

# ALTERNATIVES TO IMMIGRATION AND ASYLUM DETENTION IN THE EU

## TIME FOR IMPLEMENTATION

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for European Studies of the Université  
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# INTRODUCTION

## BACKGROUND

This research is an integral part of the project MADE REAL ('Making Alternatives to Detention in Europe a Reality by Exchanges, Advocacy and Learning'), which is co-financed by the European Commission. The project was coordinated by the Academic Network for legal studies on asylum and immigration in Europe (the 'Odysseus Academic Network'), and was implemented together with 13 non-governmental organisations in 13 Member States of the EU: Diakonie Flüchtlingsdienst (Austria), Coordination et initiatives pour et avec les Réfugiés et Etrangers (Belgium), Legal clinic for Refugees and Immigrants (Bulgaria), France Terre d'Asile (France), Greek Council for Refugees (Greece), Hungarian Helsinki Committee (Hungary), Centre for Sustainable Society (Lithuania), Jesuit Refugee Service (Malta), Justitia et Pax Nederland (the Netherlands), Slovak Humanitarian Council (Slovakia), Institute for Legal Research, Education and Counselling (iLREC) (Slovenia), Swedish Red Cross (Sweden) and Bail for Immigration Detainees (the UK). An advisory group made up of UNHCR and the European Council on Refugees and Exiles (ECRE) provided structured input at different stages of the project cycle.

The main objectives of the project were to address a knowledge and implementation gap concerning alternatives to immigration detention in the EU, paying particular attention to (vulnerable) asylum seekers, to assist Member States in the transposition of the recast Reception Conditions Directive (RCD) and to enhance the use of alternatives to detention that comply with EU and international legal standards.

The project entailed:

- a phase of research in 6 EU Member States (Austria, Belgium, Lithuania, Slovenia, Sweden and the United Kingdom) on the national legal framework and practices with regards to alternatives to detention, which culminated with the publication of this synthesis report and a training module, as well as
- a phase of training in 7 Member States (Bulgaria, France, Greece, Hungary, Malta, the Netherlands and Slovakia) using the national version of the training module developed.

The main project findings were disseminated in an EU-wide conference in Brussels in February 2015.

## PURPOSE AND SCOPE OF THE STUDY

This research constitutes a significant pooling of knowledge on the law and practice on alternatives to detention in 6 EU Member States (Austria, Belgium, Lithuania, Slovenia, Sweden and the United Kingdom). In addition, it includes legal research on the scope of Member States' obligations to implement alternatives to immigration detention under international, European (i.e. Council of Europe) and EU law. It



advances an understanding of what alternatives to immigration detention are, bearing in mind the above-mentioned legal frameworks and in particular the precisions that were brought about by the Return Directive and the recast RCD.

The critical analysis of the legal frameworks as well as of the significant mass of information on national law and practice has led to the identification of underlying principles and good practices for fair decision-making on, and effective implementation of, alternatives to detention. However, the research also reveals defective practices, which contravene the legal obligations of Member States and are ineffective in achieving Member States' objectives.

It is hoped that the present study will contribute to factually based and legally sound advocacy and will act as guide for policy and decision-makers throughout the EU.

## **MATERIAL SCOPE**

The research initially focused exclusively on alternatives to detention in the asylum field. However, in consultation with the project advisory board, the approach was slightly altered to also encompass the return framework. On the one hand, it was observed that in some of the Member States the legal provisions and schemes were applicable to both groups. On the other hand, it was decided that it would be beneficial to study schemes used in the return process, as they could be potentially adapted to the asylum framework. Finally, the new provisions of the recast RCD envisage the possibility to detain, under certain conditions, asylum seekers who applied for asylum while in a return process.<sup>1</sup> Once it was agreed to extend the scope to practices in the return framework, it followed logically that these could only be examined meaningfully when studying the legal framework that underpins them, at national, international, European and EU level.

In order to examine the issue of alternatives to detention holistically, the research included a critical assessment of the national frameworks of detention, with an emphasis on decision-making around detention, in order to ascertain the way that decisions around detention and alternatives to detention are being taken.

This research is not meant as a study on the transposition of the entirety of the relevant EU instruments and each situation is examined under the lens of the main focus, alternatives to detention. Thus, for example, when examining the rights asylum seekers under an alternative have access to, the main point of inquiry is whether their treatment differs from that of the rest of the asylum seekers at national level, rather than which choices each Member State has undertaken in order to transpose its EU obligations.

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1. Art. 8§3(d), recast RCD.

## GEOGRAPHICAL SCOPE

The legal analysis at national level covers Austria, Belgium, Lithuania, Slovenia, Sweden and the United Kingdom. The research targeted Member States that had already implemented alternatives to detention in the immigration framework. It sought to achieve a balance between the different regions of the EU, as well as to target national asylum systems at different stages of development. The countries in the sample also receive varying numbers of asylum seekers, with Belgium and Sweden among the Member States which receive the highest number of asylum applications in the EU, while Lithuania and Slovenia receive a limited amount. The aim was to ensure a sample that would be representative to the greatest extent possible by including Member States with distinct legal traditions, whose asylum systems have different capacities and whose geographic positions pose diverse challenges.

## TEMPORAL SCOPE

The analysis of the international, European and EU legal frameworks was undertaken mainly from December 2013 to August 2014. Significant jurisprudential developments up to December 2014 were incorporated. The main bulk of research on the national legal framework and practices on alternatives to immigration detention was undertaken from November 2013 to March 2014. At this stage in most Member States, only statistics for 2012 were available. Limited updates were made possible during the phase of verification of the national research results and their analysis by the coordination team. Therefore, as concerns asylum policy, they reflect the national law and practice prior to the transposition of the recast RCD, as the transposition period was ongoing at the time of drafting.

While providing a detailed overview of the law and practice on alternatives to detention in the given countries, the results of the research at national level might not fully reflect current practice as this field of law is changing rapidly. When this report was published, Member States were still in the process of transposing the recast RCD. Nevertheless, the study's main objective was to critically distil national law and practice in order to come up with underlying principles and good practices for an effective implementation of legal obligations that could be useful for each Member State, an aspect which is not temporally bound.

## METHODOLOGY

The analysis of the international, European and EU legal frameworks was conducted by the project coordination team. It was based on desk research into legislation, case-law and literature, as well as exchanges with the project advisory group, and external experts, including administrators at the European Commission, expert academics

and practitioners as well as civil society organisations that have worked significantly on these issues.

The analysis at national level was two-pronged and conducted by national experts, who are either members or are scientifically collaborating with members of the Odysseus Academic Network, and experts from the partner organisations. Two questionnaires, one focusing on the legal framework and another focusing on the national practices, served to guide the experts' inquiries.

The national research is based on desk research into legislation, administrative instructions and literature, followed by analysis of selected case-law on alternatives to detention, and interviews with national stakeholders, such as expert lawyers, government officials, judges and representatives of specialised civil society organisations.

A limitation was that the national research teams did not receive the capacity to conduct interviews with a representative sample of asylum seekers and returnees who are subject to alternatives to detention in order to explore their experience in the framework of this study. However, some of the national partners have conducted such research in other frameworks and have incorporated their results into their analyses for this project.

## **STRUCTURE OF THE RESEARCH TEAM**

Research tasks were divided among the coordination project team in Brussels, the national Odysseus Network members or their scientific collaborators and civil society project partners.

The project coordination team led the development of the research methodology and prepared the questionnaires, which were then discussed with the national members and partners. The coordination team also undertook the main legal research, compiling and analysing the results of the national members and partners' questionnaires, in consultation with them. The advisory group had input into several stages including, the elaboration of the research questionnaire and commented on different parts of the synthesis report.

## **OUTLINE OF THE MAIN RESEARCH METHODOLOGY**

The project began in September 2013 with desk research. The coordination team in Brussels surveyed academic literature, case-law, civil society and UNHCR reports, guidelines and legislation on alternatives to detention. It created a background bibliography, which was later shared with the national members and civil society partners, and prepared the draft questionnaires on the law and practice at national level.

The questionnaires were discussed with the advisory group at a dedicated meeting and with national members and partners during the kick-off meeting in October 2013.

The questionnaires were then completed on the basis of the feedback received. The questionnaires followed a thematic approach. The one on the national legal framework included questions on regulation of detention and alternatives to detention, decision-making around these areas and afterwards focused on the regulation of national schemes. A further section focused on the regulation of access to rights for third country nationals subject to those schemes and national jurisprudence. The questionnaire on national practices sought to ascertain if and how the legal framework was applied in practice by collecting for example details around the frequency of application of the different detention grounds, ascertaining whether and how guarantees provided in the legal framework were ensured, and looking further into the issue of the practical operationalisation of the schemes.

From November 2013 to April 2014 research was conducted by the experts at national level. National members of the Odysseus Academic Network, or their scientific collaborators, were responsible for the questionnaire on the legal framework, and civil society partners were responsible for the questionnaire on the practices. They conducted desk research into legislation, administrative instructions and literature, followed by analysis of selected cases on detention and alternatives to detention, and interviews with national stakeholders, such as expert lawyers, government officials, judges and representatives of specialised civil society organisations. The two sets of experts collaborated during the research phase. During the same period the coordination team commenced the legal analysis.

A first draft of the questionnaires was addressed to the project coordination team in February 2014. The team analysed the results and conducted two-day research visits in each of the 6 Member States studied. The national academic experts, the national civil society experts and the project coordination team discussed the preliminary results, agreeing where further research or clarification was necessary and cross-checking information between each pair of national experts. This was also the opportunity for the coordination team to conduct on-site visits to facilities where alternatives to detention were implemented.

Following these exchanges, the coordination team received the final versions of the national questionnaires in March 2014. These formed the basic material on which Chapter 2 of this report was drafted. The report adopts a horizontal approach, analysing results per theme and not per Member State. A first draft of the synthesis report was submitted to national members, project partners and the advisory group in July 2014 for review. On the basis of their comments, this work was finalised in January 2015.

## REPORT OUTLINE

The synthesis report is divided in two main parts. The first chapter contains three sections. The first section provides context on the phenomenon of immigration detention

and explores the rationale behind the creation of alternatives to detention. The second explores the scope of Member States' obligations to implement alternatives to immigration detention under international, European and EU law. The third section presents an understanding on what alternatives to immigration detention are.

