJEU makes it clear that, even where no express mention of the best interests of the minor is made in a provision of secondary EU law, the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child’s best interests must be a primary consideration in the interpretation and application of that provision<sup>109</sup>.

<sup>101</sup> CJEU (GC), 2019, *SM*, op. cit. (fn. 100 above), para. 68. See also CJEU, judgment of 13 March 2019, *E v Staatssecretaris van Veiligheid en Justitie*, C-635/17, EU:C:2019:192, para. 57.

<sup>102</sup> CJEU, 2018, *A and S*, op. cit. (fn. 34 above), para. 58.

<sup>103</sup> *Ibid.*, para. 34.

<sup>104</sup> *Ibid.*, paras 55, 56, 57, 59 and 60.

<sup>105</sup> *Ibid.*, para. 64.

<sup>106</sup> CJEU, 2019, *E v Staatssecretaris van Veiligheid en Justitie*, op. cit. (fn. 101 above), para. 58.

<sup>107</sup> *Ibid.*, para. 59.

<sup>108</sup> See Article 6(3) Dublin III regulation, for more on which Section 5.2 at fn. 366; and Article 23(2) RCD (recast), for more on which see Section 4.3.

<sup>109</sup> CJEU, judgment of 6 June 2013, *MA, BT, and DA v Secretary of State for the Home Department*, C-648/11, EU:C:2013:367, paras 58–59.

A general presumption within the CEAS framework is that it is in the best interests of the child to treat a child's situation as indissociable from that of their parents. Article 20(3) Dublin III regulation must be interpreted as meaning this<sup>110</sup>.

Article 7 EU Charter, which recognises the right to respect for private and family life, must be interpreted as having the same meaning and scope as Article 8 ECHR<sup>111</sup>. The ECtHR has ruled that the child's best interests – which is relevant under Article 8 ECHR – dictates that the child's ties with their family must be maintained, 'except in cases where the family has proved particularly unfit'<sup>112</sup>. Referring to Article 9(1) CRC, the court has affirmed:

An important international consensus exists to the effect that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child<sup>113</sup>.

The court has also found that 'there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance'<sup>114</sup>.

UNHCR states that, depending on the magnitude of the decision for the child, different procedural safeguards need to be in place in order to identify which among the available options is in a minor's best interests<sup>115</sup>. UNHCR's 2018 *Guidelines on Assessing and Determining the Best Interests of the Child* may be particularly relevant when considering the child's best interests in any action related to asylum-seeking children, as well as any other children of concern to UNHCR<sup>116</sup>.

It is in line with these approaches to state, as noted by the CRC Committee:

A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. This process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender sensitive related interviewing techniques<sup>117</sup>.

<sup>110</sup> CJEU, judgment of 23 January 2019, *M.A., S.A. and A.Z. v International Protection Appeal Tribunal and Others*, C-661/17, EU:C:2019:53, paras 89–90.

<sup>111</sup> CJEU (GC), 2019, *SM*, op. cit. (fn. 100 above), para. 65. For more on ensuring family unity under the CEAS, see also Section 4.3.4 below.

<sup>112</sup> ECtHR (GC), judgment of 6 July 2010, *Neulinger and Shuruk v Switzerland*, no 41615/07, para. 136.

<sup>113</sup> ECtHR (GC), judgment of 10 September 2019, *Strand Lobben and Others v Norway*, no 37283/13, para. 207, referring to Article 9(1) CRC.

<sup>114</sup> *Ibid.*, para. 204.

<sup>115</sup> UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, p. 97. See also CJEU, judgment of 23 May 2019, *Mohammed Bilali v Bundesamt für Fremdenwesen und Asyl*, C-720/17, EU:C:2019:448, para. 57.

<sup>116</sup> UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, 2018, op. cit. (fn. 115 above).

<sup>117</sup> CRC Committee, General comment no 6, op. cit. (fn. 85 above), para. 20.

## Part 3. Identification of applicants with special reception needs and/or in need of special procedural guarantees

Identification of applicants with special reception needs in accordance with the RCD (recast) and applicants in need of special procedural guarantees in accordance with the APD (recast) is a prerequisite for Member States to fulfil their obligations to such applicants under the respective directives. Identification is the first step towards ensuring that such applicants are provided with appropriate support in order to meet their needs and ‘to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection’<sup>118</sup>.

Applicants with special reception needs may or may not require special procedural guarantees and vice versa. Therefore, Member States must assess the applicant in line with each directive and apply the distinct but related provisions of both the RCD (recast) and the APD (recast). Accordingly, this part begins by separately analysing the relevant provisions of each directive relating to identification and assessment. It then provides an overview of the indicators and evidence that are relevant to identification under both directives, as indicated in Table 11.

**Table 11: Structure of Part 3**

Section	Title	Page
<b>3.1</b>	Identification and assessment of applicants with special reception needs (RCD recast)	38
<b>3.2</b>	Identification and assessment of applicants in need of special procedural guarantees (APD recast)	42
<b>3.3</b>	Indicators of applicants with special reception needs and/or in need of special procedural guarantees	47
<b>3.4</b>	Evidence and assessment of special reception needs and/or need for special procedural guarantees	49

### 3.1. Identification and assessment of applicants with special reception needs (RCD recast)

Recital 14 RCD (recast) states: ‘The reception of persons with special reception needs should be a primary concern for national authorities in order to ensure that such reception is specifically designed to meet their special reception needs.’ Article 2(k) RCD (recast) defines an ‘applicant with special reception needs’ as a ‘vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive’.

<sup>118</sup> Recital 29 APD (recast).

Article 21 RCD (recast) provides:

### Article 21 RCD (recast)

Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.

Crucially, the use of the words ‘such as’ in Article 21 RCD (recast) indicates that the article sets out a non-exhaustive list of examples of vulnerable persons. Given this, Member States may be required to take into account the specific situation of other vulnerable persons. For example, certain applicants may have special reception needs on account of their sexual orientation and/or gender identity<sup>119</sup>. Moreover, an applicant may have multiple and/or changing vulnerabilities.

Article 21 RCD (recast) states that minors and unaccompanied minors are examples of vulnerable persons. According to Article 2(d) RCD (recast), a ‘minor’ ‘means a third-country national or stateless person below the age of 18 years’. Article 2(e) RCD (recast) provides:

### Article 2(e) RCD (recast)

‘unaccompanied minor’: means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States;

The other examples of vulnerable persons in Article 21 are not further defined in the RCD (recast)<sup>120</sup>.

Article 22(3) RCD (recast) states: ‘Only vulnerable persons in accordance with Article 21 [RCD (recast)] may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive.’ It follows from Article 21 RCD (recast) that Member States are required to develop appropriate methods for identifying applicants with special reception needs. Article 22 RCD (recast) sets out the legal framework for the assessment of the special reception needs of vulnerable persons.

<sup>119</sup> With regard to LGBTI persons, see ECtHR, 2016, *O.M. v Hungary*, op. cit. (fn. 57 above), para. 53. See Section 3.2 below for definitions of ‘sexual orientation’ and ‘gender identity’.

<sup>120</sup> Offences concerning trafficking in human beings are set out in Article 2 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (anti-trafficking directive).

## Article 22(1) RCD (recast)

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

That assessment shall be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure.

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

Article 22(1) RCD (recast) thus requires Member States to:

- assess and establish whether the applicant is an applicant with special reception needs; **and**
- indicate the nature of such needs.

Pursuant to Article 21 together with Article 22(1) and (3), Member States must assess all applicants to establish if the applicant is a vulnerable person with ‘special reception needs’. Those applicants who are identified as having special reception needs must be assessed to establish the nature of their needs. Member States must, therefore, conduct an individual assessment<sup>121</sup>.

The assessment must be initiated ‘within a reasonable period of time after an application for international protection is made’. In line with Article 2(b) APD (recast), which sets out the definition of an application for international protection, an application is ‘made’ when a third-country national or a stateless person, ‘who can be understood to seek refugee status or subsidiary protection status’, makes a request for protection from a Member State and ‘does not explicitly request another kind of protection outside the scope of [QD (recast)] that can be applied for separately’. An application is, therefore, ‘made’ before it is registered and lodged in accordance with Article 6(1) and (2) APD (recast)<sup>122</sup>. Given this, the reference point

<sup>121</sup> For example, France, *Code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA) (version as last modified on 1 June 2019), Article L744-6, requires the Office français de l'immigration et de l'intégration (OFII) to undertake an evaluation of vulnerability within a reasonable time period and **after an individual interview with the asylum seeker** in order to determine whether or not they have specific reception needs (emphasis added). See also Malta, *Reception of Asylum Seekers Regulations*, 22 November 2005, Subsidiary Legislation (SL) 420.06 (as amended up to 2015), Regulation 14(1), providing that ‘account shall be taken of the specific situation of vulnerable persons ... found to have special needs **after an individual evaluation of their situation**’ (emphasis added).

<sup>122</sup> Article 6(1) APD (recast): ‘When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made.

‘If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.’

Article 6(2): ‘Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible.’

For further information on making, registering and lodging an application, see EASO, *Asylum procedures and the principle of non-refoulement – Judicial analysis*, 2018, Section 2.3.

in time from which to assess ‘a reasonable period of time’ is when the application is made and not when it is registered or lodged.

The meaning of ‘a reasonable period of time’ should be informed by the aim, reflected in Article 22(1) RCD (recast), of ensuring that the support provided to applicants with special reception needs in accordance with the RCD (recast) takes into account their special reception needs ‘throughout the duration of the asylum procedure’<sup>123</sup>. In *Cimade and Gisti*, a case that concerned the interpretation of the RCD, the CJEU held:

In addition, further to the general scheme and purpose of [the RCD] and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter, under which human dignity must be respected and protected, the asylum seeker may not ... be deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive<sup>124</sup>.

Member States have considerable discretion in the methods of the assessment. Article 22(1), second subparagraph, RCD (recast) provides that the assessment ‘may be integrated into existing national procedures’. Article 22(2) RCD (recast) adds that ‘The assessment ... need not take the form of an administrative procedure.’ Therefore, Member States may decide to establish a specific assessment of reception needs or to combine that assessment with the assessment of the need for special procedural guarantees (see Section 3.3). Furthermore, the assessment may be separate or integrated into existing procedures<sup>125</sup>.

It may be observed from Articles 24(4), 25(2) and 29(1) RCD (recast) that the assessment should be undertaken by those with appropriate training<sup>126</sup>.

The RCD (recast) does not stipulate how special reception needs must be assessed, but the methods used must be consistent with the provisions of the directive and, as is clear from recital 35, must respect the fundamental rights guaranteed by the EU Charter<sup>127</sup>. With regard to the assessment of the reception needs of minors, the child’s best interests must be a primary consideration in accordance with Article 24 EU Charter, as well as with the CRC and the ECHR<sup>128</sup>. Moreover, recital 10 states: ‘With respect to the treatment of persons

<sup>123</sup> Although not legally binding, EASO’s guidance to competent authorities recommends that ‘initial identification and assessment take place during the reception intake (1 to 3 days). Additional ongoing identification and/or assessment should take place depending on the respective special needs’; EASO, *Guidance on Reception Conditions: Operational standards and indicators*, 2016, p. 40. For its part, UNHCR ‘strongly recommends that such (initial) assessments take place as soon as possible’; UNHCR, *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, p. 51.

<sup>124</sup> CJEU, judgment of 27 September 2012, *Cimade, Groupe d’information et de soutien des immigrés (GISTI) v Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration*, C-179/11, EU:C:2012:594, para. 56.

<sup>125</sup> For example, in France, CESEDA, op. cit. (fn. 121 above), Article L744-6, requires the OFII to undertake an evaluation of vulnerability within a reasonable time period and after an individual interview with the asylum seeker in order to determine if they have specific reception needs. Relevant provisions in Belgium are found in *Loi sur l’accueil des demandeurs d’asile et de certaines autres catégories d’étrangers* of 12 January 2007, as updated to 12 March 2018, Article 22.

<sup>126</sup> Article 24(4) provides, inter alia, that ‘Those working with unaccompanied minors shall have had and shall continue to receive appropriate training concerning their needs’. Article 25(2) states that ‘Those working with victims of torture, rape or other serious acts of violence shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.’ Article 29(1) states that ‘Member States shall take appropriate measures to ensure that authorities and other organisations implementing this Directive have received the necessary basic training with respect to the needs of both male and female applicants.’ See also CRC Committee, *General comment no 6*, op. cit. (fn. 85 above), para. 20: ‘The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender sensitive related interviewing techniques.’

<sup>127</sup> Recital 35: ‘This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly.’

<sup>128</sup> See Section 2.4 on the best interests of the child, and CRC Committee, *General comment no 6*, op. cit. (fn. 85 above), Section V(a) on initial assessment and measures, paras 31 and 32.

falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party.'

While the methods used must be consistent with Member States' obligations under the RCD (recast), the EU Charter and relevant international treaties, it is nevertheless clear that they must be capable of identifying vulnerable persons falling within the scope of Article 21 RCD (recast). It follows from this article that Member States are required to develop appropriate methods for identifying applicants with special reception needs. This is particularly so in relation to those whose needs may not be obvious or immediately apparent, for example victims of torture and other serious forms of violence, applicants who are lesbian, gay, bisexual, transgender or intersex (LGBTI), applicants with a disability and/or applicants with special needs due to their mental health. The assessment may, therefore, require some time. An assessment that is only capable of identifying persons with obvious or visible signs of vulnerability risks failing to identify other categories of vulnerable persons falling within the scope of Article 21 RCD (recast)<sup>129</sup>.

Article 22(1) RCD (recast) also recognises that special reception needs may only become apparent at a later stage in the asylum procedure. Indeed, they may only become apparent upon submission of a subsequent application or on appeal to a court or tribunal. This provision acknowledges that for a number of reasons – including trauma, shame, lack of trust and/or fear – some applicants may find it difficult to disclose facts or experiences that would indicate that they have special reception needs<sup>130</sup>. Where such needs only become apparent at a later stage, Member States must ensure that those special reception needs are addressed.

Where an applicant has been identified as having special reception needs, Member States must ensure that the support they receive takes into account their special reception needs throughout the duration of the asylum procedure<sup>131</sup>. They must also provide for appropriate monitoring of their situation (Article 22(1), third subparagraph, RCD (recast)). Part 4 provides further information on the obligations of Member States under the RCD (recast).

Article 22(4) RCD (recast) states that the assessment pursuant to Article 22(1) RCD (recast) 'shall be without prejudice to the assessment of international protection needs' pursuant to the QD (recast).

## 3.2. Identification and assessment of applicants in need of special procedural guarantees (APD recast)

Article 2(d) APD (recast) defines an 'applicant in need of special procedural guarantees' as 'an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances'. Recital 29 explains:

<sup>129</sup> Although not legally binding on Member States, see European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, *The Implementation of the Common European Asylum System*, 2016, p. 87. This research paper was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs and commissioned, supervised and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

<sup>130</sup> Federal Administrative Court (Bundesverwaltungsgericht / Tribunal administratif fédéral / Tribunale amministrativo federale / Tribunal administratif federal (BVGE), Switzerland), judgment of 18 July 2016, D-6806 (English summary). See also EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018, Section 6.3 on disclosure, p. 174.

<sup>131</sup> CJEU, 2012, *Cimade*, op. cit. (fn. 124 above), para. 56; CJEU, judgment of 27 February 2014, *Federaal agentschap voor de opvang van asielzoekers v Saciri and Others*, C-79/13, EU:C:2014:103, para. 33.

### Recital 29 APD (recast)

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

The factors or circumstances listed in recital 29 are not exhaustive. Given this, Member States may be required to take into account other individual circumstances that might limit an applicant's ability to benefit from the rights and comply with the obligations provided for in the APD (recast). Moreover, it should be noted that an applicant may be limited by multiple and/or changing individual circumstances.

Minors and unaccompanied minors are applicants in need of special procedural guarantees, because of their age. According to Article 2(l) APD (recast), 'minor' 'means a third-country national or a stateless person below the age of 18 years'. Pursuant to Article 2(m) APD (recast), 'unaccompanied minor' means an unaccompanied minor as defined in Article 2(l) of the QD (recast), which states:

### Article 2(l) QD (recast)

#### Definitions

'unaccompanied minor' means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States;

In *A and S*, a case that concerned the definition of an unaccompanied minor under the corresponding article of the family reunification directive, the CJEU held that Article 2(f) of that directive must be interpreted as meaning that:

a third-country national or stateless person who is below the age of 18 at the moment of his or her entry into the territory of a Member State and of the introduction of his or her asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority ... must be regarded as a 'minor' for the purposes of that provision<sup>132</sup>.

It should be noted that an elderly applicant may also be in need of special procedural guarantees due to their age<sup>133</sup>.

<sup>132</sup> CJEU, 2018, *A and S*, op. cit. (fn. 34 above), para. 64.

<sup>133</sup> See the non-binding [UN Principles for Older Persons](#), adopted by General Assembly resolution 46/91 of 16 December 1991.

Definitions of other categories of applicants who may be in need of special procedural guarantees are not found in the APD (recast). However, guidance may be found in different authoritative sources defining different kinds of vulnerability. For example, the 2007 Yogyakarta Principles provide definitions of sexual orientation and gender identity<sup>134</sup>. Sexual orientation ‘is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender’. Gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond to the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms<sup>135</sup>.

In 2017, the Yogyakarta Principles plus 10 were adopted. The document supplements – and does not replace – the original 29 Yogyakarta Principles. It sets out additional principles and obligations of states in the application of international human rights law in relation to sexual orientation and gender identity, and recognises the distinct and intersectional grounds of gender expression and sex characteristics. The preamble defines ‘gender expression’ as ‘each person’s presentation of the person’s gender through physical appearance – including dress, hairstyles, accessories, cosmetics – and mannerisms, speech, behavioural patterns, names and personal references’, and notes ‘further that gender expression may or may not conform to a person’s gender identity’. ‘Sex characteristics’ are defined as ‘each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty’<sup>136</sup>.

As regards disability, the CRPD defines persons with disabilities as including ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’<sup>137</sup>.

Article 24 APD (recast) sets out, *inter alia*, the legal framework for the identification and assessment of applicants in need of special procedural guarantees.

#### **Article 24(1) APD (recast)** **Applicants in need of special procedural guarantees**

Member States shall assess within a reasonable period of time after an application for international protection is made whether the applicant is an applicant in need of special procedural guarantees.

Pursuant to this Article, Member States must assess all applicants to determine if they are ‘in need of special procedural guarantees’. Where an applicant has been identified as such, the nature of those needs should be assessed in order to meet the requirement of Article 24(3)

<sup>134</sup> Yogyakarta Principles, 2007, op. cit. (fn. 72 above), p. 6. The Yogyakarta Principles were developed by a group of international human right experts in 2007.

<sup>135</sup> Ibid., p. 6.

<sup>136</sup> Yogyakarta Principles plus 10, 2017, op. cit. (fn. 72 above), p. 6.

<sup>137</sup> Article 1 CRPD. As noted in Section 2.1 above, recital e recognises that disability is an evolving concept.

APD (recast) to provide adequate support<sup>138</sup>. Accordingly, Member States are obliged to carry out an individual assessment of the need for special procedural guarantees.

As mentioned in Section 3.1, in line with Article 2(b) APD (recast), which sets out the definition of an application for international protection, an application is ‘made’ as soon as a person who can be understood to seek refugee status or subsidiary protection status makes a request for or expresses a wish to apply for protection from a Member State. An application is, therefore, made before it is registered and lodged in accordance with Article 6 APD (recast)<sup>139</sup>. Given this, the reference point in time from which to assess ‘a reasonable period of time’ is when the application is made and not when the application is registered or lodged. Recital 27 APD (recast) makes it clear that:

#### **Recital 27 APD (recast)**

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

The meaning of ‘within a reasonable period of time’ should be informed by the aim, set out in recital 29 APD (recast), which is to ensure that applicants in need of special procedural guarantees receive ‘adequate support ... to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application’.

Article 24(2) APD (recast) allows Member States wide discretion with regard to the methods of the assessment, which ‘may be integrated into existing national procedures and/or into the assessment referred to in Article 22 of [the RCD (recast)] and need not take the form of an administrative procedure’. Accordingly, the assessment of whether or not an applicant is in need of special procedural guarantees may or may not be integrated into the assessment of whether or not the applicant has special reception needs.

The APD (recast) does not stipulate the methods for the assessment of whether or not an applicant is in need of special procedural guarantees. As with the RCD (recast), however, the methods used must be consistent with the provisions of the directive. As is also clear from recital 60, they must respect the fundamental rights guaranteed by the EU Charter, such as the right to respect for human dignity (Article 1) and the right to respect for private and family life (Article 7)<sup>140</sup>. When applying the APD (recast) to minors, ‘The best interests of the child should be a primary consideration ... in accordance with [the EU Charter] and the 1989 United Nations Convention on the Rights of the Child’<sup>141</sup>. Moreover, recital 15 states: ‘With

<sup>138</sup> Cited in full later in this section.

<sup>139</sup> For further information on making, registering and lodging an application, see EASO, *Asylum procedures and the principle of non-refoulement – Judicial analysis*, 2018, Section 2.3.

<sup>140</sup> Recital 60: ‘This Directive respects the fundamental rights and observes the principles recognised by the Charter. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 18, 19, 21, 23, 24 and 47 of the Charter and has to be implemented accordingly.’

<sup>141</sup> APD (recast), recital 33. See also Section 2.4 above; CRC Committee, *General comment no 6*, op. cit. (fn. 85 above), para. 20, quoted in the text at the end of Part 2.

respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party.'

While ensuring that the methods are consistent with Member States' obligations under the APD (recast), the EU Charter and relevant international treaties, it is nevertheless clear that the methods used must be capable of identifying applicants falling within the scope of Article 2(d) APD (recast). Given this, they should not be limited only to identifying applicants with obvious or visible limitations due to individual circumstances. Member States are required to develop appropriate methods for identifying applicants whose individual circumstances may not be obvious or immediately apparent, for example victims of torture and other serious forms of violence, LGBTI applicants or applicants with special needs due to their mental health <sup>142</sup>.

Article 24(3) APD (recast) provides:

#### **Article 24(3) APD (recast)**

Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.

Parts 7 and 8 of this judicial analysis provide further information on the obligations of Member States under the APD (recast).

The APD (recast) also recognises that an applicant's need for special procedural guarantees may only become apparent at a later stage. Article 24(4) APD (recast) provides:

#### **Article 24(4) APD (recast)**

Member States shall ensure that the need for special procedural guarantees is also addressed, in accordance with this Directive, where such a need becomes apparent at a later stage of the procedure, without necessarily restarting the procedure.

In accordance with Article 24(4) APD (recast), some Member States have laid down such provisions in their national legislation <sup>143</sup>. This provision acknowledges that for a number of reasons – including trauma, shame, lack of self-awareness, trust and/or fear – some applicants may find it difficult to disclose facts or experiences that would indicate their need for special procedural guarantees <sup>144</sup>. This may be the case for, among others, LGBTI persons, who may at first be reluctant to disclose very personal matters, and persons who have suffered torture, rape or other forms of psychological, physical or sexual violence, who may

<sup>142</sup> For considerations specific to indicators of torture or other cruel, inhuman or degrading treatment, see Section 7.5.4, and for those specific to sexual orientation and gender identity see Section 7.5.5.

<sup>143</sup> By way of an example of Member State legislation, see Malta, *Reception of Asylum Seekers Regulations*, 2005, op. cit. (fn. 121 above), Regulation 14(2) provides: 'Whenever the vulnerability of an applicant becomes apparent at a later stage, assistance and support shall be provided from that point onwards, pursuant to a reassessment of the case'. See also France, CESEDA, op. cit. (fn. 121 above), Article L744-6, requiring specific needs also to be taken into account if they are manifested at a later stage in the asylum procedure.

<sup>144</sup> See EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*, 2018, Section 6.3 on disclosure, p. 174.

be suffering trauma. The CJEU has acknowledged that an applicant may not declare their sexual orientation at the outset<sup>145</sup>.

When an applicant discloses, at a later stage of the procedure, facts or experiences that may indicate a need for special procedural guarantees, pursuant to Article 24(4) APD (recast), Member States must ensure that any need for such guarantees is addressed. Depending on the circumstances, this may or may not require the procedure to be restarted.

An applicant's need for special procedural guarantees may only become apparent on appeal to a court or tribunal. For further information on special procedural guarantees in proceedings before courts and tribunals, see Part 8.

### **3.3. Indicators of applicants with special reception needs and/or in need of special procedural guarantees**

Several resources set out indicators for identifying applicants with special reception needs and/or in need of special procedural guarantees. Recital 31 APD (recast) provides:

#### **Recital 31 APD (recast)**

National measures dealing with identification and documentation of symptoms and signs of torture or other serious acts of physical or psychological violence, including acts of sexual violence, in procedures covered by this Directive may, *inter alia*, be based on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

It should be noted that the manual mentioned above<sup>146</sup> is drafted specifically in the context of torture investigations<sup>147</sup>.

Both EASO and UNHCR<sup>148</sup> have developed indicators to be used as screening tools. The online EASO Tool for Identification of Persons with Special Needs (also referred to as the IPSN tool)<sup>149</sup> sets out a range of indicators. Examples of some of those indicators are set out in Table 12. For the more extensive list of indicators, the reader should refer to the online tool.

<sup>145</sup> CJEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), para. 69.

<sup>146</sup> *Istanbul Protocol – Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment*, op. cit. (fn. 69 above). As EASO notes, the Istanbul Protocol is 'very relevant, although it is not legally binding on Member States'; EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*, 2018, p. 99; see also pp. 99–101.

<sup>147</sup> For considerations specific to indicators of torture or other cruel, inhuman or degrading treatment, see Section 7.5.4.

<sup>148</sup> UNHCR and the International Detention Coalition (IDC), *Vulnerability Screening Tool – Identifying and addressing vulnerability: a tool for asylum and migration systems*, 2016.

<sup>149</sup> EASO Tool for Identification of Persons with Special Needs, 2016.

**Table 12: Examples of indicators of applicants who may be in need of special procedural guarantees and/or with special reception needs**

Indicator	Notes
<b>Age</b>	This is relevant due to the person either claiming to be under 18 years (minor) or being elderly
<b>Sex</b>	Sex refers to male, female or intersex
<b>Sexual orientation and gender identity</b>	Persons who are LGBTI or where gender identity is an issue
<b>Family status</b>	For example, an accompanied minor, an unaccompanied minor, a single parent accompanied by one or more children under the age of 18 years, a dependent adult child or a widow(er)
<b>Physical indicators</b>	Examples include: <ul style="list-style-type: none"> <li>• visible injuries</li> <li>• visible signs of illness or health conditions</li> <li>• tattoos or other marks possibly indicating ownership by exploiters</li> <li>• disabilities limiting the physical functions of limbs etc.</li> <li>• vision, hearing or speech impairment</li> <li>• intellectual disability</li> </ul>
<b>Psychosocial indicators</b>	These include diagnosed disorders, behaviour, attitude and self-perception. Examples include: <ul style="list-style-type: none"> <li>• diagnosed disorders: <ul style="list-style-type: none"> <li>– post-traumatic stress disorder (PTSD)</li> <li>– acute stress disorder</li> <li>– depression</li> <li>– psychosis</li> <li>– anxiety disorder</li> <li>– other diagnosed mental disorders;</li> </ul> </li> <li>• behaviour/attitude: <ul style="list-style-type: none"> <li>– confusion</li> <li>– disorientation</li> <li>– avoidance of stimuli related to claimed trauma</li> <li>– phobia</li> <li>– mood swings (rapid or dramatic shifts in feelings);</li> </ul> </li> <li>• self-perception: <ul style="list-style-type: none"> <li>– personality change</li> <li>– feelings of guilt</li> <li>– feelings of shame</li> <li>– sense of hopelessness</li> <li>– sense of worthlessness</li> <li>– unusual or exaggerated beliefs about personal powers</li> <li>– damaged self-image</li> </ul> </li> </ul>
<b>Environmental indicators</b>	These include country of origin information (e.g. does the applicant come from a country where torture is known to occur?) and treatment by others (e.g. experience of violence)

As mentioned above, this list is only an example of some indicators. As such, it is not exhaustive and an individual assessment will always be required.

### 3.4. Evidence and assessment of special reception needs and/or need for special procedural guarantees

#### Other relevant EASO publications

EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018.

This section deals with evidence that might verify, support or refute the contention that an applicant has special reception needs and/or is in need of special procedural guarantees, and how this should be assessed.

**Table 13: Examples of relevant evidence for assessing special procedural or reception needs**

Examples of evidence	Examples of link with the alleged vulnerability in line with Article 21 RCD (recast) and recital 29 APD (recast)
<ul style="list-style-type: none"> <li>• <b>Oral</b></li> <li>• statements by an applicant, family member, witnesses or experts</li> </ul>	The statement of an applicant may be used to demonstrate that they are a minor, have experienced violence in the past, and/or have a disability
<ul style="list-style-type: none"> <li>• <b>Documents</b></li> <li>• identity card/passport</li> <li>• birth certificate</li> <li>• medical reports</li> <li>• reports on age assessment</li> <li>• reports on country of origin</li> </ul>	<p>A birth certificate and/or other documentation may be used to substantiate the age of an applicant, whether as a minor or as an elderly person</p> <p>Medical reports may be used to confirm that an applicant has a serious illness or disability, or has experienced torture.</p> <p>A country of origin report may indicate, for example, that persons with certain profiles may have been subjected to torture or other serious forms of violence</p>
<ul style="list-style-type: none"> <li>• <b>Visual evidence</b></li> <li>• photographs</li> <li>• videos</li> </ul>	Photographs may support a claim that a person has been subjected to violence and/or has experienced torture
<ul style="list-style-type: none"> <li>• <b>Exhibits</b></li> <li>• bodily scarring</li> </ul>	Bodily scarring may substantiate a claim that an applicant has experienced torture and/or violence in the past

As the CJEU has ruled, any evidence must be gathered in a way that is ‘consistent with other relevant EU law provisions, and in particular with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, enshrined in Article 1 of the Charter, and the right to respect for private and family life, guaranteed by Article 7 thereof’<sup>150</sup>.

Respect for such fundamental rights prohibits, for example, the performance of sexual acts or submission of videos of intimate acts to substantiate an application based on sexual orientation<sup>151</sup>. The CJEU has stated that ‘the effect of authorising or accepting such types

<sup>150</sup> CJEU, judgment of 25 January 2018, *F v Bevándorlási és Állampolgársági Hivatal*, C-473/16, EU:C:2018:36, para. 35.

<sup>151</sup> CJEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), para. 65.

of evidence would be to incite other applicants to offer the same and would lead, de facto, to requiring applicants to provide such evidence’<sup>152</sup>. This would apply equally, *mutatis mutandis*, to evidence gathered for the assessments of special reception needs and need for special procedural guarantees<sup>153</sup>.

The sections that follow examine, first, medical evidence and, second, age assessment and the principle of the benefit of the doubt.

### 3.4.1. Medical evidence

#### Other relevant EASO publications

EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018, Section 4.7.2, ‘Medical evidence and medical experts’, on standards for assessing medical evidence.

Medical evidence can play an important role in identifying applicants with special reception needs and/or who are in need of special procedural guarantees. For example, a medical report may provide an expert opinion on whether or not an applicant has a particular medical condition, mental disorder or disability. Medical evidence obtained in the course of the examination of the application, pursuant to Article 10(3)(d) APD (recast), in order to corroborate a claim of torture or ill-treatment in the past, may also indicate an applicant’s need for special reception needs and/or special procedural guarantees. With regard to the assessment of an application for international protection, Article 18 APD (recast) has established standards for any medical examination concerning signs that might indicate past persecution or serious harm. Article 18(1) provides:

#### Article 18(1) APD (recast)

Where the determining authority deems it relevant for the assessment of an application for international protection ... Member States shall, subject to the applicant’s consent, arrange for a medical examination of the applicant concerning signs that might indicate past persecution or serious harm. Alternatively, Member States may provide that the applicant arranges for such a medical examination<sup>154</sup>.

In *F v Bevándorlási és Hivatal*, the CJEU held that the procedures for obtaining an expert’s report relating to an applicant’s declared sexual orientation must be consistent with the fundamental rights guaranteed by the Charter<sup>155</sup>. This would similarly be applicable, *mutatis mutandis*, to the assessment of special needs. The CJEU held that the preparation and use of a psychologist’s expert report, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of an applicant, ‘constitutes an

<sup>152</sup> CJEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), para. 66.

<sup>153</sup> For considerations specific to indicators of torture or other cruel, inhuman or degrading treatment, see Section 7.5.4.

<sup>154</sup> In this regard, see for example Czechia, *Act on Asylum* (Act no 325/1999 Coll. on Asylum, 11 November 1999, as amended to 2015), Section 10(5), which requires the administrative authority (Ministry of the Interior) to ‘inform the applicant for international protection of the opportunity of arranging for a medical examination to identify signs of persecution or serious harm’.

<sup>155</sup> CJEU, 2018, *F v Bevándorlási és Állampolgársági Hivatal*, op. cit. (fn. 150 above), para. 46.

interference with that person's right to respect for his private life' and is incompatible with Article 7 of the Charter<sup>156</sup>.

CJEU Advocate General Sharpston maintained in her opinion in *A, B, and C v Staatssecretaris van Veiligheid en Justitie* that 'there is no recognised medical examination that can be applied in order to establish a person's sexual orientation'<sup>157</sup>.

### 3.4.2. Age assessment

#### Other relevant EASO publications

EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018, Section 5.2.2, 'Age assessment'.

EASO, *Practical Guide on Age Assessment*, 2nd ed., 2018, p. 17.

EASO, *Age Assessment Practice in Europe*, 2013.

Age assessment is the process by which authorities seek to estimate the chronological age or range of age of a person in order to establish whether an individual is a minor or an adult<sup>158</sup>. Any age assessment procedure should only be applied when a Member State has doubts concerning the (claimed) age of an applicant or when their age is unknown and it must be decided whether they are a minor or an adult. The issue usually arises in the case of unaccompanied minors and is a decision of considerable importance, as Member States are obliged to grant special procedural guarantees and special reception conditions to minors, and in particular to unaccompanied minors.

Article 25 APD (recast), on guarantees for unaccompanied minors, sets out in Article 25(5) the rules for the use of medical examinations to determine the age of unaccompanied minors. Article 25(5) must be implemented with full respect for human dignity in accordance with Article 1 EU Charter, the right to integrity of the person (Article 7 EU Charter) and the protection of personal data (Article 8 EU Charter); and the best interests of the child must be a primary consideration (Article 24(2) of the EU Charter and Article 25(6) APD (recast)). According to Article 52(1) of the EU Charter, the principle of proportionality applies to any limitation on the exercise of the rights and freedoms recognised by the EU Charter<sup>159</sup>.

<sup>156</sup> CJEU, 2018, *F v Bevándorlási és Állampolgársági Hivatal*, op. cit. (fn. 150 above), para. 54.

<sup>157</sup> CJEU, Opinion of Advocate General Sharpston, 2014, *A, B and C*, op. cit. (fn. 72 above), paras 60–61. See also CJEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above). Importantly, this case dealt with the 2004 QD and 2005 APD, and the referring questions focused on, among other things, the methods of assessing the statements and documentary evidence in each of the cases. In this respect, the CJEU restricted itself to certain issues, including if it was acceptable under the relevant EU directives for the authorities to ask questions based on stereotypes as regards homosexuals and detailed questioning on the sexual practices of an applicant. See further UNHCR, *Guidelines on International Protection no 9: Claims to refugee status based on sexual orientation and/or gender identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, UN Doc HCR/GIP/12/09, para. 65.

<sup>158</sup> EASO, *Practical Guide on Age Assessment*, 2nd ed., 2018, p. 17.

<sup>159</sup> Article 52(1) EU Charter: '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.'

### Article 25(5), first subparagraph, APD (recast)

Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant's age. If, thereafter, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor.

In accordance with Article 25(5) APD (recast), the first step in the process of age assessment shall be the assessment of general statements or other relevant indications, which include documents – such as passports, identity documents of various types and birth certificates – and other sources of evidence such as statements from other family members present in the Member State<sup>160</sup>. In this regard, it should be noted that, according to the CRC Committee's General comment no 6, age assessment procedures 'should not only take into account the physical appearance of the individual, but also his or her psychological maturity'<sup>161</sup>. The only possible aim of any visual inspection must be to sort out obvious cases in which the result (adult or minor) is beyond any reasonable doubt<sup>162</sup>. When applying any test that refers to the appearance and demeanour of the applicant, it has to be borne in mind 'how unreliable the exercise of assessing age on [such a basis] is and, in consequence, how wide a margin of error is required'<sup>163</sup>.

Only if the competent authority is still in doubt concerning the minority of the applicant after any non-physically invasive steps have been taken into account, **may** Member States use medical examinations to estimate the age of an alleged unaccompanied minor. There is no legal obligation arising from EU law to assess the applicant's age by medical examination, as Article 25(5) APD (recast) only permits medical examinations ('may') but does not set out a requirement to do so<sup>164</sup>.

The difficulty in assessing chronological age is compounded by the fact that it is generally accepted that there is neither a single method nor a specific combination of methods for scientifically determining the exact age of an individual<sup>165</sup>. Member State practice varies regarding documentary and other types of evidence that are used for age assessments. By way of example, French law states that the assessment must be conducted using a multidisciplinary approach<sup>166</sup>. Similarly, Italy adopted Law 47/2017 on special provisions for the protection of unaccompanied children in April 2017. This legal framework clarifies that, as a rule, age assessments are to be conducted in appropriate conditions on the basis of a multidisciplinary approach by professionals who are adequately qualified and, where necessary, in the presence of a cultural mediator, using the least invasive means possible and

<sup>160</sup> See also CRC Committee, views adopted 31 May 2019, *A.L. v Spain*, communication no 16/2107, CRC/C/81/D/16/2017, para. 12.10; and CRC Committee, views adopted 31 May 2019, *J.A.B. v Spain*, communication no 22/2017, CRC/C/81/D/22/2017, paras 13.9 and 13.10.

<sup>161</sup> CRC Committee, General comment no 6, op. cit. (fn. 85 above), para. 31(a). See also UNHCR, *Guidelines on International Protection no 8: Child asylum claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08), para. 75: 'Age assessments ... need to be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the individual.'

<sup>162</sup> Higher Administrative Court of Bavaria (Bayerischer Verwaltungsgerichtshof, Germany), judgment of 5 April 2017, 12 BV 17.185.

<sup>163</sup> Court of Appeal (England and Wales, UK), judgment of 23 May 2019, *BF (Eritrea) v Secretary of State for the Home Department*, [2019] EWCA Civ 872, para. 65.

<sup>164</sup> See also, UN Children's Fund (UNICEF), *Age Assessment: A technical note*, January 2013; UNHCR, 'UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum' in case no CIK-1938/2014, Lithuanian Supreme Court, 1 June 2015; UNHCR, 'Submission by the Office of the United Nations High Commissioner for Refugees in the case of M.S. v Slovakia and Ukraine (Appl. No 17189/11) before the European Court of Human Rights', 1 June 2016.

<sup>165</sup> EASO, *Age Assessment Practice in Europe*, 2013, pp. 24–44.

<sup>166</sup> France, Loi no 2016-297 du 14 mars 2016 relative à la protection de l'enfant; France, Décret no 2016-840 du 24 juin 2016 relatif à l'accueil et aux conditions d'évaluation de la situation des mineurs privés temporairement ou définitivement de la protection de leur famille.

respecting the presumed age, sex, and physical and mental integrity of the person<sup>167</sup>. As an example of state practice, the Regional Court of Amsterdam allowed an appeal against an age assessment decision on the ground that the age inspection had not been carried out by experts on the matter<sup>168</sup>.

As age is not calculated in the same way or given the same degree of importance in all cultures or countries across the globe, caution needs to be exercised in making adverse inferences of credibility. Before an age assessment procedure is carried out, it is important that a representative be appointed to advise the person who claims to be a child<sup>169</sup>.

Where medical examinations are used, the standards set out in Article 25(5) APD (recast), second and subsequent paragraphs, apply.

#### **Article 25(5), second and subsequent subparagraphs, APD (recast) Guarantees for unaccompanied minors**

Any medical examination shall be performed with full respect for the individual's dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable result.

Where medical examinations are used, Member States shall ensure that:

- (a) unaccompanied minors are informed prior to the examination of their application for international protection, and in a language that they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination;
- (b) unaccompanied minors and/or their representatives consent to a medical examination being carried out to determine the age of the minors concerned; and
- (c) the decision to reject an application for international protection by an unaccompanied minor who refused to undergo a medical examination shall not be based solely on that refusal.

The fact that an unaccompanied minor has refused to undergo a medical examination shall not prevent the determining authority from taking a decision on the application for international protection.

<sup>167</sup> Italy, *Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati*, 6 May 2017. CRC Committee, 2019, *A.L. v Spain*, op. cit. (fn. 160 above), para. 12.4.

<sup>168</sup> Regional Court of Amsterdam, decision of 13 July 2016, 16/13578.

<sup>169</sup> See Article 25(1) and Article 25(5)(b) APD (recast) and also CRC Committee, views adopted 27 September 2018, *N.B.F. v Spain*, communication no 11/2017, CRC/C/79/D/11/2017, para. 12.8; CRC Committee, 2019, *A.L. v Spain*, op. cit. (fn. 160 above), para. 12.8; CRC Committee, 2019, *J.A.B. v Spain*, op. cit. (fn. 160 above), para. 13.7; and CRC Committee, views adopted 19 September 2019, *R.K. v Spain*, communication no 27/2017, CRC/C/82/D/27/2017, para. 9.8.

In terms of the types of medical evidence that can be used for age assessments, the only rule – resulting from the principle of proportionality – that can be drawn from the APD (recast) is that the examination shall provide, as far as possible, a reliable result.

There is some guidance from national case-law. For instance, the French Constitutional Council considered whether X-rays to examine bone maturity in age assessment procedures conformed with the French Constitution. The council upheld the legality of such tests for age assessment in spite of their approximative character (noting that this type of test may contain a significant margin of error), but also ruled that decisions on age assessment cannot solely rely on those tests<sup>170</sup>. The Higher Administrative Court of Hamburg has held that the use of X-rays is in line with the principle of proportionality if no other method has come to a reliable conclusion<sup>171</sup>. The use of dental X-rays has been an issue before UK courts and tribunals<sup>172</sup>. The UK Upper Tribunal noted that dental wear is not a guide to chronological age in the absence of data for a population with similar diet and masticatory habits to those of the person under examination. While dental assessments are an unreliable indicator for male applicants in their late teens, an analysis of dental maturity may assist in the process of assessing chronological age. Decision-makers should, however, beware of being misled into over-valuing statistical evidence, question the assumptions behind statistical calculations and bear in mind the risks of error<sup>173</sup>.

In *NBF v Spain*, the Committee on the Rights of the Child was critical of the use of X-rays based on the Greulich and Pyle atlas<sup>174</sup> to determine the age of a minor. It determined:

there is ample information in the file to suggest that this method lacks precision and has a wide margin of error, and is therefore not suitable for use as the sole method for determining the chronological age of a young person who claims to be a minor<sup>175</sup>.

At the request of the Norwegian Directorate of Immigration, a research group on age assessment at the Department of Forensic Medicine at Oslo University Hospital has developed a tool called BioAlder. Although still based on X-rays of the hand and teeth, this tool updates the work of Greulich and Pyle by using a mathematical model for prediction of the possible range of chronological age drawing from a collation of scientific studies<sup>176</sup>. BioAlder is, however, not to be used as the sole method for determining the chronological age of an applicant claiming to be a minor.

<sup>170</sup> Constitutional Council (Conseil constitutionnel, France), decision of 21 March 2019, *Décision no 2018-768 QPC du 21 mars 2019*. See also the earlier judgment, Court of Cassation, First Civil Chamber (Cour de cassation, première chambre civile, France), judgment of 3 October 2018, no 18-19.442, which emphasised that such tests have a margin of error and the test result should not prevail in the determination of age. See also Migration Court of Appeal (Sweden), judgment of 11 February 2014, *MIG 2014:1*, which concluded that an age assessment is only one type of evidence and that a cumulative assessment must be made.

<sup>171</sup> Higher Administrative Court of Hamburg (Hamburgisches Oberverwaltungsgericht, Germany), judgment of 9 February 2011, *4 Bs 9/11*.

<sup>172</sup> See, for example, three Upper Tribunal (Immigration and Asylum Chamber) (UK) judgments as follows: judgment of 14 September 2017, *R (AS /by his litigation friend Francesco Jeff) v Kent County Council (age assessment; dental evidence)*, [2017] UKUT 446; judgment of 29 June 2017, *R (FA) v Ealing London Borough Council*, JR/12123/2016; judgment of 11 November 2016, *R (ZM and SK) v Croydon London Borough Council (dental age assessment)*, [2016] UKUT 559 (IAC).

<sup>173</sup> Upper Tribunal (UK), 2016, *R (ZM and SK) v Croydon London Borough Council*, op. cit. (fn. 172 above). See also Upper Tribunal (UK), 2017, *R (AS) v Kent County Council (age assessment, dental evidence)*, op. cit. (fn. 172 above), which considered the utility of dental examination to assess age to be highly debateable.

<sup>174</sup> W.W. Greulich and S. Idell Pyle, *Radiographic atlas of skeletal development of the hand and wrist*, 2nd ed., Stanford University Press, 1959.

<sup>175</sup> CRC Committee, 2018, *N.B.F. v Spain*, op. cit. (fn. 169 above), para. 12.6. See also CRC Committee, 2019, *A.L. v Spain*, op. cit. (fn. 160 above), para. 12.6, similarly noting that ‘there is ample information in the file to suggest that this method lacks precision and has a wide margin of error, and is therefore not suitable for use as the sole method for determining the chronological age of a young person who claims to be a minor and who provides documentation attesting to his or her claim’.

<sup>176</sup> See Oslo University Hospital, Department of Forensic Medicine, Division of Laboratory Medicine, *Manual – BioAlder: A tool for using biological tests to assess the age of unaccompanied minor asylum-seekers*, version 1, 19 June 2017.

Article 25(5), first subparagraph, APD (recast) stipulates that if, after the use of medical examinations, ‘Member States are still in doubt concerning the applicant’s age, they shall assume that the applicant is a minor’.

There is national case-law on the application of the benefit of the doubt<sup>177</sup>, but there is no clear guidance on the standard of proof<sup>178</sup>. Nonetheless, the benefit of the doubt should be applied as broadly as possible in cases of persons claiming to be unaccompanied minors, as unaccompanied minors are less likely to have documentary evidence with them<sup>179</sup>.

UNHCR’s guidelines on international protection relating to child asylum claims also mention the centrality of the ‘benefit of the doubt’ principle in age assessment procedures, stating that the margin of appreciation inherent to these procedures ‘needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child’<sup>180</sup>.

It should be noted that Article 13(2) of the 2011 directive on preventing and combating trafficking in human beings and protecting victims (anti-trafficking directive) states that:

where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection [under that directive]<sup>181</sup>.

It has been held that, where such an initial decision is based on appearance and demeanour only, the authorities should as far as possible take into account the wide margin of error involved, and anyone claiming to be a child must be given the benefit of the doubt unless their claim is obviously false<sup>182</sup>.

<sup>177</sup> See, for example, Constitutional Council (France), 2019, no 2018-768 QPC, op. cit. (fn. 170 above); Administrative Court of Appeal of Douai (France), decision of 19 September 2017, no 17DA00024; Higher Administrative Court of Bavaria (Bayerischer Verwaltungsgerichtshof, Germany), judgment of 16 August 2016, 12 CS 16.1550 (English summary); Supreme Court (Aukščiausasis Teismas, Lithuania), judgment of 13 July 2015, *Q.N. and G.M. v The State of the Republic of Lithuania*, Civil case no e3K-3-412-690/2015, Judicial procedure no 2-68-3-39174-2013-9, upholding the judgment of the lower Court of Appeal, which had found, inter alia, that ‘the specialist’s conclusion [as to the appellants’ age] has left doubts regarding their majority; therefore, it had to be presumed that they were minors and they had to be provided with relevant guarantees’; Court of Appeal (England and Wales, UK), 2019, *BF (Eritrea) v Secretary of State for the Home Department*, op. cit. (fn. 163 above).

<sup>178</sup> See, for example, Upper Tribunal (UK), judgment of 18 June 2012, *Rawofi (age assessment) – standard of proof*, [2012] UKUT 00197, finding that where the age of an asylum seeker is disputed in an asylum appeal the burden of proof is on the appellant but the standard of proof must mirror that of all other evidence in the appeal. Therefore, the standard is that of a serious possibility, not a balance of probabilities.

<sup>179</sup> EASO, *Practical Guide on Age Assessment*, 2018, p. 22.

<sup>180</sup> UNHCR, *Guidelines on International Protection: 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*, op. cit. (fn. 161 above), paras 73 and 75.

<sup>181</sup> Anti-trafficking directive, op. cit. (fn. 120 above).

<sup>182</sup> Court of Appeal (England and Wales, UK), 2019, *BF (Eritrea) v Secretary of State for the Home Department*, op. cit. (fn. 163 above), paras 57 (Underhill LJ) and 100 (Baker LJ). See for example Underhill LJ at para. 57: ‘If it is legitimate for the Secretary of State to make an initial decision based on appearance and demeanour only, it is incumbent on him to ensure so far as possible that such decisions take fully into account the wide margin of error which such decisions will necessarily involve, so that only those young people whose claims to be under 18 are obviously false are detained: in other words, anyone claiming to be a child must be given the benefit of the doubt’.

## Part 4. Vulnerable applicants with special reception needs

This part is concerned with the treatment of vulnerable applicants under the RCD (recast). The identification and assessment of applicants with special reception needs are dealt with in Section 3.1. Although other directives may also be relevant, they are not discussed extensively in this part. A list of other relevant instruments can be found in Appendix B: Primary sources.

Part 4 is structured as set out in Table 14.

**Table 14: Structure of Part 4**

Section	Title	Page
<b>4.1</b>	Introduction	57
<b>4.2</b>	Coordinated response and provision of information	59
<b>4.3</b>	Minors	61
<b>4.4</b>	Victims of torture and violence	72
<b>4.5</b>	Material reception conditions and healthcare	74
<b>4.6</b>	Reduction or withdrawal of material reception conditions and sanctions	80
<b>4.7</b>	Appeals	83
<b>4.8</b>	Detention	84

### Other relevant EASO publications

EASO, *Guidance on Reception Conditions: Operational standards and indicators*, 2016.

EASO, *Guidance on Reception Conditions for Unaccompanied Children: Operational standards and indicators*, 2018.

EASO, *Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU) – Judicial Analysis*, 2020.

## 4.1. Introduction

Recital 14 RCD (recast) concerns ‘persons with special reception needs’:

### **Recital 14 RCD (recast)**

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

Chapter IV of the directive sets out provisions for vulnerable persons in Articles 21 to 25. Article 21 stipulates the general principle that Member States are required to take into account the ‘specific situation of vulnerable persons’:

### **Article 21 RCD (recast) General principle**

Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.

Article 22, read in conjunction with Article 21, provides the basis for the identification and assessment of the special needs of vulnerable persons. For further information on this, see Part 3. The remaining articles of Chapter IV concern the following:

- minors (Article 23)
- unaccompanied minors (Article 24)
- victims of torture and violence (Article 25).

In addition, Chapter II, setting out general provisions on reception conditions, and Chapter III, on reduction or withdrawal of material reception conditions, also contain specific provisions on vulnerable persons and applicants with special reception needs. These concern:

- detention of vulnerable persons and of applicants with special reception needs (Article 11);
- families (Article 12);
- schooling and education of minors (Article 14);
- material reception conditions and healthcare (Article 17, 18 and 19);
- reduction or withdrawal of material reception conditions (Article 20).

These provisions are all addressed in the sections that follow.

Under the RCD (recast), the reception needs of a person must be addressed as long as the person falls under the scope of Article 3 RCD (recast).

### Article 3(1) RCD (recast)

#### Scope

This Directive shall apply to all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law.

This provision must be read in conjunction with recital 8 and Article 17(1) RCD (recast)<sup>183</sup>.

### Recital 8 RCD (recast)

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

### Article 17(1) RCD (recast)

#### General rules on material reception conditions and health care

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

With regard to the requirement to ensure applicants have access to reception conditions ‘for as long as they are allowed to remain on the territory of the Member States as applicants’, in respect of the RCD, the CJEU ruled in *Saciri*:

It is apparent from the very terms of Article 13(1) of Directive 2003/9<sup>184</sup> that the material reception conditions must be available to asylum seekers, whether provided in kind or in the form of financial allowances, when they make their application for asylum<sup>185</sup>.

This was reiterated by the CJEU in *Haqbin* when it stated that, under Article 17(1) and (2) RCD (recast), ‘Member States must ensure that material reception conditions are available to applicants when they make their application for international protection’<sup>186</sup>.

The CJEU in *Cimade* stated that an applicant must not be deprived of their rights ‘even for a temporary period of time’.

In addition, further to the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter,

<sup>183</sup> See also Article 14(1) and 24(2) RCD (recast) and Section 4.5 below.

<sup>184</sup> Corresponding to Article 17(1) RCD (recast). See also recital 8 RCD (recast).

<sup>185</sup> CJEU, 2014, *Saciri*, op. cit. (fn. 131 above), para. 34.

<sup>186</sup> CJEU (GC), judgment of 12 November 2019, *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers*, C-233/18, EU:C:2019:956, para. 33.

Please see Section 3.1 above for more on when an application is made. See also EASO, *Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU) – Judicial Analysis*, 2020, Section 2.

under which human dignity must be respected and protected, the asylum seeker may not ... be deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive<sup>187</sup>.

It follows from Article 20(1)(c) RCD (recast), which allows the reduction or – in exceptional and duly justified cases – the withdrawal of material reception conditions where an applicant has lodged a subsequent application as defined in Article 2(q) APD (recast), that subsequent applications fall within the scope of the RCD (recast). When the CJEU stated, in *Cimade*<sup>188</sup>, that the personal scope of the RCD encompassed ‘any asylum seeker who has lodged an application for the first time’ when a ‘final decision has not yet been taken’, the reasoning was focused on the Dublin context. The judgment also focused on ensuring that the obligation of a Member State to grant material reception conditions does not cease before the applicant is actually transferred and thus the obligations of the receiving Member State become effective<sup>189</sup>.

## 4.2. Coordinated response and provision of information

Access to information on benefits and obligations relating to reception conditions is particularly crucial for vulnerable persons. Recitals 21 and 27 RCD (recast) along with Article 5 are particularly relevant.

### Recitals 21 and 27 RCD (recast)

In order to ensure compliance with the procedural guarantees consisting in the opportunity to contact organisations or groups of persons that provide legal assistance, information should be provided on such organisations and groups of persons.

Appropriate coordination should be encouraged between the competent authorities as regards the reception of applicants, and harmonious relationships between local communities and accommodation centres should therefore be promoted.

<sup>187</sup> CJEU, 2012, *Cimade*, op. cit. (fn. 124 above), para. 56.

<sup>188</sup> Ibid., paras 52 and 54.

<sup>189</sup> EASO, *Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU) – Judicial Analysis*, 2020, Part 7.

## Article 5 RCD (recast) Information

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

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

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

The use of ‘at least’ in the first sentence of Article 5(1) RCD (recast) demonstrates that information provided with regard to reception-related benefits may also address additional benefits. This may be relevant for applicants with special reception needs who may require information on very specific services and assistance, such as organisations providing reception assistance for minors, support for applicants with disabilities, victim support (such as safe housing) or specified healthcare assistance, as well as legal assistance<sup>190</sup>.

Article 5 RCD (recast) should also be read in conjunction with Article 18(2)(b) and (c) RCD (recast) concerning an applicant’s right to communicate with ‘relatives, legal advisers or counsellors, persons representing UNHCR and other relevant ... organisations and bodies’ and the right of ‘family members, legal advisers or counsellors, persons representing UNHCR and relevant non-governmental organisations [to have] access in order to assist the applicants’ respectively.

Article 5(1) RCD (recast), second sentence, does not distinguish between state and non-state organisations or institutions. Moreover, Article 5 RCD (recast) does not lay down any specific requirements for the mandate of an organisation. Rather, the requirement is that it be an organisation ‘that **might** be able to help or inform’<sup>191</sup>.

Article 5 RCD (recast) acknowledges that persons with specific reception needs may encounter obstacles when trying to access information, e.g. due to age, illiteracy or language barriers. Article 5(2) RCD (recast) requires that information provided be ‘in writing and in a language that the applicant understands or is reasonably supposed to understand. Where appropriate, this information may also be supplied orally’<sup>192</sup>.

<sup>190</sup> See also Article 25 RCD (recast).

<sup>191</sup> Emphasis added. See also recitals 21 and 27 RCD (recast), quoted above, on upholding coordinated response between authorities and on promoting ‘harmonious relationships between local communities and accommodation centres’.

<sup>192</sup> See, *mutatis mutandis*, ECtHR, judgment of 25 January 2018, *J.R. et autres c Grèce*, no 22696/16, paras 102, 122, 123; ECtHR, judgment of 15 March 2018, *A.E.A. c Grèce*, no 39034/12, para. 71; ECtHR, judgment of 21 March 2019, *O.S.A. et autres c Grèce*, no 39065/16, paras 46–58, dealing with the court’s examination of an information leaflet; and ECtHR, judgment of 3 October 2019, *Kaak et autres c Grèce*, no 34215/16, dealing with the ability to understand the information brochure and the various appeal possibilities available under domestic law.

Article 25(2) RCD (recast) requires that ‘Those working with victims of torture, rape or other serious acts of violence shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law’. The same applies to those working with unaccompanied minors (Article 24(4) RCD (recast)), and those working in accommodation centres (Article 18(7) RCD (recast)).

### 4.3. Minors

A ‘minor’ is defined by Article 2(d) RCD (recast) as ‘a third-country national or stateless person below the age of 18 years’. Article 21 RCD (recast) explicitly recognises minors as vulnerable persons, and Member States must accordingly take into account the specific situation of minors when implementing the RCD (recast)<sup>193</sup>.

According to recital 9, in applying the RCD (recast), Member States should seek to ensure full compliance with, *inter alia*, the principle of the best interests of the child in accordance with the EU Charter, the CRC and the ECHR<sup>194</sup>. According to Article 23(1) RCD (recast), ‘The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors.’ Article 23(2) RCD (recast) provides a non-exhaustive list of factors to be considered when assessing the best interests of the child:

#### **Article 23(2) RCD (recast)**

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

- (a) family reunification possibilities;
- (b) the minor’s well-being and social development, taking into particular consideration the minor’s background;
- (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
- (d) the views of the minor in accordance with his or her age and maturity.

Article 23 thereby seeks to ensure respect for Article 24 EU Charter, on the rights of the child<sup>195</sup>, and the CRC<sup>196</sup>.

The RCD (recast) contains specific provisions on minors, which are addressed in the sections that follow. However, as minors in accordance with Article 21 are vulnerable persons, provisions relating to vulnerable persons, in general, also apply to minors. In this regard, see

<sup>193</sup> See Part 3 for further information on the identification of minors and the obligation to assess the nature of their reception needs.

<sup>194</sup> Recital 9 is quoted in Section 4.3.4. For further information on the best interests of the child, see Section 2.4.

<sup>195</sup> Article 24 EU Charter is quoted in Section 2.4.

<sup>196</sup> According to the CRC Committee, General Comment no 14, op. cit. (fn. 88 above), the principle of the child’s best interests is ‘aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child’ (Section I.A, fourth para.). According to the CRC Committee, General Comment no 5 on measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), 27 November 2003, CRC/GC/2003/5, ‘The Committee expects States to interpret “development” as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development’ (Section I, fifteenth para.). See also CRC Committee, General comment no 12 (2009): the right of the child to be heard, 20 July 2009, CRC/C/GC/12.

Section 4.5 on material reception conditions and healthcare. With regard to the reduction or withdrawal of material reception conditions and sanctions in the case of a minor, see Section 4.6. For the issue of the detention of minors and unaccompanied minors, see Sections 4.8.3 and 4.8.4.

### 4.3.1. Adequate standard of living for minors

Article 17(2) RCD (recast) sets out a general requirement that Member States must ensure that ‘material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health’. Furthermore, Article 17(2), second subparagraph, RCD (recast) requires Member States to ‘ensure that that standard of living is met in the specific situation of vulnerable persons’<sup>197</sup>. This means that Member States must ensure that vulnerable applicants, including minors, benefit from an adequate standard of living taking into account their specific situation.

On minors specifically, Article 23(1) RCD (recast), second sentence, also requires Member States to ‘ensure a standard of living adequate for the minor’s physical, mental, spiritual, moral and social development’. In assessing the best interests of the child, under Article 23(2)(b) (cited in Section 4.3 above), Member States are also required to take due account of ‘the minor’s well-being and social development, taking into particular consideration the minor’s background’<sup>198</sup>.

### 4.3.2. Housing and leisure activities

In accordance with recital 22 RCD (recast), when deciding on housing arrangements, ‘Member States should take due account of the best interests of the child, as well as of the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State’. As regards the best interests of the child, Member States must, in particular, take due account of the factors set out in Article 23(2) RCD (recast). Pursuant to Article 23(5) RCD (recast):

#### Article 23(5) RCD (recast)

Member States shall ensure that minor children of applicants or applicants who are minors are lodged with their parents, their unmarried minor siblings or with the adult responsible for them whether by law or by the practice of the Member State concerned, provided it is in the best interests of the minors concerned<sup>199</sup>.

<sup>197</sup> This is emphasised by CJEU (GC), 2019, *Hagbin*, op. cit. (fn. 186 above), para. 34.

<sup>198</sup> This provision echoes the requirement under Article 20(3) CRC, for States Parties considering care arrangements for unaccompanied minors, to have ‘due regard ... to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background’. For more on the best interests of the child see Section 2.4.

