
The revised Reception Conditions Directive and adequate and dignified material reception conditions for those seeking international protection

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Abstract: The Recast Reception Conditions Directive (RCDr; Directive 2013/33/EU) constitutes an improvement with regard to the reception conditions that Member States are required to provide for those seeking international protection. However, it still envisages the possibility for Member States to reduce or withdraw material reception conditions and to grant less favourable treatment to international protection applicants compared to nationals where it is ‘duly justified’. This may potentially lead Member States to grant unacceptably low levels of material reception conditions and could be below what is an adequate standard of living as required under the Directive itself. Using the lens of the right to human dignity, the article examines selected cases of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) in order to see how the European Convention of Human Rights (ECHR) and the European Union Charter of Fundamental Rights (EUCFR) may assist in ensuring that the implementation of the RCDr by the Member States provides for adequate and dignified standard of living conditions for those seeking international protection.

Keywords: Reception Conditions Directive; RCD; material reception conditions; human dignity; European Convention of Human Rights; ECHR; European Court of Human Rights; ECtHR; European Union Charter of Fundamental Rights; EUCFR; Court of Justice of the European Union; CJEU.

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Biographical notes: Samantha Velluti’s research in the field of asylum focuses on developing a human rights approach to the implementation of the Common European Asylum System in order to identify ways for enabling international protection seekers to exercise and have effective standing to evoke the set of rights provided under the ECHR and the EUCFR. Her current research explores the role and mutual engagement of national and European Courts in ensuring the principled implementation of EU legislative measures and that standards and guarantees are met in accordance with International and European human rights obligations.

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1 Introduction

Harmonisation of reception conditions within the European Union (EU) is important for various reasons. Adequate and dignified reception conditions for asylum-seekers during the examination of their application are an essential element of any asylum system [ECRE, (2011), p.3]. International protection seekers are inherently vulnerable¹ and for them it is particularly difficult to fully exercise their rights before any domestic justice system as recognised to them by law: 'statelessness' not only corresponds to a situation of 'rightlessness' but also to a life devoid of public appearance and legal personhood making it impossible for those excluded from politics to claim the right to have rights (Arendt, 1958). The challenge becomes one of identifying a process to help verify the existence of and exercise those rights [Velluti, (2015), p.139]. International protection seekers are forced to flee their country leaving their family and all of their belongings, often becoming destitute and marginalised thus finding themselves in a position of complete dependency on the country of asylum. The ultimate question therefore is 'how Europe should recognise that refugees have the right to have rights' (Judge de Albuquerque, Concurring Opinion, *Hirsi Jamaa* 2012). The provision of reception conditions raises important questions in relation to the role of the state vis-à-vis 'the other' or better-said the alien. The power of Member States to decide whether, to what extent, and under what conditions persons who are not members of a given political community or society may, firstly, enter its territory and, secondly, share certain material rights brings with it the view that a person is more 'deserving' by virtue of his or her status as citizen or national than a person who is not. In this context, material rights are conceived as membership rights. However, premised on these terms integration equates to assimilation and maintains a 'securitisation' paradigm based on a dichotomy between 'insiders' and 'outsiders' (Velluti, 2013). Moreover, it remains based on a Westphalian conception of the state with clearly demarcated borders, the aim being one of conformity, discipline and migration control (Kostakopoulou, 2010). The 'civic integration' paradigm remains a crucial feature of a renewed nation-politics used by political elites to provide answers to a wide range of issues and to elicit support for a controlling state (Idem).

Hence, the question becomes a jurisdictional one (Bosniak, 2006): "should the regulatory domain of the border with its emphasis on the interest of immigration control remain confined to the border, as a result of which asylum seekers are entitled to equal treatment with nationals as regards their material rights (the 'separation model')? Or does the state's immigration power have some bearing on the normative content of state obligations as regards asylum seekers' material rights under international law (the 'convergence model')?" [Slingenberg, (2014), pp.8–9]. As will be shown, the Reception Conditions Directive (RCD) and its recast merge both models depending on the specific provisions under scrutiny.

Against this background, the article is set to examine how certain provisions of the European Union Charter of Fundamental Rights (EUCFR) and European Convention of Human Rights (ECHR) informed by European and national judicial interpretation can be used to ensure a more human rights-based approach to the standards contained in the RCD and its recast specifically in relation to material reception arrangements.² The article's main claim is that judicial interpretation should be premised on the right to human dignity. Beyond the emotionally, politically and religiously charged discussions that inform any debate about human dignity (McCrudden, 2013) – as well as acknowledging at the outset that the latter is context contingent – it is possible to identify and apply a legal concept of human dignity, particularly in the European context. Specifically, the core constitutional meaning of dignity historically has been and remains the definition and protection of humanity [Dupré, (2013b), pp.324–325], which “increasingly reflects the state of present political realities: an international community in political transition from a system premised on sovereign states toward a more fragmented global politics, constrained only by the threshold of preserving ‘humanity’” [Teitel, (2004), p.225]. Human dignity can function as a foundation for human rights but also as a ground for the critique of certain interpretations of human rights. In the words of Advocate General Stix-Hackl “respect for human dignity does [...] constitute an integral part of the general legal tenets of Community law and a criterion and requirement of the legality of acts under Community law” (Case C-36/02, *Omega*, para. 90). Human dignity can therefore address the contemporary challenge of human rights protection against a background of changes in the public and private sphere of action and be used as the core defining line for setting the parameters of adequate reception conditions for international protection seekers in the Member States.