The second chapter contains three sections. The first analyses the process of decision-making on detention and alternatives to detention. The second explores how different schemes are operationalised at national level. It revolves around the implementation of alternatives to detention at national level, including the practical details on the implementation of each scheme, such as the bodies responsible for their running. A final section deals with the issue of access to rights for individuals subject to such schemes.

The analysis of the information collected around the workings of national systems is not geared toward assessing each individual system and proposing national responses, but rather to inform decision-making around and implementation of alternatives to detention at EU level. The research aims to identify good practices, both in legal regulation and at the implementation level, as well as to identify gaps in and challenges posed by the operationalisation of such schemes.

An overall 'snapshot' of the specific situation in each country in terms of regulation of the issue of detention and alternatives to detention and a summary of the features of the schemes applied nationally is provided at the end of the research, in the form of country annexes.



# **CHAPTER 1**

# DEFINING ALTERNATIVES TO DETENTION IN THE CONTEXT OF MIGRATION AND ASYLUM

## I. CONTEXT

Detention of migrants and asylum seekers in the context of migration management has become a widespread practice. In the last decade, international organisations, such as UNHCR,<sup>2</sup> and civil society organisations<sup>3</sup> in a number of countries have expressed concerns about the increasing use of detention in the immigration framework.

Although there are many differences between EU countries with regards to detention conditions, numbers of people detained and length of detention, the great majority of Member States detain migrants and asylum seekers. It is impossible to arrive at a precise figure, but Migreurop<sup>4</sup> has documented the increase in the number of detention centres in both the EU and neighbouring countries, and reported the existence of 37,000 places in detention centres for migrants in 2012.<sup>5</sup> These findings are supported by research showing that, for example, the number of people in immigration detention in the UK<sup>6</sup> rose from 250 people in 1993, to 2,260 in 2003<sup>7</sup> and 28,909 in 2012,<sup>8</sup> and in France from 28,220 in 2003 to 51,385 in 2013.<sup>9</sup>

### 1.1 What is immigration detention?

Most literature uses the term 'immigration detention'. This is not a legal but rather a policy term, mainly because international and European law recognise specific rights of refugees, and detention of asylum seekers is regulated in a separate framework. Many countries in the EU apply a single legal framework to the detention of

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2. UNHCR, Press release, 'UNHCR concerned at detention of asylum-seekers, releases new guidelines' (21 September 2012) < <http://www.unhcr.org/cgi-bin/txis/vtx/search?page=search&docid=505c33199&query=detention>.

3. One of the main coalition of NGOs working in this area is the International Detention Coalition (IDC), a global network of over 300 civil society organisations and individuals in more than 70 countries, that advocate for, research and provide direct services to refugees, asylum seekers and migrants affected by immigration detention. For more information, please refer to their website < <http://idcoalition.org>.

4. Migreurop < <http://en.closethecamps.org/2014/03/03/europe-of-camps-deploys-its-web/>.

5. Migreurop < [http://www.migreurop.org/IMG/pdf/Carte\\_Atlas\\_Migreurop\\_19122012\\_Version\\_francaise\\_version\\_web.pdf](http://www.migreurop.org/IMG/pdf/Carte_Atlas_Migreurop_19122012_Version_francaise_version_web.pdf). This figure only reflects the detention capacity – many centres being either overcrowded or underused. It does not take into account other places where migrants can be deprived of their freedom such as police stations.

6. Official figures do not include migrants detained in prison under Immigration Act powers. A snapshot shows that 1 214 immigration detainees were in prisons at 31 December 2013. Source: House of Commons, Written Answers to Questions, Hansard 9 April 2014, c249W [AB 1 Tab 10].

7. L. Weber and B. Bowling 'Valiant beggars and global vagabonds: Select, eject, immobilize' (2008) 12 Theoretical Criminology, 355–375.

8. A. Cooke, 'National report UK – Immigration detention & the rule of law' (2013) Bingham centre for the rule of law 6 < [http://www.biicl.org/files/6568\\_uk\\_-\\_final\\_bc\\_edit.pdf](http://www.biicl.org/files/6568_uk_-_final_bc_edit.pdf).

9. M.L. Basilien-Gainche, O. Doukouré, F. Tercero 'National report France – Immigration detention & the rule of law' (2013) Bingham centre for the rule of law 4 < [http://www.biicl.org/files/6843\\_france\\_-\\_final\\_bc\\_edit.pdf](http://www.biicl.org/files/6843_france_-_final_bc_edit.pdf).

“foreigners” and detain both asylum seekers and irregular migrants in the same locations and under similar conditions.

The 2012 UNHCR Guidelines define detention as “the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities”.<sup>10</sup> The recast Reception Conditions Directive states that detention “means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement”.<sup>11</sup>

To encompass the complexity of this phenomenon, several organisations and scholars have put forward definitions of ‘immigration detention’ in particular. A. Edwards’s UNHCR study on alternatives to detention defines it as “[t]he detention of refugees, asylum-seekers, stateless persons and other migrants, either upon seeking entry to a territory (front-end detention) or pending deportation, removal or return (back-end detention) from a territory. It refers primarily to detention that is administratively authorised, but it also covers judicially sanctioned detention”. S. Silverman and E. Massa define immigration detention more generally, as “[t]he holding of foreign nationals, or non-citizens, for the purposes of realising an immigration-related goal”.<sup>12</sup> Such detention “represents a deprivation of liberty” and “takes place in a designated facility in the custody of an immigration official”.<sup>13</sup> The European Migration Network describes it, in the global migration context, as a “non-punitive administrative measure ordered by an administrative or judicial authority(ies) in order to restrict the liberty of a person through confinement so that another procedure may be implemented”.<sup>14</sup> In the EU context, it nuances the term to mean “confinement (i.e. deprivation of liberty) of an applicant for international protection by a Member State within a particular place, where the applicant is deprived of their personal liberty”.<sup>15</sup>

Detention for the purposes of migration control concerns a wide range of groups including people in need of international protection, victims of trafficking, children, and migrants in an irregular situation. Detention (defined here as “deprivation of liberty or confinement to a particular place”)<sup>16</sup> can take place in a variety of locations – from specialised administrative facilities to prison, airport transit zone or remand facilities. It can be applied both upon arrival and in the territory.

10. UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) 9 < <http://www.refworld.org/pdfid/503489533b8.pdf>.

11. Art. 2(h), recast RCD.

12. S. Silverman and E. Massa, ‘Why Immigration Detention is Unique’ Population, Space and Place (2012) 18(6) 679.

13. Ibid.

14. European Migration Network Glossary < [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary/index\\_d\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/glossary/index_d_en.htm).

15. Ibid.

16. UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) 9.



To justify its use, States use a wide range of arguments, sometimes in combination: practical considerations such as having the migrant at the disposal of the authorities for identity checks or public health screenings at arrival; enforcement-related motivations such as securing public order or forced return of irregular migrants; or political arguments such as to deter any further arrivals or to protect host societies.<sup>17</sup> For example, the former British Immigration Minister Phil Woolas argued that “the system need[s] to protect a nation from economic migrants” and promoted the idea that a strict system would lead to less migration and fewer unfounded asylum applications.<sup>18</sup> In an interview, he specifically linked this argument to immigration detention, saying that ending it would “make [the UK] a bigger draw for those seeking a new home”.<sup>19</sup>

Under international law, the right to liberty and security of the person is fundamental. There is a strong presumption in favour of personal liberty. Interference with this right is permitted only in exceptional circumstances and must not be arbitrary. The notion of arbitrariness includes compliance with the law but goes beyond lawfulness and entails compliance with the principles of necessity and proportionality. However, States have a legitimate right to control the entry and stay of non-nationals on their territory. The U.N. Working Group on Arbitrary Detention recognised “the sovereign right of States to regulate migration”.<sup>20</sup> Detention appears to be used as a means to protect and vindicate the right of States to decide on matters concerning the entry and stay of foreigners.<sup>21</sup> However, States “do not have an unlimited or unfettered authority over migration issues. International law and the growth of international human rights law [...] limit state authority” over immigration detention.<sup>22</sup>

UNHCR, which has a principled position against the detention of people in need of international protection, issued guidelines on detention of asylum seekers in 1999.<sup>23</sup> These were replaced by the 2012 detention guidelines.<sup>24</sup> UNHCR launched a global strategy for 2014-2019 to support governments in ending the detention of asylum

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17. G. Cornelisse, *Immigration detention and Human rights – Rethinking territorial sovereignty* (Martinus Nijhoff publishers 2010) 247; S. Vohra, ‘Detention of irregular migrants and asylum seekers’ in R. Cholewinski, R. Perruchoud and E. McDonald (eds), *International migration law – Developing paradigms and key challenges*, (T.M.C. Asser Institut 2007) 49.

18. The Guardian, ‘Immigration minister calls for changes in ‘outdated’ Geneva convention’ (10 January 2009) < <http://www.guardian.co.uk/politics/2009/jan/10/immigration-policy-change-woolas>.

19. The Sun, ‘Brit veto to bar asylum cash’ (8 December 2008) < <http://www.thesun.co.uk/sol/homepage/news/article2014493.ece#OTC-RSS&ATTR=News>.

20. UN Working Group on Arbitrary Detention, Report A/HRC/13/30 58 (10 January 2010).

21. G. Cornelisse, *Immigration detention and Human rights – Rethinking territorial sovereignty* (Martinus Nijhoff publishers 2010) 247.

22. S. Vohra, ‘Detention of irregular migrants and asylum seekers’ in R. Cholewinski, R. Perruchoud and E. McDonald (eds), *International migration law – Developing paradigms and key challenges*, (T.M.C. Asser Institut 2007) 49.

23. UNHCR, ‘UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers’ (26 February 1999) < <http://www.refworld.org/docid/3c2b3f844.html>

24. UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012).

seekers and refugees.<sup>25</sup> This strategy includes ensuring that alternatives to detention are available in law and implemented in practice.