<sup>199</sup> See also Section 4.3.4.

Article 12 RCD (recast) provides:

### **Article 12 RCD (recast) Families**

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

Member States must ensure that, where housing is provided in kind to minors, the housing is appropriate for their age and gender. In accordance with Article 18(3) RCD (recast), 'Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres' referred to in Article 18(1)(a) and (b)<sup>200</sup>.

Article 18(3) should be read in conjunction with Article 23(3) RCD (recast) concerning access to leisure activities, which reads:

### **Article 23(3) RCD (recast)**

Member States shall ensure that minors have access to leisure activities, including play and recreational activities appropriate to their age within the premises and accommodation centres referred to in Article 18(1)(a) and (b) and to open-air activities.

For the issue of the detention of minors, see Section 4.8.3.

### **4.3.3. Schooling and education of minors**

Article 14 RCD (recast) sets out provisions on the schooling and education of minors.

### **Article 14(1) RCD (recast)**

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

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

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

<sup>200</sup> See Section 4.5.2 on accommodation, where these articles are cited.

Article 14(2) concerns access to the education system. Article 14(3) regulates circumstances in which access is not possible owing to the specific situation of the minor<sup>201</sup>.

#### 4.3.4. Ensuring family unity

Application of the RCD (recast) must be in line with Article 24(2) and (3) of the EU Charter, which concern the child's best interests and their 'right to maintain on a regular basis a personal relationship and direct contact with both his or her parents', as quoted in full in Section 2.4 above.

Recital 9 RCD (recast) states:

##### **Recital 9 RCD (recast)**

In applying this Directive, Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity, in accordance with the [EU Charter], the [CRC] and the [ECHR] respectively.

Pursuant to the principle of family unity under the EU Charter, the RCD (recast) contains a number of provisions that aim to ensure, as far as possible, family unity<sup>202</sup>.

##### **Article 12 RCD (recast)**

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

##### **Article 18(2) RCD (recast)**

Without prejudice to any specific conditions of detention as provided for in Articles 10 and 11, in relation to housing referred to in paragraph 1(a), (b) and (c) of this Article Member States shall ensure that:

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

<sup>201</sup> See EASO, *Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU) – Judicial Analysis*, 2020, Section 5.2 on education and schooling.

<sup>202</sup> See also Article 2(c) RCD (recast), which defines 'family members'.

### Article 23 RCD (recast)

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

(a) Family reunification possibilities<sup>203</sup>;

[...]

5. Member States shall ensure that minor children of applicants or applicants who are minors are lodged with their parents, their unmarried minor siblings or with the adult responsible for them whether by law or by the practice of the Member State concerned, provided it is in the best interests of the minors concerned<sup>204</sup>.

Where Member States provide material reception conditions in the form of financial allowances, the CJEU in its *Saciri* judgment stated with regard to the RCD that:

the Member States are required to adjust the reception conditions to the situation of persons having specific needs ... Accordingly, the financial allowances must be sufficient to preserve family unity and the best interests of the child which ... are to be a primary consideration<sup>205</sup>.

It added that ‘those allowances must enable, if necessary, minor children of asylum seekers to be housed with their parents, so that the family unity ... is maintained’<sup>206</sup>.

#### 4.3.5. Rehabilitation services for minors

### Article 23(4) RCD (recast)

Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed.

The group of minor applicants who are entitled to rehabilitation, mental healthcare and counselling under Article 23(4) RCD (recast) is broader than the group of persons falling under Article 25(1) RCD (recast) concerning victims of torture and violence.

<sup>203</sup> See Section 4.3.6.3 on tracing of family members.

<sup>204</sup> See also RCD (recast), recital 9 and Articles 12 and 18(2)(a).

<sup>205</sup> CJEU, 2014, *Saciri*, op. cit. (fn. 131 above), para. 41.

<sup>206</sup> Ibid., para. 45. For more on material reception conditions, see Section 4.5.

Of particular relevance in this context is the fact that minor applicants ‘who have suffered from armed conflicts’ are also entitled to rehabilitation services, mental healthcare and counselling<sup>207</sup>, without further defining the meaning of ‘have suffered from armed conflicts’.

See also Section 4.4 for more on victims of torture, rape and other serious acts of violence.

### 4.3.6. Unaccompanied minors

The RCD (recast) sets out specific guarantees for unaccompanied minors, who are defined in Article 2(e) as follows:

**Article 2(e) RCD (recast)**  
**Definitions**

‘unaccompanied minor’: means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States;

Two groups of minors are thus included. The first concerns minors who **arrive** on the territory of the Member State **unaccompanied by an adult responsible for them**. A minor is to be considered unaccompanied ‘as long as he or she is not effectively taken into the care of such a person’.

The second group is minors who are **left unaccompanied after their arrival** in the Member State.

As the definition of an unaccompanied minor is subject to Member State law or practice concerning who may be considered an ‘adult responsible’ for the minor, it is not clear if minors may be considered ‘unaccompanied’ when an adult relative, other than a parent, is present in the Member State. This would appear possible, as Article 24(2)(a) RCD (recast) states that ‘Unaccompanied minors who make an application for international protection shall, from the moment they are admitted to the territory until the moment when they are obliged to leave the Member State in which the application for international protection was made or is being examined, be placed: (a) with adult relatives’ (among other options)<sup>208</sup>.

As outlined in greater detail in the sections below, Article 24 RCD (recast) sets out specific guarantees, which apply to unaccompanied minors in the context of:

- the appointment of a representative;
- provision of accommodation;
- tracing of family members; and
- training of personnel dealing with unaccompanied minors.

<sup>207</sup> See CRC Committee, *General comment no 12*, op. cit. (fn. 196 above), para. 124: ‘Particular assistance may be needed for children formerly involved in armed conflict to allow them to pronounce their needs.’

<sup>208</sup> CRC Committee, *General comment no 6*, op. cit. (fn. 85 above), para. 8, defines separated children as children ‘who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.’

#### 4.3.6.1. Appointing a representative for an unaccompanied minor

Article 24(1) RCD (recast) sets out requirements regarding the appointment of a representative for an unaccompanied minor and the performance of the representative:

##### **Article 24(1) RCD (recast)**

Member States shall as soon as possible take measures to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of the representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child, as prescribed in Article 23(2), and shall have the necessary expertise to that end. In order to ensure the minor's well-being and social development referred to in Article 23(2)(b), the person acting as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives.

Regular assessments shall be made by the appropriate authorities, including as regards the availability of the necessary means for representing the unaccompanied minor.

Article 2(j) RCD (recast) defines a representative:

##### **Article 2(j) RCD (recast)**

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

Under Articles 2(j) and 24(1) RCD (recast), a representative represents and assists the unaccompanied minor with regard to rights and obligations under the RCD (recast) only. However, pursuant to Article 25(1)(a) APD (recast), which provides for the appointment of a representative to represent and assist unaccompanied minors with regard to rights and obligations under the APD (recast), that representative may also be the representative referred to in the RCD (recast)<sup>209</sup>. Where a Member State appoints one representative under both directives, that representative will represent and assist the unaccompanied minor with regard to both reception conditions and procedures for the substantiation and examination of the application for international protection.

Neither of the directives uses the term 'guardian', but a guardian according to the national law in question can be a representative within the meaning of Article 24(1) RCD (recast) (and

<sup>209</sup> APD (recast), Article 25(1)(a), last sentence: 'The representative may also be the representative referred to in Directive 2013/33/EU.'

Article 25(1)(a) APD (recast))<sup>210</sup>. Article 31(1) QD (recast) uses the term ‘legal guardian’ to refer to the person who represents the unaccompanied minor.

With regard to the appointment of a representative, Article 24(1) RCD (recast) requires that measures shall be taken ‘as soon as possible’. Since the directive does not specify the nature of such measures or how a representative should be appointed, different approaches may be adopted. The phrase ‘as soon as possible’ should be informed by the purpose of the appointment of a representative: to represent and assist the unaccompanied minor to benefit from the rights and comply with the obligations under the RCD (recast). In accordance with Article 3 RCD (recast), the rights and obligations under the directive apply once an application is made. Therefore, a representative should be appointed as soon as possible after the application is made. As an application is ‘made’ before it is registered and lodged, the appointment of a representative may be necessary before an application is registered and lodged<sup>211</sup>. Following the appointment of a representative, the unaccompanied minor must ‘immediately’ be informed of the representative’s appointment.

According to the CRC Committee’s General comment no 6:

States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State<sup>212</sup>.

According to Article 24(1) RCD (recast), the representative must perform their duties in accordance with the principle of the best interests of the child. According to General comment no 6 of the CRC Committee, review mechanisms must ‘monitor the quality of the exercise of guardianship in order to ensure the best interests of the child are being represented throughout the decision-making process and, in particular, to prevent abuse’<sup>213</sup>.

Article 24(1) RCD (recast) moreover provides that the person acting as representative is to be changed only when necessary. If it can be concluded that the representative or guardian is acting contrary to the child’s best interests, that person may be changed.

In this regard, FRA states that ‘Temporary guardians appointed as part of preliminary measures for a child’s protection, should, when possible, also be assigned as “permanent” guardians’<sup>214</sup>.

<sup>210</sup> CRC Committee, *General comment no 6*, op. cit. (fn. 85 above), para. 36: ‘In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.’

<sup>211</sup> See Sections 3.1 and 3.2 for further information on when an application is made under the APD (recast). Some children may require a representative before referral to asylum procedures. See CRC Committee, *General comment no 6*, op. cit. (fn. 85 above), para. 21: ‘Subsequent steps such as the appointment of a competent guardian as expeditiously as possible serves [sic] as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child and, therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian’; and CRC Committee, *General comment no 12*, op. cit. (fn. 196 above), para. 124: ‘A guardian or adviser should be appointed, free of charge’.

<sup>212</sup> CRC Committee, *General Comment no 6*, op. cit. (fn. 85 above), para. 33. Para. 34 states that, in the case of separated minors, ‘guardianship should regularly be assigned to the accompanying adult family member or non-primary caretaker’, if this is in the best interests of the minor, whereas ‘In cases where a child is accompanied by a non-family adult or caretaker, suitability for guardianship must be scrutinized more closely.’ See also CRC Committee, views adopted 18 September 2019, *M.T. v Spain*, communication no 17/2017, CRC/C/82/D/17/2017, para. 13.8: ‘the fact that the author was not assigned a guardian to enable him to apply for asylum as a minor, even though he had official documents proving that he was a minor, deprived him of the special protection that should be afforded to unaccompanied minor asylum seekers and put him at risk of irreparable harm in the event of return to his country of origin, in violation of articles 20 (1) and 22 of the Convention’.

<sup>213</sup> CRC Committee, *General Comment no 6*, op. cit. (fn. 85 above), para. 35.

<sup>214</sup> Fundamental Rights Agency (FRA), *Guardianship for Children Deprived of Parental Care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, 2014, p. 64.

FRA also states:

If the child has complained of misconduct by the guardian, changing the guardian should be considered as an option. A change should be provided for explicitly in law, and take place immediately, if the guardian is under investigation for severe violations of child's rights, e.g. abuse or inappropriate behaviour<sup>215</sup>.

#### **4.3.6.2. Accommodation for unaccompanied minors**

Recital 22 and Article 24(2) RCD (recast) contain key provisions relevant to the accommodation of unaccompanied minors:

##### **Recital 22 RCD (recast)**

When deciding on housing arrangements, Member States should take due account of the best interests of the child, as well as of the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State.

##### **Article 24(2) RCD (recast)**

2. Unaccompanied minors who make an application for international protection shall, from the moment they are admitted to the territory until the moment when they are obliged to leave the Member State in which the application for international protection was made or is being examined, be placed:

- (a) with adult relatives;
- (b) with a foster family;
- (c) in accommodation centres with special provisions for minors;
- (d) in other accommodation suitable for minors.

Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult applicants, if it is in their best interests, as prescribed in Article 23(2).

As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

The Member State's obligation to provide accommodation to unaccompanied minors in conformity with the requirements of Article 24(2) thus applies 'from the moment they are admitted to the territory'. This underlines the urgency of ensuring such accommodation is provided in a timely manner. The article must be read in conjunction with Article 23(1) RCD

<sup>215</sup> FRA, *Guardianship for Children Deprived of Parental Care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, 2014, op. cit. (fn. 214 above), p. 64.

(recast), requiring Member States to ensure respect for the principle of the best interests of the child and ‘a standard of living adequate for the minor’s physical, mental, spiritual, moral and social development’<sup>216</sup>.

The nature of accommodation for unaccompanied minors according to Article 24(2) (c) and (d) RCD (recast) allows for a margin of interpretation, due to the references to ‘accommodation suitable for minors’ and ‘with special provisions for minors’, which are not further clarified. According to Article 20 CRC, ‘A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.’ The CRC Committee’s General comment no 6 provides further interpretative guidance on ‘special protection and assistance’ and on alternative care for such children in accordance with Article 22 CRC<sup>217</sup>. It states that, when selecting from the options for care and accommodation arrangements under Article 20(3) CRC:

the particular vulnerabilities of such a child, not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as well as the child’s age and gender, should be taken into account. In particular, due regard ought to be taken of the desirability of continuity in a child’s upbringing and to the ethnic, religious, cultural and linguistic background<sup>218</sup>.

In addition, it sets parameters for care and accommodation arrangements, which inform the child-specific guarantees laid down in the RCD (recast) and are reflected in the guarantees for (unaccompanied) minors laid down in the RCD (recast).

Article 24(2) RCD (recast) explicitly states that only unaccompanied minors aged 16 years or over may be placed in accommodation centres for adults, on condition that this is in their best interests, as defined in Article 23(1) RCD (recast)<sup>219</sup>. Article 18(3) RCD (recast) is also relevant. It states: ‘Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b):’

In addition to the guarantees to be ensured for all applicants (Article 18(2)–(7) RCD (recast)) and the additional guarantees for minors (Article 23(2)–(5) RCD (recast)), the directive lays down guarantees addressing the needs of unaccompanied minors. In particular, persons working with unaccompanied minors ‘shall have had and shall continue to receive appropriate training concerning their needs’ (Article 24(4) RCD (recast)<sup>220</sup>. In assessing the best interests of the child with regard to accommodation, pursuant to Article 23(2)(d) RCD (recast), Member States must, *inter alia*, take due account of ‘the views of the minor in accordance with his or her age and maturity’<sup>221</sup>.

As all Member States are bound by the ECHR, a failure to provide adequate living conditions may amount to a breach of obligations under the ECHR. The ECtHR has ruled that the failure

<sup>216</sup> See also Section 4.3.1 on adequate standard of living for minors. Article 20(3) CRC similarly requires care arrangements for unaccompanied minors to have ‘due regard ... to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background’.

<sup>217</sup> CRC Committee, *General Comment no 6*, op. cit. (fn. 85 above), para. 39.

<sup>218</sup> *Ibid.*, para. 40.

<sup>219</sup> See also RCD (recast), recital 22.

<sup>220</sup> See also RCD (recast), Articles 18(7), ‘Persons working in accommodation centres shall be adequately trained’, and 29(1); CRC Committee, *General Comment no 6*, op. cit. (fn. 85 above), para. 40.

<sup>221</sup> See also CRC Committee, *General Comment no 6*, op. cit. (fn. 85 above), para. 40: ‘Children must be kept informed of the care arrangements being made for them, and their opinions must be taken into consideration.’

by the French authorities to provide care for an unaccompanied minor asylum applicant in the Calais refugee camp breached Article 3 ECHR. In its judgment, the court held, *inter alia*, that the ‘shantytown’ precarious living conditions of the Calais camp, in combination with the failure of the French authorities to enforce a court order requiring that the applicant be placed in the state’s child welfare system, amounted to a violation of the state’s obligations in respect of Article 3<sup>222</sup>. In the case of *EI and Others v Greece*, the ECtHR issued a Rule 39 decision and ruled that Greece was required ‘to a) guarantee for the applicants an accommodation with reception conditions which are compatible with Article 3 of the Convention and the applicants’ health state, and b) ensure the applicants’ medical treatment in accordance with the requirements of their physical and mental health’<sup>223</sup>.

At the time of the drafting of this judicial analysis, several complaints dealing with accommodation conditions in cases of applicants for international protection claiming to be unaccompanied minors were pending at the ECtHR<sup>224</sup>.

#### 4.3.6.3. Tracing of family members

As addressed in Section 4.3.4, according to recital 9 RCD (recast), Member States should seek to ensure full compliance with the principles of the best interests of the child and family unity. In assessing the best interests of the child, pursuant to Article 23(2)(a) RCD (recast), ‘Member States shall in particular take due account of ... family reunification possibilities’, *inter alia*. The tracing of an unaccompanied minor’s family members is essential for Member States to be able to fulfil their obligations in accordance with the principles of family unity and the best interests of the child.

##### Article 24(3) RCD (recast)

Member States shall start tracing the members of the unaccompanied minor’s family, where necessary with the assistance of international or other relevant organisations, as soon as possible after an application for international protection is made, whilst protecting his or her best interests. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.

The results of family tracing may be useful when determining the child’s best interests<sup>225</sup>.

<sup>222</sup> ECtHR, judgment of 28 February 2019, *Khan v France*, no 12267/16, paras 76–95. See also ECtHR, judgment of 13 June 2019, *Sh.D. et autres c Grèce et autres*, no 14165/16.

<sup>223</sup> ECtHR, decision on interim measure of 16 April 2020, *E.I. and Others v Greece*, no 16080/20. The application was made in the context of the COVID-19 pandemic and the situation on the Greek islands.

<sup>224</sup> ECtHR, statement of facts, communicated on 11 January 2018, *Bodiang v Italy*, no 47523/17 (related to possible violations of Articles 3, 8 and 13 ECHR); ECtHR, statement of facts, communicated on 2 February 2017, *Sadio et autres c Italie*, no 3571/17 (related to possible violations of Articles 3 and 8 ECHR); ECtHR, statement of facts, communicated on 11 January 2018, *Diakité v Italy*, no 44646/17 (related to Articles 3, 5 and 8 ECHR as well as Article 2 of Protocol no 1 (right to education)); ECtHR, statement of facts, communicated on 5 July 2017, *Bacary v Italy*, no 36986/17. See also UN Human Rights Committee (HRC), views adopted 7 November 2017, *O.A. v Denmark*, communication no 2770/2016, CCPR/C/121/D/2770/2016.

<sup>225</sup> See Article 22(2) CRC, which stipulates: ‘States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family’; and CRC Committee, *General comment no 12*, op. cit. (fn. 196 above), para. 124: ‘Asylum-seeking children may also need effective family tracing and relevant information about the situation in their country of origin to determine their best interests.’

Unaccompanied minors should be provided with all relevant information concerning family tracing in order to allow for their well-informed expression of views and wishes<sup>226</sup>. Such information must be provided in a manner that is appropriate to the maturity and level of understanding of each child<sup>227</sup>.

Where possible and if in the child's best interests, Member States should reunify unaccompanied minors with their families as soon as possible<sup>228</sup>. When assessing the evidence to prove the family links or the lack of them, authorities may find guidance in the following:

- European Commission, *Commission communication – Guidance for application of Directive 2003/86/EC on the right to family reunification*, Brussels, 2014,
- EASO, *Practical Guide on Family Tracing*, 2016.

## 4.4. Victims of torture and violence

According to Article 21 RCD (recast), persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, are vulnerable persons. Article 25 RCD (recast) sets out specific guarantees for victims of torture and violence.

### Article 25(1) RCD (recast)

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.

The list of persons covered by Article 25(1) RCD (recast) is not exhaustive, as it refers not only to torture and rape but also to 'other serious acts of violence'<sup>229</sup>. Article 25(1) RCD (recast) is not limited to serious forms of violence that occurred in countries of origin or transit but also applies where applicants become victims of serious acts of violence in the Member State.

The requirement under Article 25(1) RCD (recast) to ensure that victims receive 'the necessary treatment for the damage caused by such acts' implies that there must be a causal link between the serious acts of violence an applicant has endured and the treatment. In addition, such treatment must be necessary, indicating that not every available treatment may be considered necessary, thereby leaving a margin of discretion. It is also important to note Article 25(2) RCD (recast), which reads:

<sup>226</sup> Article 23(2)(d) RCD (recast); and CRC Committee, *General comment no 6*, op. cit. (fn. 85 above), para. 25.

<sup>227</sup> CRC Committee, *General comment no 6*, op. cit. (fn. 85 above), para. 25.

<sup>228</sup> Ibid., paras 13 and 80; Article 22(2) CRC; *EASO Practical Guide on Family Tracing*, 2016, p. 12.

<sup>229</sup> According to the Committee against Torture, *General Comment no 3: Implementation of Article 14 by States Parties*, 13 December 2012, CAT/C/GC/3, para. 3, victims of torture include 'affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization'.

## Article 25(2) RCD (recast)

Those working with victims of torture, rape or other serious acts of violence shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.

Examples of binding legal instruments to protect the rights of victims of violence are provided in Table 15.

**Table 15: Legal instruments protecting the rights of victims of violence**

Organisation	Instrument
EU	<ul style="list-style-type: none"> <li>Anti-trafficking directive</li> <li>Victims of crime directive <sup>230</sup></li> </ul>
Council of Europe	<ul style="list-style-type: none"> <li>Convention on Action against Trafficking in Human Beings <sup>231</sup></li> <li>Istanbul convention</li> </ul>
UN	<ul style="list-style-type: none"> <li>CAT <sup>232</sup></li> <li>CRPD <sup>233</sup></li> <li>Palermo Protocol <sup>234</sup></li> </ul>

With regard to the CAT, Article 14(1) requires States Parties to provide redress and ‘an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible’. The Committee against Torture (CAT Committee) has defined rehabilitation as including ‘medical and psychological care as well as legal and social services’. It has also stated that specialist services must be ‘available, appropriate and promptly accessible’ and must take ‘into account victims [sic] culture, personality, history and background’. Rehabilitation must be ‘accessible to all victims without discrimination and regardless of a victim’s identity or status within a marginalised or vulnerable group ... including asylum seekers and refugees’ <sup>235</sup>.

<sup>230</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>231</sup> See also Council of Europe, Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings, 2005, paras 22 and 29–36.

<sup>232</sup> UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entered into force: 26 June 1987).

<sup>233</sup> Article 26 CRPD requires States Parties to ‘organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes’ for persons with disabilities. Article 15 is on freedom from torture or cruel, inhuman or degrading treatment or punishment; Article 16 on freedom from exploitation, violence and abuse; and Article 17 on protecting the integrity of the person.

<sup>234</sup> United Nations General Assembly, Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), 2237 UNTS 319, 15 November 2000 (entry into force: 25 December 2003).

<sup>235</sup> CAT Committee, General Comment no 3, op. cit. (fn. 229 above), paras 11–15. See also CAT Committee, views adopted 6 December 2018, *Adam Harun v Switzerland*, communication no 758/2016, CAT/C/65/D/758/2016, concerning a victim of torture requiring medical treatment who faced transfer under the Dublin III regulation to Italy. The committee determined that any such transfer required the authorities to ‘undertake an individualized assessment of the personal and real risk’ to the person concerned that took ‘due account of his particular vulnerability as a victim of torture and an asylum seeker’ (para. 9.9). See also CAT Committee, views adopted 3 August 2018, *A.N. v Switzerland*, communication no 742/2016, CAT/C/64/D/742/2016, paras 8.6–8.8; CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above).

## 4.5. Material reception conditions and healthcare

Article 17 RCD (recast) sets out ‘general rules on material reception conditions and healthcare’. Article 2(g) defines ‘material reception conditions’ as ‘reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance’<sup>236</sup>. Under Article 17(1) RCD (recast), Member States must ensure that material reception conditions are ‘available to applicants when they make their application for international protection’.

On the facts of a case that came before the Irish High Court, the applicants, a single mother with a history of mental health issues and her dependent daughter, made international protection applications on 17 September 2018. The Irish authorities did not, however, provide them with accommodation until 15 October 2018. In the circumstances, the Irish High Court held that, between the making of the application and the issuance of the decision in respect of accommodation, the Minister for Justice and Equality was in breach of Article 17(1) of the directive<sup>237</sup>.

Article 17(2) RCD (recast) sets out Member States’ obligations with special reference to vulnerable persons:

### Article 17(2) RCD (recast)

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

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

<sup>236</sup> The Administrative Court of the Republic of Slovenia has reiterated that, according to the CJEU’s *Cimade* judgment, receiving ‘a daily expense allowance’ is an element of the right to material reception conditions in addition to accommodation, food, hygiene and clothing. See Administrative Court (Republic of Slovenia), judgment of 17 January 2013, I U 1921/2012-5, English summary, para. 27.

<sup>237</sup> High Court (Ireland), judgment of 5 March 2019, *X and Y v The Minister for Justice and Equality*, [2019] IEHC 133. See also High Court (Ireland), judgment of 3 April 2019, *X and Y (a minor) v Minister for Justice and Equality (No 2)*, [2019] IEHC 226.

In addition to Member States' obligation to provide an 'adequate' standard of living pursuant to Article 17(2) RCD (recast), various provisions of the RCD (recast) refer to the requirement to ensure a 'dignified' standard of living:

#### **Recital 11 RCD (recast)**

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

#### **Recital 25 RCD (recast)**

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

#### **Recital 35 RCD (recast)**

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

The link between 'adequate standard of living' and 'dignified standard of living' remains unclear. This is particularly so in the light of Article 20(5) RCD (recast), which makes a decision to reduce or withdraw material reception conditions, guaranteeing an 'adequate' standard of living, subject to the condition that Member States must ensure a dignified standard of living for all applicants<sup>238</sup>.

The CJEU in *Saciri* ruled that 'allowances must, however, be sufficient to meet the basic needs of asylum seekers, including a dignified standard of living'<sup>239</sup>. The CJEU elaborated in *Haqbin* on the content of a 'dignified standard of living' and stated:

With regard specifically to the requirement to ensure a dignified standard of living, it is apparent from recital 35 of [the RCD (recast)] that the directive seeks to ensure full respect for human dignity and to promote the application, *inter alia*, of Article 1 of the Charter of Fundamental Rights and has to be implemented accordingly. In that regard, respect for human dignity within the meaning of that article requires the person concerned not finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity<sup>240</sup>.

<sup>238</sup> See further EASO, *Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU) – Judicial Analysis*, 2020, Section 3.1 on an adequate and dignified standard of living.

<sup>239</sup> CJEU, 2014, *Saciri*, op. cit. (fn. 131 above), para. 48. See also Federal Constitutional Court (Bundesverfassungsgericht, Germany), judgment of 18 July 2012, 1 BvL 10/10 (English translation). This judgment relates primarily to the guarantee of a fundamental right to a dignified minimum existence under the Basic Law (constitution), but international standards including the RCD are also referred to.

<sup>240</sup> CJEU (GC), 2019, *Haqbin*, op. cit. (fn. 186 above), para. 46.

In the case of vulnerable persons, additional measures may be required to ensure an adequate standard of living. For example, a severely physically disabled applicant will have specific accommodation needs, and a survivor of torture who is a single parent with young children will have particular subsistence needs. This is why Article 17(2), second subparagraph, RCD (recast) underlines that Member States must ensure that an adequate standard of living is met in the specific situation of vulnerable persons, which means that the Member States must not only provide for the availability of material reception conditions but also ensure that vulnerable persons benefit from those reception conditions in practice.

In relation to Article 17 RCD, in *Saciri*, the court held:

Member States are required to adjust the reception conditions to the situation of persons having specific needs ... Accordingly, the financial allowances must be sufficient to preserve family unity and the best interests of the child which, pursuant to Article 18(1), are to be a primary consideration.

Consequently, where a Member State has opted to provide the material reception conditions in the form of financial allowances, those allowances must be sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence by enabling them to obtain housing, if necessary, on the private rental market<sup>241</sup>.

The High Court (England and Wales) in *Refugee Action v Secretary of State for the Home Department* found that, in order to maintain a minimum standard of dignity, there needs to be some opportunity to maintain interpersonal relationships and a minimum level of participation in social, religious and cultural life<sup>242</sup>.

#### 4.5.1. Healthcare

In addition to the general rules on healthcare set out in Article 17 RCD (recast), Article 19 RCD (recast) provides:

##### Article 19 RCD (recast) Health care

1. Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders.
2. Member States shall provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.

In order to effectively implement Article 19(1), in conjunction with 22 RCD (recast), Member States must assess whether or not vulnerable applicants such as those set out in Article 21

<sup>241</sup> CJEU, 2014, *Saciri*, op. cit. (fn. 131 above), paras 41 and 42. Note that Article 17 RCD corresponds to Article 21 RCD (recast).

<sup>242</sup> High Court (England and Wales, UK), judgment of 9 April 2014, *R (Refugee Action) v Secretary of State for the Home Department*, [2014] EWHC 1033 (Admin), para. 115. The court ruled that the level of financial support for those who apply for international protection unlawfully excluded certain basic needs of asylum seekers. As the RCD (recast) does not apply to the UK, this judgment is based on the RCD. See also the pending joined cases before the ECtHR concerning numerous vulnerable applicants living in the 'hot spot' on the island of Lesbos, Greece: ECtHR, *Al. H. et autres c Grèce* and *F.J. et autres c Grèce*, nos 4892/18 et 4920/18, communicated 26 February 2019.

RCD (recast) require healthcare and the nature of any need for treatment<sup>243</sup>. Article 19(2) RCD (recast) on assistance to applicants with special reception needs includes, but is not limited to, necessary medical assistance, given that it refers specifically to ‘other assistance’. Other assistance that may be necessary should be identified in the individual assessment of special reception needs. It may include, for example, social care assistance with daily activities such as feeding, washing, dressing and mobility owing to a physical or mental condition. Vulnerable applicants may be in need of a multiagency response.

#### **4.5.2. Accommodation – modalities and implications for vulnerable persons in general**

Article 18 RCD (recast) concerns the ‘modalities for material reception conditions’, including accommodation. It contains several provisions that address the special needs of vulnerable persons and must be read with recital 22 RCD (recast).

##### **Article 18 Modalities for material reception conditions**

1. Where housing is provided in kind, it should take one or a combination of the following forms:
  - (a) premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones;
  - (b) accommodation centres which guarantee an adequate standard of living;
  - (c) private houses, flats, hotels or other premises adapted for housing applicants.
2. Without prejudice to any specific conditions of detention as provided for in Articles 10 and 11, in relation to housing referred to in paragraph 1(a), (b) and (c) of this Article Member States shall ensure that:
  - (a) applicants are guaranteed protection of their family life;
  - (b) applicants have the possibility of communicating with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non-governmental organisations and bodies;
  - (c) family members, legal advisers or counsellors, persons representing UNHCR and relevant non-governmental organisations recognised by the Member State concerned are granted access in order to assist the applicants. Limits on such access may be imposed only on grounds relating to the security of the premises and of the applicants.
3. Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b).

<sup>243</sup> See Section 3.1.

4. Member States shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres referred to in paragraph 1(a) and (b).
  5. Member States shall ensure, as far as possible, that dependent adult applicants with special reception needs are accommodated together with close adult relatives who are already present in the same Member State and who are responsible for them whether by law or by the practice of the Member State concerned.
  6. Member States shall ensure that transfers of applicants from one housing facility to another take place only when necessary. Member States shall provide for the possibility for applicants to inform their legal advisers or counsellors of the transfer and of their new address.
  7. Persons working in accommodation centres shall be adequately trained and shall be bound by the confidentiality rules provided for in national law in relation to any information they obtain in the course of their work.
  8. Member States may involve applicants in managing the material resources and non-material aspects of life in the centre through an advisory board or council representing residents.
  9. In duly justified cases, Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:
    - (a) an assessment of the specific needs of the applicant is required, in accordance with Article 22;
    - (b) housing capacities normally available are temporarily exhausted.
- Such different conditions shall in any event cover basic needs.

#### **Recital 22 RCD (recast)**

When deciding on housing arrangements, Member States should take due account of the best interests of the child, as well as of the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State.

With regard to Article 18(3) RCD (recast), age-specific concerns will, in particular, need to be taken into consideration in the case of applicants who are minors or elderly. As regards minors, Article 18(3) should be read in conjunction with Article 23 RCD (recast) on minors<sup>244</sup>.

<sup>244</sup> See Section 4.3.2 above on the housing of minors and Section 4.3.6.2 on the accommodation of unaccompanied minors, for further information.

With regard to the Member State obligation, under Article 18(3), to take into consideration **gender-specific concerns**, the explanatory report to the Istanbul Convention states that Article 60(3) requires state Parties to develop gender-sensitive reception procedures ‘that take into account women’s and men’s differences in terms of experiences and specific protection needs to ensure their right to safety when considering standards of treatment for the reception of asylum-seekers’<sup>245</sup>. Gender guidelines should also address, and be responsive to, cultural and religious sensitivities, personal factors, and recognise trauma. Article 4 Istanbul Convention contains a non-discrimination clause, which provides a non-exhaustive list of discrimination grounds, including sex, gender, language, religion, political or other opinion, national or social origin, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.

Article 18(4) RCD (recast) requires Member States to ‘take **appropriate measures to prevent assault and gender-based violence**’ (emphasis added) within the premises and accommodation centres referred to in Article 18(1)(a) and (b). Member States are also bound by guarantees deriving from, for example, the [Convention against Torture](#) and the Palermo Protocol<sup>246</sup>. Other examples of binding legal instruments to protect the rights of victims of violence include the Convention on Action against Trafficking in Human Beings and the Istanbul Convention (for the Member States party to this instrument). Consequently, immediate response in line with the guarantees laid down in these legal instruments will have to be ensured. This may include referrals, safe housing, rehabilitation, health and/or psychosocial support, or involving the police.

In terms of national case-law concerning the accommodation of victims of serious gender-based violence, a Belgian tribunal determined that a Gambian applicant, who was a victim of forced marriage and had been raped shortly after arriving in Belgium, should be accommodated not in a mixed reception centre, given her extreme vulnerability and PTSD, but in individual supported accommodation. It found that the limited number of such places was irrelevant and could not justify a violation of her right to have adapted accommodation respecting her right to human dignity and taking account of her vulnerability<sup>247</sup>.

The scope of application of Article 18(9) RCD (recast) is small, particularly in view of the obligation to take into account ‘the specific situation of vulnerable persons’ under Article 21 RCD (recast). In the case of *Saciri*, the CJEU said that, where the accommodation facilities specifically for asylum seekers are overloaded, Member States may refer applicants to bodies within the general public assistance system, provided that that system ensures that ‘the minimum standards laid down in that directive as regards the asylum seekers are met’<sup>248</sup>. The CJEU added, however, that ‘saturation of the reception networks’ is not ‘a justification for any derogation from meeting those standards’<sup>249</sup>.

<sup>245</sup> See Council of Europe, [Explanatory report to the Council of Europe Convention on preventing and combating violence against women and domestic violence](#), 11 May 2011, para. 314. Examples of such procedures are ‘the separate accommodation of single men and women; separate toilet facilities, or at a minimum, different timetables established and monitored for their use by males and females; rooms that can be locked by their occupants; adequate lighting throughout the reception centre; guard protection, including female guards, trained on the gender-specific needs of residents; training of reception centre staff; code of conduct applying also to private service providers; formal arrangements for intervention and protection in instances of gender-based violence; and provision of information to women and girls on gender-based violence and available assistance services’.

<sup>246</sup> Palermo Protocol, op. cit. (fn. 234 above).

<sup>247</sup> Francophone Labour Tribunal Brussels (Tribunal du travail francophone de Bruxelles, Belgium), judgment of 13 December 2017, 17/5651/A (English summary).

<sup>248</sup> CJEU, 2014, *Saciri*, op. cit. (fn. 131 above), para. 49.

<sup>249</sup> Ibid., para. 50.

## 4.6. Reduction or withdrawal of material reception conditions and sanctions

In accordance with Article 20 RCD (recast), Member States may reduce or exceptionally withdraw material reception conditions on stipulated grounds and apply sanctions.

### Article 20 RCD (recast) Reduction or withdrawal of material reception conditions

1. Member States may reduce or, in exceptional and duly justified cases, withdraw material reception conditions where an applicant:
  - (a) abandons the place of residence determined by the competent authority without informing it or, if requested, without permission; or
  - (b) does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down in national law; or
  - (c) has lodged a subsequent application as defined in Article 2(q) of Directive 2013/32/EU.

In relation to cases (a) and (b), when the applicant is traced or voluntarily reports to the competent authority, a duly motivated decision, based on the reasons for the disappearance, shall be taken on the reinstallation of the grant of some or all of the material reception conditions withdrawn or reduced.
2. Member States may also reduce material reception conditions when they can establish that the applicant, for no justifiable reason, has not lodged an application for international protection as soon as reasonably practicable after arrival in that Member State.
3. Member States may reduce or withdraw material reception conditions where an applicant has concealed financial resources, and has therefore unduly benefited from material reception conditions.
4. Member States may determine sanctions applicable to serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour.
5. Decisions for reduction or withdrawal of material reception conditions or sanctions referred to in paragraphs 1, 2, 3 and 4 of this Article shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 21, taking into account the principle of proportionality. 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.
6. Member States shall ensure that material reception conditions are not withdrawn or reduced before a decision is taken in accordance with paragraph 5.

When considering the application of Articles 20(1)–(4), Member States must ensure that the specific situation of vulnerable persons in accordance with Article 21 and the principle of proportionality are taken into account.

With regard to Article 20(1), vulnerable persons may fail to comply with their obligations and/or need to lodge a subsequent application because of their specific situation, for example their age, serious illness, mental illness or disorder, or fear.

The case of *Haqbin*<sup>250</sup> concerned an unaccompanied minor who, as a result of a brawl at a reception facility, was excluded from the facility for a period of 15 days. The CJEU stated that ‘the requirement for Member States to ensure that material reception conditions are available to applicants is not absolute’<sup>251</sup>. While material reception conditions may be reduced and, in exceptional cases, withdrawn, the court ruled that:

in accordance with Article 20(5) of [the RCD (recast)], any sanction within the meaning of Article 20(4) thereof must be objective, impartial, reasoned and proportionate to the particular situation of the applicant and must, under all circumstances, ensure access to health care and a dignified standard of living for the applicant<sup>252</sup>.

The court noted that ‘it is apparent from recital 35 of [the RCD (recast)] that the directive seeks to ensure full respect for human dignity and to promote the application, *inter alia*, of Article 1 of the Charter [...] and has to be implemented accordingly’<sup>253</sup>. As the applicant was an unaccompanied minor, the court stated that ‘Member States, when imposing sanctions pursuant to Article 20(4) of the directive, must especially take into account, according to the second sentence of Article 20(5) thereof, of [sic] the particular situation of the minor and of the principle of proportionality’<sup>254</sup>. Moreover, according to Article 23(1) RCD (recast) ‘the best interests of the child are a primary consideration for Member States when implementing the provisions of the directive that involve minors’<sup>255</sup>. The court concluded:

a Member State cannot [...] provide for a sanction consisting in the withdrawal, even temporary, of material reception conditions, within the meaning of Article 2(f) and (g) of the directive, relating to housing, food or clothing, in so far as it would have the effect of depriving the applicant of the possibility of meeting his or her most basic needs. The imposition of other sanctions under Article 20(4) of the directive must, under all circumstances, comply with the conditions laid down in Article 20(5) thereof, including those concerning the principle of proportionality and respect for human dignity. In the case of an unaccompanied minor, those sanctions must, in the light, *inter alia*, of Article 24 of the Charter of Fundamental Rights, be determined by taking particular account of the best interests of the child<sup>256</sup>.

Under national law, the Italian Regional Administrative Tribunal of Piedmont overturned the decision of the Prefecture of Novara to withdraw reception conditions from an asylum applicant who had violated the rules of the reception centre (leaving the centre without authorisation), because the prefect had not taken into consideration the applicant’s serious

<sup>250</sup> CJEU (GC), 2019, *Haqbin*, op. cit. (fn. 186 above).

<sup>251</sup> Ibid., para. 35.

<sup>252</sup> Ibid., para. 45.

<sup>253</sup> Ibid., para. 46.

<sup>254</sup> Ibid., para. 53.

<sup>255</sup> Ibid., para. 54.

<sup>256</sup> Ibid., para. 56.

state of health (tuberculosis, anxiety and depression) prior to the decision to withdraw. The tribunal held that national law required the administrative authority to take into consideration the specific situation of vulnerable persons including ‘individuals with serious illnesses or mental health disorders’<sup>257</sup>.

In a Spanish case, the Ministry of Labour and Social Security withdrew the access of an asylum applicant, who was vulnerable on account of his medical condition, to the reception system on the ground that the applicant had lost his right to stay there when he left his previous assigned centre without informing the authorities. The tribunal ruled that the authorities had to ensure the applicant’s access to a reception centre, as under Spanish constitutional law the ECHR and the EU Charter ensured re-admission in this case based on the right to physical and moral integrity and the right of defence, especially as the applicant was in a situation of special vulnerability due to his medical condition<sup>258</sup>.

A Member State may **reduce or, in exceptional and duly justified cases, withdraw** material reception conditions in the circumstances listed in Article 20(1) RCD (recast). It may also **reduce or withdraw** material reception conditions where an applicant has concealed financial resources, as stated in Article 20(3) RCD (recast).

Member States may, in accordance with Article 20(2), **reduce, but not withdraw**, material reception conditions in cases of late application for international protection. In this situation, the burden is on the Member State to establish that an applicant failed, ‘for no justifiable reason’, to lodge an application ‘as soon as reasonably practicable after arrival in that Member State’. The decision-maker will need to be mindful of the reasons why certain vulnerable persons, including children, victims of sexual violence and victims of human trafficking, may take time to apply for international protection.

Withdrawal or reduction of material reception conditions are subject to ensuring the applicant retains a ‘dignified standard of living’. This will depend on the facts of the case, with vulnerable persons’ circumstances requiring particular consideration<sup>259</sup>. Such decisions in the context of Article 20(3) could potentially compromise the possibility of ongoing counselling or support or care services. This could compromise a vulnerable applicant’s dignified standard living, where a similar withdrawal or reduction in respect of a non-vulnerable applicant would have no such effect.

A decision on the reduction or withdrawal of material reception conditions in respect of a vulnerable applicant requires an individualised assessment involving a more nuanced proportionality analysis than might apply typically. This means that the requirement to provide reasons for the decision will be particularly important for a vulnerable person who may wish to appeal, as discussed in Section 4.7.

Before a formal and reasoned decision has been issued, material reception conditions cannot be reduced or withdrawn (Article 20(6) RCD (recast)).

<sup>257</sup> Regional Administrative Tribunal of Piedmont (Italy), judgment of 31 December 2018, *Applicant (Nigeria) v Ministry of Interior (Prefettura di Novara)* (English summary).

<sup>258</sup> Superior Tribunal of Justice (Tribunal Superior de Justicia, Spain), judgment of 22 November 2018, *Fermin v Ministry of Employment and Social Security (Ministerio de Empleo y Seguridad Social)*.

<sup>259</sup> See also Section 4.5 concerning material reception conditions and healthcare.

## 4.7. Appeals

### 4.7.1. Requirement and scope

#### Article 26(1) RCD (recast) Appeals

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

Article 26 RCD (recast) does not provide rules for the effectiveness of the remedy required. Nonetheless, an applicant is entitled to an effective remedy in the light of, *inter alia*, Article 47 EU Charter, and in order for Article 26 of the directive to be in line with the principle of effectiveness.

Procedural guarantees provided by the directive in respect of appeal or review of a decision under the RCD (recast) may be of particular importance for vulnerable persons. They are noted below.

### 4.7.2. Free legal assistance and representation

#### Article 26(2) RCD (recast) Appeals

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

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

Article 26(2) requires Member States to provide free legal assistance and representation insofar as such aid is necessary to ensure effective access to justice, but it is only available ‘on request’. Thus, if vulnerable persons are not identified and/or are not provided with timely support to enable them to request this, they may be at risk of not receiving critical legal assistance and representation. It should be noted that, pursuant to Article 47, third

subparagraph, EU Charter, ‘Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice’. It is stated in Article 26(3), second subparagraph, RCD (recast) that:

#### **Article 26(3), second subparagraph, RCD (recast)**

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

This provision must be interpreted in its context, in the light of other provisions of EU law, the law of the Member States and the case-law of the ECtHR. This includes in particular the *Airey* judgment of the ECtHR<sup>260</sup>, according to which provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy<sup>261</sup>.

See Section 8.4.2 for the analysis of the rules of the APD (recast). These do not differ in substance from those of the RCD (recast).

## **4.8. Detention**

### **Other relevant EASO publications**

EASO, *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial Analysis*, 2019.

Article 11 RCD (recast) sets out provisions on the detention of vulnerable persons and applicants with special reception needs. These provisions establish additional guarantees in respect of the detention of:

- persons with health, including mental health, needs (Article 11(1)) (Section 4.8.2);
- minors (Article 11(2)) (Section 4.8.3);
- unaccompanied minors (Article 11(3)) (Section 4.8.4);
- families (Article 11(4)) (Section 4.8.5);
- female applicants (Article 11(5)) (Section 4.8.6).

There is no CJEU case-law on Article 11 RCD (recast) yet. Each of these provisions is examined below. Other issues that are relevant to vulnerable persons and applicants are outlined in Section 4.8.1, while derogations from special guarantees in respect of the detention of vulnerable persons are covered in Section 4.8.7. For further information on detention under the Dublin III regulation, see Section 5.6.

<sup>260</sup> ECtHR, judgment of 9 October 1979, *Airey v Ireland*, no 6289/73.

<sup>261</sup> CJEU, judgment of 22 December 2010, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, C-279/09, EU:C:2010:811, paras 36 and 37. See also Regional Court of Campania (Italy), judgment of 20 March 2019, no 03927/2108 (English summary).

#### 4.8.1. General principles

Pursuant to Article 2(h) RCD (recast), ‘detention’ means ‘confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement’. Applicants may be detained only under very clearly defined exceptional circumstances laid down in Article 8 RCD (recast)<sup>262</sup>. Recital 15 states that applicants may only be detained ‘subject to the principle of necessity and proportionality with regard to both to [sic] the manner and the purpose of such detention’. Moreover, in accordance with recital 20, in order to better ensure the physical and psychological integrity of applicants, ‘detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined’. Accordingly, Article 8(2) RCD (recast) provides:

##### Article 8(2) RCD (recast)

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

Pursuant to Article 21 RCD (recast), Member States must take into account the specific situation of vulnerable persons when implementing all the articles of the directive. Therefore, the specific situation of vulnerable persons must be taken into account on a case-by-case basis when considering the necessity and proportionality of detention as well as when considering alternative measures to detention.

Any alternative measure to detention must respect the fundamental human rights of applicants<sup>263</sup>. Relevant alternatives to detention for persons with physical constraints include telephone reporting rather than reporting in person<sup>264</sup>.

Examples of national case-law concerning alternatives to detention include a ruling by the Swiss Federal Court that the authorities should thoroughly assess options other than the detention of the parents, the withdrawal of their right of custody and the external placement of the children in a children’s home. Such options include accommodation in canton-owned properties or accommodation rented by the canton, in a transit home or possibly even in a youth home for unaccompanied minors<sup>265</sup>. In a case of an applicant with mental health issues and acute pain, the Administrative First Instance Court in Corinth (Greece) ordered that his detention cease and that he instead inform the police authorities of his address, and any future change of address, and report to the police every 3 days<sup>266</sup>. The Greek Administrative Court also ordered the release of an applicant who was vulnerable owing to his state of health and post-traumatic stress (as he had been detained and tortured in Syria). He had left an island, to which he had been geographically restricted, and had subsequently

<sup>262</sup> EASO, *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial Analysis*, 2019, Part 4 on grounds for detention.

<sup>263</sup> RCD (recast), recital 20.

<sup>264</sup> EASO, *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial Analysis*, 2019, Part 5 on alternatives to detaining applicants for international protection; UNHCR, *Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*, 2012 (UNHCR, Detention Guidelines) p. 33.

<sup>265</sup> Federal Court (Bundesgericht / Tribunal fédéral / Tribunale federale / Tribunal federal, Switzerland), judgment of 26 April 2017, 2C\_1052/2016, 2C\_1053/2016 (English summary).

<sup>266</sup> Administrative First Instance Court (Corinth, Greece), judgment of 19 August 2013, no 223/2013.

been arrested and detained. The court ordered instead periodic (twice monthly) reporting to the police station<sup>267</sup>.

A person's vulnerability can be a critical factor in determining if detention is in violation of Article 4 EU Charter<sup>268</sup> (and Article 3 ECHR<sup>269</sup>), or disproportionate for the purposes of Article 7 of the Charter<sup>270</sup> (and Article 8(2) ECHR<sup>271</sup>), or arbitrary for the purposes of Article 6 of the Charter<sup>272</sup> (Article 5 ECHR<sup>273</sup>). (The comments in Section 4.6 in respect of proportionality and individualised assessment regarding vulnerable persons apply *a fortiori* in the context of detention.)

Article 10(1) RCD (recast) states: 'Detention of applicants shall take place, as a rule, in specialised detention facilities.' Where this is not possible and the Member State 'is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners' and the detention conditions under the RCD (recast) apply<sup>274</sup>.

As regards the conditions of detention, recital 18 RCD (recast) states: 'Applicants who are in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs in that situation'<sup>275</sup>. Article 17(2) RCD (recast) requires Member States to ensure 'an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health', in the specific situation of vulnerable persons, as well as in the situation of persons who are in detention<sup>276</sup>. Given this, where the applicant has special reception needs, those needs must be met in detention. See Sections 4.8.3–4.8.6 on the special reception needs arising in the case of the detention of applicants with health conditions, minors, unaccompanied minors, families and female applicants. UNHCR observes that 'older asylum-seekers may require special care and assistance owing to their age, vulnerability, lessened mobility, psychological or physical health, or other conditions'<sup>277</sup>.

Where an applicant is held in detention, he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority.

---

<sup>267</sup> Administrative Court (Greece), judgment of 26 October 2018, *AK (Syria) v Minister of Public Order and Citizen Protection*.

<sup>268</sup> EU Charter, Article 4 (Prohibition of torture and inhuman or degrading treatment or punishment) states: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

<sup>269</sup> ECHR, Article 3 (Prohibition of torture) states: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

<sup>270</sup> EU Charter, Article 7 (right to private and family life) states: 'Everyone has the right to respect for his or her private and family life, home and communications.'

<sup>271</sup> ECHR, Article 8 provides: '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

<sup>272</sup> EU Charter, Article 6 (right to liberty and security) states: 'Everyone has the right to liberty and security of person.'

<sup>273</sup> ECHR, Article 5, is concerned with the right to liberty and security.

<sup>274</sup> RCD (recast), Article 10(1).

<sup>275</sup> See Section 4.8.3 for full citation of recital 18 and for further information on the detention of minors.

<sup>276</sup> See Section 4.5 for a full citation of Article 17(2) RCD (recast).

<sup>277</sup> UNHCR, *Detention Guidelines*, 2012, op. cit. (fn. 264 above), Guideline 9.6, p. 39.

Article 9(3) RCD (recast) concerns the judicial review of the lawfulness of detention:

### **Article 9(3) RCD (recast)**

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

Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately.

The possibility of a speedy and accessible review of detention can be particularly important for vulnerable persons held in detention. The European Law Institute provides general guidance on the right to a speedy judicial review of the lawfulness of detention in this context<sup>278</sup>. Notably, Article 13(1) CRPD provides that states parties must ensure:

effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

Article 9(4) RCD (recast) concerns communication with applicants about their detention:

### **Article 9(4) RCD (recast)**

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

It may be critical for vulnerable applicants to be provided with reasons for detention in an unequivocally clear manner, and in a language and format that they understand. It is therefore necessary to bear in mind the particular ways in which the permitted grounds for detention may relate to the individual situation or personal circumstances of a vulnerable person. It is equally necessary to bear in mind that certain vulnerable persons may already be at a disadvantage in their understanding of their arrest (e.g. if a person has a disability, memory loss or impairment, cognitive and/or learning difficulties or trauma). Article 9(4)

<sup>278</sup> See EASO, *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial Analysis*, 2019, Section 7.3 ‘Aspects of right for judicial review’; European Law Institute, *Statement of the European Law Institute: Detention of asylum seekers and irregular migrants and the rule of law* (ELI 2017), standard 24, pp. 282–284.

should be understood in the light of ECtHR jurisprudence in respect of breaches of Article 5(2) ECHR<sup>279</sup>.

Article 9(5) concerns the judicial review of detention:

#### Article 9(5) RCD (recast)

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

An initially lawful detention may subsequently become unlawful if detention conditions do not meet health and disability needs that arise for an individual<sup>280</sup>. This may, for instance, be the case where following detention evidence of a mental illness or other disability arises, or where there is evidence that detention has aggravated an already existing health condition, or indeed caused illness<sup>281</sup>.

UNHCR and the International Detention Coalition (IDC) have published a screening tool to assist decision-makers in identifying and addressing situations of vulnerability, in particular on the relevance of vulnerability factors to detention decisions and in respect of alternatives to detention for vulnerable applicants<sup>282</sup>.

#### 4.8.2. Health as a primary concern

##### Other relevant EASO publications

EASO, *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial Analysis*, 2019, Section 8.2.2 ‘Healthcare’.

Articles 21 and 22 RCD (recast) require Member States to take into account the special reception needs of vulnerable applicants throughout the duration of the asylum procedure and to provide for appropriate monitoring of their situation. This means that Member States must take account of the specific situation of, for example, pregnant women, disabled persons and persons with health conditions such as serious illnesses and mental disorders. According to Article 19 RCD (recast), Member States must ensure that applicants for international protection ‘receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders’<sup>283</sup>. Member States must also ‘provide necessary medical or other assistance to applicants who

<sup>279</sup> See for example ECtHR, judgment of 31 March 2011, *Nowak v Ukraine*, no 60846/10.

<sup>280</sup> High Court (Administrative Court) (England and Wales, UK), judgment of 23 March 2011, *R (BE) v Secretary of State for the Home Department*, [2011] EWHC 690 (Admin), paras 177–181. International law also provides safeguards to ensure that detention does not become arbitrary, in particular periodic review to enable the grounds to be assessed and judicial review of detention. See Article 9(1) and (4) *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966 (entry into force 23 March 1976).

<sup>281</sup> UNHCR, *Detention Guidelines*, 2012, op. cit. (fn. 264 above), p. 33.

<sup>282</sup> UNHCR and IDC, *Vulnerability Screening Tool – Identifying and addressing vulnerability: a tool for asylum and migration systems*, 2016, op. cit. (fn. 148 above).

<sup>283</sup> Article 19(1) RCD (recast).

have special reception needs, including appropriate mental health care where needed’<sup>284</sup>. Furthermore, according to Article 25(1) RCD (recast) victims of torture and violence must have ‘access to appropriate medical and psychological treatment or care’<sup>285</sup>. All these requirements apply, as relevant, to vulnerable applicants in detention. Indeed, the health of vulnerable applicants in detention must be a primary concern of national authorities pursuant to Article 11(1) RCD (recast):

### Article 11(1) RCD (recast)

The health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities.

Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation, including their health.

The following principles from jurisprudence in the UK provide potential guidance<sup>286</sup>.

- A failure to carry out reasonable enquiries into a potential detainee’s physical and mental health may render detention unlawful<sup>287</sup>.
- Factors relevant to whether or not a medical condition can be managed satisfactorily in detention include the nature of the detention facilities, the duration of detention, the availability of medication in detention, if the person’s demonstrated (special) care needs can be met in detention, welfare arrangements and arrangements for monitoring for signs of deterioration<sup>288</sup>.
- A failure to carry out a medical examination of a detainee in line with national rules (in the case in question, the UK rules required examination within 24 hours of detention), unless there is good reason, may render detention unlawful<sup>289</sup>.
- In extreme situations, the detention of persons with disabilities may amount to cruel, inhuman or degrading treatment contrary to Article 3 ECHR. ‘The suffering flowing from naturally occurring mental illness would be covered where its risk was or might have been exacerbated by treatment, whether flowing from conditions of detention or, in an extreme case, from the effects of detention or expulsion’<sup>290</sup>.
- ‘The severity of treatment is both relative and dependent on the facts of each case. Relevant considerations include whether the conditions of detention were compatible with respect for [the applicant’s] human dignity, whether the manner and method of execution of the measures in question subjected him to distress or hardship exceeding the unavoidable level of suffering inherent in detention and whether he was provided with the requisite medical assistance’<sup>291</sup>.

<sup>284</sup> Article 19(2) RCD (recast). See also Section 4.5.1 on healthcare.

<sup>285</sup> See also Section 4.4 on victims of torture and violence.

<sup>286</sup> It must be noted that the UK was never bound by the RCD (recast), and is no longer bound by the original RCD, except to the extent that its provisions have been incorporated into UK law by UK regulations.

<sup>287</sup> High Court (Administrative Court) (England and Wales, UK), judgment of 10 October 2014, *R (DK) v Secretary of State for the Home Department*, [2013] EWHC 1236; [2014] EWHC 3257 (Admin), para. 181.

<sup>288</sup> Court of Appeal (England and Wales, UK), judgment of 28 January 2014, *R (Das) v Secretary of State for the Home Department*, [2014] EWCA Civ 45.

<sup>289</sup> High Court (Administrative Court) (England and Wales, UK), judgment of 17 May 2013, *R (EO, RA, CE, OE and RAN) v Secretary of State of the Home Department*, [2013] EWHC 1236 (Admin), para. 53. See also High Court (Administrative Court) (England and Wales, UK), judgment of 13 July 2018, *R (KG) v Secretary of State for the Home Department*, [2018] EWHC 1767 (Admin), para. 29.

<sup>290</sup> High Court (Administrative Court) (England and Wales, UK), judgment of 28 January 2014, *R (S) v Secretary of State for the Home Department*, [2014] EWHC 50 (Admin), para. 243.

<sup>291</sup> Ibid., para. 243.

- In dealing with a case in which a person's mental health is an issue, factors will include compliance with relevant policies; whether or not clear guidance exists; capacity to understand, assess and manage the person's mental illness; capacity to implement judicial orders; and whether or not the person was treated with dignity or respect, or provided with the minimum standard of care, assessment and treatment to which he or she is entitled<sup>292</sup>.

With regard to the COVID-19 pandemic, the European Commission has directly referred to Article 11(1) RCD (recast), and stated, *inter alia*, that the World Health Organization guidance *Preparedness, prevention and control of COVID-19 in prisons and other places of detention*<sup>293</sup> provides useful information on how to prevent and address a potential disease outbreak in a place of detention, stressing also important fundamental rights elements that must be respected in the response to COVID-19<sup>294</sup>.

In the context of the ECHR, while not directly related to Article 11(1) RCD (recast), the ECtHR has observed that 'there are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant'<sup>295</sup>.

The ECtHR has ruled that the detention of an applicant with mental health issues did not, on the facts of the case, lead to a conclusion that his detention was arbitrary and in breach of Article 5(1) ECHR. This was because the applicant received special attention in the detention centres where he stayed, and reports by the psychological support services did not preclude detention<sup>296</sup>.

The ECtHR found a breach of Article 3 ECHR in respect of an asylum-seeking woman held in detention, who was vulnerable as a result of her health. She suffered from a variety of symptoms including low mood and insomnia, and had somatic symptoms such as chest pain, and a doctor vouched for an 'evident deterioration of her mental state'<sup>297</sup>. The court determined the violation due to the cumulative effect of the circumstances of her detention:

namely the fact that the applicant had no access to outdoor exercise for anything between eight and twelve weeks, the poor environment for outdoor exercise in the remaining period, the lack of specific measures to counter act [sic] the cold, the lack of female staff, the little privacy offered in the centre, and the fact these conditions persisted for over sixteen months, lead the Court to conclude that the cumulative effect of the conditions complained of, diminished the applicant's human dignity and aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance<sup>298</sup>.

<sup>292</sup> High Court (Administrative Court) (England and Wales, UK), 2014, *R (S) v Secretary of State for the Home Department*, op. cit. (fn. 290 above), para. 417.

<sup>293</sup> World Health Organization, Regional Office for Europe, *Preparedness, prevention and control of COVID-19 in prisons and other places of detention*, Copenhagen, 23 March 2020.

<sup>294</sup> Commission communication – *COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement (COM(2020/C 126/02))*, 17 April 2020.

<sup>295</sup> ECtHR, judgment of 20 January 2009, *Slawomir Musial v Poland*, no 28300/06, para. 88.

<sup>296</sup> ECtHR, judgment of 4 April 2018, *Thimothewes v Belgium*, no 39061/11 (English summary), para. 79.

<sup>297</sup> ECtHR, judgment of 3 May 2016, *Abdi Mahamud v Malta*, no 56796/13, para. 17.

<sup>298</sup> Ibid., para. 89.

In a number of other cases, the ECtHR has considered the lawfulness under the ECHR of the detention of pregnant women and persons with a disability, serious illness and mental health problems<sup>299</sup>.

Although not directly related to Article 11(1) RCD (recast), the following UNHCR guidelines concerning the detention of applicants for international protection provide further potential guidance:

- ‘swift and systematic identification and registration’ of asylum seekers with disabilities is needed to avoid arbitrary detention<sup>300</sup>;
- medical and mental health examinations, conducted by competent medical professionals, should be offered to all detainees as promptly as possible after arrival<sup>301</sup>;
- as detention can cause psychological and physical effects, periodic health assessments may guard against an initially justified detention subsequently becoming unlawful<sup>302</sup>;
- as a general rule, applicants for international protection with long-term physical, mental, intellectual and sensory impairments should not be detained<sup>303</sup>.

