

Reduction or withdrawal of material reception conditions: the contribution of the Charter of Fundamental Rights of the EU

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Introduction

With the adoption of the revised asylum *acquis* earlier this year, and specifically the [recast Reception Conditions Directive](#) [1] (?rRCD?) which needs to be transposed by 21 July 2015, there has been a marked improvement in the reception conditions that Member States need to provide for those seeking international protection. Nevertheless, there are still some obvious shortcomings and most controversially, for the first time at EU level, the rRCD has regulated the use of detention for those seeking international protection (Articles 8, 9 & 10). The recast also has some other significant shortcomings, specifically that it still allows for the reduction or withdrawal of material reception conditions (Article 20). This leaves people at risk of destitution and in certain instances, unable to complete their asylum application (see [ECRE, AIDA report, Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System](#) [2]).

Before a Member State decides to reduce or withdraw an applicant's material reception conditions, there are a number of safeguards that Member States must comply with under both primary and secondary EU law. With the entry into force of the Lisbon Treaty, the [Charter of Fundamental Rights of the European Union](#) [3] (?the Charter?) has the [same legal value as the Treaties](#)? [4] (Article 6 (1)). Given that the Charter is now primary EU law, it must be respected when interpreting or implementing secondary EU law. In addition, the scope of the Charter is broader than the European Convention of Human Rights, which presents an opportunity to ensure further safeguards for those seeking protection, beyond what has been decided by the European Court of Human Rights (Charter, Article 52 (3)). A number of its Articles can provide innovative and additional safeguards that may assist those who face the severe consequences that can result from withdrawing an applicant's reception conditions.

Reasons for the reduction/withdrawal of reception conditions

Under the [Reception Conditions Directive](#) [5] (?RCD?) and its [recast](#) [1], Member States have a lot of discretion as to how it is applied. For example, Member States can reduce reception conditions when an applicant abandons a place of residence without informing them or without permission, when the applicant does not comply with reporting duties, or when they lodge a subsequent application (Article 16 RCD and Article 20 rRCD). There are many valid reasons as to why an applicant may have breached one of the conditions above; an applicant may also not be able to comply with the reporting conditions if, for example, they were admitted to hospital.

According to EASO, the number of subsequent applications rose [by 39% in the EU in 2012](#) [6] (p18), which raises questions regarding the effectiveness of the asylum procedure or at a minimum indicates that a growing number of asylum seekers whose asylum application was rejected consider that their case was wrongly refused.

Under the rRCD, improved safeguards were introduced with regard to when a Member State can withdraw reception conditions. Material reception conditions can only be withdrawn in exceptional and duly justified cases (save for when the applicant has concealed financial resources), which limits the possibilities as to when reception conditions can be withdrawn (Article 20 (1) & (5)). Member States must also ensure that even when material reception conditions are withdrawn, they provide a dignified standard of living for all applicants (Article 20 (5)). Recital 35 of the Directive also provides that the Directive seeks to ensure full respect for human dignity.

EU Fundamental Rights and Principles

The principle of effectiveness: The principle of effectiveness is one of the most important principles of EU law. It also forms part of Article 47 of the Charter. If it is not adhered to, it is virtually impossible to access any other rights and entitlements. Generally, when the CJEU is looking to see whether a measure meets the principle of effectiveness, it finds that rules which make it virtually impossible or excessively difficult to protect rights should be set aside ([Amministratore delle Finanze dello Stato v San Giorgio](#) [7] para 14). Advocate General Sharpston in [Cimade](#) [8] highlighted the dangers associated with the denial of reception conditions when she stated that the lack of reception conditions ?may risk undermining the principle enshrined in Article 18 of the Charter that the right to asylum is to be protected in accordance with the provisions of the Treaties? (§56). Simply put, if an asylum seeker is denied the basic conditions on which they need to survive, this could impede on the effectiveness of the right to asylum.