In the following pages, the most salient aspects of the Recast Reception Conditions Directive (RCDr) are presented, with a particular focus on material reception conditions. Subsequent sections examine the case law of the European Courts on the right to human dignity in light of the ECHR and the EUCFR. The central aim of the paper is to identify ways of ensuring a human rights-based approach in Member States' implementation of the revised RCD. The conclusion brings together and reflects on the main findings of the paper.

2 The RCD, its recast³ and material reception conditions

2.1 The importance of harmonising reception conditions for international protection seekers

Harmonisation of reception conditions prevents or reduces secondary movements of international protection seekers. In turn, efficient reception conditions not only ensure an adequate standard of living but can also be a conduit for a fair and efficient asylum procedure. The importance of harmonising reception conditions was given due recognition in the year 2000 when EU guidelines on general principles were adopted explicitly envisaging dignifying reception conditions for asylum seekers with comparable living standards across the Member States (European Council, 2000). The RCD followed shortly. Under this Directive and its recast, Member States have a specific obligation to provide applicants for international protection with reception conditions. These conditions, read in the light of the fundamental rights and principles found in the ECHR

and the EUCFR should be adequate and efficient in order to ensure applicants' subsistence and, more generally, a dignifying life. However, as will be shown, there is little evidence suggesting that there has been a significant improvement of standards as a consequence of the RCD. Despite the official shift in focus from 'minimum' to 'common' standards that the creation and further development of the Common European Asylum System (CEAS) has generated the push for further harmonisation has not entailed an abandonment *tout cours* of flexibility and a margin of appreciation on the part of the Member States. By adopting the Treaty of Lisbon, Member States were not willing to completely give up their specific concepts of accommodating protection needs [Hailbronner, (2008), p.2]. The changes introduced by the Treaty of Lisbon focusing on the adoption of 'common policies' (Part Three, Title V, Chapter 2) seem to indicate that further legislation in asylum is not limited to 'minimum standards'. In particular, the reference to 'standards' as illustrated by the revised RCD, discussed further below, would seem to indicate a departure from the lowest common level of all Member States. The use of the term 'more favourable standards' (e.g. Article 4 RCDr) enables Member States to go beyond the general standards established in CEAS. While *prima facie* it may appear as a better clause, this term has been problematic in practice [Hailbronner, (2008), p.4]. In the first place, Member States have used this clause to argue that by maintaining more favourable national laws no transposition of asylum Directives was needed with the unwanted result of having either a partial or full non-transposition of asylum Directive provisions (UNHCR, 2010). Linked to this, allowing Member States to maintain substantially different 'higher' standards potentially undermines CEAS negating its harmonisation objective with the result that it does not deter secondary movements.

2.2 *The RCDr*

The revised RCD applies to all international protection applicants including family members [Articles 2(1)(b) and 3(1)], with the exception of requests for diplomatic or territorial asylum submitted to representations of Member States [Article 3(2)]. Minor and dependent adult applicants enjoy more guarantees to be housed jointly with family members and relatives [Recital 18(a), Articles 12, 18(2)(a)(c)]. However, Article 2(1)(c) Recast requires the family ties to have been established already in the country of origin. This fails to accommodate family ties that may have been formed while residing in a third country during flight and may prevent refugees from enjoying the right to family unity contrary to the 1951 Geneva Convention, which provides protection for the refugee family in various articles without explicitly mentioning family unity or reunification.⁴ Member States shall inform applicants of their rights and obligations within 15 days after they have lodged their application, of at least any established benefits and obligations that they must comply with (Article 5). Member States must also ensure that they are informed about organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including healthcare. In addition, Article 17(1) provides that "Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection". The RCDr defines material reception conditions as reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance [Article 2(g)].

Member States have an obligation to ensure access to the labour market no later than nine months after the application for international protection is lodged [Article 15(1)]. With regard to health care, there is explicit reference to essential treatment of serious mental disorders and, where needed, appropriate mental health care (Article 19). Significantly, the revised Directive strengthens safeguards for vulnerable groups (Articles 21–25) and Member States must guarantee that persons who have been subject to torture, rape or other serious acts of violence receive the necessary treatment ensuring access to appropriate medical and psychological treatment or care. Furthermore, those working with such persons must have had, and must continue to receive, the appropriate training and be bound by confidentiality rules (Article 25).