Obligations under the CRPD are important in the context of ascertaining whether or not the detention of persons with disabilities and/or persons suffering from serious illness is justified. Particularly relevant CRPD obligations in relation to detainees with disabilities include those relating to equality and non-discrimination (Article 5); accessibility of the physical environment (Article 9); liberty and security of the person (Article 14); personal mobility to ensure the greatest possible independence (Article 20); respect for privacy (Article 22); respect for home and the family including non-separation of family members (Article 23); education (Article 24); health (Article 25); habilitation and rehabilitation (Article 26); and participation in (and accessibility of) cultural life, recreation, leisure and sport (Article 30). The CRPD Committee has stated that, in the detention context, ‘authorities must pay special attention to the particular needs and possible vulnerability of the person concerned, including because of his or her disability’<sup>304</sup>.

Detainees with disabilities may be particularly at risk of exposure to violence and/or ill-treatment in detention. Therefore, the general guarantees in this regard must be kept in mind<sup>305</sup>. Likewise, the rights of persons with disabilities to be ‘treated with humanity and with respect for the inherent dignity of the human person’<sup>306</sup> and to respect for their physical and mental integrity on an equal basis with others<sup>307</sup> provide reference points for the protection of persons with disabilities in detention.

It may be unlawful to fail to make reasonable adjustments to detention facilities in response to a person’s disability<sup>308</sup>. Failure to make sufficient reasonable accommodations to ensure

<sup>299</sup> ECtHR, judgment of 31 July 2012, *Mahmundi et autres c Grèce*, no 14902/10, para. 70; ECtHR, judgment of 23 July 2013, *Aden Ahmed v Malta*, no 55352/12, para. 92; ECtHR, judgment of 21 April 2011, *Nechiporuk and Yonkalo v Ukraine*, no 42310/04, para. 156; ECtHR, judgment of 8 November 2012, *Z.H. v Hungary*, no 28973/11, para. 29; ECtHR, judgment of 20 December 2011, *Yoh-Ekale Mwanje c Belgique*, no 10486/10, para. 94; ECtHR, 2009, *Slawomir Musial v Poland*, op. cit. (fn. 295 above), para. 94. See also EASO, *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial Analysis*, 2019, Section 8.2.2.

<sup>300</sup> UNHCR, *Detention Guidelines*, 2012, op. cit. (fn. 264 above), Guideline 9.5, p. 38.

<sup>301</sup> Ibid., p. 33.

<sup>302</sup> Ibid., p. 33.

<sup>303</sup> Ibid., p. 38.

<sup>304</sup> CRPD Committee, views adopted 2 September 2016, *Noble v Australia*, communication no 7/2012, CRPD/C/16/D/7/2012, para. 8.9.

<sup>305</sup> See for example ICCPR, Article 7; CAT, Arts. 2 and 16; CRPD, Article 15.

<sup>306</sup> ICCPR, Article 10.

<sup>307</sup> CRPD, Article 17.

<sup>308</sup> County Court (Central London) (UK), judgment of 23 October 2015, *Toussaint v Home Office*, 2YL74948.

detainees with disabilities have equal access to the various areas and services in detention may be unlawful<sup>309</sup>. This applies even when detention is run by a private contractor<sup>310</sup>.

The CPRD Committee explains the legal standards relevant to such a situation in the following terms:

Accordingly, States parties must take all relevant measures, including the identification and removal of obstacles and barriers to access, so that persons with disabilities who are deprived of their liberty may live independently and participate fully in all aspects of daily life in their place of detention; such measures include ensuring their access, on an equal basis with others, to the various areas and services, such as bathrooms, yards, libraries, study areas, workshops and medical, psychological, social and legal services<sup>311</sup>.

One UK case concerned an applicant who had suffered repeated sexual abuse, domestic abuse, abduction, rape and female genital mutilation (FGM), was trafficked to the UK, lost her children to care, suffered from PTSD, claimed to have been tortured and had self-harmed. In its judgment, the High Court of England and Wales found that the enquiry by the Secretary of State regarding her immigration detention ‘was not simply to ask whether or not the Claimant was fit to be detained, but to ask whether or not the reasonableness of the length of detention and/or maintaining that detention was outweighed by the effect on the Claimant’s mental health’<sup>312</sup>.

UNHCR recommends that victims of torture and other serious physical, psychological or sexual violence generally should not be detained<sup>313</sup>.

#### 4.8.3. Detention of minors

Article 11(2) RCD (recast) concerns the detention of minors:

##### **Article 11(2) RCD (recast)**

Minors shall be detained only as a measure of last resort and after it having been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.

The minor’s best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States.

Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.

<sup>309</sup> CRPD Committee, views adopted 11 April 2014, *X v Argentina*, communication no 8/2012, CRPD/C/11/D/8/2012.

<sup>310</sup> Court of Appeal (Civil Division) (England and Wales, UK), judgment of 20 May 2008, *Gichura v Home Office*, [2008] EWCA Civ 697, [2008] ICR 1287, see especially paras 23 and 24.

<sup>311</sup> CRPD Committee, 2014, *X v Argentina*, op. cit. (fn. 309 above), para. 8.5; see also UNHCR Executive Committee, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR, no 110 (LXI), 2010.

<sup>312</sup> High Court (Queen’s Bench) (England and Wales, UK), judgment of 12 January 2017, *Arf v Secretary of State for the Home Department*, [2017] EWHC 10 (QB), para. 132.

<sup>313</sup> UNHCR, *Detention Guidelines*, 2012, op. cit. (fn. 264 above), Guideline 9.1, p. 33.

Relating to Article 11(2), first subparagraph, the ECtHR has ruled that minor applicants may only be detained if it is ensured that detention is only used as a measure of last resort and it is established that there are no alternatives<sup>314</sup>. The protection of the child's best interests involves keeping the family together, as far as possible<sup>315</sup>.

Pursuant to Article 9(2) RCD (recast), administrative procedures relevant to the grounds for detention set out in Article 8(3) must be executed with due diligence. In the context of the ECHR, the ECtHR has held that the detention of minors calls for 'greater speed and diligence on the part of the [national] authorities'<sup>316</sup>.

Member States may derogate from the obligation to provide detained minors with the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, in circumstances set out in Section 4.8.7.

Article 11(2) should be read in line with recital 18 RCD (recast):

#### **Recital 18 RCD (recast)**

Applicants who are in detention should be treated with full regard for human dignity and their reception should be specifically designed to meet their needs in that situation. In particular, Member States should ensure that Article 37 of the 1989 United Nations Convention on the Rights of the Child is applied.

<sup>314</sup> ECtHR, judgment of 5 April 2011, *Rahimi c Grèce*, no 8687/08 (English summary), paras 109 and 110.

<sup>315</sup> ECtHR, judgment of 10 April 2018, *Bistieva and Others v Poland*, no 75157/14, para. 78.

<sup>316</sup> Ibid., para. 87.

Article 37 CRC establishes specific standards:

**Article 37 CRC**

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Table 16 summarises key conditions that must be fulfilled if minor applicants for international protection are to be detained, together with the source of that obligation.

**Table 16: Conditions to be fulfilled for detention of minor applicants**

Requirement	Under EU law	Under ECHR and international law
Child's best interests a primary consideration	Art. 24(2) EU Charter; Arts. 11(2) and 23(2) RCD (recast)	Art. 3 CRC
Individual assessment has taken account of the situation of the child	Art. 8(2) and 21 RCD (recast)	
All non-custodial alternative measures duly examined and cannot be applied	Art. 11(2) RCD (recast)	
Detention is a measure of last resort	Art. 11(2) RCD (recast)	Art. 37(b) CRC
Detention is for the shortest period of time	Art. 11(2) RCD (recast)	Art. 37(b) CRC
Detention respects human dignity	Art. 1 EU Charter; recital 18 RCD (recast)	Art. 37(c) CRC
Conditions of detention do not constitute torture, inhuman or degrading treatment or punishment	Art. 4 EU Charter	Art. 3 CAT; Arts. 19 and 37(a) CRC; Art. 3 ECHR
Detention respects right to private and family life	Art. 7 and 24(3) EU Charter	Art. 9 CRC; Art. 8 ECHR
Detention specifically designed to meet the child's needs	Recital 18 RCD (recast)	Art. 37(c) CRC
Detention includes possibility of engaging in leisure, recreational and play activities	Art. 11(2) RCD (recast)	Art. 31(1) CRC
Child separated from adults unless not in child's best interests	Art. 11(3) RCD (recast)	Arts. 9(1), 16(1) and 37(c) CRC
Administrative procedures regarding grounds for detention executed with due diligence	Art. 41 EU Charter; Art. 9(2) RCD (recast)	
Access to legal assistance and judicial review of detention	Art. 47 EU Charter; Arts. 7 and 9(3), (5) and (6) RCD (recast)	Art. 37(d) CRC

A UK court has found the detention of a 1-year-old minor, where there was medical evidence that the child had developed preventable medical conditions (rickets and anaemia) while in detention, to be in breach of the minor's physical integrity under Article 8 ECHR <sup>317</sup>.

Further points emerge from the case-law of the ECtHR that are of potential relevance when implementing Article 11(1), first and second subparagraphs:

- the ECtHR has determined that keeping minors (aged 16, 11 and 1.5 years) in detention, even for a brief period of time (less than 2 days), amounts to inhuman and degrading treatment in breach of Article 3 ECHR, when there is a combination of the following factors: poor conditions, such as dilapidated walls, flaking ceilings, damp, dilapidated beds and soiled mattresses, limited access to toilets, or even buckets (forcing the children to urinate on the floor), and failure to provide food and drink for more than 24 hours <sup>318</sup>;

<sup>317</sup> High Court (England and Wales, UK), judgment of 18 July 2007, *S and Others v Secretary of State for the Home Department*, [2007] EWHC 1654 (Admin), para. 92.

<sup>318</sup> ECtHR, judgment of 7 December 2017, *S.F. and Others v Bulgaria*, no 8138/16, paras 84–93.

- the authorities' diligent transfer of a minor from adult detention to specialised accommodation on clarification of the minor's real age will be an important factor in ensuring ECHR compliance<sup>319</sup>.

A judgment from the Warsaw Court of Appeal found that an 8-year-old girl, who had suffered persecution in Pakistan, was particularly vulnerable to the unpleasant experience connected with a stay in a centre with people displaying extremely different cultures and customs, exacerbating her trauma<sup>320</sup>.

FRA has published a report that provides an overview of the European legal and policy framework on immigration detention of children (both with families and unaccompanied)<sup>321</sup>.

#### 4.8.4. Detention of unaccompanied minors

The guarantees applying to minors, as set out in Section 4.8.3, also apply to unaccompanied minors. In addition, according to Article 11(3) RCD (recast):

##### Article 11(3) RCD (recast)

Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible.

Unaccompanied minors shall never be detained in prison accommodation.

As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.

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

Relating to Article 11(3), third subparagraph, the ECtHR has found a breach of Article 3 ECHR in circumstances where an unaccompanied 5-year-old minor was detained for 2 months in a centre for adults, with no counselling or educational assistance from suitably qualified persons. The place of detention was not adapted to her needs and the national authorities failed to take action to remedy the situation, despite being expressly informed of it<sup>322</sup>.

Poor detention conditions of unaccompanied minors with regard to accommodation, hygiene and infrastructure, even if they last for only 2 days, may result in a breach of Article 3 ECHR<sup>323</sup>. The ECtHR has found a violation of Article 3 ECHR in the case of unaccompanied minors (aged around 16 and 17 years of age) who were detained for 8 months. In their case, no measures were taken to ensure they received proper counselling and educational assistance from qualified personnel specially mandated for that purpose. In addition, no

<sup>319</sup> ECtHR, judgment of 2 April 2015, *Aarabi v Greece*, no 39766/09, paras 44–45.

<sup>320</sup> Court of Appeal (Warsaw, Poland), judgment of 22 June 2016, II Aka 59/16, judgment in Polish and English summary.

<sup>321</sup> FRA, *European legal and policy framework on immigration detention of children*, 2017.

<sup>322</sup> ECtHR, judgment of 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, no 13178/03, paras 50–53.

<sup>323</sup> ECtHR, 2011, *Rahimi c Grèce*, op. cit. (fn. 314 above), para. 86.

entertainment facilities were provided adapted to their age and they were not informed of the outcome of their age assessments<sup>324</sup>.

*H.A. and Others v Greece*<sup>325</sup> concerned the placement of nine unaccompanied minor migrants in police stations in Greece for periods ranging between 21 and 33 days. They were subsequently transferred to a reception centre and then to special facilities for minors. The ECtHR held that there had initially been a violation of Article 3 ECHR on account of the conditions of their detention in the police stations. The court found that the detention conditions to which they had been subjected in the police stations represented degrading treatment and that detention on those premises could have caused them to feel isolated from the outside world, with potentially negative consequences for their physical and moral well-being. It also found that their detention could be regarded as unlawful deprivation of liberty within the meaning of Article 5(1) ECHR<sup>326</sup>.

Relating to Article 11(3), fourth subparagraph, the ECtHR has found a breach of Article 3 ECHR in circumstances where an unaccompanied minor had not been placed in an accommodation centre tailored to his needs as an unaccompanied minor. In addition, notwithstanding medical examinations revealing that he was a minor, he was still detained with adults with no explanation of why alternative accommodation suited to his needs was not provided. As the circumstances of the detention were in violation of national law laying down special guarantees for minors, the ECtHR also held that there was a violation of Article 5(1)(f) ECHR<sup>327</sup>.

UNHCR states that unaccompanied or separated children should not be detained. Instead, appropriate care arrangements remain the best measure, as liberty and freedom of movement of children should be always the preferred solution. In particular:

Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status. Furthermore, children should never be criminalised or subject to punitive measures because of their parents' migration status. Alternatives to detention should be explored, preferably through family-based alternative care options or other suitable alternative care arrangements as determined by the competent childcare authorities<sup>328</sup>.

The UNHCR *Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention* state:

alternative care arrangements, such as foster placement or residential homes, should be made by the competent child care authorities, ensuring that the child receives appropriate supervision. Residential homes or foster care placements need to cater for the child's proper development (both physical and mental) while longer term solutions are being considered<sup>329</sup>.

As the CRC Committee has stated, 'unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child

<sup>324</sup> ECtHR, judgment of 22 November 2016, *Elmi and Abubaker v Malta*, nos 25794/13 and 28151/13, paras 111–115.

<sup>325</sup> ECtHR, judgment of 28 February 2019, *H.A. et autres c Grèce*, no 19951/16 (English summary).

<sup>326</sup> The applicants had spent several weeks in police stations before the national authorities recommended their placement in reception centres for unaccompanied minors. Their statutory guardian had not put them in contact with a lawyer and had not lodged an appeal on their behalf for the purpose of discontinuing their detention in the police stations in order to speed up their transfer to the appropriate facilities.

<sup>327</sup> ECtHR, judgment of 11 December 2014, *Mohamad c Grèce*, no 70586/11 (English summary), paras 84–86.

<sup>328</sup> UNHCR, 'UNHCR's position regarding the detention of refugee and migrant children in the migration context', January 2017.

<sup>329</sup> UNHCR, *Detention Guidelines*, 2012, op. cit. (fn. 264 above), Guideline 9.2, p. 36.

being unaccompanied or separated, or on their migratory or residence status, or lack thereof<sup>330</sup>. Rather, it advises

Unaccompanied and separated children should be placed in the national/local alternative care system, preferably in family-type care with their own family when available, or otherwise in community care when family is not available. These decisions have to be taken within a child-sensitive due process framework, including the child's rights to be heard, to have access to justice and to challenge before a judge any decision that could deprive him or her of liberty, and should take into account the **vulnerabilities and needs of the child**, including those based on their gender, disability, age, mental health, pregnancy or other conditions<sup>331</sup>.

#### 4.8.5. Detention of families

Article 11(4) RCD (recast) concerns the detention of families.

##### Article 11(4) RCD (recast)

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

In applying the RCD (recast), Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity, in accordance with the EU Charter, the CRC and the ECHR<sup>332</sup>. Under the ECHR, the ECtHR has stated that it must 'determine whether the family's placement in detention, for a duration such as that in the present case, was necessary within the meaning of Article 8 § 2 of the Convention, that is to say, whether it was justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued'<sup>333</sup>. Where a family includes a minor, protection of the child's best interests involves both keeping the family together, as far as possible, and considering alternatives so that the detention of minors is only a measure of last resort<sup>334</sup>. The ECtHR is of the view that 'the child's best interests cannot be confined to keeping the family together and that the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life'<sup>335</sup>.

Member States must also ensure full compliance with Article 3 ECHR. The ECtHR has found that 15 days' detention of two children (aged 5 months and 3 years) in a closed facility for the purposes of removal was disproportionate. It determined that, although designated for receiving families, the detention facility was not properly suited for that purpose, both in terms of material conditions and in terms of the lack of privacy and the hostile psychological environment prevailing there. The court found, despite a lack of medical evidence, that

<sup>330</sup> CRC Committee, *General Comment no 6*, op. cit. (fn. 85 above), para. 61.

<sup>331</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and CRC Committee, *Joint General Comment no 4 (2017) and no 23 (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 13 (emphasis added).

<sup>332</sup> Recital 9 RCD (recast), quoted in Section 4.3 above.

<sup>333</sup> ECtHR, 2018, *Bistieva*, op. cit. (fn. 315 above), para. 77.

<sup>334</sup> Ibid., para. 78. Note that, where the family includes a minor, the guarantees in the RCD (recast) relating to minors apply. For further information see Section 4.8.3.

<sup>335</sup> Ibid., para. 85.

the applicants had suffered stress and anxiety and, in spite of the relatively short period of detention, there had been a breach of Article 3<sup>336</sup>. In another case, the ECtHR found a violation of Article 3 ECHR in circumstances where four minors (aged 7 months, 3.5 years, 5 years and 7 years), although not separated from their mother, were detained for a month in a closed centre not adapted for children, and the medical evidence indicated that they had undergone serious psychological problems while in custody<sup>337</sup>.

In terms of national case-law, in Belgium, the Council of State suspended the execution of a national law that allowed the detention of children in a centre located near Brussels Airport. It did so in the light of deficiencies in the national law in respect of the protection and safeguards in place for families and children. The applicant non-governmental organisations (NGOs) had claimed that the structure of the centre was inadequate for families, the best interests of the child were not taken into account and detention was not being used as a means of last resort<sup>338</sup>.

The Czech Supreme Administrative Court has ruled that the detention of a family including a minor in a detention centre for foreigners in circumstances where other families had been transferred to reception centres meant that there was an alternative to detention that the national authority was obliged to take into account in deciding whether or not to detain the family<sup>339</sup>.

In a Swiss case, the Federal Court ruled that the detention of families with minor children may be justified in certain circumstances, but a proportionality assessment under Article 8(2) ECHR is still necessary to comply with the ECHR<sup>340</sup>. The German Federal Court has held that there is a strict obligation for the authorities – and the courts – to consider the proportionality of the detention of a family with minor children and to examine on an individual basis whether or not the detention facilities take into account the needs of the minor<sup>341</sup>.

Member States may derogate from the obligation under Article 11(4) in circumstances set out in Section 4.8.7.

<sup>336</sup> ECtHR, judgment of 19 January 2012, *Popov c France*, nos 39472/07 and 39474/07 (extracts in English), paras 92–103.

<sup>337</sup> ECtHR, judgment of 19 January 2010, *Muskhadzhiyeva and Others v Belgium*, no 41442/07 (English summary), paras 57–63.

<sup>338</sup> Council of State (Raad van State / Conseil d'état, Belgium), judgment of 4 April 2019, *L'ordre des Barreaux Francophones et Germanophone and Others v Belgium*, no 244.190. See also Supreme Court (Poland), judgment of 2 March 2017, *S.C., Z.C. and F.C., Sygn. akt II KK 358/16* (English summary).

<sup>339</sup> Supreme Administrative Court (Czechia), judgment of 17 June 2015, *1 Azs 39/2015-56* (English summary).

<sup>340</sup> Federal Court (Switzerland), *2C\_1052/2016, 2C\_1053/2016* (English summary), op. cit. (fn. 265 above).

<sup>341</sup> Federal Court (Bundesgerichtshof, Germany), judgment of 11 October 2012, *V ZB 154/11*, para. 14.

#### 4.8.6. Detention of female applicants

With regard to the detention of female applicants, Article 11(5) RCD (recast) states:

##### **Article 11(5) RCD (recast)**

Where female applicants are detained, Member States shall ensure that they are accommodated separately from male applicants, unless the latter are family members and all individuals concerned consent thereto.

Exceptions to the first subparagraph may also apply to the use of common spaces designed for recreational or social activities, including the provision of meals.

In this context, the ECtHR took into account the fragile health of a female applicant for international protection who was held in immigration detention for 14.5 months, and found a violation of Article 3 ECHR. It concluded that ‘the cumulative effect of the conditions complained of diminished the applicant’s human dignity and aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance’<sup>342</sup>.

UNHCR states that as a general rule pregnant women and nursing mothers should not be detained, and provides other guidance on the detention of female applicants for international protection where that is unavoidable<sup>343</sup>.

Member States may derogate from the rule to accommodate female applicants separately from male applicants in circumstances set out in Section 4.8.7<sup>344</sup>.

#### 4.8.7. Derogations from special guarantees in respect of the detention of vulnerable persons

Article 11(6) RCD (recast) states that ‘In duly justified cases and for a reasonable period that shall be as short as possible ... , when the applicant is detained at a border post or in a transit zone, with the exception of the cases referred to in Article 43 [APD (recast)]’, Member States may derogate from:

- the obligation to provide detained minors with the possibility to engage in leisure activities, including play and recreational activities appropriate to their age (Article 11(3) RCD (recast));
- the obligation to provide detained families with separate accommodation guaranteeing adequate privacy (Article 11(4)); and

<sup>342</sup> ECtHR, 2013, *Aden Ahmed v Malta*, op. cit. (fn. 299 above), para. 99. See also, by contrast, ECtHR, judgment of 26 November 2015, *Mahamed Jama v Malta*, no 10290/13; and ECtHR, 2016, *Elmi and Abubakar v Malta*, op. cit. (fn. 324 above). Both these judgments determined that the detention in Malta in similar circumstances of two other women, who did not have the same health problems, did not violate Article 3 ECHR.

<sup>343</sup> UNHCR, *Detention Guidelines*, 2012, op. cit. (fn. 264 above), Guideline 9.3, p. 37. See also Committee on the Elimination of Discrimination against Women, General recommendation no 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014, CEDAW/C/GC/32, para. 34, referring to their special needs.

<sup>344</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT Committee) notes that, that when a state fails to provide separate accommodation, allegations of ill-treatment of women in custody by men, and of sexual harassment, including verbal abuse with sexual connotations, arise (CPT Standards, CPT/Inf/E (2002) – Rev. 2015).

- the obligation to ensure that detained female applicants are accommodated separately from male applicants (Article 11(5)).

The exceptional cases in which Member States may not invoke this derogation are where Member States provide for procedures in order to decide at the border or in transit zones of the Member State on (a) the admissibility of an application for international protection pursuant to Article 33 APD (recast) made at the border or in a transit zone; and/or (b) the substance of an application pursuant to Article 31(8) APD (recast). This latter provision concerns accelerated procedures and/or procedures conducted at the border or in transit zones in accordance with Article 43 APD (recast).

Notwithstanding that these derogations are narrow, it must be remembered that one of the standards against which detention conditions are examined, namely Article 4 EU Charter / Article 3 ECHR, is absolute. There can be no justification even for temporary derogations that pose a real risk of a breach of Article 4 EU Charter / Article 3 ECHR. Moreover, national authorities are obliged to invoke derogations in line with the principle of proportionality. Temporary derogation countenanced by Article 11(6) RCD (recast) must therefore be interpreted restrictively. Thus, for example, if detention conditions are inadequate in that they deprive minors of facilities and recreational activities appropriate to their age for a significant period of time, this may go beyond what is permitted.

## Part 5. Vulnerable applicants and the Dublin III regulation

This part of the judicial analysis explains the safeguards for vulnerable applicants that apply during the procedures provided for in the Dublin III regulation to determine the Member State responsible for examining an application for international protection. These procedures apply until either the actual transfer of the applicant to the responsible Member State or the assumption of responsibility by the state in which the applicant is present. The part is divided into seven sections, as shown in Table 17.

**Table 17: Structure of Part 5**

Section	Title	Page
5.1	Introduction	102
5.2	Guarantees for (unaccompanied) minors	105
5.3	Criteria for determining the Member State responsible	108
5.4	Discretionary clauses	113
5.5	Transfers	117
5.6	Detention	127
5.7	Effective remedy	128

### 5.1. Introduction

#### Other relevant EASO publications

EASO, *Asylum procedures and the principle of non-refoulement – Judicial Analysis*, 2018, Part 3 ‘Member State responsible for examining the application according to the Dublin III Regulation’.

Unlike the APD (recast) and the RCD (recast), the Dublin III regulation<sup>345</sup> does not contain a provision listing examples of applicants who may be vulnerable or in need of special guarantees. Unaccompanied minors are the only category of applicants explicitly referred to as being ‘vulnerable’ by the Dublin III regulation<sup>346</sup>. There are specific provisions dealing with (unaccompanied) minors, applicants in need of healthcare and applicants who are dependent on other persons<sup>347</sup>.

Nevertheless, the fact that the regulation only refers explicitly to unaccompanied minors as vulnerable – and only specifically addresses the situation of minors, applicants in need

<sup>345</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless persons (recast) (Dublin III regulation).

<sup>346</sup> See Recital 13: ‘In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their particular vulnerability.’

<sup>347</sup> (Unaccompanied) minors: recital 13, Articles 6, 8 and 31(2)(c). Persons in need of physical or mental healthcare: Articles 31(2)(a) and 32. Dependent persons: recital 16 and Article 16.

of healthcare and dependent persons – does not preclude other categories of vulnerable persons from being in need of particular consideration, support and/or special guarantees under the Dublin procedures.

According to recital 11 Dublin III regulation, the RCD (recast) applies to Dublin procedures<sup>348</sup>. A Member State in receipt of an application for international protection is obliged to grant the minimum reception conditions under the RCD (recast) to the applicant. If it decides to call upon another Member State to take charge of or take back that applicant, that obligation only ‘ceases when that same applicant is actually transferred by the requesting Member State’<sup>349</sup>. Moreover, recital 12 Dublin III regulation states that the APD (recast) ‘should apply in addition and without prejudice to the provisions concerning the procedural safeguards regulated’ under the Dublin III regulation.

Consequently, the provisions of the RCD (recast) (see Part 4 above) and the APD (recast) (see Part 7) also apply in Dublin procedures ‘subject to the limitations in the application of [those] Directive[s]’<sup>350</sup>. Thus, the standards and obligations flowing from these directives apply equally to applicants during Dublin procedures, including provisions relating to applicants with special reception and/or procedural needs<sup>351</sup>. Given this, Member States are obliged to take into account any special reception and procedural needs of an applicant, in accordance with the RCD (recast) and APD (recast), at every step of the Dublin procedure.

The Dublin procedure starts ‘as soon as an application for international protection is first lodged with a Member State’<sup>352</sup>. It consists of the determination of the Member State responsible, the decision on whether or not to transfer the person concerned and finally the actual transfer of the applicant or the assumption of responsibility for assessing the application by the state in which the applicant is present<sup>353</sup>. The procedure may also entail a retransfer to the requesting state if the transfer was carried out erroneously or the transfer decision was overturned by a court decision<sup>354</sup>.

The lawful application of the criteria for the determination of the Member State responsible concerning minors and family members – mainly Articles 8 to 11 – may be of particular importance to applicants belonging to one of those categories<sup>355</sup>.

Recital 13 stipulates that the best interests of the child should be a primary consideration of Member States when applying the Dublin III regulation.

<sup>348</sup> Recital 11 states: ‘Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection should apply to the procedure for the determination of the Member State responsible as regulated under this Regulation, subject to the limitations in the application of that Directive.’

<sup>349</sup> CJEU, 2012, *Cimade*, op. cit. (fn. 124 above), para. 61; see also recital 11 Dublin III regulation.

<sup>350</sup> Recitals 11 and 12.

<sup>351</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 70.

<sup>352</sup> Article 20(1) Dublin III regulation.

<sup>353</sup> See, EASO, *Asylum procedures and the principle of non-refoulement – Judicial Analysis*, 2018, Section 3.1.

<sup>354</sup> See Article 30(2) Dublin III regulation; and CJEU, judgment of 25 January 2018, *Bundesrepublik Deutschland v Aziz Hasan*, C-360/16, EU:C:2018:35.

<sup>355</sup> See Section 5.3.

### Recital 13 Dublin III regulation

In accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States when applying this Regulation. In assessing the best interests of the child, Member States should, in particular, take due account of the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background. In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their particular vulnerability.

Furthermore, respect for family life should also be a primary consideration.

### Recital 14 Dublin III regulation

In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union, respect for family life should be a primary consideration of Member States when applying this Regulation.

Recitals 32 and 39 Dublin III regulation state that the Member States are bound, in the application of the regulation, by the case-law of the ECtHR and that the regulation should be applied in full observance of Article 18 EU Charter and in accordance with the rights recognised under Articles 1, 4, 7, 24 and 47 EU Charter<sup>356</sup>. It is settled case-law of the CJEU that the rules of secondary EU law, including the provisions of the Dublin III regulation, must be interpreted and applied in a manner consistent with the fundamental rights guaranteed by the EU Charter<sup>357</sup>.

When applicants have been identified as applicants in need of special procedural guarantees pursuant to Article 24 APD (recast) (see Part 3), they must be provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of the Dublin III regulation throughout the duration of the Dublin procedure. Specific support may, therefore, be required to ensure that such applicants benefit from the right to information (Article 4) and the personal interview (Article 5) under the Dublin III regulation. Thus, the general rule of Article 4(1) Dublin III regulation must be implemented in a way which takes into account an applicant's special procedural needs. This expressly provides that 'it is after ... an application has been lodged that the applicant must be informed, in particular, of the criteria for determining the Member State responsible, the organisation of a personal interview and the possibility of submitting information to the competent authorities'<sup>358</sup>. For example, applicants who are suffering from trauma or other mental health problems, or who have a cognitive learning difficulty, may require specific support.

<sup>356</sup> See CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 63.

<sup>357</sup> See, by analogy, as regards the Dublin II regulation, CJEU (GC), 2011, *NS and Others*, op. cit. (fn. 17 above), paras 77 and 99. See also CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 59; and CJEU (GC), 2019, *Jawa*, op. cit. (fn. 40 above), para. 78.

<sup>358</sup> CJEU, judgment of 4 October 2018, *Bahtiyar Fathi v Predsedatel na Darzhavna agentsia za bezhantsite*, C-56/17, EU:C:2018:803, para. 48.

Article 31 sets out provisions on the exchange of relevant information before a transfer is carried out. It requires the Member State carrying out the transfer to ‘communicate to the Member State responsible such personal data concerning the person to be transferred as is appropriate, relevant and non-excessive for the sole purposes of ensuring that the competent authorities, in accordance with national law in the Member State responsible, are in a position to provide that person with adequate assistance, including the provision of immediate healthcare required in order to protect his or her vital interests, and to ensure continuity in the protection and rights afforded by this Regulation and by other relevant asylum legal instruments’<sup>359</sup>.

Article 32(1) Dublin III regulation requires the exchange of health data on ‘disabled persons, elderly people, pregnant women, minors and persons who have been subject to torture, rape or other serious forms of psychological, physical and sexual violence’. It requires that this be ‘for the sole purpose of the provision of medical care or treatment’<sup>360</sup>.

## 5.2. Guarantees for (unaccompanied) minors

### Other relevant EASO publications

EASO, *Asylum procedures and the principle of non-refoulement – Judicial Analysis*, 2018, Section 3.4, for a detailed account of the special procedural guarantees and their effects on minors.

Article 6 Dublin III regulation sets out ‘guarantees for minors’, including unaccompanied minors. The terms ‘minor’ and ‘unaccompanied minor’ are defined in Article 2(i) and (j) of the Dublin III regulation, which is in line with all other CEAS instruments<sup>361</sup>.

### Article 2(i) and (j) Dublin III regulation

- (i) ‘minor’ means a third-country national or a stateless person below the age of 18 years;
- (j) ‘unaccompanied minor’ means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Member States;

In line with recital 13<sup>362</sup>, which refers to the CRC and the EU Charter, Article 6(1) states that ‘The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation’<sup>363</sup>.

<sup>359</sup> Article 31(1) Dublin III regulation.

<sup>360</sup> See also Section 5.5.

<sup>361</sup> Article 2(d) and (e) RCD (recast), Article 2(l) APD (recast) and Article 2(k) and (l) QD (recast).

<sup>362</sup> Recital 13 is quoted in Section 5.1 above. See CJEU, 2013, *MA, BT and DA*, op. cit. (fn. 109 above), para. 57.

<sup>363</sup> For a general analysis of the legal concept of the best interests of the child, see Section 2.4.

Article 6(2) provides that ‘Member States shall ensure that a representative represents and/or assists an unaccompanied minor with respect to all procedures provided for’ in the regulation. In order to ensure that the best interests of the child are a primary consideration in each case and that they are assessed properly, the representative of an unaccompanied minor is required to ‘have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration’<sup>364</sup>. Such a representative must have ‘access to the content of the relevant documents in the applicant’s file including the specific leaflet for unaccompanied minors’.

The Dublin III regulation does not stipulate the time by which a representative should be appointed to represent and/or assist an unaccompanied minor. This appointment should, however, be informed by Article 2(k), which states that the purpose of a representative is ‘to assist and represent an unaccompanied minor in [Dublin procedures] with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary’. Under the APD (recast), Member States have a choice of whether a minor has the right to make an application for international protection either on their own behalf, or through their parents or other adult family members, or an adult responsible for them, whether by law or by the practice of the Member State concerned, or through a representative (Article 7(3) APD (recast)). Therefore, the appointment of a representative may be necessary before the lodging of an application within the meaning of Article 20(1) Dublin III regulation, if an unaccompanied minor does not, according to the national law of the Member State concerned, have the legal capacity to act on their own behalf.

When the applicant is an unaccompanied minor, the provision of information must be appropriate for their age. Annex XI of Commission Regulation 118/2014<sup>365</sup> contains a common leaflet pursuant to Article 4(3) and recital 34 Dublin III regulation that Member States should use to inform unaccompanied minors about the procedure, in line with Articles 4 and 5 Dublin III regulation.

Article 6(3) specifies some of the factors to be taken into account in assessing the best interests of the child.

### Article 6(3) Dublin III regulation

In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:

- (a) family reunification possibilities;
- (b) the minor’s well-being and social development;
- (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
- (d) the views of the minor, in accordance with his or her age and maturity.

<sup>364</sup> Article 6(2) Dublin III regulation.

<sup>365</sup> Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 39/1.

Article 6(3)(d) Dublin III regulation requires that, in assessing the best interests of the child, Member States take due account of, *inter alia*, ‘the views of the minor in accordance with his or her age and maturity’. This would suggest that a minor applicant be interviewed when this is deemed to be appropriate with regard to his or her age and maturity. This interpretation of the Dublin III regulation would correspond with Article 12(2) CRC, which states:

the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law<sup>366</sup>.

The CRC Committee’s General comment no 12 states: ‘Article 12 of the Convention establishes the right of every child to freely express her or his views, in all matters affecting her or him, and the subsequent right for those views to be given due weight, according to the child’s age and maturity’<sup>367</sup>.

Article 6(4) provides the following:

#### **Article 6(4), first two subparagraphs, Dublin III regulation**

For the purpose of applying Article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child.

To that end, that Member State may call for the assistance of international or other relevant organisations, and may facilitate the minor’s access to the tracing services of such organisations<sup>368</sup>.

It follows from Article 6(4) that Member States shall take ‘appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of the Member States – with a view *inter alia* to applying the criteria to determine the Member State responsible ... , set out in Article 8 of that regulation’<sup>369</sup>.

‘The staff of the competent authorities ... who deal with requests concerning unaccompanied minors’ must ‘have received, and shall continue to receive, appropriate training concerning the specific needs of minors’<sup>370</sup>.

<sup>366</sup> See also CRC Committee, views of 27 September 2018, *Y.B. and N.S. v Belgium*, communication no 12/2017, CRC/C/79/D/12/2017, paras 8.7–8.8, affirming the right of a 5-year-old girl to be heard. Para. 8.7 reads: ‘... The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child’s views in determining his or her best interests’. See also Section 7.5.6 below.

<sup>367</sup> CRC Committee, *General comment no 12*, op. cit. (fn. 196 above), para. 15. For more on the child’s right to be heard see Section 7.5.6 below, text at fn. 683.

<sup>368</sup> With regard to a minor, under Article 2(g) Dublin III regulation, when the applicant is a minor and unmarried, a family member is ‘the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present’; and under Article 2(h) “relative” means the applicant’s adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law’.

<sup>369</sup> CJEU, judgment of 26 July 2017, *Tsegezab Mengesteb v Bundesrepublik Deutschland*, C-670/16, EU:C:2017:587, para. 87.

<sup>370</sup> Article 6(4) Dublin III regulation. For further information see Section 5.3.1, which addresses Article 8.

## 5.3. Criteria for determining the Member State responsible

The fact that an applicant is vulnerable may be relevant to applying the criteria for determining the Member State responsible for examining an application<sup>371</sup>. The hierarchy of these criteria reflect the fact that the best interests of the child and respect for family life should be primary considerations (see Sections 2.4, 5.1 and 5.2)<sup>372</sup>.

In accordance with Article 7(1) Dublin III regulation, the criteria are to ‘be applied in the order in which they are set out in’ Chapter III of the regulation.

The first criterion, Article 8, concerns minors.

The following three articles (Articles 9, 10 and 11) concern applicants who have a family member, within the meaning of Article 2(g) Dublin III regulation, in a Member State. These criteria take precedence over the subsequent criteria. Moreover, ‘Where, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States’, or vice versa, ‘Member States shall normally keep or bring together the applicant’ with that family member as prescribed in the binding responsibility criterion in Article 16(1)<sup>373</sup>.

### 5.3.1. Minors

As stated above, Article 8 Dublin III regulation is the first criterion to be applied when assessing which Member State is responsible for examining the application for international protection. Article 8(1), (2), (3), and (4) reads:

#### Article 8(1), (2), (3), and (4) Dublin III regulation

##### Minors

1. Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor. Where the applicant is a married minor whose spouse is not legally present on the territory of the Member States, the Member State responsible shall be the Member State where the father, mother or other adult responsible for the minor, whether by law or by the practice of that Member State, or sibling is legally present.

<sup>371</sup> For the application of the criteria for determining the Member State responsible generally, see EASO, *Asylum procedures and the principle of non-refoulement – Judicial Analysis*, 2018, Section 3.6.2.

<sup>372</sup> See CJEU (GC), judgment of 2 April 2019, *Staatssecretaris van Veiligheid en Justitie v H. and R.*, joined cases C-582/17 and C-583/17, EU:C:2019:280, para. 83.

<sup>373</sup> Article 16(1) Dublin III regulation. Article 16 is not listed in Chapter III of the regulation, which contains the responsibility criteria according to its heading, but is in Chapter IV on ‘dependent persons and discretionary clauses’. Recital 16 nevertheless describes dependency rules as a ‘binding responsibility criterion’.

2. Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her, that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor.
3. Where family members, siblings or relatives as referred to in paragraphs 1 and 2, stay in more than one Member State, the Member State responsible shall be decided on the basis of what is in the best interests of the unaccompanied minor.
4. In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor.

Recital 16, which states that ‘When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion’, is reflected in Article 8(2).

The CJEU ruled, in its judgment in *MA, BT, and DA*, that in circumstances:

where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State in which that minor is present after having lodged an asylum application there is to be designated the ‘Member State responsible’<sup>374</sup>.

Article 12 Dublin Implementing Regulation 1560/2003<sup>375</sup>, as amended by Commission Implementing Regulation (EU) No 118/2014<sup>376</sup>, sets out the framework and specific rules for cooperation and consultation among Member States when determining responsibility for examining the applications of unaccompanied minors, in which the best interests of the child are to be a primary consideration.

### 5.3.2. Family life

Recital 14<sup>377</sup> requires that respect for family life be ‘a primary consideration of Member States when applying [the Dublin III] Regulation’.

Thus, Article 9 Dublin III regulation states:

<sup>374</sup> CJEU, 2013, *MA, BT and DA*, op. cit. (fn. 109 above), para. 67; see also Article 8(4). The CJEU refers to this case as *MA and Others*, but it is referred to here as *MA, BT and DA* in order to distinguish it from the case of *MA, SA and AZ*, which is also referred to as *MA and Others* by the CJEU.

<sup>375</sup> Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 222/3. (The references to Article 15(2) of the Dublin II regulation are to be read as references to Article 16(1) of the Dublin III regulation.)

<sup>376</sup> Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 39/1.

<sup>377</sup> Cited in full in Section 5.1.

### **Article 9 Dublin III regulation**

#### **Family members who are beneficiaries of international protection**

Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.

This means that, if, for example, the parents of a minor applying for international protection in Sweden have been allowed to reside as beneficiaries of international protection in Italy and the parents do not express their desire in writing, Italy cannot be considered responsible for examining the application for international protection of the minor<sup>378</sup>.

Article 10 applies the same principle if the applicant has family members who are applicants for international protection in another Member State.

### **Article 10 Dublin III regulation**

#### **Family members who are applicants for international protection**

If the applicant has a family member in a Member State whose application for international protection in that Member State has not yet been the subject of a first decision regarding the substance, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.

Article 11 covers family procedure.

### **Article 11 Dublin III regulation**

#### **Family procedure**

Where several family members and/or minor unmarried siblings submit applications for international protection in the same Member State simultaneously, or on dates close enough for the procedures for determining the Member State responsible to be conducted together, and where the application of the criteria set out in this Regulation would lead to their being separated, the Member State responsible shall be determined on the basis of the following provisions:

- (a) responsibility for examining the applications for international protection of all the family members and/or minor unmarried siblings shall lie with the Member State which the criteria indicate is responsible for taking charge of the largest number of them;
- (b) failing this, responsibility shall lie with the Member State which the criteria indicate is responsible for examining the application of the oldest of them.

<sup>378</sup> An example of such reasoning may be seen in the judgment by the Migration Court of Appeal (Sweden), judgment of 26 October 2016, MIG 2016:20.

Article 20(3) of the Dublin III regulation states:

### Article 20(3) Dublin III regulation Start of the procedure

For the purposes of this Regulation, the situation of a minor who is accompanying the applicant and meets the definition of family member shall be indissociable from that of his or her family member and shall be a matter for the Member State responsible for examining the application for international protection of that family member, even if the minor is not individually an applicant, provided that it is in the minor's best interests. The same treatment shall be applied to children born after the applicant arrives on the territory of the Member States, without the need to initiate a new procedure for taking charge of them.

In this regard, the CJEU has stated that it is clear from the wording of Article 20(3) Dublin III regulation that 'it is only where it is established that such an examination carried out in conjunction with that of the child's parents is not in the best interests of that child that it will be necessary to treat the child's situation separately from that of its parents' <sup>379</sup>. The CJEU considered that finding to be consistent with recitals 14 to 16 and, *inter alia*, Article 6(3)(a) and (4), Article 8(1) and Article 11 Dublin III regulation. It follows from those provisions that respect for family life and, more specifically, preserving the unity of the family group is, as a general rule, in the best interests of the child <sup>380</sup>.

It held that Article 20(3) must be interpreted as meaning that 'in the absence of evidence to the contrary, that provision establishes a presumption that it is in the best interests of the child to treat that child's situation as indissociable from that of its parents' <sup>381</sup>.

In 'take back' procedures, since the process of determining the Member State responsible for examining the application has previously been completed in the Member State that was asked to take charge of the applicant and resulted in that state acknowledging that it is responsible for examining that application, 'it is no longer necessary to re-apply the rules governing the process of determining that responsibility, foremost among which are the criteria set out in Chapter III of the Regulation' <sup>382</sup>.

With regard to the determination of the Member State responsible, two other provisions of the Dublin III regulation seek to ensure respect for the principle of family unity. See Section 5.3.3 on dependent persons and Section 5.4 on the discretionary clauses for further information.

<sup>379</sup> CJEU, 2019, *M.A., S.A. and A.Z.*, op. cit. (fn. 110 above), para. 88.

<sup>380</sup> Ibid., para. 89.

<sup>381</sup> Ibid., para. 90.

<sup>382</sup> CJEU (GC), 2019, *H. and R.*, op. cit. (fn. 372 above), para. 67.

### 5.3.3. Dependent persons

The requirement normally to keep or bring together applicants who are family also applies to dependent persons in accordance with Article 16(1)<sup>383</sup>. Article 16(1) and (2) reads:

#### Article 16(1) and (2) Dublin III regulation

1. Where, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing.
2. Where the child, sibling or parent referred to in paragraph 1 is legally resident in a Member State other than the one where the applicant is present, the Member State responsible shall be the one where the child, sibling or parent is legally resident unless the applicant's health prevents him or her from travelling to that Member State for a significant period of time. In such a case, the Member State responsible shall be the one where the applicant is present. Such Member State shall not be subject to the obligation to bring the child, sibling or parent of the applicant to its territory.

According to recital 16, if the stated circumstances are met, Article 16 sets out a 'binding responsibility criterion'<sup>384</sup>.

Under the corresponding Article 15(2) Dublin II regulation, the CJEU held that a daughter-in-law who had 'a new-born baby and suffer[ed] from a serious illness and handicap following a serious and traumatic occurrence which took place in a third country' was dependent on the applicant, her mother-in-law<sup>385</sup>. It has to be noted that, under Article 16 Dublin III regulation, the scope of the dependency clause was narrowed to children, siblings and parents. Any other situation of dependency would need to be considered under the discretionary clause of Article 17(2).

Article 11 Dublin implementing regulation<sup>386</sup>, as amended by Commission Implementing Regulation (EU) no 118/2014<sup>387</sup>, sets out the factors to be taken into account in assessing situations of dependency. The information that needs to be exchanged, for the purposes of assessing the applicability of Article 16, concerns 'the proven family links', the dependency link, the capacity of the person concerned to take care of the dependent person, and 'where necessary, the elements to be taken into account in order to assess the inability to travel for

<sup>383</sup> See also EASO, *Asylum procedures and the principle of non-refoulement – Judicial Analysis*, 2018, Section 3.6.3.

<sup>384</sup> Recital 16 Dublin III regulation reads in full: 'In order to ensure full respect for the principle of family unity and for the best interests of the child, the existence of a relationship of dependency between an applicant and his or her child, sibling or parent on account of the applicant's pregnancy or maternity, state of health or old age, should become a binding responsibility criterion. When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion.'

<sup>385</sup> See CJEU, judgment of 6 November 2012, *K v Bundesasylamt*, C-245/11, EU:C:2012:685, para. 16.

<sup>386</sup> Commission Regulation (EC) No 1560/2003, 2003, op. cit. (fn. 375 above). (The references to Article 15(2) of the Dublin II regulation are to be read as references to Article 16(1) of the Dublin III regulation as provided for in the correlation table in Annex II of the Dublin III regulation.)

<sup>387</sup> Commission Implementing Regulation (EU) No 118/2014, 2014, op. cit. (fn. 365 above).

a significant period of time’<sup>388</sup>. Member States are provided with the form in Annex VII of Commission Implementing Regulation (EU) no 118/2014 for the consultation and exchange of information provided for under Article 16(4) Dublin III regulation. Information may also be exchanged through other means, in particular through take charge requests or information requests.

The German Federal Constitutional Court held that the conditions for taking a transfer decision and carrying out the transfer must be assessed by the Member States and the competent courts or tribunals, when respect for the right to family life or the best interests of the child might be affected<sup>389</sup>. The Swiss Federal Administrative Court stated in a decision on Article 16 that the dependency link must be substantial and that mere affective support does not meet the criteria, if it is not coupled with a need for immediate and substantial assistance in case of grave illness or disability<sup>390</sup>.

### 5.3.4. Residence documents or visas

Under national law, or EU or international public law, it may be mandatory to issue a residence document within the meaning of Article 2(l) Dublin III regulation to some vulnerable applicants. Article 2(l) Dublin III regulation encompasses any authorisation to stay, even if such authorisations are temporary. The only exceptions are ‘visas and residence authorisations issued during the period required to determine the Member State responsible ... or during the examination of an application for international protection or an application for a residence permit’.

In accordance with Article 12 Dublin III regulation, if an applicant is in possession of a valid residence document or visa, the Member State that issued the document or visa is responsible for examining the application for international protection, unless Articles 8–11 or 16 apply and accordingly another Member State is responsible. Responsibility also falls to the issuing state if a residence document is issued after the application for international protection was lodged (see Article 19(1)).

The Swiss Federal Court stated in a 2019 decision concerning a Dublin transfer that there is an obligation flowing from Article 4 ECHR and Article 14 of the Council of Europe Convention on Action against Trafficking in Human Beings<sup>391</sup> to issue a residence document to victims of trafficking who are willing to cooperate in criminal proceedings<sup>392</sup>. The court did not rule, however, on the implications for the Dublin procedure.

## 5.4. Discretionary clauses

Article 17 of the Dublin III regulation comprises two different discretionary clauses. Article 17(1) permits a Member State to take over responsibility for examining an application that has been lodged there even if it is not responsible for examining that application under

<sup>388</sup> Commission Implementing Regulation (EU) No 118/2014, 2014, op. cit. (fn. 365 above), Article 11(6).

<sup>389</sup> Federal Constitutional Court (Germany), decision of 17 September 2014, 2 BvR 939/14, para. 16.

<sup>390</sup> Federal Administrative Court (BVGE, Switzerland), judgment of 11 May 2017, BVGE 2017 VI/5, para. 8.3.5.

<sup>391</sup> Article 14 of this convention states: ‘Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both: (a) the competent authority considers that their stay is necessary owing to their personal situation; (b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.’

<sup>392</sup> Federal Administrative Court (BVGE, Switzerland), judgment of 14 February 2018, 2C\_373/2017.

the criteria of the Dublin III regulation. Article 17(2) permits a Member State, under certain conditions, to request another Member State to take charge of an applicant, even where that other Member State is not responsible under the criteria of the Dublin III regulation.

### 5.4.1. Article 17(1)

Article 17(1) Dublin III regulation states:

#### Article 17(1) Dublin III regulation

By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility.

[...]

According to recital 17 of the Dublin III regulation:

#### Recital 17 Dublin III regulation

Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in this Regulation.

The CJEU, the ECtHR, and courts and tribunals of Member States have provided, in their case-law, several examples of when Article 17(1) has been considered with reference to the vulnerability of the applicant. The applicants in those cases have been children<sup>393</sup>; seriously ill applicants or applicants with mental or physical illness or psychiatric difficulties<sup>394</sup>; dependants<sup>395</sup>; or other family members<sup>396</sup>.

<sup>393</sup> For example, in *Tarakhel v Switzerland*, the ECtHR (GC) established that the Swiss authorities should, under the Dublin Regulation, refrain from transferring the applicants to Italy, if they considered that the receiving country was not fulfilling its obligations under the ECHR (see ECtHR (GC), 2014, *Tarakhel v Switzerland*, op. cit. (fn. 48 above), paras 89–90). See also Court of Appeal (England and Wales, UK), judgment of 18 January 2018, *R (RSM, a child) v Secretary of State for the Home Department*, [2018] EWCA Civ 18.

<sup>394</sup> See for example CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 88; ECtHR, judgment of 30 June 2015, *A.S. v Switzerland*, no 39350/13, paras 10–13.

<sup>395</sup> See for example Federal Administrative Court (Bundesverwaltungsgericht, Austria), W205 2104654-1, 15 May 2016, AT:BVWG:2016:W205.2104654.1.00, para. 3.3. In this case the court stated that it is imperative for the Austrian authorities to make use of their discretion under Article 17(1) of the Dublin III regulation. In the Netherlands, The Hague Court decided that the Dutch authorities had not examined whether or not the use of Article 17 would be appropriate in these circumstances. See The Hague Court (Rechtbank Den Haag, Netherlands), judgment of 9 June 2016, NL 16.1136 and NL 16.1138, NL:RBDHA:2016:6809.

<sup>396</sup> See for example Federal Administrative Court (Bundesverwaltungsgericht, Austria), W165 2135349-1, 8 March 2017, AT:BVWG:2017:W165.2135349.1.00. For more on these kinds of cases, see ECRE and European Legal Network on Asylum, *ECRE/ELENA case law note on the application of the Dublin Regulation to family reunion cases*, February 2018.

In situations in which the application of either the criteria in Chapter III or Article 3(2) Dublin III regulation leads to a possible conflict with the fundamental rights of a vulnerable applicant, the discretionary clause under Article 17(1) provides a mechanism for the protection of those fundamental rights.

The CJEU ruled in *M.A., S.A. and A.Z.*:

Article 17(1) ... is optional in so far as it leaves it to the discretion of each Member State to decide to examine an application for international protection lodged with it, even if that examination is not its responsibility under the criteria ... for determining the Member State responsible. The exercise of that option is not, moreover, subject to any particular condition ... That option is intended to allow each Member State to decide, in its absolute discretion, on the basis of political, humanitarian or practical considerations, to agree to examine an asylum application even if it is not responsible under the criteria laid down in that regulation<sup>397</sup>.

Furthermore, the CJEU stressed: ‘In the light of the extent of the discretion thus conferred on the Member States, it is for the Member State concerned to determine the circumstances in which it wishes to use the option conferred by the discretionary clause set out in Article 17(1)’<sup>398</sup>.

With regard to a circumstance in which the state of health of an applicant precludes a transfer, the CJEU has stated in *C.K. and Others*<sup>399</sup>:

Where necessary, if it is noted that the state of health of the asylum seeker concerned is not expected to improve in the short term, or that the suspension of the procedure for a long period would risk worsening the condition of the person concerned, the requesting Member State may choose to conduct its own examination of his application by making use of the ‘discretionary clause’ laid down in Article 17(1) of the Dublin III Regulation ... The fact nevertheless remains that that provision, read in the light of Article 4 of the Charter, cannot be interpreted, in a situation such as that at issue in the main proceedings, as meaning that it implies an obligation on that Member State to make use of it in that way<sup>400</sup>.

In its judgment, the CJEU determined that the ‘situation such as that at issue in the main proceedings’ was that the national authorities had not ensured any of the precautionary measures referred to in paragraphs 81 to 83 of the judgment before the Supreme Court sent an order for a preliminary ruling to the CJEU<sup>401</sup>.

The CJEU has also addressed the situation in which an applicant’s state of health prohibits their transfer and the Member State where the applicant is present, nevertheless, declines to make use of its discretion to assume responsibility under Article 17(1) Dublin III regulation. In such circumstances, the court has clarified that:

if the state of health of the asylum seeker concerned does not enable the requesting Member State to carry out the transfer before the expiry of the six-month period

<sup>397</sup> CJEU, 2019, *M.A., S.A. and A.Z.*, op. cit. (fn. 110 above), para. 58. See also CJEU, judgment of 30 May 2013, *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministrskia savel*, C-528/11, EU:C:2013:342, para. 36; and CJEU, 2018, *Fathi*, op. cit. (fn. 358 above), para. 53.

<sup>398</sup> CJEU, 2019, *M.A., S.A. and A.Z.*, op. cit. (fn. 110 above), para. 59.

<sup>399</sup> See Sections 5.5.3 and 5.5.4 for more details on this topic.

<sup>400</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 88.

<sup>401</sup> Ibid., paras 81–83.

provided for in Article 29(1) of the Dublin III Regulation, the Member State responsible would be relieved of its obligation to take charge of the person concerned and responsibility would then be transferred to the first Member State, in accordance with paragraph 2 of that article<sup>402</sup>.

With regard to the right to an effective remedy in relation to Article 17(1), Article 27(1) of the Dublin III regulation does not require a distinct remedy to be made available against a decision not to apply the discretionary clause. This is, however, ‘without prejudice to the fact that that decision may be challenged at the time of an appeal against a transfer decision’ in order to avoid multiple remedies against Dublin decisions<sup>403</sup>.

#### 5.4.2. Article 17(2)

Article 17(2) Dublin III regulation sets out a completely different discretionary clause. It empowers a Member State to request another Member State to take charge of an applicant.

##### Article 17(2) Dublin III regulation

The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing.

The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation.

[...]

It is not altogether clear whether Article 17(2) provides the option of derogating from the responsibility criteria for family reasons **and** humanitarian reasons or **only** family reasons. Read in the light of recital 17, however, it seems clear that the overarching aim of the provision is to enable Member States to respect family life and bring families together and that it does not enable Member States to derogate from the responsibility criteria for solely humanitarian reasons.

The first subparagraph of Article 17(2) provides for respect for family life in a broad sense. The scope of its application is not limited to situations of dependency, since reference is made to ‘humanitarian grounds based in particular on family or cultural considerations’ where the application of the criteria does not ensure family unity. Read in conjunction with recital 17, it is clear that the aim is to bring together family members, relatives or any

<sup>402</sup> Ibid., para. 89. See also Section 5.5.3 below.

<sup>403</sup> CJEU, 2019, *M.A., S.A. and A.Z.*, op. cit. (fn. 110 above), paras 76 and 79.

other family relations, i.e. family in a broad sense. Its application is, however, subject to the consent of the persons concerned<sup>404</sup>.

## 5.5. Transfers

The special needs of a vulnerable applicant should be taken into account in the context of transfer requests, take charge and take back procedures, and the actual transfer of the applicant concerned, as outlined below.

### 5.5.1. Sending requests

During the course of Dublin procedures, a vulnerable applicant's special needs should be taken into account at the time of sending a take charge or take back request. Member States' authorities as well as courts and tribunals must assess information provided by the applicant regarding content and relevance. As the CJEU stated in the *C.K. and Others* judgment:

where an asylum seeker provides, particularly in the context of an effective remedy guaranteed to him by Article 27 of the Dublin III Regulation, objective evidence, such as medical certificates concerning his person, capable of showing the particular seriousness of his state of health and the significant and irreversible consequences to which his transfer might lead, the authorities of the Member State concerned, including its courts, cannot ignore that evidence. They are, on the contrary, under an obligation to assess the risk that such consequences could occur when they decide to transfer the person concerned or, in the case of a court, the legality of a decision to transfer, since the execution of that decision may lead to inhuman or degrading treatment of that person<sup>405</sup>.

Special needs must also be taken into account, if a request is sent under Article 21 (Annex I of Commission Implementing Regulation 118/2014) and Article 23 or 24 (Annex III of Commission Implementing Regulation 118/2014)<sup>406</sup>. Copies of relevant documents provided by the applicant are to be attached to the request.

After the competent authorities have issued a decision, it may become apparent that an applicant is vulnerable and has special needs. Competent courts or tribunals may need to take such circumstances into account during the proceedings. This is because, as the CJEU has ruled, 'an applicant must have an effective and rapid remedy available to him which enables him to rely on circumstances subsequent to the adoption of the decision to transfer him, when the correct application of the Dublin III Regulation depends upon those circumstances being taken into account'<sup>407</sup>. The assessment of the legal and factual situation in the receiving Member State could also require an assessment of if and how specific special needs are addressed in the receiving Member State.

<sup>404</sup> The Administrative Court of Münster (Germany) decided that the Member State asked to take charge has no discretion but is obliged to apply Article 17(2) Dublin III regulation in cases in which this Member State had been the one responsible for examining an application before but was relieved of its obligations to take charge or to take back the applicant owing to the lapse of time for the transfer in accordance with Article 29(2) Dublin III regulation. See Administrative Court Münster (Verwaltungsgericht Münster, Germany), order of 20 December 2018, 2 L 989/18.A.

<sup>405</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 75.

<sup>406</sup> Commission Implementing Regulation (EU) No 118/2014, op. cit. (fn. 365 above).

<sup>407</sup> See CJEU, 2018, *Aziz Hasan*, op. cit. (fn. 354 above), para. 31.

Some national courts and tribunals have judged that, if the assessment was not conducted in line with obligations flowing from EU law or public international law and the national system permits, the court or tribunal may send the decision back to the authorities in order to assess, prior to a transfer decision, the nature of the applicant's needs and if those needs will be addressed in the receiving Member State<sup>408</sup>.

## 5.5.2. 'Take back' procedures and Article 20(5) Dublin III regulation

Article 20(5) Dublin III regulation provides:

### Article 20(5) Dublin III regulation

An applicant who is present in another Member State without a residence document or who there lodges an application for international protection after withdrawing his or her first application made in a different Member State during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Articles 23, 24, 25 and 29, by the Member State with which that application for international protection was first lodged, with a view to completing the process of determining the Member State responsible.

That obligation shall cease where the Member State requested to complete the process of determining the Member State responsible can establish that the applicant has in the meantime left the territory of the Member States for a period of at least three months or has obtained a residence document from another Member State.

An application lodged after the period of absence referred to in the second subparagraph shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible.

In take back procedures, the CJEU has stated that the requesting Member State is not required:

before making a take back request to another Member State, to establish, on the basis of the criteria for determining responsibility laid down by the Regulation and in particular of the criterion set out in Article 9 thereof, whether that latter Member State is responsible for examining the application<sup>409</sup>.

The court added, however, that:

the criteria for determining responsibility set out in Articles 8 to 10 of the Regulation, read in the light of recitals 13 and 14 thereof, are intended to promote the best interests of the child and the family life of the persons concerned, which are moreover guaranteed in Articles 7 and 24 of the Charter of Fundamental Rights. In those circumstances, a Member State cannot, in accordance with the principle of sincere

<sup>408</sup> See for example, for annulments of decisions in trafficking cases, Federal Administrative Court (Bundesverwaltungsgericht, Austria), judgment of 28 March 2017, W161 2149727-1/5E ua; and Federal Administrative Court (BVGE, Switzerland), judgment of 24 August 2017, D-5920/2016. The latter decision also states in para. 8 that the general obligations flowing from public international law regarding victims of trafficking (including the assessment of all relevant circumstances if there are reasonable grounds to believe that the person has been a victim of trafficking in human beings) are applicable in Dublin procedures.

<sup>409</sup> CJEU (GC), 2019, *H. and R.*, op. cit. (fn. 372 above), para. 80.

cooperation, properly make a take back request, in a situation covered by Article 20(5) of the regulation, when the person concerned has provided the competent authority with information clearly establishing that that Member State must be regarded as the Member State responsible for examining the application pursuant to those criteria for determining responsibility. In such a situation, it is, on the contrary, for that Member State to accept its own responsibility<sup>410</sup>.