The EU has had legal competences in migration and asylum since the Treaty of Amsterdam,<sup>26</sup> further reinforced by the treaties of Nice<sup>27</sup> and Lisbon.<sup>28</sup> Regarding asylum, the aim is to create a Common European Asylum System (CEAS) providing a single asylum procedure and a uniform protection status throughout the EU.<sup>29</sup> To this end, the EU has undertaken legislative harmonisation efforts (Temporary Protection Directive,<sup>30</sup> recast Reception Conditions Directive,<sup>31</sup> recast Qualification Directive,<sup>32</sup> recast Asylum Procedures Directive,<sup>33</sup> recast Dublin Regulation,<sup>34</sup> recast EURODAC Regulation);<sup>35</sup> practical cooperation efforts culminating in the creation of a European Asylum Support Office (EASO);<sup>36</sup> and financial solidarity (for example through the Asylum, Migration and Integration Fund).<sup>37</sup> Detention is regulated through a series of

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25. UNHCR, 'Beyond detention: A global strategy to end the detention of asylum seekers and refugees' (2014) < <http://www.unhcr.org/53aa929f6.pdf>

26. See Consolidated Version of the Treaty Establishing the European Community, OJ 1997 C 340/145 [TEC].

27. See Consolidated Version of the Treaty Establishing the European Community, OJ 2006 C 321 E/37 [TEC].

28. See Consolidated Version of the Treaty, Treaty on the Functioning of the European Union, OJ 2010 C 83/47 [TFEU].

29. The Treaty of Lisbon enounced the development of a "common policy on asylum, subsidiary protection and temporary protection" (Art. 79§1 TFEU) and a "common immigration policy" (Art. 78§1 TFEU).

30. Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12.

31. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ 2013 L 180/96. The Reception Conditions Directive was originally adopted in 2003: Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ 2003 L 31/18.

32. 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), OJ 2011 L 337/9. The Qualification Directive was originally adopted in 2004: Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 2004 L 304/12.

33. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ 2013 L 180/60. The Asylum Procedures Directive was originally adopted in 2005: Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ 2005 L 326/13.

34. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ 2013 L 180/31. The Dublin Regulation was originally adopted in 2003: Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003 L 50/1.

35. Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT (recast), OJ 2013 L 180/1.

36. Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ 2010 L 132/11.

37. Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, OJ 2014 L 150/168.

directives which apply to either asylum seekers or irregular migrants, defined as two separate groups.

The recast Reception Conditions Directive in particular regulates detention of asylum seekers via an exhaustive list of detention grounds, guarantees for detained asylum seekers and rules regarding detention conditions.<sup>38</sup> It establishes an explicit obligation to examine less coercive measures before resorting to detention and to lay down in national law rules governing alternatives to detention.<sup>39</sup> Member States must transpose the recast Directive into national law by July 2015.<sup>40</sup> The United Kingdom and Ireland have decided not to opt in to the Directive and are thus not bound by it.<sup>41</sup> However, the UK had opted in to the original Directive (2003) and thus remains bound by that version. Denmark has a general opt out of all asylum measures and thus is not bound by either version of the RCD.<sup>42</sup>

Another instrument relating to detention of non-nationals is the Return Directive, adopted in 2008 as part of the EU immigration policy. This regulates the detention of migrants (including refused asylum seekers) in the framework of a return procedure.<sup>43</sup> It includes an exhaustive list of detention grounds, guarantees for detained returnees and rules for detention conditions.<sup>44</sup> A key rule is the limitation of the detention period to a maximum of 18 months.<sup>45</sup> As shown by the European Commission's evaluation of the transposition of the Return Directive, this has had mixed effects, with 12 countries reducing detention periods and 8 increasing them.<sup>46</sup> Similarly, several Member States such as Lithuania<sup>47</sup> and Hungary<sup>48</sup> have introduced new grounds for detention of asylum seekers in anticipation of the transposition of the recast RCD without always adopting the accompanying safeguards.

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38. Arts. 8-11, recast RCD. The aim of the recast is "to lay down standards for the reception of asylum seekers in Member States" (Art.1). The previous version of the Directive established 'minimum' standards; see Art.1, RCD.

39. Art. 8§§ 2 and 4, recast RCD and *infra* Section '2.3.5.e.: The obligation to examine alternatives to detention' for a detailed analysis.

40. Art. 34, recast RCD.

41. Recital 33, recast RCD.

42. Recital 34, recast RCD.

43. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98.

44. Arts. 15-17, Return Directive.

45. Art. 15 §§ 5 and 6, Return Directive.

46. Commission, 'Communication from the Commission to the Council and the Parliament on the return Policy' COM (2014) 199 final.

47. Lithuania Practices questionnaire, Q.2.

48. "On 1 July 2013, following the adoption of Bill T/11207, 5 new amendments to the Asylum Act entered into force. The transposition of the recast RCD (not even formally adopted at the time of drafting the amendments) served as a pretext for the changes. Transposition, however, remained limited to provisions concerning detention of asylum-seekers; while in contrast, for instance provisions which entail obligations on Member States in relation to the assessment of the special reception needs of vulnerable persons were not transposed". Hungarian Helsinki Committee, 'Brief Information note on the main asylum-related legal changes in Hungary as of 1st July 2013' (2013) 1 < [http://helsinki.hu/wp-content/uploads/HHC-update-hungary-asylum-1-July-2013.pdf?utm\\_source=Weekly+Legal+Update&utm\\_campaign=066dacbabd-WLU\\_23\\_05\\_2014&utm\\_medium=email&utm\\_term=0\\_7176f0fc3d-066dacbabd-419613565](http://helsinki.hu/wp-content/uploads/HHC-update-hungary-asylum-1-July-2013.pdf?utm_source=Weekly+Legal+Update&utm_campaign=066dacbabd-WLU_23_05_2014&utm_medium=email&utm_term=0_7176f0fc3d-066dacbabd-419613565).

## 1.2. Detention and the criminalisation of migration

The available definitions appear to frame immigration detention in opposition to 'criminal detention'. Detention of migrants and asylum seekers is usually regulated by administrative rather than criminal law, as it is related to the right to stay in a given country. The conflation of these two distinct fields of law has led to confusion around the nature of immigration detention. In the last decades, there has been a clear movement towards the criminalisation of migration and of migrants themselves, to the extent that a term - "crimmigration"<sup>49</sup> - has emerged in the USA.<sup>50</sup> This can be observed in law, media and politics, and the increased use of detention is one of its key features.

In political and media discourse, migration has increasingly been assimilated to security. Migrants, especially those who are undocumented, are presented as a danger to society. Detention policies, portrayed as a legitimate response to protecting national interests, have become a symbol of a certain political stance in the public arena. Furthermore, as analysed by G. Mitchell and R. Sampson, also in the context of globalisation "[d]etention has increasingly become a preferred means for States to maintain and assert their territorial authority and legitimacy, and respond to mounting political pressures regarding border security".<sup>51</sup>

Migration intersects both criminal and administrative national law, according to local contexts. Several countries have criminalised irregular entry, leading to criminal proceedings and prison sentences. A recent FRA report states that all but three Member States (Portugal, Spain and Malta) punish irregular entry with fines or even imprisonment. Irregular stay is punishable in all EU Member States except France, Portugal and Malta.<sup>52</sup> The European Commission recently reported that migrants subject to a return order are detained along with criminal detainees in 9 Member States.<sup>53</sup> Furthermore, on the other side of the spectrum, non-nationals who commit crimes while on a legal stay are expelled after serving their criminal sentences or paying the fine, even if often they have strong ties with the host community and few ties with their country of origin. They may therefore also end up transiting through specialised detention centres if they are included in a return procedure.

Finally, [im]migration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement, while rejecting the procedural

49. The term was pinned down by J. Stumpf, in her article on 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) *American University Law Review* 367 < <http://www.wcl.american.edu/journal/lawrev/56/stumpf.pdf> .

50. One can find an extensive review of literature on this topic in the following article: J. Parkin, 'The criminalisation of migration in Europe - A state of the art of academic literature and research' (October 2013) 61 CEPS.

51. R. Sampson and G. Mitchell, 'Global trends in immigration detention and alternatives to detention: practical, political and symbolic rationales' (2013) 1(3) *JMHS* 97.

52. FRA, 'Criminalisation of migrants in an irregular situation and of people engaging with them' (2014) < [http://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants_en.pdf).

53. Commission, 'Communication from the Commission to the Council and the Parliament on the return Policy' COM(2014)199 final.

ingredients of criminal adjudication.<sup>54</sup> Indeed, most safeguards contained in prison rules developed over centuries in most European countries are not present in immigration detention. This includes existing standards in the criminal field on detention conditions but also procedural guarantees such as rights of the defence, level of proof, etc. Although administrative detention of migrants is not supposed to have a punitive purpose, some have argued that in its construct and its aim, it does.<sup>55</sup>

*It's not a room, it's a cell. Anything without a window and a ventilator, would you call that a room? Anything to do with you being locked up and you can't even see what is outside, somebody has to check from the outside on you with light on, to see if you're still alive, that's a cell. It qualifies as a cell.*<sup>56</sup>

In the same way, the development of most non-custodial alternative measures to immigration detention – such as electronic tagging, bail with conditions, reporting, designated residence – are inspired by the criminal legal framework.

There is increasing recognition that more safeguards and monitoring are necessary in administrative detention. This is exemplified by the increased presence of national prison monitoring bodies, such as the NPMs (national preventive mechanisms)<sup>57</sup> in immigration detention. A guide for monitoring immigration detention has recently been finalised by APT (Association for the Prevention of Torture), IDC and UNHCR.<sup>58</sup> In light of the phenomenon of criminalisation of migrants described above, academics and civil society have been cautious in taking inspiration from the criminal law field as a means to ensure better respect for fundamental rights of immigration detainees. However, while some areas of criminal law and policy cannot be transposed or would be problematic to apply to migration, some interesting safeguards exist. Detailed guidelines such as the U.N. Tokyo Rules on “Standard Minimum Rules for Non-Custodial Measures”<sup>59</sup> on alternatives to imprisonment in the criminal field contain important elements on access to rights and judicial remedies. The U.N. General Assembly has not similarly adopted guidelines regarding alternatives to detention

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54. S.H. Legomsky, 'The New Path of Immigration: Asymmetric Incorporation of Criminal Justice Norms' (2007) Washington & Lee Legal Review 469 < <http://www.seattle.gov/Documents/Departments/OIRA/64-2LegomskyArticle.pdf>.

55. I. Majcher, 'Crimmigration in the European Union, the case of immigration detention' (2014), < <http://crimmigration.com/2014/02/11/crimmigration-in-the-european-union-the-case-of-immigration-detention.aspx>.

