

UNHCR COMMENTS AND RECOMMENDATIONS ON THE DRAFT MODIFICATION OF CERTAIN MIGRATION, ASYLUM-RELATED AND OTHER LEGAL ACTS FOR THE PURPOSE OF LEGAL HARMONISATION

1. Introduction

In accordance with its mandate responsibilities the United Nations High Commissioner for Refugees (UNHCR) is pleased to share with the Ministry of the Interior of Hungary its comments and recommendations on the “*Draft modification of certain migration, asylum-related and other legislative acts for the purpose of legal harmonisation*” (“Draft”) for the purpose of transposing of and legal harmonisation with relevant recast EU Asylum Law Directives, especially 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 Procedure Directive*) and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (*Recast Reception Directive*).

UNHCR offers these comments and recommendations as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate and, for assisting governments in seeking permanent solutions to the problem of refugees.¹ As set forth in its Statute, UNHCR fulfils its international protection mandate by, inter alia, “(p)romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto².” UNHCR’s supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”) according to which State parties undertake to “co-operate with the Office of the United Nations High Commissioner for Refugees (...) in the exercise of its functions and shall in particular facilitate its duty of supervising the application of the provisions of the Convention”. The same commitment is included in Article II of the 1967 Protocol relating to the Status of Refugees (“the 1967 Protocol”). UNHCR’s supervisory responsibility extends to Hungary, as it is Party to both instruments.

UNHCR’s supervisory responsibility has been reflected in European Union law, both primary and secondary. Article 78 (1) of the Treaty on the Functioning of the European Union³ stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Convention. Further, Declaration 17 to the Treaty of Amsterdam provides that “consultations shall be established with the United Nations High Commissioner for Refugees (...) on matters relating to asylum policy”.⁴ In addition, Article 18 of the Charter of Fundamental Rights of the European Union⁵ states that the right to

¹ Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, UN Doc A/1775, para. 1, available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

² *ibid.*, para. 8(a).

³ European Union, Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Communities (C 83) of 30 March 2010, available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML>.

⁴ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, Declaration on Article 73k of the Treaty establishing the European Community, OJ C 340, 10.11.1997, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

⁵ European Union, Charter of Fundamental Rights of the European Union, Official Journal of the European Communities (C 83) of 30 March 2010, 7 December 2000, available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF>.

asylum shall be guaranteed with due respect for the rules of the 1951 Convention and the 1967 Protocol.

UNHCR also wishes to highlight that EU Member States may introduce more favourable provisions in their national law than those stipulated in the recast asylum directives, as expressly foreseen in the recast directives themselves.⁶ These comments accordingly indicate where UNHCR recommends that the present Draft should exceed the minimum standards of the recast directives.

UNHCR welcomes the opportunity to share its comments and suggestions concerning the present Draft, which we submit, in the spirit of co-operation and mutual understanding, to the Ministry of Interior of Hungary for consideration. UNHCR fully supports the Hungarian Government's efforts to amend the asylum legislation in force and harmonize it in accordance with the standards laid down in relevant recast EU directives that have the potential to improve protection standards and practice across the Union.

UNHCR, as part of its on-going collaboration with the Government of Hungary and in the exercise of its supervisory function concerning the 1951 Convention, offers its support to the Government of Hungary and other stakeholders to assist with the transposition process. UNHCR herein reiterates its commitment to work closely with national authorities to seek positive outcomes to this critical transposition and implementation phase.

UNHCR notes that the main focus of the current Draft is twofold: on the one hand to transpose the relevant EU Directives and on the other hand to address challenges in the current law and to enhance efficiency, in particular in light of the large scale influx of mixed migration flows since 2013. As the Draft does not focus exclusively on the transposition process, UNHCR has included in these comments some additional issues not touched upon by the current Draft, which may further improve the quality of the asylum law.

2. General comments

Positive findings

UNHCR welcomes the definitions given in the Draft of special needs and guarantees accorded to applicants for international protection as per Articles 2 d) and 24 of the Recast Procedure Directive and Articles 2 k) and 21 of the Recast Reception Directive. (**Subsections 34 (1), (3) and 35 (2)**)

UNHCR welcomes that **Subsection 35 (1)** of the Draft introduces basic instructions on how to apply the best interest notion of the child as per Recital 33 of the Recast Procedure Directive.

UNHCR welcomes that the Draft proposes to transfer the tolerated stay status from Act II of 2007 on the conditions of entry and stay of third-country nationals (hereinafter referred to as Aliens Act) to Act LXXX of 2007 on Asylum (hereinafter referred to as Asylum Act). This shift introduces a greater degree of transparency and consistency. (**Sections 33 and 42**).

UNHCR welcomes that the Draft extends the scope of access of the legal aid provider to COI and expert opinions contained in the RSD case file. (**Subsection 49 (2)**).

⁶ Article 4 of the Recast Procedure Directive, Article 4 of the Recast Reception Directive, and Article 3 of the Recast Qualification Directive (QD) (2011/95/EU).

UNHCR welcomes that by virtue of **Subsection 55 (3)** of the Draft, appeals against decisions on Dublin transfers as per the Dublin III Regulation will have suspensive effect if the applicant requests for the suspension of the implementation of the decision.

UNHCR welcomes the deletion of **Subsection 35(6)** of the Asylum Act, which raised serious concerns regarding its compatibility with Article 1 of the UN Convention on the Rights of the Child, stipulating that any person under the age of 18 is considered a child.⁷ Further, UNHCR welcomes that **Subsection 42(2)** of the Asylum Act, limiting the prohibition of collecting information on subsequent applicants, has been deleted.⁸ (**Sections 48 and 77 of the Draft**).

Concerns

UNHCR is concerned that the Draft does not seek to amend legislative gaps in relation to detention of asylum-seekers. UNHCR is in particular concerned about the very lengthy period for automatic judicial review of detention, the lack of judicial remedy against a detention order, the detention of families with children and unaccompanied/separated children and the fact that the newly established system on alternatives to detention has not yet been reviewed.

UNHCR is further concerned about the very short time limit allocated for the submission of judicial review request and the removal of automatic suspensive effect attached to judicial review requests.

3. Detailed comments

Ad Subsections 34 (1), (3) and 35 (2)

Section 2 k) of the Act LXXX of 2007 on Asylum shall be replaced by the following provision:

“k) person with special reception needs: a vulnerable person, in particular, a minor, unaccompanied minor, elderly or disabled person, pregnant woman, single parent raising a minor child, victim of human trafficking, a person suffering from a serious illness, a person suffering from mental disorders, and a person who has undergone torture, rape or any other grave form of psychological, physical or sexual violence, including female genital mutilation, who is in need of special guarantees to enable the exercise of the rights granted to him/her as a person seeking recognition and to meet the obligations provided for applicants for recognition.”

Act LXXX of 2007 on Asylum shall be complemented by the following Section 2 o) – p):

“o) person with special procedural needs: a person who, due to his/her individual circumstance – in particular age, sex/gender, sexual orientation, gender identity, disability, serious illness, mental disorder, the consequence of torture, rape or other serious psychical, physical or sexual violence suffered by him/her – is able to exercise the rights granted to him/her as a person seeking recognition and to meet the obligations provided for applicants for recognition to a limited degree, therefore enjoys special procedural guarantees;

p) special procedural guarantees: all procedural safeguards granted by law for applicants

⁷ ‘If the person seeking recognition is an unaccompanied minor, the refugee authority shall, with no delay, provide for the appointment of a guardian for the case serving to represent the minor, unless the person seeking recognition is likely to become adult before the refugee authority would take an in-merit decision regarding the case.’ (emphasis added).

⁸ ‘Subsection (1) shall not apply if the same applicant submits an application after the adoption of a final and absolute decision of refusal or discontinuation with respect to his/her previous application and the Hungarian authority or court so decided that the prohibition of refoulement was not applicable.’

seeking recognition in view of their special procedural needs.”

Subsection 4 (3) of the Act LXXX of 2007 on Asylum shall be replaced by the following provision:

“(3) The provisions of this Act shall apply to persons with special reception or procedural needs with due consideration of their specific needs arising from their situation”

As mentioned above, UNHCR welcomes the proposed definition of special needs and guarantees accorded to asylum-seekers with special needs in compliance with the Recast Procedure Directive. The Recast Reception and Procedure Directives confer a clear obligation on Member States to assess special needs of asylum-seekers. No provision of the Draft seem to transpose Article 22 of the Recast Reception Directive on the assessment of special reception needs and none of the authorisations given in Sections 74-75 of the Draft seem to invite the Government or the Minister of Interior to establish such a mechanism by way of implementing legislation. UNHCR encourages the Government of Hungary to include in its draft amendments to Act LXXX a provision concerning the identification of persons with special needs. Reference is made to the regional project of UNHCR ‘*Ensuring effective responses to vulnerable asylum-seekers: Promotion of adequate standards for identification and claim determination for people with special needs*’.⁹

Ad Subsection 35 (1)

Act LXXX of 2007 on Asylum shall be complemented by the following Subsection 4 (1a)

“(1a) In the examination of the best interests of the child, the following factors shall in particular be taken into account:

- a) the possibilities of family reunification,
- b) the welfare and social development of the child, with particular attention to the child’s background,
- c) safety considerations, in particular when the child is at risk of becoming the victim of trafficking in humans, and
- d) the opinion of the child, in accordance with the child’s age and degree of maturity.”

As mentioned above, UNHCR welcomes the proposed Section 4 (1) (a) providing for basic orientation on which factors to take into account when assessing the best interests of a child. UNHCR notes that General Comment no. 14 of the Committee on the Rights of the Child provides for a much wider non-exhaustive list of the main aspects to be taken into account: identity, parent / caregiver’s view, child’s view, preservation of the family environment, maintaining or restoring relationships, care, protection and safety of the child, situation of vulnerability, child’s right to health, access to education. Presently, only a few of the above are included in the Draft. UNHCR recommends expanding the list of elements to be taken into account with the elements referred to in General Comment no. 14. It is furthermore recommended that a formal procedure be introduced for the assessment and determination of the best interests of a child as described by the recently published UNICEF-UNHCR document “Safe & Sound – What States can do to ensure respect for the best interest of unaccompanied and separated children in Europe”.¹⁰ Without such a formal mechanism in

⁹ The project is aimed at addressing the specific needs of vulnerable groups and promoting high quality decision-making and capacity building in the countries concerned. Detailed project description is available at: <http://www.unhcr-centraleurope.org/en/what-we-do/caring-for-vulnerable-groups/response-to-vulnerability-in-asylum.html>

¹⁰ Available

at: <http://www.refworld.org/docid/5423da264.html><https://mail.unhcr.org/owa/redir.aspx?SURL=3AAUUCkm923oBeCn-z7LtuncVkJXNTQbWwfY6KF_rUoAkmmUGY6jRCGgAdAB0AHAAOgAvAC8AdwB3AHcALgByAGUAZgB3AG8AcgB

place, there is a risk that the best interests assessment and determination principles are not applied in practice.