In this context, it should be noted that Article 20(5) applies to an applicant who lodges an application for international protection in a Member State after withdrawing their first application made in a different Member State during the process of determining the Member State responsible for examining the application. Even though the requesting Member State is generally not required to assess the responsibility of the requested Member State, it may not submit a take back request when its own responsibility is clearly established by facts and is based on elements related to the best interests of the child or respect for family life<sup>411</sup>.

### 5.5.3. Prohibition or suspension of transfer

#### Other relevant EASO publications

EASO, *Asylum procedures and the principle of non-refoulement – Judicial Analysis*, 2018, Section 3.6 ‘Legality of a transfer decision’.

The CJEU has ruled that, when deciding on the legality of a transfer decision or a transfer that has already been carried out, the prohibition of torture, inhuman or degrading treatment or punishment, laid down in Article 4 EU Charter, ‘is of fundamental importance, and is general and absolute in that it is closely linked to respect for human dignity, which is the subject of Article 1 EU Charter’<sup>412</sup>. It has further stated that the transfer of an applicant, within the framework of the Dublin III regulation, ‘can take place only in conditions which preclude that transfer from resulting in a real risk of the person concerned suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter’<sup>413</sup>.

It has to be noted that:

EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected ... , and that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter<sup>414</sup>.

<sup>410</sup> CJEU (GC), 2019, *H. and R.*, op. cit. (fn. 372 above), para. 83.

<sup>411</sup> Ibid., para. 83.

<sup>412</sup> CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 78. See also CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 59.

<sup>413</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 65.

<sup>414</sup> CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 80.

Accordingly, in the context of the CEAS and in particular the Dublin III regulation, it must be presumed that the treatment of applicants for international protection in all Member States complies with the requirements of the EU Charter, the Refugee Convention and the ECHR<sup>415</sup>. This presumption applies to all applicants, whether they are vulnerable or not.

As the CJEU states, however, it is not:

inconceivable that [an asylum] system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that applicants for international protection may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights<sup>416</sup>.

In such circumstances, a decision to transfer an applicant may be unlawful under Article 4 EU Charter<sup>417</sup>.

Article 3(2), second subparagraph, Dublin III regulation is a codification of CJEU case-law<sup>418</sup>, namely the landmark judgment in the cases of *N.S. and Others*<sup>419</sup>. Article 3(2) states:

### **Article 3(2), second subparagraph, Dublin III regulation**

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

The CJEU's judgment in the cases of *N.S. and Others* includes several references to the judgment of the ECtHR in the case of *M.S.S. v Belgium and Greece*<sup>420</sup>. Both decisions deal with the legality of transfers in applying the Dublin II regulation. One of the main issues of the ECtHR's landmark decision was to clarify under which circumstances Member States are fully responsible under the ECHR when applying Union law. The Grand Chamber set out clearly – by reiterating its jurisprudence – that a Member State would be fully responsible under the ECHR for all acts falling outside its strict international legal obligations, notably where it exercised state discretion<sup>421</sup>. The application of the discretionary clause falls within the discretion of each Member State<sup>422</sup>.

Even where there are no systemic flaws within the meaning of the Dublin III regulation, the individual position or circumstances may be such that it cannot be excluded that the

<sup>415</sup> Ibid., para. 82.

<sup>416</sup> CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 83. See also CJEU, judgment of 26 July 2017, *Khadija Jafari and Zainab Jafari*, C-646/16, EU:C:2017:586, para. 101.

<sup>417</sup> CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 83. See also CJEU, 2017, *Jafari*, op. cit. (fn. 416 above), para. 101.

<sup>418</sup> CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 86.

<sup>419</sup> CJEU (GC), 2011, *N.S. and Others*, op. cit. (fn. 17 above).

<sup>420</sup> ECtHR (GC), 2011, *M.S.S. v Belgium and Greece*, op. cit. (fn. 46 above).

<sup>421</sup> Ibid., para. 338. For a more detailed analysis of the interplay between EU law and the ECHR, see EASO, *An introduction to the Common European Asylum System for courts and tribunals – Judicial analysis*, 2016, Section 3.4.1.

<sup>422</sup> ECtHR (GC), 2011, *M.S.S. v Belgium and Greece*, op. cit. (fn. 46 above). The ECtHR states in para. 340: 'The Court concludes that, under the Dublin Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention. Consequently, the Court considers that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations. Accordingly, the presumption of equivalent protection does not apply in this case.'

transfer itself and/or the particular conditions in the Member State primarily designated as responsible might result in a real risk of a violation of Article 4 EU Charter. The CJEU further developed<sup>423</sup> its approach to Article 4 EU Charter in the context of the Dublin III regulation in its judgment in the case of *Jawo*:

Although the second subparagraph of Article 3(2) of the Dublin III Regulation envisages only the situation underlying the judgment of 21 December 2011, *N. S. and Others* ... , namely that in which the real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, stems from systemic flaws in the asylum procedure and the reception conditions of applicants for international protection in the Member State which, pursuant to that regulation, is designated as responsible for examining the application, it is nevertheless apparent from paragraphs 83 and 84 of the present judgment and from the general and absolute nature of the prohibition laid down in Article 4 of the Charter that the transfer of an applicant to that Member State is ruled out in any situation in which there are substantial grounds for believing that the applicant runs such a risk during his transfer or thereafter.<sup>424</sup>

Thus, systemic flaws in the asylum procedure or in the reception conditions resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 EU Charter or any other (individual) situation leading to such a real risk of ill-treatment render a transfer according to the Dublin III regulation unlawful.

Vulnerable applicants with special needs may be at risk of ill-treatment within the meaning of Article 4 EU Charter due to systemic flaws in a Member State, or due to the impact of the transfer itself or the conditions in the Member State as a result of their personal circumstances. This is also apparent from the definition of the minimum level of severity of treatment required for it to fall within the scope of Article 4 EU Charter. This can be found in the settled case-law of the ECtHR, which is applied by the CJEU, as set out in Article 52(3) EU Charter<sup>425</sup>. It takes into account the personal circumstances of the victim as follows:

In order for treatment to fall within the scope of that provision it must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.<sup>426</sup>

The CJEU has clarified that, especially when an applicant is vulnerable because of their state of health, the transferring Member State must examine not only whether or not the applicant can bear the direct consequences of the transfer but also the wider impact of the transfer on their condition. In *MP*, the CJEU stated:

Article 4 of the Charter must be interpreted as meaning that the removal of a third country national with a particularly serious mental or physical illness constitutes inhuman and degrading treatment, within the meaning of that article, where such

<sup>423</sup> The CJEU referred to a prohibition of a transfer due to individual reasons giving rise to concerns under Article 4 EU Charter for the first time in CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 98.

<sup>424</sup> CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 87.

<sup>425</sup> Ibid., para. 91; and CJEU, judgment of 25 July 2018, *ML*, C-220/18 PPU, EU:C:2018:589, para. 91.

<sup>426</sup> ECtHR (GC), judgment of 31 January 2019, *Rooman v Belgium*, no 18052/11, para. 141.

removal would result in a real and demonstrable risk of significant and permanent deterioration in the state of health of the person concerned<sup>427</sup>.

Given the fundamental importance of Article 4 EU Charter, the court has ruled that ‘it is necessary to consider all the significant and permanent consequences that might arise from the removal’<sup>428</sup>. Indeed ‘particular attention must be paid to the specific vulnerabilities of persons whose psychological suffering, which is likely to be exacerbated in the event of their removal, is a consequence of torture or inhuman or degrading treatment in their country of origin’<sup>429</sup>.

The CJEU decided in *C.K. and Others*:

It is, therefore, for those authorities to eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned. In this regard, in particular in the case of a serious psychiatric illness, it is not sufficient to consider only the consequences of physically transporting the person concerned from one Member State to another, but all the significant and permanent consequences that might arise from the transfer must be taken into consideration.

In that context, the authorities of the Member States concerned must verify whether the state of health of the person at issue may be protected appropriately and sufficiently by taking the precautions envisaged by the Dublin III Regulation and, in the affirmative, must implement those precautions<sup>430</sup>.

Personal circumstances that have resulted in an applicant being identified as having special reception needs and/or being in need of special procedural guarantees may also place that applicant at a real risk of ill-treatment contrary to Article 4 EU Charter if they are transferred to the Member State responsible. As these personal circumstances may be specific to that applicant, that real risk of ill-treatment must be established solely on an individual basis and not based on systemic flaws within the meaning of Article 3(2) Dublin III regulation. Article 3(2) Dublin III regulation will be applicable where there are systemic flaws in the asylum procedure and/or in the reception conditions resulting in a risk of ill-treatment for a category of vulnerable applicants who share the same special needs.

The ECtHR case of *Tarakhel*<sup>431</sup> may serve as an example of how special circumstances and personal vulnerabilities must be assessed when establishing a real risk of ill-treatment contrary to Article 4 EU Charter. The Grand Chamber of the ECtHR decided that ‘the current situation [mainly the reception conditions] in Italy can in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment’<sup>432</sup>. It nevertheless held that ‘the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, cannot be dismissed as unfounded’<sup>433</sup>. It further held that the ‘requirement of “special protection” of asylum seekers is particularly important

<sup>427</sup> CJEU (GC), 2018, *MP*, op. cit. (fn. 39 above), para. 41.

<sup>428</sup> Ibid., para. 42.

<sup>429</sup> CJEU (GC), 2018, *MP*, op. cit. (fn. 39 above), para. 42.

<sup>430</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), paras 76 and 77.

<sup>431</sup> ECtHR (GC), 2014, *Tarakhel v Switzerland*, op. cit. (fn. 48 above).

<sup>432</sup> Ibid., para. 114.

<sup>433</sup> Ibid., para. 115.

when the persons concerned are children, in view of their specific needs and their extreme vulnerability’<sup>434</sup>. The judgment therefore concludes that:

were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention<sup>435</sup>.

In its judgment in the case of *Ilias and Ahmed*, the ECtHR again laid considerable weight on the question of whether or not the applicants ‘could be considered particularly vulnerable and, if so, whether the [reception] conditions [they endured] were incompatible with any such vulnerability to the extent that these conditions constituted inhuman and degrading treatment with specific regard to the applicants’<sup>436</sup>.

The real risk of ill-treatment does not need to be immediate during the transfer or on the very day of arrival in the Member State responsible. As the CJEU has ruled in *Jawo*:

it is immaterial, for the purposes of applying Article 4 of the Charter, whether it is at the very moment of the transfer, during the asylum procedure or following it that the person concerned would be exposed, because of his transfer to the Member State that is responsible within the meaning of the Dublin III Regulation, to a substantial risk of suffering inhuman or degrading treatment<sup>437</sup>.

The transfer of an applicant whose state of health is particularly serious may, in itself, result, for the person concerned, in a real risk of inhuman or degrading treatment within the meaning of Article 4 EU Charter, irrespective of the quality of the reception and the care available in the Member State responsible for examining the application<sup>438</sup>.

Member States will need to assess not just the transfer itself or the conditions that the applicant might expect to encounter as an applicant for international protection in the Member State responsible, but also the living conditions the applicant might expect to encounter as a beneficiary of international protection were they to be granted international protection in that Member State. The CJEU has stated:

it cannot be entirely ruled out that an applicant for international protection may be able to demonstrate the existence of exceptional circumstances that are unique to him and mean that, in the event of transfer to the Member State normally responsible for processing his application for international protection, he would find himself, because of his particular vulnerability, irrespective of his wishes and personal choices, in a situation of extreme material poverty meeting the criteria [of Article 4 EU Charter] after having been granted international protection<sup>439</sup>.

In terms of national case-law, a French administrative tribunal annulled a decision to transfer a Nigerian applicant to Italy under the Dublin III regulation because, *inter alia*, the decision

<sup>434</sup> Ibid., para. 119.

<sup>435</sup> Ibid., para. 122.

<sup>436</sup> ECtHR, 2019, *Ilias and Ahmed*, op cit. (fn. 53 above), para. 191.

<sup>437</sup> See CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 88. A very similar standard for beneficiaries of international protection was established by the court in the *Ibrahim and Others* judgment of the same day (CJEU, judgment (GC) of 19 March 2019, *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov*, joined cases C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219).

<sup>438</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 73.

<sup>439</sup> CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 95.

had failed to take account of systemic deficiencies in the Italian reception system. The tribunal also took into account the situation of great insecurity in which she had previously lived there, which had resulted in her becoming the victim of a prostitution network and in her being in a particularly vulnerable situation<sup>440</sup>.

When a real risk of ill-treatment contrary to Article 4 EU Charter is established, stemming either from a systemic flaw within the meaning of Article 3(2) Dublin III regulation or from the individual characteristics of the applicant, the competent authorities may eliminate that risk by taking appropriate measures to address the special needs of the individual applicants. The CJEU has held in this regard:

It is apparent from the case law of the European Court of Human Rights that Article 3 of the ECHR does not, in principle, require a Contracting State to refrain from proceeding with the removal or expulsion of a person where he is fit to travel and provided that the necessary appropriate measures, adapted to the person's state of health, are taken in that regard ...

With more specific regard to the circumstances in which the psychiatric difficulties that an asylum seeker is facing reveal that he has suicidal tendencies, the European Court of Human Rights has held, on several occasions, that the fact that a person whose expulsion has been ordered has threatened to commit suicide does not require the contracting State to refrain from enforcing the envisaged measure, provided that concrete measures are taken to prevent those threats from being realised ...<sup>441</sup>

It is, therefore, for the Member State authorities ‘to eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned’<sup>442</sup>. In that context, the authorities concerned ‘must verify whether the state of health of the person at issue may be protected appropriately and sufficiently by taking the precautions envisaged by the Dublin III Regulation and, in the affirmative, must implement those precautions’<sup>443</sup>.

As regards those precautions, the CJEU has emphasised that ‘the Member State having to carry out the transfer may cooperate with the Member State responsible, in accordance with Article 8 of the implementing regulation, in order to ensure that the asylum seeker concerned receives health care during and after the transfer’<sup>444</sup>. A court or tribunal may order auxiliary measures or specific transfer methods<sup>445</sup> to guarantee that the transfer is carried out without a risk of such violation<sup>446</sup>.

If the state of health of the asylum seeker concerned does not enable the requesting Member State to carry out the transfer before the expiry of the 6-month period provided for in Article 29(1) of the Dublin III regulation, the Member State responsible will, as stated in Section 5.4, be relieved of its obligation to take charge of the person concerned

<sup>440</sup> Administrative Tribunal of Toulouse (France), judgment of 9 November 2018, 1805185 (English summary).

<sup>441</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), paras 78 and 79. See also ECtHR, decision of 4 October 2016, *Jihana Ali and Others v Switzerland and Italy*, no 30474/14; ECtHR, decision of 14 March 2017, *Ojei v the Netherlands*, no 64724/10.

<sup>442</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 76.

<sup>443</sup> *Ibid.*, para. 77.

<sup>444</sup> *Ibid.*, para. 80. See also UK Upper Tribunal, judgment of 4 December 2018, *R (SM & Others) v Secretary of State for the Home Department (Dublin Regulation – Italy)*, [2018] UKUT 429 (IAC). The UK Upper Tribunal ruled, in a case concerning a vulnerable applicant, that the Tribunal therefore considered that the UK Government would need to seek an assurance from the Italian authorities that suitable support and accommodation would be in place, before effecting a transfer.

<sup>445</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 84.

<sup>446</sup> See also Section 5.5.4, addressing the execution of a transfer in such a way that there is no breach of Article 4 EU Charter.

and responsibility will be transferred to the requesting Member State, in accordance with Article 29(2)<sup>447</sup>.

Pursuant to Article 17(1) of the Dublin III regulation, a Member State may decide, without awaiting the expiry of the 6-month period, to assume responsibility for the examination of the application<sup>448</sup>.

Where a real risk of ill-treatment is due to systemic flaws, within the meaning of Article 3(2), second subparagraph, Dublin III regulation, the determining Member State, pursuant to that subparagraph, must continue to examine the criteria set out in Chapter III in order to establish if another Member State can be designated as responsible. In the event that the transfer cannot be made to any Member State on the basis of the criteria or to the first Member State with which the application was lodged, pursuant to Article 3(2), third subparagraph, the determining Member State becomes the Member State responsible.

#### 5.5.4. Executing a transfer

When executing a transfer, Member States are required, according to recital 24 of the Dublin III regulation, to ensure that:

##### Recital 24 Dublin III regulation

supervised or escorted transfers are undertaken in a humane manner, in full compliance with fundamental rights and respect for human dignity, as well as the best interests of the child and taking utmost account of developments in the relevant case law, in particular as regards transfers on humanitarian grounds.

Article 29(1), second subparagraph, confirms that if transfers ‘are carried out by supervised departure or under escort, Member States shall ensure that they are carried out in a humane manner and with full respect for fundamental rights and human dignity’. Thus, it may be necessary to apply specific transfer methods, in particular for vulnerable persons.

Furthermore, some transfers may only be carried out when specific requirements are met that ensure that the special needs of an applicant are met, most prominently concerning the impact of a transfer on their state of health. In *C.K. and Others*, the CJEU alluded to specific transfer methods by stating, *inter alia*, that:

the Member State carrying out the transfer must be able to organise it in such a way that the asylum seeker concerned is accompanied, during transportation, by adequate medical staff with the necessary equipment, resources and medication, so as to prevent any worsening of his health or any act of violence by him towards himself or other persons<sup>449</sup>.

<sup>447</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 90.

<sup>448</sup> See Section 5.4 on the discretionary clause.

<sup>449</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 81.

In order to meet immediate special needs and safeguard human rights, the Dublin III regulation provides for the exchange of information and health data in order to ensure that, before, during and after the transfer, special needs are met and fundamental rights are respected. Article 31(1) and (2) concern the information exchange in this regard.

### **Article 31(1) and (2) Dublin III regulation Exchange of relevant information before a transfer is carried out**

1. The Member State carrying out the transfer of an applicant or of another person as referred to in Article 18(1)(c) or (d) shall communicate to the Member State responsible such personal data concerning the person to be transferred as is appropriate, relevant and non-excessive for the sole purposes of ensuring that the competent authorities, in accordance with national law in the Member State responsible, are in a position to provide that person with adequate assistance, including the provision of immediate health care required in order to protect his or her vital interests, and to ensure continuity in the protection and rights afforded by this Regulation and by other relevant asylum legal instruments. Those data shall be communicated to the Member State responsible within a reasonable period of time before a transfer is carried out, in order to ensure that its competent authorities in accordance with national law have sufficient time to take the necessary measures.
2. The transferring Member State shall, insofar as such information is available to the competent authority in accordance with national law, transmit to the Member State responsible any information that is essential in order to safeguard the rights and immediate special needs of the person to be transferred, and in particular:
  - (a) any immediate measures which the Member State responsible is required to take in order to ensure that the special needs of the person to be transferred are adequately addressed, including any immediate health care that may be required;
  - (b) contact details of family members, relatives or any other family relations in the receiving Member State, where applicable;
  - (c) in the case of minors, information on their education;
  - (d) an assessment of the age of an applicant.

Data protection standards apply to this information exchange according to Article 31(3). If medical care or treatment is to be provided or was provided, Article 32 specifies the exchange of health data before a transfer is carried out. For the exchange of information, the form provided in Annex VI of Commission Implementing Regulation 118/2014 is to be used for transmitting information about the transfer itself <sup>450</sup>, in order to safeguard the rights and immediate needs of the person to be transferred. Information regarding special needs is only indicated if, during or after the transfer, special arrangements are necessary. The information is conveyed only to carry out the transfer.

<sup>450</sup> This is prescribed in Commission Implementing Regulation (EU) No 118/2014, 2014, op. cit. (fn. 365 above).

**Article 32(1) Dublin III regulation  
Exchange of health data before a transfer is carried out**

For the sole purpose of the provision of medical care or treatment, in particular concerning disabled persons, elderly people, pregnant women, minors and persons who have been subject to torture, rape or other serious forms of psychological, physical and sexual violence, the transferring Member State shall, in so far as it is available to the competent authority in accordance with national law, transmit to the Member State responsible information on any special needs of the person to be transferred, which in specific cases may include information on that person's physical or mental health. That information shall be transferred in a common health certificate with the necessary documents attached. The Member State responsible shall ensure that those special needs are adequately addressed, including in particular any essential medical care that may be required.

For the exchange of health data, the form provided in Annex IX of Commission Implementing Regulation 118/2014 is to be used. As the CJEU has noted:

The standard form set out in Annex VI to the implementing regulation and the common health certificate found in Annex IX to that regulation may thus be used to inform the Member State responsible that the asylum seeker concerned requires medical assistance and care upon his arrival, as well as all the relevant aspects of his illness and the care which that illness will make necessary in the future. In that case, that information must be communicated within a reasonable period of time before the transfer is carried out, in order to provide the Member State responsible with sufficient time to take the necessary measures. The Member State carrying out the transfer may, in addition, obtain from the Member State responsible the confirmation that the necessary care will be fully available upon arrival.

If the court having jurisdiction finds that those precautions are sufficient to exclude any real risk of inhuman or degrading treatment in the event of transferring the asylum seeker concerned, it will be for that court to take the necessary measures to ensure that they are implemented by the authorities of the requesting Member State before the person concerned is transferred. Where necessary, that person's state of health should be reassessed before the transfer is carried out<sup>451</sup>.

## 5.6. Detention

**Other relevant publications**

- EASO, *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial Analysis*, 2019.
- European Law Institute, *Statement of the European Law Institute: Detention of asylum seekers and irregular migrants and the rule of law*, 2017, Section 4.

<sup>451</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), paras 83 and 84.

Article 28(1) of the Dublin III regulation states: ‘Member States shall not hold a person in detention for the sole reason that he or she is subject to the [Dublin procedure].’ Article 28(2) ensures that detention is used as a measure of last resort only. It reads as follows:

### Article 28(2) Dublin III regulation Detention

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

Furthermore, Article 28(4) clarifies: ‘As regards the detention conditions and the guarantees applicable to persons detained, in order to secure the transfer procedures to the Member State responsible, Articles 9, 10 and 11 of Directive 2013/33/EU shall apply.’ This means that the guarantees for vulnerable detainees, as described above in Section 4.8, also apply to detention pursuant to Article 28 of the Dublin III regulation.

Consequently, if detention is considered, the authority, court or tribunal ordering or confirming detention must take into account the specific situation and special needs of vulnerable applicants.

A Swiss case may serve as an illustration of legal challenges encountered in detention cases involving vulnerable persons. In Switzerland, the Federal Court has found that detention decisions regarding a family, in a case concerning a Dublin transfer to Norway, were unlawful, even though the first attempt to transfer had failed on account of non-cooperation. The authority had ordered the detention of the father and mother and had decided to put two children in custody in a youth welfare institution, where contact with the parents was denied. Moreover, the mother was detained with her new-born child in order to safeguard the best interests of the child. The Federal Court stated that the detention and custody decisions violated the principle of the best interests of the child and were disproportionate. The authorities had also failed to assess alternatives to detention<sup>452</sup>.

## 5.7. Effective remedy

### Other relevant EASO publications

- EASO, *Asylum procedures and the principle of non-refoulement – Judicial Analysis*, 2018, Section 3.8 ‘Legal remedies’ (under the Dublin III regulation).

<sup>452</sup> See Federal Administrative Court (BVGE, Switzerland), 2017, 2C\_1052/2016, 2C\_1053/2016 (English summary), op. cit. (fn. 265 above). See also Supreme Administrative Court (Czechia), judgment of 17 June 2015, 1 Azs 39/2015-56 (English summary). The Czech Supreme Administrative Court ruled that the detention of a family including a minor in a detention facility in circumstances where other families had been transferred to a reception centre meant that there was an alternative to the detention that the national authority was obliged to take into account in deciding whether or not to detain the family under the Dublin III regulation.

This section deals with the requirements of an effective remedy for applicants with special needs in the context of the Dublin III regulation. For any general requirements and guarantees for vulnerable applicants in the CEAS concerning court/tribunal proceedings, please refer to Part 8 of this judicial analysis.

Article 27(1) of the Dublin III regulation provides that a person who is the subject of a transfer decision has ‘the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal’<sup>453</sup>. The specific situation or personal circumstances of vulnerable applicants should be taken into account by courts and tribunals when ensuring the effectiveness of remedies against decisions taken under the Dublin III regulation.

### 5.7.1. Scope of the remedy

The scope of the remedy under Article 27(1) is set out in recital 19 Dublin III regulation, which states (emphasis added):

#### Recital 19 Dublin III regulation

In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, **an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred.**

The scope of the remedy available to an applicant under Article 27(1), read in the light of recital 19, has been clarified by the case-law of the CJEU<sup>454</sup>. The scope covers both the factual and legal circumstances<sup>455</sup>. The Grand Chamber of the CJEU stated in the case of *Ghezelbash* that the drafting of Article 27(1), which provides the right to an effective remedy, ‘makes no reference to any limitation of the arguments that may be raised by the asylum seeker when availing himself of that remedy’<sup>456</sup>.

With regard to the legal circumstances, the CJEU has ruled that the remedy must be able to ‘relat[e] both to observance of the rules attributing responsibility for examining an application for international protection and to the procedural safeguards laid down by [the Dublin III regulation]’<sup>457</sup>. With respect to vulnerable applicants, the court or tribunal may need to examine whether or not their special procedural needs, if any, have been taken into account. The application of the criteria for determining the Member State responsible as

<sup>453</sup> See also CJEU (GC), 2019, *H. and R.*, op. cit. (fn. 372 above), para. 38.

<sup>454</sup> See for example CJEU, 2018, *Aziz Hasan*, op. cit. (fn. 354 above), paras 27–40; CJEU (GC), judgment of 7 June 2016, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, C-63/15, EU:C:2016:409; CJEU, judgment of 7 June 2016, *George Karim v Migrationsverket*, C-155/15, EU:C:2016:410.

<sup>455</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 63.

<sup>456</sup> CJEU (GC), 2016, *Ghezelbash*, op. cit. (fn. 454 above), para. 36.

<sup>457</sup> CJEU (GC), 2019, *H. and R.*, op. cit. (fn. 372 above), para. 40. See also, to the same effect, CJEU judgment of 26 July 2017, *A.S. v Republika Slovenija*, C-490/16, EU:C:2017:585, paras 27 and 31; CJEU, 2017, *Mengesteab*, op. cit. (fn. 369 above), paras 44–48; CJEU, judgment of 25 October 2017, *Majid Shiri, also known as Madzhdi Shiri v Bundesamt für Fremdenwesen und Asyl*, C-201/16, EU:C:2017:805, para. 38.

well as the dependency and discretionary clauses (Articles 16 and 17 respectively) may lead to appeals based on an alleged violation of the applicant's right to family life guaranteed in Article 7 EU Charter and Article 8 ECHR. It has to be noted that any application of the Dublin III regulation, as secondary EU law, has to be in conformity with the EU Charter.

A decision to suspend or prohibit a transfer may depend on the relevant individual and/or general circumstances, the applicant's special needs and the reason for an applicant's vulnerability. The CJEU ruled in *C.K. and Others* that there is:

an obligation on the competent authorities and the national court to examine all the circumstances of significance for observance of the principle of non-refoulement, including the state of health of the person concerned, in the case where an asylum seeker claims that the Member State responsible for his application is not a 'safe State' for him.<sup>458</sup>

Courts and tribunals must therefore take into account the applicant's personal situation and assess if the mere fact of transferring that person might in itself be contrary to the principle of *non-refoulement*. In accordance with recital 19, courts and tribunals must also take into account the legal and factual situation in the Member State to which the applicant is to be transferred. In assessing the factual situation, courts and tribunals may need to assess not just the conditions that the applicant might expect to encounter as an applicant for international protection, but also the living conditions the applicant might expect to encounter as a beneficiary of international protection in the event they are granted international protection in that Member State.<sup>459</sup> This is important, since courts and tribunals may be required to take into account the personal circumstances that render an applicant vulnerable in their assessment of the factual situation in the Member State for both applicants for, and beneficiaries of, international protection. For these reasons, an appeal with regard to the legality of a transfer decision is not limited to 'systemic flaws' pursuant to Article 3(2), second subparagraph, Dublin III regulation.

### 5.7.2. Evidentiary standards

#### Other relevant EASO publications

- EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018, Section 5.8 'Dublin III Regulation and the assessment of evidence', including Section 5.8.1 'Obtaining and assessment of evidence relating to application of criteria for determining Member State responsible'.

In all cases where the applicant relies on a real risk of ill-treatment contrary to Article 4 EU Charter because of the standard of reception conditions and/or the asylum procedure, the question of the applicable standard of proof / evidentiary standard arises. This is related to the question of the rebuttal of the presumption that the fundamental rights of the applicant for international protection are observed in the Member State responsible.

<sup>458</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 44.

<sup>459</sup> CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 98.

The evidentiary standard for the assessment of ‘systemic flaws’ was set out first in the CJEU’s *N.S. and Others* judgment of 2011, which related to the Dublin II regulation. The CJEU stated:

the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ ... where they cannot be unaware that systemic deficiencies<sup>460</sup> in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter<sup>461</sup>.

The CJEU has ruled in the context of the Dublin III regulation, with regard to future risks that may result from the living conditions that an applicant may be expected to encounter as a beneficiary of international protection:

where the court or tribunal hearing an action challenging a transfer decision has available to it evidence provided by the person concerned for the purposes of establishing the existence of such a risk, that court or tribunal is obliged to assess, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, whether there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people<sup>462</sup>.

Thus, it seems fair to conclude that court or tribunals are required to assess risks stemming from any possible future grant of international protection on a complete and updated basis when the applicant provides evidence that may establish such a risk, but are required to assess risks stemming from systemic flaws when they cannot be unaware of such risks even without an applicant providing such evidence.

If the risk is related to the applicant’s personal situation, it is generally necessary for them to present evidence related to those individual circumstances that supports a conclusion that the transfer should be suspended or prohibited, in the light of their individual circumstances and the general situation in that Member State. For health-related issues, the CJEU has found:

where an asylum seeker provides, particularly in the context of an effective remedy guaranteed to him by Article 27 of the Dublin III Regulation, objective evidence, such as medical certificates concerning his person, capable of showing the particular seriousness of his state of health and the significant and irreversible consequences to which his transfer might lead, the authorities of the Member State concerned, including its courts, cannot ignore that evidence. They are, on the contrary, under an obligation to assess the risk that such consequences could occur when they decide to transfer the person concerned or, in the case of a court, the legality of a decision to transfer, since the execution of that decision may lead to inhuman or degrading treatment of that person<sup>463</sup>.

<sup>460</sup> The meaning of ‘systemic deficiencies’ in this judgment equates to ‘systemic flaws’ in Article 3(2), second subparagraph, of the Dublin III regulation, which codifies that case-law. For more on systemic flaws, see Section 5.5.3 above.

<sup>461</sup> See CJEU (GC), 2011, *N.S. and Others*, op. cit. (fn. 17 above), para. 94.

<sup>462</sup> CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 90.

<sup>463</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 75.

In such cases, it is, therefore, for the applicant to provide objective evidence, which the court or tribunal is then obliged to assess, to determine whether the transfer decision was correct or the transfer should be prohibited.

If the court or tribunal comes to the conclusion that there are substantial grounds for believing that there are systemic flaws in the asylum procedure and/or in the reception conditions for a special group of applicants, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 EU Charter, for example families with infants, it is sufficient for the applicant to demonstrate that he or she belongs to that group at risk and shares the special needs unless there are individual circumstances that lead to the conclusion that the person concerned faces no real risk of ill-treatment contrary to Article 4 EU Charter. This was the case, for instance, as regards the reception conditions for families with children in Italy in the *Tarakhel* case of the ECtHR<sup>464</sup>.

Article 27(2) of the Dublin III regulation requires Member States to ‘provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy’. The difficulties that may arise for vulnerable applicants in this context do not differ from those in other procedures under the CEAS. Generally, time limits (under the APD (recast)) are discussed in Part 8. This also applies to the guarantee of (free) legal and linguistic assistance as provided for in Article 27(5) and (6) Dublin III regulation. These topics are dealt with in Part 8 as well. There, they are seen from the perspective of the APD (recast), which does not differ materially from the requirements of the Dublin III regulation in these matters.

---

<sup>464</sup> ECtHR (GC), 2014, *Tarakhel v Switzerland*, op. cit. (fn. 48 above).

# Part 6. Vulnerability in the context of qualification for and content of international protection under the QD (recast)

The purpose of this part of the judicial analysis is to address the issue of how the vulnerability of applicants for international protection may affect the decision on qualification for international protection (Chapters I–VI QD (recast)). It also examines the impact of such vulnerability on decisions on the content of the protection granted to beneficiaries of international protection (Chapter VII QD (recast)), as well as looking briefly at withdrawal of international protection because of an error when establishing facts on vulnerability. The structure of Part 6 is set out in Table 18.

**Table 18: Structure of Part 6**

Section	Title	Page
<b>6.1</b>	Introduction	134
<b>6.2</b>	Possible impact of vulnerability on evidence and credibility assessment	135
<b>6.3</b>	Persecution and serious harm	143
<b>6.4</b>	Applicants who have already been subject to persecution or serious harm	147
<b>6.5</b>	Reasons for persecution	148
<b>6.6</b>	Actors of protection and vulnerability	150
<b>6.7</b>	Internal protection	153
<b>6.8</b>	Some specific categories of vulnerability	154
<b>6.9</b>	Vulnerability and the content of the protection granted to beneficiaries of international protection	167
<b>6.10</b>	Withdrawal of international protection because of an error when establishing facts on vulnerability	172

## Other relevant EASO publications

- EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016.
- EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018.

## 6.1. Introduction

Chapters I–VI QD (recast), which address qualification for international protection, do not elaborate on the term ‘vulnerability’<sup>465</sup>. By contrast, Chapter VII states at Article 20(3):

### Article 20(3) QD (recast)

When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

Chapter VII deals with the content of international protection and, in accordance with Article 20(2) QD (recast), applies ‘both to refugees and persons eligible for subsidiary protection’.

Outside the context of the QD (recast), the specific references to vulnerable persons are not linked to qualification for international protection. On the contrary, in the context of the reception of applicants for international protection, Article 22(4) RCD (recast) states that the assessment of the special reception needs of vulnerable persons ‘shall be without prejudice to the assessment of international protection needs’ pursuant to the QD (recast). Thus, the fact that a particular applicant is identified as having special reception needs does not necessarily mean that their identified vulnerability will influence the assessment of international protection needs or the result of that assessment.

Nevertheless, it is possible to identify specific ways in which the assessment of applications for international protection may be affected by considerations of vulnerability.

As reflected in Table 18, the structure and the order of the sections of Part 6 partly follow the ‘general scheme and purpose’ of the QD (recast)<sup>466</sup>. First, this part looks at the possible impact of vulnerability on evidence and credibility assessment in the context of Article 4 (Section 6.2). It goes on to examine the application to vulnerable applicants of key requirements of the refugee definition, in particular persecution, and the definition of serious harm as set out in Articles 9 and 15 respectively (Section 6.3). Other issues include the provision for those who have already been subject to persecution or serious harm as set out in Article 4(4) (Section 6.4); the five reasons for persecution as set out in Article 10 (Section 6.5); actors of protection as set out in Article 7 (Section 6.6); and internal protection as set out in Article 8 (Section 6.7).

Given the non-exhaustive approach to individual circumstances set out in Article 4(3) QD (recast), the next section (Section 6.8) seeks to examine how some of these circumstances, namely those relating to age, gender, sexual orientation, gender identity, health, disability and mental disorder, and related provisions, are to be applied.

<sup>465</sup> Unless one counts the mention of vulnerability in recital 36 QD (recast): ‘Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status.’

<sup>466</sup> See for example CJEU, judgment of 7 November 2013, *X, Y and Z v Minister voor Immigratie en Asiel*, joined cases C-199/12 to C-201/12, EU:C:2013:720, para. 40.

The impact of vulnerability on decisions on the content of international protection granted to beneficiaries is the subject of Section 6.9. Section 6.10 deals briefly with the consequences of a situation where vulnerability has been erroneously established.

## 6.2. Possible impact of vulnerability on evidence and credibility assessment

### Other relevant EASO publications

- EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016.
- EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018, Part 4 and Section 5.2.

This section seeks to look at some of the main ways in which vulnerability may have an impact on evidence and credibility assessment.

### 6.2.1. The principle of individual assessment

A key principle enshrined in the QD (recast) is the principle of individual assessment<sup>467</sup>. It is set out in Article 4 QD (recast), which concerns the assessment of the facts and circumstances of an application for international protection. Article 4(3) states:

#### Article 4(3) QD (recast) Assessment of facts and circumstances

The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

[...]

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

The CJEU has had the opportunity to elaborate on the meaning of Article 4(3)(c) QD, which has the same wording as Article 4(3)(c) QD (recast). In its judgment in the case of *A, B, and C*, the court explicitly stated that taking into account the personal or general circumstances surrounding the application includes the requirements to take into account ‘in particular, the

<sup>467</sup> The CJEU in its judgment of 4 October 2018, *Nigyar Rauf Kaza Ahmedbekova and Rauf Emin Oglia Ahmedbekov v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, C-652/16, EU:C:2018:801, para. 48, described it as ‘settled case-law that every decision on whether to grant refugee status or subsidiary protection status must be based on an individual assessment’. In the preceding paragraph it linked the principle of individual assessment to Articles 13 and 18 QD (recast), read in conjunction with the definitions of ‘refugee’ and ‘person eligible for subsidiary protection’ set out in Article 2(d) and (f) thereof.

**vulnerability of the applicant**, and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant’<sup>468</sup>.

Thus, it is clear that the obligation under Article 4(3)(c) QD (recast) to take into account the applicant’s ‘individual position’ and ‘personal circumstances’, as well as general circumstances surrounding the application<sup>469</sup>, includes circumstances regarding ‘the vulnerability of the applicant’<sup>470</sup>.

Article 4(3)(c) QD (recast) refers non-exhaustively to ‘factors such as background, gender and age’ that must be taken into account in the assessment<sup>471</sup>. Therefore, the examples of personal circumstances that render an applicant vulnerable under Article 21 RCD (recast) and recital 29 APD (recast)<sup>472</sup> can also properly be regarded as among those that will need to be taken into account in the assessment of an application. Applying the reasoning of the CJEU in *A, B and C*, the Member State must ensure, whatever the ground for persecution or serious harm relied on in support of an application, that all aspects of its assessment take account of any vulnerabilities.

Besides the general statement in Article 4(3)(c) QD (recast) regarding the obligation to take account of the individual position and personal circumstances of the applicant, several other provisions of the QD (recast) spell out certain legal and factual circumstances that require the individual position and personal circumstances of the applicant to be taken into account. These are set out in Table 19.

**Table 19: The ‘individual position and personal circumstances’ of the applicant and aspects of vulnerability under the QD (recast)**

Vulnerability/issue	Requirement	QD (recast)
Assessment of applications for international protection	Take into account applicant’s ‘individual position and personal circumstances, including ... background, gender and age’	Art. 4(3)(c)
Minors	Best interests of the child a primary consideration	Recitals 18, 19, 27 and 38; Arts. 25 and 31(4) and (5)
	Consideration of ‘child-specific forms of persecution’	Recital 28 and Art. 9(2)(f) <sup>473</sup>
Family members	Take into account ‘different particular circumstances of dependency’ with ‘special attention to be paid to the best interests of the child’	Recital 19
	‘Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution’	Recital 36

<sup>468</sup> CJEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), para. 70 (emphasis added). See also CJEU, judgment of 26 February 2015, *Andre Lawrence Shepherd v Bundesrepublik Deutschland*, C-472/13, EU:C:2015:117, para. 26. For the full quotation see Section 6.2.2 below, on substantiation of an application.

<sup>469</sup> It stems from Article 15(3)(a) APD (recast) that the general circumstances surrounding the application shall be taken into account and thus constitute ‘background’ within the meaning of Article 4(3)(c) QD (recast).

<sup>470</sup> See for example Council for Aliens Law Litigation (Raad voor Vreemdelingenbetwistingen (RVV) / Conseil du contentieux des étrangers (CCE), Belgium), judgment of 24 June 2019, *223 104*.

<sup>471</sup> Recital 30 QD (recast) states that, for the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, ‘should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution’.

<sup>472</sup> These provisions are cited in Sections 3.1 and 3.2 of this judicial analysis respectively. For more on identification of persons with special reception needs and/or in need of special procedural guarantees, see Part 3.

<sup>473</sup> See also Section 6.8.1.1.

Vulnerability/issue	Requirement	QD (recast)
Gender	Consideration of gender-specific forms of persecution	Art. 9(2)(f) <sup>474</sup>
Internal protection	Regard for the applicant's 'personal circumstances'	Art. 8(2) in conjunction with Art. 8(1) <sup>475</sup>
Membership of a particular social group	Due consideration of 'an applicant's gender, including gender identity and sexual orientation, ... in so far as [it is] related to the applicant's well-founded fear of persecution'	Recital 30 <sup>476</sup>
Applicant has already been subject to, or subject to direct threats of, persecution or serious harm	This is 'a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated'	Art. 4(4) <sup>477</sup>

When an application for international protection is to be assessed, it is also important to keep Article 15(3)(a) APD (recast) in mind.

### Article 15(3) APD (recast)

Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:

(a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability;

Moreover, it is important to recall that the CJEU, in *A, B and C*, has underlined that the individual assessment must be based firmly on respect for fundamental rights. Thus, in *A, B and C*, when considering the methods used by the competent authorities to assess evidence, the court emphasised that such methods:

must be consistent with the provisions of Directive 2004/83 [QD] and 2005/85 [APD] and, as is clear from recitals 10 and 8 in the preambles to those directives respectively, with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, enshrined in Article 1 of the EU Charter, and the right to respect for private and family life guaranteed by Article 7 thereof<sup>478</sup>.

Drawing on the *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, the following matters are among the most relevant that are likely to arise in the context of assessing an application by a vulnerable applicant.

<sup>474</sup> See also Section 6.8.2.

<sup>475</sup> See also Section 6.7 on internal protection.

<sup>476</sup> See also Sections 6.8.2 and 6.8.3.

<sup>477</sup> See also Section 6.5 on reasons for persecution.

<sup>478</sup> CJEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), para. 53. See also CJEU, 2018, *F v Bevándorlási és Állampolgársági Hivatal*, op. cit. (fn. 150 above), paras 50 and 55.

## 6.2.2. Substantiation of an application for international protection

Vulnerability may affect **how** and the **extent** to which an applicant can be expected to cooperate and substantiate their application for international protection.

Article 4(1) QD (recast) provides that ‘Member States **may** consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection’ (emphasis added). In respect of the temporal requirement ‘as soon as possible’, the CJEU in *A, B, and C* stated:

the obligation laid down by Article 4(1) [QD] to submit all elements needed to substantiate the application for international protection ‘as soon as possible’ is tempered by the requirement imposed on the competent authorities, under Article 13(3)(a) [APD] and Article 4(3) [QD] to conduct the interview taking account of the personal or general circumstances surrounding the application, in particular, the vulnerability of the applicant, and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant.

Thus, to hold that an applicant for asylum is not credible, merely because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution, would be to fail to have regard to the requirement referred to in the previous paragraph<sup>479</sup>.

Indeed, recital 29 APD (recast) states that vulnerable applicants in need of special procedural guarantees ‘should be provided with adequate support, including **sufficient time**, in order to create the conditions necessary ... for presenting the elements needed to substantiate their application for international protection’<sup>480</sup>.

Article 4(1) QD (recast), second sentence, states: ‘In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.’ Vulnerable applicants may face particular challenges substantiating their application. The CJEU has made it very clear that the Member State must actively cooperate in helping applicants to overcome such challenges:

This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents<sup>481</sup>.

<sup>479</sup> CJEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), paras 70–71. See also Section 7.2 on adequate support and sufficient time related to recital 29 APD (recast); and CJEU, Opinion of Advocate General Sharpston, 2014, *A, B and C*, op. cit. (fn. 72 above), para. 81, on the importance of obtaining statements specifically where the sole evidence of their sexual orientation is their own declaration.

<sup>480</sup> Emphasis added. See Section 7.2 for further information.

<sup>481</sup> CJEU, judgment of 22 November 2012, *M.M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, EU:C:2012:744, para. 66; see also EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018, p. 56.

The duty of cooperation in assessing the elements of an application for international protection is also secured through specific procedural guarantees provided for certain vulnerable applicants in the APD (recast)<sup>482</sup>.

Under Article 4(1) in conjunction with Article 4(2) QD (recast), Member States may consider it the duty of the applicant to provide statements and all the documentation at their disposal concerning, *inter alia*, the reasons for applying for international protection. Where Member States impose such a duty and where aspects of the applicant's statements are not supported by documentary or other evidence, the application of Article 4(5) QD (recast), which circumscribes the conditions under which an applicant shall not need to support aspects of their statements with documentary or other evidence, needs particular care.

### **Article 4(5) QD (recast)** **Assessment of facts and circumstances**

Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:

- (a) the applicant has made a genuine effort to substantiate his application;
- (b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements;
- (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
- (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
- (e) the general credibility of the applicant has been established.

When determining whether or not the cumulative conditions set out in Article 4(5)(a)–(e) QD (recast)<sup>483</sup> are met, the personal circumstances of vulnerable applicants must also be taken into account. For example, the condition set out in Article 4(5)(b) QD (recast), that the applicant submit all relevant elements at their disposal, is one that may pose challenges to vulnerable applicants because of their personal circumstances, e.g. intellectual limitations, their mental health condition, trauma or shame<sup>484</sup>. In order to assess if, pursuant to Article 4(5)(b), 'a satisfactory explanation has been given regarding any lack of other relevant elements', it will be necessary to take into account the applicant's vulnerability<sup>485</sup>.

<sup>482</sup> See for example Articles 10(3)(d), 15(3)(e) and 25 APD (recast). For further information see Part 7. See also EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018, Section 5.2.3 on substantiation of the application in cases involving minors.

<sup>483</sup> In CIEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), para. 58, the CIEU refers to the conditions under Article 4(5)(a)–(e) QD (recast) as 'cumulative conditions'.

<sup>484</sup> CIEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), para. 70. Advocate General Sharpston, in her 2014 opinion in *A, B and C*, op. cit. (fn. 72 above), para. 81, outlined 'that the procedures for granting refugee status must ensure that applicants have the opportunity specifically to address questions concerning their credibility in cases where the sole evidence of their sexual orientation is their own declaration'.

<sup>485</sup> See UNHCR, 2013, *Beyond Proof – Credibility assessment in EU asylum systems*, p. 97.

Under Article 4(5)(c) QD (recast), it is for the Member State to assess if the applicant's statements can be found to be 'coherent and plausible and [not running] counter to available specific and general information relevant to the applicant's case'. Again, in assessing this, the Member State must take into consideration their personal circumstances<sup>486</sup>. For example, if an applicant has been subjected to a traumatic experience such as torture, rape or other serious forms of psychological, physical or sexual violence, it is important for a decision-maker to be aware of how traumatic experiences may impact an applicant's ability to present coherent statements<sup>487</sup>.

Article 4(5)(d) QD (recast) imposes a temporal requirement that also has to be considered in view of the applicant's individual position and personal circumstances. A vulnerable applicant's position or personal circumstances may 'demonstrate good reason' for not having been able to apply for international protection at the earliest possible time.

Examples include:

- applicants lacking or with unclear legal capacity;
- applicants experiencing shame for strong personal, social and/or cultural reasons;
- applicants being unaware of or uninformed about the possibility of applying for international protection, e.g. as a result of intellectual limitations, (mental) health condition, age, educational background or trauma<sup>488</sup>.

The vulnerability of an applicant may require specific measures to be taken to ensure their applications are supported by independent evidence<sup>489</sup>. Documentary evidence supporting the applicant's statement(s) or other evidence such as medical reports, psychosocial statements and witness reports may be important to confirm their statement(s) and to establish material facts, particularly in view of possibly limited capacities to provide a personal statement.

Medical evidence may be sought to support various aspects of a vulnerable applicant's claim, including, for example:

- assessing the extent to which a vulnerable applicant can submit relevant elements and if they are able to provide a statement (Article 4(1) QD (recast); see also Article 14(2)(b) APD (recast) and Section 3.4.1 'Medical evidence');
- ensuring adequate support and appropriate conditions during the personal interview (recital 29 and Articles 15(3) and 24(3) APD (recast); see also Sections 7.2 and 7.5.3);
- substantiating indications of past persecution or serious harm (Article 4(4) QD (recast) and Article 18(1) APD (recast));
- assessing scars, injuries and wounds (see also Section 7.5.4);
- confirming physical and/or mental health issues relevant to establishing a well-founded fear of persecution or real risk of serious harm, and/or an insufficiency of protection under Article 7 QD (recast), and/or unavailability of internal protection under Article 8 QD (recast).

<sup>486</sup> CIEU, 2018, *F v Bevándorlási és Állampolgársági Hivatal*, op. cit. (fn. 150 above), para. 36.

<sup>487</sup> See also EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018, Section 6.2.

<sup>488</sup> See for example Upper Tribunal (Immigration and Asylum Chamber, UK), judgment of 8 April 2010, *AZ (Trafficked women) Thailand v Secretary of State for the Home Department*, CG [2010] UKUT 118 (IAC), para. 116. See also Section 6.2.3 'Credibility indicators' below.

<sup>489</sup> See also Section 7.5.1 'Advice from experts'.

However, as the CJEU ruled in *F*, in relation to statements made by an applicant relating to his sexual orientation:

1. Article 4 [QD (recast)] must be interpreted as meaning that it does not preclude the authority responsible for examining applications for international protection, or, where an action has been brought against a decision of that authority, the courts or tribunals seised, from ordering that an expert's report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant, provided that the procedures for such a report are consistent with the fundamental rights guaranteed by the [EU] Charter ... , that that authority and those courts or tribunals do not base their decision solely on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation.
2. Article 4 [QD (recast)], read in the light of Article 7 of the [EU] Charter ... , must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, such as that at issue in the main proceedings, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant<sup>490</sup>.

The German Federal Administrative Court, in a case of a traumatised victim of sexual violence, held that it is in the judge's discretion to decide whether an expert shall be sought to support aspects of the claim or not. If an applicant shows serious indications of trauma, which might seriously influence the applicant's ability to provide a statement, the judge will have to reasonably explain the reasons why the judge expects to be in a position to assess the applicant's credibility. In the specific case, the court concluded that the lower court had failed to provide a reasonable explanation why the judges considered themselves capable of making a decision, despite numerous factors relating to the serious sexual violence endured (birth of child out of wedlock, scars, crying during interview, etc.)<sup>491</sup>.

If for any reason supporting evidence is unavailable, it will still be necessary to make certain that the applicant's right to be heard has been ensured<sup>492</sup>.

### 6.2.3. Credibility indicators

In the assessment of credibility more generally, which is dealt with in detail in the judicial analysis on evidence and credibility assessment, the application of established credibility indicators to vulnerable applicants will need particular care<sup>493</sup>.

The personal circumstances of vulnerable applicants may affect the level of internal consistency, sufficiency of detail and plausibility in their accounts owing to, for example, trauma, a (mental) health condition, young/old age, gender, sexual orientation, gender identity or (educational) background<sup>494</sup>.

<sup>490</sup> CJEU, 2018, *F v Bevándorlási és Állampolgársági Hivatal*, op. cit. (fn. 150 above), conclusion.

<sup>491</sup> Federal Administrative Court (Bundesverwaltungsgericht, Germany), order of 18 July 2001, 1 B 118.01.

<sup>492</sup> See also Part 8.

<sup>493</sup> See EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018, Section 4.5.

<sup>494</sup> Ibid., Sections 4.5.1 'Internal consistency', 4.5.3 'Sufficiency of detail', 6.2 'The impact of traumatic experiences', 6.5 'Gender' and 6.6 'Sexual orientation and gender identity'.

Some examples of national practice follow. In Belgium, in a case dealing with a subsequent application, the Council for Aliens Law Litigation held that, even though the applicant's previous statements had been vague, documentation and statements provided in the subsequent procedure were convincing and precise as a whole, taking into account the mental health condition of the applicant, a victim of gender-based violence<sup>495</sup>. The Austrian Constitutional Court, in a case concerning a minor applicant, emphasised the importance of giving due weight to the possible implications of mental health problems an applicant might have when assessing the plausibility and coherence of the statements provided<sup>496</sup>. In Italy, in a case concerning an applicant whose claim was based on sexual orientation (as attributed by others to him), the Tribunal of Genoa overturned the lower authority's decision, which had found his account incoherent and too generic. The tribunal determined rather that he had made all reasonable efforts to provide all the elements to support his claim. In reaching this conclusion, it took into due consideration the fact that the applicant had been a victim of sexual violence and, as such, experienced post-traumatic stress disorder liable to cause memory loss and a lack of emotional involvement. Therefore, the tribunal found that he could not reasonably be expected to display greater emotion when recounting his story<sup>497</sup>. In Switzerland, the Federal Administrative Court accepted the subsequent application of a victim of trafficking on the basis that the ability of victims of sexual exploitation to give a statement might be influenced by the violence they have endured, including feelings of shame and possible trauma<sup>498</sup>.

When assessing the external consistency of a vulnerable applicant's statements, specific information that may be relevant includes information regarding discriminatory treatment of certain groups; the hostile perceptions of groups by the surrounding society; the traditions governing the way in which laws and regulations are implemented and applied; (informal) conflict resolution systems; witness protection systems; treatment of health conditions; treatment of persons with disabilities; spiritual beliefs; law enforcement and rule of law; and child care and guardian systems. Regard must also be had, however, to the possibility that such information may not always be available. For example, information on country-specific harmful traditions or customary law, may be unavailable owing to a lack of codification. When assessing the incidence of violence, family violence might be understood as 'family matters', harmful traditional practices might be perceived as taboo in society, etc.<sup>499</sup>. The decision-maker should also be aware that some vulnerable applicants, such as minors, persons with mental disorders and women from countries where there are social constraints, may not have access to information about and/or knowledge of certain events, activities and/or organisations<sup>500</sup>.

Taking due consideration of the age of minor applicants is crucial for assessing the credibility of their statements. A number of considerations specific to minor applicants should be taken

<sup>495</sup> Council for Aliens Law Litigation (RVV/CCE, Belgium), judgment of 10 November 2015, 156 326 (English summary).

<sup>496</sup> Constitutional Court (Vefassungsgerichtshof, Austria), judgment of 26 June 2013, U1343/2012.

<sup>497</sup> Tribunal of Genoa (Tribunale di Genova, Italy), judgment of 13 May 2016, 15023/15 (English summary). See also ECtHR, judgment of 29 January 2013, *S.H.H. v United Kingdom*, no 60367/10.

<sup>498</sup> Federal Administrative Court (BVGE, Switzerland), 2016, D-6806, op. cit. (fn. 130 above). According to UNHCR, decision-makers should understand that cultural differences and trauma play an important and complex role in determining the behaviour of a person who has experienced gender-based violence. See UNHCR, *Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, para. 36(xii)). UNHCR recommends that the type and level of emotion displayed during the recounting of her experiences should not affect an applicant's credibility. In this context, it recommends that trained psychosocial counsellors be available to assist the claimant before and after the interview and that authorities should implement mechanisms for referral to psychosocial counselling and to other support services where necessary (*ibid.*, para. 36(xii)).

<sup>499</sup> UN Women, UNICEF and UN Development Programme, *Informal Justice Systems – Charting a course for human rights-based engagement*, 2012; UN Assistance Mission in Afghanistan and Office of the High Commissioner for Human Rights, *Harmful traditional practices and implementation of the law on elimination of violence against women in Afghanistan*, 9 December 2010.

<sup>500</sup> EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018, Sections 4.5.2 on external consistency and 6.5 on gender.

into account. These include their stage of development and how this affects their memory; the way they typically recount memories; and their knowledge of specific and general information relevant to their case<sup>501</sup>.

### 6.3. Persecution and serious harm

With regard to qualification for refugee status, Article 9(1) QD (recast) defines acts of persecution.

#### **Article 9(1) QD (recast)** **Acts of persecution**

In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:

- (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

As regards qualification for subsidiary protection, Article 15 QD (recast) defines serious harm.

#### **Article 15 QD (recast)** **Serious harm**

Serious harm consists of:

- (a) the death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country or origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

The sections that follow focus on how an applicant's vulnerability may mean that an act is regarded as an act of persecution or serious harm, whereas if the same act were perpetrated against someone without such a vulnerability it might not be so regarded.

<sup>501</sup> Ibid., Section 5.2.4 'Evidence and credibility assessment: specific factors to be taken into account in the case of minor applicants'.

### 6.3.1. Persecution and serious harm are ‘relative’

By defining acts of persecution in terms of severe violations of basic human rights (Article 9(1)(a)) or their cumulative equivalents (Article 9(1)(b)), the QD (recast) commits itself to recognition of the relative nature of persecution. What amounts to a severe violation of a basic human right for an applicant will depend in part on their individual circumstances. As stated in the judicial analysis on qualification for international protection, ‘a violation of a human right, even if it is to be considered as basic, must pass the test of severity on the basis of the particular impact it has on the applicant’<sup>502</sup>. The same act may have different impacts depending on an applicant’s personal circumstances and individual situation, including particularly factors relating to vulnerability, such as background, gender and age.

In relation to the basic human right most often in play in the context of persecution, namely the prohibition of ill-treatment, the CJEU has stated that ‘the prohibition of inhuman or degrading treatment laid down in Article 4 of the Charter corresponds to that laid down in Article 3 of the ECHR and, to that extent, its meaning and scope are ... the same as those conferred on it by [the ECHR]’<sup>503</sup>. In turn, the ECtHR has emphasised that:

the ill-treatment the applicant alleges that he will face if returned must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this level is relative, depending on all the circumstances of the case<sup>504</sup>.

The ECtHR has further stated that ‘The assessment must focus on the foreseeable consequences of the applicant’s removal to the country of destination, in the light of the general situation there and of his or her personal circumstances’<sup>505</sup>. In the Grand Chamber’s judgment in *M.S.S. v Belgium and Greece*, the court stated that ‘The assessment of this minimum ... depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim’<sup>506</sup>.

The ECtHR generally considers treatment to be inhuman when it was ‘premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering’. The ECtHR considers treatment to be ‘degrading’ when it:

humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral or physical resistance ... It may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others ... Lastly, although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3<sup>507</sup>.

<sup>502</sup> EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016, p. 34.

<sup>503</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), para. 67.

<sup>504</sup> ECtHR (GC), 2016, *J.K. and Others*, op. cit. (fn. 49 above), para. 79, which makes reference to an earlier judgment: ECtHR, judgment of 6 March 2001, *Hilal v United Kingdom*, 45276/99, ECLI:CE:ECHR:2001:0306JUD004527699.

<sup>505</sup> Ibid., para. 83.

<sup>506</sup> ECtHR (GC), 2011, *M.S.S. v Belgium and Greece*, op. cit. (fn. 46 above), para. 219. See also ECtHR, judgment of 3 December 2013, *Ghorbanov and Others v Turkey*, no 28127/09, para. 33.

<sup>507</sup> ECtHR (GC), 2011, *M.S.S. v Belgium and Greece*, op. cit. (fn. 46 above), para. 220.

This means that an act that might not otherwise reach the minimum level of severity required might do so where the person is, for example, female, a child or elderly, or suffers from a disability or health condition.

Reflecting this common understanding, the CJEU noted in *Y and Z*:

it is apparent from the wording of Article 9(1) of the Directive that there must be a ‘severe violation’ of religious freedom having a significant effect on the person concerned in order for it to be possible for the acts in question to be regarded as acts of persecution<sup>508</sup>.

Similarly, the CJEU noted in the case of *A, B and C* that:

in accordance with Article 4(3)(c) [QD (recast)], [the] assessment must be made on an individual basis and must take account of the individual situation and personal circumstances of the applicant, including factors such as background, gender and age, in order for it to be determined whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm<sup>509</sup>.

Applying the same approach, national courts of the Member States have developed case-law that illustrates that certain acts may constitute persecution or serious harm when perpetrated against a child, where they might not for a comparably placed adult.

For instance, in a case involving an accompanied 7-year-old minor with albinism, who had been born and raised in the United Kingdom, the UK Upper Tribunal held that the starting point is the particular vulnerability of the applicant, considering their personal perspective and the particular facts of the case. After having specifically considered the age of the applicant and his background as a child raised in the UK, the tribunal finally concluded that the discrimination due to albinism would be ‘entirely new’ to the applicant and therefore much more serious than if he had been raised in Nigeria. Referring to his age, the tribunal also considered that a child can be at risk of persecutory harm in circumstances where a comparably placed adult would not<sup>510</sup>.

In the case of a 15-year-old girl from Iran, the Austrian Asylum Court determined that in her case acts by the head of her school such as beating and spitting on her, as well as abuse and confinement in dark rooms, including deprivation of sleep, were acts of persecution. The court held that, in view of her young age and gender when she was exposed to these measures, even marginally repressive acts can amount to persecution<sup>511</sup>.

Article 15 QD (recast) also reflects a detailed understanding of the relative nature of serious harm.

As regards Article 15(a), the death penalty is as such and under any circumstances, regardless of whether the applicant is deemed vulnerable or not, considered serious harm. Article 15(b) corresponds in essence to Article 3 ECHR, which forms part of the general principles of EU

<sup>508</sup> CJEU (GC), judgment of 5 September 2012, C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, EU:C:2012:518, para. 59.

<sup>509</sup> CJEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), para. 57. See also Sections 3.4 and 3.4.1 above.

<sup>510</sup> Upper Tribunal (Immigration and Asylum Chamber, UK), judgment of 24 November 2016, JA (*child – risk of persecution*) *Nigeria*, [2016] UKUT 560 (IAC), paras 14–15.