56. Quote from Barbados, BH in M. Bosworth's article, 'Subjectivity and identity in detention: punishment and society in a global age' (2012) 16(2) Theoretical criminology 123, 129.

57. National Preventive Mechanisms (NPM) are the national component of the preventive system established by the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The OPCAT is an international human rights treaty designed to strengthen protection for people deprived of their liberty. It recognises that such people are particularly vulnerable and aims to prevent their ill-treatment through establishing a system of visits or inspections to all places of detention. The OPCAT requires that States designate a 'national preventive mechanism' to carry out visits to places of detention, to monitor the treatment of and conditions for detainees and to make recommendations regarding the prevention of ill-treatment. For more information, you can refer to the website of the association for the prevention of torture (APT): <http://www.apr.ch/en/national-preventive-mechanisms-npms/>.

58. APT, IDC and UNHCR, 'Monitoring Immigration Detention – Practical Manual' (2014) < [http://reliefweb.int/sites/reliefweb.int/files/resources/monitoring\\_immigration\\_detention.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/monitoring_immigration_detention.pdf). For more information, please refer to the website of APT < <http://www.apr.ch/en/migrants-in-detention/>

59. UN Standard Minimum Rules for Non-custodial Measures (1990) < <http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>.

for migrants and asylum seekers. However, UNHCR's guidelines on the detention of asylum seekers refer to the need to examine ATD and to some of the safeguards that should accompany their application.<sup>60</sup>

### 1.3. Why alternatives to detention?

There is an increasing interest in alternatives to detention from governmental actors and civil society, mirroring the growing concern over the use of immigration detention. In Europe, widespread violations of human rights in immigration detention centres, documented by international non-governmental organisations such as Amnesty International<sup>61</sup> and Human Rights Watch,<sup>62</sup> platforms of civil society organisations working with refugees and migrants such as ECRE<sup>63</sup> and PICUM,<sup>64</sup> international organisations such as the Council of Europe<sup>65</sup> and UNHCR,<sup>66</sup> led to public pressure on governments to change their policies. Member States such as Greece, Malta, Belgium and France were repeatedly condemned by the ECtHR on the basis of inhumane and degrading treatment in detention (Art. 3 ECHR)<sup>67</sup> and arbitrariness of detention decisions (Art. 5 ECHR).<sup>68</sup> As the number of migrants detained increased and alarming detention conditions were revealed, researchers started investigating both the rationale and the consequences of detention on migrants themselves. The key concerns include:

#### ♦ The ineffectiveness of detention policies

The increasing use of detention worldwide has not reduced irregular migration flows.<sup>69</sup> Research has found that migrants are not often aware or have a limited understanding of migration policies in the countries of transit or arrival.<sup>70</sup> According to F. Crépeau, the United Nations special rapporteur on the human rights of migrants,

60. UNHCR, 'UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012) guideline 4.3.

61. Amnesty International webpage on migration < <http://www.whenyoudontexist.eu>.

62. Human Rights Watch webpage on migration < <http://www.hrw.org/topic/migration>.

63. ECRE < <http://www.ecre.org>.

64. PICUM < [www.picum.org/en/](http://www.picum.org/en/)

65. Council of Europe webpage on migration < [http://www.coe.int/t/democracy/migration/default\\_en.asp](http://www.coe.int/t/democracy/migration/default_en.asp).

66. UNHCR website on Europe < <http://www.unhcr.org/pages/4a02d9346.html>.

67. See for example *Tatishvili v Greece* App no 26452/11 (ECtHR, 31 July 2014), *F.H. v Greece* App no 78456/11 (ECtHR, 31 July 2014); *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 27 March 2013); *Popov v France* App no 39474/07 (ECtHR, 19 January 2012); *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006); *Muskhadzhiyeva and others v Belgium* App no 41442/07 (ECtHR, 19 January 2010).

68. See for example *Suso Musa v Malta* App no 22414/93 (ECtHR, 23 July 2013); *Ahmade v Greece* App no 50520/09 (ECtHR, 25 September 2012); *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996); *Riad and Idiab v Belgium* App no 29787/03 and 29810/03 (ECtHR, 24 January 2008).

69. A. Edwards, UNHCR, 'Back to Basics: The Right to Liberty and Security of Persons and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants', (April 2011) 85 < <http://www.refworld.org/docid/4dc935fd2.html>.

70. IDC and La Trobe Refugee Research Center, 'There are alternatives, a handbook for preventing unnecessary detention' (2011) 11; C. Costello and E. Kaytas, UNHCR, 'Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva' (June 2013).



those migrants who are aware of such policies “possibly see detention as an inevitable part of their journey”.<sup>71</sup>

For people in need of international protection, the compelling reasons for their initial departure leave them no other choice but to flee until they find protection, even if it means experiencing detention. As stressed by UNHCR, “[r]efugees and asylum-seekers are in a different situation than other aliens by virtue of the fact that they may be forced by their circumstances to enter a country illegally in order to escape persecution”.<sup>72</sup> For other migrants, often leaving behind extreme poverty and unstable social contexts, motivation to find a safe haven, earn a living or reunite with family members may also supersede the hardship inherent in such migratory trajectories.

Furthermore, the efficiency of detention in reaching a given aim is rarely assessed. Some of the reasons why the authorities justify their need to detain an asylum seeker or migrant, such as establishing identity or enforcing return, cannot always be fulfilled during the period of detention, rendering detention unnecessary. This is particularly the case of migrants in return procedures who are “unreturnable” and who often are repeatedly detained without any prospect of their case being resolved.<sup>73</sup> In the UK for example, it is estimated that almost 40% of detainees who spent more than 3 months in detention were eventually released into the community with their cases still outstanding.<sup>74</sup> Figures on the number of people detained then released without resolution of their case are difficult to find and are not centralized at EU level.<sup>75</sup> Comparing justifications for detention against outcomes would enhance the transparency of the process and support a factually-based debate.

## ♦ The high financial cost of detention

Although it is difficult to find reliable data on this issue, partly because States are reluctant to publish figures, several studies at national level have shown that detention is costly for the State. In Austria, the estimated cost is 120€ per day per individual, in Belgium 180€/day (without considering the cost of infrastructure, lawyers and removal) and in the UK 164€/day.<sup>76</sup> In Lithuania, the authorities estimate the price of

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71. UN special rapporteur on the human rights of migrants, Report (2 April 2012) A/HRC/20/24 point 8.

72. UNHCR, ‘Detention of asylum-seekers and refugees: the framework, the problem and recommended practice’, EC/49/SC/CRP.13 (4 June 1999) point 7.

73 M.Vanderbruggen, J.Phelps, N. Sebtaoui, A.Kovats, K.Pollet « Point of no return, the futile detention of unreturnable migrants », January 2014, available at : [http://pointofnoreturn.eu/wp-content/uploads/2014/01/PONR\\_report.pdf](http://pointofnoreturn.eu/wp-content/uploads/2014/01/PONR_report.pdf) .

74 K.Marsh, M.Venkatachalam, K.Samenta (Matrix), ‘An economic analysis of alternatives to long term detention’, september 2012, <http://detentionaction.org.uk/wordpress/wp-content/uploads/2011/10/Matrix-Detention-Action-Economic-Analysis-0912.pdf>

75 But a large number of migrants served with a deportation order – some of which are detained to enforce return – are finally not deported; a reality described as the “deportation gap” . Although not everyone with a removal order is detained, it is interesting to note that in Europe, only a third return of those in the return procedure effectively go back to their country of origin. This is due to a series of reasons such as the lack of collaboration of consular authorities, delays in obtaining travel documents or to identify the individual, suspension of returns on the basis of human rights or broader humanitarian considerations.

76. Information gathered in the Made Real Practices Questionnaires, Q.37.

'lodging' someone in detention as 62 litas/day (about 18.6€).<sup>77</sup> Additional costs can include human resources (including security and specialised staff), security devices and technology, lodging and food, medical and legal support. Unfortunately, the ways of calculating the total cost of detention differ in every Member State and the lack of centralised data makes it impossible to construct comparable statistics. JRS Europe has tried to collect information on this issue from different Member States but has encountered similar limitations.<sup>78</sup>

Detention is inherently more expensive than providing open reception or alternatives to detention by the mere fact that security personnel, devices and infrastructure are expensive. Research conducted by IDC has shown a cost saving of 93% in Canada and 69% in Australia on alternatives to detention compared to detention.<sup>79</sup> Belgian authorities have calculated that the "*maison de retour*", an alternative to detention, costs 90€ per person/day, half of what detaining the same person would cost.<sup>80</sup> According to information provided by Slovenian authorities, detention in the Aliens Centre costs 15.10€ per person per day versus 7.20€ in the Asylum Home. In the case of returnees, costs to implement alternatives are very limited since reporting and supervision activities are part of the Slovenian police's daily tasks.

In addition, voluntary returns in the EU and Australia save approximately 70% of the costs compared to forced removals.<sup>81</sup> A recent report on the situation in the UK with regard to returnees in detention suggests that:

"[p]roviding case management in the UK to all the migrants who would be released promptly [...] would cost around £164.2 million, about 44% of the savings made as a result of avoided detention. However, as voluntary returns are far cheaper than enforced removals, this could lead to further savings as well as increased overall numbers of returns".<sup>82</sup>

## ♦ The dire consequences of detention on physical and psychological health of migrants and asylum seekers

A number of medical and sociological studies show that experiencing detention can seriously affect an individual's physical health and psychological well-being in both the short and long term.<sup>83</sup> In June 2010, JRS-Europe published a report enti-

77. Ibid. Euro values of litas are estimated based on the final exchange rate before Lithuania joined the Euro zone on 1 January 2015, i.e. 1 litas per 0.30 euros.

78. JRS Europe < [http://www.detention-in-europe.org/index.php?option=com\\_content&view=article&id=176&Itemid=210](http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=176&Itemid=210).

79. IDC, 'Ten things IDC found about immigration detention' < <http://idcoalition.org/cap/handbook/capfindings/>

80. Belgium Practices Questionnaire, Q.37.

81. IDC, 'Ten things IDC found about immigration detention' < <http://idcoalition.org/cap/handbook/capfindings/>.

82. K. Marsh, M. Venkatachalam, K. Samenta (Matrix), 'An economic analysis of alternatives to long term detention' (September 2012) < <http://detentionaction.org.uk/wordpress/wp-content/uploads/2011/10/Matrix-Detention-Action-Economic-Analysis-0912.pdf>.