As to material reception conditions, Article 17(2) provides that “Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health”. Where Member States provide material reception conditions in the form of financial allowances or vouchers, Article 17(5) provides for a system based on reference points established by each Member State in law or in practice to ensure adequate standards of living comparable with nationals but there is no obligation to provide for equality of treatment. Article 17(5) also allows Member States to grant less favourable reception treatment ‘where it is duly justified’ in situations where there is a housing shortage or where necessary to determine a vulnerable applicant’s particular needs [Article 18(9)]. This may potentially lead Member States to grant unacceptably low levels of material reception conditions as the extent to which treatment may be less favourable compared to nationals is not qualified. There is a risk that treatment could be well below what is an adequate standard of living necessary to guarantee their subsistence and protect their physical and mental health as required under Article 17(2). More generally, it may be contrary to the aim of the Directive, which lays down standards for the reception of applicants that are sufficient to ensure them a dignified standard of living (Recital 11) and respect for the fundamental rights recognised by the EUCFR, including the full respect for human dignity (Recital 35).

It is regrettable that the revised Directive affords such flexibility and margin of appreciation to the Member States considering that a comparative study of the implementation of the original RCD shows that the provision of national reception support in many Member States is insufficient and is often supplemented or even replaced by assistance provided by non-governmental organisations (NGOs) (Odysseus, 2007). A recent study [ECRE, (2015), pp.20–33] not only confirms the significant difference between Member States’ reception conditions but also shows how “a lengthy asylum procedure and insufficient reception capacity in many Member States results in a failure to provide a dignified standard of living” [ECRE, (2015), p.22]. In spite of this evidence the RCDr still affords Member States with a fairly high degree of discretion and flexibility. Article 7(3) provides that Member States may make provision of the material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. In addition, Member States may make the provision of some, or all of the material reception conditions and health care, subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence [Article 17(3)]. They can also require applicants to cover or contribute to the cost of the material reception conditions and healthcare if they have sufficient resources [Article 17(4)].

Article 18 states that when housing is provided it should take one or a combination of one of the following forms:

- a premises for the purposes of housing applicants during the examination of an application for asylum lodged at a border or in transit zones
- b accommodation centres that guarantee an adequate standard of living
- c private houses, flats, hotels or other premises adapted for housing applicants.

Member States must also ensure the protection of applicants' family life, their gender, age-specific concerns and the situation of vulnerable persons and give applicants the possibility to communicate with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and NGOs and bodies and to grant them access to the premises of the applicants [Article 18(2)–(3)]. In addition, the revised Directive provides that dependent adults with special reception needs are accommodated together with close adult relatives who are already present in the same Member State and who are responsible for them [Article 18(5)]. A further safeguard concerns the transfer of applicants from one housing facility to another, which should only take place when necessary and applicants will be able to inform their legal advisers or counsellors of the transfer and new address [Article 18(6)].

With regard to the possibility of Member States' reducing material reception conditions, Member States retain a wide margin of discretion. Material reception conditions can be reduced 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 20(1)a–c]. The RCDr has improved the safeguards for withdrawing material reception conditions⁵ as Member States can only withdraw them in exceptional and duly justified cases [Article 20(1)] with the exception of when financial resources are concealed [Article 20(3)]. In addition, decisions for reduction or withdrawal of material reception conditions shall be taken individually, objectively and impartially and reasons must be given, taking into account the principle of proportionality [Article 20(5)]. When material reception conditions are reduced or withdrawn Member States must still ensure access to healthcare and ensure a dignified standard of living for all applicants [Article 20(5)]. Recital 35 explicitly refers to full respect for human dignity. Nevertheless, the possibility that the withdrawal or reduction of reception conditions might be below an adequate standard of living is not consistent with the requirements of European human rights law and arguably even in its revised form the RCD does not adequately reflect established case law under Article 3 ECHR. The possibility for Member States to completely withdraw reception conditions should only be allowed where it is shown that the applicant concerned has sufficient means of support ensuring an adequate standard of living.

Overall, the above analysis indicates that even in its revised form the RCD has not achieved a full harmonisation of reception conditions. Hence, we can see how states' immigration control power has some bearing on the normative content of states' obligations regarding asylum seekers material rights under International law. In turn, this further illustrates how it is not possible to maintain a clear distinction between a 'separation model' and a 'convergence model' (see above, Section 1).

A way to adequately address the limitations of the RCD (including its recast) and its problematic application is through the judicial intervention and further mutual engagement of both national and European Courts which have a key monitoring function to ensure that standards and guarantees are met. Courts may play an important part in ensuring the principled implementation of the revised RCD by the Member States and, in particular, compliance with International and European human rights obligations. The next section examines the case-law of the European Courts in relation to the right to human dignity and its application to reception conditions.

