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

GENERAL PREAMBULAR COMMENTS

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-related legislative acts for the purpose of legal harmonisation*" ("Draft").

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 thereto*[2]." 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")[3] 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. Article 78(1) of the Treaty on the Functioning of the European Union[4] 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".*[5] In addition, Article 18 of the Charter of Fundamental Rights of the European Union[6] states that the right to asylum shall be guaranteed with due respect for the rules of the 1951 Convention and the 1967 Protocol. EU secondary legislation also

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[1] See 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 ("Statute").

[2] *Ibid.*, para. 8(a).

[3] UNTS No. 2545, Vol. 189, p. 137., as Hungary acceded to the Convention and the Protocol in 1989, these international legal instruments have become part of the Hungarian domestic law through Law Decree 15 of 1989.

[4] European Union, Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal C 83 of 30 March2010* at: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML

[5] 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, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML.

[6] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 90 March 2010 (C 83) at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF

emphasizes the role of UNHCR. For instance, Recital 22 of the recast Qualification Directive (QD) states that consultations with the UNHCR *"may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention."* The supervisory responsibility of UNHCR is also specifically articulated in Article 20 of the recast Asylum Procedure Directive (APD).[7]

The UN General Assembly has entrusted UNHCR with a global mandate to provide protection to stateless persons worldwide and for preventing and reducing statelessness.[8] It has specifically requested UNHCR "*to provide technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States*". The General Assembly has also entrusted UNHCR with the specific role foreseen in Article 11 of the 1961 Convention on the Reduction of Statelessness. Furthermore, UNHCR's Executive Committee has requested UNHCR to provide technical advice with respect to nationality legislation and other relevant legislation with a view to ensuring adoption and implementation of safeguards, consistent with fundamental principles of international law, to prevent the occurrence of statelessness which results from arbitrary denial or deprivation of nationality[9]. UNHCR thus has a direct interest in national legislation of countries impacting on the prevention or reduction of statelessness, including implementation of safeguards contained in international human rights treaties.

UNHCR submits these comments to assist Hungary, ensuring that while transposing relevant EU legislation and amending national law, international standards related to refugee law are respected.

UNHCR wishes to highlight as well that Hungary, like any other EU Member States, may still introduce more favourable provisions related to asylum than those contained in relevant EU Directives[10], UNHCR therefore hopes that its comments will be considered as part of an on-going dialogue with Hungary to ensure that, as relevant, higher standards rather than the minimum standards foreseen by EU legislation will be adopted in the near future.

UNHCR notes that the main focus of the amendment is once again to enhance public order and security. While UNHCR recognizes the States' sovereignty and the legitimate right to control entry and stay in their territory as well as to handle security concerns, it also wishes to draw the attention of Hungary to the principle of international law which states that in cases in which there is a conflict between national legislation and an international treaty obligation

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[7] 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); Official Journal L 337, 20/12/2011 P. 0009 – 0026; European Union: European Commission, *Amended Proposal for a Directive of the European Parliament and the Council on common procedures for granting and withdrawing international protection status (Recast)*, 1 June 2011, COM(2011) 319 final, at: http://www.unhcr.org/refworld /docid/4e3941c22.html

[8] UN Genral Asembly Resolution A/RES/50/152, 9 February 1996, available at http://www.unhcr.org/refworld/docid/3b00f31d24.html.

[9] ExCom Conclusion 106, Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, No. 106(LVII) – 2006, 6 October 2006, para (a)

[10] See Recital (15), Article 13 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; Recital (7) and Article 5 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; Recital (14) and Article 3 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011

predominance shall always be given to the latter as codified in Article 27 of the Vienna Convention on the Law of Treaties which states *"(a) party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*." Furthermore, it is important to note that Hungary is not only bound by the provisions of the 1951 Convention, but has an international law obligation to apply it in good faith.

Accordingly, UNHCR wishes to share the following comments and suggestions to the Draft, which we request, in the spirit of co-operation and mutual understanding, the Ministry of Interior of Hungary to take into consideration at this drafting stage.

POSITIVE FINDINGS

UNHCR positively notes that the Draft (**Section 23 (1))** extends the scope of family members in the context of unaccompanied/separated minors to include adults arriving together with the child if that person is responsible for the child by law or tradition.

UNHCR welcomes that **Section 23(2)** of the Draft introduces alternatives to detention in the form of bail, designated place of stay and reporting obligation.

UNHCR positively notes that the Draft (**Section 24**) decreases the time limitation which restricts the employment of asylum-seekers to the premises of the OIN reception centre for one year upon application for asylum. The Draft now makes it possible for asylum-seekers to engage in employment after 9 months from application under the same conditions as regular foreigners do. The change represents a substantial improvement in terms of asylum-seekers getting self-sufficient and also establishes the link between reception conditions and - future integration.

UNHCR welcomes that the Draft introduces a significant change in the integration regime, moving away from OIN-run camp based integration to a community based system for which UNHCR has been advocating for many years. While discontinuing the parallel pre-integration regime by OIN, the Draft aims to mainstream the task of integration into the mainstream national social support system in a sustainable manner (**Section 52** of the Draft).

It is welcomed that by virtue of **Sections 58, 61, 62, 67, 69** of the Draft, stateless people recognized by Hungary shall have a clear status in specific fields of the Hungarian law such as health services, social security, equal opportunities of those with special needs (disabled), family support services, marriage and birth registry and tertiary education.

CONCERNS

General

UNHCR notes with concern that no proper impact assessment accompanying the Draft has been carried out, especially with respect to the applicability of the new mechanism on alternatives to detention as well as on the introduction of a completely new integration model. No budgetary impact analysis has been provided, in particular no information is available on the costs incurred by the implementation of asylum detention nor any information on the normative financial support to be provided to the beneficiaries of international protection for the purpose of enhancing their integration in the Hungarian society.

UNHCR also notes with concern that stakeholders have not been provided with adequate time to consult the Draft and share their comments and recommendations concerning the Draft with the Ministry of Interior. This is difficult to understand as there is no requirement or otherwise pressing deadline for transposition with regard to matters relevant to asylum that would justify such a haste.

Furthermore, it is noted with regret that the Government has decided to selectively transpose the Recast Reception Conditions Directive *first and foremost* with respect to the provisions concerning detention of asylum-seekers, even though the Directive hasn't been formally adopted and promulgated yet and so the two years time limit to be set for the transposition hasn't even started yet. In contrast, for example, provisions conferring obligations on Member States in relation to assessing the special reception needs of vulnerable persons are not being transposed (Article 22). At the same time, there seems to be no intention at this stage to transpose in a similar pace the provisions of the Recast Asylum Procedures Directive, particularly concerning the treatment of vulnerable asylum-seekers.

Finally, the lack of information on the planned implementing provisions makes it difficult to assess the applicability and impact of the newly introduced provisions and mechanisms in the Draft.