<sup>511</sup> Independent Asylum Senate (Unabhängiger Asylsenat, Austria), decision of 9 July 1998, 203.332/0-VIII/22/98.

law and is set out in its own right in both Article 4<sup>512</sup> and Article 19(2)<sup>513</sup> of the EU Charter. With regard to Article 15(c), the relevance of the vulnerability of an applicant is addressed in the next section<sup>514</sup>.

### 6.3.2. Vulnerability, armed conflict and indiscriminate violence

In situations of armed conflict or generalised violence, vulnerable applicants may be affected more severely than others. As noted by UNHCR:

The overall context of a situation of armed conflict and violence can compound the effect of harms on a person, giving rise in certain circumstances to harm that amounts to persecution. Protracted situations of armed conflict and violence, for example, can have serious deleterious effects on the physical and psychological health of applicants or their personal development, which would need to be evaluated, taking into account their character, background, position in society, age, gender, and other factors<sup>515</sup>.

The QD (recast) contains a specific provision addressing situations of indiscriminate violence in situations of armed conflict in the context of subsidiary protection. Article 15(c) QD (recast) states that serious harm consists of, among other things, ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’<sup>516</sup>. Assessment of levels of indiscriminate violence is not simply a quantitative analysis of civilian deaths and casualties etc.; it is also a qualitative exercise<sup>517</sup>.

#### Other relevant EASO publications

- EASO, *Article 15(c) Qualification Directive (2011/95/EU) – Judicial analysis*, 2014, notably Section 1.6 ‘Serious and individual threat’.

The CJEU has given specific guidance on situations of armed conflict and indiscriminate violence in the context of applications based on Article 15(c) QD (recast) in two cases: *Elgafaji* and *Diakité*. What the court said in *Elgafaji* has relevance in the context of the vulnerability of an applicant for international protection, in particular in relation to cases in which there are factors particular to an applicant’s personal circumstances (sometimes called the ‘sliding-scale’ approach). The CJEU ruled:

The exceptional nature of that situation [under Article 15(c)] is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires

<sup>512</sup> CJEU, 2017, *C.K. and Others*, op. cit. (fn. 41 above), paras 67–68; CJEU (GC), 2018, *MP*, op. cit. (fn. 39 above), para. 37; CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 91; CJEU, 2019, *Ibrahim and Others*, op. cit. (fn. 437 above), para. 89.

<sup>513</sup> CJEU (GC), judgment of 18 December 2014, *Mohamed M'Bodj v État belge*, C-542/13, EU:C:2014:2452, para. 38; CJEU (GC), judgment of 18 December 2014, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida*, C-562/13, EU:C:2014:2453, para. 47; CJEU (GC), judgment of 17 February 2009, *Elgafaji v Staatssecretaris van Justitie*, C-465/07, EU:C:2009:94, para. 28.

<sup>514</sup> For the relationship between Article 3 ECHR and Article 15(c) QD, see CJEU (GC), 2009, *Elgafaji*, op. cit. (fn. 513 above), para. 28.

<sup>515</sup> UNHCR, Guidelines on International Protection no 12: Claims for refugee status related to situations of armed conflict and violence, 2 December 2016, HCR/GIP/16/12, para. 12.

<sup>516</sup> Article 15 QD (recast) is cited in full in Section 6.3 above.

<sup>517</sup> See EASO, *Article 15(c) Qualification Directive (2011/95/EU) – Judicial analysis*, 2014, p. 31.

a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.

In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection<sup>518</sup>.

Thus, in situations of a relatively low level of indiscriminate violence, any personal circumstances that render an applicant vulnerable should be thoroughly assessed as part of the sliding-scale approach.

The French National Court of Asylum Law (Cour nationale de droit d'asile (CNDA)) accorded subsidiary protection to a young Iraqi, who had fled the country as a 16-year-old orphan, on the grounds that his isolation as an orphan would place him in a situation of particular vulnerability if returned to Iraq in the context of the indiscriminate violence that ensued<sup>519</sup>.

## 6.4. Applicants who have already been subject to persecution or serious harm

Article 4(4) QD (recast) states:

### Article 4(4) QD (recast)

The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated<sup>520</sup>.

Under the definition of a refugee, establishing an applicant's well-founded fear of persecution requires a forward-looking assessment based on present circumstances<sup>521</sup>. However, Article 4(4) QD (recast) requires the fact of past persecution (or serious harm) to be treated as a serious indication of present risk unless there are good reasons for considering it will not be repeated. In *MP*, the CJEU emphasised that the fact that a person 'has in the past been tortured by the authorities of his country of origin is not in itself sufficient justification for him to be eligible for subsidiary protection when there is no longer a real risk that such torture will be repeated if he is returned to that country'<sup>522</sup>.

<sup>518</sup> CJEU (GC), 2009, *Elgafaji*, op. cit. (fn. 513 above), paras 38 and 39. See also CJEU, judgment of 30 January 2014, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, C-285/12, EU:C:2014:39, para. 31.

<sup>519</sup> National Court of Asylum (Cour nationale de droit d'asile (CNDA), France), judgment of 13 January 2020, *M.A.*, no 17016120 C.

<sup>520</sup> The CJEU has already referred to this concept in its interpretations, for example in CJEU, 2013, *X, Y and Z*, op. cit. (fn. 466 above), paras 63–64.

<sup>521</sup> CJEU, 2013, *X, Y and Z*, op. cit. (fn. 466 above), para. 74.

<sup>522</sup> CJEU (GC), 2018, *MP*, op. cit. (fn. 39 above), para. 30.

Article 4(4) may be particularly relevant in the case of vulnerable applicants, since their past persecution may have involved physical and/or mental injury that may make them more susceptible to a repetition of such persecution.

One example of how having been subjected in the past to persecution or serious harm can affect vulnerable applicants concerns trafficked women. A number of national decisions have explored this issue. In a 2016 case, for instance, the UK Upper Tribunal set out a range of factors that will indicate an enhanced risk of being re-trafficked. These include, but are not limited to:

- (a) The absence of a supportive family willing to take [the applicant] back into the family unit;
- (b) Visible or discernible characteristics of vulnerability, such as having no social support network to assist her, no or little education or vocational skills, mental health conditions, which may well have been caused by experiences of abuse when originally trafficked, material and financial deprivation such as to mean that she will be living in poverty or in conditions of destitution;
- (c) The fact that a woman was previously trafficked is likely to mean that she was then identified by the traffickers as someone disclosing characteristics of vulnerability such as to give rise to a real risk of being trafficked<sup>523</sup>.

Another example of persecution or serious harm suffered in the past that can heavily affect vulnerable applicants' status determination is the practice of FGM. It will have to be considered on a case-by-case basis whether or not the fact of having been subject to FGM leads to the application of Article 4(4) QD (recast)<sup>524</sup>.

This type of vulnerability may also have an impact on the cessation of refugee status and subsidiary protection. The cessation clauses in Articles 11 and 16 QD (recast) do not apply to a beneficiary of refugee status or subsidiary protection status 'who is able to invoke compelling reasons arising out of previous [persecution or serious harm] for refusing to avail himself or herself of the protection of the country of nationality or, being a stateless person, of the country of former habitual residence'<sup>525</sup>. A similar provision can also be found in the Refugee Convention (last paragraph of Article 1C<sup>526</sup>).

## 6.5. Reasons for persecution

A vulnerable applicant may have a well-founded fear of being persecuted for any of the five reasons set out in Articles 2(d) and 10 QD (recast): race, religion, nationality, political opinion or membership of a particular social group<sup>527</sup>.

<sup>523</sup> Upper Tribunal, Asylum and Immigration Chamber (UK), judgment of 17 October 2016, *HD (trafficked women) Nigeria CG*, [2016] UKUT 454 (IAC), para. 190. See also Upper Tribunal (IAC, UK), 2010, *AZ (Trafficked women) Thailand v SSHD*, op. cit. (fn. 488 above), paras 141 and 149; and CNDA (Grande formation, France), judgment of 30 March 2017, *Mme F.*, no 16015058 R.

<sup>524</sup> See, by way of example, Council for Aliens Law Litigation (RVV/CCE, Belgium), judgment of 26 November 2019, no 229 288, para. 4.5; and UNHCR, *Guidance note on refugee claims relating to female genital mutilation*, May 2009. Please note that the concept of 'continuing form of harm' as described in paras 13–15 of the guidance note has not yet been applied by either the CJEU or the ECTHR.

<sup>525</sup> Articles 11(3) and 16(3) QD (recast).

<sup>526</sup> Although the scope of Article 1C is limited to statutory refugees.

<sup>527</sup> EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016, Section 1.5.2.4.

Each of these reasons may, in certain contexts, raise issues specific to vulnerable applicants. Consider, for example, a wheelchair-bound person who campaigns for disability rights, who may face a well-founded fear of being persecuted because they are perceived as holding a political opinion hostile to the authorities. However, it is the reason of membership of a particular social group that is most likely to arise in applications by vulnerable applicants, and hence the focus of the illustrations in this section is confined to this issue<sup>528</sup>.

Article 10(1)(d) QD (recast) provides a definition of a particular social group.

### **Article 10(1) QD (recast)** **Reasons for persecution**

Member States shall take the following elements into account when assessing the reasons for persecution:

[...]

(d) a group shall be considered to form a particular social group where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and — that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender-related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;

Recital 30 QD (recast) is also relevant and reads:

### **Recital 30 QD (recast)**

It is equally necessary to introduce a common concept of the persecution ground ‘membership of a particular social group’. For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution.

According to Article 10(1)(d) QD (recast), ‘Gender-related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular

<sup>528</sup> Ibid., Section 1.5.2 on the different reasons for persecution according to Article 10 QD (recast).

social group’<sup>529</sup>. Other personal circumstances that will fall within the scope of Article 10(1) (d) include those of persons with a disability or a mental illness or disorder, and persons who have been trafficked<sup>530</sup>.

By way of example, the Austrian Federal Administrative Court found that an Iranian woman and her minor daughter might face honour-related violence from the woman’s husband, because both the wife and daughter opposed the wish of the husband to forcibly marry off the daughter. The woman finally left her husband, together with her daughter. In the legal reasoning, the court referred to the likelihood of honour-related killing and found that the woman belonged to the particular social group of a family member<sup>531</sup>.

The French Council of State, in its highest chamber, ruled in a number of cases that a nexus with membership of a particular social group could be established where minor female applicants, born in France, were at risk of female genital mutilation if sent to their parents’ country of origin<sup>532</sup>.

The French National Court of Asylum Law (Cour nationale de droit d’asile (CNDA)) found that victims of trafficking from Edo State in Nigeria share a common background and distinct identity that falls within the definition of a particular social group<sup>533</sup>. The CNDA focused primarily on the community’s perception of trafficked victims in its assessment of whether they constitute a particular social group<sup>534</sup>.

In *AZ (Trafficked women) Thailand*, the UK Upper Tribunal established a nexus with a particular social group by considering not only the applicant’s past experiences as a victim of trafficking but also her age as specific characteristics. The tribunal identified the particular social group of ‘young females who have been victims of trafficking for sexual exploitation’ and highlighted that the appellant was a particularly vulnerable young woman, which was why she was not in the same position as other women being returned to Thailand<sup>535</sup>.

## 6.6. Actors of protection and vulnerability

There are a few specific relationships between vulnerability and the role of actors of protection. Once it has been established that the act a vulnerable applicant fears qualifies as an act of persecution according to Article 9 QD (recast) or an act of serious harm according to Article 15 QD (recast) and there is an actor of persecution or serious harm as defined by Article 6 QD (recast), the focus turns to actors of protection. Actors of protection are dealt with in Article 7 QD (recast), which states:

<sup>529</sup> For more, see Sections 6.8.2 on gender and 6.8.3 on LGBTI persons.

<sup>530</sup> Upper Tribunal (IAC, UK), 2016, *JA (child – risk of persecution) Nigeria*, op. cit. (fn. 510 above).

<sup>531</sup> Federal Administrative Court (Bundesverwaltungsgericht, Austria), judgment of 10 March 2015, L506 1438704-1. See also Federal Administrative Court (Bundesverwaltungsgericht, Austria), judgment of 10 April 2017, W268 2127664-1, granting asylum to a woman from Iraq who was forcibly married as a minor and faced constant violence from her husband as well as other family members. The court established the membership of a particular social group of separated women without family support.

<sup>532</sup> Council of State (Conseil d’état, Assemblée, France), judgment of 21 December 2012, *Mme AB et Mlle CD-B*, no 332491, FR:CEASS:2012:332491.20121221 (unofficial translation). See also CNDA (France), judgment of 13 February 2014, *Ms K*, no 12022774 (minor girl, national of Côte d’Ivoire); CNDA (France), judgment of 9 June 2016, *Ms D*, no 16001323 (minor girl, national of Guinea).

<sup>533</sup> CNDA (France), decision of 24 March 2015, *J.E.F.*, no 10012810. This case concerned a referral back to the CNDA from the Council of State. The decision refers to the appellant’s location of origin (Edo State in Nigeria) as a specific characteristic and thus part of the definition of a particular social group. Given that most Nigerian women who were victims of trafficking for sexual exploitation originated from Edo State or Delta State, the region the appellant came from can indeed be recognised as a special characteristic. The CNDA found that victims of trafficking from Edo State share a common background.

<sup>534</sup> See also CNDA (France), 2017, *Mme F.*, no 16015058 R, op. cit. (fn. 523 above). This judgment ruled on all Nigerian states and not only Edo State and Benin City.

<sup>535</sup> Upper Tribunal (IAC, UK), 2010, *AZ (Trafficked women) Thailand v SSHD*, op. cit. (fn. 488 above), para. 140; Upper Tribunal (IAC, UK), 2016, *JA (child – risk of persecution) Nigeria*, op. cit. (fn. 510 above).

## Article 7 QD (recast)

### **Actors of protection**

1. Protection against persecution or serious harm can only be provided by:
  - (a) the State; or
  - (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;

provided they are willing and able to offer protection in accordance with paragraph 2.
2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection.
3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Union acts.

Article 7 QD (recast) should be read in the light of recital 26 QD (recast), which states:

### **Recital 26 QD (recast)**

Protection can be provided, where they are willing and able to offer protection, either by the State or by parties or organisations, including international organisations, meeting the conditions set out in this Directive, which control a region or a larger area within the territory of the State. Such protection should be effective and of a non-temporary nature.

In relation to acts of persecution or serious harm inflicted by state actors, recital 27 QD (recast) reads as follows:

### **Recital 27 QD (recast)**

... Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant. ...

In assessing if there is effective protection against non-state actors of persecution or serious harm, the Member State should take into account the personal circumstances, for example

gender or minor age, that render the applicant vulnerable when the perpetrators may be non-state actors, such as family or clan members.

In the overall assessment of whether or not there is effective protection, it may be relevant to consider if applicants with limited legal capacity, such as unaccompanied minors, will be afforded, *inter alia*, effective guardianship and custody systems as well as caring systems. Depending on the circumstances of the case, it may also be necessary to assess if applicants with disabilities may require special equipment and/or medical treatment or other help to access durable protection and if applicants with serious (mental) health conditions may, for example, require access to specific treatment.

In *NA and VA*, the United Kingdom Upper Tribunal (UKUT) analysed the meaning of ‘reasonable steps’ to ensure protection and concluded that it encompassed taking account of individual characteristics that may affect the ability of an applicant to receive effective, non-temporary protection, and thus whether or not the state is *de facto* able and willing to protect them. As regards specific protection needs of applicants, UKUT gave examples of measures to ensure efficacious witness protection, emphasising the importance of a ‘broad array of measures ... depending on the individual context’<sup>536</sup>. This analysis acknowledges that different groups of (vulnerable) applicants may require specific measures for them to be able to enjoy effective protection.

With regard to effective protection for women from gender-based violence, the question has been raised of whether or not women’s safe houses run by NGOs can provide sufficient protection. In *OA*, Advocate General Hogan reasoned ‘The protection envisaged by the Geneva Convention is fundamentally, in substance, the traditional protection offered by a State, namely, a functioning legal and policing system based on the rule of law’<sup>537</sup>. Non-state actors can only provide protection in accordance with Article 7(1)(b) if they are essentially quasi-state entities ‘who control all or a substantial part of the territory of a state and who have also sought to replicate traditional State functions by providing or supporting a functioning legal and policing system based on the rule of law’<sup>538</sup>. Thus, a women’s safe house run by an NGO cannot meet the requirements of Article 7 as regards actors of protection.

### Other relevant EASO publications

- EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016, Sections 1.7 ‘Actors of protection (Article 7)’ and 2.6 ‘Actors of protection (Article 7)’ in the contexts of refugee and subsidiary protection respectively.

<sup>536</sup> Upper Tribunal (Immigration and Asylum Chamber, UK), judgment of 19 June 2015, *NA and VA (protection: Article 7(2) Qualification Directive) India*, [2015] UKUT 432 (IAC), para. 17: ‘The “reasonable steps” required to provide effective protection could, in principle, embrace a broad array of measures. Thus, while in the present case the emphasis is on the need for an efficacious witness protection model, other measures may be required, depending on the individual context: for example, *home security; enhanced police protection; simple warnings and security advice to the person concerned; the grant of a firearms licence; or, in extremis, what has come to be known in the United Kingdom as a comprehensive “relocation” package, which may involve a change of identity, accompanied by appropriate financial and logistical support*’ (emphasis added).

<sup>537</sup> CJEU, Opinion of Advocate General Hogan of 30 April 2020, *Secretary of State for the Home Department v OA*, C-255/19, EU:C:2020:342, para. 78.

<sup>538</sup> *Ibid.*, para. 79.

## 6.7. Internal protection

The need to take the applicant's personal circumstances into account, referred to in Article 4(3)(c) QD (recast), also applies when examining whether or not an applicant can access internal protection in a part of the country of origin in accordance with Article 8 QD (recast). This is explicitly mentioned in Article 8(2) QD (recast), which states (emphasis added):

### Article 8(2) QD (recast)

In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the **personal circumstances of the applicant** in accordance with Article 4. ...

When assessing whether or not an applicant can access internal protection in another part of their country of origin, it is necessary to apply two tests: the 'protection test' and the 'reasonableness test'. In accordance with Article 8(1) QD (recast), the protection test means that it must be determined that the applicant:

- (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or
- (b) has access to protection against persecution or serious harm as defined in Article 7;

and ... can travel safely and legally to and gain admittance to that [other] part of the country.

The reasonableness test means that the decision-maker must establish whether or not the applicant 'can reasonably be expected to settle there'<sup>539</sup>. The personal circumstances of an applicant must be taken into account in both tests. Thus, any vulnerability of the applicant must be respected in the two tests<sup>540</sup>.

When the applicant is an unaccompanied minor and the option of internal protection is examined, 'the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available', according to recital 27 QD (recast)<sup>541</sup>.

As regards vulnerability in more general terms, the German Bundesverwaltungsgericht (Federal Administrative Court) has held that an applicant can reasonably be expected to stay in another part of the country only if their subsistence is sufficiently assured. The court held that the standard of economic survival goes beyond the absence of an existential plight<sup>542</sup>. In a case that concerned domestic violence in China, the Austrian Bundesverwaltungsgericht

<sup>539</sup> Article 8(1) QD (recast).

<sup>540</sup> See Migration Court of Appeal (Sweden), judgment of 17 March 2017, MIG 2017:6 (child), and judgment of 10 April 2018, MIG 2018:6 (adult); Council for Aliens Law Litigation (RVV/CCE, Belgium), judgment of 18 October 2012, 90 024.

<sup>541</sup> See Section 6.6 above for the text of recital 27 QD (recast).

<sup>542</sup> Federal Administrative Court (Bundesverwaltungsgericht, Germany), judgment of 29 May 2008, 10 C 11.07, para. 35. See also Council for Aliens Law Litigation (RVV/CCE, Belgium), judgment of 18 September 2018, 209 550.

(Federal Administrative Court) held that the applicant, as a young single woman without family support or other social networks, would not be able to lead a life without undue hardship in China, especially as nationals are dependent on the traditional extended family and community structures for security and economic survival, including housing and a reasonable level of subsistence. It was also not apparent that the applicant would have sufficient financial resources to secure her existence in China<sup>543</sup>.

#### Other relevant EASO publications

- EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016, Sections 1.8 ‘Internal protection (Article 8)’ and 2.7 ‘Internal protection (Article 8)’ in the contexts of refugee and subsidiary protection respectively.

## 6.8. Some specific categories of vulnerability

As noted at the outset of this part, the chapters of the QD (recast) dealing with qualification for international protection (Chapters I–VI) neither expressly refer to vulnerability nor contain any list of vulnerable persons such as is found in Article 20(3) in Chapter VII, which concerns the content of international protection. Nevertheless Article 4(3)(c), when giving examples of personal circumstances that must be taken into account when assessing an application, does mention ‘background, gender and age’. Article 9(2)(f) refers to ‘gender-specific’ and ‘child-specific’ acts of persecution, and Article 10 identifies ‘a group based on a common characteristic of sexual orientation’. By virtue of the fact that Article 4(3)(c) does not seek to define particular circumstances exhaustively, there is clearly scope for taking into account other vulnerable categories. One further characteristic, health, has been the subject of CJEU attention in the cases of *M'Bodj*<sup>544</sup> and *MP*<sup>545</sup>. As a final illustration of specific categories, this section looks at disability and mental disorder.

### 6.8.1. Age

Article 4(3)(c) QD (recast) makes clear that Member States must take into account:

the individual position and personal circumstances of the applicant, including factors such as ... age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.

The factor of age is of particular relevance when the applicant is a minor or an elderly person.

<sup>543</sup> Federal Administrative Court (Bundesverwaltungsgericht, Austria), judgment of 22 October 2015, W119 1434517-1. See also Council for Aliens Law Litigation (RVV/CCE, Belgium), judgment of 24 October 2016, 176 763. In another case, the Belgian Council for Aliens Law Litigation considered that the physical disability of the applicant, who was a young woman, had to be fully taken into account; Council for Aliens Law Litigation (RVV/CCE, Belgium), judgment of 24 June 2019, 223 104.

<sup>544</sup> CJEU (GC), 2014, *M'Bodj*, op. cit. (fn. 513 above).

<sup>545</sup> CJEU (GC), 2018, *MP*, op. cit. (fn. 39 above).

### 6.8.1.1. Minors

Reinforcing the importance of taking into account a minor's age when assessing their eligibility for international protection is the fact (already noted in Section 2.4) that the QD (recast) also requires the principle of the best interests of the child to be a primary consideration.

Recital 18 QD (recast) states:

#### **Recital 18 QD (recast)**

The ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive, in line with the 1989 United Nations Convention on the Rights of the Child. In assessing the best interests of the child, Member States should in particular take due account of the principle of family unity, the minor’s well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity.

The scope and meaning of this recital – in conjunction with Article 24 EU Charter – in the context of qualification for international protection is not entirely clear from the QD (recast) itself. Article 20(5) QD (recast), on the content of international protection, states that the best interests of the child shall be a primary consideration for Member States when implementing the provisions of Chapter VII that involve minors. By contrast, Chapters II–VI on assessment of applications for international protection, qualification for being a refugee, refugee status, qualification for subsidiary protection and subsidiary protection status do not contain a similar provision. Nevertheless, the references in Article 4(3)(c) QD (recast) to the relevance of age when assessing an application for international protection, and in Article 9(2)(f) QD (recast) to the fact that acts of persecution can take the form of ‘acts of a ... child-specific nature’, can be said to constitute workings of the principle of the best interests of the child. Moreover, recital 27 QD (recast) explicitly states that with regard to the assessment of internal protection, when ‘the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available’<sup>546</sup>.

With regard to acts of persecution or serious harm, an act that may not constitute persecution or serious harm if perpetrated against an adult might do so if perpetrated against a minor. Therefore, the impact of the act on the individual has to be assessed both in accordance with Article 4(3)(c) and under Article 9(1)(a) and (b) QD (recast). See Sections 6.2.1 on the requirement of an individual assessment and 6.3.1 for further information on the fact that persecution and serious harm are relative.

It should be noted with regard to the relative nature of the notion of persecution and serious harm that some acts directed against young adults may have the same effect as when directed against minors<sup>547</sup>. This needs to be assessed on an individual basis.

<sup>546</sup> EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016, p. 80.

<sup>547</sup> See for example Council for Aliens Law Litigation (RVV/CCE, Belgium), judgment of 11 April 2019, 219 682, para. 5.2.10.4 (concerning two Afghan brothers who had only just reached the age of majority).

Child-specific acts of persecution must be assessed through the lens of vulnerability, as minors who are victims of acts of persecution should be considered particularly vulnerable per se. Recital 28 QD (recast) explicitly emphasises:

### Recital 28 QD (recast)

It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution.

The wording of Article 9(2)(f), which sets out that persecution as qualified in Article 9(1) can, *inter alia*, take the form of acts of a ‘child-specific nature’, amounts to express recognition that children may be subjected to specific forms of persecution. These may be either ones that can only be inflicted on a child (e.g. underage military recruitment, forced underage marriage) or ones that might be considered mere harassment in the case of an adult but could cause serious physical or psychological harm amounting to persecution in the case of a child. It may also be a form of persecution that is perpetrated mainly during childhood, such as FGM. There are other forms of child-specific acts of persecution that are clearly so serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) ECHR, which would amount to persecution if the victim were an adult.

Among child-specific acts of persecution or serious harm there are forcible and/or underage recruitment into military service<sup>548</sup> or armed groups; family or domestic violence; infanticide; forced and/or underage marriage; discrimination against street children; FGM; forced child labour; child sexual abuse and exploitation<sup>549</sup>; trafficking; and family planning laws and policies discriminating against children born in contravention of those laws and plans<sup>550</sup>.

The Convention on the Rights of the Child contains a number of specific human rights of children<sup>551</sup>. Breaches of some of these rights may either by their nature or by repetition constitute a violation of a basic human right in the sense of Article 9(1)(a) QD (recast), or the accumulation of various measures may be considered an infringement of fundamental rights constituting persecution within the meaning of Article 9(1)(b) QD (recast). Their character as a basic human right may be derived from the fundamental importance of a specific right for a child’s living conditions and its proximity to the rights under Article 15(2) ECHR from which no derogation is allowed<sup>552</sup>.

UNHCR’s Guidelines on International Protection no 8 refer extensively to child-specific forms of persecution, which require an individual assessment of the effect of the harm on the child in view of their personal circumstances<sup>553</sup>.

<sup>548</sup> Higher Administrative Court of Bavaria (Bayerischer Verwaltungsgerichtshof, Germany), judgment of 23 May 2017, [13a B 17.30111](#).

<sup>549</sup> Migration Court of Appeal (Sweden), judgment of 17 March 2017, [UM 911-16 \(English summary\)](#). The court did not, however, find a reason for persecution within the meaning of Article 10 QD (recast).

<sup>550</sup> Higher Administrative Court of Baden-Württemberg (Verwaltungsgerichtshof Baden-Württemberg, Germany), judgment of 14 September 2016, [A 11 S 1125/16](#). See also J. Pobjoy, *The Child in International Refugee Law*, Cambridge University Press, London, 2017, pp. 116–122.

<sup>551</sup> See Section 2.4 ‘Best interests of the child’.

<sup>552</sup> EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016, p. 43.

<sup>553</sup> UNHCR, *Guidelines on International Protection: 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*, op. cit. (fn. 161 above), para. 14. Examples are forced separation of a child from his or her parents, due to discriminatory custody laws or the detention of the child’s parent(s); violations of survival and development rights as well as severe discrimination against children born outside strict family planning rules and against stateless children as a result of loss of nationality and attendant rights; child labour; deprivation of socioeconomic rights; and violations of economic, social and cultural rights (*ibid.*, paras 17, 24–30 and 34–36).

Minors may be persecuted for one or more of the reasons set out in Article 2(d) QD (recast) read in conjunction with Article 10 QD (recast). With regard to Article 10(1)(d) QD (recast), being a child is an innate characteristic, and where children have a distinct identity in a particular society their fear of persecution may well be found to arise for reason of membership of a particular social group<sup>554</sup>.

### 6.8.1.2. Elderly persons

It should be emphasised that the elderly are also a clear example of a category of applicants who may well be vulnerable owing to infirmity or the ageing process, which will, of course, vary depending on social, environmental and economic circumstances. In Belgium, the Council for Aliens Law Litigation, in granting an applicant subsidiary protection status, found that his risk of serious harm if returned to Iraq was heightened by the fact that he was a single elderly person requiring medical and other care<sup>555</sup>.

### 6.8.2. Gender

Article 4(3)(c) QD (recast) makes clear that Member States must take into account:

the individual position and personal circumstances of the applicant, including factors such as ... gender ... , so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm<sup>556</sup>.

By stating that acts of persecution as qualified in Article 9(1) can, *inter alia*, take the form of 'acts of a gender-specific or child-specific nature', the wording of Article 9(2)(f) QD (recast) emphasises the relative nature of acts of persecution or serious harm, as already laid out in Article 4(3)(c) QD (recast)<sup>557</sup>.

#### Other relevant EASO publications

- EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016, Section 1.4.2.6.1 'Gender-specific acts of persecution'.

**Gender-specific acts of persecution**, which concern mostly but not exclusively women or girls and 'may be related to certain legal traditions and customs', include for example 'genital mutilation, forced sterilisation or forced abortion', as noted in recital 30 QD (recast) in the context of the need for a 'common concept of the persecution ground "membership of a particular social group"'. They may also encompass forced prostitution or sexual

<sup>554</sup> UNHCR, *Guidelines on International Protection: 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*, op. cit. (fn. 161 above), paras 49–51. See also Section 6.5 above on reasons for persecution.

<sup>555</sup> Council for Aliens Law Litigation (RVV/CCE, Belgium), judgment of 29 June 2016, no 170 821.

<sup>556</sup> See Section 6.2.1 on the principle of individual assessment.

<sup>557</sup> See Section 6.3.1 for further information on the fact that persecution and serious harm are relative.

exploitation and trafficking for such purposes<sup>558</sup>, forced marriage<sup>559</sup> and any other form of sexual violence<sup>560</sup>.

In the context of applications for international protection made by women, girls or LGBTI persons, where gender-specific acts of persecution or serious harm are at issue, vulnerability is a relevant factor when considering the type of persecution or harm that may be perpetrated, given for instance their (often inferior) position within society. This may mean they are more vulnerable to persecutory treatment. As the UK House of Lords has ruled, ‘women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and ... they may be persecuted because of the inferior status accorded to their gender in their home society’<sup>561</sup>.

The legal concept of acts of a gender-specific nature may involve acts of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group; the social group may or may not be defined on the basis of gender. Pursuant to recital 30 and Article 10(d) QD (recast), for the purposes of defining a particular social group, issues arising from an applicant’s gender should be given due consideration insofar as they are related to the applicant’s well-founded fear of persecution<sup>562</sup>.

In cases where gender-specific acts are not considered persecution because the acts were not committed for any reason within the meaning of Article 10 QD (recast), it cannot be ruled out that the acts may amount to ‘serious harm’ within the meaning of Article 15(b) QD (recast).

The case-law of Member States demonstrates the impact of gender on the assessment of acts as persecution according to Article 9(1)(a) and/or (b) QD (recast). In its *Islam AP v ex parte Shah AP* judgment, the UK House of Lords laid down an important basis for the acknowledgement that violence against women in the form of domestic violence is gender-based persecution<sup>563</sup>.

In relation to the gender aspect in contexts of domestic violence, the UK Upper Tribunal, for instance, found that the fact that an applicant had been repeatedly beaten in different ways on different occasions, with the intention of humiliating and controlling her behaviour, was severe enough to establish persecution:

In my judgment the severity of violence in a marriage is only one of the factors that has to be considered in determining if it is described properly as persecutory. Any violence between partners is to be taken seriously although some violence is plainly

<sup>558</sup> See for example Upper Tribunal (UK), judgment of 6 September 2018, *ES (s82 NIA 2002, Negative NRM)*, [2018] UKUT 335.

<sup>559</sup> See for example Upper Tribunal (UK), judgment of 24 July 2014, *AK and SK (Christians: risk) Pakistan CG v Secretary of State for the Home Department*, [2014] UKUT 00569 (IAC); CNDA (France), judgment of 2 October 2019, *Mme L.*, no 19003209 C, concerning an ethnic Yanzi woman from the Democratic Republic of Congo; and CNDA (France), judgment of 20 March 2019, *Mme K.*, no 18030347 C, concerning a lesbian from Sierra Leone who was subjected to forced marriage and marital rape because she was perceived as having dishonoured the family on account of her homosexuality.

<sup>560</sup> See for example Administrative Court of Münster (Verwaltungsgericht Münster, Germany), judgment of 23 July 2019, 11 K 3969/16/A, concerning systematic rapes in the Eritrean National Service; High Administrative Court (Poland), judgment of 8 May 2008, *X v Ministry of Internal Affairs*, II OSK 237/07 (English summary).

<sup>561</sup> House of Lords (UK), judgment 10 October 2006, *Secretary of State for the Home Department v K (FC) and Fornah v Secretary of State for the Home Department*, [2006] UKHL 46, para. 86.

<sup>562</sup> See Section 6.5 on reasons for persecution. See also EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016, Section 1.5.2.4 ‘Membership of a particular social group (Article 10(1)(d))’.

<sup>563</sup> House of Lords (UK), judgment of 25 March 1999, *Islam (AP) v Secretary of State for the Home Department and Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP) (Conjoined Appeals)*, [1999] UKHL 20. See also Lee Hasselbacher, ‘State obligations regarding domestic violence: The European Court of Human Rights, due diligence, and international legal minimums of protection’, *Northwestern Journal of International Human Rights*, Vol. 8, No 2, 2010. The CEDAW General Recommendation no 19: Violence against women, 1992, UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, and United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, contributed to recognising that women are particularly vulnerable to violence in the private sphere in the hands of private actors.

even much [sic] serious than others. **A horrible element of domestic violence is not just the fact of the violence but the fact that it is inflicted in a relationship where the victim, usually but not always a woman, should be entitled to support and affection.** When that is replaced by violent bullying and controlling behaviour it is horrible for her and there is clear evidence here of repeated nasty acts of violence intended to humiliate and overbear the victim. This is clearly sufficiently severe to amount to persecution<sup>564</sup>.

The case-law of the Member States demonstrates that gender is a factor in the context of infliction of harmful traditional practices – such as forced marriage<sup>565</sup>, FGM<sup>566</sup> or the practice of *bacha bazi* ('dancing boys') – on applicants and that their gender can make them vulnerable to such practices. Practices such as *bacha bazi* show that not only the gender of the (male) applicants but also their (minor) age is a factor when establishing whether or not such practices amount to acts of persecution<sup>567</sup>.

UNHCR's 'Guidelines on International Protection: Gender-related persecution' refer extensively to gender-based forms of persecution, including links to Convention grounds<sup>568</sup>.

### 6.8.3. Lesbian, gay, bisexual, transgender and intersex persons

Applications for international protection from LGBTI persons may raise issues relating to sexual orientation and/or gender identity<sup>569</sup>. The definitions of these terms, as set out in the Yogyakarta Principles, can be found in Section 3.2. Specific consideration has already been given in Section 6.8.2 to gender as a category of vulnerability.

Applications for international protection that raise issues of sexual orientation and/or gender identity can involve situations in which applicants are vulnerable in their country of origin or habitual residence. This vulnerability may arise from laws and/or social practices that are persecutory and/or discriminatory and a failure by the authorities to protect LGBTI persons from persecution and/or discrimination by family members and others. With regard to criminalising homosexual acts, in view of the discriminatory nature of such sanctions, the CJEU has ruled:

Article 9(1) of [Directive 2004/83], read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts per se does not ... constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted

<sup>564</sup> Upper Tribunal (Immigration and Asylum Chamber) (UK), judgment of 12 December 2016, *DD v Secretary of State for the Home Department*, AA 12842 2015, para. 34 (emphasis added).

<sup>565</sup> See for example Higher Administrative Court (Verwaltungsgerichtshof, Austria), judgment of 4 March 2010, 2006/20/0832; Higher Administrative Court (Verwaltungsgerichtshof, Austria), judgment of 15 September 2010, 2008/23/0463.

<sup>566</sup> See for example CNDA (France), judgment of 19 April 2017, *Ms C*, no 16034664; CNDA (France), judgment of 2 February 2018, *Ms A*, no 17034030 C; CNDA (Grande formation, France), 5 December 2019, *Mimes N., S. et S.*, nos 19008524, 19008522 and 19008521 R; Federal Administrative Court (Bundesverwaltungsgericht, Germany), judgment of 19 April 2018, 1 C 29.17, para. 38; Tribunal of Bologna (Italy), judgment of 20 January 2020, 8957/2018. This last recognises refugee status on account of gender-based persecution and discrimination, including as a result of exposure to forced marriage and FGM.

<sup>567</sup> See for example Federal Administrative Court (Bundesverwaltungsgericht, Austria), 3 April 2017, W169 2112518-1, a case of a boy who had endured years-long sexual exploitation as a *bacha bazi* in Afghanistan; and CNDA (France), judgment of 21 June 2016, *M. Q.*, no 15004692 C.

<sup>568</sup> UNHCR, *Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees*, 7 May 2002, HCR/GIP/02/01.

<sup>569</sup> EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016, Section 1.4.2.6. See also UNHCR, *Guidelines on International Protection* no 9, op. cit. (fn. 157 above). For a regularly updated list of cases, see University of Sussex, 'Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA'.

such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution<sup>570</sup>.

As regards reasons for persecution, recital 30 QD (recast) provides that ‘For the purposes of defining a particular social group, issues arising from an applicant’s ... gender identity and sexual orientation ... should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution’. Article 10(1)(d) QD (recast) specifically recognises that, ‘Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation’<sup>571</sup>. However, it continues, ‘Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States’<sup>572</sup>. It adds that ‘Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group’<sup>573</sup>.

In assessing such cases, it is important to bear in mind that the CJEU in *X, Y and Z* confirmed that a person’s sexual orientation is a characteristic so fundamental to his or her identity that he or she should not be forced to renounce it<sup>574</sup>. The court also noted that ‘the existence [in the country of origin] of criminal laws ... which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group’<sup>575</sup>. Where it is established that on return to his country of origin an applicant’s homosexuality would expose him to a genuine risk of persecution within the meaning of Article 9(1) QD, the court determined that ‘The fact that he could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect’<sup>576</sup>. The CJEU ruled that, when assessing an application for refugee status, ‘the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation’<sup>577</sup>.

It may be important, when assessing applications by LGBTI persons that are based on their sexual orientation and/or gender identity, to consider the specific forms of persecution that can arise for different categories of persons<sup>578</sup>. Examples include the phenomenon, in respect of lesbians, of the risk of ‘corrective’ rape<sup>579</sup> or, for transgender persons, those of refusal to amend documentation to reflect their new gender and involuntary prostitution, which have been found to amount cumulatively to persecution<sup>580</sup>.

<sup>570</sup> CJEU, 2013, *X, Y and Z*, op. cit. (fn. 466 above), para. 61.

<sup>571</sup> See also CJEU, 2018, *F v Bevándorlási és Állampolgársági Hivatal*, op. cit. (fn. 150 above), para. 30.

<sup>572</sup> Only homosexual acts that are criminal in accordance with the national law of the Member States are excluded from its scope. See CJEU, 2013, *X, Y and Z*, op. cit. (fn. 466 above), para. 67: ‘Apart from those acts considered to be criminal in accordance with the national law of the Member States, nothing in the wording of Article 10(1)(d) suggests that the European Union legislature intended to exclude certain other types of acts or expression linked to sexual orientation from the scope of that provision.’

<sup>573</sup> See also Section 6.5 ‘Reasons for persecution’.

<sup>574</sup> CJEU, 2013, *X, Y and Z*, op. cit. (fn. 466 above), para. 70: ‘In that connection, it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it.’

<sup>575</sup> Ibid., para. 49.

<sup>576</sup> Ibid., para. 75.

<sup>577</sup> Ibid., para. 76.

<sup>578</sup> See generally UNHCR, *Guidelines on International Protection no 9*, op. cit. (fn. 157 above), paras 10 and 20–25.

<sup>579</sup> See Upper Tribunal Immigration and Asylum Chamber (UTIAC, UK), decision of 24 June 2011, *SW (lesbians – HJ and HT applied)*, UKUT-251.

<sup>580</sup> See for example Asylum Court (Asylgerichtshof, Austria), judgment of 24 February 2011, A4 213.316-0/2008/11E (English summary), concerning an Egyptian transgender woman unable, inter alia, to amend her Egyptian passport to her female identity; Asylum Court (Asylgerichtshof, Austria), judgment of 29 January 2013, E1 432.053-1/2013/5E (English summary), a case involving involuntary prostitution. Other cases involving transgender persons involve forms of persecution also faced by gay men. See for example CNDA (France), judgment of 3 October 2019, *M.H.*, no 18031476 C, concerning an Algerian man seeking asylum on account of his sexual orientation and gender identity, who had arrived in France as a homosexual, began medical treatment to become a transgender woman and was recognised as a refugee; and Administrative Court Potsdam (Verwaltungsgericht Potsdam, Germany), judgment of 27 April 2017, 6 K 338/17.A (English summary), concerning a bisexual, transgender Russian activist recognised as a refugee in Germany.

In addition, the methods used to assess an application by LGBTI persons may place them in a situation of vulnerability<sup>581</sup>.

In the case of *A, B and C*, the CJEU pointed out the ‘sensitive nature of questions relating to a person’s personal identity and, in particular, his sexuality’<sup>582</sup>. For that reason, and with reference to the rights to respect for private and family life and human dignity as guaranteed by Articles 7 and 1 EU Charter, the CJEU decided that ‘questions concerning details of the sexual practices of [the] applicant’ and ‘the submission of the applicants to possible “tests” in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts’ are prohibited<sup>583</sup>.

Similarly, the CJEU ruled in the case of *F* that, should recourse be had to an expert’s report, the procedures upon which it is based ‘must be consistent with other relevant EU law provisions, and in particular with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, enshrined in Article 1 of the Charter, and the right to respect for private and family life guaranteed by Article 7 thereof’<sup>584</sup>. The CJEU confirmed this approach in relation to assessment of sexual orientation. It decided:

It is also necessary to take into account, in order to assess the seriousness of the interference arising from the preparation and use of a psychologist’s expert report, such as that at issue in the main proceedings, of Principle 18 of the Yogyakarta principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity … , which states, *inter alia*, that no person may be forced to undergo any form of psychological test on account of his sexual orientation or gender identity<sup>585</sup>.

The court concluded in this case:

Article 4 of Directive 2011/95, read in the light of Article 7 of the Charter of Fundamental Rights, must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist’s expert report, such as that at issue in the main proceedings, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant<sup>586</sup>.

By way of example, a decision of the French National Court of Asylum Law shows which criteria and circumstances may be assessed when an asserted sexual orientation is contested in an asylum case<sup>587</sup>.

<sup>581</sup> CJEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), para. 70.

<sup>582</sup> Ibid., para. 69.

<sup>583</sup> Ibid., paras 64 and 65.

<sup>584</sup> CJEU, 2018, *F v Bevándorlási és Állampolgársági Hivatal*, op. cit. (fn. 150 above), para. 35. See also Section 6.2.2 ‘Substantiation of an application for international protection’ above.

<sup>585</sup> Ibid., para. 62.

<sup>586</sup> Ibid., conclusion. The court also made it clear, however, that weight could be attached to expert reports that were based on ‘sufficiently reliable methods and principles in the light of the standards recognised by the international scientific community’ (para. 58). Even so, it emphasised at para. 42 that ‘the determining authority cannot base its decision solely on the conclusions of an expert’s report and that that authority cannot, *a fortiori*, be bound by those conclusions when assessing the statements made by an applicant relating to his sexual orientation’.

<sup>587</sup> CNDA (France), judgment of 30 May 2017, M.S., no 16015675 C. Guidance may also be sought in UNHCR, *Guidelines on International Protection no 9*, op. cit. (fn. 157 above).

## 6.8.4. Health

From what has been said in Section 6.2.1, it is clear that the individual position and personal circumstances of an applicant, which must be taken into account when assessing if the acts to which they have been or could be exposed would amount to persecution or serious harm, can include the applicant's state of health.

The CJEU has considered the situation of applicants for international protection who are vulnerable by virtue of having a serious medical condition, and if this would qualify them for subsidiary protection, in at least two cases: *M'Bodj* and *MP*.

The first case, *M'Bodj*, concerned the situation of an applicant for international protection who was suffering from a serious illness, and the risk he would face of a deterioration in his state of health owing to the lack of adequate treatment in his country of origin<sup>588</sup>. In its judgment, the CJEU considered whether or not this situation would qualify him for subsidiary protection under Article 15(b) QD. Article 15(b) defines serious harm as, among other things, 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin'. In this case, the person concerned had been the victim of an assault in the host Member State<sup>589</sup>. The CJEU noted that Article 6 QD sets out a list of those deemed responsible for inflicting persecution or serious harm, which 'supports the view that such harm must take the form of conduct on the part of a third party and that it cannot therefore simply be the result of general shortcomings in the health system of the country of origin'<sup>590</sup>. The court continued:

Similarly, recital 26 [QD] states that risks to which the population of a country or a section of the population is generally exposed do not normally in themselves create an individual threat which would qualify as serious harm. It follows that the risk of deterioration in the health of a third country national suffering from a serious illness as a result of the absence of appropriate treatment in his country of origin is not sufficient, unless that third country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection<sup>591</sup>.

The court also repeated what it had already stated in other judgments, that the scope of the QD does not extend to persons granted leave to reside in the territories of the Member States for other reasons, that is, on a discretionary basis on compassionate or humanitarian grounds<sup>592</sup>.

The CJEU also examined whether or not such an interpretation would be contrary to Article 19(2) of the EU Charter, but came to the conclusion, with reference to ECtHR case-law regarding Article 3 ECHR, that it would not<sup>593</sup>. The court noted that Article 3 QD allows Member States to introduce or retain more favourable standards for determining, *inter alia*, who qualifies as a person eligible for subsidiary protection, insofar as those standards are compatible with the directive<sup>594</sup>. However, the reservation set out in Article 3 QD:

<sup>588</sup> CJEU (GC), 2014, *M'Bodj*, op. cit. (fn. 513 above).

<sup>589</sup> This distinct element in comparison with the situation in the case of *MP* has been emphasised by the CJEU in CJEU (GC), 2018, *MP*, op. cit. (fn. 39 above), para. 47.

<sup>590</sup> CJEU (GC), 2014, *M'Bodj*, op. cit. (fn. 513 above), para. 35.

<sup>591</sup> *Ibid.*, para. 36.

<sup>592</sup> *Ibid.*, para. 37.

<sup>593</sup> *Ibid.*, paras 38–41.

<sup>594</sup> *Ibid.*, para. 42.

precludes a Member State from introducing or retaining provisions granting the subsidiary protection status provided for in the directive to a third country national suffering from a serious illness on the ground that there is a risk that that person's health will deteriorate as a result of the fact that adequate treatment is not available in his country of origin, as such provisions are incompatible with the directive<sup>595</sup>.

In other words, subsidiary protection cannot be granted on grounds of deficiencies or weaknesses in the health systems of countries of origin unless that person is intentionally deprived of healthcare.

By the time the CJEU came to consider the case of *MP*, there had been a further development in the case-law of the ECtHR. As noted by the CJEU, it follows from the more recent judgment of the ECtHR in *Paposhvili v Belgium*<sup>596</sup> that Article 3 ECHR:

precludes the removal of a seriously ill person where he is at risk of imminent death or where substantial grounds have been shown for believing that, although not at imminent risk of dying, he would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of suffering a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to [sic] a significant reduction in life expectancy<sup>597</sup>.

The case of *MP* concerned a third-country national who had been tortured by the authorities of his country of origin in the past. In addition – even though there was no longer any risk of him being tortured again if returned to that country – he continued to suffer severe psychological after-effects resulting from the torture. Furthermore, according to duly substantiated medical evidence, those after-effects would be substantially aggravated and lead to a serious risk of him committing suicide if he were returned to his country of origin. The CJEU stated that:

In order to assess whether a third country national who has in the past been tortured by the authorities of his country of origin, faces, if returned to that country, a real risk of being intentionally deprived of appropriate care for the physical and mental after-effects resulting from the torture inflicted by those authorities, it is necessary ... to take Article 14 [CAT] into consideration<sup>598</sup>.

In that regard, however, the court noted that the directive and the CAT pursue different aims. It found that the directive establishes distinct protection mechanisms, such that it is not possible 'for a third country national in a situation such as that of MP to be eligible for subsidiary protection as a result of every violation, by his State of origin, of Article 14 [CAT]'<sup>599</sup>. The court stated:

It is therefore for the national court to ascertain, in the light of all current and relevant information, in particular reports by international organisations and non-governmental human rights organisations, whether, in the present case, MP is likely, if returned to his country of origin, to face a risk of being intentionally deprived of appropriate care for the physical and mental after-effects resulting from the torture

<sup>595</sup> CJEU (GC), 2014, *M'Bodj*, op. cit. (fn. 513 above), para. 43. See also Constitutional Court (Belgium), judgment of 26 June 2008, no 95/2008.

<sup>596</sup> ECtHR (GC), judgment of 13 December 2016, *Paposhvili v Belgium*, no 41738/10.

<sup>597</sup> CJEU (GC), 2018, *MP*, op. cit. (fn. 39 above), para. 40, with reference to paras 178 and 183 of *Paposhvili*.

<sup>598</sup> Ibid., para. 52.

<sup>599</sup> Ibid., paras 54–56.

he was subjected to by the authorities of that country. That will be the case, inter alia, if, in circumstances where, as in the main proceedings, a third country national is at risk of committing suicide because of the trauma resulting from the torture he was subjected to by the authorities of his country of origin, it is clear that those authorities, notwithstanding their obligation under Article 14 [CAT], are not prepared to provide for his rehabilitation. There will also be such a risk if it is apparent that the authorities of that country have adopted a discriminatory policy as regards access to health care, thus making it more difficult for certain ethnic groups or certain groups of individuals, of which MP forms part, to obtain access to appropriate care for the physical and mental after-effects of the torture perpetrated by those authorities<sup>600</sup>.

Reiterating the requirement noted in *M'Bodj*, that in order to establish eligibility for subsidiary protection it was necessary to show that the lack of care was attributable to intentional acts or omissions of the receiving state, the court ruled in *MP*:

Articles 2(e) and 15(b) [QD], read in the light of Article 4 of the Charter ... , must be interpreted as meaning that a third country national who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country, but whose physical and psychological health could, if so returned, seriously deteriorate, leading to a serious risk of him committing suicide on account of trauma resulting from the torture he was subjected to, is eligible for subsidiary protection if there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture, that being a matter for the national court to determine<sup>601</sup>.

This essentially means, on the one hand, that if the requirement of an ‘intentional act’ is fulfilled in a particular case then, in determining qualification for subsidiary protection, the determining authority and/or court or tribunal of the Member State concerned must assess ‘the impact of removal on the person concerned ... by comparing his or her state of health prior to removal and how it would evolve after transfer to the receiving State’<sup>602</sup>. On the other hand, if the requirement of an ‘intentional act’ is not fulfilled, then the applicant cannot qualify for international protection under the QD (recast), and the standards as set out in *Paposhvili* are relevant only to determining whether or not return would violate protection from *non-refoulement* under Article 19(2) of the EU Charter and Article 3 ECHR<sup>603</sup>.

The reasoning in *MP* does not exclude the possibility that, at least in certain circumstances, applicants who on return could face a serious deterioration in their health could qualify for refugee status, if there was a lack of care attributable to the state authorities and the deprivation of care was carried out for one or more of the reasons set out in Article 10 QD (recast).

<sup>600</sup> CJEU (GC), 2018, *MP*, op. cit. (fn. 39 above), para. 57.

<sup>601</sup> Ibid., concluding paragraph of the judgment.

<sup>602</sup> ECtHR (GC), 2016, *Paposhvili v Belgium*, op. cit. (fn. 596 above), para. 188.

<sup>603</sup> Article 19(2) EU Charter: ‘No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’ See also Article 21 QD (recast).

## 6.8.5. Disability and mental disorder

Within the CEAS legislation, ‘disabled people’ and ‘persons with mental disorders’ are particular categories of vulnerable persons. As noted in Sections 2.1, 3.1 and 3.2, Article 21 RCD (recast) and Article 20(3) QD (recast) explicitly recognise persons with disabilities and mental disorders as vulnerable. In addition, recital 29 APD (recast) recognises that certain applicants may be in need of special procedural guarantees owing to, *inter alia*, their disability and/or mental disorder.

The requirement in Article 4(3)(c) QD (recast) to carry out the assessment of an application for international protection on an individual basis taking into account the applicant’s ‘individual position and personal circumstances’ must clearly include factors such as disability and a mental disorder. In each case, decision-makers must determine in the light of all the specific individual circumstances whether or not the threshold of persecution or serious harm is reached<sup>604</sup>.

The relative nature of the assessment of whether or not acts are a severe violation of basic human rights under Article 9(1) QD (recast) or amount to serious harm under Article 15 of the same directive is particularly important in the case of applicants who have a disability and/or a mental disorder. In relation to Article 15(b), which corresponds in essence to Article 3 ECHR, the ECtHR has recognised that persons with mental health problems may be more vulnerable if detained, for example<sup>605</sup>.

Furthermore, an applicant’s disability or mental disorder, either on its own or in combination with other characteristics, may lead to them being targeted for persecution or serious harm on account of, for example, social prejudices, stigmatisation or beliefs held about particular types of disability such as dwarfism and Down syndrome, or conditions with associated disabilities, such as albinism<sup>606</sup>. Even though Article 9(2) QD (recast) does not identify disability-specific forms of persecution, the list it provides is expressly non-exhaustive. There may be some forms of harm that are characteristic of persons with disabilities and mental disorders. For example, persons with disabilities (both intellectual and physical) may often be targeted for sexual exploitation. They may be more likely to experience involuntary detention and incarceration. They may also have a heightened exposure to torture or inhuman and degrading treatment in institutions and in the private sphere<sup>607</sup>.

Since 2011, the CRPD has formed an integral part of EU law<sup>608</sup>. Article 2 of the CRPD defines the principle of ‘reasonable accommodation’ as requiring States Parties to undertake:

<sup>604</sup> See M. Crock, C. Ernest and R. McCallum, ‘Where disability and displacement intersect: Asylum seekers and refugees with disabilities’, *International Journal of Refugee Law*, Vol. 24, No 4, 2013, pp. 735–764, at 742–743.

<sup>605</sup> See for example ECtHR, judgment of 20 October 2005, *Romanov v Russia*, no 63993/00; ECtHR, judgment of 6 September 2007, *Kucheruk v Ukraine*, no 2570/04. See, *mutatis mutandis*, ECtHR, judgment of 3 April 2011, *Keenan v United Kingdom*, no 27229/95, paras 111, 114.

<sup>606</sup> See for example Council for Aliens Law Litigation (RVV/CCE, Belgium), judgment 12 May 2015, 145 367, concerning a mother and daughter of Somali origin and Tanzanian nationality who were recognised as refugees on the grounds of membership of an albino family; Upper Tribunal (IAC, UK), 2016, JA (*child – risk of persecution*) *Nigeria*, op. cit. (fn. 510 above), in which the 7-year-old albino applicant’s young age was also taken into account; CNDA (France), judgment of 13 February 2017, *M.E.*, no 16017097 C, concerning an albino man from Nigeria; and Administrative Court Bayreuth (Verwaltungsgericht Bayreuth, Germany), judgment of 7 May 2019, B 4 K 17.33417, concerning an albino man from Côte d’Ivoire.

<sup>607</sup> For more on this, see Crock et al., op. cit. (fn. 604 above), p. 747.

<sup>608</sup> Council Decision concerning the conclusion by the European Community of the CRPD, 2009, op. cit. (fn. 18 above), Articles 1(1) and 2(1). The CJEU has highlighted that, when secondary EU law is open to more than one interpretation, the primacy of international agreements concluded by the EU over provisions of secondary EU legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements, particularly when the EU measure is intended specifically to give effect to such an international agreement. See CJEU, judgment of 14 July 1998, *Bettati v Safety Hi-Tech Srl*, C-341/95, [1998] ECR 1-4355, para. 20; CJEU, judgment of 7 December 2006, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, ECR 1-11519, para. 35; CJEU, judgment of 3 September 2008, *Kadi and Al Barakaat v Council and Commission*, joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, para. 307. For the relevant interplay between EU law and CRPD, see CJEU, 2013, *HK Danmark*, op. cit. (fn. 26 above), para. 29; CJEU, judgment of 18 March 2014, *Z v A Government department and the Board of management of a community school*, C-363/12, EU:C:2014:159, paras 68–74, 87–90.

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Article 11 CRPD requires States Parties to take all necessary measures, in accordance with their international law obligations, ‘to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters’. Among other relevant provisions, Article 16(2) requires States Parties to:

take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse.

Under Article 9(1)(b) QD (recast), acts of persecution can result from ‘an accumulation of various measures, including violations of human rights which is [sic] sufficiently severe as to affect an individual in a similar manner mentioned in point (a)’. It is therefore to be noted that persons with disabilities may face discrimination. Indeed, according to Article 2 CRPD, the denial of reasonable accommodation is by definition a form of discrimination<sup>609</sup>. In addition, Article 21(1) EU Charter prohibits any discrimination based on, inter alia, disability<sup>610</sup>. Article 14 ECHR prohibits discrimination in enjoyment of the rights and freedoms set forth in the Convention ‘on any ground’. According to the UNHCR handbook, discrimination can amount to persecution if ‘measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities’<sup>611</sup>. In this respect, relevant measures could also be those that affect access to the labour market, healthcare and accommodation.

The reason for persecution of membership of a ‘particular social group’ as defined in Article 10(1)(d) QD (recast) is of particular importance in the context of persons with disabilities. Persons with disabilities may often be able to show that they are members of a group sharing ‘an innate characteristic, or a common background that cannot be changed’ and that their group ‘has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society’ (the two requirements of Article 10(1)(d)).

As regards the link between disability, as a category of vulnerability, and international protection, it is nevertheless clear from the case-law of the CJEU that the proscribed conduct must at least predominantly stem from intentional acts or omissions by those concerned<sup>612</sup>. If there is intentional deprivation<sup>613</sup> and that intention is based on the applicant’s disability

<sup>609</sup> Article 2 CRPD: “Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation’.

<sup>610</sup> Article 21(1) EU Charter: ‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited’ (emphasis added).

<sup>611</sup> UNHCR, *Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 Convention and the 1967 Protocol relating to the status of refugees*, 1979, reissued February 2019, HCR/1P/4/ENG/REV. 4, para. 54.

<sup>612</sup> See Section 6.8.4 on vulnerable applicants with a health condition.

<sup>613</sup> CJEU (GC), 2018, *MP*, op. cit. (fn. 39 above), para. 51.

in the sense of membership of a particular social group, then their claim should be examined from the point of view of qualification for refugee status.

The ECtHR judgment in *S.H.H. v UK*<sup>614</sup> concerned an Afghan applicant who had been left seriously injured (amputated lower right leg and penis, and serious injury to his left leg and right hand) during a rocket launch in Afghanistan. The court considered that, to establish ill-treatment under Article 3 ECHR, the applicant had to meet an exceptionality threshold as applied in health cases such as *D. v United Kingdom* and *N. v United Kingdom*<sup>615</sup>. The applicant claimed, *inter alia*, that he would be particularly vulnerable to violence and at increased risk of further injury or death in the ongoing armed conflict. In addition, he would face living conditions and discrimination, if returned to Afghanistan, that would breach Article 3 of the ECHR, because there was no one available to care for him in Afghanistan.

In rejecting his application, the ECtHR relied, *inter alia*, on the absence in any of the background country reports of reference to disabled persons being at greater risk of violence, ill-treatment or attacks in Afghanistan<sup>616</sup>. The ECtHR took into account that, even though the applicant's disability could not be described as a 'naturally occurring illness', any future harm in relation to living conditions as a disabled person in Afghanistan would emanate not from deliberate ill-treatment from any party, but from a lack of resources and the fact that the applicant's disability did not require medical treatment. It also found that he had failed to submit any evidence that he could not make contact with his two sisters living with their families in Afghanistan upon his return<sup>617</sup>.

There being as yet relatively little CJEU or ECtHR case-law on risks arising in countries of origin for disabled persons, other international human rights law sources, such as the decisions of the CRPD-monitoring Committee on the Rights of Persons with Disabilities, may provide relevant and useful assistance as a persuasive authority<sup>618</sup>.

## 6.9. Vulnerability and the content of the protection granted to beneficiaries of international protection

Chapter VII QD (recast) concerns the content of international protection. According to Article 20(1) QD (recast), Chapter VII applies 'without prejudice to the rights laid down in the Geneva Convention', and Article 20(2) states that it applies 'both to refugees and persons eligible for subsidiary protection unless otherwise indicated'.

Article 20(3) QD (recast) requires Member States to take into account the specific situation of vulnerable persons when international protection is provided. This provision states:

<sup>614</sup> ECtHR, 2013, *S.H.H. v United Kingdom*, op. cit. (fn. 497 above). This decision was cited by the CJEU in CJEU (GC), 2018, *MP*, op. cit. (fn. 39 above), at para. 39.

<sup>615</sup> ECtHR, judgment of 2 May 1997, *D. v United Kingdom*, no 30240/96, paras 51–54; ECtHR (GC), judgment of 27 May 2008, *N. v United Kingdom*, no 26565/05, paras 42–45.

<sup>616</sup> ECtHR, 2013, *S.H.H. v United Kingdom*, op. cit. (fn. 497 above), paras 85–86.

<sup>617</sup> Ibid., paras 78, 83, 89, 91.