83. See for example Z. Steel, D. Silove, R. Brooks, S. Momartin, B. Alzuhairi and I. Susljik, 'The impact of immigration detention and temporary protection on the mental health of refugees' (2008) 188 British journal of psychiatry 58 < <http://bjp.rcpsych.org/content/188/1/58.full.pdf+html>; Physicians for Human Rights and The Bellevue/NYU program for survivors of torture, 'From persecution to prison: the health consequences of detention for asylum seekers' (June 2003).



titled “Becoming Vulnerable in Detention” based on interviews with 685 detained asylum seekers in 23 EU Member States.<sup>84</sup> The study revealed that detention itself, irrespective of the detention conditions or past experiences of the individual, influenced the detainees’ level of vulnerability. The authors concluded:

“[t]he vast majority of detainees describe a scenario in which the environment of detention weakens their personal condition. The prison-like environments existing in many detention centres, the isolation from the ‘outside world’, the unreliable flow of information and the disruption of a life plan lead to mental health impacts such as depression, self-uncertainty and psychological stress, as well as physical health impacts such as decreased appetite and varying degrees of insomnia”.<sup>85</sup>

These findings are exemplified by the testimonies of the asylum seekers themselves in that study:

*“In detention, the pain started to come because of the stress. The old pain started to come all over my body. My heart, the stress, my head and the pain: that is my illness. I’m too stressed. There is too much pressure so I have to calm down.”*<sup>86</sup>

Certain vulnerable individuals such as children, single women and victims of torture are disproportionately affected. Detention is not a suitable environment for a child. Research shows that children are more heavily affected psychologically by detention, disrupted in their education and are more vulnerable to violence, trafficking or exploitation.<sup>87</sup> Women in detention are more exposed to verbal and sexual assault inside the centre, including by male guards, and their particular health needs such as reproductive health are not always met.<sup>88</sup>

For victims of torture or other forms of violence, detention can worsen past trauma or make it resurface. In Malta, 85% of Doctors without Borders’ (MSF) patients who suffered from mental health problems in detention had a history of trauma prior to displacement.<sup>89</sup> In a medical study conducted in the US with detained asylum seekers, a majority of whom were also victims of torture, significant symptoms of depression were present in 86% of the 70 detained asylum seekers, anxiety in 77% and post-traumatic stress disorder in 50%. These already high rates worsened the longer they remained in detention.<sup>90</sup>

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84. JRS Europe, DEVAS project, ‘Becoming vulnerable in detention’ (June 2010) < [https://eur.internationaljrs.org/assets/Sections/Downloads/JRS-Europe\\_Becoming%20Vulnerable%20In%20Detention\\_June%202010\\_PUBLIC1.pdf](https://eur.internationaljrs.org/assets/Sections/Downloads/JRS-Europe_Becoming%20Vulnerable%20In%20Detention_June%202010_PUBLIC1.pdf).

85. Ibid. 13.

86. Ibid. 64. Testimony of a young 20 years old man from Sierra Leone applying for asylum and detained in Belgium.

87. A. Farmer, ‘The impact of immigration detention on children’ (September 2013) 44 FMR 14.

88. M. Brané, L. Wang, ‘Women: The invisible detainees’ (September 2013) 44 FMR 37.

89. I. Kotsioni, A. Ponthieu, S. Egidi, ‘Health at risk in immigration detention facilities’ (September 2013) 44 FMR 13.

90. A. Keller, ‘From persecution to prison’ (June 2003) < <http://physiciansforhumanrights.org/library/reports/from-persecution-to-prison.html>.

Substandard detention conditions were repeatedly found in several Member States such as Greece, Malta and Hungary.<sup>91</sup> In recent reports, MSF underlined that overcrowding; failure to separate men, women, families and unaccompanied minors, and lack of sanitation and adequate services worsen the inherent negative psychological and medical consequences of detention. A recent study on the situation in Greece found that:

“[m]igrants and asylum seekers in detention suffer from medical problems caused or aggravated by the substandard conditions, the length of detention, and the lack of consistent or adequate medical assistance. MSF’s experience demonstrates that detention is a cause of suffering and is directly linked to the majority of the health problems for which detained migrants require medical attention”.<sup>92</sup>

### ◆ The negative impact of detention on the interaction between the individual and State authorities

Most detention centres for migrants (and in some countries, reception centres for asylum seekers) are in isolated locations and difficult to access for external actors such as the media and civil society organisations. This increases exclusion, as the detainees are not only excluded from the community but also from public scrutiny. Furthermore, being deprived of freedom for reasons that might not be understood creates a strong feeling of injustice and alienation. Most detainees do not understand why they are treated as criminals and isolated from the community after arriving in Europe. This feeling of isolation can impact the detainee after her release, in how she perceives both herself and the ‘host’ society. As stressed by M. Bosworth:

“In an inverse of the usual justifications of penal confinement, a period of detention neither changes the detainees nor prepares them for eventual return. Rather, detention merely confirms their identity. They are always, already non-citizens, excludable and deportable”<sup>93</sup>

The isolation created by detention is also symbolic and impacts the perception of both the migrant herself and the host society. It is important to keep this context in mind when examining the way some non-custodial measures – mainly electronic tagging – are applied to migrants and asylum seekers in the community. While they enable

91. See the Asylum information database (AIDA) national reports for: Hungary (ECRE and the Hungarian Helsinki Committee, April 2014) < [http://www.asylumineurope.org/files/report-download/aida\\_-\\_hungary\\_second\\_update\\_final\\_uploaded\\_0.pdf](http://www.asylumineurope.org/files/report-download/aida_-_hungary_second_update_final_uploaded_0.pdf); Malta (ECRE, Aditus Foundation, JRS Malta, December 2013) < [http://www.asylumineurope.org/files/report-download/aida\\_-\\_report\\_malta\\_-\\_update\\_-\\_published\\_on\\_website\\_09-january-2014.pdf](http://www.asylumineurope.org/files/report-download/aida_-_report_malta_-_update_-_published_on_website_09-january-2014.pdf); Greece (Greek Council for Refugees, December 2013) < [http://www.asylumineurope.org/files/report-download/aida\\_greece\\_report\\_-\\_first\\_update\\_-\\_final\\_version\\_-\\_published\\_on\\_aida\\_on\\_22-1\\_0.pdf](http://www.asylumineurope.org/files/report-download/aida_greece_report_-_first_update_-_final_version_-_published_on_aida_on_22-1_0.pdf).

92. MSF, ‘Invisible suffering’ (April 2014) 8 < [http://www.msf.org/sites/msf.org/files/invisible\\_suffering.pdf](http://www.msf.org/sites/msf.org/files/invisible_suffering.pdf) Other MSF reports include: ‘Migrants in detention – Lives on hold’ (2010) < <http://www.doctorswithoutborders.org/sites/usa/files/Migrants-in-Greece-Report.pdf>; ‘Emergency intervention in Evros’ (2011) < <http://www.msf.org/article/more-60-percent-medical-problems-faced-detained-migrants-evros-greece-caused-inhumane-living>; ‘Medical assistance to migrants and refugees in Greece’ (2013) < [http://www.msf.org.uk/sites/uk/files/greece\\_refugees\\_2013.pdf](http://www.msf.org.uk/sites/uk/files/greece_refugees_2013.pdf).

93. M. Bosworth, ‘Subjectivity and identity in detention: punishment and society in a global age’ (2012) 16(2) Theoretical criminology 123, 134.

the person to be outside detention, they could also further contribute to the negative image of migrants in our societies.

As detention takes a heavy toll on the individual, it may also impact her willingness to collaborate with authorities and her prospects of integration. This link between detention and post-detention is rarely made in practice.<sup>94</sup> However, many returnees and asylum seekers held in detention stay in the end in the territory, with statuses ranging from a residence permit for protection grounds to tolerated stay, or remain without a status.<sup>95</sup> As an indication, 28% of asylum seekers who had lodged an asylum application the EU in 2012 received protection (refugee status, subsidiary protection or humanitarian protection) in the first instance and 19% in the second instance.<sup>96</sup>

As underlined by C. Costello and E. Kaytas in their research,<sup>97</sup> asylum seekers are prone to collaborating with the authorities at their arrival because:

“First, the refugee predicament and fear of return; secondly, an existing inclination towards law-abidingness; thirdly the desire to avoid the hardship and vulnerability of irregular residence and lastly trust and perceptions of fairness of the host state, in particular its RSD process”.<sup>98</sup>

In the framework of asylum, alternatives to detention can fulfil the interests of all parties:

- For the asylum seeker: to secure access to a fair protection procedure.<sup>99</sup>
- For the host community: to facilitate integration if the person receives a residence permit on the basis of protection.
- For the State: to enable better cooperation of the asylum seekers with RSD (refugee status determination) and other administrative procedures, both during and after the asylum process.

In the same way, some findings have shown that for migrants in a return procedure, the impression of fairness in the procedure and transparency in communication would facilitate return.<sup>100</sup> Furthermore, migrants or refused asylum seekers in a return procedure have usually been on the territory longer than asylum seekers and

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94. Anne Bathily, 'Immigration detention and its impact on integration: A European Approach' (2014), Knowledge for INtegration Governance project, Fondazione ISMU, < [king.ismu.org](http://king.ismu.org).

95. M. Vanderbruggen, J. Phelps, N. Sebtaoui, A. Kovats, K. Pollet, 'Point of no return, the futile detention of unreturnable migrants' (January 2014) < [http://pointofnoreturn.eu/wp-content/uploads/2014/01/PONR\\_report.pdf](http://pointofnoreturn.eu/wp-content/uploads/2014/01/PONR_report.pdf).

96. Eurostat, Newsrelease, 'Asylum decisions in EU 27' (18 June 2013) < [http://europa.eu/rapid/press-release\\_STAT-13-96\\_en.htm](http://europa.eu/rapid/press-release_STAT-13-96_en.htm)

97. C. Costello and E. Kaytas, UNHCR, 'Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva' (June 2013).

98. C. Costello and E. Kaytas, 'Predisposed to cooperate' (September 2013), Forced Migration Review 44.

99. For refugees fairness included "being afforded a proper hearing, consistency of decision-making and taking decisions promptly, access to trusted legal advice and assistance at an early stage". Ibid.