Ad Sections 31

Met shall be complemented by Sections 31/A-31/F:

"Asylum detention

Section 31/A (1) In order to ensure compliance with the provisions of Section 33 and subsection (5) of Section 49, and having regard to the limitations determined under subsection (2) and in Section 31/B, the refugee authority may detain a person seeking recognition whose right of residence is only based on the submission of an application for recognition if

a) the identity or nationality of the person seeking recognition is uncertain, in order to establish it;

b) the person seeking recognition has hid from the authority or has obstructed the course of the asylum procedure in another manner;

c) there are well-founded grounds for presuming that the person seeking recognition is delaying or frustrating the asylum procedure or presents a risk for absconding, in order to establish the data required for conducting the asylum procedure;

d) the detention of the person seeking recognition is necessary in order to protect national security, public safety or – in the event of serious or repeated violations of the rules of the compulsory designated place of stay – public order;

e) the application has been submitted in an airport procedure; or

f) the person seeking recognition has not fulfilled his or her obligation to appear on summons, and is thereby obstructing the Dublin procedure.

(2) Asylum detention may not be ordered in the case of an unaccompanied minor seeking recognition.

(3) Asylum detention may only be ordered on the basis of individual deliberation and only if its purpose cannot be achieved by taking the measures ensuring availability.

(4) Before ordering asylum detention, the refugee authority shall consider whether the purpose determined in subsection (1) can be achieved by taking measures ensuring availability.

(5) The measure mentioned in sub-paragraph *lc)* of paragraph *l)* of Section 2 may be ordered individually or concurrently with the measures determined in sub-paragraphs *la)* and *lb)* of

paragraph *l)* of Section 2.
(6) Asylum detention shall be ordered by a formal decision, and shall be executed at the time it is communicated.
(7) Asylum detention may not be ordered for more than seventy-two hours. The refugee authority may present a motion for the extension of asylum detention in excess of seventy-two hours within twenty-four hours of the ordering of detention, at the district court competent according to the place of detention. The court may extend the period of detention by sixty days at most, and this period may be prolonged by another sixty days at the request of the refugee authority on not more than two occasions, in such a manner that the period of detention may not exceed six months even in such cases. The motion for extension must be received by the court no later than within eight business days before the date when the period must be extended. The refugee authority shall justify its motion.
(8) Asylum detention shall last no longer than six months or, in the case of a family with minors, thirty days.
(9) Detention must be terminated immediately if
a) a period of six months – or in the case of a family with minors, thirty days – have passed since detention was ordered;
b) the reason for the detention order no longer exists;
c) it has been established that the detainee is an unaccompanied minor seeking recognition;
d) the detained person seeking recognition requires extended hospitalization for health reasons;
e) the conditions of implementing transfer or return under the Dublin procedure (hereinafter: Dublin transfer) exist; or
f) it becomes obvious that the Dublin transfer cannot be carried out.
(10) If asylum detention is terminated in accordance with paragraph *a), c), d)* or *f)* of subsection (9), the refugee authority shall designate a place of residence for the person seeking recognition.

Section 31/B (1) Asylum detention may not be ordered for the sole reason that the person seeking recognition has submitted an application for recognition.
(2) 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.

Section 31/C (1) The person seeking recognition may not request the suspension of the procedure for ordering asylum detention or for using a measure ensuring availability.
(2) There are no legal remedies against the ruling ordering asylum detention or the use of a measure ensuring availability.
(3) The person seeking recognition may file an objection against an order of asylum detention or the use of a measure ensuring availability if the refugee authority has not fulfilled its obligation determined in sections 31/E and 31/F.
(4) The objection shall be decided upon by the district court having jurisdiction based on the place of residence of the person seeking recognition within eight days.
(5) Based on the decision of the court, the omitted measure must be carried out or the unlawful situation must be terminated.

Section 31/D (1) The court shall act as a sole judge and pass its decision in the form of an order in the procedure related to the judgment on the objection and the extension of detention.
(2) If the court has rejected the objection or the motion, no other objection or motion can be submitted on the same grounds.
(3) The person seeking recognition may only be represented by a legal representative in the

court procedure.
(4) The court shall appoint a guardian *ad litem* for the person seeking recognition if he or she does not speak Hungarian and is unable to arrange his or her representation by an authorized representative.
(5) With the exception determined in subsection (7), a personal hearing must be held in the following cases:
a) when the detention period is extended by the court in excess of seventy-two hours for the first time; and
b) in the procedure related to an objection or the further extension of the detention, if the person concerned has requested a personal hearing.
(6) The personal hearing can be held at the place of detention and also in the absence of the legal representative of the person seeking recognition.
(7) The court may dispense with the personal hearing if
a) the person seeking recognition is unable to attend a hearing because he or she is treated as an inpatient in a health-care institution; or *b)* the objection or the motion has not been submitted by a person entitled to do so.
(8) At the personal hearing the person seeking recognition and the refugee authority may submit evidence in writing or present the same verbally. Those present shall be given an opportunity to familiarize themselves with the evidence, unless otherwise prescribed by law. If the person seeking recognition or the representative of the refugee authority which filed the motion has not appeared but has submitted his or her comments in writing, the court shall present such comments.
(9) The court's order must be communicated to the person seeking recognition and the refugee authority as well as to the legal representative and the guardian *ad litem.* The order must be communicated by announcement and it must be delivered immediately after it has been committed to writing.
(10) No further legal remedies against the decision of the court are available.
(11) Any costs of the court procedure will be borne by the state.

Section 31/E (1) The detained person seeking recognition shall be informed about his or her rights and obligations in his or her mother tongue or in another language that he or she speaks.
(2) The authority that has ordered detention shall immediately arrange, by way of a temporary measure, the accommodation of the applicant's dependent family members or the family members who are left without supervision, and for the safekeeping of any valuables of the applicant that are left unattended.

Section 31/F (1) The refugee authority shall implement the asylum detention at a place designated for this purpose.
(2) During the execution of the detention, the following persons shall be separated:
a) men from women – with the exception of spouses; and
b) families with minors from other detainees, ensuring the appropriate protection of privacy.
(3) The accommodation of persons requiring special treatment shall be arranged in view of their specific needs – in particular their age and health condition (including their mental condition).
(4) The detained person seeking recognition
a) in addition to the material conditions of reception, shall be entitled to the following:
aa) to have unsupervised contact with his or her relatives and a member of his or her consular representation;
ab) to receive and send packages and letters and to receive visitors according to the legal provisions;

ac) to supplement his or her food at his or her own cost;
ad) to practice his or her religion;
ae) to take advantage of any available public educational opportunities;
af) to make objections, complaints and public announcements and to submit requests; and
ag) to spend at least one hour per day outdoors; and
b) he or she shall must abide by the following:
ba) to observe the rules of the institution where the detention is implemented and to comply with the relevant instructions;
bb) to behave in a manner that does not disturb other detainees and does not violate their rights;
bc) to contribute to keeping clean the areas used by him or her, without compensation;
bd) to subject himself or herself to the examinations concerning him or her and to tolerate the inspection of his or her clothing as well as the confiscation of any personal items whose possession is not permitted; and

be) to pay all costs of the accommodation and services provided to him or her and any damage caused by him or her deliberately."

General comments concerning asylum detention

UNHCR welcomes that the Draft – in transposing the relevant provisions of the Recast Reception Conditions Directive concerning detention – sets out an exhaustive list of the possible grounds for detention of asylum-seekers. UNHCR, however, notes with concern that the grounds for detention in the Draft are far too vaguely formulated leaving much room for interpretation, thereby jeopardizing legal certainty, an overriding principle confirmed, inter alia, by the European Court of Human Rights.[11] To that end, in UNHCR's view it would be necessary to provide specific criteria in a non-exhaustive manner concerning each detention ground for the law enforcement authority to be taken into account when assessing the necessity of detention. In this respect, UNHCR recalls the importance of the appropriate application of the *"necessity and proportionality"* test and recalls the prohibition of arbitrary detention. UNHCR also underlines that proper individual assessment is the cornerstone for a detention order to be justified.