3 The jurisprudence of the European Courts

3.1 Reception conditions that guarantee adequate standards of living for international protection seekers

As stated by the United Nations High Commissioner for Refugees (UNHCR, 2009) “poor material reception conditions coupled with lack of employment opportunities during the asylum procedure can lead to a vicious circle of isolation, discrimination and poor integration prospects. This can have a negative impact on asylum seekers’ physical and psychological health, leaving them demoralized after recognition as refugees, or unprepared to return if their applications are rejected”. Moreover, disparity between reception arrangements in the EU makes certain Member States more attractive than others increasing secondary migratory movements of asylum-seekers (Directive 2003/9/EC, Preamble, Recital 8). Secondary movements can be explained by a series of factors such as language, recognition rates and geography. While the actual influence of reception conditions on the choice of those seeking international protection is difficult to evaluate, the quality of reception conditions will arguably have an impact, in particular, “where the applicant is left waiting to access an asylum procedure in unfavourable circumstances” [O’Nions, (2014), p.134].

The foregoing raises the question of what is meant by ‘adequate standard of living’. Article 31 of the European Social Charter provides for the right to housing which includes access to housing of an adequate standard; the prevention, reduction and gradual elimination of homelessness and accessible price of housing to those without adequate resources. Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone has the right to “an adequate standard of living for himself and his family including adequate food, clothing and housing, and to the continuous improvement of living conditions”. Further guidance can be found in Article 25 of the Universal Declaration of Human Rights (UDHR) which states that:

“(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All Children, whether born in or out of wedlock shall enjoy the same social protection.”

From the above, we can see that the notion of ‘adequate standard of living’ encompasses the guarantee of basic rights concerning an individual’s mental and physical health, subsistence and general well-being.

3.2 *The case law of the ECtHR and the right to human dignity*

3.2.1 *A commitment to the protection of human dignity*

The European Court of Human Rights (ECtHR) has made its commitment to protecting human dignity explicit since the 1990s. In *SW v UK* (Application No. 20166/92) the Court referred to the respect for human dignity and human freedom as the very essence of the fundamental objectives of the Convention (para. 44), which was re-stated in *Pretty v UK* where the ECtHR spoke about dignity in relation to Article 8 ECHR and the notion of quality of life (para. 65). The Court has also associated the right to human dignity with the concept of personal autonomy and the personal sphere of each individual (*I v UK*, Application No. 25680/94, para. 70). At the same time, the ECtHR also found that Article 8 ECHR cannot be interpreted as obliging a state to provide everyone with a home, (*Chapman v UK*, Application No. 27238/95) and that it does not provide for a general obligation to give refugees financial assistance in order for them to maintain a certain standard of living (*Muslim v Turkey*, Application No. 53566/99).

Significantly, in *Kurić* the Court referred to the Arendtian notion of the lack of legal personhood in relation to a country’s refusal to grant citizenship making the applicants stateless and held that it constituted a ‘serious encroachment on human dignity’ (*Kurić and Others v. Slovenia*, Application No. 26828/06, para. 319). A similar situation occurs when an international protection seeker is unable to register an application for no fault of their own and leaving them in a situation where they do not have rights or any entitlements [ECRE, (2015), p.17]. By the same token, when the actual receipt of material reception conditions for international protection seekers is tied to the issuance of a residence card, delays in issuing the card – where the delay is caused by a given national administration – can raise questions vis-à-vis the principle of good administration [ECRE, (2015), pp.21–22].

3.2.2 *The application of Article 3 ECHR to domestic reception conditions*

When considering Article 3 ECHR cases, the ECtHR has consistently held that the lack of resources of a state cannot normally justify the failure to fulfil their obligations under the Convention. This has been particularly the case in relation to detention conditions (e.g. *Poltoratskiy v Ukraine*, Application No. 38812/97; *Nazarenko v Ukraine*, Application No. 39483/98). Under Article 3 ECHR detention conditions have to be compatible with the respect of human dignity (*Orchowski v Poland*, Application No. 17885/04; *Peers v Greece*, Application No. 28524/95; *Rahimi v Greece*, Application No. 8687/08). In another series of cases concerning the provision of social welfare services by the state, the Court found that its insufficient provision particularly in cases of complete dependency on state support may be incompatible with human dignity (*Budina v Russia*, Application No. 45603/05 and *Larioschina v Russia*, Application No. 56869/00, even though the latter was declared inadmissible).

A parallelism can be drawn with the obligation that Member States have under the RCD and its recast to provide adequate reception conditions. The reasoning in the above judgments would seem to indicate that insufficient reception conditions would not ensure an adequate quality of life for international protection seekers and could be incompatible therefore with the right to dignity and thus Article 3 ECHR. Indeed, in *M.S.S. v Greece and Belgium* (Application No. 30696/09) the ECtHR found both Belgium and Greece in violation of Article 3 ECHR due to the extremely poor conditions that the applicant was subject to while living in Greece where he did not receive any subsistence or accommodation from the state. Belgium was found to be in breach of Article 3 ECHR as the authorities sent the applicant back to Greece (under the Dublin Regulation) where there was a real risk that he would face treatment that would be contrary to Article 3 ECHR. The ECtHR held that the fact that an asylum-seeker had spent months living in a state of extreme poverty, unable to cater for his most basic needs in combination with prolonged uncertainty and the total lack of any prospects of his situation improving amounted to a violation of Article 3 ECHR.