100. A. Edwards, UNHCR, 'Back to Basics: The Right to Liberty and Security of Persons and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants', (April 2011), p.85 < <http://www.refworld.org/docid/4dc935fd2.html>.

have therefore developed strong ties with the community through personal or professional relations. In the context of alternatives to detention, that could mean they may have several incentives to cooperate and not to abscond.

Numerous ways exist to address irregular migration. Some States scarcely use detention in this context, especially when it concerns asylum seekers. According to A. Edwards this

“beg(s) the question of how some States can continue to justify the detention of asylum-seekers [...] while others are able to manage migration and respect the right to seek asylum and to liberty and security of person, without recourse to detention”.<sup>101</sup>

Many States have indicated interest in non-custodial measures, as alternatives to detention are seen as “a way to achieve effective migration management, while protecting the rights and dignity of migrants”.<sup>102</sup> In this context, alternatives to detention have been perceived as a pragmatic, efficient and humane way of addressing key concerns voiced on detention while still preserving State interests.

## 2. THE LEGAL FRAMEWORK ON ALTERNATIVES TO DETENTION

This section explores the legal framework underpinning decision-making around detention and alternatives to detention. It analyses the implications of the right to liberty and security and the principle of freedom of movement in EU law. It draws primarily on the 1951 Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR),<sup>103</sup> the ECHR and EU law.

It is important, first, to distinguish between deprivation of liberty and restrictions on the freedom of movement. Some alternatives to detention, and even open reception centres in some cases, may entail restrictions on the freedom of movement of asylum seekers and migrants. RCD contemplates some such restrictions, which may be permissible as long as they fulfil the requirements of international and European human rights law.

Nevertheless, the difference between deprivation of liberty and restrictions on the freedom of movement is one of degree or intensity, not of kind. Thus, what may seem to national authorities as a cumulation of permissible restrictions might in fact lead to a regime that deprives asylum applicants or migrants of their liberty. It is thus necessary to analyse the legal frameworks underpinning both the principle of freedom of movement and the right to freedom and security.

101. Ibid 5.

102. R. Sampson and G. Mitchell, ‘Global trends in immigration detention and alternatives to detention: practical, political and symbolic rationales’ (2013) 1(3) JMHS 97.

103. International Covenant on Civil and Political Rights, New York, 16 December 1966 (entered into force 23 March 1976) [ICCPR].

## 2.1. Applicable treaties

According to the EU treaties and the EU Charter of Fundamental Rights (EU Charter),<sup>104</sup> EU asylum policy must respect the 1951 Refugee Convention.<sup>105</sup> This is affirmed by secondary legislation, such as the Qualification Directive, as well as by the CJEU.<sup>106</sup> Several of the rights enunciated in the 1951 Refugee Convention accrue specifically to refugees who are either 'present in the territory' or 'lawfully present'.<sup>107</sup> Given that a person is a refugee the moment she fulfils the refugee definition and therefore refugee status is declarative,<sup>108</sup> asylum seekers must have access to these rights. There are already refugees within the population of persons requesting protection; provisionally affording the entire population the rights of refugees physically present on the territory is the only way to be sure of avoiding breaches of the rights of those who are in fact refugees.<sup>109</sup>

All EU Member States are also parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, or ECHR). While the Convention does not recognise a right to asylum as such, the substantial body of jurisprudence that has emerged from the European Court of Human Rights (ECtHR) has a bearing on the rights of refugees across Europe.<sup>110</sup> The EU Charter clarifies that so far as the rights it recognises correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are the same as those laid down by the latter Convention.<sup>111</sup> This is however a threshold and not a barrier: Union law may provide for more extensive protection.<sup>112</sup> Finally, the EU Member States are also bound by international law obligations to respect human rights, which cannot be restricted or adversely affected by the EU Charter provisions.<sup>113</sup> This means that, where international law establishes a higher level of protection, neither obligations under the Charter, nor those under the ECHR can negate it.<sup>114</sup>

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104. Art. 78, TFEU; Art. 18, EU Charter.

105. 1951 Geneva Convention Relating to the Status of Refugees, 189 UNTS 150, as amended by the 1967 Protocol Relating to the Status of Refugees, 606 UNTS 267.

106. Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010], para 52 where the Court characteristically notes '[t]he Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and the provisions of and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria'.

107. For example Article 31 of the 1951 Refugee Convention on non-penalisation concerns refugees who 'enter or are present in the territory' while Article 26 of the 1951 Refugee Convention on freedom of movement concerns refugees who are 'lawfully in' the territory. Further rights accrue to refugees who are 'lawfully staying'.

108. Department of International Protection, 'Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' HCR/IP/4/Eng/REV 1 (2<sup>nd</sup> edn UNHCR 1992), para 28.

109. See J.C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 171-186.

110. N. Mole and C. Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe Publishing, 2010) 19.

111. Art. 52§3, EU Charter.

112. *Ibid.*

113. Art. 53, EU Charter.

114. *Ibid.* See also Art. 53, ECHR.

## 2.2. Freedom of movement as a principle and permissible restrictions

The ICCPR and the ECHR each enshrine the general principle of freedom of movement within a State.<sup>115</sup> The 1951 Refugee Convention contains specific protections of this right for refugees.<sup>116</sup> EU law establishes specific rules regarding asylum applicants<sup>117</sup> and individuals subject to a return procedure.<sup>118</sup> All of these norms are pertinent for ascertaining the scope of Member States' legal obligations regarding detention and alternatives to detention.

### 2.2.1. Analysing the provisions of the ICCPR and the 1951 Refugee Convention

Article 12 ICCPR provides the right to freedom of movement and freedom to choose his/her residence to "everyone lawfully within the territory of a State". This applies without discrimination between citizens and aliens. The HRC has noted that:

"the question whether an alien is 'lawfully' within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations".<sup>119</sup>

Article 12 permits restrictions when they "are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the [ICCPR]".<sup>120</sup> According to the HRC, restrictions in pursuit of one of these aims must not "nullify the principle of liberty of movement"<sup>121</sup> and their application "in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality".<sup>122</sup> Restrictions must be "prescribed by law" and must also safeguard the individual against arbitrariness.<sup>123</sup> The measures "must be the least intrusive instrument amongst those which might achieve the desired result".<sup>124</sup>

In the case of *Celepli v. Sweden*, the HRC found that the applicant, who had entered illegally and been granted not refugee status but an authorisation to stay on the basis of the principle of *non-refoulement*, subject to restrictions on his freedom of movement (namely designated residence and reporting obligations), was "lawfully in the

115. Art. 12, ICCPR; Art. 2, Protocol No 4 ECHR.

116. Arts. 26 and 31, 1951 Refugee Convention.

117. Art. 7, recast RCD.

118. See Return Directive.

119. HRC, 'General Comment no27 on Freedom of movement' (2 November 1999), para 4.

120. Art. 12§3, ICCPR.

121. HRC, 'General Comment no27 on Freedom of movement' (2 November 1999), para 2.

122. Ibid para 16.

123. For an analysis of the notion of arbitrariness, see Chapter 1 Section 2 Part 2.3.2.

124. HRC, 'General Comment no27 on Freedom of movement' (2 November 1999), para 14.

territory”.<sup>125</sup> He could thus benefit from the protection of that article; however the restrictions were found to be justified in his case for reasons of national security as he was suspected of acts of terrorism.

The case of *Karker v. France* concerned a Tunisian national whose removal could not be enforced and whose residence in France was subject to restrictions on his freedom of movement.<sup>126</sup> The applicant arrived before the Committee “[h]aving breached the compulsory residence order by staying with his family during three weeks”.<sup>127</sup> The Committee did not rule that he could not claim the protection of Article 12 ICCPR. However in examining the restrictions, based on national security grounds given that the applicant was “an active supporter of a movement which advocates violent action”, it could not “conclude that the State party has misapplied the restrictions in article 12§3”.

In conclusion, any restriction on the right to freedom of movement of an individual who is lawfully within the territory, whether she is a citizen, an alien or an asylum seeker, has to be justified under Article 12§3 of the ICCPR.<sup>128</sup> The HRC examines the legality of the restrictions, in light of the principles of necessity and proportionality, even when an individual has violated the restrictions on which lawful presence was conditioned.

In the framework of international refugee law, Article 26 of the 1951 Refugee Convention stipulates that “[e]ach Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances”. Article 31 protects refugees against penalisation for being in a host State without authorisation.

Within the EU, Germany contends that asylum seekers whose claim has been registered and is under examination are not yet “lawfully in” Germany, and requires them to remain within the administrative district where their claim will be assessed.<sup>129</sup> Their stay is provisional and serves to determine whether the asylum seeker will be allowed to stay lawfully in the country.<sup>130</sup> In this view the word ‘lawful’ essentially refers to the domestic law of the State concerned.<sup>131</sup> According to J. C. Hathaway, presence is lawful in the case of “[a] person not yet in possession of a residence

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125. *Celepli versus Sweden* Communication no 456/1991 (HRC), para 9.2.

126. *Salah Karker v France* Communication no 833/1998 (HRC).

127. *Ibid* para 9.2.

128. HRC, ‘General Comment no27 on Freedom of movement’ (2 November 1999), para 4.

129. See *Asylverfahrensgesetz (AsylVfG)*, paras 55-60; there have been relaxations of this regime according to the legislation of each ‘Bundesland’; this online map by Pro Asyl offers an overview of the different applicable rules < <http://www.proasyl.de/en/topics/basics/basics/rechte-der-fluechtlinge/bewegungsfreiheit/residenzpflicht/>

130. R. Marx, ‘Article 26’ in A. Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 1161.

131. A. Takkenberg, ‘Detention and Other Restrictions on the Freedom of Movement of Refugees and Asylum Seekers: The European Perspective’, in J. Bhabha, G. Coll (eds) *Asylum Law and Practice in Europe and North America: A Comparative Approach*, (Washington, DC: Federal Publications, 1992) 142-143.



permit but who had applied for it and had the receipt for that application”.<sup>132</sup> As a consequence, Article 26 applies to asylum seekers, who have filed an application for international protection. The drafting history of that article supports the view that the drafters intended to extend the same rights of free movement to refugees as to the general population, and that this right should engage immediately upon the establishment of some sort of regularised presence.<sup>133</sup> Because the Asylum Procedures Directive requires Member States to register and process asylum claims, an asylum application confers such regularisation.