The amendments stipulated by Sections 31 of the Draft clearly seek to legalize the detention of asylum-seekers in Hungary (with the exception of unaccompanied and separated children). In contrast, the current situation where asylum-seekers may be detained as an exception (only repeat applicants are detained), according to this Draft, asylum-seekers for a much broader group of reasons may be legally kept detained for a maximum of 6 months as a result of the amendment. The timing of the entry into force (1 January 2013) of this particular provision of the Draft vis-à-vis that of the rest (1 January 2014), in conjunction with information provided by senior Government officials, suggests that the primary aim of the amendment is to decrease the number of asylum applications (by deterring abusive applicants from seeking asylum in

[11] See *Case of Amuur v. France*, Application no. 19776/92, 25 June 1996, par. 50: 'Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness. ...Quality in this sense implies that where a national law authorises deprivation of liberty - especially in respect of a foreign asylum-seeker - it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.'; See also *Case of Lokpo and Touré v. Hungary*, Application no. 10816/10, final judgment, 08/03/2012; *Case of Al-Tayyar Abdelhakim v. Hungary*, Application no. 13058/11, final judgement, 23/01/2013, *Case of Hendrin Ali Said and Aras Ali Said v. Hungary*, Application no. 13457/11, 23/01/2013

Hungary) given the recent significant increase of late[12]. Under this Draft, detention would be applied as a migration control tool penalising illegal entry and prevent unlawful onward movements. UNHCR notes in this context that according to the UN Working Group on Arbitrary Detention: "*criminalising illegal entry into a country exceeds the legitimate interest of the States to control and regulate illegal immigration and leads to unnecessary detention*."[13] UNHCR also notes that criminalising illegal migration would run counter to the conditions set by Article 5 of the European Convention of Human Rights (on the right to liberty and security), providing a cause of action before the European Court of Human Rights. The Dublin Regulation, and not detention has been developed by the European Union to handle irregular onward movements of asylum-seekers.

Another main general concern is that as a result of the new provisions, asylum-seekers in asylum detention may face stricter legal conditions than non-asylum-seekers in immigration detention, because of lesser procedural guarantees available for them (e.g. less judicial control – see our detailed comments to Section 31/A(7) on prolongation of detention).

Detention of asylum-seekers is, in the view of UNHCR, inherently undesirable. UNHCR recalls at the outset Article 31 of the 1951 Convention relating to the Status of Refugees[14] and the relevant conclusion of UNHCR's Executive Committee[15] as well as the international and regional human rights law, according to which detention of asylum-seekers should only be *exceptional* and should only be resorted to where provided for by law and where necessary to achieve a legitimate purpose, proportionate to the objectives to be achieved and applied in a non-discriminatory manner, for a minimal period. Exceptionality is stipulated as a requirement by Recital 15 of the recast Reception Directive[16]as well. The current Draft, is not compliant with the requirement of exceptionality as asylum-seekers who apply for the first time in Hungary will be put into asylum detention, while subsequent applicants will be subject to immigration detention.

Detention of asylum-seekers should comply with human rights standards as well as the ones stipulated by the Parliamentary Assembly of the Council of Europe in 2010[17]. The necessity of detention should be established in each individual case, following full consideration of

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[12] The number of applications submitted in Hungary in January-March 2013 is 2,322 compared to 2,157 in the entire year of 2012.

[13] See: A/HCR/7/4. Para.53, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/100/91/PDF/G0810091.pdf?OpenElement

[14] Article 31 (1): The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
(2). The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

[15] UN High Commissioner for Refugees, *Detention of Refugees and Asylum-Seekers*, 13 October 1986, No. 44 (XXXVII) - 1986, available at: http://www.unhcr.org/refworld/docid/3ae68c43c0.html

[16] Recital (15): "Detention of asylum seekers should be applied in line with the underlying principle that a person should not be held in detention for the sole reason that are seeking international protection, notably in accordance with the international legal obligations of the Member States, and particularly Article 31 of the Geneva Convention relating to the Status of Refugees of 28 July 1951. […] Detention of asylum seekers should only be possible under very clearly defined **exceptional circumstances** laid down in this Directive and subject to the principle of necessity and proportionality with regard both to the manner and to the purpose of such detention…"

[17] Parliamentary Assembly Resolution 1707(2010) of 28 January 2010 as well as Recommendation 1900 (2010) of 28 January 2010 on the detention of asylum-seekers and irregular migrants

alternative options. This requirement is confirmed in the Draft Recast Reception Conditions Directive, which imposes a clear obligation on EU Member States to carry out an individual assessment each and every case, including assessment of the application of less coercive measures.[18] In this context, UNHCR wishes to refer to its revised Guidelines on Detention (2012) providing detailed guidance on the applicable international standards regarding detention of asylum-seekers as well as possible alternative measures to detention.[19]

UNHCR has long held that the current national legislation lacks a clearly applicable legal basis for detaining asylum-seekers.[20] As a result asylum-seekers have been detained under the Aliens Act for the purpose of securing deportation, which is contrary to international and European legal standards[21]which stipulate that asylum-seekers must receive protection against refoulement. This practice of detention for the purpose of deportation has appropriately resulted in a formal inquiry initiated by the European Commission against Hungary, possibly leading to a formal infringement procedure.[22]

Detailed comments concerning asylum detention

- Grounds for detention

Although in Section 31/A (3) and (4) the Draft stipulates that detention can only be ordered on the basis of an individual assessment and if no alternative measures can be applied to secure the presence of the asylum-seeker, nevertheless this general and vague formulation does not provide for adequate safeguards that during the assessment the requirements of necessity and proportionality will indeed be complied with. UNHCR therefore recommends explicitly listing a minimum list of criteria to be taken into account by the asylum authority when carrying out the individualized assessment, and which should also be reflected in the reasoning of the decision ordering detention.

Concerning Section 31/A (1) point a) on the basis of which detention can be ordered for the purpose of verifying the applicant's identity or nationality – also laid down in Article 8 (3) a) of the Recast Reception Conditions Directive – it needs to be emphasized that only minimal periods in detention may be permissible to carry out initial identity and security checks. In this respect UNHCR notes that the inability to produce identification documents affects the majority of asylum-seekers. However, the mere inability to produce any documentation should not automatically result in detention and should not either automatically be interpreted as an unwillingness to cooperate or a finding that the individual would pose a risk of absconding.[23] In this context, reference is made to the obligation of Contracting States enshrined in Article 31 of the Geneva Convention not to impose penalties on asylum-seekers on account of their illegal entry or presence in the territory of the State. UNHCR notes with concern that there is

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[18] Article 8 (2) of the Draft Directive of the European Parliament and the Council laying down minimum standards for the reception of asylum seekers (Recast); COM (2011) 320 final, 1 June 2011; the Council reached a political agreement on 25 October 2012

[19] UN High Commissioner for Refugees *Guidelines on the Applicable Criteria ans Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012; available online at: http://www.unhcr.org/505b10ee9.html

[20] UN High Commissioner for Refugees, *Hungary a country of asylum – Observations on the situation of aslyum seekers and refugees in Hungary*, p. 15.; Available at: http://www.unhcr.org/refworld/pdfid/4f9167db2.pdf

[21] See Case C-357/09, *Said Shamilovich Kadzoev (Huchbarov) v. Administrativen sad Sofia-grad – Bulgaria*, Judgment of the Court (Grand Chamber) of 30 November 2009, *European Court reports 2009 Page I-11189*

[22] 3322-12-HOME EU Pilot

[23] See also *UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum seekers* (COM (2011) 320 final, 1 June 2011), July 2012; available online at: http://www.unhcr.org/refworld/category,REFERENCE,,COMMENTARY,,500560852,0.html

no strict time limit established in law regarding this particular ground for detention and recommends modifying Section 31/A (7) by setting a reasonably strict maximum time limit for which detention ordered on the above-mentioned ground can be prolonged. UNHCR recalls the obligation to respect the principle of proportionality. If the verification of identity/nationality proves to be impossible or excessively difficult, detention should immediately be terminated as detention can no longer be justified on a legitimate ground.