Ad Section 36

The following Subsection (3) shall complement Section 5 of Act LXXX of 2007 on Asylum:

“(3) The person seeking recognition in the absence of authentic documents suitable for identification shall be required to make best efforts for the clarification of his/her identity, thus, in particular, to contact his/her family members, relatives, legal representative, and – in the event of non-state or non-state linked actors of persecution – with the authorities of his/her country of origin.”

According to the justification to this amending provision, Article 12(1)(a) of the Recast Procedure Directive is being transposed through this provision specifying the content of the requirement relevant to the obligation to cooperate by the applicant with the authorities. The obligation to cooperate with the authorities is laid down in Article 4(1) of Directive 2011/95/EU (the “Qualification Directive”),¹¹ which states 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. Pursuant to Article 4(2) of the Qualification Directive, the elements that can be used to substantiate an application consist of the applicant’s statements and all the documentation *at the applicant’s disposal* [emphasis added] regarding the applicant’s age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.

In line with paragraph 195 of the UNHCR Handbook¹², the relevant facts of the individual case will have to be furnished in the first place by the applicant. It will then be up to the person charged with determining his or her status to assess the relevant elements of the application. The duty to cooperate means that Member States must cooperate with the applicant to ensure that all of the elements needed to substantiate the application are assembled. There may be limits as to what can be expected of the applicant in substantiating his or her application. Often, an applicant may not be able to support his or her statements by documentary or other proof. Persons in need of international protection may arrive with the barest necessities, and frequently without any documents. In addition, time elapsed since alleged events, cultural, social, gender and education background, age, feelings of stigma and shame, language challenges need to be taken into account when substantiating the relevant facts. If the applicant is unable to provide the necessary evidence, the examiner is required to use all the means at his/her disposal to obtain the necessary evidence in support of the application.

UNHCR would like to point out that Article 4(2) of the Qualification Directive **does not** stipulate an obligation on the part of the applicant to contact his/her relatives or the authorities of the country of origin. UNHCR has serious concerns about the introduction of this provision which obliges applicants, in case the agent of the persecution is a non-state actor, to contact

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¹¹ 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), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>.

¹² UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/IP/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>

the authorities in their country of origin. In UNHCR's view such obligation is **not in compliance with international legal standards on confidentiality** that are imposed on States.

UNHCR recalls that in ExCom Conclusion No. 93 (LIII) – 2002 it is recommended that asylum-seekers receive appropriate assistance from governments and non-governmental organizations, **including respect for their privacy**.¹³ The duty on the part of Member States to keep confidential any information obtained from applicants for international protection is further laid down in Article 48 of the Recast Procedure Directive.¹⁴ It is evident that confidentiality in asylum procedures is critically important, as the unauthorized disclosure of information regarding an individual application for international protection – or the fact that an application has been made – to third parties in the country of origin or elsewhere could endanger family members or associates of the applicant, the applicant in the event of return to the country of origin, and/or the applicant in the host State. Therefore UNHCR recommends that Section 36 of the Draft be amended to reflect the wording of Article 4(1) and (2) of the Qualification Directive. All reference to an alleged obligation on the part of the applicant to contact family, friends or authorities in the country of origin should be removed from the proposed section.

Ad Section 37

Act LXXX of 2007 on Asylum shall be complemented by the following Subsections 8 (3)-(4):

“(3) In the application of Article 1 point F c) in particular the following shall be deemed as contrary to the objectives and principles of the United Nations

- a) acts of terrorism;
- b) financing terrorism, and
- c) incitement of the acts in point a) and b).

(4) No refugee status shall be granted to a foreigner whose stay in Hungary is contrary to national security.”

The proposed Subsection 8(3) seems to transpose Recital 31 of the Qualification Directive, whereas Subsection 8(4) seems to transpose Article 14(5), in combination with Article 14(4)(a) of the Recast Qualifications Directive. UNHCR is concerned about both proposals.

As far as Recital 31 is concerned, the broad and general terms of Articles 1 and 2 of the Charter of the United Nations, which set out its purposes and principles, offer little guidance as to the criminal acts which could exclude a person from refugee status through the application of Article 1F (c) of the 1951 Convention. Article 1F (c) should be interpreted restrictively in light of the gravity of the consequences of exclusion from refugee protection. An interpretation of the language of Article 1F (c) to include acts of “*terrorism*” without proper qualification may lead to an overly extensive application of this particular exclusion clause, especially in view of the fact that “*terrorism*” is without a clear or universally agreed definition. For the purpose of interpreting and applying Article 1F (c), only those acts within the scope of United Nations Resolutions relating to measures combatting terrorism which impinge upon the international plane in terms of their gravity, international impact, and

¹³ UN High Commissioner for Refugees (UNHCR), *A Thematic Compilation of Executive Committee Conclusions, 6th edition, June 2011*, June 2011, available at: <http://www.refworld.org/docid/4f50cfbb2.html>.

¹⁴ Member States shall ensure that authorities implementing this Directive are bound by the confidentiality principle as defined in national law, in relation to any information they obtain in the course of their work.

implications for international peace and security, should give rise to exclusion under this provision.¹⁵

The proposed Subsection 8(4) intends to transpose Article 14(5) of the Recast Qualification Directive. Article 14(5) Qualification Directive stipulates that a Member State may decide **not to grant status** to an applicant when situations described in Article 14(4)(a) and (b) are at issue. These situations are notably the finding that the refugee in question constitutes a danger to the security of the Member State in which he or she is present, or the fact that he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.

UNHCR is of the view that Article 14(4) of the Qualification Directive departs from the exclusion clauses of the 1951 Convention, by adding the elements of Article 33(2) of the 1951 Convention (on exceptions to the non-refoulement principle) as a basis for exclusion from refugee status. Under the Convention, the exclusion clauses and the exception to the non-refoulement principle serve different purposes. The rationale of Article 1F of the 1951 Convention, which exhaustively enumerates the grounds for exclusion based on the conduct of the applicant, is twofold. Firstly, certain acts are so grave that they render their perpetrators undeserving of international protection. Secondly, the refugee protection framework should not stand in the way of prosecution of serious criminals. By contrast, Article 33(2) of the 1951 Convention deals with the treatment of refugees and defines the circumstances under which they could nonetheless be *refoulé*. It aims at protecting the safety of the country of refuge or of the community. The provision hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted by a final judgment of a particularly serious crime, poses a danger to the community.

Article 33(2) of the 1951 Convention was not, however, conceived as a ground for terminating or not granting refugee status. Assimilating the exceptions to the non-refoulement principle permitted under Article 33(2) to the exclusion clauses of Article 1F would therefore be incompatible with the 1951 Convention.

Based on the above, UNHCR recommends that Section 37 of the Draft be deleted in its entirety.

¹⁵ See UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, <http://www.unhcr.org/refworld/docid/3f5857d24.html>, paragraphs 46–49; *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, <http://www.unhcr.org/refworld/docid/3f5857684.html>; *Selected Documents Relating to National Security and Counter-Terrorism Relevant to International Refugee Protection*, May 2009, <http://www.unhcr.org/refworld/docid/49feaa62.html>; UNHCR, *Yasser al-Sirri (Appellant) v. Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (Appellant) v. Secretary of State for the Home Department (Respondent): UNHCR'S composite case in the two linked appeals*, 23 March 2012, paras. 18–40, <http://www.unhcr.org/refworld/docid/4f6c92b12.html>, as affirmed by *Al-Sirri (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and DD (Afghanistan) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*, [2012] UKSC 54, United Kingdom: Supreme Court, 21 November 2012, paras. 36–40, <http://www.unhcr.org/refworld/docid/50b89fd62.html>; See also UNHCR, "Terrorism as a Global Phenomenon", UNHCR presentation to the Joint Seminar of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and Committee on Article 36 (CATS), 17 January 2008, <http://www.unhcr.org/refworld/docid/4794c7ff2.html>.

Ad Section 44

(1) Subsection 31/A (1) of Act LXXX of 2007 on Asylum shall be replaced by the following provision:

“(1) The refugee authority, in order to conduct the asylum procedure and to secure the Dublin transfer – taking into account the restriction laid down in Section 31/B – can take the person seeking recognition into asylum detention if his/her entitlement to stay is exclusively based on the submission of an application for recognition, where

a) the identity or citizenship of the person seeking recognition is unclear, in order to establish them,

b) a procedure is on-going for the expulsion of the person seeking recognition and it can be presumed with good reason that the person seeking recognition applies for asylum exclusively to delay or frustrate the order or execution of the expulsion,

c) to establish the facts and circumstances underpinning the application for asylum where these facts or circumstances cannot be established in the absence of detention, especially when there is a risk of absconding by the applicant,

d) the detention of the person seeking recognition is necessary for the protection of national security or public order,

e) the application was submitted in an airport procedure, or

f) it is necessary to execute the Dublin transfer and there is a serious risk of absconding.”

(2) The following Subsections (1a) and (1b) shall complement Section 31/A of Act LXXX of 2007 on Asylum:

“(1a) In order to execute the Dublin transfer, the refugee authority may take a foreigner, who did not submit an application for asylum in Hungary but the Dublin handover can take place, into asylum detention.

(1b) The rules applicable to applicants seeking recognition shall apply *mutatis mutandis* to a foreigner detained under Subsection (1a), for the duration of the asylum detention. Following the termination of the asylum detention and the frustration of the transfer, the alien policing rules shall apply.”

(3) Subsection 31/A (6) of Act LXXX of 2007 on Asylum shall be replaced by the following provision:

“(6) Asylum detention can be ordered for a maximum of seventy-two hours. The refugee authority may propose the extension of asylum detention beyond seventy-two hours at the district court competent for the location of the detention within twenty-four hours of the decision ordering detention. The court may extend the duration of the detention by sixty days at the most, which duration can be extended upon a proposal from the refugee authority for another sixty days at the most. The refugee authority may submit a motion to extend the detention several times with the proviso that the full duration of the detention cannot exceed six months. The motion for an extension shall be received by the court at least eight working days before the due date of the extension. The refugee authority shall be required to state the reasons for its motion.”

(4) Subsection 31/A (10) of Act LXXX of 2007 on Asylum shall be replaced by the following provision:

“(10) The refugee authority shall execute asylum detention in an asylum detention centre established for the purpose of the implementation of such detention.”

General comments concerning asylum detention

Detention of asylum-seekers is inherently undesirable. In view of the hardship which it entails, and consistent with international refugee and human rights law and standards, detention of asylum-seekers should in UNHCR's view normally be avoided and be a measure of last resort. As seeking asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review.