In *M.S.S.*, the Court used EU asylum standards to find a lack of protection that went beyond the traditional Conventional rights [Ippolito and Velluti, (2014), p.178]. In particular, the ECtHR found that there is a positive obligation on Member States stemming from the RCD to provide asylum seekers with accommodation and decent material conditions and it used the ‘particularly serious’ deprivation of material reception conditions to extend the notion of inhuman and degrading treatment to the extremely poor living conditions of destitute asylum seekers (*M.S.S.*, para. 250). Hence, failure by Greece to comply with the RCD was used by the Court as an “aggravating factor that compounded the systemic frustration of *M.S.S.’s* needs and increased his sense of lack of redress” [Clayton, (2011), p.768].

In *Tarakek v Switzerland* (Application No. 29217/12) – a case concerning a Dublin transfer – the ECtHR noted that asylum seekers were an ‘underprivileged and vulnerable group’, and it was possible that extreme poverty could raise issues under Article 3 ECHR (para. 118). The Court also referred to prior case law on the need to ensure that child asylum-seekers, who were in a position of ‘extreme vulnerability’, enjoyed ‘protection and humanitarian assistance’ (para. 99). While the Court distinguished the situation in Italy from that of Greece (and consequently that this was a different case from that of *M.S.S.*), it found that there were a number of problems in relation to the reception conditions within certain facilities (para. 120). The Swiss authorities therefore could not send an Afghan family back to Italy under the Dublin Regulation without having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together (para. 122).

From the above, we may argue that the right to human dignity requires that the quality of life of an applicant for international protection must be one that is of a sufficient standard and specifically one that respects the intrinsic worth of mankind. What this means is that in cases where national authorities are dealing with a particularly vulnerable group such as asylum seekers minimum reception conditions, namely, food, clothes, bedding and access to sanitary conditions, need to be provided to meet the standard under Article 3 ECHR.

3.3 *The case law of the CJEU and the EU Charter of Fundamental Rights: towards more harmonised and dignified standards of living?*

3.3.1 *The significance of the EU Charter of Fundamental Rights for a human rights-based implementation of the RCD*

The Charter has improved the centrality and weight of fundamental rights, reinforcing both their visibility in the legal discourse of the Court of Justice of the European Union (CJEU) and their role as parameters of constitutionality [Iglesias Sánchez, (2012), p.1576].

Its scope of application is not limited to Union citizens but also extends to third-country nationals (TCNs). Notably, the right to human dignity is applicable to all persons, regardless of their nationality or status within the Union. Its primacy is recognised in Article 1 EUCFR which states that human dignity is inviolable and it must be respected and *protected* and Article 2 TEU where human dignity is included as one of the values on which the Union is founded. In addition, Chapter 1 of the EU Charter provides the normative features of human dignity in a cluster of key prohibitions, which emphasise its legal significance in the EU framework of fundamental rights. This is in stark contrast with the ECHR where we find no equivalent. The first and only express reference to human dignity is in Protocol 13 concerning the abolition of the death penalty. However, in *Pretty* the ECtHR found that “the very essence of the Convention is respect for human dignity and freedom” (*Pretty v United Kingdom*, Application No. 2346/02, 29 July 2002, para 65; see also *SW v United Kingdom*, Application No. 20166/92, 22 November 1995).

As a constitutional foundation of any legal system based on the rule of law human dignity is a response to times of inhumanity and it carries the hope that the regime created by a given constitution (which is based in dignity) will foster a democracy (comprising the setting up of appropriate human rights and institutional design) in which human beings can lead a meaningful life and shape their personal and political destiny [Dupré, (2013b), pp.324–325; Dupré, 2013a]. Hence, the right to human dignity encompasses a negative obligation on Member States not to interfere with an individual’s right to human dignity, but it also imposes a positive obligation on Member States to ensure that an applicant’s right to dignity not be breached.

How do we define human dignity legally? The content of the right to human dignity has not been explicitly defined by the ECtHR or the CJEU. However, it is possible to identify a ‘core’ meaning of human dignity by looking at some of the first International human rights instruments following the end of World War II. The Preamble to the Charter of the United Nations (UN, 1945) reaffirms the people’s faith “in the dignity and worth of the human person”. Hence, as maintained by McCrudden (2008, p.679), the minimum content of human dignity consists in the fact that every human possesses an innate worth, just by being human, which needs to be respected and recognised. The Preambles to the 1948 UDHR and both the 1966 UN Covenants on Civil and Political Rights (ICCPR) and the ICESCR recognise the inherent dignity and the equal and inalienable rights of all human beings as the foundation of freedom, justice and peace in the world and as forming the basis for these rights. Article 1 UDHR refers to all human beings as born free and equal in dignity and rights and other provisions of the UDHR refer to the realisation of economic, social and cultural rights as indispensable for the dignity and free development of the personality of human beings (Article 22) and to the