UNHCR considers that Section 31/A (1) c) and d) of the Draft are vaguely formulated grounds for detention that can create the risk of a widespread detention of asylum-seekers. Regarding the risk of absconding set out in Section 31/A (1) c), UNHCR recommends further elaborating what might constitute a "*well-founded ground for presuming that the person seeking recognition is delaying or frustrating the asylum procedure or presents a flight risk*" by providing an open list of examples, for instance past history of non-cooperation or refusal by the applicants to provide information about the basic elements of their claim etc. In this regard reference is made to the revised UNHCR Guidelines on Detention (2012).[24]

- Detention of families with children and unaccompanied/separated children

UNHCR is particularly concerned about Sections 31/A(8) and 31/B (2) of the Draft, which continue 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 interest of the child, 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[25]. This is also confirmed by the Draft UNHCR-UNICEF Guidance on Best Interests Determination for Separated and Unaccompanied Children in Industrialized Countries (European context).

Reference is made in this context to the report of the Hungarian Ombudsperson[26] which clearly states that the detention of families with children is a form of discrimination on the ground of the family status of the child, as detention of unaccompanied minor asylum-seekers is prohibited by Hungarian law, whereas the same national legislation provides a ground for detention of minors 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.[27] Furthermore, children in detention due to their legal incapacity do not enjoy the right to appeal against the detention decision, which is contrary to Article 37 d) of the UN Convention on the Rights of the Child.[28] In this context, reference is made to the judgment of the European Court of Human Rights in *Popov v. France*[29] where the Court has

[24] Guideline 4.1: detention is an *exceptional* measure and can only be justified for a legitimate purpose, See footnote 14

[25] Jesuit Refugee Service: Becoming Vulnerable in Detention (2010), page 98 http://www.detention-in-europe.org/images/stories/DEVAS/jrseurope_becoming%20vulnerable%20in%20detention_june%202010_public_updated%20on%2012july10.pdf

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

[27] „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."

[28] „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."

[29] 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.

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 Human Rights and relevant non-governmental organisations, has long advocated for abolishing detention of families with children.[30] UNHCR reiterates its previous position and strongly recommends that Section 31/B (2) of the Draft be deleted.

Alternatively, should the Government insist on maintaining the possibility of detention of families with children only in *exceptional cases*, UNHCR recommends that Section 31/B (2) be amended by providing for an objective set of criteria on the basis of which the asylum authority would be obliged to assess the necessity of detention as well as the best interest of the child before ordering detention. Even in such cases, detention should not exceed 15 days (see ECtHR judgement in *Popov v France*). Experience has shown that even though national legislation spells out the requirement that detention of families with children can only be applied as a last resort measure, in practice detention is often mechanically applied without any prior individualised assessment taking place, this concern has also been shared by the Parliamentary Commissioner for Human Rights. In this context UNHCR wishes to reiterate the guidance of the European Court of Human Rights.[31]

- Prolongation of detention

UNHCR notes with concern that Section 31/A (7) of the Draft foresees prolongation of detention for a maximum of 60 day interval, whereas under the Aliens Act immigration detention can be prolonged by a maximum of 30 day interval. UNHCR is convinced that the legal guarantees accompanying asylum detention should not be lower than those provided in the case of immigration detention, regardless of any difference in the detention regimes. Therefore UNHCR strongly recommends to change the 60-day period to 30-day in Section 31/A (7).

Another main concern in the context of judicial review and prolongation of detention is the efficiency of judicial review in Hungary. According to a current survey conducted by the Curia (the highest court in Hungary), out of some five thousand court decisions made in 2011 and 2012 only three discontinued immigration detention, while the rest simply prolonged detention without any specific justification[32]. UNHCR is concerned that as of 1 July 2013, the same local courts will be in charge of the judicial review of asylum detention as for immigration detention (surveyed by the Curia).

- Alternatives to detention

UNHCR welcomes the introduction of a new system on alternatives to detention. In Section 31/A (4) the Draft confers an obligation on the asylum authority to assess the applicability of alternatives to detention. Section 2 l) sets out a new definition covering the possible measures acting as alternatives to detention, such as regular reporting requirement, designated place of

[30] 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 footnote 25)

[31] *Popov v. France*, see above n. 26; Case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, application no. 13178/03

[32] Information kindly shared with UNHCR by the Curia.

residence and financial deposit (bail). The latter can be applied individually or together with either the regular reporting requirement or the designated place of residence.

UNHCR is of the view that the Draft needs further elaboration. In particular the purpose of each alternative measure should explicitly be set out in the legislation, i.e. securing the presence of the asylum-seeker during certain procedural steps. Further, the conditions of application of each measure should also be laid down for the purpose of legal clarity already in the Asylum Act and not in its implementing government decree. Concerning financial deposits, it should explicitly be set out that after having deposited the amount of money the asylum-seeker cannot be taken into detention and that the authority shall return the surety to the depositor if the asylum is granted or certain conditions are met. The possible consequences of breaching the accompanying obligation to report to the authorities/report of residence should also be explicitly laid down in the Asylum Act. In this context, UNHCR wishes to draw comparison with the legal institution of bail, the objective and main criteria for application of which are also laid down in the form of an act (in the Penal Procedure Act) and not in enabling legislation. Further technical details, such as the actual deposition procedure could be specified by the implementing decree.

UNHCR believes it would be desirable if certain scenarios or conditions would be set out where alternatives to detention may not be applied at all, thereby providing objective guidance for the asylum authority when carrying out the individual risk assessment of the asylum-seeker concerned. For instance, this may apply in case of a serious threat to the national security or public order or if the individual concerned did not comply with the previously imposed alternative measure.

- Detention conditions

Regarding Section 31/F (2), UNHCR notes that Article 10 (1) of the Recast Reception Conditions Directive imposes a clear obligation on EU Member States to ensure that asylum-seekers be kept separately from other third-country nationals. In UNHCR's view this obligation is not sufficiently reflected by the Draft, therefore recommends modifying Section 31/F (2) by adding a separate provision setting out the above requirement.

In the same vein, UNHCR is of the view that Hungary is not fully transposing the obligation set out in Article 11 of the Directive concerning the conditions of detention of vulnerable persons and persons with special reception needs. This Article imposes a specific obligation on the authorities to ensure regular monitoring and adequate support for vulnerable persons. Section 31/F (3) of the Draft in setting out a general obligation to provide adequate support to vulnerable asylum-seekers does not include such monitoring obligation. Further, UNHCR is particularly concerned that the impact assessment sheet of the Draft does not foresee any financial allocation for meeting this obligation. In the current setting, the special needs of vulnerable persons are only met within the framework of projects funded by the Solidarity and Migration Funds. UNHCR finds it worrisome that the Government does not foresee allocating any additional financial support to that end.