In its recently published Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention¹⁶ (*hereafter referred to as UNHCR Detention Guidelines*) UNHCR recognizes that whilst the array of contemporary challenges to national asylum systems caused by irregular migration as well as the right of States to control the entry and stay of non-nationals on their territory, subject to refugee and human rights standards, the rights to liberty and security of person are fundamental human rights, reflected in the international prohibition on arbitrary detention, and supported by the right to freedom of movement.

UNHCR wishes to remind that detention can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case. Detention cannot serve as a migration control tool penalising irregular entry and preventing unlawful onward movements. There are various ways for governments to address irregular migration – other than detention – that take due account of the concerns of governments as well as the particular circumstances of the individual concerned. In this context UNHCR reminds that there is no evidence that detention has any deterrent effect on irregular migration.¹⁷ Regardless of any such effect, detention policies aimed at deterrence are generally unlawful under international human rights law as they are not based on an individual assessment as to the necessity to detain.

UNHCR further draws attention to the fact that detention, particularly where it is for extended or indeterminate periods and/or in poor conditions, can prejudicially affect the ability of people who are later granted protection to integrate successfully and swiftly in their host countries.¹⁸ The psychological and physical effects of detention may also exacerbate the trauma suffered by some asylum-seekers in the past or indeed create trauma, and thus hinder progress towards the point where recognized refugees can contribute actively and positively to European society, which is contrary to the aims of states and other asylum stakeholders alike.¹⁹

¹⁶ UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, <http://www.refworld.org/docid/503489533b8.html>

¹⁷ See footnotes 13, 14 and 15 on p. 11 International Detention Coalition, *There are Alternatives: A handbook for preventing unnecessary immigration detention*, 13 May 2011, ISBN 978-0-9871129-1-0, <http://www.refworld.org/docid/4f0c14252.html>

¹⁸ See UN High Commissioner for Refugees (UNHCR), Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions, July 2011, Conclusion 15, <http://www.refworld.org/docid/4e315b882.html>.

¹⁹ See UNHCR and Office of the High Commissioner for Human Rights (OHCHR), Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions, July 2011, para. 10, <http://www.unhcr.org/refworld/docid/4e315b882.html>. See also Coffey, G.J. et al., "The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum", *Social Science & Medicine*, Vol. 70, No. 12, pp 2070-2079.

Detailed comments concerning asylum detention

Grounds for detention

Regarding **Subsection 31/A (1) a)** of the Asylum Act transposing Article 8 (3) a) of the Recast Reception Directive, UNHCR underlines that detention may only be imposed on this ground in cases where identity is undetermined or in dispute and where there are indications that the applicant used false or forged documents and cannot provide plausible explanation for that or is uncooperative in establishing his/her identity or intends to mislead the authorities.²⁰ UNHCR strongly recommends that detailed guidance be laid down in enabling legislation for the correct application of this detention ground.

UNHCR reiterates that only minimal periods in detention may be permissible for the purpose of identity verification and strict time limits need to be laid down in law. UNHCR notes with concern that the Draft fails to introduce strict time limit regarding this particular ground for detention and therefore recommends modifying **Subsection 31/A (7)** by setting a reasonably strict maximum time limit for which detention may be permissible.

Analysis of law enforcement practice shows that in the absence of strict time limits in its motion to the court the asylum authority generally initiates the prolongation of detention based on this particular ground even following the second 60-day judicial review interval. In this context reference is made to the recently issued report by the Curia's (highest court of Hungary) Working Group that analysed the judicial practice with regard to asylum cases, which confirms this shortcoming and puts forward practical recommendations on the correct application of this particular detention ground.²¹

Although national law transposes the general procedural guarantee set out in Article 9 (1) of the Recast Reception Directive under **Subsection 31/A (8) b) of the Asylum Act**²² and Section 36/A (4) of the implementing Government Decree, however in UNHCR's view these provisions do not constitute sufficient guarantee specifically related to this particular detention ground.

Further, UNHCR recalls that authorities have a positive obligation to make reasonable efforts to verify the identity of the applicant. This is also confirmed in Recital 16 of the Recast Reception Directive which elicits that with regard to administrative procedures relating to the grounds for detention, the notion of 'due diligence' at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time and that detention shall not exceed the time reasonably needed to complete the relevant procedures. Accordingly, if the verification of identity proves to be impossible or excessively difficult, detention should immediately be terminated as detention can no longer be justified on a legitimate ground.

Finally, UNHCR reminds the Hungarian Government that whilst nationality is part of one's identity, the examination of nationality can be a complex and lengthy process, especially for stateless applicants, and thus special safeguards will need to be put in place to avoid arbitrary detention, including prolonged or indefinite, in such cases where an applicant is stateless. In all cases, detention should be for the shortest possible period (Recital 16 Recast Reception Directive), and alternatives should be considered in each individual case.

²⁰ See UNHCR Detention Guidelines, Guideline 4.1, para. 25.

²¹ Report available at:

http://www.lb.hu/sites/default/files/joggyak/menekultugyi_jecs_osszefoglalo_velemenyn_2014okt20.pdf

²² Section 31/A (8) b) of the Asylum Act sets out the following: 'Detention shall be terminated immediately if the ground for detention has ceased to exist'

Subsection 31/A (1) b) of the Asylum Act intends to transpose Article 8 d) of the Recast Reception Directive. UNHCR acknowledges that in order to prevent possible abuse Member States may detain or keep a person in pre-removal detention if they can show that the person applies for international protection solely to frustrate the removal process and where it can be established that the person had **an effective possibility to apply for international protection** previously in that Member State. UNHCR notes that the proposed amendment does not make reference to the latter condition. Further, UNHCR reminds the Hungarian Government that **objective criteria** need to be developed on the basis of which authorities can substantiate that there are reasonable grounds to believe that the applicant is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision.

Further, decisions to detain need to be explicit as to the ground applicable in the individual case. Careful judicial scrutiny would be required where the application of several grounds for detention is applied in succession, as this is likely to become arbitrary. UNHCR urges a rigorous application of the safeguards pursuant to Article 9 of the Recast Reception Directive in each individual case.

Finally, UNHCR emphasizes the vital role of courts in overseeing the proper implementation of this provision and related safeguards.²³

Regarding **Subsection 31/A (1) c)** of the Asylum Act transposing Article 8 b) of the Recast Reception Directive UNHCR notes that it intends to replace current Subsection 31/A (1) points b) and c). UNHCR underlines that clear criteria need to be developed in order to assess the risk of absconding in order to avoid any arbitrary application of this ground. Factors to balance in an overall assessment of the necessity of detention could include but are not limited to: past history of (non) cooperation, past (non) compliance with conditions of release or bail, family or community links or other support networks in the country of asylum, willingness or refusal to provide information about the basic elements of their claim, or whether the claim is considered manifestly unfounded or abusive.²⁴

UNHCR strongly recommends a non-exhaustive list of criteria is laid down in the Asylum Act instead in the enabling legislation. UNHCR reiterates its previous position that Section 36/E c) of the implementing Government Decree²⁵ does not meet the requirement of legal clarity as it allows for an unreasonably wide margin of interpretation for the law enforcement authority.

Regarding **Section 31/A f)** of the Asylum Act, UNHCR welcomes the improvement of the current text²⁶ transposing Article 8(3)(f) of the Recast Reception Directive and Article 28 of the Dublin III Regulation.

In addition, as regards maximum time limits for detention pursuant to the Dublin Regulation, UNHCR recommends that the maximum time limit of 3 months be strictly observed where an applicant does not lodge an appeal against the transfer decision in line with Article 28 of that

²³ The wording in this provision follows the ruling in *Arsalan* (Czech Republic) (C-534/11), Judgment of the Court of Justice of the European Union of 30 May 2013, which states that a third-country national who has applied for international protection from pre-removal detention, may be kept in detention on the basis of a provision of national law, where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardize the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return (para 63) <http://www.refworld.org/pdfid/51a88fc04.pdf>

²⁴ See UNHCR Detention Guidelines, Guideline 4.1, par.22

²⁵ Section 36 E c) reads as follows: “based on his/her statements, it is probable that s/he will depart for an unknown destination, therefore there is reasonable grounds for presuming that s/he will frustrate the realization of the purpose stipulated by Sections 33 and 49 (5) of the Act”.

²⁶ Subsection 31/A (1) f) in force lays down the following detention ground: the person seeking recognition has not fulfilled his or her obligation to appear on summons and is thereby obstructing the Dublin procedure.

Regulation. In the event that the applicant *does* lodge an appeal, UNHCR is of the opinion that his appeal should be dealt with as swiftly as possible in line with the principle of due diligence as set forth in Article 9 (1) Recast Reception Directive in order to prevent prolonged periods of detention while respect of the safeguards set forth in Article 9 (5) of the Recast Reception Directive.

Similarly to the detention ground outlined under Subsection 31/A (1) c), UNHCR reiterates the need to develop clear criteria in order to assess whether there is a **serious** risk of absconding, recalling that that Article 2 n) of the Dublin III Regulation sets a higher threshold in that sense than Article 8(3)(b) of the Recast Reception Directive, which speaks only of a “risk of absconding”. Finally, UNHCR points out that the Dublin Regulation only permits detention in order to secure transfer procedures, 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. UNHCR recommends that these safeguards be built into the proposed text of Section 31 (A) (f) as well.

Individual assessment (necessity, reasonableness and proportionality test)

UNHCR notes with concern that decisions ordering detention are generally not adequately individually and sufficiently motivated/reasoned; the wording of administrative decisions imposing detention is usually sketchy and lacks adequate justification underlying the necessity, reasonableness and proportionality of the imposed detention order.

In order to ensure transparency and legal certainty, UNHCR urges to elaborate clear criteria in the Asylum Act, in a non-exhaustive manner, on the factors that need to be taken into account during the individual assessment. In this context, UNHCR reminds of the obligation set out under Article 8 (2) of the Recast Reception Directive limiting detention of asylum-seekers by introducing a necessity test (“*when it proves necessary and on the basis of an individual assessment of each case*” and “*if other less coercive alternative measures cannot be applied effectively*”).

Assessment and factoring in of special needs of applicants

Many asylum-seekers suffer from psychological illness, trauma, or depression because of the experience of seeking asylum, and the often traumatic events precipitating flight. Such factors need to be weighed in the assessment of the necessity to detain.²⁷ Detention can and has been shown to aggravate and even cause the aforementioned illnesses and symptoms.²⁸ This can be the case even if individuals present no symptoms at the time of detention.²⁹ Because of the serious consequences of detention, initial and periodic assessments of detainees’ physical and mental state are required, carried out by qualified medical practitioners. Appropriate treatment needs to be provided to such persons, and medical reports presented at periodic reviews of their detention.³⁰ Children including unaccompanied children, pregnant women and nursing mothers, victims of torture and other serious physical, psychological or sexual violence also need special attention and should generally not be detained.³¹

²⁷ see UNHCR Detention Guidelines Guideline 4

²⁸ See Conclusion 10, Global Roundtable Summary Conclusions. UN High Commissioner for Refugees (UNHCR), Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions, July 2011, <http://www.refworld.org/docid/4e315b882.html>

²⁹ See, Jesuit Refugee Service - Europe (JRS-E), *Becoming Vulnerable in Detention*, June 2010, <http://www.unhcr.org/refworld/docid/4ec269f62.html>.