Prohibition against torture inhuman or degrading treatment (Article 4 Charter): The ECtHR has held that Article 8 cannot be interpreted as obliging Contracting States to provide everyone with a home, ([Chapman v the United Kingdom](#) [9] §99) nor does it entail a general obligation to give refugees financial assistance in order for them to maintain a certain standard of living ([Muslim v Turkey](#) [10] §85). Nevertheless, it has found that if benefits provided are wholly insufficient, there could, in principle, be issues raised under Article 3 ECHR/Article 4 of the Charter, ([Larioshina v. Russia](#) [11]). Moreover, if someone faces a situation of destitution or severe poverty which is capable of being characterised as inhuman or degrading treatment as a result of a specific action/inaction from State authorities, then under certain circumstances Article 3 ECHR (Article 4 Charter) could be invoked.

In [M.S.S. v Greece and Belgium](#) [12] (§ 250, 251 and 263), the Court stated that it attaches considerable importance to the Applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable group in need of special protection. It noted that the Applicant spent months living on the streets, at fear of being attacked and robbed. Whilst in this case an important factor in finding a violation of Article 3 was Government inaction with regard to his living conditions (or lack thereof), arguably if the relevant Government authority withdrew or reduced material conditions without carrying out an individual assessment on an impartial basis or if conditions are withdrawn as a result of a Governments ill-informed decision making, an issue under Article 3 could arise.

The right to good administration (Article 41 of the Charter): The right to good administration not only applies to EU institutions but also to Member States when applying Community law (Advocate General Kokott; [Mellor v Secretary of State for Communities and Local Government](#) [13] §33). In addition, as it constitutes a general principle of EU law, Member States need to abide by

the principle when adopting decisions when they fall within the scope of EU law, even when there is no specific procedure in place. This principle also covers instances whereby a party to the proceedings is penalised by virtue of the fact that they did not comply with procedural rules? [when this non-compliance arises from the behaviour of the administration itself? \(§25\) \[14\].](#)

When, for instance, reception conditions are reduced or withdrawn because an applicant lodged a subsequent application, it may invoke Article 41. For example, in Belgium persons who lodge subsequent applications are excluded from reception and material aid. ([ECRE, AIDA report, Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System \[2\] p86](#)). In certain instances applicants need to lodge a subsequent application because the relevant state authority did not correctly assess their need for international protection at first instance or at the appeal stage. In other instances, where applicants have made an application for protection but did not have an effective opportunity to lodge it, they may have their application considered as implicitly withdrawn or abandoned (Article 6 (2) [recast Asylum Procedures Directive \[15\]](#)). Where the applicant reports again to the authorities after a decision to discontinue the examination, the application can be treated as a subsequent asylum application ([this for example happens in Greece \[2\] p37](#)). In such instances the applicant should not be penalised for this mal-administration. Arguably, if the subsequent application succeeds, and it can be proven that they needed to lodge a subsequent application as a result of the mal-administration of the authorities, the applicant could claim compensation for the fact that their conditions with reduced or withdrawn.

The Right to be heard (Article 41 of the Charter): Central to the right to good administration is the right to be heard and is specifically stipulated in Article 41 (2) (b) of the Charter. In [MM v Minister for Justice \[16\]](#) the CJEU found that Article 41(2) of the [Charter \[3\]](#), by its very wording is of general application. It stated that the 'Court has always affirmed the importance of the right to be heard and its very broad scope in the EU legal order, considering that that right must apply in all proceedings which are liable to culminate in a measure adversely affecting a person' (§85). It is applicable even when the applicable legislation does not expressly provide for a procedural requirement ([MM v Minister for Justice \[16\] §86](#)). It requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views on the evidence on which the contested decision is based? ([Dokter \[17\] §74](#)). It also provides that the authorities pay due attention to observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision ([München-Mitte v Technische Universität München \[18\] §14](#)). Nevertheless, if there is a breach of the right to be heard, it will only lead to an annulment of the decision if the procedure could have produced a different decision should the right have been complied with ([Mário Campolargo v Commission \[19\] §39](#)).

Reducing or withdrawing material reception conditions would have enormous ramifications on the applicant concerned; therefore ensuring that the applicant has the right to be heard is an essential safeguard. This is particularly pertinent as any decision taken to reduce material reception conditions needs to be taken on an individual objective and impartial basis and reasons also need to be given. Therefore, when the applicant submits their reasons as to why they may have breached one of the conditions listed in Article 20 rCD, the relevant Government authority would need to take these submissions into account when making their decision, they cannot just provide a generic decision.