Ad Section 40

Met. shall be complemented by the following Section 62/A:

"62/A.§. Protection against persecution or serious harm can only be provided by
a) the State
b) Parties or organisations, including international organisations, controlling the State or substantial part of the territory of the State, provided they are willing and able to offer

protection in accordance with para 2."

UNHCR has generally welcomed the transposition of this provision of the EC Qualification Directive as it guarantees the recognition of refugee status or subsidiary protection status irrespective of the source or agent of persecution, including persecution emanating from non-State actors. However, the Article of the Directive raises the question regarding the extent to which non-State entities can provide protection. In UNHCR's view, refugee status should not be denied on the basis of an assumption that the threatened individual could be protected by parties or organizations, including international organizations, if that assumption cannot be challenged. It would, in UNHCR's view, be inappropriate to equate national protection provided by States with the exercise of a certain administrative authority and control over territory by international organizations on a transitional or temporary basis. Under international law, international organizations and other parties and organisations do not have the attributes of a State, are not parties to international human rights treaties, and therefore cannot be held accountable for their actions as can a state. In practice, this generally has meant that their ability to enforce the rule of law is limited[33].

Accordingly, UNHCR recommends that Section 62/A of the Draft be deleted**.**

Ad Section 41

Section 68 (2) of Met shall be replaced by the following provision:

"(2) The statement of claim shall be submitted to the refugee authority within eight days of the communication of the decision. The refugee authority shall forward the statement of claim, together with the documents of the case and its counter-application, to the court without delay. The submission of the statement of claim shall have a suspensive effect on the implementation of the decision of the refugee authority, except in the case set forth in Section 54.

(3) The court shall decide on the statement of claim in a litigious (adversarial) procedure within sixty days of receipt of the statement of claim. If the applicant is the subject of a coercive measure, a sanction or punishment restricting personal freedom or of a measure restricting personal freedom ordered in an immigration procedure, the court shall conduct an expedited procedure."

[33] "The lack of clarity of the concept allows for wide divergences and for very broad interpretations which may fall short of the standards set by the Geneva Convention on what constitutes adequate protection. For instance, national authorities interpreting broadly the current definition have considered clans and tribes as potential actors of protection despite the fact that these cannot be equated to States regarding their ability to provide protection. In other instances, authorities have considered non-governmental organisations as actors of protection with regard to women at risk of female genital mutilation and honour killings, despite the fact that such organisations can only provide temporary safety or even only shelter to victims of persecution".
European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, 21.10.2009, p. 6, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0551:FIN:EN:PDF.

In Hungary, no administrative review is available for asylum-seekers against a negative administrative decision in their asylum case; the only review available for them is judicial review. UNHCR is therefore concerned that the time available for asylum-seekers to request a review by the court of their case which affects the lives and security of individuals – is to decrease from the current 15 (calendar) days to 8 in an extremely complex legal environment where many asylum-seekers face multiple procedures (such as the one relevant to their detention and in addition the asylum proceedings), those not fluently familiar with Hungarian law and procedure are at significant disadvantage. To shorten the already abbreviated time allocated for the submission of the request for court review may result in limited access to legal remedy, especially in combination with the fact that the availability of professional, competent legal aid and representation is insufficient too. This in turn may raise 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).

It should also be mentioned that the justification provided by the Draft in support of this particular change - i.e. the reduction of the period available for asylum-seekers to lodge a request for administrative review - serves the purpose of preventing the excessive prolongation of the asylum procedure, in UNHCR's view, does not seem to be a valid argument given that the administrative review period allocated for the judiciary increases from 45 days to 60, thus overall the procedure wouldn't be shorter. On the other hand, however, this 7 day-period is an extremely important and valuable legal guarantee for the asylum-seekers themselves to be able to exercise their right to effective remedy in an extremely complex legal environment.

It is strongly recommended therefore that Section 41 of the Draft be deleted.

Ad Section 52

Act III of 1993 on Social Administration and Social Benefits shall be complemented by the following provisions:

"o) *integration contract*: is a contract concluded with an authority by a beneficiary of international protection in order to enhance his/her social integration; it contains the rights and obligations of the parties under the contract, the obligation of the foreigner to cooperate, and the consequences of non-compliance with the contract.

4) the following chapter ... of Act III of 1993 on Social Governance and Social Benefits shall be amended to include:

"Chapter ...
Assistance provided for the social integration of refugees or beneficiaries of subsidiary protection

"Section ... (1) Assistance for the social integration of refugees or beneficiaries of subsidiary protection shall be provided for by the district government agencies of the capital and of the counties (Budapest district) offices (hereinafter: district offices) in accordance with the support defined in this Act. In order to carry out this task, the district office may use the integration funds from the central budget.

(2) In order to assist refugees or beneficiaries of subsidiary protection to integrate into society, the district office shall conclude an integration contract at the request of the refugee or beneficiary of subsidiary protection, if they are in need.
(3) An application for the conclusion of an integration contract may be submitted within 4 months from the date on which the decision recognising refugee status, or granting subsidiary protection, was issued. The term of validity of the integration contract may last for up to two years from the date on which the status is recognised.
(4) If the refugee or beneficiary of subsidiary protection
a) has not submitted an application for the signature of an integration contract within the time limit prescribed in paragraph (3),
b) moves away from the area over which the district office specified in the integration contract has jurisdiction, during the period of validity of said agreement, and except for the cases specified in this Act, or
c) if the disbursement of support or the provision of services granted to this person under the integration contract are terminated in accordance with this Act,
then the refugee or beneficiary of subsidiary protection will no longer be eligible for this support determined on the basis of their legal status.
(5) During the term of validity of the integration contract, the refugee or beneficiary of subsidiary protection may only change their place of residence within Hungary in justified cases, such as, in particular, where the change in residence is required for reasons of
a) employment,
b) provision of housing,
c) family reunification, or
d) special care or placement in a health-care or social institution.

Section ... (1) The disbursement of support or the provision of services under the integration contract may be suspended if the refugee or beneficiary of subsidiary protection
a) does not, for a period of at least 30 consecutive days, and through his or her own fault, fails to perform the obligations stipulated by the integration contract,
b) makes a false statement regarding his or her assets or income,
c) requires inpatient care exceeding 30 days at a health-care institution, or
d) if he or she has been charged with a criminal offence and criminal proceedings have been instituted against him or her.
(2) The disbursement of support or the provision of services under the integration contract may be terminated if
a) if any of the circumstances in paragraph (1) points *a)-c)* is present within the time limits specified for that circumstance,
b) if, because of any of the circumstances in paragraph (1) points *a)-d)*, the suspension of the disbursement of support or the provision of services should become necessary again,
c) a final judgment is handed down which finds the refugee or beneficiary of subsidiary protection guilty of the intentional commission of a criminal offence, or
d) if the refugee or beneficiary of subsidiary protection has renounced his or her legal status or if this status was revoked by the refugee authority."