³⁰ See UNHCR Detention Guidelines, Guideline 9.1, 9.2 and 9.3.

³¹ Ibid.

UNHCR recalls that alternatives to detention would not just reduce costs but also costs flowing from the treatment of the effects of detention in applicants after their release. This is particularly true for vulnerable applicants including children and victims of torture and trauma, and persons suffering from mental illnesses, where research has shown the particularly detrimental consequences of detention on their mental health and in the case of children their development.

As mentioned above, UNHCR is concerned that the Draft does not foresee a mechanism to assess the special reception needs of applicants in line with Article 22 (1) of the Recast Reception Directive. This is all the more problematic in the context of detention as in the absence of proper identification of individual circumstances of the applicant including possible vulnerabilities victims of torture and trauma and other vulnerable applicants may end up in detention. UNHCR reminds that special needs need to be appropriately or sufficiently considered in the necessity and proportionality test prior to a decision to detain or not, in line with Article 8 (2) of the Recast Reception Directive. For the purpose of ensuring full compliance with international and EU law, UNHCR recommends amending the Asylum Act so that this obligation is clearly articulated and that detailed guidance is provided for the law enforcement authority in the enabling legislation. In particular, UNHCR suggest amending the list of mandatory termination of detention set out in Subsection 31/A (8) of the Asylum Act with an additional reason namely the applicant's vulnerability making his or her detention disproportionate. Currently there is only one ground related to the specific health situation of the applicant, if he/she requires extended hospitalization for health reasons, which is, however, unnecessarily narrowly construed.

Further, UNHCR is also concerned about the situation of children in detention pending age assessment in the absence of a presumption of minority in age disputes in national law. In this context it is to be emphasized that where not properly conducted considering the necessary safeguards in line with the best interests of the child, age assessment can lead to the arbitrary detention of children. UNHCR would like to refer to its International Guidelines on Child Asylum Claims,³² UNICEF's Technical Note on Age assessment³³ and EASO's Age Assessment Practice in Europe document, which lay out safeguards for age assessment and suggest a step by step multi-disciplinary approach in assessing age using the least invasive method and departing from a presumption of minority.³⁴

Further, UNHCR notes with concern that the Draft does not foresee the transposition of the obligation under Article 11 (1) of the Recast Reception Directive requiring regular, independent monitoring of the situation of vulnerable applicants in detention. Firstly, UNHCR recommends elaborating a systematic internal monitoring of detention of asylum-seekers (e.g. by ensuring regular monitoring visits by the Ministry of Interior). Further, in order to comply with the obligations flowing from Article 11 (1) of the Recast Reception Directive, thus ensuring independent periodic monitoring of detention, UNHCR recommends that the Parliamentary Commissioner for Fundamental Rights be appointed as an independent monitoring body, which body also assumes the function of National Preventive Mechanism under UN OPCAT as of 1 January 2015.

³² UN High Commissioner for Refugees (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, <http://www.refworld.org/docid/4b2f4f6d2.html>.

³³ UN Children's Fund (UNICEF), Age Assessment: A Technical Note, January 2013, <http://www.refworld.org/docid/5130659f2.html>.

³⁴ EASO Age Assessment Practice in Europe <http://easo.europa.eu/wp-content/uploads/EASO-Age-assessment-practice-in-Europe.pdf>

Length and judicial prolongation of detention

UNHCR notes with concern that **Subsection 31/A (6)** of the Asylum Act has not been amended and still provides for an excessively long maximum period for the judicial prolongation of detention at a time (60-day interval) up to a maximum period of six months.

UNHCR expresses its concerns that detention of asylum-seekers is applied neither as exception nor for the shortest possible time in Hungary. The UN Working Group on Arbitrary Detention visiting Hungary in September 2013 expressed concerns about the “overuse of detention”³⁵, similarly the Council of Europe’s Commissioner for Human Rights in its recently issued report also expressed concerns regarding the routine detention of asylum-seekers.³⁶

In UNHCR’s view the maximum 60-day interval cannot be regarded as ‘reasonable’ as required by Article 9 (5) of the Recast Reception Directive. Further, this is not in line with the international principle – also enshrined in the Recast Reception Directive³⁷ – requiring that applicants may only be detained for as short a period of time as possible.³⁸ Practice so far shows that the asylum authority, for reasons of administrative convenience, automatically requests the court to prolong detention for the maximum period of 60 days. In this context UNHCR recalls the requirement under Article 9 (1) of the Recast Reception Directive, which clearly sets out that “*delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention*”.

UNHCR therefore calls on the Government to amend the above provision preferably by adopting the model for regular periodic review as suggested in the UNHCR Detention Guidelines³⁹, and to shorten the 60-day maximum interval set out in Subsection 31/A (6) to at maximum 30 days. Analysis of current judicial review practice carried out by the Curia reveals that local courts tend to prolong detention for the maximum interval of 60 days for mere administrative convenience due to extensive backlog of cases.⁴⁰

Legal remedy against detention order

Further, UNHCR notes that the Draft still does not provide for a **standalone legal remedy**⁴¹ against a decision imposing asylum detention. The institution of the so-called *objection* is unclear in the absence of detailed regulation, which has led to confusion within the law enforcement asylum authority.⁴² In practice, objection is only available within the initial period of detention order for 72 hours, as beyond this period asylum detention can only be upheld ex officio by the court based on an automatic judicial review procedure. A further problem is that during the 72-hour timeframe detained asylum-seekers do not have access to professional legal aid. As a result they cannot effectively exercise the right to submit an objection contrary to ECtHR case law and Article 47 of the EU Charter (on the right to an

³⁵ See press release available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13817&LangID=E>

³⁶ Report by Nils Muiznieks Commissioner for Human Rights of the Council of Europe following his visit to Hungary from 1 to 4 July 2014, available at:

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2658043&SecMode=1&DocId=2218468&Usage=2>

³⁷ Article 9(1) of the Recast Reception Directive

³⁸ See UNHCR Detention Guidelines, Guideline 7, para. 47.

³⁹ Ibid.

⁴⁰ See footnote 7.

⁴¹ Section 31/C of Asylum Act stipulates: „(2) there is no legal remedy against the decision ordering asylum detention or the use of a measure securing availability. (3) The person seeking recognition may file an objection against an order of asylum detention or the use of a measure securing availability.”

⁴² Unlike e.g. Section 31 (2) of the Asylum Act providing a legal remedy against the reduction or withdrawal of reception conditions.

effective remedy). According to the law, a case guardian should only be appointed during the judicial review of detention (at 60-day intervals), however when detention is ordered against the asylum-seeker (within the 72 hours from the ordering of detention by the asylum authority) no legal aid has to be provided. Statistical information available on the number of objections submitted by asylum-seekers against decisions imposing detention during the initial 72 hour period shows the practical inefficiency of this procedure.⁴³ Accordingly, there is no effective means to challenge a detention order, the UN Working Group on Arbitrary Detention and the Commissioner for Human Rights of the Council of Europe have also expressed their concerns in this respect.⁴⁴

UNHCR strongly suggests implementing the recommendation of the Curia of introducing an effective legal remedy against the regular judicial review decisions prolonging detention similarly to the system already in place in the case of pre-trial detention in criminal law procedures.⁴⁵

Detention of families with children and unaccompanied/separated children

UNHCR notes with concern that the Draft continues to provide for the possibility of the detention of asylum-seeking families with children for up to 30 days. UNHCR reiterates that detention is clearly against the best interests of the child, as demonstrated in regional case law, a notion and requirement stipulated by Article 3 of the UN Convention on the Rights of the Child, as even short-term detention is highly detrimental to the psycho-social development of children. This finding is also mentioned in the recently published UNICEF-UNHCR guidelines *Safe and Sound; How States can ensure respect for the best interest of unaccompanied and separated children in Europe*.⁴⁶

Reference is also made to the report of the Hungarian Parliamentary Commissioner for Fundamental Rights⁴⁷ which clearly states that detention of families with children is a form of discrimination on the ground of the family status of the child as detention of unaccompanied / separated asylum-seeking children is prohibited by Hungarian law, whereas the same national law provides a ground for detention of children who are accompanied by a family member. This is clearly contrary to international human rights standards, in particular Article 2 (2) of the UN Convention on the Rights of the Child.⁴⁸ Furthermore, children in detention do not enjoy the right to appeal against the detention decision due to their legal incapacity, which is

⁴³ During the period of 1 July 2013 – 30 September 2014, a total of 2 objections were registered by the Office of Immigration and Nationality (statistical data shared with UNHCR by the Office of Immigration and Nationality in a letter of 11 November 2014, ref. number 106-Ji-32082/1/2014.)

⁴⁴ See the press release of the UN Working Group on Arbitrary Detention, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13816&LangID=E>; the report on Hungary by the Commissioner for Human Rights of the Council of Europe is available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2662996&SecMode=1&DocId=2218468&Usage=2> (see para. 157.)

⁴⁵ See par. 3.4.4. at page 80 of the report of the Curia (see footnote 21 above).

⁴⁶ “Safe & Sound – What States can do to ensure respect for the best interest of unaccompanied and separated children in Europe”, available at <http://www.refworld.org/docid/5423da264.html> <https://mail.unhcr.org/owa/redir.aspx?SURL=3AAUUCkm923oBeCn-z7LtuncVxNTObWwfY6KF_rUoAkmmUGY6jRCGgAdAB0AHAAOgAvAC8AdwB3AHcALgByAGUAZgB3AG8AcgBsAGQALgBvAHIAZwAvAGQAAbwBjAGkAZAAvADUANAAYADMAZABhADIANgA0AC4AaAB0AG0AbAA.&URL=http%3a%2f%2fwww.refworld.org%2fdocid%2f5423da264.html>

⁴⁷ Report no. AJB 4019/2012 of June 2012, available at: www.ajbh.hu

⁴⁸ „States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.”

contrary to Article 37 d) of the UN Convention on the Rights of the Child.⁴⁹ In this context, reference is made to the judgment of the European Court of Human Rights in *Popov v. France*⁵⁰ where the Court found an infringement of Article 5 (4) of the European Convention of Human Rights on the ground that the child was not provided with the right to appeal separately against the detention order. UNHCR, together with the Parliamentary Commissioner for Fundamental Rights and relevant non-governmental organisations, has long advocated for abolishing detention of families with children.⁵¹

UNHCR reiterates its position and strongly recommends that Subsection 31/B (2) of the Asylum Act [and Subsection 56 (3) of the Aliens Act for that matter] be deleted. Despite the fact that these provisions stipulate that families can only be detained as *a last resort*⁵² and that the best interests of the child should be taken into account as a primary consideration, experience has shown in practice that detention is often mechanically applied without any prior individualised assessment or best interests assessment taking place, thus this guarantee is not met in practice. Since September 2014 asylum-seeking families with children have been routinely detained in Hungary.