right to just remuneration to ensure an existence worthy of human dignity (Article 23). Essentially, these provisions rest on the idea of self-determination and freedom of mankind. A similar line of reasoning can be found in the Opinion of Advocate General Stix-Hackl in the *Omega* case where she attempts to elaborate a legal concept of human dignity in the EU framework (Case C-36/02, Opinion, paras. 74–94). According to the Advocate General “human dignity is an expression of the respect and value to be attributed to each human being on account of his or her humanity. It concerns the protection of and respect for the essence or nature of the human being per se – that is to say the ‘substance’ of mankind” (Case C-36/02, Opinion, para. 75). Human dignity “reflects the idea that every human being is considered to be endowed with certain inherent or inalienable rights” (Case C-36/02, Opinion, para. 77), and because of “his ability to forge his own free will he is a person (subject) and must not be downgraded to a thing or object” (Case C-36/02, Opinion, para. 78). In this context, dignity is considered in its negative connotation as ‘indignity’ illustrating how the lack of dignity should also be understood in terms of humiliation (Margalit, 2011). Such conceptualisation of dignity may be helpful to show the degree of humiliation that international protection seekers are subject to in a given host society.

As mentioned earlier, the significance of the Charter’s provisions as an ‘EU’ human rights instrument is that only a few are limited to Union citizens, which are mainly to be found in Chapter 5 of the Charter. However, even in this chapter, there are fundamental rights to which any person is entitled. Article 41 EUCFR contains a right to good administration (or due diligence), providing that: “Every person has the right to have his or her affairs handed impartially, fairly and within a reasonable time by the institutions and bodies of the Union”. When referring to the institutions and bodies of the Union, it also includes national authorities when they are implementing EU law [as per Article 51(1) EUCFR] and, specifically, when the matter falls within the scope of EU law (*Åkerberg Fransson*, Case C-617/10; *Texdata*, Case C-418/11). The CJEU considered this issue also in the context of Dublin transfers (*NS and ME*, Joined Cases C-411/10 and C-493/10) where it found that the sovereignty clause in Article 3(2) of the Dublin Regulation (Regulation No. 343/2003) “forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the CEAS. Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter”. However, the problem with Article 41 EUCFR is that, by contrast to Article 51(1) EUCFR, there is no explicit reference to national authorities implementing EU law, which was highlighted by the CJEU in *Cicala* (Case C-482/10). The limited scope of Article 41 EUCFR has been addressed by Advocate General Kokott in *Mellor* (Case C-75/08) for whom, independently of the limitation in Article 41 EUCFR, Member States may not be completely free when enacting procedural rules with a view to the application of Union law and that Article 41 EUCFR “contains rules of good administration by the institutions, but documents a general principle of law, which authorities of the Member States too must observe when applying Community law” (Opinion of AG Kokott, paras. 27, 33–34). As a general principle of EU law and in spite of the wording of Article 41 EUCFR, the right to good administration thus requires that Member States have certain administrative standards in place for their implementation of EU law, although this may vary between Member States.

Following this line of thinking, it could be argued that international protection seekers could rely on Article 41 EUCFR for requesting that his or her claim be dealt with an impartial and fair manner and within a reasonable period of time. This argument is buttressed by the fact that asylum law and policy is now clearly within the remit of EU law (Article 78 TFEU). Moreover, as the right to good administration constitutes a general principle of EU law Member States need to abide by it when adopting decisions that fall within the scope of EU law. This principle also covers instances whereby non-compliance of one party to the proceedings arises from the behaviour of the administration itself. The right to due diligence therefore protected in Article 41 EUCFR is particularly important in the context of the reduction or withdrawal of material reception conditions.

Another right which is essential to decisions concerning the reduction or withdrawal of material reception conditions is the right to be heard as per Article 41(2) EUCFR. In *Dokter* (Case C-28/05) the Court held 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. In *MM* (Case C-277/11) the CJEU held that the right to good administration includes the right of every person to be heard and restated that the latter is of particular salience before any individual measure which can potentially affect him or her adversely is taken (para. 85). Specifically, it held that the right to be heard is a fundamental principle of EU law and that Article 41(2) EUCFR is of general application (paras. 82 and 84). In particular, “according to its case law, Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law” (para. 93), including the right to be heard. Consequently, according to the CJEU an asylum applicant must be heard by the national authorities responsible for determining the claim of international protection pursuant to the rules of the CEAS (para. 89). This case seems to indicate that the Court is willing to apply Article 41 EUCFR to national authorities. However, this is not set in stone. In *Mukarubega* (Case C-166/13) and *Buodjlida* (Case C-249/13) on the Return Directive (Directive 2008/115/EC) the CJEU held that the right to be heard only applies to the institutions, bodies, offices and agencies of the EU and not to national bodies. According to Basilien-Gainche (2014), “the CJEU restricts the extent and the content of the right to be heard for TCNs facing removal orders, so much so that this supposedly fundamental right appears to be nonexistent”.

International protection seekers may also be able to rely on Article 47 EUCFR, which provides for the right to an effective remedy and to a fair trial (*e.g.* Case C-175/08, *Abdulla*, where there is explicit reference to the respect of the rights protected in the EUCFR). In this respect the CJEU has found that when national rules make it impossible or excessively difficult to protect rights they should be set aside as they would constitute a breach of the principle of effectiveness (Case 199/82, *San Giorgio*).