It is generally welcomed that the Draft introduces a significant change in the integration regime, moving away from OIN-run camp based integration to a community based system UNHCR has been advocating for many years. While discontinuing the parallel pre-integration regime of OIN, it aims to mainstream the task of integration into the mainstream national social support system in a sustainable manner. It is however noted with concern that no proper impact assessment accompanying the Draft has been carried out, or at least shared for

comments, especially with respect to the introduction of a completely new integration model. No budgetary impact analysis has been provided: in particular no information is available on the normative financial support to be provided for beneficiaries of international protection for the purpose of enhancing their integration in the Hungarian society.

- Reception phase

"(1) The refugee and the beneficiary of subsidiary protection are – in case of need – entitled to avail themselves of the material conditions of reception and of the care and benefits as determined by law, for no more than 60 days after the date of the final ruling on recognition."

According to the Draft, beneficiaries of international protection will be entitled to 60 days of reception conditions after receiving the decision granting refugee or subsidiary protection. UNHCR notes with concern that – according to the plans of the Government – this phase is not meant to facilitate their integration process but is only foreseen for the issuance of basic documentation. It remains unclear whether beneficiaries of international protection will be moved to the pre-integration facility in Bicske or will stay for two more months in the reception facility in Debrecen. UNHCR underlines that an additional move to Bicske would put a further burden on them, especially on families whose children are attending school whereby no guarantees exist that their education will be ensured for this 60 days period. UNHCR here recalls that the right to education is widely recognised as a fundamental human right.[34] Reference is made to the UNHCR Report on "*Improving Access to Education for Asylum-seeker, Refugee Children and Adolescents in Central Europe*"[35] to take into account the fact that refugee children and children with subsidiary protection should be able to access education during all phases of their displacement cycle.

UNHCR therefore suggests – taking also into account that Hungary is obliged to implement Article 3 (1) of the UN Convention on the Rights of the Child and therefore give primary consideration to the best interests of the child – that beneficiaries of international protection are not moved to another reception facility only for reasons of issuing their basic documentation. Moreover, it is recommended – as stipulated in the UNHCR "*Note on Refugee Integration in Central Europe*"[36] – that all efforts are made to begin the integration process at the earliest possible stage[37]and to provide refugees with an integration programme from the very moment of their recognition.

UNHCR underlines that access to safe, secure and affordable housing is a fundamental human right. Adequate housing plays a critical role in supporting the overall health and well-being of refugees and providing a base from which they may seek employment, re-establish family relations and make connections with the wider community. Therefore UNHCR emphasizes the need to ensure adequate and affordable housing for beneficiaries of international protection. As the current Draft does not foresee any provisions for the beneficiaries of international protection after their move out from the reception facility, UNHCR urges the

[34] Article 28 of the CRC, Article 14 of the EU Charter on Fundamental Rights, Article 2 of the First Protocol to the ECHR
[35] UNHCR Regional Representation for Central Europe, Budapest, July 2011
[36] See: http://unhcr.org.ua/img/uploads/docs/11%20UNHCR-Integration_note-screen.pdf
[37] 2.1. The Link between the Reception and Integration Phases, p. 7
http://unhcr.org.ua/img/uploads/docs/11%20UNHCR-Integration_note-screen.pdf

immediate implementation of Sub-Section 1 (d), Section 2 of the Act on the Hungarian Red Cross.[38] UNHCR also recommends that a study be conducted on the re-allocation of the operational costs of the Bicske pre-integration facility to support temporary shelters of the Red Cross.

- Integration contract

"Section ... (1) Assistance for the social integration of refugees or beneficiaries of subsidiary protection shall be provided for by the district government agencies of the capital and of the counties (Budapest district) offices (hereinafter: district offices) in accordance with the support defined in this Act. In order to carry out this task, the district office may use the integration norm from the central budget.

(2) In order to assist refugees or beneficiaries of subsidiary protection to integrate into society, the district office shall conclude an integration contract at the request of the refugee or beneficiary of subsidiary protection, if they are in need."

„o) Integration contract: is a contract concluded with an authority by a beneficiary of international protection in order to enhance his/her social integration; it contains the rights and obligations of the parties under the contract, the obligation of the foreigner to cooperate, and the consequences of non-compliance with the contract."

UNHCR welcomes that the Government intends to introduce a new integration system which aims to better respond to the individual needs of the beneficiaries of international protection. UNHCR notes that the new integration scheme is to be based on the conclusion of an integration contract between the service provider on one hand and the beneficiaries of international protection on the other hand. Tasks related to integration are to be channelled into the mainstream social assistance system.

As most of the content of the integration contract is to be specified in the relevant government decree, UNHCR would like to draw attention to the following:

The current mainstream social support system has not been appropriately prepared to carry out the tasks laid down in the current Draft. UNHCR therefore recommends that the government decree foresees continuous training activities which are carried out by relevant stakeholders in order to allow for a smooth hand-over, to establish a sustainable system and to respond to newly-arising questions and needs.

UNHCR underlines that the integration contract should be based on the acknowledgement of rights and obligations of *both parties*: the beneficiary of international protection and the service provider, demonstrating a fair balance between what is being offered and expected, especially for vulnerable cases and illiterate beneficiaries of international protection

It is advised that the relevant government decree explicitly stipulates also obligations on behalf of the service provider. In order to underline the obligation of both parties to cooperate it is suggested that Sub-Section (3) (o) is amended as follows: "*Integration contract: is a contract concluded with an authority by a beneficiary of international protection in order to*

[38] "The Red Cross – in the sphere of its basic activities – performs the following tasks: d) through establishing and maintaining temporary shelters and by other means it participates in the relief efforts for assisting refugees and asylum seekers, it facilitates the creation of conditions for their earliest possible return home."

*enhance his/her social integration; it contains the rights and obligations of the parties under the contract, **their** obligation to co-operate, and the consequences of non-compliance with the contract*".

- Application for support

"(3) An application for the conclusion of an integration agreement may be submitted within 4 months from the date on which the decision recognising refugee status, or granting subsidiary protection, was issued. The term of validity of the integration contract may last for up to two years from the date on which the status is recognised."

According to the Draft the beneficiaries of international protection have four months from the date when granted international protection to file an application for the integration programme. If they miss the given deadline they will lose the only opportunity to receive the integration assistance. Moreover, the Draft does not provide any exemptions for missing the given deadline. UNHCR notes that refugees may not be in the position to comply with the time limit for filing the petition for the integration support – given that currently it remains unclear what kind of assistance they will receive from the State to do so – and that they might not be well aware of their obligations to file such request. Moreover, the Draft does not specify what kind of support refugees receive until they submit an application. This may cause a time lag where they are left without any support while the administration is assessing their application.

Therefore, UNHCR strongly encourages the authorities to remove time barriers from concluding the state integration contract. Reference is made to the study "*Refusal to grant Integration Assistance – Law and Practice*" commissioned by the Polish Institute of Public Affairs in Poland[39] (with a very similar type of integration support scheme) on the existing legal and administrative barriers in integration contained in the Law on Social Assistance. The study confirms that strict deadlines for applying for the integration programme – the delay period reaching up to 395 days in Poland - cause barriers in accessing the assistance and might leave refugees without any targeted support.