<sup>618</sup> See for example CRPD Committee, views adopted 18 August 2017, *X v Tanzania*, communication no 022/2014, CRPD/C/18/D/22/2014, para. 8.6, in which the committee concluded that the author of the complaint, a national of Tanzania, had been a victim of a form of violence that exclusively targeted persons with albinism. Among the violations found was a violation of the provision prohibiting torture or cruel, inhuman or degrading treatment or punishment, and degrading treatment or punishment (Article 15 CRPD). The committee concluded that 'the suffering experienced by the author owing to the lack of action by the State party that would allow the effective prosecution of the suspected authors of the crime, becomes a cause of revictimization, and amounts to psychological torture and/or ill-treatment'. See similarly CRPD, views adopted 31 August 2018, *Y v Tanzania*, communication no 23/2014, CRPD/C/20/D/23/2014, containing similar circumstances and reasoning.

### Article 20(3) QD (recast) General rules

When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

This provision is intended to ensure that, in all decisions relating to the content of international protection, consideration is given to vulnerable persons. However, Article 20(4) QD (recast) further regulates that that paragraph ‘shall apply only to persons found to have special needs after an individual evaluation of their situation’.

Article 20(5) QD (recast) states that ‘The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors’<sup>619</sup>.

Articles 21 to 35 of Chapter VII set out the content of international protection. The articles most relevant to vulnerable persons are briefly addressed below. It should be noted that, with regard to some rights, a beneficiary of international protection is entitled to the right under the same conditions as nationals. With regard to other rights, they may be entitled to that right under the same conditions as third country nationals legally residing in the territory of the Member State.

Recital 41 provides that, in order to enhance the effective exercise of the rights and benefits of the QD (recast) by beneficiaries of international protection, ‘it is necessary to take into account their specific needs and the particular integration challenges with which they are confronted’. However, this ‘should normally not result in a more favourable treatment than that provided to their own nationals, without prejudice to the possibility for Member States to introduce or retain more favourable standards’.

<sup>619</sup> See Section 2.4 ‘Best interests of the child’ and Section 6.8.1 ‘Age’.

## 6.9.1. Family unity

Among the more important things for many beneficiaries of international protection is that their family unity be respected. Article 23 states:

**Article 23 QD (recast)**  
**Maintaining family unity**

1. Member States shall ensure that family unity can be maintained.
2. Member States shall ensure that family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35, in accordance with national procedures and as far as is compatible with the personal legal status of the family member.
3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from international protection pursuant to Chapters III and V.
4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred to therein for reasons of national security or public order.
5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of international protection at that time.

Recital 38 QD (recast) explains that, when deciding on entitlements to benefits included in the QD (recast), Member States should take due account of ‘the particular circumstances of the dependency on the beneficiary of international protection of close relatives who are already present in the Member State and who are not family members of that beneficiary’. It adds that ‘In exceptional circumstances, where the close relative of the beneficiary of international protection is a married minor but not accompanied by his or her spouse, the best interests of the minor may be seen to lie with his or her original family.’

## 6.9.2. Minors

As already mentioned, the best interests of the child, in accordance with Article 20(5) QD (recast), ‘shall be a primary consideration for Member States when implementing the provisions [on the content of international protection] that involve minors’. Recital 38 makes it clear that, when ‘deciding on entitlements to the benefits [under the QD (recast)], Member States should take due account of the best interests of the child’.

According to Article 27(1) QD (recast), ‘Member States shall grant full access to the education system to all minors granted international protection, under the same conditions as nationals.’

Article 31 QD (recast) sets out the rights of unaccompanied minors with regard to representation ‘by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors’ (Article 31(1)); the obligation that their needs be met by

the appointed guardian or representative and regular assessments be made (Article 31(2)); where and with whom they may be accommodated (Article 31(3)); non-separation of siblings and changes of residence (Article 31(4)); tracing of family members (Article 31(5)); and the requirement that those working with them have and continue to receive appropriate training (Article 31(6)).

### 6.9.3. Accommodation

The right to accommodation is spelled out in Article 32 QD (recast). It states:

**Article 32 QD (recast)**  
**Access to accommodation**

1. Member States shall ensure that beneficiaries of international protection have access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories.
2. While allowing for national practice of dispersal of beneficiaries of international protection, Member States shall endeavour to implement policies aimed at preventing discrimination of beneficiaries of international protection and at ensuring equal opportunities regarding access to accommodation.

### 6.9.4. Social welfare and healthcare

Beneficiaries of international protection have a right to social welfare as well as healthcare. The right to social welfare is provided for in Article 29 QD (recast) and the right to healthcare in Article 30 QD (recast). Although equal treatment between beneficiaries of international protection and nationals is not a general rule, Articles 29(1) and 30(1) QD (recast) guarantee all beneficiaries of international protection entitlement to social welfare and healthcare under the same conditions as nationals.

In the case of *Ayubi*, the question arose whether this right to social welfare applied only to beneficiaries of international protection who had been granted the right of permanent residence in a Member State or it applied also to beneficiaries who have been granted a time-limited right of residence. The CJEU decided that ‘both Article 29 [QD (recast)] and Article 23 of the Geneva Convention cover all refugees and do not make the rights to which they are entitled depend on the length of their stay in the Member State concerned or the duration of the residence permit they have’<sup>620</sup>.

The court continued: ‘It follows from the foregoing that refugees who have a residence permit limited to three years must be entitled to the same level of social assistance as that provided to nationals of the Member State which granted them refugee status’<sup>621</sup>.

Recital 45 QD (recast) states that ‘Especially to avoid social hardship, it is appropriate to provide beneficiaries of international protection with adequate social welfare and means of subsistence, without discrimination in the context of social assistance.’ The possibility

<sup>620</sup> CJEU, 2018, *Ayubi*, op. cit. (fn. 61 above), para. 28.

<sup>621</sup> Ibid., para. 29.

of limiting social assistance to core benefits is to be understood, according to recital 45, as ‘covering at least minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, in so far as those benefits are granted to nationals under national law’.

There is no case-law of the CJEU on any possible minimum standards for those entitlements in general, and specifically on whether or not the Member States’ margin of appreciation allows any living condition that pays full respect to human dignity (Article 1 EU Charter) to be considered appropriate. On this, in a case concerning an applicant for international protection rather than a beneficiary of international protection, the CJEU has nevertheless ruled:

respect for human dignity within the meaning of that article requires the person concerned not finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity<sup>622</sup>.

With regard to the right to healthcare, it follows from Article 30(2) QD (recast) that this right not only applies in general terms but also applies to ‘beneficiaries of international protection who have special needs’. Article 30(2) QD (recast) states:

#### **Article 30(2) QD (recast)** **Healthcare**

Member States shall provide, under the same eligibility conditions as nationals of the Member State that has granted protection, adequate healthcare, including treatment of mental disorders when needed, to beneficiaries of international protection who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict.

### **6.9.5. Integration facilities and freedom of movement**

The specific needs of beneficiaries of international protection are also mentioned in relation to access to integration facilities. In accordance with Article 34 QD (recast):

#### **Article 34 QD (recast)** **Access to integration facilities**

... Member States shall ensure access to integration programmes which they consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status or of subsidiary protection status, or create pre-conditions which guarantee access to such programmes.

<sup>622</sup> CJEU (GC), 2019, *Haqbin*, op. cit. (fn. 186 above), para. 46, with references to CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 92.

Moreover, beneficiaries of international protection are entitled to freedom of movement within the Member State ‘under the same conditions and restrictions as those provided for other third-country nationals legally resident in their territories’ (Article 33 QD (recast)).

## 6.10. Withdrawal of international protection because of an error when establishing facts on vulnerability

Member States may decide to withdraw international protection in accordance with the provisions set out in Articles 14 and 19 QD (recast). In the case of *Bilali*, the CJEU had to deal with the question of the withdrawal of subsidiary protection because of an error on the part of the administrative authorities with respect to the established facts. Referring to, *inter alia*, the UNHCR handbook<sup>623</sup>, the CJEU decided: ‘The situation of an individual who has obtained subsidiary protection status on the basis of incorrect information without ever having met the conditions for obtaining that status has no connection with the rationale of international protection’<sup>624</sup>. The court continued:

in the light of the general scheme and purpose of [QD (recast)], ... where the host Member State has new information which establishes that, contrary to its initial assessment of the situation of a third-country national or of a stateless person to whom it granted subsidiary protection, based on incorrect information, that person never faced a risk of serious harm, within the meaning of Article 15 of that directive, that Member State must conclude from this that the circumstances underlying the granting of subsidiary protection status have changed in such a way that retention of that status is no longer justified<sup>625</sup>.

Such an error concerning the facts may also occur in cases of identification of vulnerability. If erroneously established facts on vulnerability have actually led to the grant of refugee status or subsidiary protection status, then the protection granted has to be withdrawn. The CJEU adds, however, that in such a case the ‘Member State is obliged to observe ... the fundamental right of the person concerned to respect for private and family life, which is guaranteed, within their respective scope of application, by Article 7 of the [EU Charter] and by Article 8 of the ECHR’<sup>626</sup>.

When an applicant claims that it was their vulnerability that led to the erroneously established facts of the case, for example regarding their identity, these circumstances need to be substantiated by the applicant. In this context, the French CNDA ruled in a case involving two applicants from Chechnya (Russia) who had obtained refugee status on the basis of fraudulent declarations. The applicants had claimed the fraudulent declarations were made on account of their situation of vulnerability, as they needed to protect themselves from rumours circulating within the Chechen community in France that might have revealed their presence to the Russian authorities. The court determined, however, that they had not provided any tangible evidence establishing the alleged situation of vulnerability<sup>627</sup>.

<sup>623</sup> CJEU, 2019, *Bilali*, op. cit. (fn. 115 above), para. 58, referring to UNHCR, *Handbook on procedures and criteria for determining refugee status and guidelines on international protection*, op. cit. (fn. 611 above), para. 117.

<sup>624</sup> CJEU, 2019, *Bilali*, op. cit. (fn. 115 above), para. 44.

<sup>625</sup> Ibid., para. 51.

<sup>626</sup> Ibid., para. 62.

<sup>627</sup> CNDA (France), judgment of 28 June 2019, *OPRRA c M. T. alias S. et Mme K.T.*, nos 18024910–18024911 C.

# Part 7. Special procedural guarantees in administrative procedures

This part examines the special procedural guarantees that apply to vulnerable applicants for international protection in administrative asylum procedures. These include the provision of adequate support and the context in which vulnerability may lead to exemption from accelerated and border procedures and/or require prioritisation of the assessment of the application. It also sets out other special procedural guarantees relevant to vulnerable applicants. Finally, it considers how vulnerability may affect an application that might otherwise be considered inadmissible or may require the consideration of a subsequent application. Part 8 addresses the question of special procedural guarantees in proceedings before courts and tribunals.

The part contains six sections as set out in Table 20.

**Table 20: Structure of Part 7**

Section	Title	Page
7.1	Introduction	173
7.2	Adequate support	175
7.3	Exemption from accelerated and border procedures	176
7.4	Prioritisation	179
7.5	Other special procedural guarantees	179
7.6	Inadmissibility	191

## Other relevant EASO publications

- EASO, *Asylum procedures and the principle of non-refoulement – Judicial Analysis*, 2018, Part 4 ‘APD (recast): Basic principles, safeguards and procedural guarantees’ and Part 5 ‘Procedures at the administrative level’.

## 7.1. Introduction

When an applicant has been identified as a vulnerable person, certain special procedural guarantees may apply during the relevant administrative procedures<sup>628</sup>.

For courts and tribunals, it can be important to verify whether the decision-making authority has taken the necessary steps to ensure that an applicant has been given the appropriate tools and assistance, to enable them to have effective access to the procedures.

<sup>628</sup> For more on how to identify an applicant as vulnerable, see Part 3 on identification of applicants with special reception needs and/or in need of special procedural guarantees. The online EASO Tool for Identification of Persons with Special Needs contains practical information and guidance for first-instance decision-makers. It may also be used as a guide for court and tribunal members when examining whether the applicant has been given effective access to procedures or not.

The ‘right to good administration’ applies in Member States as a general principle of EU law and is not based on Article 41 EU Charter, as the CJEU has explained in the case of *Boudjida*<sup>629</sup>. It should be noted that the right to be heard in all proceedings cannot therefore be derived from Article 41(2) of the EU Charter, but such a right is ‘inherent in respect for the rights of the defence, which is a general principle of EU law’<sup>630</sup>. The APD (recast) reflects some aspects of this right. For example, Article 10(3) requires determining authorities to ensure that decisions on applications for international protection are taken after ‘an appropriate examination’. Article 23(1) guarantees the applicant’s legal representative(s) ‘access to the information in the applicant’s file’. The right to good administration is reflected in Article 31(2) APD (recast), which requires ‘the examination procedure [to be] concluded as soon as possible, without prejudice to an adequate and complete examination’<sup>631</sup>.

It should also be noted, in this context, that reasonable grounds may arise indicating that the applicant’s life and/or physical and mental integrity are at risk. This could be the case if for example an applicant is suspected of being subject to ongoing gender-based violence or of being a victim of trafficking in human beings. In such circumstances, Member States’ obligations to respond and ensure protection and assistance derive from fundamental rights, EU secondary law and international human rights law<sup>632</sup>. Examples of relevant instruments include the EU victims of crime directive<sup>633</sup>; the EU anti-trafficking directive<sup>634</sup>; Council of Europe conventions, such as the Anti-Trafficking Convention<sup>635</sup> and the Istanbul Convention<sup>636</sup>; and well-established case-law<sup>637</sup>. These instruments set out States Parties’ obligations to protect victims of violence and/or trafficking<sup>638</sup>.

If there are suspicions that an applicant may be at risk of violence, the competent authorities are required to enable referrals to specialist support services. This could involve interrupting and/or adjourning an interview to ensure privacy, confidentiality and/or safety. It could also involve protection as set out, for instance, in the EU victims of crime directive (recital 38).

<sup>629</sup> CJEU, judgment of 11 December 2014, *Khaled Boudjida v Préfet des Pyrénées-Atlantiques*, C-249/13, EU:C:2014:2431, paras 33–34.

<sup>630</sup> CJEU, judgment of 5 November 2014, *Sophie Mukarubega v Préfet de police et Préfet de la Seine-Saint-Denis*, C-166/13, EU:C:2014:2336, para. 45.

<sup>631</sup> Article 31(2) APD (recast) requires that the international protection procedure be concluded as soon as possible; Article 31(3)–(6) provides for time limits for the procedure. See CJEU (GC), 2011, *N.S. and Others*, op. cit. (fn. 17 above), para. 98. See also Advocate General Bot, opinion of 13 June 2018, *X v Staatssecretaris van Veiligheid en Justitie*, C-213/17, EU:C:2018:434, para. 156.

<sup>632</sup> See Council of Europe, *Council of Europe Convention on Action against Trafficking in Human Beings* (Anti-Trafficking Convention), ETS 197 (16 May 2005, entry into force 1 February 2008), Article 10; and Council of Europe, *Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings*, 6 May 2005, para. 128. Member States must ensure that competent authorities involved in identifying and helping suspected victims of trafficking in human beings are provided with trained personnel.

<sup>633</sup> EU victims of crime directive, op. cit. (fn. 230 above). The European Parliament’s report on the implementation of the victims of crime directive emphasises the importance of Member States taking appropriate action to facilitate cooperation between their competent authorities or entities providing specialist support to ensure that victims have effective access to such information and services. See European Parliament, *Report on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime* (2016/2328(INI)), 14 May 2018, para. 12.

<sup>634</sup> EU anti-trafficking directive, op. cit. (fn. 120 above).

<sup>635</sup> See for example Council of Europe *Anti-Trafficking Convention*, Article 10, which explicitly refers to immigration services as ‘competent authorities’ involved in identifying and helping victims and to the requirement to ensure collaboration with other competent authorities, such as police, as well as with relevant support organisations. See also Council of Europe, *Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings*, op. cit. (fn. 632 above), para. 194: ‘By “competent authorities” is meant the wide range of public authorities with which victims may have their first contact with officialdom, such as the police, the prosecutor’s office, the labour inspectorate, or the customs or immigration services. It does not have to be these services which supply the relevant information to victims. However, as soon as a victim is in touch with such services, he or she needs to be directed to persons, services or organisations able to supply the necessary information.’

<sup>636</sup> Council of Europe, *Convention on preventing and combating violence against women and domestic violence*, November 2014.

<sup>637</sup> See for example ECtHR, judgment of 7 January 2010, *Rantsev v Cyprus and Russia*, no 25965/04, finding violations of Articles 2, 3 and 4 ECHR due to the deficient response to a suspected victim of trafficking, who was found dead after she had approached the police, who had responded by contacting the suspected perpetrator to come and pick her up, without having conducted a proper interview or providing other protection measures.

<sup>638</sup> See also Table 15.

## 7.2. Adequate support

According to recital 29 and Article 24(3) APD (recast), ‘adequate support’ must be provided to applicants ‘in need of special procedural guarantees’. Recital 29 states:

### **Recital 29 APD (recast)**

applicants [in need of special procedural guarantees] should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.

Article 24(3), first subparagraph, APD (recast) reads:

### **Article 24(3), first subparagraph, APD (recast)** **Applicants in need of special procedural guarantees**

Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.

The content of ‘adequate support’ is not further defined, but it is elaborated to a certain extent in terms of the guarantees that are set out in the directive. The features associated with ‘adequate support’ are addressed in more detail in Section 7.5. The support required depends on the personal circumstances of the applicant and the nature of their procedural needs.

In order for an applicant to be provided with ‘adequate support’, Member States may extend the time limit within which the examination of the application for international protection must be concluded, pursuant to Article 31(3), third and fourth subparagraphs, APD (recast). Article 31(3) requires Member States to ensure that the examination procedure is concluded within ‘six months of the lodging of the application’. In accordance with Article 31(3), third subparagraph, Member States may extend the time limit of six months for a period not exceeding a further nine months where, *inter alia*, ‘complex issues of fact and/or law are involved’, while Article 31(3), fourth subparagraph, provides: ‘By way of exception, Member States may, in duly justified circumstances, exceed the time limits laid down in this paragraph by a maximum of three months where necessary in order to ensure an adequate and complete examination of the application for international protection.’ These extensions may be appropriate for applicants in need of special procedural guarantees, in order to ensure an ‘adequate and complete examination’ in accordance with Article 31(2) APD (recast).

One example of a vulnerable person in need of adequate support and sufficient time is someone who is traumatised or claims to have experienced torture. They may need time to produce the medical evidence that could show their vulnerability and/or exposure to torture. Another example would be a woman who is pregnant and close to the estimated date of delivery, has recently given birth or is experiencing medical difficulties during pregnancy or

post-partum. In such circumstances, the personal interview should be postponed. A person who has been tortured or is traumatised may need several interviews before they are able to give a full account of their experiences. This may sometimes become apparent only after the personal interview. Another example could be a person with a cognitive disability, who might need more time to file an application, or to access and process information, to be able to exercise their rights<sup>639</sup>. A person who is illiterate could also face challenges that must be taken into consideration by the authorities. For example, the CAT Committee considered a case of an illiterate applicant whose application for asylum had been rejected on the grounds that his statements were inconsistent. The Committee noted the complainant's claim that 'his statement's inconsistency was originated by inadequate language interpretation, and that he was unable to check it since he is illiterate'<sup>640</sup>.

The concept of 'adequate support' applies throughout the procedure. It must be provided if any need becomes apparent at a later stage of the procedure, without necessarily restarting the procedure. Article 24(4) reads:

**Article 24(4) APD (recast)**  
**Applicants in need of special procedural guarantees**

Member States shall ensure that the need for special procedural guarantees is also addressed, in accordance with this Directive, where such a need becomes apparent at a later stage of the procedure, without necessarily restarting the procedure.

This means that the determining authority must re-evaluate the question of whether or not an applicant is or has become an applicant in need of special procedural guarantees, even if this was not initially apparent. For example, an applicant may only demonstrate or disclose that he or she has been traumatised by past events during the course of the personal interview. He or she may require time to provide medical evidence to determine the nature and extent of mental health difficulties, and procedural adjustments may need to be made in the light of any such difficulties<sup>641</sup>.

### 7.3. Exemption from accelerated and border procedures

Recital 30 APD (recast) states: 'Where adequate support cannot be provided to an applicant in need of special procedural guarantees in the framework of accelerated or border procedures, such an applicant should be exempted from those procedures.' According to Article 24(3):

<sup>639</sup> Court of Appeal of England and Wales (UK), judgment of 27 July 2017, *AM (Afghanistan) v Secretary of State for the Home Department and Lord Chancellor*, [2017] EWCA Civ 1123, para. 23.

<sup>640</sup> CAT Committee, decision of 23 November 2012, communication no 464/2011, *K.H. v Denmark*, CAT/C/49/D/464/2011, para. 8.6 (see also paras 2.4, 5.4 and 8.8); Council for Aliens Law Litigation (RVV/CCE, Belgium), judgment of 21 April 2015, case 143 740, para. 4.6.

<sup>641</sup> See also Section 7.5.3.

**Article 24(3), second subparagraph, APD (recast)**  
**Applicants in need of special procedural guarantees**

Where adequate support cannot be provided within the framework of the procedures referred to in Article 31(8) and Article 43 [concerning accelerated, border or transit procedures], in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, Member States shall not apply, or shall cease to apply, Article 31(8) and Article 43. Where Member States apply Article 46(6) to applicants to whom Article 31(8) and Article 43 cannot be applied pursuant to this subparagraph, Member States shall provide at least the guarantees provided for in Article 46(7).

In addition, for unaccompanied minors, Article 25(6) APD (recast) restricts the circumstances under which accelerated and/or border procedures under Article 31(8) may apply.

**Article 25(6) APD (recast)**  
**Guarantees for unaccompanied minors**

The best interests of the child shall be a primary consideration for Member States when implementing this Directive.

Where Member States, in the course of the asylum procedure, identify a person as an unaccompanied minor, they may:

(a) apply or continue to apply Article 31(8) only if:

- (i) the applicant comes from a country which satisfies the criteria to be considered a safe country of origin within the meaning of this Directive; or
- (ii) the applicant has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5); or
- (iii) the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law;

(b) apply or continue to apply Article 43, in accordance with Articles 8 to 11 of Directive 2013/33/EU, only if:

- (i) the applicant comes from a country which satisfies the criteria to be considered a safe country of origin within the meaning of this Directive; or
- (ii) the applicant has introduced a subsequent application; or

- (iii) the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law; or
- (iv) there are reasonable grounds to consider that a country which is not a Member State is a safe third country for the applicant, pursuant to Article 38; or
- (v) the applicant has misled the authorities by presenting false documents; or
- (vi) in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality.

Member States may apply points (v) and (vi) only in individual cases where there are serious grounds for considering that the applicant is attempting to conceal relevant elements which would likely lead to a negative decision and provided that the applicant has been given full opportunity, taking into account the special procedural needs of unaccompanied minors, to show good cause for the actions referred to in points (v) and (vi), including by consulting with his or her representative;

There is no specific CJEU guidance on the issue of the exemption of vulnerable applicants from accelerated and/or border procedures.

The Piraeus Administrative Court of Appeal in Greece provides one example of when a Member State's court has applied these provisions. The court overturned an Appeals Committee decision, which had recognised the vulnerable status of an applicant, but had failed to correctly assess the procedural requirements necessitated by his vulnerability, which should have resulted in his exemption from the border procedure<sup>642</sup>.

In Belgium, if the asylum authorities decide that an applicant has special procedural needs, in particular in cases of torture, rape or other serious forms of psychological, physical or sexual violence, which are not compatible with accelerated or border procedures, they do not apply that procedure or they no longer apply it<sup>643</sup>. Similarly, in Croatia, legislation precludes the application of accelerated or border procedures to 'applicants who are in need of special procedural guarantees, especially victims of torture, rape or another form of serious psychological, physical or sexual violence, if it is not possible to provide the appropriate support'<sup>644</sup>. In France, if the asylum authorities consider that an applicant has been the victim of serious violence or is a minor and requires special procedural guarantees that are not compatible with the accelerated procedure, they can consider the application under the regular procedure<sup>645</sup>. The Netherlands specifically does not apply its border procedure to certain vulnerable groups<sup>646</sup>.

<sup>642</sup> Piraeus Administrative Court of Appeal, judgment of 10 May 2018, DEPPIR 231/2018 (English summary).

<sup>643</sup> Belgium, Law of 15 December 1980 regarding the entry, residence, settlement and removal of aliens (version of 28 August 2020), Article 48/9(5).

<sup>644</sup> Croatia, Act on International and Temporary Protection (as amended to 1 January 2018), Article 15(3).

<sup>645</sup> France, CESEDA, op. cit. (fn. 121 above), Article L.723-3.

<sup>646</sup> See Netherlands, Aliens Decree, Articles 3.108, 3.109b(7) and 5.1a(3); Aliens Circular, para. A1/7.3.

## 7.4. Prioritisation

The prioritisation of the examination of applications is addressed in Article 31(7) APD (recast):

**Article 31(7) APD (recast)**  
**Examination procedure**

Member States may prioritise an examination of an application for international protection in accordance with the basic principles and guarantees of Chapter II in particular:

- (a) where the application is likely to be well-founded;
- (b) where the applicant is vulnerable, within the meaning of Article 22 [RCD (recast)], or is in need of special procedural guarantees, in particular unaccompanied minors.

Thus, under Article 31(7)(b) APD (recast), Member States may prioritise the examination of the applications of vulnerable applicants within the meaning of Article 22 RCD (recast), read in conjunction with Article 21 RCD (recast)<sup>647</sup>. Member States may also prioritise the examination of applications of applicants in need of special procedural guarantees under the APD (recast). Pursuant to Article 25(6) APD (recast), the best interests of the child must be a primary consideration for Member States when considering the prioritisation of an application of an unaccompanied minor<sup>648</sup>.

## 7.5. Other special procedural guarantees

As noted in Section 7.2, Article 24(3) APD (recast) requires applicants in need of special procedural guarantees to be provided with ‘adequate support’. This notion contains different aspects, as set out in the following sections.

### 7.5.1. Advice from experts

In order to ensure that ‘decisions by the determining authority on applications for international protection are taken after an appropriate examination’, Article 10(3) APD (recast) sets out various requirements detailed in subparagraphs (a) to (d), the latter of which is quoted below. Member States must ensure that:

<sup>647</sup> See Section 3.1 for further information.

<sup>648</sup> See Section 7.5.6 for further information.

**Article 10(3)(d) APD (recast)**  
**Requirements for the examination of applications**

(d) the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues.

Applicants may always submit expert evidence and country of origin material in support of their application, but this provision highlights that determining authorities may also seek expert advice<sup>649</sup>. Examples of situations where expert advice could be sought include medical advice to investigate and document claims of torture or other serious harm to physical or mental health.

Some Member States have introduced legislation that requires the determining authority to obtain evidence. In Germany, for instance, the Asylum Act obliges the determining authority to ‘clarify the facts of the case and compile the necessary evidence’<sup>650</sup>. This includes the use of medical expert evidence in cases where the applicants are not capable of producing sufficient evidence themselves.

### 7.5.2. Information

Article 12 APD (recast) concerns guarantees for applicants. In accordance with Article 12(1), all applicants are entitled to:

be informed in a language which they understand or are reasonably supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities ... ;

... receive the services of an interpreter for submitting their case to the competent authorities whenever necessary ... ;

... communicate with UNHCR or with any other organisation providing legal advice or other counselling to applicants ... ;

[...]

... be given notice in reasonable time of the decision by the determining authority on their application ... ;

... be informed of the result of the decision by the determining authority in a language that they understand or are reasonably supposed to understand when they are not assisted or represented by a legal adviser or other counsellor.

<sup>649</sup> For further information on standards for assessing expert evidence, see EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018, Section 4.7.1.

<sup>650</sup> Germany, *Asylum Act* (2008, as amended to March 2016), Section 24(1).

The manner in which information is provided to vulnerable applicants and the required time frame to comply with requests for information may need to be adjusted. For example, in the case of a vulnerable applicant with cognitive disabilities, it may be necessary to explain the information in another way, or an applicant with a hearing disability may need an interpreter with knowledge of sign language.

### 7.5.3. The personal interview

There are several provisions in the APD (recast) dealing with the personal interview, which are of special importance for vulnerable persons requiring ‘adequate support’<sup>651</sup>.

Article 4(3) APD (recast) requires Member States to ‘ensure that the personnel of the determining authority ... are properly trained’ and that those interviewing applicants under the APD (recast) ‘have acquired general knowledge of problems which could adversely affect the applicants’ ability to be interviewed, such as indications that the applicant may have been tortured in the past’.

Article 14(1) APD (recast) states that ‘Before a decision is taken by the determining authority, the applicant shall be given the opportunity of a personal interview’. According to Article 14(2), however:

**Article 14(2) APD (recast)**  
**Personal interview**

The personal interview on the substance of the application may be omitted where:

[...]

(a) the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control. When in doubt, the determining authority shall consult a medical professional to establish whether the condition that makes the applicant unfit or unable to be interviewed is of a temporary or enduring nature.

If an applicant in need of special procedural guarantees is considered unfit or unable to be interviewed, reasonable adjustments should be made to enable the submission of further information by alternative means. In addition, if an applicant has failed to appear at the personal interview, the personal circumstances of a vulnerable applicant should be taken into account when determining if there are ‘good reasons for the failure to appear’, as referred to in Article 14(5) APD (recast).

Article 15 APD (recast) concerns the requirements for a personal interview. These apply to all applicants. Applicants in need of special procedural guarantees may need additional support. Member States must take appropriate steps in order to create the conditions that allow them to present the grounds for their applications in a comprehensive manner in the personal interview.

<sup>651</sup> Specific questions regarding the personal interview of minors are dealt with in Section 7.5.7.

**Article 15 APD (recast)**  
**Requirements for a personal interview**

1. A personal interview shall normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have other family members present.
2. A personal interview shall take place under conditions which ensure appropriate confidentiality.
3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:
  - (a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability;
  - (b) wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests, unless the determining authority has reason to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;
  - (c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests, unless the determining authority has reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;
  - (d) ensure that the person who conducts the interview on the substance of an application for international protection does not wear a military or law enforcement uniform;
  - (e) ensure that interviews with minors are conducted in a child-appropriate manner.
4. Member States may provide for rules concerning the presence of third parties at a personal interview.

Two recitals of the APD (recast) are also relevant:

#### **Recital 16 APD (recast)**

It is essential that decisions on all applications for international protection be taken on the basis of the facts and, in the first instance, by authorities whose personnel has the appropriate knowledge or has received the necessary training in the field of international protection.

#### **Recital 32 APD (recast)**

With a view to ensuring substantive equality between female and male applicants, examination procedures should be gender-sensitive. In particular, personal interviews should be organised in a way which makes it possible for both female and male applicants to speak about their past experiences in cases involving gender-based persecution. ...

Examples of how ‘adequate support’ needs to be provided to vulnerable applicants during the personal interview and their link to relevant provisions of the APD (recast) are listed below.

- A woman who claims she has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence should not have her child in the room while interviewed, unless perhaps a baby, since she would otherwise not be able to speak freely about what she has been experiencing (Article 15(1)).
- With regard to pregnancy, other family members may not be aware of the pregnancy. The principle of confidentiality must therefore be observed (Article 15(2)).
- A woman who claims she has been subjected to rape or other serious forms of sexual violence should wherever possible be interviewed by a woman and have a female interpreter, if she requests it (Article 15(3)(b) and (c)).
- A girl who claims to be at risk of FGM should, wherever possible, be interviewed, without the presence of her parents, by a woman and have a female interpreter, if she so requests (Article 15(1) and (3)(b) and (c)).
- A person with a hearing deficiency or a speech impediment should have access to an interpreter who can meet the needs of the applicant (Article 15(3)(c)).
- The personnel interviewing a traumatised person must have adequate knowledge of how trauma affects people and how traumatised persons may or may not be able to speak about their experiences or remember details of them (recital 16, Articles 4(3), 10(3)(c) and 15(3)(a)).
- A person with a hearing deficiency or a neuropsychiatric diagnosis may need more time for their personal interview (Article 15(3)).
- A person who has been tortured, traumatised or trafficked may need several interviews to be able to describe their experiences (recital 16, Articles 4(3), 10(3)(c) and 15(3)).

## 7.5.4. Considerations specific to indications of torture or other cruel, inhuman or degrading treatment or punishment

Recital 31 APD (recast) refers directly to the Istanbul Protocol<sup>652</sup>, thus clearly endorsing the importance of that manual, which follows a strongly interdisciplinary approach. The wording nevertheless leaves it to Member States to decide the methodology to be used for the identification and documentation of symptoms of torture or other serious acts of violence.

### Recital 31 APD (recast)

National measures dealing with identification and documentation of symptoms and signs of torture or other serious acts of physical or psychological violence, including acts of sexual violence, in procedures covered by this Directive may, *inter alia*, be based on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).

Under Article 18 APD (recast):

### Article 18(1), first subparagraph, APD (recast) Medical examination

... Member States shall, subject to the applicant's consent, arrange for a medical examination of the applicant concerning signs that might indicate past persecution or serious harm. Alternatively, Member States may provide that the applicant arranges for such a medical examination.

This provision concerns the assessment of international protection generally and makes no direct reference to the assessment of an applicant's need for special procedural guarantees. That said, a medical examination conducted pursuant to Article 18(1) APD (recast), or expert medical advice obtained pursuant to Article 10(3)(d) APD (recast), may provide medical expert evidence in support of an applicant's need for special procedural guarantees.

Precedent-setting ECtHR case-law<sup>653</sup> indicates that certain medical reports submitted by applicants may by themselves constitute a strong presumption of ill-treatment contrary to Article 3 ECHR and should be noted in this context. Even in cases in which a certificate had not been written by an expert specialising in the assessment of torture injuries, the ECtHR considered that, nevertheless, it 'gave a rather strong indication to the authorities that the applicant's scars and injuries may have been caused by ill-treatment or torture'<sup>654</sup>. The court held that it is for the determining authority to 'dispel any doubts that might have persisted as to the cause of such scarring'. It further held that the 'State has a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture'<sup>655</sup>.

<sup>652</sup> Istanbul Protocol, op. cit. (fn. 69 above).

<sup>653</sup> ECtHR, judgment of 19 September 2013, *R.J. c France*, no 10466/11, para. 42; and judgment of 9 June 2010, *RC v Sweden*, no 41827/07, para. 53.

<sup>654</sup> ECtHR, 2010, *RC v Sweden*, op. cit. (fn. 653 above), para. 53.

<sup>655</sup> Ibid.

The CAT Committee has found that the decision-making authorities must conduct a thorough examination of alleged torture. These decisions may be applicable, by analogy, in the context of procedural guarantees, but it should be noted that CAT decisions are not EU law.

The CAT Committee has observed that a medical examination requested by a complainant to prove the acts of torture that he or she has allegedly suffered should, in principle, be conducted, regardless of the authorities' assessment of the credibility of the allegation, so that the authorities can complete the assessment of prospective risk of torture objectively<sup>656</sup>. Similar reasoning may apply where an applicant alleges that past ill-treatment requires certain procedural safeguards.

In another decision, the CAT Committee observed:

although it is for the complainant to establish [a] *prima facie* case to request for asylum, it does not exempt the State party from making substantial efforts to determine whether there are grounds for believing that the complainant would be in danger of being subjected to torture if returned. In the circumstances, the Committee considers that the complainant provided the State party's authorities with [sufficient material supporting] his claims of having been subjected to torture, including two medical memoranda, to seek further investigation on his claims, *inter alia*, through specialized medical examination<sup>657</sup>.

In a further decision, the CAT Committee found that three medical certificates confirmed the precarious mental health of the complainant, which was connected to his past experiences. As to the medical report issued by a psychiatric service, the committee noted that it mentioned terrorism or torture as a possible cause of the post-traumatic stress disorder that the complainant was diagnosed as having. In the committee's view such elements should have caught the attention of the authorities responsible and constituted sufficient grounds for investigating the alleged risks more thoroughly<sup>658</sup>.

To summarise, the decision-making authorities should investigate indications of past persecution or serious harm of vulnerable persons, both to be able to meet the applicant's needs regarding procedural guarantees and to be able to make a proper assessment of the application. The decision-making authorities should not make a decision in a case involving alleged serious acts of violence without making the necessary investigations, for example by allowing more time for a more thorough medical examination. It is, therefore, important to be aware of, and examine, past experiences of this kind before conducting an interview, during the interview and when assessing the application on its merits.

### 7.5.5. Considerations specific to sexual orientation and gender identity

In accordance with recital 29 APD (recast), 'Certain applicants may be in need of special procedural guarantees due ... to their ... sexual orientation [and/or] gender identity'. As in other cases, where applicants base their fear of persecution or suffering serious harm on their sexual orientation and/or gender identity, Member States should ensure that the personal interview is conducted under conditions that allow the applicant to present

<sup>656</sup> CAT Committee, decision of 28 April 2017, communication no 602/2014, *SSB v Denmark*, CAT/C/60/D/602/2014, para. 8.7.

<sup>657</sup> CAT Committee, 2012, *K.H. v Denmark*, op. cit. (fn. 640 above), para. 8.8.

<sup>658</sup> CAT Committee, decision of 1 June 2012, communication no 396/2009, *Gbadjavi v Switzerland*, CAT/C/48/D/396/2009, para. 7.8.

the application ‘in a comprehensive manner’ (Article 15(3)). More specifically, they should ‘ensure that the person conducting the interview is competent to take account of ... the applicant’s ... sexual orientation, gender identity or vulnerability’ (Article 15(3)(a)). This involves, for instance, bearing in mind that sexual orientation and/or gender identity can be intimate and private matters that may be difficult to disclose.

The CJEU has made it clear in *A, B and C* that the assessment of applications for international protection on the basis solely of stereotyped notions is not permitted, since such an approach ‘does not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned’<sup>659</sup>. The court also ruled that:

while the national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum, questions concerning details of the sexual practices of that applicant are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life as affirmed in Article 7 thereof<sup>660</sup>.

In relation to ‘the production by those applicants of evidence such as films of their intimate acts’, the court noted that ‘besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature infringe human dignity, the respect of which is guaranteed by Article 1 of the Charter’<sup>661</sup>.

Subsequently, the CJEU also ruled in *F* that the preparation and use of a psychologist’s expert report based on projective personality tests to provide an indication of sexual orientation, such as the report in the proceedings, is prohibited<sup>662</sup>. The court noted that ‘the suitability of an expert’s report ... may be accepted only if it is based on sufficiently reliable methods and principles in the light of the standards recognised by the international scientific community’<sup>663</sup>.

### 7.5.6. Special procedural guarantees specific to minors and unaccompanied minors

The APD (recast) sets out special procedural guarantees that are specific to minors and unaccompanied minors, in particular in Article 25 APD (recast), which concerns guarantees for unaccompanied minors<sup>664</sup>.

Regarding medical examinations to determine the age of unaccompanied minors in accordance with Article 25(5) APD (recast), see Part 3 on identification of applicants with special reception needs and/or in need of special procedural guarantees; in particular Section 3.4.2 on age assessment. See also Section 7.4 on prioritisation of the examination

<sup>659</sup> CJEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), para. 62.

<sup>660</sup> Ibid., para. 64.

<sup>661</sup> Ibid., para. 65.

<sup>662</sup> CJEU, 2018, *F v Bevándorlási és Állampolgársági Hivatal*, op. cit. (fn. 150 above), para. 71. See Section 6.2.3 for further information.

<sup>663</sup> Ibid., para. 58. The expert report in question is described in para. 22.

<sup>664</sup> A ‘minor’ means a third-country national or a stateless person below the age of 18 years (Article 2(l) APD (recast)). An ‘unaccompanied minor’ means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for them whether by law or by the practice of the Member State concerned, and for as long as they are not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after they have entered the territory of the Member States (Article 2(l) QD (recast) and Article 2(m) APD (recast)). For the definitions of ‘minor’ and ‘unaccompanied minor’ in the RCD (recast), see Section 3.1 above.

of applications of unaccompanied minors and note the possibility of seeking expert advice on child-related matters (briefly mentioned in Section 7.5.1). Regarding appeals, see Section 8.4.2.

The best interests of the child must be a primary consideration for Member States<sup>665</sup>. According to recital 33:

#### **Recital 33 APD (recast)**

The best interests of the child should be a primary consideration of Member States when applying this Directive, in accordance with the Charter of Fundamental Rights of the European Union (the Charter) and the 1989 United Nations Convention on the Rights of the Child. In assessing the best interest of the child, Member States should in particular take due account of the minor's well-being and social development, including his or her background<sup>666</sup>.

According to Article 7(3) and (5) APD (recast):

#### **Article 7(3) and 7(5) APD (recast) Applications made on behalf of dependants or minors**

3. Member States shall ensure that a minor has the right to make an application for international protection either on his or her own behalf, if he or she has the legal capacity to act in procedures according to the law of the Member State concerned, or through his or her parents or other adult family members, or an adult responsible for him or her, whether by law or by the practice of the Member State concerned, or through a representative.

5. Member States may determine in national legislation:

- (a) the cases in which a minor can make an application on his or her own behalf;
- (b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 25(1)(a);

[...]

<sup>665</sup> For more on the best interests of the child, see Section 2.4.

<sup>666</sup> See also Article 25(6) APD (recast); and EASO, *Practical guide on the best interests of the child in asylum procedures*, 2019.

An unaccompanied minor has the right to a representative. According to Article 25(1) and (2) APD (recast)

### **Article 25(1) and (2) APD (recast) Guarantees for unaccompanied minors**

1. ... Member States shall:

(a) take measures as soon as possible to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of a representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child and shall have the necessary expertise to that end. The person acting as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives. The representative may also be the representative referred to in Directive 2013/33/EU;

(b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself or herself for the personal interview. Member States shall ensure that a representative and/or a legal adviser or other counsellor admitted or permitted as such under national law are present at that interview and have an opportunity to ask questions or make comments, within the framework set by the person who conducts the interview.

Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.

2. Member States may refrain from appointing a representative where the unaccompanied minor will in all likelihood reach the age of 18 before a decision at first instance is taken.

The APD (recast) defines a 'representative' as 'a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary' (Article 2(n)).

Pursuant to Article 14(1) APD (recast), fourth subparagraph, 'Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.' Article 12(2) CRC stipulates that:

the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

According to the recommendation of the CRC Committee in its General comment no 12: ‘After the child has decided to be heard, he or she will have to decide how to be heard: “either directly, or through a representative or appropriate body”’<sup>667</sup>. The committee recommends that, ‘wherever possible, the child must be given the opportunity to be directly heard in any proceedings’<sup>668</sup>.

By way of example, in Norway, all children over the age of 7 years old are asked if they want to have an interview, as are children under 7 years who are considered mature enough to form their own opinion. This is regardless of whether they may have information material to the case or not<sup>669</sup>. In France, the CNDA has determined that there is no need to interview an accompanied minor who has not alleged personal threats<sup>670</sup>. The court has also held that there is no need to interview accompanied minors aged 2 and 4 years old, as their parents are their legal representatives<sup>671</sup>. In another case, the CNDA remitted the case to OFPRA, as the interview with the accompanied minor took place in the absence of her mother and her legal representative<sup>672</sup>.

Interviews with minors must be ‘conducted in a child-appropriate manner’<sup>673</sup>. If an unaccompanied minor has a personal interview, it must be ‘conducted by a person who has the necessary knowledge of the special needs of minors’<sup>674</sup>.

### Article 25(3) APD (recast) Guarantees for unaccompanied minors

Member States shall ensure that:

- (a) if an unaccompanied minor has a personal interview on his or her application for international protection as referred to in Articles 14 to 17 and 34, that interview is conducted by a person who has the necessary knowledge of the special needs of minors;
- (b) an official with the necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor.

This provision only deals with unaccompanied minors, but the person who conducts an interview with an accompanied minor must also be competent to take account of the personal and general circumstances surrounding the application, including the applicant’s vulnerability<sup>675</sup>.

<sup>667</sup> CRC Committee, *General Comment no 12 (2009)*, op. cit. (fn. 196 above), para. 35.

<sup>668</sup> Ibid. See also CRC Committee, 2018, *Y.B. and N.S. v Belgium*, op. cit. (fn. 366 above), para. 8.8.

<sup>669</sup> Immigration Act (Norway), Section 81; and Immigration Regulations (Norway), Sections 17-3 to 17-5.

<sup>670</sup> CNDA (France), judgment of 22 January 2018, *M. X., Mme C. épouse X, M. X., Mme T, M. X., M. X.*, nos 17030975 – 17031078 – 17035295 – 17031240 – 17031077 – 17030908 C. See also Council of State (Conseil d’état, France), judgment of 6 November 2019, no 422017, FR:CECHR:2019:422017.20191106, finding that, when an applicant for international protection is accompanied by their minor children, their application includes that of the minor children and that under those circumstances a minor child must be interviewed individually only if the decision-making authority considers they might have been subject to persecution or serious harm about which their parents would not be aware.

<sup>671</sup> CNDA (France), judgment of 1 December 2017, *Mme M. N., Mme D., Mme M. N. et M. K. N.*, nos 17033719, 17033718, 17033841, 17033840 C.

<sup>672</sup> CNDA (France), judgment of 5 October 2016, *Mme Y.*, no 14012645 C. The applicant was a minor and the daughter of a woman who by marriage had been granted refugee status. The applicant claimed that she too should be granted refugee status based on the principle of family unity or on her own merits. OFPRA, the first instance decision-making body, held the interview with the daughter in the absence of her mother and without any other representative, which was in breach of the regulations set out in the national law (*CESEDA*, op. cit. (fn. 121 above)). The facts of the case regarding the applicant were not sufficiently investigated, so the case was remitted for reconsideration.

<sup>673</sup> Article 15(3)(e) APD (recast).

<sup>674</sup> Article 25(3)(a) APD (recast).

<sup>675</sup> Article 15(3)(a) APD (recast).

According to Article 25(4), ‘Unaccompanied minors and their representatives shall be provided, free of charge, with legal and procedural information’. This includes, at least, information on the procedure in the light of the applicant’s particular circumstances and on the procedure for the withdrawal of international protection, when the authorities reconsider their qualification as a beneficiary of international protection.

In the light of the principle of the best interests of the child, there are also provisions and procedural guarantees regarding the circumstances under which unaccompanied minors may be exempted from border and accelerated procedures<sup>676</sup>. See Section 7.3 for further information.

In accordance with Article 25(6)(c)<sup>677</sup>:

**Article 25(6) APD (recast)**  
**Guarantees for unaccompanied minors**

[...]

Where Member States, in the course of the asylum procedure, identify a person as an unaccompanied minor, they may:

[...]

(c) consider the application to be inadmissible in accordance with Article 33(2)(c) if a country which is not a Member State is considered as a safe third country for the applicant pursuant to Article 38, provided that to do so is in the minor’s best interests;

### 7.5.7. The decision

In the context of applications by family members that are considered jointly, according to Article 11(3) APD (recast):

**Article 11(3) APD (recast)**  
**Requirements for a decision by the determining authority**

... whenever the application is based on the same grounds [as those of other family members], Member States may take a single decision, covering all dependants, unless to do so would lead to the disclosure of particular circumstances of an applicant which could jeopardise his or her interests, in particular in cases involving gender, sexual orientation, gender identity and/or age-based persecution. In such cases, a separate decision shall be issued to the person concerned.

As mentioned in the introduction to Part 7, the right to good administration is a general principle of EU law. This extends to the way the determining authority determines how to

<sup>676</sup> Article 25(6) APD (recast).

<sup>677</sup> See Section 7.6 for further information on inadmissibility.

administer or promulgate the decision. The determining authority should consider if separate decisions for each member of a family, rather than a single decision covering the family as a whole, would be necessary for a vulnerable person. It should be noted that Article 11(3) APD (recast) only deals with the question of whether the procedure on the administrative level should end with a single decision or with separate decisions. It does not cover the questions of whether or not the procedure(s) as such may be separated and whether or not the decisions should be issued at the same time<sup>678</sup>.

## 7.6. Inadmissibility

According to Article 33(2) APD (recast), an application for international protection can only be considered inadmissible under certain conditions. The article states:

**Article 33(2) APD (recast)**  
**Inadmissible applications**

Member States may consider an application for international protection as inadmissible only if:

- (a) another Member State has granted international protection;
- (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;
- (c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38;
- (d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant; or
- (e) a dependant of the applicant lodges an application, after he or she has in accordance with Article 7(2) consented to have his or her case be part of an application lodged on his or her behalf, and there are no facts relating to the dependant's situation which justify a separate application.

As the CJEU has ruled, EU law is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust among Member States that those values will be recognised; that EU law implementing them will be respected; and that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter, including Articles 1 and 4 of the Charter, which enshrine

<sup>678</sup> On this issue, see CJEU, 2018, *Ahmedbekova*, op. cit. (fn. 467 above).

one of the fundamental values of the EU and its Member States<sup>679</sup>. The court goes on to state:

the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law<sup>680</sup>.

The CJEU has found in *Ibrahim and Others* that, in determining whether or not a person will be removed to circumstances that meet the high threshold of treatment in breach of Article 4 EU Charter, it is important to assess the nature and extent of their vulnerability. It determined that the fact that persons granted subsidiary protection in the Member State that granted the applicant such protection do not receive:

any subsistence allowance, or that such allowance as they receive is markedly inferior to that in other Member States, though they are not treated differently from nationals of that Member State, ... can lead to the finding that that applicant is exposed in that Member State to a real risk of suffering treatment that is in breach of Article 4 of the Charter only if the consequence is that the applicant is, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, in a situation of extreme material poverty that meets the criteria described in paragraphs 89 to 91 of the present judgment<sup>681</sup>.

A CAT Committee decision concerning a survivor of torture, who had been granted international protection in Italy and then travelled to Switzerland and faced deportation from Switzerland to Italy, is also relevant. The committee ruled that the Swiss authorities had ‘not examined in an individualized and sufficiently thorough manner the complainant’s personal experience as a victim of torture and the foreseeable consequences of his forced return to Italy’. It found that Italy had failed to deliver on assurances it had previously given or to take ‘any measures to guarantee him access to rehabilitation services that are tailored to his needs, which would allow him to exercise his right to rehabilitation as a victim of torture’. The committee therefore determined that his deportation would violate Article 3 of the Convention against Torture<sup>682</sup>.

The HRC ruled in a case concerning a particularly vulnerable mother and her two children facing deportation to Italy, where they had been granted subsidiary protection. It recalled:

States parties should give sufficient weight to the real and personal risk a person might face if deported and considers that it was incumbent upon the State party to undertake an individualized assessment of the risk that the author and her two children (both of whom were minor during the asylum proceedings) would face in Italy, rather than rely on general reports and on the assumption that, as the author had benefited from subsidiary protection in the past, she would, in principle, be entitled to the same level of subsidiary protection today. The Committee considers that the State party failed to take into due consideration the special vulnerability of the author and her children. Notwithstanding her formal entitlement to subsidiary

<sup>679</sup> See for example CJEU (GC), 2019, *Jawo*, op. cit. (fn. 40 above), para. 80, cited at fn. 416 above, and the case-law cited, as discussed in Section 5.5.3 above.

<sup>680</sup> Ibid., para. 81.

<sup>681</sup> CJEU (GC), 2019, *Ibrahim and Others*, op. cit. (fn. 437 above), para. 93.

<sup>682</sup> CAT Committee, 2018, *Adam Harun v Switzerland*, op. cit. (fn. 235 above), para. 9.11.

protection in Italy, the author, who has been severely mistreated by her spouse, faced great precarity, and was not able to provide for herself and her children, including for their medical needs, in the absence of any assistance from the Italian authorities. The State party has also failed to seek effective assurances from the Italian authorities that the author and her two children, who are in a particularly vulnerable situation analogous to that encountered by the author in *Jasin v Denmark* (which also involved the planned deportation of an unhealthy single mother with minor children, who had already experienced extreme hardship and destitution in Italy), would be received in conditions compatible with their status as asylum seekers entitled to temporary protection and the guarantees under article 7 of the Covenant<sup>683</sup>.

According to Article 34(1) APD (recast):

**Article 34(1), first subparagraph, APD (recast)**  
**Special rules on an admissibility interview**

Member States shall allow applicants to present their views with regard to the application of the grounds referred to in Article 33 [concerning inadmissible applications] in their particular circumstances before the determining authority decides on the admissibility of an application for international protection. To that end, Member States shall conduct a personal interview on the admissibility of the application.

Member States may make an exception only in accordance with Article 42 [concerning procedural rules] in the case of a subsequent application.

Thus, the question of admissibility should be thoroughly investigated after, as a rule, a personal interview. The practice of a thorough admissibility assessment is especially important for vulnerable applicants. As regards guarantees for unaccompanied minors, see Section 7.5.6 for further information.

The APD (recast) defines a subsequent application, which may be inadmissible in accordance with Article 33(2)(d) QD (recast), as follows:

**Article 2(q) APD (recast)**

‘subsequent application’ means a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1).

<sup>683</sup> HRC, views adopted 10 March 2017, *Raziye Rezaifar v Denmark*, communication no 2512/2014, CCPR/C/119/D/2512/2014, para. 8.9 (footnotes omitted). See also, for example, HRC, views adopted 28 October 2016, *R.A.A. and Z.M. v Denmark*, communication no 2608/2015, CCPR/C/118/D/2608/2015, regarding deportation to Bulgaria.

According to Article 40(3) APD (recast):

**Article 40(3) APD (recast)**  
**Subsequent application**

If the preliminary examination referred to in paragraph 2 concludes that new elements or findings have arisen or been presented by the applicant which significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of Directive 2011/95/EU, the application shall be further examined in conformity with Chapter II. ...

Vulnerable applicants may, on account of their vulnerability, present new elements or findings, or new elements or findings may have arisen, after a final decision has been taken on their previous application.

Such persons could include victims of sexual violence, or victims of human trafficking, in circumstances where the substantive basis for their claim for international protection has crystallised belatedly. For example, a victim of human trafficking may not have been able to disclose in their first application their history of being trafficked and exploited for fear of reprisal from the traffickers involved. Later, if the person is in a position to substantiate their true claim, perhaps as a result of belated benefit from the support and counselling that flow from special procedural guarantees in the asylum process, it may be that the person will need to seek to substantiate their claim in the context of a subsequent application.

By way of example, the Swiss Federal Administrative Court accepted a subsequent application in a case of a victim of trafficking, whose exploitation took place while the first procedure was pending. The judgment referred to particular attitudes and behaviour of victims of sexual exploitation (resulting for example from fear or shame), which might make it difficult for the applicant to provide detailed statements<sup>684</sup>.

Similar concerns arise for vulnerable persons such as victims of rape or sexual violence, or victims of torture, who, particularly if they were without the necessary support during the processing of their initial application, may seek to substantiate their true claim for the first time in a subsequent application. Someone who has not mentioned their sexual orientation and/or gender identity at the outset, for example because of fear or shame, could be in a similar position<sup>685</sup>.

A subsequent application from someone whose health has deteriorated substantially since the previous application could also, potentially, fulfil the requirements of Article 40(3) APD (recast). Persons with severe health problems but at no risk of personal persecution are generally not considered to need international protection. Applications from such persons are granted only in exceptional cases, according to the case-law from the CJEU<sup>686</sup> and ECtHR<sup>687</sup>. Nevertheless, an application made by such a vulnerable person should be handled in line with the relevant procedural guarantees, if there are new elements or findings.

<sup>684</sup> Federal Administrative Court (BVG, Switzerland), 2016, D-6806, op. cit. (fn. 130 above).

<sup>685</sup> CJEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), para. 69.

<sup>686</sup> CJEU (GC), 2014, *M'Bodj*, op. cit. (fn. 513 above); CJEU (GC), 2014, *Abdida*, op. cit. (fn. 513 above).

<sup>687</sup> ECtHR (GC), 2016, *Paposhvili v Belgium*, op. cit. (fn. 596 above); ECtHR (GC), 2008, *N. v United Kingdom*, op. cit. (fn. 615 above); ECtHR, 1997, *D. v United Kingdom*, op. cit. (fn. 615 above).

There are special procedural rules regarding subsequent applications in Article 42 APD (recast). In this context, it should be noted that if an unmarried minor (who could be a vulnerable person) lodged an application after an application has been lodged on their behalf, the preliminary examination of the application may not be conducted on the sole basis of written submissions without a personal interview<sup>688</sup>.

---

<sup>688</sup> Article 42(2)(b) in conjunction with Article 40(6)(b) APD (recast).

## Part 8. Special procedural guarantees in proceedings before courts and tribunals

This part focuses on the right of vulnerable applicants to an effective remedy in proceedings before courts and tribunals under the APD (recast). It identifies how the relevant principles relating to effective judicial protection can apply to vulnerable applicants, including by way of practical measures in oral hearing contexts<sup>689</sup>. Part 7 addresses the question of special procedural guarantees for vulnerable persons in administrative procedures.

The part is structured as set out in Table 21.

**Table 21: Structure of Part 8**

Section	Title	Page
<b>8.1</b>	The right to an effective legal remedy)	197
<b>8.2</b>	Full and <i>ex nunc</i> examination of facts and law	200
<b>8.3</b>	Special procedural guarantees at the appeal stage	203
<b>8.4</b>	Access to an effective legal remedy	205
<b>8.5</b>	Right to remain during appeal procedures	210

All these topics are addressed with a special focus on vulnerable applicants. The right to an effective remedy in general is described in EASO's *Asylum procedures and the principle of non-refoulement – Judicial Analysis*. This part adds relevant jurisprudence of the CJEU that postdates the publication of that judicial analysis<sup>690</sup>.

### Other relevant EASO publications

- EASO, *Asylum procedures and the principle of non-refoulement – Judicial Analysis*, 2018, for explanations of key legal principles relating to the right to an effective remedy under the APD (recast).

See also Section 4.6 of this judicial analysis for an analysis of matters relating to effective remedy and vulnerable persons in the context of the RCD (recast), and Section 5.5 for an analysis of matters relating to effective remedy and vulnerable persons in the context of Dublin proceedings.

<sup>689</sup> For further details, see Appendix D: Examples of good practice in international protection proceedings before courts or tribunals under the APD (recast).  
<sup>690</sup> See, notably, judgment of 26 July 2017, C-348/16, *Moussa Sacko v Commissione Territoriale per il riconoscimento della protezione internazionale di Milano*, EU:C:2017:591, particularly paras 44, 46, 47, 48, 49 and paras 31, 32–43, where Article 47 is explained; CJEU (GC), judgment of 25 July 2018, *Serin Alheto v Zamestnik-predsedatel na Darzhavna agentstva za bezhantsite*, C-585/16, EU:C:2018:584, particularly paras 103, 116, 107, 109–114, 116, 147; and CJEU, 2018, *Ahmedbekova*, op. cit. (fn. 467 above), particularly paras 94, 97–99, 102, 103.

## 8.1. The right to an effective legal remedy

As the CJEU has ruled:

The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, ... which is now reaffirmed by Article 47 of the [EU] Charter<sup>691</sup>.

This provision of the Charter provides:

**Article 47 EU Charter**  
**Right to an effective remedy and to a fair trial**

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

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The CJEU has also confirmed that 'The principle of effective judicial protection of the rights which individuals derive from EU law comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented'<sup>692</sup>.

Member States may limit EU procedural rights, including the right to an effective remedy and the right to be heard<sup>693</sup>. A failure to give an appellant the right to be heard is a restriction of the rights of the defence<sup>694</sup>. Any restriction in this regard must comply with Article 52(1) of the EU Charter<sup>695</sup>. This means that the interest of the party affected needs to be balanced against the interests of the state or other parties, as appropriate. The balancing exercise to ensure there is not a disproportionate infringement of a vulnerable person's rights of defence and judicial protection must be examined in relation to the specific circumstances of the vulnerable person's case.

The particular vulnerabilities and special needs of applicants will be important factors in such a balancing exercise.

Particular concerns will arise in appeals involving vulnerable applicants, e.g. when a person's cognitive disabilities or communication difficulties require a court or tribunal to take more

<sup>691</sup> CJEU, judgment of 24 June 2019, *European Commission v Poland*, C-619/18, EU:C:2019:531, para. 49.

<sup>692</sup> CJEU, 2017, *Sacko*, op. cit. (fn. 690 above), para. 32.

<sup>693</sup> Ibid., para. 38.

<sup>694</sup> Ibid., para. 37.

<sup>695</sup> Article 52(1) EU Charter provides: '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.'

time on particular aspects of the appeal/review process, or when a traumatised person or a victim of a serious form of psychological, physical or sexual violence may need time to obtain necessary support and counselling to provide effective evidence on appeal.

The APD (recast) sets out the standards applying regarding an effective remedy as follows:

### **Recital 50 APD (recast)**

It reflects a basic principle of Union law that the decisions taken on an application for international protection, the decisions concerning a refusal to reopen the examination of an application after its discontinuation, and the decisions on the withdrawal of refugee or subsidiary protection status are subject to an effective remedy before a court or tribunal.

### **Article 46(1) and 46(2) APD (recast) The right to an effective remedy**

1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;

(ii) considering an application to be inadmissible pursuant to Article 33(2);

(iii) taken at the border or in the transit zones of a Member State as described in Article 43(1);

(iv) not to conduct an examination pursuant to Article 39;

(b) a refusal to reopen the examination of an application after its discontinuation pursuant to Articles 27 and 28;

(c) a decision to withdraw international protection pursuant to Article 45.

2. Member States shall ensure that persons recognised by the determining authority as eligible for subsidiary protection have the right to an effective remedy pursuant to paragraph 1 against a decision considering an application unfounded in relation to refugee status.

[...]

The right to an effective remedy before a court or tribunal relates to any decision taken on an application for international protection. Typical decisions in this regard are those listed at Article 46(1) APD (recast). Examples of issues relating to vulnerability that can arise in these decisions are set out in Figure 1.