Alternatives to detention

UNHCR notes that the Draft fails to amend the provisions regulating alternatives to detention despite clear gaps in legislation and shortcomings identified in practice.

The current text (provisions) on alternatives to detention needs to be further elaborated and improved. In particular, clear criteria for the application of each alternative measure should be laid down in the Asylum Act for the purpose of legal clarity/certainty. UNHCR further believes it would be desirable to develop certain indicators guiding decision-makers on when alternatives to detention might be applied and when applicants should be released from detention.

UNHCR has observed that the assessment of applicability of alternatives to detention is largely restricted in practice to the applicability of asylum bail, the other two alternative measures, such as the regular reporting requirement and the designated place of accommodation, are not or rarely applied as standalone measures. Regarding the application of asylum bail, it is observed that the amount of the asylum bail is usually set at a very high level (2,000 euros or above, whereas the minimum amount is 500 euros, the maximum is 5,000 euros). As a result only those applicants can benefit from the application of this measure who have the required financial resources to deposit the bail resulting in a discrimination against asylum-seekers with limited funds. In this context, UNHCR underlines that alternatives to detention where applied should always be tailored to an individual's needs

⁴⁹ „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.”

⁵⁰ European Court of Human Rights, *Affaire Popov c. France*, application numbers: 39472/07 et 39474/07, final judgment, 19/04/2012, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108708>.

⁵¹ UN High Commissioner for Refugees *Hungary a country of asylum*, p. 16. available at: <http://www.unhcr.org/refworld/pdfid/4f9167db2.pdf>; see also International Detention Coalition: 'Captured Childhood', available at: <http://idcoalition.org/ccap/>; Report by the Parliamentary Commissioner for Human Rights in the case of no. AJB 4019/2012 (see above)

⁵² See also Subsection 31/B (3) of the Asylum Act: 'families with minors may only be placed in asylum detention as a measure of last resort, and taking the best interests of the child into account as a primary consideration.' The Aliens Act also allows for the detention of families with children under Subsection 56 (3): "With respect to the best interest of the child primarily, detention can only be ordered in respect of a family with minor children *as a last resort* for a *maximum* term of thirty days provided that the alien control authority has ascertained that the purpose of ordering the detention may not be accomplished by way of the application of the provisions of Subsections 48 (2) or 62 (1) of this Act."

and circumstances. The amount set must be reasonable given the particular situation of asylum-seekers, and should not be so high as to render bail system merely theoretical.⁵³

In UNHCR's view practical deficiencies in implementing alternatives to detention in practice can, in the Hungarian context, be imputed to the following factors: a) lack of adequate information provision to applicants on the objective and application of alternative measures, b) lack of a detailed regulation on the application of alternative measures, c) lack of capacity, both human resources and skills, of the law enforcement authority to ensure adequate application and monitoring of the application of alternative measures in practice, d) lack of administrative measures in place ensuring effective implementation of alternatives to detention.

UNHCR recalls that generally, practice suggest that alternatives when applied correctly and in combination with proper complementary measures such as case management, counselling and support including by a representative / case guardian are likely to be more effective in reducing the risk of absconding of applicants.⁵⁴

Accordingly, UNHCR strongly recommends strengthening the system on alternatives to detention. To that end, UNHCR recommends putting in place complementary measures, such as case management or case resolution system in order to ensure effective monitoring and follow-up of the application of alternative measures. UNHCR offers its technical support in designing such a system. Further, the amount of bail accumulated by the State should be allocated for the purpose of strengthening the system on alternatives to detention.

Ad Subsection 45 (1)

Subsection 31 D (7) of Asylum Act shall be complemented by the following provision c):

(The court may dispense with the personal hearing if)

”c) it deems the personal hearing unjustified on the basis of the earlier statements of the person seeking recognition and their file.”

Personal hearing before a court in the judicial review procedure is an indispensable procedural guarantee in order to ensure that detention is not arbitrarily imposed; lack of personal hearing can render judicial review process ineffective (*habeas corpus*). UNHCR strongly opposes the inclusion of this provision. It is all the more worrisome that this provision is motivated by administrative cost-efficiency and decreasing of administrative burden on the law enforcement and judicial bodies engaged in the detention system.

In this respect documentary evidence and previous statements by the applicant cannot substitute personal hearing before the court where applicants have the possibility to elaborate on their personal circumstances. UNHCR is all the more concerned of the situation of vulnerable applicants, especially in view of the fact that there is no mechanism in place to identify special needs of applicants.

⁵³ See UNHCR Detention Guidelines, Annex A, point (vi)

⁵⁴ See for example UN High Commissioner for Refugees (UNHCR), Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva, June 2013, PPLA/2013/02, <http://www.refworld.org/docid/51a6fec84.html>; see also page 44 of UNHCR Detention Guidelines on complementary measures and other considerations to alternatives to detention.

Ad Section 49

Subsection 37 (1) of the Asylum Act shall be replaced by the following provision:

“(1) Upon submission of an application, the refugee authority shall simultaneously inform, in writing, the person seeking recognition of his/her procedural rights and obligations as well as of the legal consequences of the violation of such obligations - including the consequences of withdrawing the application - in his/her mother tongue or in another language understood by him/her.”

UNHCR recommends amending Subsection 37 (1) and inserting specific requirement set out under Article 7 (2) of the Recast Procedure Directive to inform and counsel in private the dependant family member of the relevant procedural consequences of the lodging of a joint application and his/her right to make a separate application for international protection. In UNHCR 's view, information given beforehand in private and separately from the principal applicant on the legal procedural consequences of lodging an application on his/her behalf and his/her separate right to lodge an application on his/her own behalf are crucial to ensure that dependants understand the implications of their consent.

Further, UNHCR recommends complementing this Section with specific information provision on applicants' right that they may, on their own initiative and at their own cost, arrange for a medical examination concerning signs that might indicate past persecution or serious harm in line with the requirement set out in Article 18 (2) of the Recast Procedure Directive.

Finally, UNHCR also suggests amending the Draft in a way that specific reference is equally made to obligation of the asylum authority to inform applicants under the admissibility assessment about the requirement to present new elements in their case, which would warrant the examination of the substance of their claim. Taking into account that access to user-friendly protection information concerning the asylum procedure seems to be insufficient in practice and the severe consequences the decision on the admissibility of the application entails, UNHCR is of the view that information provision to applicants in this regard should be improved, to that end UNHCR suggests amending the text of the Asylum Act.

Ad Section 50

Subsection 42 (1) of Act LXXX of 2007 on Asylum shall be replaced by the following provision:

“(1) Hungarian authority or court
a) shall not provide information on the application for asylum and the submission of the application to the alleged persecutor or the alleged perpetrator of the serious harm, and
b) cannot acquire information from the alleged persecutor or the alleged perpetrator of the serious harm in such a way that results in the persecutors becoming aware of the fact that the person seeking recognition submitted an application for recognition or if, as a consequence of such entry into contact, the person seeking recognition or a member of his/her family would be exposed to a physical threat or the freedom or security of the family members of the person seeking recognition living in his/her country of origin would be exposed to a threat.”

While noting that Article 30 (b) of the Recast Procedure Directive provides that Member States shall not obtain information in a way that could result in the alleged actor of persecution or serious harm being informed “directly” of the application, UNHCR reiterates its

recommendation⁵⁵, in line with its study on the implementation of the Recast Procedure Directive⁵⁶, to omit the term “directly” in order to offer a higher standard of protection under this provision.

Accordingly, UNHCR recommends deleting the term “directly” from Subsection 42 (1) b) of the Asylum Act.

Ad Section 51

Subsection 43 (2) of Asylum Act shall be replaced by the following provision:

“(2) The refugee authority may dispense with a personal interview if the person seeking recognition
a) is in no fit state to be heard, or
b) submitted a subsequent application and, in the application, failed to state facts or circumstances that would allow the recognition as refugee or beneficiary of subsidiary protection.”

It is noted that Section 51 of the Draft aims to transpose Articles 14(2) and 42(2) of the Recast Procedure Directive. However, it is also noted with concern that the second part of Article 42(2)b) is not planned to be transposed (“with the exception of the cases referred to in Article 40(6)”), that is: dependants and unmarried minors of subsequent applicants are exempted from not being heard before a decision is made on their claims.

It is suggested therefore that the Draft stipulate this exemption along the lines of Article 42(2)b).

Ad Section 55

Subsections 49 (1)-(2), (5) and (9) of the Asylum Act shall be replaced by the following provisions:

“(1) During the proceedings, the refugee authority shall examine whether the criteria for the application of the Dublin Regulations are met.
(2) If the refugee authority establishes that a Dublin procedure is to be conducted, it shall suspend the procedure until the conclusion of the Dublin procedure.”
“(5) Where the refugee is not subject to asylum detention, the refugee authority shall provide, in the handover decision, that the foreigner may not leave the place of residence designated for him/her until the completion of handover but for a maximum 72 hours in the interest of securing the implementation of the handover procedure.”
“(9) In the course of the court review, a request for the suspension of the implementation of the decision providing for handover shall have suspensive effect on the implementation of the decision.”

UNHCR welcomes the amendments, in particular the introduction of suspensive effect of appeals against decisions on Dublin transfers, which aim to ensure compliance with Dublin III Regulation. Nevertheless UNHCR notes with regret that no efforts have been made to amend Subsection 49 (7) of the Asylum Act in order to introduce reasonable time limit for the submission of appeals against Dublin transfers. UNHCR notes in this respect that a 3 day time

⁵⁵ UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, page 30, available at: <http://www.refworld.org/docid/4c63ebd32.html>

⁵⁶ UN High Commissioner for Refugees (UNHCR), *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, page. 453

limit cannot be regarded as “reasonable” as required by Article 27 (2) of the Dublin III Regulation. Based on the jurisprudence of the CJEU at least a 15 day time limit should be introduced.⁵⁷

Ad Section 56

Section 51 of the Asylum Act shall be replaced by the following provision:

“Section 51 (1) If the conditions for the application of the Dublin Regulations are not met, the refugee authority shall decide on the question of the admissibility of the application for refugee status and on whether the criteria for deciding on the application in an accelerated procedure are met.