The duty to state the reasons (Article 41 of the Charter): This also forms part of the right to good administration, and one of the principle reasons for this obligation is that, when it is a question as to whether a fundamental right was breached, it allows the appellant to defend that right under the best possible conditions and have the possibility of deciding, with full knowledge of the relevant facts, whether there is any point in applying to the courts to appeal. The standard for

the statement of reasons is that it must enable a court to review the decision ([Organisation des Modjahedines du peuple d'Iran v Council of the European Union](#) [20] §89). The relevant decision-making body is not obliged to give reasons for every relevant fact or point of law. It is adequate to state the facts and legal considerations that are of importance in the context of that decision.

The duty to state the reasons is a very important safeguard to ensure that material conditions are not reduced or withdrawn on an arbitrary basis. For example, material conditions can be withdrawn when it is considered that an application was not lodged as soon as reasonably practicable yet there is no uniform standard as to what is considered 'reasonably practicable'. It is welcome that both Directives provide that reasons shall be given for the reduction of conditions. In order to comply with Article 41 of the Charter, the decision 'must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof' ([Organisation des Modjahedines du peuple d'Iran v Council of the European Union](#) [20] §141).

Conclusion

These are but some of the provisions that need to be applied when a Member State decides to take the drastic measure to reduce or withdraw an applicant's material reception conditions. Member States must also ensure that the dignity of individuals seeking protection is respected, this is specifically provided for under Article 1 of the Charter; in addition, recital 35 of the rRCD provides that the Directive seeks to ensure full respect for human dignity. The result of withdrawing or reducing reception conditions puts individuals who are already in a very vulnerable position at risk of real poverty, destitution and at a greater risk of xenophobic attacks. Whilst Member States have the obligation to take a decision on an individual and impartial basis with reasons for the decision, [past practice](#) [2] indicates that this does not always happen. The Charter is an important and powerful tool that can be applied to ensure that all relevant safeguards are adhered to; it just needs to be used by legal representatives.

ECRE is coordinating a project, [FRAME](#) [21], which aims to promote the use of the Charter and strengthen legal networks in the area of asylum and migration. As part of this project a number of publications will be produced examining how the Charter can be used to promote the rights of those seeking protection, including in asylum procedural law and on the detention and reception conditions for asylum seekers.

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(This journal entry is an expression of the author's own views, and not those of EDAL or ECRE. If you would like to share any comments, you can contact us [here](#) [22].)

Tags:

ECRE

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recasts

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Links:

[1] <https://www.asylumlawdatabase.eu/en/content/en-recast-reception-conditions-directive-directive-201333eu-26-june-2013>

[2] http://www.asylumineurope.org/files/shadow-reports/not_there_yet_02102013.pdf

[3] <https://www.asylumlawdatabase.eu/en/content/en-charter-fundamental-rights-european-union>

[4] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF>

[5] <https://www.asylumlawdatabase.eu/en/content/en-reception-conditions-directive-directive-20039ec-27-january-2003>

[6] <http://easo.europa.eu/wp-content/uploads/EASO-Annual-Report-Final.pdf>

[7]

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=91964&pageIndex=0&doclang=EN&>

[8] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-17911-cimade-groupe-d%E2%80%99information-et-de-soutien-des-immigres-gisti-v-ministre-de-l>

[9] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59154>

[10] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68897>

[11] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22359>

[12] <https://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609>

[13]

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=74019&pageIndex=0&doc>

[14] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CJ0428:EN:HTML>

[15] <https://www.asylumlawdatabase.eu/en/content/en-recast-asylum-procedures-directive-directive-201332eu-26-june-2013-0>

[16] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-27711-mm-v-minister-justice-equality-and-law-reform-ireland-attorney-general-0>

[17] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0028:EN:HTML>

[18]

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97440&pageIndex=0&doclang=EN&>

[19]

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=47276&pageIndex=0&doc>

[20]

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=66370&pageIndex=0&doc>

[21] <http://www.ecre.org/component/content/article/63-projects/324-frame.html>

[22] <http://www.asylumlawdatabase.eu/en/content/contact-us>