3.3.2 *The Saciri judgment: an application of dignified standards of living to material reception conditions*

Article 4 EUCFR is the EU equivalent of Article 3 ECHR and the line of reasoning of the ECtHR in relation to Article 3 ECHR can also be applied to Article 4 EUCFR.⁶ Accordingly, if Member States provide material reception conditions that are insufficient

thus exposing the applicant to a real risk of poverty, it could potentially raise an issue under Article 4 EUCFR.

We have seen that under International and European human rights law the realisation of economic, social and cultural rights is indispensable for the dignity and free development of human beings. In this regard, the RCDr provides that Member States must ensure that material reception conditions guarantee adequate standards of living for applicants, namely, their subsistence and physical and mental health [Article 17(2)]. This notwithstanding, the revised Directive also affords a significant amount of flexibility and margin of appreciation to the Member States allowing less favourable treatment compared to nationals ‘where duly justified’. In addition, it envisages the possibility that the reduction or withdrawal of material reception conditions might be below an adequate standard of living. Given this embedded ambivalence of the RCDr, the role of the CJEU becomes clearly pivotal: firstly, in ensuring adequate standards of material reception conditions and, more generally, in reducing the gap between a ‘securitisation’ and a human rights-based approach.

The key case concerning the provision of material reception conditions and dignified standards of living is *Saciri* (Case C-79/13), which provides a good insight into the complexity and nature of the problems concerning material reception conditions at national level. This case was about a family that applied for asylum in Belgium and for accommodation to the Belgian agency for asylum seeker reception (Fedasil). Fedasil informed the Saciri family that it did not have any available accommodation and referred it to obtain a financial allowance from the Belgian public centre for social welfare (OCMW). OCMW refused to provide the family with a financial allowance on the grounds that the family was not staying at Fedasil’s asylum reception centre. Consequently, the family was denied both public asylum seeker accommodation and a financial allowance to rent in the private market. So essentially, the case concerned minimum standards for ensuring the right to family housing for destitute asylum seekers.

The CJEU was asked to examine what level of support a Member State should provide when they opt to provide material support in the form of a financial allowance as per Article 13(5) RCD. In particular, the questions concerned whether a Member State that chooses to provide a financial allowance instead of accommodation is bound by the requirements of Articles 13 and 14 RCD and, in particular, whether the financial allowance should be sufficient to allow an asylum seeker to provide their own accommodation at all times. Another important question concerned the time of payment of the financial allowance and whether the positive obligation stemming from the Directive also arises in situations of full asylum accommodation and when a Member State refers asylum seekers to other public agencies.

The CJEU held that the Directive’s purpose and general scheme, together with the observance of fundamental rights, is to prevent the asylum seeker from being deprived of the protection of the minimum standards as provided in the Directive itself. The material reception conditions therefore must be available to the asylum seeker from the day he makes the application for asylum, as provided also by Article 13(1) RCD (para. 34). The Court confirmed its judgment in *Cimade and Gisti* (Case C-179/11) where it held that Member States are obliged to grant the minimum conditions for the reception of asylum-seekers, even to those in respect of whom it decides to call upon another Member State as responsible for examining their application for asylum to take charge of or to take back those applicants (paras. 33 and 35; see further UNHCR, 2013). In that same case, Advocate General Sharpston explicitly referred to human dignity and the importance of

respecting and protecting it. She also said that failure to ensure social assistance available to applicants and, more generally, the lack of reception conditions may risk undermining the effectiveness of the right to asylum as per Article 18 EUCFR (Opinion, Case C-179/11, paras. 55–56). In a similar vein, the Court held that the right to human dignity must be respected and protected (para. 42). Asylum seekers therefore may not be deprived, even for a temporary period of time, of the protection of the minimum standards laid down by that Directive (para. 56).

As to the amount of the financial allowance granted by a Member State that opted for this form of material reception conditions, the amount of aid granted must be sufficient to ensure a standard of living, which is adequate for the health of the applicants and capable of ensuring their subsistence (para. 40). However, in combination with Recital 7 in the Preamble of the Directive, those allowances must be also sufficient to ensure a dignified standard of living by enabling them to obtain housing, if necessary, even on the private rental market (paras. 39 and 42). In particular, this means that in the case of persons having special needs, such as minors, the amount must be sufficient to assure them to be housed with their parents in order to maintain the family unity (paras. 41 and 45). At the same time, the CJEU held that asylum seekers cannot make their own choice of housing suitable for themselves (para. 43). Hence, Member States maintain some margin of discretion.