Type of decision	Issues that may arise as a result of vulnerability/ies
Any decision on international protection	A vulnerable applicant's claim on appeal, made on the basis of 'further representations', may be critically different from the claim ostensibly made initially, e.g. when a person with a hitherto undiagnosed mental disorder, having belatedly received effective medical and legal support, is in a position to provide sufficiently detailed new grounds of appeal or new evidence.
Decision considering an application to be unfounded	A vulnerable applicant's application may be determined to be unfounded in circumstances where the determining authority had insufficient information, e.g. when the person's personal history of human trafficking had not been voiced.
Decision considering an application to be inadmissible (Article 33(2) APD (recast))	It may be, for example, that the daughter of an applicant may have consented to her application being lodged on her behalf and included in her father's application, notwithstanding that she is a victim of sexual violence and could not, at that time, disclose this to her father or the authorities.
Decision taken at the border or in a transit zone (Article 43(1) APD (recast))	Important support relevant to certain vulnerable persons, such as counselling services for victims of rape or sexual violence, or for persons with a serious illness, psychological difficulties or mental illness, may not be available there. This creates a real risk that a decision taken in such contexts in relation to such a vulnerable person will not be taken on a sufficiently factual basis.
Refusal to reopen examination of an application after its discontinuation (Article 28 APD (recast))	An initial application may have been inadvertently abandoned or deemed withdrawn in circumstances where a vulnerable person, such as a person with a disability or mental illness, was unable to comply with certain procedural requirements, and did not have the requisite support.
Decision to withdraw international protection pursuant to Article 45 APD (recast)	Withdrawal of international protection may occur long after the initial grant of protection. This could be in circumstances where a person, e.g. a person with mental health issues, has not benefited from the ongoing health care they need, or where their condition has worsened notwithstanding the level of care provided, such that they could not engage in the procedure for withdrawal effectively.

Figure 1: Examples of how vulnerability may raise new issues at appeal

Recitals and provisions in the APD (recast) of particular relevance to ensuring that vulnerable persons are able to benefit from an effective remedy in the context of appeals before national courts and tribunals are set out in Table 22.

**Table 22: APD (recast) provisions of particular relevance to an effective remedy for vulnerable persons**

Recital/article	Relevance
<b>Recital 25</b>	Effective access to procedures, the opportunity to cooperate and properly communicate, and sufficient procedural guarantees in order to safeguard correct recognition of persons in need of international protection
<b>Recital 30</b>	Support for applicants in need of special procedural guarantees in the framework of accelerated or border procedures and where their appeal does not have automatic suspensive effect
<b>Recital 50</b>	Effective remedy as a basic principle of Union law
<b>Article 20</b>	Free legal assistance and representation in appeals procedures
<b>Article 21</b>	Conditions for the provision of legal and procedural information free of charge and free legal assistance and representation
<b>Article 22</b>	Right to legal assistance and representation at all stages of the procedure
<b>Article 24</b>	Applicants in need of special procedural guarantees
<b>Article 25</b>	Guarantees for unaccompanied minors
<b>Article 46</b>	The right to an effective remedy

## 8.2. Full and *ex nunc* examination of facts and law

On appeal, courts and tribunals must perform a full and up-to-date examination of facts and law in accordance with Article 46(3) APD (recast).

### Article 46(3) APD (recast)

... Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.

How Article 46(3) APD (recast) should be interpreted has been elaborated by the CJEU in its case-law. In the case of *Sacko* for example, the CJEU stated:

the characteristics of the remedy provided for in Article 46 [APD (recast)] must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection.<sup>696</sup>

In *Alheto*, the CJEU clarified that Article 46(3) ‘defines the scope of the right to an effective remedy which applicants for international protection must enjoy, as provided for in

<sup>696</sup> CJEU, 2017, *Sacko*, op. cit. (fn. 690 above), para. 31.

Article 46(1) of that directive, against decisions concerning their application’<sup>697</sup>. Thus, the court ruled:

Article 46(3) states that, in order to comply with Article 46(1) of that directive, Member States bound by that directive must ensure that the court or tribunal before which the decision relating to the application for international protection is contested carries out ‘a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to [the QD (recast)]’<sup>698</sup>.

Those words must, according to the CJEU, ‘be interpreted and applied in a uniform manner’ and ‘in accordance with their ordinary meaning, while also taking into account the context in which they occur and the purposes of the rules of which they form part’<sup>699</sup>.

In *Sacko*, one of the questions referred to the CJEU was if it would be contrary to Article 46(3) for a court to dismiss an appeal, on the basis that the application is manifestly unfounded, without having given the applicant an opportunity to be heard in person. The CJEU clarified that:

the obligation imposed in Article 46(3) [APD (recast)] on the court with jurisdiction to ensure that a full and *ex nunc* examination of both facts and points of law is conducted must be interpreted in the context of the procedure for the examination of applications for international protection as a whole, as governed by that directive, taking into account the close link between appeal proceedings before a court or tribunal and the proceedings at first instance preceding those proceedings, during which the applicant must be given the opportunity of a personal interview on his or her application for international protection, as required by Article 14 of the directive<sup>700</sup>.

The CJEU went on to state that:

as the report or transcript of any personal interview with an applicant must, in accordance with Article 17(2) [APD (recast)], be available in connection with the applicant’s file, the content of the report or transcript is an important factor in the assessment by the court with jurisdiction when it carries out the full and *ex nunc* examination of both facts and points of law required under Article 46(3) of the directive<sup>701</sup>.

According to the CJEU, it follows that:

whether it is necessary for the court or tribunal hearing the appeal ... to grant the applicant a hearing has to be assessed in the light of its obligation to carry out the full and *ex nunc* examination required under Article 46(3) of the directive, in the interests of effective judicial protection of the rights and interests of the applicant. It is only if that court or tribunal considers that it is in a position to carry out such an examination solely on the basis of the information in the case-file, including, where applicable, the

<sup>697</sup> CJEU (GC), 2018, *Alheto*, op. cit. (fn. 690 above), para. 105.

<sup>698</sup> *Ibid.*, para. 106.

<sup>699</sup> *Ibid.*, paras 107–108.

<sup>700</sup> CJEU, 2017, *Sacko*, op. cit. (fn. 690 above), para. 42.

<sup>701</sup> *Ibid.*, para. 43.

report or transcript of the personal interview with the applicant in the procedure at first instance, that it may decide not to hear the applicant in the appeal before it. In such circumstances, the possibility of not holding a hearing is in the interest of both the Member States and applicants, as referred to in recital 18 [APD (recast)], to have a decision made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out<sup>702</sup>.

Thus, the CJEU concluded that Article 46(3):

read in the light of Article 47 of the [EU] Charter, must be interpreted as not precluding the national court or tribunal hearing an appeal against a decision rejecting a manifestly unfounded application for international protection from dismissing the appeal without hearing the applicant where the factual circumstances leave no doubt as to whether that decision was well founded, on condition that, first, during the proceedings at first instance, the applicant was given the opportunity of a personal interview on his or her application for international protection ... , and the report or transcript of the interview, if an interview was conducted, was placed on the case-file ... , and, second, the court hearing the appeal may order that a hearing be conducted if it considers it necessary for the purpose of ensuring that there is a full and *ex nunc* examination of both facts and points of law<sup>703</sup>.

The Irish High Court has ruled that Article 46 APD (recast), read in the light of Article 47 of the Charter and Article 6 ECHR, requires that an applicant be heard in an oral hearing by the court or tribunal assessing the appeal against the negative international protection decision, if the court or tribunal decides on factual issues, including the credibility of the applicant's asylum account<sup>704</sup>. This might be crucial especially in cases of vulnerable applicants who may not be able to sufficiently present the relevant facts because of their personal circumstances.

The requirement to provide a full and *ex nunc* examination of both facts and law may be critical for a vulnerable applicant when, for reasons connected with their vulnerability, factual issues in respect of the substance of the claim crystallise on appeal. For example:

- a trafficked person may not have been able to disclose their history of trafficking, abuse and exploitation, for fear of reprisal from the agents of harm;
- victims of torture, rape or other serious forms of psychological, physical or sexual violence may have initially been without the support required to give them enough confidence in the system to be able to disclose the history of violence underpinning their true claim<sup>705</sup>;
- a victim of rape or sexual violence, who did not disclose their history of sexual violence initially, may in the context of an appeal, with the benefit of appropriate procedural measures, be in a position to disclose such facts<sup>706</sup>;
- the determining authority may not have effectively applied the measures in place in the appeal context to ensure the voice of the child is heard, but may have subsumed a minor's claim into that of a parent;

<sup>702</sup> CJEU, 2017, *Sacko*, op. cit. (fn. 690 above), para. 44.

<sup>703</sup> Ibid., para. 49.

<sup>704</sup> High Court (Ireland), judgment of 30 March 2012, *S.U.N. (South Africa) v Refugee Applications Commissioner*, [2012] IEHC 338.

<sup>705</sup> See EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*, 2018, Section 6.2, on the impact of traumatic experiences, and Section 6.3, on disclosure.

<sup>706</sup> Ibid., Sections 6.2 and 6.3.

- an applicant may be reluctant to disclose that their claim is related to their sexual orientation and/or gender identity, for example because of shame, stigma, fear in the presence of an interpreter of the same nationality or lack of trust in authorities<sup>707</sup>;
- minors may not understand or realise the importance of particular circumstances for their application;
- an applicant who has been traumatised by their experiences may not have been able to disclose their experiences owing to PTSD/depression<sup>708</sup>;
- an applicant with a physical disability may have been stigmatised.

If an applicant's vulnerability was not identified in the administrative procedure and/or necessary procedural measures or support were not both provided and fully effective, the determining authority may not have been apprised of all the material grounds and/or evidence in the case.

Late submission of new facts could be justified, e.g. if the interview questions did not concern the issue; if the applicant was not aware of the importance of certain facts for their application; if trauma, embarrassment of the applicant or other constraints (previous experience of torture, sexual violence or persecution on grounds of sexual orientation) apply; or if the gender of the interviewer or interpreter constrained the applicant's ability to present their claim<sup>709</sup>.

It should be stressed that the CJEU has made it clear that, when Member States have not correctly implemented Article 46(3) APD (recast) in their national legislation, national courts and tribunals are nevertheless obliged to adhere to it because it has direct effect<sup>710</sup>.

### 8.3. Special procedural guarantees at the appeal stage

**Article 24(4) APD (recast)**  
**Applicants in need of special procedural guarantees**

Member States shall ensure that the need for special procedural guarantees is also addressed, in accordance with this Directive, where such a need becomes apparent at a later stage of the procedure, without necessarily restarting the procedure.

Article 24 APD (recast) requires Member States to provide special procedural guarantees throughout the duration of the asylum procedure, when applicants have been identified as applicants in need of such guarantees (see Part 3 and Part 77). By virtue of Article 24(4), the special procedural guarantees set out in Part 7 will be instructive for courts or tribunals when, in any particular case, the need for special procedural guarantees becomes apparent in the context of an appeal/review<sup>711</sup>.

<sup>707</sup> See EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial analysis*, 2018, Section 6.6, on sexual orientation and gender identity, and Section 6.3, on disclosure.

<sup>708</sup> Ibid., Section 6.2, on the impact of traumatic experiences, and Section 6.3, on disclosure.

<sup>709</sup> Constitutional Court (Ustavní soud České republiky, Czechia), judgment of 12 April 2016, I.ÚS 425/16.

<sup>710</sup> CJEU (GC), judgment of 29 July 2019, *Alekszij Torubarov v Bevandoriasi es Menekültügyi Hivatal*, C-556/17, EU:C:2019:626, para. 73.

<sup>711</sup> The Court of Appeal of England and Wales has stated that 'early identification of issues of vulnerability is encouraged, if at all possible, before any substantive hearing'. See Court of Appeal of England and Wales (UK), 2017, *AM (Afghanistan) v Secretary of State for the Home Department*, op. cit. (fn. 639 above), para. 31.

The interplay between Article 24(4) and Article 46(3) APD (recast) may be critical for vulnerable applicants. Even if a procedural rule is considered reasonable and proportionate generally, applying it in a particular case may nonetheless violate the right to an effective remedy in the light of a particular applicant's personal circumstances. This matter is for the national court or tribunal to decide<sup>712</sup>. It will also be for a national court or tribunal to determine if a time limit, in a given situation, is insufficient in view of the circumstances of a vulnerable appellant<sup>713</sup>.

The CJEU recognises that the principle of effective judicial protection in Article 47 EU Charter includes the principle of equality of arms<sup>714</sup>. The principle implies 'that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'<sup>715</sup>. The CJEU states that 'the aim of equality of arms is to ensure a balance between the parties to proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings'<sup>716</sup>. It can fall to the national court or tribunal to ensure this balance in cases involving vulnerable applicants, who may be disadvantaged without the requisite special procedural guarantees and support. Thus, for example, a physically disabled appellant may be given practical assistance so that they are able to attend the hearing and are not at a physical disadvantage in the hearing room.

Certain vulnerable applicants for international protection, including those listed at Article 21 RCD (recast) and recital 29 APD (recast), may be in need of special procedural guarantees. For example:

- victims of torture may be afraid to speak freely to Member State authorities<sup>717</sup>;
- victims of human trafficking may need time to escape the influence of their trafficker(s)<sup>718</sup>;
- special provisions may be necessary to allow vulnerable applicants to make their case effectively<sup>719</sup>.

While it is not possible to set out 'one size fits all' procedural rules to ensure an effective remedy for vulnerable persons before courts or tribunals, in analysing each particular case, appropriate or necessary measures will depend on, *inter alia*:

- the particular nature of an appellant's vulnerability;
- when the vulnerability was identified and whether or not it has already resulted in the application of special procedural guarantees;
- the role of a particular provision in the procedure;
- the domestic judicial system as a whole;
- the principles derived from the right to an effective remedy as they apply in the domestic judicial system.

<sup>712</sup> CJEU, judgment of 28 July 2011, *Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, C-69/10, EU:C:2011:524, paras 66–68.

<sup>713</sup> Ibid., para. 68.

<sup>714</sup> CJEU, 2017, *Sacko*, op. cit. (fn. 690 above), para. 32.

<sup>715</sup> CJEU, judgment of 6 November 2012, *Europese Gemeenschap v Otis NV and Others*, C-199/11, EU:C:2012:684, para. 71.

<sup>716</sup> Ibid., para. 72.

<sup>717</sup> UNHCR, *Handbook on procedures and criteria for determining refugee status and guidelines on international protection*, op. cit. (fn. 611 above), para. 198.

<sup>718</sup> Council of Europe, *Anti-Trafficking Convention and its Explanatory Report*, op. cit. (fn. 632 above).

<sup>719</sup> J. Herlihy, 'Evidentiary assessment and psychological difficulties', in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Martinus Nijhoff, Leiden/Boston, 2005, pp. 123–137.

Examples of special procedural guarantees that may arise in international protection proceedings before courts and tribunals are set out in Appendix D. Ultimately, it will be for the court or tribunal to decide if specific procedural arrangements are made, what they are and whether or not a hearing can proceed in their absence<sup>720</sup>. Furthermore, if an applicant is a vulnerable person and wishes to represent themselves, this should also be dealt with in terms of the duty of the court or tribunal to make allowances for and to assist the applicant in putting their case effectively, bearing in mind that the vulnerable applicant may not be in a position to represent themselves effectively.

In any case, the aforementioned interplay between Article 24(4) APD (recast), which was specifically designed for administrative authorities, and Article 46(3) APD (recast), which refers to proceedings before courts and tribunals, needs to be applied with respect to the fact that Article 46(2) APD (recast) has direct effect and with respect to the general principles of equivalence and effectiveness under EU law. This means that detailed procedural rules as defined in Article 46(3) APD (recast) in conjunction with the case-law of the CJEU and any rules for safeguarding an individual's rights under national law must be no less favourable than those governing similar domestic actions (principle of equivalence). In addition, they must not render practically impossible or excessively difficult the exercise of rights conferred by Union law (principle of effectiveness)<sup>721</sup>.

## 8.4. Access to an effective remedy

This section examines the questions of time limits and of free legal assistance and representation in appeals procedures, and how vulnerable applicants may be affected.

### 8.4.1. Time limits

#### Article 46(4) APD (recast) The right to an effective remedy

Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to paragraph 1. The time limits shall not render such exercise impossible or excessively difficult.

[...]

In the interests of legal certainty, Member States may set reasonable time limits for bringing proceedings<sup>722</sup>. It is in line with the principle of effective judicial protection to shorten the time limit for bringing an action in the accelerated procedure, compared with the time limits in place in the ordinary procedure, if these procedural rules aim to ensure that unfounded or inadmissible applications are processed more quickly<sup>723</sup>.

<sup>720</sup> UK Immigration and Asylum Tribunals, Joint Presidential Guidance Note no 2 of 2010, para. 6.

<sup>721</sup> CJEU, judgment of 13 March 2007, *Unibet v Justitiekanslern*, C-432/05, EU:C:2007:163, para. 43.

<sup>722</sup> CJEU, judgment of 29 October 2009, *Virginie Pontin v T-Comalux SA*, C-63/08, EU:C:2009:666, para. 48.

<sup>723</sup> CJEU, 2011, *Samba Diouf*, op. cit. (fn. 712 above), para. 65.

The time limit in place must nevertheless be sufficient in practical terms to enable the applicant to prepare and bring an effective action. Should the time limit prove to be insufficient in a given situation in view of the circumstances, it is for the court or tribunal to decide whether or not that element is such as to justify, on its own, upholding the action brought indirectly against the decision to examine the application under an accelerated procedure<sup>724</sup>.

The CJEU ruled that ‘the fact that the time-limit for bringing an action is 15 days in the case of an accelerated procedure, whilst it is 1 month in the case of a decision adopted under the ordinary procedure’ did ‘not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved’<sup>725</sup>.

The court stressed that ‘the important point’ was that the time limit for lodging an appeal ‘must be sufficient in practical terms to enable the applicant to prepare and bring an effective action’<sup>726</sup>. What will be sufficient for applicants in general is, however, unlikely to be sufficient, for instance, for a traumatised applicant, who may require a social worker, counselling and/or specialist legal assistance in order to prepare an effective action.

Short time limits throughout the procedure may influence the effective use of the right to be heard<sup>727</sup> and render the exercise of effective judicial review difficult, thus potentially leading to an infringement of Article 47 EU Charter. Thus, vulnerable applicants, e.g. those with physical and/or mental illnesses and/or disabilities, who may need more time than an applicant without a disability would need to effectively make their case, may be disproportionately affected by a system in which the cumulative effect of short deadlines erodes their right to be heard.

A very short time limit can also make it difficult to obtain advice or assistance from a specialist legal adviser<sup>728</sup>. That being the case, a very short time limit is likely to have a disproportionate impact on the capacity of certain vulnerable applicants to obtain legal assistance from a specialist legal adviser. For example, applicants with PTSD or who have suffered sexual violence and/or human trafficking will have factually complex claims that are likely to be legally complex. They may face problems in, *inter alia*, obtaining relevant evidence, resolving procedural difficulties and, potentially, putting together an effective appeal in the light of these complexities.

A vulnerable applicant may in addition seek to make further representations on appeal to address the real issues in their case. This may be so, for instance, when an applicant’s wife has a separate case from that of her husband, involving sexual violence that she felt unable to disclose in the context of an interview in the presence of her husband. Similarly, an applicant who initially made a claim that was deemed manifestly unfounded, but had in fact been trafficked for exploitation and was terrified to reveal the identities of their traffickers, may also need to make further representations on appeal.

<sup>724</sup> CJEU, 2011, *Samba Diouf*, op. cit. (fn. 712 above), paras 65 and 68.

<sup>725</sup> Ibid., paras 66–67.

<sup>726</sup> Ibid., para. 66.

<sup>727</sup> CJEU, judgment of 8 July 2010, *Susanne Bulicke v Deutsche Büro Service GmbH*, C-246/09, EU:C:2010:418, para. 36.

<sup>728</sup> CJEU, 2009, *Virginie Pontin v T-Comalux SA*, op. cit. (fn. 722 above), para. 65.

The ECtHR has observed that it may be difficult, if not impossible, for an applicant for international protection to obtain and supply evidence within a short period of time<sup>729</sup>. Thus, ‘time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim’<sup>730</sup>.

An automatic and mechanical application of a time limit may be at variance with the protection of the right to *non-refoulement* under Article 3 ECHR<sup>731</sup>. Thus, for example, an accelerated procedure may be effective when the examination concerns a second asylum application that received full examination in the normal procedure such that the existence of the first review justifies the brevity of the examination of the second application<sup>732</sup>. Such brevity of examination in a second application may not, however, be justified by what may be a *prima facie* full examination in a normal procedure, if an applicant, because of their vulnerability, was unable to substantiate their case in that first application, or indeed state their claim. This may particularly be so when that vulnerability was not identified or addressed with special procedural guarantees.

#### **8.4.2. Free legal assistance and representation in appeals procedures**

Access to legal aid is part of the right to an effective remedy under Article 47 EU Charter.

**Article 47, third subparagraph, EU Charter  
Right to an effective remedy and to a fair trial**

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

It should be provided ‘where the absence of such aid would make it impossible to ensure an effective remedy’<sup>733</sup>. Member States are obliged to grant free legal assistance and representation on request in appeals procedures pursuant to Article 20(1) APD (recast)<sup>734</sup>.

**Article 20(1) APD (recast)  
Free legal assistance and representation in appeals procedures**

Member States shall ensure that free legal assistance and representation is granted on request in the appeals procedures provided for in Chapter V. It shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.

It is notable that the applicant is required to request legal assistance and representation.

<sup>729</sup> ECtHR, judgment of 19 February 1998, *Bahaddar v Netherlands*, no 25894/94, para. 45.

<sup>730</sup> Ibid.

<sup>731</sup> ECtHR, judgment of 11 July 2000, *Jabari v Turkey*, no 40035/98, para. 40.

<sup>732</sup> ECtHR, judgment of 20 September 2007, *Sultani c France*, no 45223/05 (extracts in English), para. 65. The relevant line in the original French text at para. 65 reads: ‘L’existence de ce premier contrôle justifie la brièveté du délai d’examen de la seconde demande, dans le cadre duquel l’OPERA se contente de vérifier, à l’occasion d’une procédure accélérée, s’il existe de nouveaux motifs propres à modifier sa décision de rejet préalable.’

<sup>733</sup> Explanations relating to the Charter of Fundamental Rights, 2007, op. cit. (fn. 82 above), Article 47, p. 30, citing ECtHR, 1979, *Airey v Ireland*, op. cit. (fn. 260 above).

<sup>734</sup> See also recitals 23 and 25 APD (recast).

Bearing in mind that Article 47, third subparagraph, EU Charter is inspired by the case-law of the ECtHR on the right to an effective remedy (Articles 6 and 13 ECHR)<sup>735</sup>, the Charter is also intended to guarantee rights that are practical and effective<sup>736</sup> and not just theoretical and illusory<sup>737</sup>. The ECtHR has applied this principle in relation to free legal assistance<sup>738</sup> and has accepted that the financial situation of the litigant or their prospects of success in the proceedings may be taken into account<sup>739</sup>. Thus, especially in some cases of extreme vulnerability, national judges or tribunal members have to be extremely cautious that their interpretation of national procedural rules governing access to free legal assistance and representation does ‘not render practically impossible or excessively difficult the exercise of rights conferred’ by EU law (principle of effectiveness)<sup>740</sup>, and is in accordance with Article 47, third subparagraph, EU Charter.

Article 20(3) further provides:

**Article 20(3) APD (recast)**  
**Free legal assistance and representation in appeals procedures**

Member States may provide that free legal assistance and representation not be granted where the applicant’s appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success.

Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority which is not a court or tribunal, Member States shall ensure that the applicant has the right to an effective remedy before a court or tribunal against that decision.

In the application of this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant’s effective access to justice is not hindered.

What is stated in Article 20(3), third subparagraph, APD (recast) may be important in particular for vulnerable applicants. For instance, when assessing whether or not the appeal has a tangible prospect of success, the applicant’s special needs should be taken into account in order to assess if these needs, and any absence of the benefit of special procedural guarantees, should be taken into consideration in deciding whether or not there is a tangible prospect of success.

As the CJEU has noted:

the assessment of the need to grant [legal] aid must be made on the basis of the right of the actual person whose rights and freedoms as guaranteed by EU law have been

<sup>735</sup> See Section 8.1, where Article 47 EU Charter is cited in full. See also Section 2.2.

<sup>736</sup> ECtHR, judgment of 18 December 1984, *Sporrong and Lönnroth v Sweden*, nos 7151/75 and 7152/75.

<sup>737</sup> ECtHR, 1979, *Airey v Ireland*, op. cit. (fn. 260 above), para. 24: ‘The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective ... This is particularly so of the right of access to the courts’.

<sup>738</sup> *Ibid.*, para. 24.

<sup>739</sup> ECtHR, judgment 15 February 2005, *Steel and Morris v UK*, no 68416/01, para. 62.

<sup>740</sup> See for example the following CJEU judgments: 2010, *Bulicke*, op. cit. (fn. 727 above), para. 25; 12 February 2008, *Willy Kempter KG v Hauptzollamt Hamburg-Jonas*, C-2/06, EU:C:2008:78, para. 57; 7 June 2007, joined cases C-222/05 to C-225/05, *Van der Weerd and Others v Minister van Landbouw, Natuur en Voedselkwaliteit*, EU:C:2007:318, para. 28; and 13 March 2007, *Unibet v Justitiekanslern*, C-432/05, EU:C:2007:163, para. 43.

violated, rather than on the basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid<sup>741</sup>.

The applications of vulnerable persons can present particular complexities in relation to the interplay of law and procedure, such that, without effective legal focus, an appeal raising substantive issues runs the risk of being ended prematurely as an inadmissible or a manifestly unfounded application. Moreover, the vulnerable applicant will rarely be in a position to represent themselves effectively, whether because of disability, mental health, age or other issues, or the complex nature of the application in fact and law, or both. If a legal representative is appointed by the court or tribunal, sufficient time should be provided for the representative to assist the appellant in asserting their rights effectively in the proceedings<sup>742</sup>.

As the facts and circumstances of relevance in a vulnerable applicant's case may be complex, or not readily evident from an applicant's administrative file, any pre-screening of the appeal or review of a vulnerable applicant's case, when implementing a 'tangible prospect of success' test, must take care not to omit material issues or otherwise hinder effective access to justice.

In the case of unaccompanied minors, Article 25(6)(d) APD (recast) provides that Member States may 'apply the procedure referred to in Article 20(3) provided that the minor's representative has legal qualifications in accordance with national law'. In other words, if an unaccompanied minor's appeal is considered to have no tangible prospect of success, they may be refused free legal assistance and representation as long as their representative has legal qualifications in accordance with national law. According to the German Federal Court, granting free legal aid to unaccompanied minors only in case of a tangible prospect of success and on request does not interfere with the right to an effective remedy, assuming the unaccompanied minor has a guardian who by law has sufficient legal qualifications. It held that the suitability of the guardian as a representative within the meaning of Article 24 RCD (recast) could not be called into question by the fact that the guardian does not possess specific legal expertise in the field of asylum law. Thus, the appointment of a lawyer, as joint guardian, to represent the unaccompanied minor in matters relating to aliens law, including the asylum procedure, was inadmissible. The court further reasoned that it would be unjustified to treat unaccompanied minors differently from minors who had fled their country of origin together with their parents<sup>743</sup>. Thus, with regard to unaccompanied minors, the German Federal Court makes a clear distinction between free legal representation guaranteed by Article 25(1) QD (recast), which is granted unconditionally, and free legal assistance and representation in appeals procedures under Article 20 APD (recast), which can be denied if the applicant's appeal is considered by the court or tribunal or other competent authority to have no tangible prospect of success (Article 20(3) APD (recast)) or if the minor does not lack sufficient financial resources (Article 21(2)(a) APD (recast)).

In relation to Article 15(2) of the Anti-Trafficking Directive, FRA states:

If a child is involved in administrative, criminal or civil proceedings, the guardian and/or other representative – if no guardian has been assigned yet – should ensure that

<sup>741</sup> CJEU, 2010, *DEB v Bundesrepublik Deutschland*, op. cit. (fn. 261 above), para. 42.

<sup>742</sup> Constitutional Court (Verfassungsgerichtshof, Austria), judgment of 5 December 2011, no U 2018/11.

<sup>743</sup> Federal Court (Bundesgerichtshof, Germany), order of 13 September 2017, XII ZB 497/16, para. 14.

the child has access to free legal aid and that competent national authorities appoint a qualified legal professional in accordance with national legal provisions<sup>744</sup>.

It further states that the ‘role of qualified lawyer or other qualified legal professional who provides legal counselling and legal assistance to the child differs from the mandate and actual role of the “representative” or “legal representative” as defined in EU law’<sup>745</sup>.

## 8.5. Right to remain during appeal procedures

This section sets out the general rule regarding the right to remain on the territory that applies during appeals, the exceptions that apply and how these may affect vulnerable applicants.

### 8.5.1. General rule

**Article 46(5) APD (recast)**  
**The right to an effective remedy**

Without prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

The APD (recast) provides for a right to remain on the territory of the Member State during the appeals procedure. The directive has also codified exceptions to this rule, which are dealt with in Section 8.5.2 below.

In some Member States, a return decision may be adopted without the decision on international protection being final. As a result, there may be distinct remedies in respect of the return decision and the international protection decision. That being the case, it is notable that a Member State may adopt a return decision following a negative decision on an application for international protection, but before any appeal in respect of that application is taken or concludes. The CJEU has clarified, however, that ‘all the effects of the return decision must be suspended during the period prescribed for bringing that appeal and, if such an appeal is brought, until resolution of the appeal’<sup>746</sup>. The person concerned retains their status as an applicant for international protection until a final decision is adopted in relation to that application. For its part, the Member State must ‘allow the person concerned to rely on any change in circumstances that occurred after the adoption of the return decision and that may have a significant bearing on the assessment of his situation’<sup>747</sup>.

Notably, although the judicial body making the decision on a return will be tasked with the duty of effective judicial protection, its capacity to carry out the review may be jeopardised in

<sup>744</sup> FRA, *Guardianship for Children Deprived of Parental Care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, 2014, op. cit. (fn. 214 above), p. 39.

<sup>745</sup> Ibid.

<sup>746</sup> CJEU, judgment of 19 June 2018, *Sadikou Gnandi v État belge*, C-181/16, EU:C:2018:465, para. 61.

<sup>747</sup> Ibid., para. 64.

certain circumstances. This may, for instance, be because the applicant's vulnerability has yet to be identified and/or assessed or because the vulnerable applicant may not have had the benefit of the special procedural guarantees under Article 24 APD (recast). It may also be so, if the vulnerable applicant requires cooperation from the Member State under Article 4 QD (recast) in substantiating their application commensurate with their vulnerability, which may not yet have occurred. Uncertainties about the facts of the case may be latent in the case of, for example, minors, the elderly, people with cognitive disabilities, victims of trafficking and/or victims of rape or sexual violence. The difficulties addressed here may or do occur in systems where the return decision is adopted without the decision on international protection being final and where there are different judicial bodies for the remedy against each of the two decisions. They do not occur when the decision on international protection and the decision on return may be appealed against in one procedure.

By contrast, the CJEU has decided that Article 46 APD (recast), 'read in the light of Articles 19(2) and 47 of the Charter, must be interpreted as not precluding national legislation which does not confer suspensory effect on an appeal brought against a decision ... not to further examine a **subsequent** application for asylum'<sup>748</sup>. This is in the light of the CJEU's ruling that, when an applicant makes a subsequent application without presenting new evidence or arguments, 'it would be disproportionate to oblige Member States to carry out a new full examination procedure and, in these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally provided by the applicant'<sup>749</sup>. The CJEU emphasised that this decision applies to cases in which the enforcement of that decision cannot, as such, lead to that national's removal because no return decision had been issued (yet)<sup>750</sup>.

### 8.5.2. Exceptions to the general rule

Article 46(6) APD (recast) sets out the conditions under which Member States may (but are not obliged to) provide for **exceptions** to the right to remain in the territory in respect of certain decisions. In these scenarios a court or tribunal has the power to rule, at the applicant's request or on its own motion depending on the procedural rules of the Member State in question, on whether or not the applicant may remain on the territory of the Member State.

<sup>748</sup> CJEU, judgment of 17 December 2015, *Abdoulaye Amadou Tall v Centre public d'action sociale de Huy*, C-239/14, EU:C:2015:824, para. 60 (emphasis added), although the judgment related to Article 39 APD rather than the corresponding Article 46 APD (recast). See also Section 7.6 above.

<sup>749</sup> CJEU, 2015, *Amadou Tall*, op. cit. (fn. 748 above), para. 46.

<sup>750</sup> Ibid., paras 57–59.

**Article 46(6) APD (recast)**  
**The right to an effective remedy**

In the case of a decision:

- (a) considering an application to be manifestly unfounded in accordance with Article 32(2) or unfounded after examination in accordance with Article 31(8), except for cases where these decisions are based on the circumstances referred to in Article 31(8) (h);
- (b) considering an application to be inadmissible pursuant to Article 33(2)(a), (b) or (d);
- (c) rejecting the reopening of the applicant's case after it has been discontinued according to Article 28; or
- (d) not to examine or not to examine fully the application pursuant to Article 39,

a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant's request or acting *ex officio*, if such a decision results in ending the applicant's right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law.

It is the task of the national legislature to decide whether the decision on such measures can be taken upon request, *ex officio* or both. The Member State has to choose at least one of the two alternatives and may opt for both. If the applicant has an arguable claim in relation to Article 3 ECHR or Article 4 EU Charter, a legal remedy must have an automatic suspensive effect.

A court or tribunal's decision on whether or not an applicant may remain on the territory of the Member State according to Article 46(6) requires a modified full and *ex nunc* assessment. The modification is that it only has to deal with the question of whether or not there is an arguable claim of an infringement of Article 4 EU Charter or Article 3 ECHR. In such circumstances, the matter must be fully examined to ascertain if there is such an arguable claim.<sup>751</sup>

The following scenarios illustrate how suspensive effect, or its absence, under the APD (recast) may raise particular issues in respect of vulnerable applicants.

- **In the case of an unfounded/manifestly unfounded** decision in an accelerated procedure under Article 31(8) APD (recast), an application may be determined to be unfounded in circumstances where the determining authority had insufficient information, e.g. where the person's having suffered human trafficking was not known.
- **In the case of an 'inadmissibility'** decision under Article 33(2) APD (recast), an adult dependant of an applicant may have consented to their case being lodged on their

<sup>751</sup> ECtHR, 2000, *Jabari v Turkey*, op. cit. (fn. 731 above), paras 39 and 49–50; ECtHR, judgment of 19 January 2016, *M.D. et M.A. c Belgique*, no 58689/12, para. 55; ECtHR, judgment of 5 November 2015, *A.Y. c Grèce*, no 58399/11, para. 68.

behalf and included in a parent's claim, notwithstanding that the defendant has a heightened individual risk of persecution or serious harm on account of a serious mental illness.

- **In a decision refusing to reopen a case that was discontinued** in accordance with Article 28 APD (recast) on account of implicit withdrawal of the application, an application by a vulnerable applicant, particularly if their vulnerability is not identified at an early stage, may be deemed abandoned or withdrawn if the applicant, because of their vulnerability, has not appeared for a personal interview or has failed to respond to requests to provide essential information.

It should be observed that, in cases in which 'a State Party decides to remove an alien to a country where there are substantial grounds for believing that he or she faces a risk [under Article 3 ECHR,] Article 13 [ECHR] requires that the person concerned should have access to a remedy with automatic suspensive effect'<sup>752</sup>. The CJEU has applied this requirement in a case concerning Directive 2008/115 (concerning the return of illegally staying third country nationals)<sup>753</sup>. The court ruled that Articles 5 (concerning *non-refoulement*) and 13 (concerning effective remedy) of that directive, taken in conjunction with Articles 19(2) and 47 EU Charter, preclude national legislation 'which does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health'<sup>754</sup>.

Particular guarantees in respect of Member States' exercise of the options under Article 46(6) are given to applicants in border procedures.

#### Article 46(7) APD (recast)

Paragraph 6 shall only apply to procedures referred to in Article 43 [i.e. border procedures] provided that:

- (a) the applicant has the necessary interpretation, legal assistance and at least one week to prepare the request and submit to the court or tribunal the arguments in favour of granting him or her the right to remain on the territory pending the outcome of the remedy; and
- (b) in the framework of the examination of the request referred to in paragraph 6, the court or tribunal examines the negative decision of the determining authority in terms of fact and law.

If the conditions referred to in points (a) and (b) are not met, paragraph 5 [regarding suspensive effect] shall apply.

As regards unaccompanied minors, Article 25(6) APD (recast) states that 'Without prejudice to Article 41, in applying Article 46(6) to unaccompanied minors, Member States shall provide at least the guarantees provided for in Article 46(7) in all cases.'

<sup>752</sup> ECtHR, judgment of 26 April 2007, *Gebremedhin v France*, no 25389/05, para. 66.

<sup>753</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348.

<sup>754</sup> CJEU (GC), 2014, *Abdida*, op. cit. (fn. 513 above), para. 53.

Where the exceptions expressly permitted by Article 46(7) apply (putting aside the matter of appeals in respect of a decision not to examine a subsequent application), a court or tribunal is empowered to rule on the application to remain, either upon request or *ex officio*, if two criteria are met. A court or tribunal has this power if the decision in question results in ending the applicant's right to remain in the Member State and if the right to remain in the Member State pending the outcome of the remedy is not provided for in national law (Article 46(6) APD (recast)). Nonetheless, notwithstanding the guarantees under Article 46(7), the risks outlined above in respect of Article 46(5) and (6) apply *a fortiori* in border contexts.

#### **Article 46(8) APD (recast)**

Member States shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory, laid down in paragraphs 6 and 7.

# Appendix A. Methodology

The development of this judicial analysis was undertaken within the framework of a contract between IARMJ-Europe and EASO to provide expert services for the revision, update and further development of EASO professional development materials for members of courts and tribunals. Although seeking to work as far as possible within the framework of the EASO methodology for the professional development series as a whole, this judicial analysis required a modified approach. It has already been observed in the section on contributors that the drafting process had two main components: drafting undertaken by a team of experts; and review and overall supervision of that team's drafting work by an editorial team (ET) composed exclusively of judges and tribunal members.

## Preparatory phase

During the preparatory phase, the drafting team considered the scope, structure and content of analysis, in conjunction with the ET, and prepared:

- a provisional bibliography of relevant resources and materials available on the subject;
- an interim compilation of relevant jurisprudence on the subject;
- a sample of work in progress;
- a preparatory background report, which included a provisional structure for the analysis and a report on progress.

These materials were shared with the ET, which provided both general guidance and more specific feedback in the form of instructions to the drafting team regarding the further development of the judicial analysis and compilation of jurisprudence.

## Drafting phase

The drafting team developed a draft of the judicial analysis and compilation of jurisprudence, in accordance with the EASO style guide, using desk-based documentary research and analysis of legislation, case-law, training materials and any other relevant literature, such as books, reports, commentaries, guidelines and articles from reliable sources. Sections of the judicial analysis and the compilation of jurisprudence were allocated to team members for drafting. These initial drafts were then considered by other members of the team, with a full exchange of views followed by redrafting in the light of those discussions.

The first draft, completed by the drafting team, was shared with the ET, which was charged with reviewing the draft with a view to assisting the drafting team to enhance quality. Accordingly, the ET provided further instructions to the drafting team concerning the structure, format and content. Pursuant to these instructions, the drafting team made further amendments and submitted a second draft to the ET. The process above was repeated to produce further drafts. In order to prepare a text ready for external consultation, the ET undertook a further review and amended the text as necessary.

## External consultation

The draft judicial analysis and compilation of jurisprudence was shared with the EASO network of members of courts and tribunals, UNHCR and members of EASO's Consultative Forum, who were invited to review the material and provide feedback with a view to assisting the ET in further enhancing quality. Comments on the draft were also received from Lars Bay Larsen, a judge, and Yann Laurans, a legal secretary, both of the CJEU, and from the judge Jolien Schukking and the lawyers Elise Russcher and Agnes van Steijn of the ECtHR in their personal capacities.

Feedback received was taken into consideration by the ET, which reached conclusions on the resultant changes that needed to be made. Final revisions were made by the ET.

# Appendix B. Primary sources

## 1. European Union law

### 1.1. EU primary law

Treaty on European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)), [2012] OJ C 326/13

Treaty on the Functioning of the European Union (consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009)), [2012] OJ C 326/47

Charter of Fundamental Rights of the European Union (as amended on 12 December 2007 (entry into force: 1 December 2009)), [2007] OJ C 303/01

### 1.2. EU secondary legislation

#### 1.2.1. Directives

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, [2003] OJ L 31/18

Council Directive 2004/83/EC of the 29 April 2004 on the minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/12

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] OJ L 326/13

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, [2008] OJ L 348/98

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (anti-trafficking directive), [2011] OJ L 101/1

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons

eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (victims of crime directive), [2012] OJ L 315/57

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60

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

## **1.2.2. Regulations**

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 50/1

Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 222/3

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

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L 180/31

Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 amending Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2014] OJ L 39/1

## **1.2.3. Other EU instruments**

Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ C 303/17

Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC), OJ L 23/35

## 2. International treaties of universal and regional scope

### 2.1. United Nations

#### 2.1.1. Conventions and protocols

Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287, 12 August 1949 (entry into force: 21 October 1950)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977 (entry into force: 7 December 1978)

Convention relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entry into force: 22 April 1954)

International Covenant on Civil and Political Rights (ICCPR), 16 December 1966 (entry into force: 23 March 1976)

Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entry into force: 4 October 1967)

Convention on the elimination of all forms of discrimination against women (CEDAW), 1249 UNTS 1, 18 December 1979 (entry into force: 3 September 1981)

Convention against torture and other cruel, inhuman or degrading treatment or punishment, 1465 UNTS 85, 10 December 1984 (entry into force: 26 June 1987)

Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entry into force: 2 September 1990)

Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), 2237 UNTS 319, 15 November 2000 (entry into force: 25 December 2003)

Convention on the Rights of Persons with Disabilities (CRPD), 2515 UNTS 3, 13 December 2006 (entry into force: 3 May 2008)

## 2.1.2. Human Rights Council resolutions

Protection against violence and discrimination based on sexual orientation and gender identity (adopted 30 June 2016), UN Doc A/HRC/RES/32/2

Human rights, sexual orientation and gender identity (adopted 26 September 2014), UN Doc A/HRC/RES/27/32

Human rights, sexual orientation and gender identity (adopted 17 June 2011), UN Doc A/HRC/RES/17/19

## 2.2. Council of Europe

### 2.2.1. Conventions

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, ETS no 5, 4 November 1950 (entry into force: 3 September 1953)

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS no 126, 26 November 1987 (entry into force: 1 February 1989)

Council of Europe Convention on Action against Trafficking in Human Beings, CETS no 197, 16 May 2005 (entry into force: 1 February 2008)

Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), ETS no 210, 11 May 2011 (entry into force 1 August 2014)

### 2.2.2. Council of Europe recommendations and resolutions

Committee of Ministers, Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity (adopted 31 March 2010)

Parliamentary Assembly, Resolution 2020 (2014), The alternatives to immigration detention of children (adopted 3 October 2014)

Parliamentary Assembly, Resolution 2048 (2015), Discrimination against transgender people in Europe (adopted 22 April 2015)

Parliamentary Assembly, Resolution 2191 (2017), Promoting the human rights of and eliminating discrimination against intersex people (adopted 12 October 2017)

Parliamentary Assembly, Resolution 2239 (2018), Private and family life: achieving equality regardless of sexual orientation (adopted 10 October 2018)

### 3. Case-law

#### 3.1. Court of Justice of the European Union

##### 3.1.1. Judgments

Judgment of 14 July 1998, *Bettati v Safety Hi-Tech Srl*, C-341/95, [1998] ECR 1-4355

Judgment (GC) of 27 June 2006, *European Parliament v Council of the European Union*, C-540/03, EU:C:2006:429

Judgment of 7 December 2006, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, C-306/05, ECR 1-11519

Judgment (GC) of 13 March 2007, *Unibet v Justitiekanslern*, C-432/05, EU:C:2007:163

Judgment of 7 June 2007, *Van der Weerd and Others v Minister van Landbouw, Natuur en Voedselkwaliteit*, joined cases C-222/05 to C-225/05, EU:C:2007:318

Judgment (GC) of 12 February 2008, *Willy Kempter KG v Hauptzollamt Hamburg-Jonas*, C-2/06, EU:C:2008:78

Judgment (GC) of 3 September 2008, *Kadi and Al Barakaat v Council and Commission*, joined cases C-402/05 P and C-415/05, EU:C:2008:461

Judgment (GC) of 17 February 2009, *Elgafaji v Staatssecretaris van Justitie*, C-465/07, EU:C:2009:94

Judgment of 29 October 2009, *Virginie Pontin v T-Comalux SA*, C-63/08, EU:C:2009:666

Judgment of 23 December 2009, *Detiček v Segulia*, C-403/09 PPU, EU:C:2009:810

Judgment (GC) of 2 March 2010, *Abdulla and Others v Bundesrepublik Deutschland*, joined cases C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105

Judgment of 8 July 2010, *Susanne Bulicke v Deutsche Büro Service GmbH*, C-246/09, EU:C:2010:418

Judgment of 22 December 2010, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, C-279/09, EU:C:2010:811

Judgment of 28 July 2011, *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, C-69/10, EU:C:2011:524

Judgment (GC) of 21 December 2011, *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, joined cases C-411/10 and C-493/10, EU:C:2011:865

Judgment (GC) of 5 September 2012, *Bundesrepublik Deutschland v Y and Z*, joined cases C-71/11 and C-99/11, EU:C:2012:518

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

Judgment (GC) of 6 November 2012, *Europese Gemeenschap v Otis NV*, C-199/11, EU:C:2012:684

Judgment (GC) of 6 November 2012, *K v Bundesasylamt*, C-245/11, EU:C:2012:685

Judgment of 22 November 2012, *M.M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, EU:C:2012:744

Judgment of 31 January 2013, *H.I.D. and B.A. v Refugee Applications Commissioner and Others*, C-175/11, EU:C:2013:45

Judgment of 11 April 2013, *HK Danmark v Dansk almennyttigt Boligselskab and Dansk Arbejdsgiverforening*, joined cases C-335/11 and C-337/11, EU:C:2013:222

Judgment of 30 May 2013, *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet*, C-528/11, EU:C:2013:342

Judgment of 6 June 2013, *MA, BT and DA v Secretary of State for the Home Department*, C-648/11, EU:C:2013:367

Judgment of 7 November 2013, *X, Y and Z v Minister vor Immigratie en Asiel*, joined cases C-199/12 to C-201/12, EU:C:2013:720

Judgment of 30 January 2014, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, C-285/12, EU:C:2014:39

Judgment of 27 February 2014, *Federal agentshap voor de opvang van asielzoekers v Selver Saciri and Others*, C-79/13, EU:C:2014:10

Judgment (GC) of 18 March 2014, *Z v A Government department and the Board of management of a community school*, C-363/12, EU:C:2014:159

Judgment of 8 May 2014, *H.N. v Minister for Justice, Equality and Law Reform and Others*, C-604/12, EU:C:2014:302

Judgment of 5 November 2014, *Sophie Mukarubega v Préfet de police, Préfet de la Seine-Saint-Denis*, C-166/13, EU:C:2014:2336

Judgment (GC) of 2 December 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, joined cases C-148/13 to C-150/13, EU:C:2014:2406

Judgment of 11 December 2014, *Khaled Boudjida v Préfet des Pyrénées-Atlantiques*, C-249/13, EU:C:2014:2431

Judgment (GC) of 18 December 2014, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v Moussa Abdida*, C-562/13, EU:C:2014:2453

Judgment (GC) of 18 December 2014, *Mohamed M'Bodj v État belge*, C-542/13, EU:C:2014:2452

Judgment of 26 February 2015, *Andre Lawrence Shepherd v Bundesrepublik Deutschland*, C-472/13, EU:C:2015:117

Judgment of 17 December 2015, *Abdoulaye Amadou Tall v Centre public d'action sociale de Huy*, C-239/14, EU:C:2015:824

Judgment (GC) of 1 March 2016, *Kreis Warendorf v Ibrahim Alo and Amira Osso v Region Hannover*, joined cases C-443/14 and C-444/14, EU:C:2016:127

Judgment (GC) of 7 June 2016, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, C-63/15, EU:C:2016:409

Judgment (GC) of 7 June 2016, *George Karim v Migrationsverket*, C-155/15, EU:C:2016:410

Judgment of 1 December 2016, *Mohamed Daoudi v Bootes Plus SL*, C-395/15, EU:C:2016:917

Judgment of 9 February 2017, *M v Minister for Justice and Equality, Ireland, and the Attorney General*, C-560/14, EU:C:2017:101

Judgment of 16 February 2017, *C.K. and Others v Republika Slovenija*, C-578/16 PPU, EU:C:2017:127

Judgment of 9 March 2017, *Petya Mikova v Izpálnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, C-406/15, EU:C:2017:198

Judgment of 26 July 2017, *Moussa Sacko v Commissione Territoriale per il riconoscimento della protezione internazionale di Milano*, C-348/16, EU:C:2017:591

Judgment (GC) of 26 July 2017, *A.S. v Republika Slovenija*, C-490/16, EU:C:2017:585

Judgment (GC) of 26 July 2017, *Khadija Jafari and Zainab Jafari*, C-646/16, EU:C:2017:586

Judgment (GC) of 26 July 2017, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, C-670/16, EU:C:2017:587

Judgment (GC) of 25 October 2017, *Majid Shiri, also known as Madzhdi Shiri v Bundesamt für Fremdenwesen und Asyl*, C-201/16, EU:C:2017:805

Judgment (GC) of 23 January 2018, *Dawid Piotrowski*, C-367/16, EU:C:2018:27

Judgment of 25 January 2018, *Bundesrepublik Deutschland v Aziz Hasan*, C-360/16, EU:C:2018:35

Judgment of 25 January 2018, *F v Bevándorlási és Állampolgársági Hivatal*, C-473/16, EU:C:2018:36

Judgment of 12 April 2018, *A and S v Staatssecretaris van Veiligheid en Justitie*, C-550/16, EU:C:2018:248

Judgment (GC) of 24 April 2018 (GC), *MP v Secretary of State for the Home Department*, C-353/16, EU:C:2018:276

Judgment (GC) of 19 June 2018, *Sadikou Gnandi v État belge*, C-181/16, EU:C:2018:465

Judgment of 25 July 2018, *ML*, C-220/18 PPU, EU:C:2018:589

Judgment (GC) of 25 July 2018, *Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, C-585/16, EU:C:2018:584

Judgment of 4 October 2018, *Nigyar Rauf Kaza Ahmedbekova and Rauf Emin Oglá Ahmedbekov v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, C-652/16, EU:C:2018:801

Judgment of 4 October 2018, *Bahtiyar Fathi v Predsedatel na Darzhavna agentsia za bezhantsite*, C-56/17, EU:C:2018:803

Judgment of 21 November 2018, *Ayubi v Bezirkshauptmannschaft Linz-Land*, C-713/17, EU:C:2018:929

Judgment of 23 January 2019, *M.A., S.A. and A.Z. v International Protection Appeals Tribunal and Others*, C-661/17, EU:C:2019:53

Judgment of 13 March 2019, *E. v Staatssecretaris van Veiligheid en Justitie*, C-635/17, EU:C:2019:192

Judgment (GC) of 19 March 2019, *Abubacarr Jawo v Bundesrepublik Deutschland*, C-163/17, EU:C:2019:218

Judgment (GC) of 19 March 2019, *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov*, joined cases C-297/17, C-318/17, C-319/17 and C-438/17, EU:C:2019:219

Judgment (GC) of 26 March 2019, *SM v Entry Clearance Officer, UK Visa Section*, C-129/18, EU:C:2019:248

Judgment (GC) of 2 April 2019, *Staatssecretaris van Veiligheid en Justitie v H and R*, joined cases C-582/17 and C-583/17, EU:C:2019:280

Judgment of 23 May 2019, *Mohammed Bilali v Bundesamt für Fremdenwesen und Asyl*, C-720/17, EU:C:2019:448

Judgment (GC) of 24 June 2019, *European Commission v Republic of Poland*, C-619/18, EU:C:2019:531

Judgment (GC) of 29 July 2019, *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal*, C-556/17, EU:C:2019:626

Judgment of 11 September 2019, *DW v Nobel Plastiques Ibérica SA*, C-397/18, EU:C:2019:703

Judgment (GC) of 12 November 2019, *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers*, C-233/18, EU:C:2019:956

### **3.1.2. Opinions of Advocates General**

Opinion of Advocate General Sharpston of 17 July 2014, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, joined cases C-148/13 to C-150/13, EU:C:2014:2111

Opinion of Advocate General Bot of 13 June 2018, *X v Staatssecretaris van Veiligheid en Justitie*, C-213/17, EU:C:2018:434

Opinion of Advocate General Hogan of 30 April 2020, *Secretary of State for the Home Department v OA*, C-255/19, EU:C:2020:342

## **3.2. European Court of Human Rights**

### **3.2.1. Judgments and decisions of the European Court of Human Rights**

Judgment of 9 October 1979, *Airey v Ireland*, no 6289/73

Judgment of 18 December 1984, *Sporrong and Lönnroth v Sweden*, nos 7151/75 and 7152/75

Judgment of 28 May 1985, *Abdulaziz, Cabales and Balkandali v United Kingdom*, nos 9214/80, 9473/81 and 9474/81

Judgment of 2 May 1997, *D. v United Kingdom*, no 30240/96

Judgment of 19 February 1998, *Bahaddar v Netherlands*, no 25894/94

Judgment of 6 April 2000, *Thlimmenos v Greece*, no 34369/97

Judgment of 11 July 2000, *Jabari v Turkey*, no 40035/98

Judgment of 3 April 2001, *Keenan v United Kingdom*, no 27229/95

Judgment of 24 September 2002, *Posti and Rahko v Finland*, no 27824/95

Judgment 15 February 2005, *Steel and Morris v United Kingdom*, no 68416/01

Judgment of 20 October 2005, *Romanov v Russia*, no 63993/00

Judgment of 17 January 2006, *Aoulmi v France*, no 50278/99

Judgment of 12 October 2006, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, no 13178/03

Judgment of 11 January 2007, *Salah Sheekh v Netherlands*, no 1948/04

Judgment of 26 April 2007, *Gebremedhin v France*, no 25389/05

Judgment of 6 September 2007, *Kucheruk v Ukraine*, no 2570/04

Judgment of 20 September 2007, *Sultani v France*, no 45223/05

Judgment (GC) of 27 May 2008, *N. v United Kingdom*, no 26565/05

Judgment of 20 January 2009, *Ślawomir Musiał v Poland*, no 28300/06

Judgment of 11 June 2009, *S.D. c Grèce*, no 53541/07

Judgment of 9 June 2009, *Opuz v Turkey*, no 33401/02

Judgment of 7 January 2010, *Rantsev v Cyprus and Russia*, no 25965/04

Judgment of 19 January 2010, *Muskhadzhiyeva et autres c Belgique*, no 41442/07

Judgment of 9 March 2010, *R.C. v Sweden*, no 41827/07

Judgment of 6 July 2010, *Neulinger and Shuruk v Switzerland*, no 41615/07

Judgment (GC) of 21 January 2011, *M.S.S. v Belgium and Greece*, no 30696/09

Judgment of 31 March 2011, *Nowak v Ukraine*, no 60846/10

Judgment of 5 April 2011, *Rahimi c Grèce*, no 8687/08 (in French with English summary)

Judgment of 21 April 2011, *Nechiporuk and Yonkalo v Ukraine*, no 42310/04

Judgment of 28 June 2011, *Sufi and Elmi v United Kingdom*, nos 8319/07 and 11449/07

Judgment of 20 December 2011, *Yoh-Ekale Mwanje c Belgique*, no 10486/10

Judgment of 19 January 2012, *Popov c France*, nos 39472/07 and 39474/07 (extracts in English)

Judgment of 31 July 2012, *Mahmundi et autres c Grèce*, no 14902/10

Judgment of 8 November 2012, *Z.H. v Hungary*, no 28973/11

Judgment of 29 January 2013, *S.H.H. v United Kingdom*, no 60367/10

Judgment of 23 July 2013, *Aden Ahmed v Malta*, no 55352/12

Judgment of 19 September 2013, *R.J. c France*, no 10466/11

Judgment of 3 December 2013, *Ghorbanov and Others v Turkey*, no 28127/09

Judgment of 27 March 2014, *W.H. v Sweden*, no 49341/10

Judgment of 3 April 2014, *A.A.M. v Sweden*, no 68519/10

Judgment (GC) of 4 November 2014, *Tarakhel v Switzerland*, no 29217/12

Judgment of 11 December 2014, *Mohamad c Grèce*, no 70586/11

Judgment of 2 April 2015, *Aarabi c Grèce*, no 39766/09

Judgment of 30 June 2015, *A.S. v Switzerland*, no 39350/13

Judgment of 5 November 2015, *A.Y. c Grèce*, no 58399/11

Judgment of 26 November 2015, *Mahamed Jama v Malta*, no 10290/13

Judgment of 19 January 2016, *M.D. et M.A. c Belgique*, no 58689/12

Judgment of 3 May 2016, *Abdi Mahamud v Malta*, no 56796/13

Judgment of 5 July 2016, *O.M. v Hungary*, no 9912/15

Judgment (GC) of 23 August 2016, *J.K. and Others v Sweden*, no 59166/12

Judgment (GC) of 17 November 2016, *V.M. and Others v Belgium*, no 60125/11

Judgment of 22 November 2016, *Abdullahi Elmi and Aweys Abubakar v Malta*, nos 25794/13 and 28151/13

Judgment (GC) of 13 December 2016, *Paposhvili v Belgium*, no 41738/10

Judgment of 24 January 2017, *Khamtokhu and Aksenchik v Russia*, nos 60367/08 and 961/11

Judgment of 4 April 2017, *Thimothawes v Belgium*, no 39061/11

Judgment of 7 December 2017, *S.F. and Others v Bulgaria*, no 8138/16

Judgment of 25 January 2018, *J.R. et autres c Grèce*, no 22696/16

Judgment of 15 March 2018, *A.E.A. c Grèce*, no 39034/12

Judgment of 10 April 2018, *Bistieva and Others v Poland*, no 75157/14

Judgment of 31 January 2019, *Rooman v Belgium*, no 18052/11

Judgment of 28 February 2019, *HA et autres c Grèce*, no 19951/16 (in French with English summary)

Judgment of 28 February 2019, *Khan v France*, no 12267/16

Judgment of 21 March 2019, *O.S.A. et autres c Grèce*, no 39065/16

Judgment of 13 June 2019, *Sh.D. et autres c Grèce et autres*, no 14165/16

Judgment of 10 September 2019, *Strand Lobben and others v Norway*, no 37283/13

Judgment of 1 October 2019, *Savran v Denmark*, no 57467/15

Judgment of 3 October 2019, *Kaak et autres c Grèce*, no 34215/16

Judgment of 10 October 2019, *M.D. c France*, no 50376/13

Judgment of 21 November 2019, *Ilias and Ahmed v Hungary*, no 47287/15

Judgment of 2 July 2020, *N.H. et autres c France*, no 28220/13

Decision of 4 October 2016, *Jihana Ali and Others v Switzerland and Italy*, no 30474/14

Decision of 14 March 2017, *Ojei v Netherlands*, no 64724/10

Decision on interim measure of 16 April 2020, *EI and Others v Greece*, no 16080/20

### **3.2.2. Cases communicated to the European Court of Human Rights**

Statement of facts, 2 February 2017, *Sadio et autres c Italy*, no 3571/17

Statement of facts, 5 July 2017, *Bacary v Italy*, no 36986/17

Statement of facts, 11 January 2018, *Bodiang v Italy*, no 47523/17

Statement of facts, 11 January 2018, *Diakité v Italy*, no 44646/17

Statement of facts, 26 February 2019, *Al. H. et autres c Grèce and FJ et autres c Grèce*, nos 4892/18 and 4920/18

### **3.3. Views and decisions of United Nations treaty bodies**

#### **3.3.1. Human Rights Committee**

Views adopted 28 October 2016, *R.A.A. and Z.M. v Denmark*, communication no 2608/2015, CCPR/C/118/D/2608/2015

Views adopted 10 March 2017, *Raziye Rezaifar v Denmark*, communication no 2512/2014, CCPR/C/119/D/2512/2014

Views adopted 7 November 2017, *OYKA v Denmark*, communication no 2770/2016, CCPR/C/121/D/2770/2016

### **3.3.2. Committee against Torture**

Decision of 1 June 2012, *Combey Brice Magloire Gbadjavi v Switzerland*, communication no 396/2009, CAT/C/48/D/396/2009

Decision of 23 November 2012, *K.H. v Denmark*, communication no 464/2011, CAT/C/49/D/464/2011

Decision of 28 April 2017, *S.S.B. v Denmark*, communication no 602/2014, CAT/C/60/D/602/2014

Decision of 3 August 2018, *A.N. v Switzerland*, communication no 742/2016, CAT/C/64/D/742/2016

Decision of 6 December 2018, *Adam Harun v Switzerland*, communication no 758/2016, CAT/C/65/D/758/2016

### **3.3.3. Committee on the Rights of the Child**

Views of 27 September 2018, *N.B.F. v Spain*, communication no 11/2017, CRC/C/79/D/11/2017

Views of 27 September 2018, *Y.B. and N.S. v Belgium*, communication no 12/2017, CRC/C/79/D/12/2017

Views of 31 May 2019, *A.L. v Spain*, communication no 16/2107, CRC/C/81/D/16/2017

Views of 31 May 2019, *J.A.B. v Spain*, communication no 22/2017, CRC/C/81/D/22/2017

Views of 18 September 2019, *M.T. v Spain*, communication no 17/2017, CRC/C/82/D/17/2017

Views of 19 September 2019, *R.K. v Spain*, communication no 27/2017, CRC/C/82/D/27/2017

### **3.3.4. Committee on the Rights of Persons with Disabilities**

Views adopted 11 April 2014, *X. v Argentina*, communication no 008/2012, CRPD/C/11/D/8/2012

Views adopted 2 September 2016, *Noble v Australia*, communication no 007/2012, CRPD/C/16/D/7/2012

Views adopted 18 August 2017, *X v Tanzania*, communication no 22/2014, CRPD/C/18/D/22/2014

Views adopted 31 August 2018, *Y v Tanzania*, communication no 023/2014, CRPD/C/20/D/23/2014

### **3.4. Courts and tribunals of Member States and the United Kingdom**

#### **3.4.1. Austria**

Constitutional Court (Verfassungsgerichtshof), judgment of 5 December 2011, no U 2018/11

Constitutional Court (Verfassungsgerichtshof), judgment of 26 June 2013, U1343/2012

Federal Administrative Court (Bundesverwaltungsgericht), judgment of 10 March 2015, L506 1438704-1

Federal Administrative Court (Bundesverwaltungsgericht), judgment of 22 October 2015, W119 1434517-1

Federal Administrative Court (Bundesverwaltungsgericht), judgment of 15 May 2016, W205 2104654-1

Federal Administrative Court (Bundesverwaltungsgericht), judgment of 8 March 2017, W165 2135349-1

Federal Administrative Court (Bundesverwaltungsgericht), judgment of 28 March 2017, W161 2149727-1/5E ua

Federal Administrative Court (Bundesverwaltungsgericht), judgment of 3 April 2017, W169 2112518

Federal Administrative Court (Bundesverwaltungsgericht), judgment of 10 April 2017, W268 2127664-1

Higher Administrative Court (Verwaltungsgerichtshof), judgment of 4 March 2010, 2006/20/0832

Higher Administrative Court (Verwaltungsgerichtshof), judgment of 15 September 2010, 2008/23/0463

Asylum Court (Asylgerichtshof), judgment of 24 February 2011, A4 213.316-0/2008/11E (English summary)

Asylum Court (Asylgerichtshof), judgment of 29 January 2013, E1 432.053-1/2013/5E, (English summary)

Independent Asylum Senate (Unabhängiger Asylsenat), decision of 9 July 1998,  
203.332/0-VIII/22/98

### **3.4.2. Belgium**

Council of State (Raad van State/Conseil d'état), judgment of 4 April 2019, *L'ordre des Barreaux Francophones et Germanophone and Others v Belgium*, no 244.190

Constitutional Court, judgment of 26 June 2008, *Arrêt* no 95/2008

Council for Aliens Law Litigation (Raad voor Vreemdelingenbetwistingen (RVV)/Conseil du contentieux des étrangers (CCE)), judgment 18 October 2012, no 90 024

Council for Aliens Law Litigation (RVV/CCE), judgment of 21 April 2015, no 143 740

Council for Aliens Law Litigation (RVV/CCE), judgment 12 May 2015, no 145 367

Council for Aliens Law Litigation (RVV/CCE), judgment of 10 November 2015, no 156 326  
([English summary](#))

Council for Aliens Law Litigation (RVV/CCE), judgment of 29 June 2016, no 170 821

Council for Aliens Law Litigation (RVV/CCE), judgment of 24 October 2016, no 176 766

Council for Aliens Law Litigation (RVV/CCE), judgment of 15 May 2018, no 203 815

Council for Aliens Law Litigation (RVV/CCE), judgment of 18 September 2018, no 209 550

Council for Aliens Law Litigation (RVV/CCE), judgment of 11 April 2019, no 219 682

Council for Aliens Law Litigation (RVV/CCE), judgment 24 June 2019, no 223 104

Council for Aliens Law Litigation (RVV/CCE), judgment of 26 November 2019, no 229 288

Francophone Labour Tribunal Brussels (Tribunal du travail francophone de Bruxelles),  
judgment of 13 December 2017, 17/5651/A ([English summary](#))

### **3.4.3. Czechia**

Constitutional Court (Ustavní soud Ceske republiky), judgment of 12 April 2016, I.ÚS 425/16

Supreme Administrative Court, judgment of 17 June 2015, 1 Azs 39/2015-56

### **3.4.4. Estonia**

Tallinn Circuit Court (Court of Appeal), judgment of 23 December 2015, no 3-15-2383

Tallinn Circuit Court (Court of Appeal), judgment of 18 August 2017, no 3-17-1361

Tallinn Circuit Court (Court of Appeal), judgment of 8 November 2018, no 3-18-808

### 3.4.5. France

Constitutional Council (Conseil constitutionnel), decision of 21 March 2019, no 2018-768 QPC, FR:CC:2019:2018.768.QPC

Council of State (Conseil d'état, Assemblée), judgment of 21 December 2012, *Mme AB et Mlle CD-B*, no 332491, FR:CEASS:2012:332491.20121221

Council of State (Conseil d'état), judgment of 6 November 2019, no 422017, FR:CECHR:2019:422017.20191106

Court of Cassation, First Civil Chamber (Cour de cassation, première chambre civile), judgment of 3 October 2018, no 18-19.442, FR:CCASS:2018:C101020

National Court of Asylum Law (Cour national du droit d'asile (CNDA)), judgment of 13 February 2014, *Ms K*, no 12022774

CNDA, judgment of 24 March 2015, *J.E.F.*, no 10012810

CNDA, judgment of 9 June 2016, *Ms D.*, no 16001323

CNDA, judgment of 21 June 2016, *M. Q*, no 15004692 C

CNDA, judgment of 5 October 2016, *Mme Y*, no 14012645 C

CNDA, judgment of 13 February 2017, *M. E.*, no 16017097 C

CNDA, judgment of 30 March 2017, *Mme F.*, no 16015058 R

CNDA, judgment of 19 April 2017, *Mme C.*, no 16034664

CNDA, judgment of 30 May 2017, *M. S.*, no 16015675 C

CNDA, judgment of 1 December 2017, *Mme M. N., Mme D., Mme M. N. et M. K. N.*, nos 17033719 – 17033718 – 17033841 – 17033840 C.