(2) An application is inadmissible where

- a) the applicant is a national of one of the Member States of the European Union;
- b) the applicant was recognised by another Member State as a refugee or granted subsidiary protection to him/her;
- c) the applicant was recognised by a third country as a refugee, provided that this protection exists at the time of the assessment of the application and the third country in question is ready to admit the applicant;
- d) the application is a subsequent one and no new facts and circumstances occurred that would suggest that the applicant’s recognition as a refugee or beneficiary of subsidiary protection is justified;
- e) for the applicant there is a third country qualifying as a safe third country for him/her.

(3) In the application of Subsection (2) d), new facts and circumstances are those that the applicant was unable to mention in the previous procedure due to circumstances beyond his/her control.

(4) The application may be declared inadmissible under Subsection (2) e) only where

- a) the applicant stayed in a safe third country, and s/he would have the opportunity to apply for effective protection, according to Section 2 i), in that country;
 - b) the applicant travelled through the territory of such third country and s/he would have the opportunity to apply for effective protection, according to Section 2 i), in that country;
 - c) the applicant has relatives in that country and is entitled to enter the territory of the country;
- or
- d) the safe third country requests the extradition of the person seeking recognition.

(5) In the cases referred to in Subsection (4) a) and b), the person seeking recognition has to prove that s/he had no opportunity for effective protection, as per Section 2 i), in that country.

(6) Where Subsection (2) e) applies, the refugee authority shall issue a certificate in the official language of the third country to the applicant that his/her application for asylum was not assessed on the merits.

(7) The application may be decided on in an accelerated procedure where the applicant

- a) discloses only information irrelevant for both recognition as a refugee and a beneficiary of subsidiary protection;
- b) originates in a country listed on the European Union or national list of safe countries of origin as specified by separate legislation;
- c) misled the authorities by providing false information on his/her identity or nationality or by providing false documents or by withholding information or documents that would have been able to influence the decision making adversely;
- d) has destroyed or thrown away, presumably in bad faith, his/her identity card or travel

⁵⁷ See Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration*, Judgment of the Court (Second Chamber) of 28 July 2011, OJ C 298 from 08.10.2011, p.6., paras. 66-68.

document that would have been helpful in establishing his/her identity of nationality;

e) makes clearly incoherent, contradictory, false or obviously unlikely statements contradicting the duly substantiated information relevant to the country of origin that makes it clear that, on the basis of his/her application, he/she is not entitled to recognition as a refugee or beneficiary of subsidiary protection,

f) submitted a subsequent application that is not inadmissible under Subsection (2) d);

g) submitted an application for the sole reason of delaying or preventing the order of the alien policing expulsion or the execution of the expulsion by the alien policing authority or court,

h) failed to submit an application for recognition within a reasonable time although he/she would have been able to submit it earlier and has no reasonable excuse for the delay.

i) refuses to comply with an obligation to have his/her fingerprints taken, or

j) may pose a threat to Hungary's national security or public order, or he/she was expelled by the alien policing authority due to harming or threatening public safety or the public order.

(8) The application cannot be rejected solely on the grounds of Subsection (7) h).

(9) In the event of applying accelerated proceedings, the refugee authority shall assess the merits of the application for recognition in order to establish whether the criteria for recognition as a refugee or beneficiary of subsidiary protection exist.

(10) Where the application is partly or fully based on circumstances referred to in Subsections 6 (2) or 12 (2), the reasonable time referred to in Subsection (7) h) shall be counted from the occurrence of these circumstances.

(11) In the event of applying Subsections (2) e) or (7) b), the applicant, when this fact is communicated to him/her, can declare immediately but within three days at the latest why the specific country does not qualify as a safe country of origin or safe third country in his/her case.”

Section 56 of the Draft specifies **inadmissible applications** (Subsections 51 (2)-(6) of the Asylum Act). Concerning Section 51 (3) of the Asylum Act setting out the definition of new elements or findings, UNHCR recommends not transposing this optional clause under Article 40 (4) of the Recast Procedure Directive as the application of such procedural bar may lead to a potential breach of *non-refoulement* principle and human rights obligations. In UNHCR's view a subsequent application should not automatically be refused on the ground that the new elements or findings could have been raised in the previous procedure. As explicitly recognised by Article 24 (4) of the Recast Procedure Directive,⁵⁸ certain elements of the claim may become evident at a later stage. This is the case, for instance in claims relevant to sexual orientation and/or gender identity of persons who can at first be reluctant to talk about intimate matters, including sexual or gender-based violence, particularly when their sexual orientation or gender identity is negatively perceived in their country of origin.⁵⁹

Further, it should be borne in mind that possible trauma and sensitivities related to sexual violence or culture may, for example, lead a female asylum-seeker initially to consent to an asylum application on her behalf. She may, however, develop the understanding and confidence to substantiate the claim properly only after some time has passed. It is therefore important that appropriate safeguards ensure that the examination of subsequent applications

⁵⁸ Article 24 (4): “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.”

⁵⁹ UN High Commissioner for Refugees (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/12/01, para 59, at: <http://www.refworld.org/docid/50348afc2.html>

of dependants as foreseen by Article 33 (2) of the Recast Procedure Directive takes such constraints into account.⁶⁰

Section 56 of the Draft also specifies the conditions for **accelerated procedure** (Subsections 51 (7)-(11) of the Asylum Act) *largely* in accordance with Article 31 (8) of the Recast Procedure Directive, however, with two major shortcomings in Subsection 51 (7) of the Asylum Act, concretely in paras h) (corresponding to Article 31(8) h)) and j) (corresponding to Article 31 (8)j)). The Draft fails to reflect an important element of Article 31 (8) h), namely that only cases of applicants “*unlawfully entering or present in the territory*” can be channelled into accelerated procedure under this paragraph. Concerning the term “*unlawfully or (...) stay unlawfully*”, UNHCR encourages interpreting this notion in a consistent manner with the provisions of the 1951 Refugee Conventions using similar formulations and refers to its interpretation note on “*lawfully staying*”.⁶¹ Concerning Subsection 51 (7) j) of the Asylum Act intending to transpose Article 31 (8) (j) of the Procedure Directive, UNHCR is of the view that circumstances listed under this ground encompass claims falling outside the categories of manifestly unfounded or clearly abusive claims and which may be based on serious grounds requiring detailed examination including with regard to exclusion⁶² considerations. Given the severe consequences of a negative decision in cases of applications raising issues of national security, the Parliamentary Assembly of the Council of Europe⁶³ has recommended that these be exempted from accelerated procedures. UNHCR supports this recommendation and reaffirms that this ground should therefore not be invoked to accelerate such claims.⁶⁴ In any case, it is to be noted that the text of the Draft fails to reflect the requirement of “*serious reasons*” as stipulated by the Recast Procedure Directive in Article 31(8) j).

In both cases, the Draft opens for a much wider application of the accelerated procedure that is actually meant by the Directive. It is suggested therefore that the Draft duly follows the wording of the Directive in this respect.

Ad Section 60

Subsections 54 (1)-(4) of the Asylum Act shall be replaced by the following provision:

“(1) Where the applicant submits a subsequent application following a final termination or rejection decision on the former application, the refugee authority shall examine whether any new circumstances or facts occurred following the earlier decision that would allow for the recognition of the applicant as a refugee or as a beneficiary of subsidiary protection.

(2) Where, in the case referred to in Subsection (1), the refugee authority establishes that the submission of the subsequent application took place following the ordering of the applicant’s expulsion and rejects the application on the basis of Subsection 51 (2) d), following the

⁶⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, p. 9, available at: <http://www.refworld.org/docid/42492b302.html>

⁶¹ UN High Commissioner for Refugees (UNHCR), “*Lawfully Staying*” - A Note on Interpretation, 3 May 1988, available at: <http://www.refworld.org/docid/42ad93304.html>

⁶² UN High Commissioner for Refugees Guidelines on International Protection **No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees**, 4 September 2003, HCR/GIP/03/05, at: <http://www.unhcr.org/refworld/docid/3f5857684.html>

⁶³ Council of Europe: Parliamentary Assembly, *Resolution 1471 (2005) on Accelerated Asylum Procedures in Council of Europe Member States*, 7 October 2005, 1471 (2005), para 8.9, at: <http://www.unhcr.org/refworld/docid/43f349e04.html>

⁶⁴ UN High Commissioner for Refugees (UNHCR), *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, p.32, available at: <http://www.refworld.org/docid/42492b302.html>

communication of the decision the applicant shall not be entitled to the rights laid down in Subsection 5 (1) a)- c).

(3) Where the applicant submits an application following a final rejection decision on his/her earlier subsequent application, the applicant shall not be entitled to the rights laid down in Subsection 5 (1) a) - c).

(4) The request for court review and the application to suspend the enforcement submitted against the decisions made under Subsections (2) and (3) shall have no suspensive effect on the enforcement of the decision.”

UNHCR welcomes the efforts to transpose provisions relating to **subsequent applications** (Section 54 of the Asylum Act). This provision is directly linked to Articles 40, 41 and 46 of the Recast Procedure Directive. However, the Draft fails to provide for a clear, comprehensive and unified definition of subsequent application. Considering the significant procedural consequences for the applicant, UNHCR stresses the importance of a clear definition of subsequent applications. Thus, for the purpose of transparency and legal clarity, UNHCR suggests inserting the definition of subsequent application under Section 2 of the Asylum Act.

UNHCR underlines that in general no application should be considered subsequent unless the previous claim was considered fully on merit. This implies that an application should be considered subsequent only after an adequate analysis in line with assessment standards set up in Article 4 of the Qualification Directive. UNHCR underlines that the provision under Section 54 upholds certain problematic elements. In this respect, UNHCR notes that Subsections 54 (1)-(2) cover cases in which the procedure was terminated without a substantial examination of the claim. Furthermore, it is extremely worrisome that appeals against decisions made on the bases of Subsections 54 (2)-(3) shall have no suspensive effect just like requests for suspending execution of the decision. UNHCR considers that the applicant should at least have a right to request suspensive effect in all cases where a subsequent application is made and for that, he/she should be allowed to stay in the territory pending the outcome of this request to ensure the effectiveness of his/her right to effective legal remedy.

With respect to Subsections 54 (2)-(3) of the Asylum Act, UNHCR is concerned that repeat applicants falling under categories of Article 41 (1) of the Recast Procedure Directive are automatically **excluded from material reception conditions**. UNHCR cautions against such an interpretation as it raises concerns of conformity with Article 20 (5) of the Recast Reception Directive, which clearly requires an individual decision based on the particular situation of the person concerned on any reduction or withdrawal of reception material conditions taking also into account the principle of proportionality, especially with regard to applicants with special needs. UNHCR reminds that Member States have to ensure, at minimum, access at least to emergency health care and a dignified standard of living for all applicants irrespective of whether he/she qualifies as a subsequent applicant.⁶⁵

Accordingly, UNHCR recommends deleting reference to Subsection 5 (1) b) of the Asylum Act.