This position can be strengthened by two further arguments. First, it would be illogical if asylum seekers could not benefit from Article 26 and the general rule of freedom of movement, whereas they are granted protection against arbitrary restriction of liberty pursuant to Article 31, paragraph 2.<sup>134</sup> Articles 26 and 31 must be read together, as complementary provisions. Freedom of movement is guaranteed to asylum seekers pursuant to both provisions. Article 26 permits States to impose on refugees only those limitations on freedom of movement that apply generally to all aliens lawfully in the territory.<sup>135</sup> Second, according to the principle of international law that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”,<sup>136</sup> it would be wrong to interpret the expression “lawfully in” so as to exclude asylum seekers. The object and purpose of the 1951 Refugee Convention is to extend “the protection of the international community to refugees, and assuring to refugees the widest possible exercise of fundamental rights and freedoms”.<sup>137</sup>

132. J.C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 173.

133. R. Marx, ‘Article 26’ in A. Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 1161-1163.

134. J.C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 413.

135. J.C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 695.

136. Art. 31, Vienna Convention on the Law of Treaties (22 May 1969).

137. G.S. Goodwin-Gill, ‘L’article 31 de la Convention de 1951 relative au statut des réfugiés: l’absence de sanctions pénales, la détention et la protection’, in E. Feller, V. Türk and F. Nicholson (dir), *La protection des réfugiés en droit international* (Larcier 2008) 223-300. This is also the position of UNHCR. See UNHCR, ‘Lawfully Staying - A Note on Interpretation’ (3 May 1988). < <http://www.refworld.org/docid/42ad93304.html>.



## 2.2.2. Examining the ECHR

According to the ECtHR, in order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5, paragraph 1,<sup>138</sup> the starting point must be her concrete situation and account must be taken of criteria such as the type, duration, effects and manner of implementation of the measure in question.<sup>139</sup> The difference between deprivation of and restriction on liberty is one of degree or intensity, and not of kind.<sup>140</sup> The assessment will be case-specific; a deprivation of liberty might be established not by any one factor taken individually but by examining all elements cumulatively.<sup>141</sup> Even a brief restriction, such as a few hours, will not automatically result in a finding that the situation constituted a restriction on movement as opposed to a deprivation of liberty.<sup>142</sup> In *Amuur v. France* as well as in *Riad and Idiab v. Belgium*, the ECtHR held that detention of asylum seekers in the transit zone of an airport was unlawful under Article 5 § 1 of the ECHR.<sup>143</sup> In *Guzzardi v. Italy* the Court found that:

“[w]ilst the area around which the applicant could move far exceeded the dimensions of a cell and was not bounded by any physical barrier [...] supervision was carried out strictly and on an almost constant basis. Thus, Mr. Guzzardi was not able to leave his dwelling between 10 p.m. and 7 a.m. without giving prior notification to the authorities in due time. [...] It is admittedly not possible to speak of “deprivation of liberty” on the strength of any one of these factors taken individually, but cumulatively and in combination they certainly raise an issue of categorization from the viewpoint of Article 5 [...] The Court considers on balance that the present case is to be regarded as one involving deprivation of liberty”.<sup>144</sup>

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138. This provision reads as follows:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

139. *Austin and others v the United Kingdom* App no 39692/09, 40713/09 and 41008/09 (ECtHR, 15 March 2012), para 57.

140. *Ibid.* See also *Guzzardi v Italy* App no 7367/76 (ECtHR, 6 November 1980), paras 92-93; *Medvedyev and others v France* App no 3394/03 (ECtHR, 29 mars 2010), para 73.

141. FRA and Council of Europe, ‘Handbook on European Law relating to asylum, borders and immigration’ (2013) 138.

142. *Ibid.*

143. *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996), paras 48-49; *Riad and Idiab v Belgium* App no 29787/03 and 29810/03 (ECtHR, 24 January 2008), para 68.

144. *Guzzardi v Italy* App no 7367/76 (ECtHR, 6 November 1980), paras 92-95.

Restrictions on the freedom of movement are governed by Article 2, Protocol Nr. 4 of the ECHR, which has been ratified by 26 of the 28 EU Member States.<sup>145</sup> Any restriction must be necessary and proportionate and must pursue one of the following legitimate aims: national security or public safety, the maintenance of *ordre public*, the prevention of crime, the protection of health or morals, or the protection of the rights and freedoms of others.<sup>146</sup>

That provision only applies to individuals who are “lawfully within the territory of a State”.<sup>147</sup> The ECtHR interpreted this term very restrictively in a case concerning the compatibility of residence conditions imposed on asylum seekers in Germany with Article 2, Protocol Nr. 4 of the ECHR. The applicant had been provisionally admitted to the territory, pending proceedings to determine whether or not he was entitled to a residence permit under domestic law. According to German law his freedom of movement was restricted to one specific district (*Landkreis*, a sub-*Land* entity) and he had to seek permission in order to leave this area. The Court found that he could only be regarded as “lawfully” in the territory as long as he complied with the conditions to which his admission and stay were subjected.<sup>148</sup> The applicant had violated those terms, so could no longer enjoy the protection of that article as he was no longer “lawfully within the territory”. It thus appears that, in contrast to the HRC’s findings, asylum seekers cannot contest such restrictions on the basis of Article 2, Protocol Nr. 4 to the ECHR once they have violated their terms due to the irregular character of their stay. This interpretation greatly restricts the protective scope of this article. However, the Court has not yet pronounced itself on a case brought by an applicant who had obeyed such restrictions, thus would be “lawfully within the territory”, but would contest whether they pursue a legitimate aim or are necessary or proportionate.

In a case concerning Switzerland, the Court found that such restrictions were in violation of Article 8 of the ECHR, which guarantees respect for private life, family life, home and correspondence.<sup>149</sup> The case concerned failed asylum seekers who, according to Swiss law, need to remain in the allocated canton in order to facilitate their removal and guarantee an equitable distribution of asylum seekers between the cantons. The applicants, who were assigned to different cantons when they applied for asylum, married after their applications had been rejected. Due to the reluctance of the Ethiopian authorities to repatriate their own nationals, their removal had already been impossible for 5 years and did not seem feasible at the time of examination of the case by the Court. The ECtHR found that in the circumstances, despite the

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145. Protocol No 4 to the ECHR, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto as amended by Protocol No 11 Strasbourg, 16 September 1963. Greece has neither signed nor ratified the Protocol; the United Kingdom has signed but not ratified it.

146. Art. 2§3, Protocol No 4 ECHR.

147. *Ibid* para 1.

148. *Omwenyeye v Germany* App no 44294/04 [inadmissible] (ECtHR, 20 November 2007); *Paramanathan v Germany* App no 12068/86 (ECmHR, 4 December 1986).

149. *Mengesha Kimfe v Switzerland* App no 24404/05 (ECtHR, 29 July 2010).

fact that such interference was according to law and could be justified as pursuing a legitimate aim, namely “the economic wellbeing of the country”, it could not be considered “necessary in a democratic society”.<sup>150</sup> It interfered disproportionately with the applicant’s family life for a considerable number of years, while reassigning her would have neither altered significantly the number of foreigners in the canton, nor disrupted public order.<sup>151</sup>

### 2.2.3. Assessing the system of the RCD and its recast

Regarding freedom of movement and permissible restrictions, the recast uses the same wording as the previous Directive, except for the deletion of one paragraph which referred to “confinement”, i.e. detention.<sup>152</sup> The recast Directive stipulates that asylum seekers benefit from freedom of movement, but authorises Member States to restrict applicants to a particular region.<sup>153</sup> An applicant may also be assigned to a specific residence “for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection”.<sup>154</sup> These provisions do not concern detention, thus applicants should not be deprived of their liberty in the specified region or at the designated residence.

The discretion of Member States to restrict asylum seekers to a specific area “shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive”.<sup>155</sup> M. Peek observes that the minimum size of such an area should depend on the availability of necessary services and infrastructure.<sup>156</sup> In its comments on the 2003 Directive UNHCR recommended that national legislation also take into account the presence of NGOs, legal aid providers, language training facilities and, where possible, an established community of the asylum seeker’s national or ethnic group; as well as the possibilities for harmonious relations with the surrounding communities.<sup>157</sup>

Member States must provide for the possibility of granting applicants temporary permission to leave the place of residence or the assigned area.<sup>158</sup> Decisions must be taken individually, objectively and impartially and reasons given if they are negative.<sup>159</sup> No permission is required to keep appointments with authorities and courts if an

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150. Ibid paras 64-72.

151. Ibid para 70.

152. Art. 7§3, RCD.

153. Art. 7§1, recast RCD.

154. Art. 7§2, recast RCD.

155. Art. 7§1, recast RCD.

156. M. Peek, ‘Council Directive 2003/9/EC of 27 January 2003’ in K. Hailbronner (ed), *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives* (C.H. Beck - Hart - Nomos 2010) 913.

157. UNHCR, ‘UNHCR Annotated Comments on Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers’ (July 2003).

158. Art. 7§4, recast RCD.

159. Ibid.

appearance is necessary.<sup>160</sup> Abandonment of the assigned place of residence without informing the competent authority or without permission may result in reduction or, in exceptional and duly justified cases, withdrawal of material reception conditions.<sup>161</sup> Finally, Member States may make provision of material reception conditions subject to actual residence by the applicants in a place determined by the Member State.<sup>162</sup>

It has been observed that the practice of considering that asylum seekers are “lawfully” present in the territory only after the examination of their claim (and the subsequent grant of refugee status) is neither supported by the *travaux préparatoires* of the Convention,<sup>163</sup> nor compatible with the spirit and logic of the Asylum Procedures Directive which enounces the right to remain in the Member State pending examination of the claim.<sup>164</sup> The fact that article 7(1) of the recast RCD provides considerable discretion to the Member States to restrict the freedom of movement of asylum seekers, and the national practices that result from its application, raise the question of its compatibility with Article 26 of the 1951 Geneva Convention,<sup>165</sup> which only recognises restrictions “applicable to aliens generally in the same circumstances”.