CNDA, judgment of 22 January 2018, *M. X., Mme C. épouse X., M. X., Mme T., M. X., M. X.*, nos 17030975 – 17031078 – 17035295 – 17031240 – 17031077 – 17030908 C

CNDA, judgment of 2 February 2018, *Ms A.*, no 17034030 C

CNDA, judgment of 20 March 2019, *Mme K.*, no 18030347 C

CNDA, judgment of 28 June 2019, *OFPRA c M. T. alias S. et Mme K.T.*, nos 18024910–18024911 C

CNDA, judgment of 2 October 2019, *Mme L.*, no 19003209 C

CNDA, judgment of 3 October 2019, *M. H.*, no 18031476 C

CNDA, judgment of 13 January 2020, *M. A.*, no 17016120 C

Administrative Court of Appeal of Douai, 19 September 2017, no 17DA00024

Administrative Tribunal of Toulouse, judgment of 9 November 2018, no 1805185 (English summary)

### 3.4.6. Germany

Federal Constitutional Court (Bundesverfassungsgericht), judgment of 18 July 2012, [1 BvL 10/10](#) (English translation)

Federal Constitutional Court (Bundesverfassungsgericht), decision of 17 September 2014, [2 BvR 939/14](#)

Federal Court (Bundesgerichtshof), order of 11 October 2012, [V ZB 154/11](#)

Federal Court (Bundesgerichtshof), order of 13 September 2017, [XII ZB 497/16](#)

Federal Administrative Court (Bundesverwaltungsgericht), order of 18 July 2001, [1 B 118.01](#)

Federal Administrative Court (Bundesverwaltungsgericht), judgment of 29 May 2008, [10 C 11.07](#)

Federal Administrative Court (Bundesverwaltungsgericht), judgment of 19 April 2018, [1 C 29.17](#)

Federal Administrative Court (Bundesverwaltungsgericht), Judgment of 8 May 2019, [8 C 3.18](#), DE:BVerwG:2019:080519U8C3.18.0

Higher Administrative Court Hamburg (Hamburgisches Oberverwaltungsgericht, Germany), judgment of 9 February 2011, [4 Bs 9/11](#)

Higher Administrative Court of Baden-Württemberg (Verwaltungsgerichtshof Baden-Württemberg), judgment of 7 March 2013, [A 9 S 1872/12](#)

Higher Administrative Court of Bavaria (Bayerischer Verwaltungsgerichtshof), judgment of 16 August 2016, [12 CS 16.1550](#) (English summary)

Higher Administrative Court of Baden-Württemberg (Verwaltungsgerichtshof Baden-Württemberg), judgment of 14 September 2016, [A 11 S 1125/16](#)

Higher Administrative Court of Bavaria (Bayerischer Verwaltungsgerichtshof), judgment of 5 April 2017, [12 BV 17.185](#)

Administrative Court Potsdam (Verwaltungsgericht Potsdam, Germany), judgment of 27 April 2017, [6 K 338/17.A \(English summary\)](#)

Higher Administrative Court of Bavaria (Bayerischer Verwaltungsgerichtshof), judgment of 23 May 2017, [13a B 17.30111](#)

Higher Administrative Court of Baden-Württemberg (Verwaltungsgerichtshof Baden-Württemberg), judgment of 16 October 2017, A 11 S 512/17

Administrative Court Münster (Verwaltungsgericht Münster), order of 20 December 2018, [2 L 989/18.A](#)

Administrative Court Bayreuth (Verwaltungsgericht Bayreuth), judgment of 7 May 2019, [4 K 17.33417](#)

Administrative Court Münster (Verwaltungsgericht Münster), judgment of 23 July 2019, [11 K 3969/16.A](#)

Higher Administrative Court of Baden-Württemberg (Verwaltungsgerichtshof Baden-Württemberg), judgment of 29 July 2019, A 4 S 749/19

Higher Administrative Court of Hesse (Hessischer Verwaltungsgerichtshof), judgment of 27 September 2019, [7 A 1637/14.A](#)

Higher Administrative Court of Baden-Württemberg (Verwaltungsgerichtshof Baden-Württemberg), judgment of 29 October 2019, A 11 S 1203/19

Higher Administrative Court of Baden-Württemberg (Verwaltungsgerichtshof Baden-Württemberg), judgment of 29 November 2019, A 11 S 2376/19

### 3.4.7. Greece

Piraeus (Administrative Court of Appeal), judgment of 10 May 2018, [DEFPIR 231/2018, \(English summary\)](#)

Administrative First Instance Court (Corinth), judgment of 19 August 2013, [no 223/2013](#)

Administrative Court, judgment of 26 October 2018, [AK \(Syria\) v Minister of Public Order and Citizen Protection](#)

### 3.4.8. Ireland

High Court, judgment of 5 February 2010, [O. \(a minor\) v Minister for Justice, Equality and Law Reform and Another, \[2010\] IEHC 151](#)

High Court, judgment of 30 March 2012, [S.U.N. \(South Africa\) v Refugee Applications Commissioner, \[2012\] IEHC 338](#)

High Court, judgment of 5 March 2019, *X and Y v Minister for Justice and Equality*, [2019] IEHC 133

High Court, judgment of 3 April 2019, *X and Y (a minor) v Minister for Justice and Equality (No 2)*, [2019] IEHC 226

### **3.4.9. Italy**

Tribunal of Genoa (Tribunale di Genova, Italy), judgment of 13 May 2016, 15023/15 ([English summary](#))

Regional Administrative Court of Piedmont (Tribunale Amministrativo Regionale per il Piemonte, Italy), judgment of 31 December 2018, *Applicant (Nigeria) v Ministry of Interior (Prefettura di Novara)* ([English summary](#))

Tribunal of Bologna (Tribunale di Bologna, Italy), judgment of 20 January 2020, [8957/2018](#)

Regional Administrative Court of Campania (Tribunale Amministrativo Regionale della Campania, Italy), judgment of 20 March 2019, no [03927/2018](#) ([English summary](#))

### **3.4.10. Lithuania**

Supreme Court (Aukščiausiasis Teismas), judgment of 13 July 2015, *Q.N. and G.M. v State of the Republic of Lithuania*, Civil case no e3K-3-412-690/2015, Judicial procedure no 2-68-3-39174-2013-9

### **3.4.11. Netherlands**

The Hague Court (Rechtbank Den Haag), judgment of 9 June 2016, [NL 16.1136](#) and [NL 16.1138](#)

Regional Court of Amsterdam, decision of 13 July 2016, [16/13578](#) ([English summary](#))

### **3.4.12. Poland**

Supreme Court, judgment of 2 March 2017, *S.C., Z.C. and F.C., Sygn. akt II KK 358/16* ([English summary](#))

High Administrative Court, judgment of 8 May 2008, *X. v Ministry of Internal Affairs*, II OSK 237/07 ([English summary](#))

Court of Appeal (Warsaw), judgment of 22 June 2016, II Aka 59/16 (judgment in Polish and English summary)

### 3.4.13. Slovenia

Administrative Court, judgment of 17 January 2013, I U 1921/12 (English summary)

### 3.4.14. Spain

High Court of Justice (Tribunal Superior de Justicia), judgment of 22 November 2018, *Fermin v Ministry of Employment and Social Security*

### 3.4.15. Sweden

Migration Court of Appeal, judgment of 11 February 2014, MIG 2014:1

Migration Court of Appeal, judgment of 1 July 2016, MIG 2016:16 (English summary)

Migration Court of Appeal, judgment of 26 October 2016, MIG 2016:20

Migration Court of Appeal, judgment of 17 March 2017, MIG 2017:6

Migration Court of Appeal, judgment of 10 April 2018, MIG 2018:6

### 3.4.16. United Kingdom

House of Lords (UK), judgment of 25 March 1999, *Islam (AP) v Secretary of State for the Home Department and R v Immigration Appeal Tribunal and Another ex parte Shah (AP) (Conjoined Appeals)*, [1999] UKHL 20

House of Lords (UK), judgment 10 October 2006, *Secretary of State for the Home Department v K (FC) and Fornah v Secretary of State for the Home Department*, [2006] UKHL 46

Court of Appeal (Civil Division) of England and Wales, judgment of 20 May 2008, *Gichura v Home Office*, [2008] EWCA Civ 697, [2008] ICR 1287

Court of Appeal (Civil Division) of England and Wales, judgment of 28 January 2014, *R (Das) v Secretary of State for the Home Department*, [2014] EWCA Civ 45

Court of Appeal (Civil Division) of England and Wales, judgment of 27 July 2017, *AM (Afghanistan) v Secretary of State for the Home Department*, [2017] EWCA Civ 1123

Court of Appeal (Civil Division) of England and Wales, judgment of 18 January 2018, *R (RSM, a child) v Secretary of State for the Home Department*, [2018] EWCA Civ 18

Court of Appeal (Civil Division) of England and Wales, judgment of 23 May 2019, *BF (Eritrea) v Secretary of State for the Home Department*, [2019] EWCA Civ 872

High Court (Administrative Court) of England and Wales, judgment of 17 November 2005, *R (Mlloja) v Secretary of State for the Home Department*, [2005] EWHC 2833 (Admin)

High Court (Administrative Court) of England and Wales, judgment of 18 July 2007, *S and Others v Secretary of State for the Home Department*, [2007] EWHC 1654

High Court (Administrative Court) of England and Wales, judgment of 23 March 2011, *R (BE) v Secretary of State for the Home Department*, [2011] EWHC 690 (Admin)

High Court (Administrative Court) of England and Wales, judgment of 17 May 2013, *R (EO, RA, CE, OE and RAN) v Secretary of State of the Home Department*, [2013] EWHC 1236 (Admin), [2013] WLR (D) 190

High Court (Administrative Court) of England and Wales, judgment of 28 January 2014, *R (S) v Secretary of State for the Home Department*, [2014] EWHC 50 (Admin)

High Court (Administrative Court) of England and Wales, judgment of 9 April 2014, *R (Refugee Action) v Secretary of State for the Home Department*, [2014] EWHC 1033 (Admin)

High Court (Administrative Court) of England and Wales, judgment of 9 July 2014, *Detention Action v Secretary of State for the Home Department*, [2014] EWHC 2245 (Admin), [2014] 1 WLR(D) 310

High Court (Administrative Court) of England and Wales, judgment of 10 October 2014, *R (DK) v Secretary of State for the Home Department*, [2014] EWHC 3257 (Admin)

High Court (Administrative Court) of England and Wales, judgment of 3 July 2015, *R (RE, JM, KW, MY) v Secretary of State for the Home Department*, [2015] EWHC 2331 (Admin)

High Court of England and Wales (Queen's Bench), judgment of 12 January 2017, *Arf v Secretary of State for the Home Department*, [2017] EWHC 10 (QB)

High Court (Administrative Court) (England and Wales), judgment of 13 July 2018, *R (KG) v Secretary of State for the Home Department*, [2018] EWHC 1767 (Admin)

County Court (Central London), judgment of 23 October 2015, *Toussaint v Home Office*, no 2YL74948

Upper Tribunal, judgment of 29 July 1994, *Tiganov* (11193)

Upper Tribunal, judgment of 10 March 1997, *Aga* (14632)

Upper Tribunal, judgment of 25 March 1997, *Akyol* (14745)

Asylum and Immigration Tribunal, judgment of 29 January 1998, *Orman v Secretary of State for the Home Department* (15173), IAT [1998] INLR 431

Upper Tribunal (Immigration and Asylum Chamber), decision of 26 January 2010, *AZ (Trafficked women) Thailand v Secretary of State for the Home Department*, CG [2010] UKUT 118

Upper Tribunal (Immigration and Asylum Chamber), decision of 24 June 2011, *SW (lesbians – HJ and HT applied)*, CG [2011] UKUT 00251

Upper Tribunal (Immigration and Asylum Chamber), judgment of 6 January 2012, *AA (unattended children) Afghanistan*, CG [2012] UKUT 00016

Upper Tribunal (Immigration and Asylum Chamber), judgment of 18 June 2012, *Rawofi (age assessment) – standard of proof*, [2012] UKUT 00197

Upper Tribunal, judgment of 24 July 2014, *AK and SK (Christians: risk) Pakistan CG v Secretary of State for the Home Department*, [2014] UKUT 00569

Upper Tribunal (Immigration and Asylum Chamber), judgment of 19 June 2015, *NA and VA (protection: Article 7(2) Qualification Directive)*, [2015] UKUT 432

Upper Tribunal (Immigration and Asylum Chamber), judgment of 17 October 2016, *HD (trafficked women) Nigeria*, CG [2016] UKUT 454

Upper Tribunal, judgment of 11 November 2016, *R (ZM and SK) v London Borough of Croydon (Dental age assessment)*, [2016] UKUT 559

Upper Tribunal (Immigration and Asylum Chamber), judgment of 24 November 2016, *JA (child – risk of persecution) Nigeria*, [2016] UKUT 00560

Upper Tribunal (Immigration and Asylum Chamber), judgment of 12 December 2016, *DD v Secretary of State for the Home Department*, AA 12842 2015

Upper Tribunal (Immigration and Asylum Chamber), judgment of 29 June 2017, *R (FA) v London Borough of Ealing*, JR/12123/2016

Upper Tribunal (Immigration and Asylum Chamber), judgment of 14 September 2017, *R (AS (by his litigation friend Francesco Jeff)) v Kent County Council (age assessment; dental evidence)*, [2017] UKUT 446

Upper Tribunal, judgment of 6 September 2018, *ES (s82 NIA 2002, Negative NRM)*, [2018] UKUT 335

Upper Tribunal (Immigration and Asylum Chamber), judgment of 4 December 2018, *R (SM and Others) v Secretary of State for the Home Department (Dublin Regulation – Italy)*, [2018] UKUT 429

### 3.5. Courts and tribunals of non-EU Member States

Canada, Federal Court/Cour fédérale, judgment of 14 July 1999, *Griffith v Canada (Minister of Citizenship and Immigration)*, (1999) 171 FTR 240

Canada, Federal Court/Cour fédérale, judgment of 29 July 2007, *Streanga v Canada (Citizenship and Immigration)*, 2007 FC 792

Canada, Federal Court/Cour fédérale, judgment of 20 February 2008, *Streanga v Canada (Citizenship and Immigration)*, 2008 FC 231

Switzerland, Federal Court (Bundesgericht/Tribunal fédéral/Tribunale federale/Tribunal federal), judgment of 26 April 2017, 2C\_1052/2016, 2C\_1053/2016 (key extracts in German) (English summary)

Switzerland, Federal Court, judgment of 14 February 2018, 2C\_373/2017

Switzerland, Federal Administrative Court (Bundesverwaltungsgericht / Tribunal administratif fédéral / Tribunale amministrativo federale / Tribunal administrativ federal), judgment of 18 July 2016, D-6806

Switzerland, Federal Administrative Court, judgment of 11 May 2017, BVGE 2017 VI/5

Switzerland, Federal Administrative Court, judgment of 24 August 2017, D-5920/2016

## Appendix C. Select bibliography

### 1. Official documents

#### 1.1. European Union

Bureau of the Convention, *Explanations relating to the Charter of Fundamental Rights*, 14 December 2007, (2007/C303/02)

EASO, *Age Assessment Practice in Europe*, 2013

EASO, *Article 15(c) Qualification Directive (2011/95/EU)*, 2014

EASO, *Practical Guide on Family Tracing*, 2016

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

EASO, *Guidance on Reception Conditions: Operational standards and indicators*, 2016

EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016

EASO, *Ending International Protection: Articles 11, 14, 16 and 19 Qualification Directive (2011/95/EU) – Judicial analysis*, 2016

EASO, *Asylum procedures and the principle of non-refoulement – Judicial Analysis*, 2018

EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018

EASO, *Practical Guide on Age Assessment – Second edition*, 2018

EASO, *Detention of applicants for international protection in the context of the Common European Asylum System – Judicial Analysis*, 2019

EASO, *Practical guide on the best interests of the child in asylum procedures*, 2019

EASO, *Reception of applicants for international protection (Reception Conditions Directive 2013/33/EU) – Judicial Analysis*, 2020

EASO, *Exclusion: Articles 12 and 17 Qualification Directive - Judicial Analysis*, 2nd ed., 2020

EASO Tool for Identification of Persons with Special Needs

European Commission, [Proposal for a Council Directive on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection](#), Brussels, 12 September 2001, COM(2001) 510 final

European Commission, [Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers](#), Brussels, 3 December 2008, COM(2008) 815 final

European Commission, [Commission communication – Guidance for application of Directive 2003/86/EC on the right to family reunification](#) (COM(2014) 210 final), 3 April 2014

European Commission, [Commission Decision \(EU\) 2018/753 of 22 May 2018 confirming the participation of Ireland in Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection](#), Brussels, 22 May 2018, OJ L 126/8

European Commission, [Commission communication – COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement](#) (COM(2020/C 126/02)), 17 April 2020

European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, [\*The Implementation of the Common European Asylum System\*](#), May 2016

European Parliament, Committee on Women's Rights and Gender Equality, Interparliamentary Committee Meeting, 'Women refugees and asylum seekers in the EU: Current legislation and situation at national level', 3 March 2016

European Parliament, [Resolution of 3 May 2018 on the protection of children in migration](#) (2018/2666 (RSP)), 3 May 2018

European Parliament, [Report on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime](#) (2016/2328(INI)), 14 May 2018

European Union Agency for Fundamental Rights (FRA), [\*Handbook on European law relating to asylum, borders and immigration\*](#), 27 June 2014

FRA, [\*Guardianship for Children Deprived of Parental Care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking\*](#), 2014

FRA, [\*European legal and policy framework on immigration detention of children\*](#), 22 June 2017

## 1.2. Council of Europe

Council of Europe, European Social Charter (revised), adopted 3 May 1996 (entry into force: 1 July 1999)

Council of Europe, Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings, CETS no 197, 16 May 2005 (entry into force: 1 February 2008)

Council of Europe, Explanatory report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), CETS no 210, 11 May 2011 (entry into force: 1 August 2014)

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT Committee), *CPT Standards*, CPT/Inf/E (2002) – Rev. 2015

## 1.3. United Nations

### 1.3.1. United Nations High Commissioner for Refugees

UNHCR, *Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 Convention and the 1967 Protocol relating to the status of refugees*, 1979, reissued April 2019, HCR/1P/4/ENG/REV. 4

UNHCR, Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees, 7 May 2002, HCR/GIP/02/01

UNHCR, Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees to victims of trafficking and persons at risk of being trafficked, 7 April 2006, HCR/GIP/06/07

UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008

UNHCR, *Guidance note on refugee claims relating to female genital mutilation*, May 2009.

UNHCR, Guidelines on International Protection: Child asylum claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees, 22 December 2009, HCR/GIP/09/08

UNHCR Executive Committee, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR, 12 October 2010, no 110 (LXI)

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

UNHCR, Guidelines on International Protection no 9: Claims to refugee status based on sexual orientation and/or gender identity within the context of Article 1A(2) of the 1951

Convention and/or its 1967 Protocol relating to the status of refugees, 23 October 2012, HCR/GIP/12/09

UNHCR, *Beyond Proof – Credibility assessment in EU asylum systems*, May 2013

UNHCR, UNHCR annotated comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), April 2015

UNHCR, UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum – Case no CIK-1938/2014 – Lithuanian Supreme Court, 1 June 2015

UNHCR and International Detention Coalition (IDC), *Vulnerability Screening Tool – Identifying and addressing vulnerability: a tool for asylum and migration systems*, 2016

UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of *M.S. v Slovakia and Ukraine* (appl. no 17189/11) before the European Court of Human Rights, 1 June 2016

UNHCR, ‘UNHCR’s position regarding the detention of refugee and migrant children in the migration context’, January 2017

UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018

### **1.3.2. Other UN bodies**

UN Assistance Mission in Afghanistan and Office of the High Commissioner for Human Rights, *Harmful traditional practices and implementation of the law on elimination of violence against women in Afghanistan*, 9 December 2010

UN Committee on the Rights of the Child (CRC), General comment no 5 (2003) – General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), November 2003, CRC/GC/2003/527

UN CRC, General comment no 6 (2005) – Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, CRC/GC/2005/6

UN CRC, General comment no 12 (2009) – The right of the child to be heard, 1 July 2009, CRC/C/GC/12

UN CRC, General comment no 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14

UN Committee against Torture, General comment no 3 of the Committee against Torture – Implementation of Article 14 by States parties, 19 November 2012, CAT/C/GC/3

UN Committee on the Elimination of Discrimination against Women, General recommendation no 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 14 November 2014, CEDAW/C/GC/21

UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and CRC Committee, Joint general comment no 4 (2017) and no 23 (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23

UN Committee on the Rights of Persons with Disabilities, General comment no 1 (2014): Article 12 equal recognition before the law, 19 May 2014, CRPD/C/GC/1

UN General Assembly, Declaration of the Rights of the Child, 20 November 1959, A/Res/1386(XIV)

UN General Assembly, UN Principles for Older Persons, resolution 46/91 of 16 December 1991

UN High Commissioner for Human Rights, *Istanbul Protocol – Manual on the effective investigation and documentation of torture and other cruel, inhuman and degrading treatment or punishment*, 2004, PTS No 8/Rev.1

UN Children's Fund (UNICEF) (T. Smith and L. Brownlees), *Age Assessment: A technical note*, January 2013

UNICEF (R. Hodgkin and P. Newell), *Implementation Handbook for the Convention on the Rights of the Child*, 3rd ed., 2007

UN Women, UNICEF and UN Development Programme, *Informal Justice Systems – Charting a course for human rights-based engagement*, 2012

#### **1.4. International Association of Refugee and Migration Judges publications**

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

EASO, *Qualification for International Protection (Directive 2011/95/EU) – Judicial analysis*, 2016

EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018

EASO, *Asylum procedures and the principle of non-refoulement – Judicial Analysis*, 2018

## 2. Other publications

Asylum Information Database (AIDA) and European Council on Refugees and Exiles (ECRE), *The Concept of Vulnerability in European Asylum Procedures*, 2017

M. Crock, C. Ernest and R. McCallum, ‘*Where disability and displacement intersect: Asylum seekers and refugees with disabilities*’, *International Journal of Refugee Law*, Vol. 24, No 4, 2013, pp. 735–764

ECRE, *Not There Yet: An NGO perspective on challenges to a fair and effective Common European Asylum System*, 2013

ECRE and European Legal Network on Asylum, *ECRE/ELENA case law note on the application of the Dublin Regulation to family reunion cases*, February 2018

European Law Institute, *Statement of the European Law Institute: Detention of asylum seekers and irregular migrants and the rule of law*, 2017

W. W. Greulich and S. Idell Pyle, *Radiographic atlas of skeletal development of the hand and wrist*, 2nd ed., Stanford University Press, CA, 1959

Lee Hasselbacher, ‘State obligations regarding domestic violence: The European Court of Human Rights, due diligence, and international legal minimums of protection’, *Northwestern Journal of International Human Rights*, Vol. 8, No 2, 2010

J. Herlihy, ‘Evidentiary assessment and psychological difficulties’, in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures*, Martinus Nijhoff, Leiden/Boston, 2005, pp. 123–137

International Commission of Jurists (ICJ), *The Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007

ICJ, *The Yogyakarta Principles plus 10 – Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles*, 10 November 2017

Ireland, International Protection Appeals Tribunal, Chairperson’s guideline no 2019/1 on taking evidence from appellants and other witnesses, 28 January 2019

F. Krill, ‘The protection of women in international humanitarian law’, *International Review of the Red Cross*, No 249, 1985

Oslo University Hospital, Department of Forensic Medicine, Division of Laboratory Medicine, Manual – BioAlder: A tool for using biological tests to assess the age of unaccompanied minor asylum-seekers, version 1, 19 June 2017

J. Pobjoy, *The Child in International Refugee Law*, Cambridge University Press, London, 2017

University of Sussex, ‘Sexual Orientation and Gender Identity Claims of Asylum: A European human rights challenge – SOGICA’.

UK, Asylum and Immigration Tribunal and Immigration Appellate Authority, *Immigration Appellate Authority – Asylum Gender Guidelines*, 1 November 2000

UK, Tribunals Judiciary, Practice Direction – First-tier and Upper Tribunal: Child, vulnerable adult and sensitive witnesses

UK, Tribunals Judiciary, Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance

World Health Organization, London School of Hygiene and Tropical Medicine and Daphne Programme of the European Commission, *WHO Ethical and Safety Recommendations for Interviewing Trafficked Women*, 2003

## Appendix D. Examples of good practice in international protection proceedings before courts or tribunals under the APD (recast)

This appendix provides examples of good practice by courts and tribunals in court proceedings concerning vulnerable appellants in international protection cases. After initially listing some points concerning vulnerability in general, it goes on to provide good practice examples that are relevant to:

- minor appellants,
- appellants where sexual orientation and/or gender identity are at issue,
- appellants with disabilities,
- appellants suffering from serious illness,
- appellants suffering from mental disorders,
- appellants suffering from serious psychological or physical consequences of torture or other inhuman or degrading treatment,
- appellants suffering the consequences of rape or sexual violence,
- victims of human trafficking.

Practice is dependent on the national judicial system. Some Member States' courts or tribunals address the matter of vulnerability in practice directions. In the UK, for instance, there is a relevant joint presidential guidance note of 2010<sup>755</sup>, to which is appended a 2008 practice direction<sup>756</sup>. It applies in the UK's tribunal system and is applicable to children, vulnerable adults<sup>757</sup> and sensitive witnesses<sup>758</sup>.

<sup>755</sup> Tribunals Judiciary (UK), Joint Presidential Guidance Note no 2 of 2010: Child, vulnerable adult and sensitive appellant guidance, from which some of the guidance in this appendix is derived. The note was 'developed for the First Tier Immigration and Asylum Chamber following the Guidance issued by the Senior President of Tribunals regarding Child, Vulnerable Adult and Sensitive Witnesses' (i.e. Tribunals Judiciary (UK), Practice Direction – First-tier and Upper Tribunal: Child, vulnerable adult and sensitive witnesses). It was issued by the Upper Tribunal and First Tier Tribunal of the Immigration and Asylum Chamber for application in those tribunals.

<sup>756</sup> Tribunals Judiciary (UK), Practice Direction – First Tier and Upper Tribunal: Child, vulnerable adult and sensitive witnesses, 2008.

<sup>757</sup> Under UK law, 'vulnerable adult' here means, in accordance with Section 59 of the Safeguarding Vulnerable Groups Act 2006, 'a person [who] has attained the age of 18 and – (a) he is in residential accommodation, (b) he is in sheltered housing, (c) he receives domiciliary care, (d) he receives any form of health care, (e) he is detained in lawful custody, (f) he is by virtue of an order of a court under supervision by a person exercising functions for the purposes of Part 1 of the Criminal Justice and Court Services Act 2000 ... , (g) he receives a welfare service of a prescribed description, (h) he receives any service or participates in any activity provided specifically for persons who fall within subsection (9), (i) payments are made to him (or to another on his behalf) in pursuance of arrangements under section 57 of the Health and Social Care Act 2001 ... , or (j) he requires assistance in the conduct of his own affairs'.

<sup>758</sup> UK, Practice Direction – First Tier and Upper Tribunal: Child, vulnerable adult and sensitive witnesses, op. cit. (fn. 756 above), para. 1(c), 'an adult witness where the quality of the evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with giving evidence in the case'.

### Vulnerability in general

- Under the UK's practice direction, vulnerable individuals should be called as witnesses only where the tribunal determines that the evidence is necessary to enable the fair hearing of the case and where their welfare would not be prejudiced by doing so<sup>759</sup>. Such a decision is to be made referring to all available evidence and the submissions of the parties<sup>760</sup>.
- If possible, issues and solutions should be identified before the hearing<sup>761</sup>.
- It may be appropriate to direct that a vulnerable person's evidence be given by telephone, video link or other means, or to direct that a person be appointed for the purpose of the hearing who has the appropriate skills or experience in facilitating the giving of evidence by a child, vulnerable adult or sensitive witness<sup>762</sup>.
- It may be appropriate to invite input from interested persons, such as a child's parents<sup>763</sup>.
- It may be advisable for a vulnerable witness to be spared the ordeal of giving live evidence a second time. Where giving evidence on a second occasion is recognised as a potential ordeal, consideration might be given to referring the claim back to a differently constituted panel for redetermination, with the caveat that the transcript of the applicant's evidence taken in the first hearing be accepted as evidence without the need for the applicant to testify orally again, except with respect to questions or further evidence that might be required to be presented by the applicant, another party, or the court or tribunal<sup>764</sup>.
- In the UK, a tribunal may exclude any or all members of the public from a hearing or part of a hearing if it is necessary, *inter alia*, to protect the private life of a party or the interests of a minor<sup>765</sup>. UK tribunals may also, in exceptional circumstances, exclude any or all members of the public from any hearing or part of a hearing to ensure that publicity does not prejudice the interests of justice, but only if and to the extent that it is strictly necessary to do so<sup>766</sup>. In some Member States the hearing will, by default, be in private.
- Sometimes a court or tribunal will have to be proactive in engaging with vulnerable appellants to ensure they have effective representation. For example, if a vulnerable applicant has no legal representation and, despite having a right to an oral hearing, elects for a papers-only appeal, the court or tribunal may see fit to write to them to explain that their appeal nonetheless will be by way of an oral hearing and that they can, and may wish to, engage legal representation.
- A vulnerable appellant should be given adequate time before the hearing to familiarise themselves with the hearing room<sup>767</sup>.
- A case involving a vulnerable person should be listed first on the day's agenda, ahead of other cases<sup>768</sup>.
- If the vulnerable person is not legally represented, consider whether or not an adjournment would enable representation to be obtained<sup>769</sup>.
- A well-formulated introduction helps alleviate anxiety. Taking simple steps such as greeting everyone with a smile when you come in, introducing yourself and everyone and explaining what the court or tribunal's role is can assist in this regard. The order of proceedings can be important in creating effective conditions for a vulnerable person to give evidence.
- Do not assume that a particular vulnerable appellant will want specific or particular arrangements<sup>770</sup>.
- Signpost a difficult issue by indicating that the court appreciates it is not pleasant to talk about them and that the court just has some very particular questions regarding the matters in question.
- Moderate the tone or content of questioning as appropriate.
- If an appellant is identified as vulnerable during the hearing, an adjournment may be required to enable expert evidence to be called and/or instructions to be taken<sup>771</sup>.

<sup>759</sup> UK, *Practice Direction – First Tier and Upper Tribunal: Child, vulnerable adult and sensitive witnesses*, op. cit. (fn. 756 above), para. 1(c), para. 2.

<sup>760</sup> Ibid., para. 3. The joint presidential guidance note provides further guidance on child, vulnerable adult and sensitive appellants before the UK First Tier Tribunal (*Joint Presidential Guidance Note no 2*, op. cit. (fn. 755 above)).

<sup>761</sup> UK, *Joint Presidential Guidance Note no 2*, op. cit. (fn. 755 above), para. 4.

<sup>762</sup> UK, *Practice Direction – First Tier and Upper Tribunal: Child, vulnerable adult and sensitive witnesses*, op. cit. (fn. 756 above), para. 7.

<sup>763</sup> Ibid., para. 4.

<sup>764</sup> See for example Federal Court / Cour fédérale (Canada), judgment of 14 July 1999, *Griffith v Canada (Minister of Citizenship and Immigration)*, (1999) 171 FTR 240.

<sup>765</sup> This is set down in secondary law in the UK. See Statutory Instrument 2005/230, r. 54(3)(b).

<sup>766</sup> This is set down in secondary law in the UK. See *ibid.*, r. 54(4).

<sup>767</sup> UK, *Joint Presidential Guidance Note no 2*, op. cit. (fn. 755 above), para. 7.

<sup>768</sup> Ibid., para. 5.1(iv).

<sup>769</sup> Ibid., para. 5.1(vi).

<sup>770</sup> Ibid., para. 4.

<sup>771</sup> Ibid., para. 10.2(viii).

### Minors

- Children have specific needs that are related in particular to their age and lack of independence, and to their asylum seeker status<sup>772</sup>.
- The CRC requires states to ‘take appropriate measures to ensure that a child who is seeking refugee status ... whether unaccompanied or accompanied ... receive[s] appropriate protection and humanitarian assistance’<sup>773</sup>.
- In view of the potential vulnerability of minors, particular priority and care is to be given to the handling of their cases, with close attention being paid to their welfare at all times.
- Be guided by the child’s best interests at all times.
- Specialised training is often a prerequisite for a court or tribunal to be able to hear minors’ appeals. In Ireland, for example, a 2-day UNHCR training module is obligatory for decision-makers.
- Ensure the hearing is less formal than typical hearings.
- Ensure the minor’s representative is present.
- Permit the minor to have as many appropriate adults (including social workers) in support at the hearing as they want.
- Consider if it is appropriate for a minor to make a statement in the presence of a person who, although acting as a responsible adult, is known to have strong influence over the minor<sup>774</sup>. Do not assume that a child wants a specific person, even a guardian or parent, with them during the hearing<sup>775</sup>.
- The court or tribunal should be mindful that ‘A child, by reason of his lack of knowledge, experience and maturity, cannot be expected to comply with procedures in the same way as an adult. Of course a child may lie as well as tell the truth, but he may also find it more difficult to answer questions with the necessary understanding and insight’<sup>776</sup>.
- The hearing should be as informal as possible.
- PTSD and resulting arrested emotional development may have an impact on a minor’s ability to give an account of distressing historical events<sup>777</sup>.
- A court or tribunal should take care not to impute expectations to a minor applicant without consideration of their maturity or of whether or not those expectations are realistic given their maturity and particular circumstances<sup>778</sup>.
- Explore the issues with legal representatives / relevant responsible adults before, or instead of, hearing evidence from a minor<sup>779</sup>.
- Although it may appear that a court or tribunal is unlikely to be assisted by hearing the evidence of a minor who is 12 or younger, young children also have a right to express their views on matters directly affecting them and may well be able to express them<sup>780</sup>.
- A change in the vocabulary used and in tone may be necessary (dependent on age). Avoid jargon. Smile more during proceedings.
- If possible, wear something other than an all-black/charcoal/navy suit or dress if such attire could be intimidating for a young child.

<sup>772</sup> ECtHR (GC), 2014, *Tarakhel v Switzerland*, op. cit. (fn. 48 above), para. 99.

<sup>773</sup> Article 22(1) CRC. See also ECtHR, 2012, *Popov c France*, op. cit. (fn. 336 above), cited at ECtHR (GC), 2014, *Tarakhel v Switzerland*, op. cit. (fn. 48 above), para. 99.

<sup>774</sup> Tallinn Circuit Court (Estonia), judgment of 23 December 2015, case no 3-15-2383.

<sup>775</sup> UK, *Joint Presidential Guidance Note no 2*, op. cit. (fn. 755 above), para. 10.1(iv).

<sup>776</sup> High Court of England and Wales (Administrative, UK), Judgment of 17 November 2005, *R (Milloja) v Secretary of State for the Home Department*, [2005] EWHC 283 (Admin), para. 33.

<sup>777</sup> Upper Tribunal (UK), judgment of 6 January 2012, *AA (unattended children) Afghanistan*, CG [2012] UKUT 00016 (IAC), para. 11.

<sup>778</sup> High Court (Ireland), judgment of 5 February 2010, *O (a minor) v Minister for Justice, Equality and Law Reform and Anor*, [2010] IEHC 151.

<sup>779</sup> Upper Tribunal (UK), judgment of 31 May 2013, *ST (Child asylum seekers) Sri Lanka*, [2012] UKUT 00292 (IAC).

<sup>780</sup> Contrast UKUT, 2013, *ST (Child asylum seekers) Sri Lanka*, op. cit. (fn. 779 above), with CRC Committee, General comment no 14, op. cit. (fn. 88 above), Section 1.A, second para.: ‘The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child’s views in determining his or her best interests’; and CRC Committee, 2018, *Y. B. and N.S. v Belgium*, op. cit. (fn. 366 above), para. 8.8, concerning a child who was ‘5 years old when the second decision on the authors’ application for a humanitarian visa was made and ... would have been perfectly capable of forming views of her own regarding the possibility of living permanently with the authors in Belgium’.

### Minors

- Check on the minor's comfort before they give evidence (are they cold/hot, would they like water, etc.).
- The court or tribunal should always ask the minor what they wish to be called. 'Mr' or 'Ms' is likely to be too formal in this context. Normally, it will be appropriate to refer to a minor by their first name.
- Ensure that it is clearly explained at the outset of the hearing what will happen during it.
- Frequently explain in plain terms what is happening.
- Having paper and pens available for younger minors to draw may be helpful.
- Do not wait for the minor to request a break. Offer one. Take regular breaks.
- Give the child an idea of when to expect the decision and explain that they should not worry about it.
- If applicable and appropriate, in a clear-cut case, give an oral indication of a grant to avoid further anxiety for a minor.
- A court or tribunal should alert legal representatives if it intends to depart from a favourable assessment of credibility in respect of a minor<sup>781</sup>.
- Special arrangements may need to be made for unaccompanied minors attending an oral hearing.
- The UK tribunals hold a pre-review hearing for all applicants who, at the date of the application for asylum, are under the age of 18<sup>782</sup>.
- Guidance in case-law from the UK<sup>783</sup> sets out the following checklist of considerations for the hearing of a minor's appeal.
  - What was the age of the child at the date of application for asylum?
  - Should the hearing be held in camera or should it be open to the public? Has the representative requested that the public be excluded?
  - Should the venue of the hearing be changed to accommodate more child-friendly surroundings?
  - Have applicable national rules and UNHCR guidelines concerning children's evidence been considered?
  - Is it possible for the child to give evidence by video?

<sup>781</sup> UKUT, 2013, *ST (Child asylum seekers) Sri Lanka*, op. cit. (fn. 779 above).

<sup>782</sup> Asylum and Immigration Tribunal (UK), judgment of 29 January 1998, *Orman v Secretary of State for the Home Department*, IAT [1998] INLR 431.

<sup>783</sup> Ibid.

### Sexual orientation and/or gender identity

- It will be appropriate to consider what procedural measures are necessary in respect of LGBTI claims on a case-by-case basis. It may be appropriate to hear them in camera.
- Detailed questioning on the sexual practices of an applicant for international protection is precluded<sup>784</sup>.
- Decision-makers should maintain an objective and impartial approach so that they do not reach conclusions based on stereotypical, superficial, erroneous or inappropriate perceptions of gender<sup>785</sup>.
- The ‘difference, stigma, shame, harm’ (DSSH) model<sup>786</sup> may be of assistance. It provides a methodology for decision-makers questioning an applicant to obtain effective evidence in respect of claims based on sexual orientation and gender identity.
- UNHCR recommends the following procedural measures in cases relating to sexual orientation and/or gender identity<sup>787</sup>:
  - ‘i. An open and reassuring environment is often crucial to establishing trust between the interviewer and applicant and will assist the disclosure of personal and sensitive information. At the beginning of the interview, the interviewer needs to assure the applicant that all aspects of his or her claim will be treated in confidence. Interpreters are also bound by confidentiality.
  - ‘ii. Interviewers and decision makers need to maintain an objective approach so that they do not reach conclusions based on stereotypical, inaccurate or inappropriate perceptions of LGBTI individuals. The presence or absence of certain stereotypical behaviours or appearances should not be relied upon to conclude that an applicant possesses or does not possess a given sexual orientation or gender identity. There are no universal characteristics or qualities that typify LGBTI individuals any more than heterosexual individuals. Their life experiences can vary greatly even if they are from the same country.
  - ‘iii. The interviewer and the interpreter must avoid expressing, whether verbally or through body language, any judgement about the applicant’s sexual orientation, gender identity, sexual behaviour or relationship pattern. Interviewers and interpreters who are uncomfortable with diversity of sexual orientation and gender identity may inadvertently display distancing or demeaning body language. Self-awareness and specialized training (see iv.) are therefore critical aspects to a fair status determination.
  - ‘iv. Specialized training on the particular aspects of LGBTI refugee claims for decision makers, interviewers, interpreters, advocates and legal representatives is crucial.
  - ‘v. The use of vocabulary that is non-offensive and shows positive disposition towards diversity of sexual orientation and gender identity, particularly in the applicant’s own language, is essential. Use of inappropriate terminology can hinder applicants from presenting the actual nature of their fear. The use of offensive terms may be part of the persecution, for example, in acts of bullying or harassment. Even seemingly neutral or scientific terms can have the same effect as pejorative terms. For instance, although widely used, “homosexual” is also considered a derogatory term in some countries.
  - ‘vi. Specific requests made by applicants in relation to the gender of interviewers or interpreters should be considered favourably. This may assist the applicant to testify as openly as possible about sensitive issues. If the interpreter is from the same country, religion or cultural background, this may heighten the applicant’s sense of shame and hinder him or her from fully presenting all the relevant aspects of the claim.
  - ‘vii. Questioning about incidents of sexual violence needs to be conducted with the same sensitivity as in the case of any other sexual assault victims, whether victims are male or female. Respect for the human dignity of the asylum-seeker should be a guiding principle at all times.
  - ‘viii. For claims based on sexual orientation and/or gender identity by women, additional safeguards are presented in UNHCR’s Guidelines on Gender-Related Persecution. Women asylum-seekers should, for instance, be interviewed separately, without the presence of male family members in order to ensure they have an opportunity to present their case.
  - ‘ix. Specific procedural safeguards apply in the case of child applicants, including processing on a priority basis and the appointment of a qualified guardian as well as a legal representative.’

<sup>784</sup> CJEU (GC), 2014, *A, B and C*, op. cit. (fn. 32 above), para. 72; CJEU, 2018, *Fathi*, op. cit. (fn. 358 above), para. 89.

<sup>785</sup> UNHCR, *Beyond Proof – Credibility assessment in EU asylum systems*, May 2013, p. 28.

<sup>786</sup> The DSSH model was created by the UK barrister S. Chelvan and is referred to by UNHCR, Guidelines on International Protection no 9, op. cit. (fn. 157 above). See also EASO, *Evidence and credibility assessment in the context of the Common European Asylum System – Judicial Analysis*, 2018, p. 180.

<sup>787</sup> UNHCR, *Guidelines on International Protection no 9*, op. cit. (fn. 157 above), para. 60.

Disability
<ul style="list-style-type: none"> <li>• Ensure precise details of an applicant's disability are known, to enable appropriate arrangements for the hearing room regarding, for example, mobility or space for carers. Ensure the room is arranged prior to the sitting <sup>788</sup>.</li> <li>• Consider if expert evidence about disability is required and if an adjournment is necessary to this end <sup>789</sup>.</li> <li>• Having regard to the principle of human dignity, ensure legal aid and protection for persons who, due to their disability, are unable to defend their interests effectively <sup>790</sup>.</li> <li>• A court should not require a blind applicant to make a declaration in writing <sup>791</sup>.</li> <li>• In a hearing with a blind appellant, the Irish Tribunal thought it helpful, in order to orient the appellant and make him feel more comfortable, to describe to him the hearing room in detail, e.g. the shape of the desks and the distance from him to the tribunal member and to others present. The tribunal member also briefly introduced those present.</li> <li>• In keeping with the requirement under Article 12(3) CRPD to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity', support may 'take various forms, including recognition of diverse communication methods, allowing video testimony in certain situations, procedural accommodation, the provision of professional sign language interpretation and other assistive methods' <sup>792</sup>.</li> </ul>

Serious illness
<ul style="list-style-type: none"> <li>• Ensure precise details of a medical condition are known, to enable appropriate arrangements for the hearing room, e.g. regarding mobility, space for carers. Ensure the room is arranged prior to the sitting <sup>793</sup>.</li> <li>• Appellants may have any number of conditions that they may not think to disclose without prompting but may be material to their vulnerability in the context of appeal proceedings, e.g. type 1 diabetes, PTSD, anxiety, depressive symptoms (falling short of PTSD), migraine, headache or blood pressure problems. Ascertain at the outset whether or not an appellant has such an illness.</li> <li>• If there is a medical issue on which there is no or insufficient information, the court or tribunal could consider giving a direction allowing time for medical information, or updated medical information as the case may be, to be submitted if the medical issue has a specific bearing on the case.</li> <li>• If there is a medical report on file, the court or tribunal should say that it is aware of it and ask if the appellant would like to add anything. Depending on the response, the court or tribunal might enquire if the appellant is being medicated for the problem and note that they can take a break at any time. Short regular breaks may be appropriate.</li> <li>• A key task is to manage the hearing with breaks, being alert to the state of the appellant during the hearing, by watching for, for example, triggering of the recollection of events for PTSD victims; undue levels of anxiety that impair the giving of evidence (when the appellant is 'shutting down' or becoming tearful); and engaging with their legal representative with respect to any specific requests.</li> <li>• Be conscious of the effect of stigma in relation to illness in a person's country of origin. In a case in Belgium, an applicant with HIV emphatically requested an Amharic interpreter from a country other than the applicant's country of origin, Ethiopia, because of discrimination against people with HIV. The court did not accede to this request and the decision was annulled <sup>794</sup>.</li> </ul>

<sup>788</sup> UK, Joint Presidential Guidance Note no 2, op. cit. (fn. 755 above), para. 5.1(ii).

<sup>789</sup> Ibid., para. 5.1(vii).

<sup>790</sup> Tallinn Circuit Court (Estonia), judgment of 18 August 2017, case no 3-17-1361.

<sup>791</sup> Ibid.

<sup>792</sup> CRPD Committee, General Comment no 1 (2014): Article 12 Equal Recognition before the Law, 19 May 2014, CRPD/C/GC/1, para. 39.

<sup>793</sup> UK, Joint Presidential Guidance Note no 2, op. cit. (fn. 755 above), para. 5.1(ii).

<sup>794</sup> Council for Aliens Law Litigation (RVV/CCE, Belgium), judgment of 15 May 2018, 203 815.

### Mental disorders

- If an appellant has a history of mental illness, a medical report should be produced dealing with their mental history and specifically addressing their fitness to give oral evidence. In addition, if the report can do so, it should explain whether or not such evidence is likely to be influenced by their condition <sup>795</sup>.
- If no report is available, consider if expert evidence about mental health is required, and if an adjournment is necessary to this end <sup>796</sup>.
- In assessing oral evidence, pay attention to the illness/disorder, its effects on the appellant's recollection and its relevance to the normal stress of giving evidence <sup>797</sup>.
- Consider what procedural measures are necessary in appeals involving people with psychological problems due to trauma, mental illness etc., on a case-by-case basis. It may be appropriate to hear the appeal in camera.
- In the UK context, the power to determine appeals without a hearing is to be exercised with extreme caution. It is only after investigation and consideration of any representations and with the assistance of a medical report that the power should be used <sup>798</sup>.
- If an appellant has any medical conditions evident from doctors' letters or medico-legal reports, particularly with reference to matters such as PTSD or depression/anxiety, the court or tribunal should ask and ascertain if they are fit to proceed, which also informs the appellant that the court or tribunal is aware of their medical condition. The court or tribunal might see fit also to ask if there is anything in the evidence that they are about to give that will cause the appellant particular upset, so that the court or tribunal can take any necessary steps to manage the manner in which the evidence is provided.
- If a person with mental illness is unrepresented, a court or tribunal may see fit to send them to the Member State's agency providing legal aid for appeals.
- Although it may be necessary to test the credibility of an appellant's statements, this should not be done in a derisory way by making statements questioning their mental health <sup>799</sup>.

### Persons suffering from serious psychological or physical consequences of torture or other inhuman or degrading treatment

- With respect to appellants who have relevant medical conditions evident from documents on file, e.g. PTSD, anxiety or social stressors, as a result of torture or other inhuman or degrading treatment, the court or tribunal may see fit to take more breaks during the hearing.
- Survivors of torture may, for example, feel faint or nauseous when giving evidence. The court or tribunal should ask if they would like to take a break, go for a walk, drink water etc., before resuming the hearing.

<sup>795</sup> Upper Tribunal (UK), judgment of 10 March 1997, *Aga* (14632; 10 March 1997).

<sup>796</sup> UK, Joint Presidential Guidance Note no 2, op. cit. (fn. 755 above), para. 5.1(vii).

<sup>797</sup> Upper Tribunal (UK), 1997, *Aga*, op. cit. (fn. 795 above).

<sup>798</sup> Ibid.

<sup>799</sup> Tallinn Circuit Court (Court of Appeals, Estonia), judgment of 8 November 2018, case no 3-18-808.

### Persons suffering consequences of rape or sexual violence

- It may be necessary to consider, *ex officio* if need be, specific measures to ensure that true access to justice is afforded to an appellant in respect of whom there is evidence of trauma. Such measures may include adopting a more informal procedure, giving sensitive evidence via video link or in writing, and hearing the appeal in private.<sup>800</sup>
- An appellant may be traumatised by recounting their experiences of sexual violence. Consider whether an oral hearing is necessary, or whether it is only for legal submissions that it is necessary to convene one.<sup>801</sup> Engage with the legal representatives on this and have them clarify any instructions from the appellant.
- Sensitivity to those giving evidence of particular forms of past violence may call for a court or tribunal to be composed of those whose gender is most likely to put a witness at ease and thus promote the interests of justice. The Upper Tribunal in the UK has recognised that a female victim of sexual abuse is entitled to a hearing conducted entirely by women.<sup>802</sup>
- It may be prudent to ensure that the interpreter is of the same sex.
- The standard notice of appeal may not address whether or not the appellant would prefer an interpreter of a particular sex. It may be prudent to ascertain if there is a preference. If necessary, a hearing can be adjourned to enable an interpreter of the preferred sex to attend.
- Not every female victim of rape or sexual violence will want a female legal representative, interpreter or decision-maker, however; the decision-maker should be respectful of the appellant's wishes in this regard.
- If it is compatible with national procedural rules, it may be prudent to hand over an appeal to a court or tribunal member of another sex if an appellant expresses a preference for a decision-maker of a different sex. If it becomes apparent from information on the file (e.g. a medico-legal report) that the sex of a decision-maker will give rise to a real risk of not obtaining the best evidence, it may be prudent to write to the appellant's legal representative highlighting that document and asking them to confirm instructions regarding any preference as to the sex of court or tribunal members.
- If hearings are normally open to the public, alternative arrangements may be prudent when the appellant is a victim of rape or sexual violence. The default in some Member States, such as Ireland, is for private hearings, so this issue will not arise in those Member States.
- If this has not already done, give the appellant time to attend a support and counselling service. Such support may, *inter alia*, enable them to establish a safe environment and tell their story, including by being better able to supplement the written report with shorter oral evidence.
- Consider if a report from a specialist body should be sought to assist in assessing the extent to which the appellant can provide effective testimony.
- At the outset of the hearing, it may be appropriate to ask the appellant's legal representative to ask any male legal apprentice or observer present to leave the hearing.
- It will be prudent to explain what guarantees of confidentiality apply within the court or tribunal.
- It will be prudent to tell appellants that they are free to request a break at any time and they do not need to give a reason for wanting a break.
- If an appellant is giving testimony relating to sexual violence and they appear distressed, it may be prudent to grant a short break.
- Assure the appellant that the hearing is confidential (if applicable).
- It may be that an appellant will only disclose that they were raped when they feel they can trust the court or tribunal sufficiently to disclose this. If this occurs, it may be appropriate to adjourn a hearing to allow the appellant to be referred to an appropriate support and counselling service. The court or tribunal should avoid doing a person additional harm by pushing them to give evidence and relive a traumatic experience when they are not ready.

<sup>800</sup> Asylum and Immigration Tribunal / Immigration Appellate Authority (UK), 'Immigration Appellate Authority – Asylum gender guidelines', 1 November 2000, para. 5.6, as recognised and applied in Upper Tribunal (UK), judgment of 29 July 1994, *Tiganov* (11193), and Upper Tribunal (UK), judgment of 25 March 1997, *Akyol* (14745).

<sup>801</sup> International Protection Appeals Tribunal (Ireland), *Chairperson's guidelines 2019/1 on taking evidence from appellants and other witnesses*, para. 4.2.

<sup>802</sup> UKUT, 1994, *Tiganov*, op. cit. (fn. 800); UKUT, 1997, *Akyol*, op. cit. (fn. 800).

### Persons suffering consequences of rape or sexual violence

- Where there are related cases, e.g. involving a married couple, and there are testimonies arising in one claim that is sensitive and not known by the other appellant (e.g. about a rape), practical measures may be needed to manage this both in the hearing and in the making of the decision.
- In the context of an appeal by a husband and wife, the wife may be reluctant to give evidence regarding rape or sexual violence, as this might be a taboo for the husband and/or he may not be aware of the matter. Ensure that such an appellant is able to give evidence in the absence of her husband/partner.
- Be vigilant that questions of a personal nature are asked in a sensitive way. When such a concern arises, the court or tribunal might see fit to intervene to progress matters, or highlight that the subject matter is very serious/sensitive and that the manner of questioning is inappropriate.

### Victims of human trafficking

- Seek clarification at the start from the parties, if applicable, that a particular sensitive issue is not disputed and then explain, if it is the case, that there will not be questions on that, in order to let the appellant know the topic is not being discussed.
- Victims of trafficking may not be able to reveal their personal history until some time after their arrival in the Member State.<sup>803</sup>
- Canadian jurisprudence suggests that giving evidence in open court against people traffickers must generate a real risk that the witness's identity will become known to them. The traffickers' reach may be very significant and they may be motivated to seek revenge.<sup>804</sup>
- The court or tribunal may see fit to permit a victim of trafficking not to give oral evidence, while ensuring that they may have an oral hearing if they so wish, including, if appropriate, on confidential issues.
- Article 12(4) of EU Anti-Trafficking Directive 2011/36/EU (as well as containing provisions on legal counselling and legal representation, guaranteeing confidentiality of the victim, and preferred gender of the interviewer and interpreter) protects against secondary victimisation of victims of human trafficking by requiring Member States to avoid:
  - '(a) unnecessary repetition of interviews during investigation, prosecution or trial;
  - '(b) visual contact between victims and defendants including during the giving of evidence such as interviews and cross-examination, by appropriate means including the use of appropriate communication technologies;
  - '(c) the giving of evidence in open court; and
  - '(d) unnecessary questioning concerning the victim's private life.'

<sup>803</sup> Upper Tribunal (IAC, UK), 2010, *AZ (Trafficked women) Thailand v SSHD*, op. cit. (fn. 488 above), para. 116, noting in particular UNHCR, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees to victims of trafficking and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07, para. 48. See also World Health Organization, London School of Hygiene and Tropical Medicine and Daphne Programme of the European Commission, *WHO Ethical and Safety Recommendations for Interviewing Trafficked Women*, 2003.

<sup>804</sup> See for example Federal Court (Cour fédérale, Canada), judgment of 29 July 2007, *Streanga v Canada (Citizenship and Immigration)*, 2007 FC 792; Federal Court (Cour fédérale, Canada), judgment of 20 February 2008, *Streanga v Canada (Citizenship and Immigration)*, 2008 FC 231.



## **Getting in touch with the EU**

### **In person**

All over the European Union there are hundreds of Europe Direct information centres. You can find the address of the centre nearest you at: [https://europa.eu/european-union/contact\\_en](https://europa.eu/european-union/contact_en)

### **On the phone or by email**

Europe Direct is a service that answers your questions about the European Union. You can contact this service:

- by freephone: 00 800 6 7 8 9 10 11 (certain operators may charge for these calls),
- at the following standard number: +32 22999696 or
- by email via: [https://europa.eu/european-union/contact\\_en](https://europa.eu/european-union/contact_en)

## **Finding information about the EU**

### **Online**

Information about the European Union in all the official languages of the EU is available on the Europa website at: [https://europa.eu/european-union/index\\_en](https://europa.eu/european-union/index_en)

### **EU publications**

You can download or order free and priced EU publications from the EU Bookshop at: <http://publications.europa.eu/eubookshop>. Multiple copies of free publications may be obtained by contacting Europe Direct or your local information centre (see [https://europa.eu/european-union/contact\\_en](https://europa.eu/european-union/contact_en)).

### **EU law and related documents**

For access to legal information from the EU, including all EU law since 1952 in all the official language versions, go to EUR-Lex at: <http://eur-lex.europa.eu>

### **Open data from the EU**

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



Publications Office  
of the European Union