⁶⁵ In this context UNHCR refers to the judgment of the Court of Justice of the European Union in *C-79/13 Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others*, Judgment of the Court (Fourth Chamber) of 27 February 2014

Ad Sections 65 and 69

Subsection 68 (2) of the Asylum Act shall be replaced by the following provision:

“(2) The request for review shall be submitted to the refugee authority within eight days of the communication of the decision. The refugee authority shall forward the request for review, together with the file of the case and its counter-application, to the court without delay.”

Subsection 75 (2) of the Asylum Act shall be replaced by the following provision:

“(2) The request for review shall be submitted to the refugee authority within eight days of the communication of the decision. The refugee authority shall forward the request for review, together with the file of the case and its counter-application, to the court without delay.”

Sections 65 and 69 of the Draft introduce changes that are neither required nor foreseen by EU law. Currently, there is an 8-day time frame to challenge a decision rejecting application on international protection, whereas there are 15 days available for challenging a decision on withdrawal/revocation of international protection status. According to the amendment the 15-day time limit available for challenging withdrawal/revocation decisions would also be reduced to 8 days. UNHCR is extremely concerned about this development and reiterates its position that an 8-day period for submitting **judicial review request** is **extremely short time limit**, especially considering that only a one-instance judicial review is available for asylum-seekers to challenge negative administrative decisions and in combination with the fact that the availability of professional, competent legal assistance is insufficient. Practice shows that asylum-seekers having access to quality legal aid have much higher chances of being granted international protection.⁶⁶ Furthermore, in conjunction with the discontinuation of suspensive effect of the appeal UNHCR believes that this short time limit is very disadvantageous for the person concerned. Taking into account the above, in UNHCR’s view the planned amendment raises concerns regarding compliance with Article 46 (4) of the Recast Procedure Directive according to which ‘reasonable time limits’ have to be provided for the purpose of exercise of the right to an effective remedy. Based on the jurisprudence of the CJEU at minimum a 15 day time limit can be regarded as ‘reasonable’.⁶⁷ Further, it raises the issue of compliance with Articles 6 (right of fair trial) and 13 (right to an effective remedy) of the European Convention on Human Rights and Article 47 of the Charter of the EU (right to an effective remedy and to fair trial).

Regarding the planned **removal of automatic suspensive effect** attached to judicial review requests, the justification of the Draft fails to provide any serious, convincing reason why such significant changes are to be introduced. It only mentions that suspensive effect is not a requirement of effective remedy, neither required by the Directive, therefore it will be discontinued in law. In our principled opinion, suspensive effect is a fundamental prerequisite of a remedy being effective. UNHCR is seriously concerned about the planned amendment in particular in view of the Hungarian context, where only a one-instance remedy is available against negative administrative decisions and asylum-seekers have extremely limited access to professional, competent legal assistance. As the judicial procedure is the only opportunity to challenge a negative decision it must have all the guarantees inclusive of sufficient time allocated to the applicant to make an informed decision on appeal as well as suspensive effect entailing to the appeal. The foreseen changes could be in particular detrimental to applicants

⁶⁶ In previous years, local NGO Hungarian Helsinki Committee (HHC) with wide-ranging expertise in asylum and a professional domestic network of nine lawyers was providing this service free of charge with ERF-support. The overturn rate in those cases where HHC provided legal representation before the court is outstandingly high (82%).

⁶⁷ See Case C-69/10, Brahim Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration, Judgment of the Court (Second Chamber) of 28 July 2011, OJ C 298 from 08.10.2011, p.6., paras. 66-68.

with special procedural needs (in this context see Recital 30 of the Recast Procedure Directive).

Taking into account the above, it gives rise to serious concerns whether under such circumstances the right to effective remedy can be exercised by asylum-seekers. It is strongly recommended therefore that Sections 65 and 69 of the Draft be deleted.

Ad Section 71

UNHCR recommends that Section 71 of the Draft be complemented by a Subsection (1) (while the current text becomes Subsection (2)), in order to stipulate the requirement of detailed statistical information gathering on the number of applicants identified / treated as applicants with special reception and/or procedural needs preferably in the breakdown of nationality, gender and age under Subsection 83(1) of the Asylum Act. Currently there is no statistical information available on the number and profile of vulnerable applicants, which hinders any meaningful analysis and planning. Furthermore, UNHCR recommends improving current statistical data gathering on asylum detention and including systematic data collection obligation on repeat applications and on the number of cases where the asylum authority initiated the age assessment procedure.

Accordingly, UNHCR recommends the following amendments under Section 71 Subsection (1):

Subsection 83 (1) of the Asylum Act shall be replaced by the following provisions:
“(1) The refugee records shall contain the following details of a person coming under the effect of the present Act:
d) if the applicant is an unaccompanied minor, this fact **and whether the asylum authority initiated a medical expert examination for the determination of the age of the applicant;**
f) the date of submission of the application for recognition as refugee or beneficiary of subsidiary or temporary protection as well as the date of the withdrawal of such application **and the fact whether the application is considered as repeat application;**
j) marital status, occupation, education of the person seeking recognition **and the fact whether the applicant is considered by the asylum authority as a person with special procedural and/or with special reception needs;**
s) the legal base, time limit or duration, location, name of ordering authority, number of decision ordering asylum detention of the person seeking recognition **and whether the person concerned submitted an objection in accordance with Section 31/C (3) of the Act.**”

RECOMMENDATIONS TO INCLUDE ADDITIONAL ISSUES

The Draft fails to transpose some of the important, relevant EU rules and also fails to address certain shortcomings of the current law in force to which UNHCR has been calling for solutions for long. As the current amendment package contains not only EU transposition norms but also provisions that aim to improve coherence of the legal system and address systemic shortcomings, it is an excellent opportunity to fix the following problems as well.

1. UNHCR to receive court decisions

It is recommended that Section 38 ac) of the Asylum Act be amended as follows:

“ac) Unless objected to by the asylum-seeker, the refugee authority shall share with UNHCR all decisions taken with respect to the status of the asylum applications, **including court decisions**”;

Justification: Article 35 of the 1951 Geneva Convention calls for cooperation by States Parties to the Convention. The reception of administrative and court decisions made in the refugee status determination procedure is the prerequisite for UNHCR to successfully perform its Mandate of supervising the implementation of the Convention. In addition, the amendment would greatly enhance coherence of domestic law as Section 166 of Government Decree 114/2007 (V.24.) implementing Act II of 2007 (Aliens Act) clearly stipulates that UNHCR shall receive the decisions made in the statelessness status determination procedure.

2. Age assessment

It is recommended that Section 44 of the Asylum Act be complemented by a Subsection (4), as suggested by the Parliamentary Commissioner of Fundamental Rights in his report of AJB 7120/2009 (12 May 2010) covering among others the issue of age assessment in case of unaccompanied/separated child asylum-seekers.

“(1) If any doubt emerges concerning the minor status of a person seeking recognition who claims to be a minor, a medical expert examination may be initiated for the determination of his/her age. The examination may only be performed with the consent of the person seeking recognition, or if the person seeking recognition is in a state which does not permit the issuance of a declaration, with that of his/her representative by law or guardian.

(2) An application for recognition may not be refused solely on the grounds that the person seeking recognition, the representative by law or guardian did not consent to the performance of the examination.

(3) If the person seeking recognition, the representative by law or guardian does not consent to the expert examination aimed at determining the minor status, the provisions relating to minors, with the exception of the provisions relating to the involvement of a legal representative or the appointment of a guardian, may not be applied to the person seeking recognition.

(4) Beyond the physical appearance of the applicant, the medical expert examination shall cover the psychological maturity of the applicant and the relevant ethnic and cultural facts/components. It shall be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, the decision should be made to the benefit of the person examined. The examination shall be carried out by an independent paediatrician with appropriate expertise and persons claiming to be children shall be treated as such, until age determination has taken place.⁶⁸”

Justification: Article 8 of the UN Convention on the Rights of the Child stipulates that “*State Parties undertake to respect the right of the child to preserve his or her identity.*” According to the Hungarian Ombudsman, the age of the child is an important element of his / her identity. The Ombudsman refers to Section 31 (i) of General Comment No. 6 on UNCRC⁶⁹ by the Committee on the Rights of the Child, according to which the identification of a child without appropriate ID documents as an unaccompanied one should include age assessment and should not only take into account the physical appearance of the individual, but also his or her *psychological maturity*. As regards age assessment, it is emphasized in the document that it must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect

⁶⁸ See UNHCR provisional comments to Article 17 (15(5) of the Asylum Procedure Directive

⁶⁹ The Committee on the Rights of the Child General Comment No. 6 (2005) TREATMENT OF UNACCOMPANIED AND SEPARATED CHILDREN OUTSIDE THEIR COUNTRY OF ORIGIN
<http://www2.ohchr.org/english/bodies/crc/comments.htm>

to human dignity; and, in the event of remaining uncertainty, the decision should be made to the benefit of the person examined.

3. Family reunification

Refugees

Many refugees recognized by Hungary are prevented from re-uniting with their family members left behind as the family members' travel document (e.g. a Somali national passport) is not recognized by EU MS. The lack of family reunification forces those refugees to leave Hungary in an irregular manner and find a place where the family may reunite. The EU Uniform Format Forms based on the above mentioned instrument is used in many EU MSs (e.g. in the UK) to solve this problem. Hungary has failed to apply this regulation, even though it is directly applicable in its entirety⁷⁰ therefore it is recommended that it be applied in order to facilitate the practice of basic human rights such as family life of refugees and so enhance the opportunity for successful integration in Hungary.

Recommendation: apply Council Regulation (EC) No 333/2002 of 18 February 2002 on uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognized by the Member State.

Beneficiaries of subsidiary protection

UNHCR notes with concern that while beneficiaries of subsidiary protection are not explicitly excluded by law from being reunited with their families, they do not benefit from the more favourable conditions of which exempt refugees from meeting the requirements to provide evidence of accommodation, health insurance and stable and regular resources. As stipulated in *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*⁷¹ beneficiaries of subsidiary protection will face the same difficulties as refugees in fulfilling these conditions as they may have spent lengthy periods of time in asylum reception waiting for the outcome of the asylum procedure with limited access to the labour market. UNHCR considers that the humanitarian needs of persons benefiting from subsidiary protection are not different from those of refugees and differences in entitlements are therefore not justified in terms of the individual's flight experience and protection needs. There is also no reason to distinguish between the two as regards their right to family life and access to family reunification.

UNHCR therefore strongly recommends that the Government takes into account the particularities of the situation of beneficiaries of subsidiary protection by applying the same favourable rules for family reunification to beneficiaries of subsidiary protection as to refugees.