Moreover, the Draft restricts the availability of the integration programme to only those in need while it does not specify the circumstances for assessing this need. UNHCR recalls that some aspects of the integration programme are independent from the "*need*" of refugees: as underlined in the UNHCR Note on Refugee Integration in Central Europe learning the language and having a basic knowledge of the receiving country are basic requirements for achieving independence and self-sufficiency as well as becoming part of the local community. They are also means for refugees to regain a sense of security, dignity and self-worth[40] and therefore should be provided to all refugees without discrimination. Beneficiaries of international protection may have diverging needs, but the objective of an integration system is to assess the level of need without restriction and discrimination, and to provide assistance in response to the needs. UNHCR further reiterates that all refugees will have similar set of basic needs for assistance in accessing their economic, social and cultural rights, and becoming self-reliant in a foreign country. Thus, the state should not restrict access to support for refugees as part of integration assistance which should include adequate housing, employment opportunities, education, language training and healthcare services.

[39] http://pasos.org/wp-content/uploads/2011/12/1322886481.pdf
[40] http://www.unhcr.org/refworld/topic,4565c22553,4565c25f66b,4bfe70d72,0,,,.html

UNHCR underlines that without the targeted integration support, persons of concern face great obstacles in the process of integration. Furthermore, lack of access to integration assistance might contribute to a failure of their integration since there are no alternative measures to integration programmes.

It is strongly recommended that Section 52 (2) be amended as follows: "*in order to facilitate the social integration of the refugee or beneficiary of subsidiary protection – at request of the refugee or beneficiary of subsidiary protection – the government office concludes an integration contract. Moreover, it is recommended that Section 52 (3) be amended as follows: beneficiaries of international protection have 12 months from the date when granted international protection to file an application for the integration programme*".

- Reasons for declining to grant integration assistance

"Section ... (1) The disbursement of support or the provision of services under the integration agreement may be suspended if the refugee or beneficiary of subsidiary protection
a) does not, for a period of at least 30 consecutive days, and through his or her own fault, fails to perform the obligations stipulated by the integration agreement,
b) makes a false statement regarding his or her assets or income,
c) requires inpatient care exceeding 30 days at a health-care institution, or
d) if he or she has been charged with a criminal offence and criminal proceedings have been instituted against him or her.
(2) The disbursement of support or the provision of services under the integration agreement may be terminated if
a) if any of the circumstances in paragraph (1) points a)-c) is present within the time limits specified for that circumstance,
b) if, because of any of the circumstances in paragraph (1) points a)-d), the suspension of the disbursement of support or the provision of services should become necessary again,
c) a final judgment is handed down which finds the refugee or beneficiary of subsidiary protection guilty of the intentional commission of a criminal offence."

According to Section 52 (1) (a), the integration support may be suspended if the beneficiary – through his/her own fault – fails to perform the obligations stipulated by the contract. It remains unclear – how the legislation – will provide for the assessment and definition of "*own fault*" of the refugee and how much it will take into account individual capacities and abilities. Reference is made to instances where assessing "*own fault*" of the refugee/beneficiary of subsidiary protection becomes problematic for the service provider (e.g. a refugee/beneficiary of subsidiary protection forgets to attend language classes as a consequence of PTSD; mothers not being able to participate at language courses because their children are sick etc.).

UNHCR therefore recommends that Section 52 (1) (a) be amended as follows: "*a) after assessment of his/her individual capacities and specific needs by the service provider – does not for a period of at least 30 consecutive days, and through his or her own fault, fails to perform the obligations stipulated by the integration contract.*"

According to Section 52 (1) (c), the integration support may be suspended if the refugee or beneficiary of subsidiary protection receives inpatient care exceeding 30 days at a health-care institution. The Draft, however does not take into account that the beneficiary of international

protection might have fixed/permanent expenses (such as rent, utilities and medication etc.) which might still occur during his/her treatment in a health care institution. Therefore, it is suggested that besides full withdrawal the legislation also enables reduction of the support and takes into account individual needs of beneficiaries.

Accordingly, it is recommended that Sub-Section (1) is amended as follows: "*The disbursement of support or the provision of services under the integration contract may be suspended or reduced – after taking into account individual needs of the refugee or beneficiary of subsidiary protection – if the refugee or beneficiary of subsidiary protection requires inpatient care exceeding 30 days at a health-care institution.*"

UNHCR notes that the assistance can be withheld in the case of criminal proceedings being launched against the refugee or beneficiary of subsidiary protection – until such proceedings are terminated. Moreover, assistance can be terminated if s/he has been convicted of an intentional crime. While in Sub-Section (1) d) presumption of innocence should still prevail until the termination of the proceeding, UNHCR notes with concern that Sub-Section (2) (b) introduces an additional sanction in the form of denial of integration assistance while that conviction in criminal proceedings has been already linked to the application of a defined sanction in the Criminal Code. The refusal to grant a defined entitlement due to earlier criminal liability can be considered a double jeopardy, that is, a situation where for one deed its perpetrator receives a punishment twice.

It is well noted that beneficiaries of international protection are also obliged to respect the laws in Hungary and ought to bear responsibility for violating them. One should consider, however, whether every committed crime should have the same consequences. In this respect UNHCR recalls the public statement of two United Nations Special Rapporteurs[41] on extreme poverty and on adequate housing on the recent amendment to the Hungarian Fundamental Law – that authorizes national and municipal legislation to outlaw sleeping in public spaces through which the Hungarian Parliament institutionalizes the criminalization of homelessness and enshrines discrimination against and stigmatization of homeless persons in the Constitution – which will have a disproportionate impact on persons living in poverty in general and on homeless persons in particular. According to a recent study published by Menedek Association[42] safeguarding access to adequate housing for refugees and beneficiaries of subsidiary protection remains a challenge in Hungary today with a growing number of refugees and beneficiaries of subsidiary protection facing homelessness or a serious risk of becoming homeless.

The experience of Poland[43] shows that another category of crimes committed by persons of concern petitioning for integration assistance is related to substance abuse. In Hungary, consumption of small quantities of narcotic drugs (Section 178 (6) of the Penal Code) and driving under the influence of alcohol (Section 237 (1) of the Penal Code) fall into this category. The difficulties of refugees' living conditions in detention and reception facilities resulting in frustrations and abuse of various addictive substances have been pointed out in

[41] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13206&LangID=E
[42] Access to Housing in Hungary for Beneficiaries of International Protection - Report by Menedék Hungarian Association for Migrants, 11 March 2013
[43] Reference made to above-mentioned study on Poland: [43] http://pasos.org/wp-content/uploads/2011/12/1322886481.pdf

para 33 of UNHCR's Report "Hungary as a country of asylum - Observations on the situation of asylum-seekers and refugees in Hungary".[44]

UNHCR underlines that the penalty should be proportional to the severity of the crime committed and therefore minor crimes committed should not automatically result in depriving a refugee of their chances for future integration support. Such an interpretation of the law on integration assistance has an adverse effect on integration of refugees and persons with subsidiary protection. Also – when specifying the scope of eligible beneficiaries of the contract (such as family members) – it should be avoided that the integration assistance is automatically denied to the members of the applicant's family who have not received a sentence.

Accordingly, UNHCR strongly recommends that Section 52 (1) (d) "*the assistance can be withheld in the case of criminal proceedings being launched" and Section 52 (2) (c) be modified to "the assistance can be terminated if a court with a final and absolute decision sentences the refugee for having committed a crime which is according to law punishable by five years or longer term imprisonment*".