The CJEU also held that since Member States may grant material reception conditions in the form of financial allowances if they cannot grant them in kind, they may refer an asylum seeker to bodies within the general public assistance system if they cannot provide for housing (para. 49). If a Member State decides to use as intermediaries the bodies which are part of the general public assistance system, they have to ensure that the minimum standards laid down in the Directive for asylum seekers are respected (para. 49). Significantly, the Court held that saturation of the reception networks cannot be used as a justification for not meeting the minimum standards set out in the RCD (para. 50). In practice this means that Member States will not be able to escape their obligations under the RCD and its recast even in circumstances where asylum seeker accommodation is full. This is particularly important in light of the fact that in most Member States protection seeker accommodation is insufficient and overcrowded [ECRE, (2015), pp.22–27]. Another important aspect of the judgment concerns Article 14(3) RCD, which requires that minors should be housed with their parents. The Court found that even though it does not apply to the financial allowance, the latter should nevertheless enable minors to live with their parents (para. 45). This constitutes not only a recognition of the importance of family unity but also of dignifying living standards. Hence, in contrast with the ECtHR (cfr. *Chapman v UK* and also *Muslim v Turkey*, in Section 3) the CJEU seems to adopt a much stronger human rights-based approach to the national provision of certain material reception conditions, particularly when the case concerns vulnerable persons such as destitute asylum seekers, minors and the unity of the family.

Overall, the *Saciri* judgment represents an important step forward in helping to give concrete meaning and ensure adequate and dignified standards of living for those seeking international protection in the EU context.

5 Conclusions: giving with one hand and taking with the other

The preceding analysis provides a mixed picture of the RCD and its recast: on the one hand, some of the provisions have improved the quality of material reception conditions in the Member States. On the other hand, Member States still retain a significant margin of discretion. Differences between Member States remain because the RCD and its recast maintain this state of affairs. Specifically, the provisions on material reception conditions continue to be open to wide interpretation and Member States may grant less favourable treatment to international protection seekers compared to nationals where some of the support is provided in kind or where national standards of living are higher than what is prescribed for international protection seekers under the RCD. Overall, the changes introduced by the Recast Directive are insufficient to guarantee an adequate and dignified standard of living for international protection seekers. This limited ‘success’ of the Directive is explained by the persistence of ‘securitisation’ and ‘civic integration’ paradigms, which maintain and exacerbate the distinction between those who are members of a given political community and those who are not members. Consequently, there is still a strong tension between a migration control rational and one premised on the protection of human rights; a tension which ‘seeps out of the pores’⁷ of the Directive.

Both national and European Courts retain a key monitoring role in ensuring that standards and guarantees are met. Where courts take into account the legal reasoning of other courts they might engage in a process of practical reasoning which may gradually help to define adequate and dignified reception conditions for international protection seekers with comparable living standards across the Member States. In particular, courts may play an important part in ensuring the principled implementation of the revised RCD by the Member States, namely, compliance with International and European human rights obligations.

The article argued throughout that judicial interpretation should be premised on the right to human dignity. Human dignity can have both a foundational function for other fundamental rights and also act as a ground for critiquing certain interpretations of human rights. It can therefore address the contemporary challenge of human rights protection against a background of changes in the public and private sphere of action and be used as the core defining line for setting the parameters of adequate reception conditions for international protection seekers in the Member States.

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Notes

- 1 Article 21 of the RCDr provides for a non-exhaustive list of those who should be considered vulnerable according to specific factors or circumstances; cfr with Article 2(k) where the definition of which categories of applicants are particularly vulnerable remains unspecified; on the notion of vulnerability in the EU, see Brandl and Czech (2015); on vulnerability and ECHR law, see Peroni and Timmer (2013).
- 2 For detailed analysis of Member States' obligations stemming from international refugee law, international social security law and international human rights law in relation to their reception arrangements for asylum seekers, see Slingenberg (2014).
- 3 The recast Reception Conditions Directive entered into force in July 2013 and the deadline for transposition is July 2015.
- 4 E.g. Article 4 refers to refugees' "freedom as regards the religious education of their children"; Article 12(2) provides that "[...] rights attaching to marriage, shall be respected [...]"; Article 22 concerns the public education of children in elementary school and beyond; para. 2 of the annexed schedule, concerning travel documents, notes that children may be included in the travel document of a parent or, in exceptional circumstances, of another adult refugee.
- 5 This provision was inserted in the original RCD further to concerns of the UK which had domestic legislation in place according to which support to applicants would be denied if their claim was not submitted 'as soon as practicable', Section 55 Nationality, Immigration and Asylum Act 2002. The then House of Lords found the implementation of this policy to breach Article 3 ECHR where the applicant was forced to live in degrading conditions, see *Regina v. Secretary of State for the Home Department (Appellant), ex parte Adam (FC)* (Respondent); *Regina v. Secretary of State for the Home Department (Appellant), ex parte Limbuela (FC)* (Respondent); *Regina v. Secretary of State for the Home Department (Appellant), ex parte Tesema (FC)* (Respondent) (Conjoined Appeals), [2005] UKHL 66.
- 6 Article 4 EUCFR provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". According to the Explanations of the Charter, it has the same meaning and scope as Article 3 ECHR (Praesidium of the Convention, 2007).
- 7 This expression was taken from McCrudden (2013).