4. Need to issue ICAO compliant Convention Travel Document (CTD) for refugees

Since 1 April 2010, States are required to issue machine readable passports in line with Annex 9 to the 1944 Convention on International Civil Aviation (Chicago Convention) as developed by the International Civil Aviation Organization (ICAO)⁷². These new ICAO standards also

⁷⁰ See Article 288 TFEU – ex-Article 249 of TEC

⁷¹ <http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/pdf/0023/famreun/internationalorganisationsocialpartnersngos/unhcr.pdf>

⁷² See ICAO Document 9303, *Machine Readable Travel Documents*, sixth edition – 2006. Part 1, Machine readable passports, Volume 1, Passports with Machine Readable Data Stored in Optical Character Recognition Format, Approved by the Secretary General and published under his

apply to the issuance of CTDs to refugees and stateless persons. ICAO Document 9303 provides for the technical specifications of official MRTDs and, *inter alia*, designates codes for “*persons of an undefined nationality*”, including *refugees and stateless persons*. In addition to being machine readable, travel documents issued after 1 April 2010 must contain several security features, including a digitalized image of the bearer. ICAO standards further require that travel documents be issued in a secure environment and that individual documents be issued to all family members intending to travel, including to minor children. Like national passports, CTDs should take the form of a book consisting of a cover and a minimum of eight pages and must include a data page onto which the issuing State enters the personal details relating to the holder of the document and the data concerning its issuance and validity. Hence there is a need to update the format of CTDs issued pursuant to the 1951 and 1954 UN Conventions.

Travel documents issued by Hungary under the 1954 Convention are machine-readable, while CTDs issued for refugees recognized by Hungary do not comply with the ICAO requirements. It is **strongly suggested** therefore that the process that aim to amend migration-related national legislation also address this gap.

5. Stateless

It is noted that the wording of Subsection 76 (1) of the Aliens Act remains to be corrected.

Section 76

“(1) Proceedings aimed at the establishment of statelessness shall be instituted upon an application submitted to the alien police authority by an applicant **lawfully staying** in the territory of the Republic of Hungary, which may be submitted by the person seeking recognition as a stateless person (hereinafter referred to as the “applicant”) orally or in writing.

(2) An application presented orally shall be committed to minutes by the alien police authority.

(3) Upon submission of an application, the alien policing authority shall inform the applicant on his/her procedural rights and obligations, the consequences of not complying with the obligations and the place of accommodations designated to him/her.

(4) The acknowledgement of the provision of information shall be committed to minutes.”

The current wording is not in compliance with the 1954 UN Convention on the status of stateless persons. It limits the application of the Convention to lawfully staying applicants. In other words, unlawfully staying applicants are prevented to benefit from the Convention in Hungary. It is suggested that the term “*lawfully staying*” be deleted from the text of Subsection 76 (1). Reference is made in this context to the UNHCR intervention (attached) in the case of *Sudita Keita v Office of Immigration and Nationality* currently processed by the Constitutional Court (ref. no. III.01664/2014) upon reference by the Administrative and Labour Law Court of Budapest. Reference is also made in this regard to point 3.3 of the recently published report of the Council of Europe’s Commissioner for Human Rights⁷³.

authority. Available at:

<http://www2.icao.int/en/MRTD/Downloads/Doc%209303/Doc%209303%20English/Doc%209303%20Part%201%20Vol%201.pdf>.

⁷³ Report by Nils Muiznieks Commissioner for Human Rights of the Council of Europe following his visit to Hungary from 1 to 4 July 2014, available at

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2658043&SecMode=1&DocId=2218468&Usage=2>

6. Making of the application

Article 6 (1) of the Recast Procedure Directive clearly distinguishes between three phases: the making, the lodging and the registration of the application for international protection. Given that the Directive attaches significant legal effect to the making of the application, inter alia the right to remain in the territory of the country, UNHCR believes it is important to clarify relevant national legislative provision under the Aliens Act.

Subsection 51(2) of the Aliens Act

“In connection with any third-country national whose application for asylum is pending, prohibition against refoulement and/or expulsion shall apply and such person may not be returned or expelled if the third-country national in question has the right of residence within the territory of Hungary under specific other legislation.”

Subsection 1 (2) of the Asylum Act (Scope of the Act)

“The provisions of the present Act shall apply to foreigners who have submitted applications for recognition or who enjoy asylum.”

Subsection 35 (1) of the Asylum Act (Submission of Application for Recognition)

“An asylum procedure shall be instituted on the basis of an application for recognition submitted to the refugee authority.”

In UNHCR’s view the term “*the third-country national is under asylum procedure*” lacks sufficient legal clarity and gives rise to concerns regarding compliance with the Directive. This provision also stands at odds with Sections 1 and 35 (1) of the Asylum Act according to which the third-country national falls under the scope of the Act if he/she submitted a claim for international protection. At the time when persons of concern make their application before the Police in the alien police procedure they do not yet fall under the scope of the Asylum Act until their making of application is registered by the Police and transferred to the asylum authority. Thus the above mentioned term is ambiguous and gives rise to differing interpretation.

UNHCR therefore recommends amending the contested part from Subsection 51 (2) of the Aliens Act in order to ensure legal clarity.

7. Lodging application for international protection on behalf of unaccompanied and separated children and on behalf of dependants

UNHCR notes with concern that the Draft does not endeavour to transpose Article 7 (4) of the Recast Procedure Directive providing for an important guarantee for **non-asylum seeking unaccompanied and separated children** under alien police procedure. UNHCR has long advocated for putting in place effective child protection measures in cases of expulsion of unaccompanied children.⁷⁴ Current practice shows that there is no individual and substantive examination in place on the determination of the best interests of the child in expulsion procedures and there is lack of structured cooperation between the alien police, asylum and child-care authorities. The relevant provision of the Recast Procedure Directive provides an important guarantee that the appointed child protection guardian can, if finds it necessary following individual assessment of the situation of the child, lodge an application for international protection on behalf of the child.

⁷⁴ See Asylum Seekers’ Access to the Territory and to the Asylum Procedure in Hungary 2013, available at: http://helsinki.hu/wp-content/uploads/border_monitoring_2013_ENG_final.pdf

UNHCR therefore calls for the proper transposition of this provision into national law by articulating clearly this particular authorization of the child protection guardian.

8. Clarifying inconsistencies when conducting personal interview

Article 16 of the Recast Procedure Directive contains a clear obligation for the decision-making authority to give the explicit opportunity to the applicant to provide explanations regarding elements which may be missing and/or any inconsistencies or contradictions in his/her statement.

It is noted with regret that the Draft does not seek to transpose this requirement under the Asylum Act. UNHCR is particularly concerned as in the overwhelming majority of cases refusal to grant international protection is based on adverse credibility findings. In practice, there is no structured, systematic approach towards credibility assessment.⁷⁵ UNHCR has observed that applicants are not provided systematically with a reasonable opportunity to clarify issues during the interview in case of inconsistencies, discrepancies found by the determining authority, which is generally only referred to in the decision.⁷⁶ In this respect, UNHCR recalls that the right to be heard and of defence are part of the general principles of EU law, this obligation is also affirmed by Article 41 of the European Charter of Fundamental Rights and confirmed in CJEU jurisprudence.⁷⁷

Accordingly, in order to ensure full compliance with the Directive, UNHCR strongly recommends the specific inclusion of this requirement under the Asylum Act.

9. Other issues

- **Full transposition of guarantees relating to unaccompanied children:** it is noted that the Draft does not open the Child Protection Act⁷⁸ for amendment, whereas specific guarantees on the appropriate training of officials working with unaccompanied children, in particular set out under Article 24 (4) of the Reception Directive, Article 6 (3) of the Dublin Regulation, may require the modification of this act. UNHCR therefore recommends carefully reviewing existing legislation on children in order to ensure full compliance with obligations flowing from the recast asylum package on the protection of unaccompanied children.
- **Transposition of Article 11 (3) of the Recast Procedure Directive:** this provision contains an important procedural guarantee preventing the asylum authority from taking a single decision covering all dependents when the disclosure of the details regarding sexual orientation and gender identity or other age based persecution would

⁷⁵ See new UNHCR publication, which contains practical guidance for decision-makers: *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, available at: <http://www.refworld.org/docid/519b1fb54.html> [accessed 21 October 2013]

⁷⁶ In this respect UNHCR would like to recall para. 199 of the UNHCR Handbook, which highlights the importance of resolving contradictions: “it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts.”; see UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, January 1992, HCR/IP/4/Eng/REV.1*, available at: <http://www.refworld.org/docid/3ae6b3314.html> [accessed 21 October 2013]

⁷⁷ See *M.M. v. Minister for Justice, Equality and Law Reform, Ireland*, Attorney General (Opinion of Advocate General), C-277/11, CJEU, 26 April 2012, par. 32: “Consequently, the right to be heard must apply in relation to the procedure for examining an application for international protection followed by the competent national authority in accordance with rules adopted in the framework of the common European Asylum system.”

⁷⁸ Act XXXI of 1998 on the Protection of Children and on Guardianship Administration (Child Protection Act)

jeopardize the interest of the applicant.⁷⁹ UNHCR notes that the Draft does not seek to transpose this guarantee under the Asylum Act.

- **Transposition of Article 31 (7) of the Recast Procedure Directive** (prioritization of examination of asylum application): UNHCR recommends the transposition of this provision of the Recast Procedure Directive allowing for the prioritisation of examination of asylum applications in case the application is manifestly well-founded or the applicant is with special needs. UNHCR recommends amending Subsection 35 (7) of the Asylum Act.
- **Amending Subsection 73 (1) of the Asylum Act**⁸⁰ (withdrawal of international protection): UNHCR suggests including under this provision a specific reference to the information provision to applicants on the reasons for withdrawal. UNHCR has observed that in practice applicants do not receive adequate information on the reasons why the asylum authority initiated the withdrawal procedure of their international protection status, which puts applicants in a highly disadvantageous position vis-à-vis the determining authority.
- **Access by the applicant and his/her legal representative to the reasoned opinions of the national security bodies in exclusion procedures:** UNHCR is concerned that there is no mechanism in place to ensure that the procedural rights of the applicant flowing from the right to a fair trial are guaranteed in exclusion procedures as applicants are denied access to the reasoning of the opinions issued by the national security bodies taking part in the asylum procedure as expert authorities. UNHCR therefore calls on to establish a mechanism whereby the individual interest of the applicant and the public interest (national security considerations) are adequately balanced.

UNHCR
7 January 2015

⁷⁹ UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, p. 17, available at: <http://www.refworld.org/docid/4c63ebd32.html> ; See also UN High Commissioner for Refugees (UNHCR), *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, p.38, available at: <http://www.refworld.org/docid/4c63e52d2.html>

⁸⁰ See Section 73 (1) of the Asylum Act: “*If the refugee authority establishes upon the revision of the existence of the criteria of recognition as a refugee or eligibility for subsidiary protection that recognition is to be revoked, it shall notify the refugee or the beneficiary of subsidiary protection thereof in writing, in his/her mother tongue or in another language understood by him/her.*”