- Duration and content of the integration programme

"(3) An application for the conclusion of an integration agreement may be submitted within 4 months from the date on which the decision recognising refugee status, or granting subsidiary protection, was issued. The term of validity of the integration contract may last for up to two years from the date on which the status is recognised."

UNHCR underlines that the process of acquiring proficiency in a foreign language lasts at least three years. Therefore, all beneficiaries of international should be supported in their language learning at least three years as the rule. Moreover, the content of the programme should support a harmonious combination of full-time employment and language lessons to prepare refugees and beneficiaries of subsidiary protection to become self-reliant. Assistance should be extended according to need. Appropriate assessments should be conducted, and persons with special need should be provided extended assistance.

Accordingly, it is recommended that the effect of the integration contract to be extended to at least 3 years and that Sub-Section (3) be amended as follows: "*The term of validity of the integration contract may last for up to 3 years from the date on which the status is recognised taking into account individual needs of refugees and beneficiaries of subsidiary protection*".

- Restrictions during the integration programme

"(5) During the term of validity of the integration contract, the refugee or beneficiary of subsidiary protection may only change his/her place of residence within Hungary in justified cases, such as, in particular, where the change in residence is required for reasons of
a) employment,
b) provision of housing,

[44] "Heavily medicated in detention, by the time they arrive in Balassagyarmat, some have become practically dependent on tranquilizers. There have been reported cases of hepatitis and drug addiction, and many suffer from psychological problems that are inadequately addressed." http://www.unhcr.org/refworld/docid/4f9167db2.html

c) family reunification, or
d) special care or placement in a health-care or social institution."

The Draft limits refugees and beneficiaries of subsidiary protection in their free movement as it binds them to stay at the same place of residence for the two years integration period. According to Section 27 (1) of the Fundamental Law of Hungary every person lawfully staying in the territory of Hungary shall have the right to freedom of movement and to freely choose residence. While the restriction is discriminative towards refugees, it also fails to take into account everyday reasons for changing the residence such as ensuring education, reunification with partners other than spouses etc. Therefore, UNHCR strongly recommends deleting Section 52 (5).

It is well noted that beneficiaries of subsidiary protection should not be moving without informing the authorities and that there is a need to facilitate coordination and cooperation between the district offices. Therefore, UNHCR recommends amending Sub-Section (5) as follows:
"(5) During the term of validity of the integration contract, the refugee or beneficiary of subsidiary protection shall inform the district office if s/he wishes to change his/her place of residence within Hungary."

- Monitoring and evaluation of the integration programme

UNHCR strongly underlines the need to develop methodologies and tools to guide, monitor and evaluate the implementation of the integration policy with the aim of increasing its effectiveness and longer term impact. Moreover, UNHCR would recommend including civil society actors in the monitoring and evaluation mechanisms that will contribute to their transparency. With respect to the individual integration programmes their implementation should be evaluated by their beneficiaries as well as service providers responsible for its implementation. Another step could include a wide range of stakeholder involved (such as family support centres, labour offices, educational institutions, NGOs, etc.). The organizations will need specialized training, regular coordination and financial support.

Completing evaluation questionnaires after the closure of the integration programme could be one aspect of the general assessment of the effectiveness of the programme. The questionnaire should be prepared by the Office of Immigration and Nationality being responsible for the overall coordination and control of the integration of beneficiaries of international protection.

UNHCR therefore strongly recommends that monitoring and evaluations of the integration programme do form an integral part of the overall support programme and their content is specified in the Government Decree.

RECOMMENDATIONS TO INCLUDE ADDITIONAL ISSUES

The Draft fails to address certain shortcomings of the current law to which UNHCR has been calling for solutions long. These are the following ones.

1. UNHCR to receive RSD decisions
It is recommended that Section 38 ac) of Met be amended as follows:

"*ac) Unless objected to by the asylum-seeker, the refugee authority shall be shared with UNHCR any 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. Identification of vulnerable asylum-seekers

UNHCR strongly recommends Hungary to transpose Article 22 of the Recast Reception Conditions Directive imposing an obligation on Member States to assess the special reception needs of vulnerable persons. In the same token, UNHCR suggests considering transposing the relevant provisions of the Recast Asylum Procedures Directive on the identification of persons in need of special procedural guarantees.

Justification: the Asylum Act contains the definition of persons in need of special treatment, however there is no procedure foreseen for the identification of vulnerable asylum-seekers, nevertheless this is a prerequisite to be able to properly and effectively respond to the specific needs of these persons. In this respect, the Recast Reception Conditions Directive and the Recast Asylum Procedures Directive confer a clear obligation on Member States to assess special needs of asylum-seekers. UNHCR is ready to assist the Government in drawing up a standard operating procedure aiming at the identification of persons with special needs. In this context 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'.

3. Age assessment

It is recommended that Section 44 of Met be complemented by a Sub-Section (4) as follows, as suggested by the Parliamentary Commissioner of Human Rights in his report of AJB 7120/2009 (12 May 2010) covering among others the issue of age assessment in case of unaccompanied/separated minor 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 be 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.[45]*"*

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 Ombusman, the age of the child is an important element of the identity. Furthermore, according to Section 31 (i) of General Comment No. 6 on UNCRC[46] by the Committee on the Rights of the Child, the identification of a child without appropriate ID documents as an unaccompanied minor 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 to human dignity; and, in the event of remaining uncertainty, the decision should be made to the benefit of the person examined.

4. 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.

Justification: many refugees recognized by Hungary are prevented from re-unifying 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 till today, even though it is directly applicable in its entirety[47] 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.

5. Family reunification of beneficiaries of subsidiary protection be facilitated

UNHCR welcomes that the current Draft aims at the convergency of the rights and entitlements of refugees and beneficiaries of subsidiary protection. However, UNHCR also

[45] See UNHCR provisional comments to Article 17 (15(5) of the Asylum Procedure Directive.
[46] 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
[47] See Article 288 TFEU – ex-Article 249 of TEC

notes with concern that while beneficiaries of subsidiary protection are not explicitly excluded in 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)*[48] 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.

6. 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)[49]. These new ICAO standards also 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 data 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 the Republic of Hungary under the 1954 Convention are machine-readable, however, 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 addresses this need.

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[48] http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2012/pdf/0023/famreun/internationalorganisationssocialpartnersngos/unhcr.pdf

[49] 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 authority. Available at: http://www2.icao.int/en/MRTD/Downloads/Doc%209303/Doc%209303%20English/Doc%209303%20Part%201%20Vol%201.pdf.

7. Stateless

It is welcomed that by virtue of Sections 58, 61, 62, 67, 69 of the Draft, stateless people recognized by Hungary shall have a clear status in specific fields of the Hungarian law such as health services, social security, equal opportunities of those with special needs (disabled), family support services, marriage and birth registry and tertiary education. It is however recognized that the wording of Section 76 (1) of Act II of 2007 on the entry and stay of third country citizens (Harmtv) remains to be corrected. Therefore, it is suggested that the term "*lawfully*" be deleted from the text of Section 76 (1):

"*Section 76*
(1) Proceedings aimed at the establishment of the 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."

Justification: 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 excluded from the application of the Convention in Hungary (de facto exclusion clause). Article 38 (1) of the Convention expressly prohibits that States Parties make reservation to Articles 1, 3, 4, 16(1) and 33 to 42 inclusive. A de facto exclusion clause is a de facto reservation to Article 1 which should be discontinued.

UNHCR
12 April 2013