Issues arise also as to the compatibility of restrictions on the freedom of movement with international and European human rights law. The ECHR and the ICCPR permit limitations on this right, which however must pursue one of several specified aims and are subject to the principles of necessity and proportionality. The recognised aims are national security, public order, public health or morals, and the rights and freedoms of others.<sup>166</sup> The ECHR adds crime prevention and public safety, while the ICCPR requires that restrictions be “consistent with the other rights” it recognises.<sup>167</sup>

Deciding on the residence of an applicant for the “swift processing and effective monitoring of their application” does not seem to fit any of these aims. Similarly, neither the ECHR nor the ICCPR recognises the term “public interest”. Furthermore, the recast makes no mention of having to apply necessity and proportionality when deciding on the imposition of such restrictions, although this is a prerequisite according to both the ICCPR and the ECHR. However, these should be taken into account in the interpretation of the provisions of the recast Directive, as forming part of the general principles of EU law.

160. Art. 7§4 indent 2), recast RCD.

161. Art. 20§1(a), recast RCD.

162. Art. 7§3, recast RCD.

163. J.C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 175.

164. P. McDonough, ‘Revisiting Germany’s *Residenzpflicht* in Light of Modern EU Asylum law’ (2009) 30 *MJIL* 542 referring to Article 7§1 of the APD.

165. R. Marx, ‘Article 26’ in A. Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 1163-1164.

166. Art. 2§3, Protocol No 4 to the ECHR and Art. 12§3, ICCPR.

167. *Ibid.*

A few Member States leave asylum seekers no choice of where to reside. Others do so only when the asylum seeker cannot make their own arrangements.<sup>168</sup> It is debatable whether a decision on designated residence is justified if an asylum seeker disposes of an alternative to public accommodation, such as their own resources, or living with friends or relatives.<sup>169</sup> The RCD permits Member States to predicate access to material reception conditions on residence in a specific place, if there is a system of in kind provision and the applicant does not possess own resources. However, this should not violate the applicant's fundamental rights, such as the prohibition of inhuman or degrading treatment or the right to family life, and should address any special reception needs of the individual.

## 2.3. Right to Liberty and Security: Detention as an exception

The right to liberty and security is enshrined in the ICCPR<sup>170</sup> and the ECHR.<sup>171</sup> The 1951 Refugee Convention contains rules specifically pertaining to refugees.<sup>172</sup> EU law also establishes specific rules regarding asylum applicants<sup>173</sup> and individuals subject to a return procedure.<sup>174</sup> The following sections outline Member States' legal obligations and critically assess EU law.

### 2.3.1. Protection against arbitrary deprivation of liberty

The right to liberty and security is an essential component of an individual's fundamental rights and is protected by international, European (Council of Europe) and EU law. Personal liberty is an inalienable right, which an individual cannot legitimately waive.<sup>175</sup> In the international legal framework, Article 9, paragraph 1 of the ICCPR stipulates that:

“[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”.

Furthermore, Article 10 ICCPR establishes that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. At the European level, the ECHR and its Article 5, paragraph 1 guarantee the right to liberty and security. The EU Charter contains the same wording as Article 9 of

168. See Odysseus Academic Network, 'Comparative overview of the implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU member states' (2006) 45-47.

169. M. Peek, 'Council Directive 2003/9/EC of 27 January 2003' in K. Hailbronner (ed), *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives* (C.H. Beck - Hart - Nomos 2010) 914.

170. Art. 9, ICCPR.

171. Art. 5, ECHR.

172. Art. 31, 1951 Refugee Convention.

173. Arts. 8-11, recast RCD.

174. Arts. 15-17, Return Directive.

175. Report of the European Commission on Human Rights relating to the vagrancy cases, 19 July 1969, para 174.

the ICCPR and states in Article 6 that “[e]veryone has the right to liberty and security of person”.

However, according to these provisions, while there is a presumption in favour of personal liberty, there is no absolute protection against its deprivation. M. Nowak argues that Article 9 of the ICCPR “does not strive towards the ideal of a complete abolition of State measures that deprive liberty. [...] It is not the deprivation of liberty itself that is disapproved of but rather that which is arbitrary and unlawful”.<sup>176</sup> The Human Rights Committee (HRC) recognises that “[l]iberty is not absolute [and that] sometimes deprivation of liberty is justified”.<sup>177</sup> Furthermore, even if Article 5, paragraph 1 of the ECHR states that “[e]veryone has the right to liberty and security of person”, some exceptions are foreseen.

Unlike Article 9 of the ICCPR and Article 6 of the EU Charter which do not enumerate permissible grounds for detention, Article 5 paragraph 1, indent a) to f) of the ECHR contains an exhaustive list of exceptions to the right to liberty and security.<sup>178</sup> As it is not an open list, these exceptions should be interpreted restrictively. Indeed, “[a]ny deprivation of liberty will invariably put the person affected into an extremely vulnerable position, [so] judges should constantly keep in mind that in order for the guarantee of liberty to be meaningful, any deprivation of it should always be exceptional, objectively justified and of no longer duration than absolutely necessary”.<sup>179</sup>

However, unlike the right to life (Article 6 ICCPR) or the right not to be subjected to torture (Article 7 ICCPR),<sup>180</sup> the right to liberty and security of person is derogable. Article 4 ICCPR states that “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, [States] may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation”. According to General Comment n° 29 of the HRC, these measures “must be of an exceptional and temporary nature”.<sup>181</sup> Two conditions must be met in order to invoke Article 4 ICCPR: “[t]he situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency”.<sup>182</sup>

176. M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2<sup>nd</sup> edn, N.P. Engel Verlag Publisher 2005) 210.

177. HRC, ‘Draft General Comment No 35 on Article 9: Liberty and security of person’, CCPR/C/107/R.3 (28 January 2013), para 11.

178. *Engel and others versus the Netherlands*, App no 5100/71, 5101/71, 5102/71, 5354/72, 5370/52 (ECtHR, 8 June 1976) para 57.

179. M. Macovei, *Human rights handbook No 5, The right to liberty and security of the person – A guide to the implementation of Article 5 of the European Convention on Human Rights*, (Council of Europe 2003) 6.

180. Art. 4§2, ICCPR: “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision”.

181. HRC, ‘General Comment No 29 on Article 4: State of emergency’ (31 August 2001), para 2.

182. *Ibid.* See, *Adrien Mundy Busyo and others v Democratic Republic of the Congo* Communication no 933/2000 (HRC), para 5.2; The United Kingdom has officially derogated from some of its obligations, including Article 9 of the ICCPR, through its *Anti-terrorism, Crime and Security Act 2001*.

Article 15 of the ECHR also permits derogation from the right to liberty and security of person. Article 15 stipulates that derogation from the obligations of the Convention can take place also in case “of a public emergency threatening the life of the nation” where “strictly required by the exigencies of the situation”. In the framework of immigration detention this has been relevant to non-nationals suspected of terrorism. The Court has found that in this matter, national authorities should be left with a wide margin of appreciation which, however, does not amount to unlimited discretion.<sup>183</sup> The Court thus exercises supervision and gives appropriate weight to factors such as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency.<sup>184</sup> Where a derogating measure encroaches upon a fundamental Convention right, such as the right to liberty, the Court must be satisfied that it was a genuine response to the emergency, that it was fully justified by the special circumstances of the emergency and that adequate safeguards were provided against abuse.<sup>185</sup>

### 2.3.2. The notion of “arbitrariness”

The notion of “arbitrariness” underlies the protection enshrined in Article 9 of the ICCPR and Article 5 of the ECHR. Article 9 of the ICCPR states that “[n]o one shall be subjected to *arbitrary* arrest or detention”.<sup>186</sup> Article 5 of the ECHR does not mention “arbitrariness” and refers to the concept of lawfulness. However, the ECtHR has repeatedly stated that: “[c]ompliance with national law is not sufficient: Article 5 § 1 requires, in addition, that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness”.<sup>187</sup> M. Nowak notes that the majority of the drafters of the ICCPR stressed that the meaning of “arbitrary” went beyond the simple notion of “unlawful”.<sup>188</sup> In *Hugo van Alphen versus the Netherlands*, the HRC highlighted that:

“[t]he drafting history of Article 9§1, confirms that ‘arbitrariness’ is not to be equated with the terms ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all circumstances. Furthermore, remand in custody must be necessary in all circumstances”.<sup>189</sup>

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183. *A and others v the UK* App no 3455/05 (ECtHR, G.C., 19 February 2009), para 173.

184. *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978), para 207; *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996), para 68.

185. *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996), paras 71-84; *A and others v the UK* App no 3455/05 (ECtHR, G.C., 19 February 2009), para 184.

186. Emphasis added.

187. *Amuur v France* App no 19776/92 (ECtHR, 25 June 1996), para 50; *Witold Litwa v Poland* App no 26629/95 (ECtHR, 4 April 2000), para 78.

188. M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2<sup>nd</sup> edn, N.P. Engel Verlag Publisher 2005).

189. *Hugo van Alphen versus The Netherlands* Communication no305/1998 (HRC), para 5.8.



In the same vein, the European Court of Human Rights (ECtHR) has stated that:

“[i]t is a fundamental principle that no detention which is arbitrary can be compatible with Article 5§1 and the notion of “arbitrariness” in Article 5§1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention”.<sup>190</sup>

In addition, the ECtHR has specified that the notion of arbitrariness implies the absence of bad faith while deciding on detention and requires that detention be closely connected to the ground of detention invoked by the authorities.<sup>191</sup> Furthermore, in order to avoid arbitrary detention, the conditions and place of detention should be appropriate,<sup>192</sup> and its duration should not exceed the time reasonably required for the purpose pursued by detention.<sup>193</sup> Finally, the ECtHR subjects deprivation of liberty to the requirement of necessity.<sup>194</sup> However according to the ECtHR, the necessity test does not apply to Article 5(1)f of the Convention.

### 2.3.3. The principles of necessity and proportionality

The principles of necessity and proportionality are at the core of individualised detention decisions. D. Wilsher stresses that, on the assumption that the legitimate goal of immigration detention is to support overall migration policy, detention which is not necessary in an individual case cannot be acceptable.<sup>195</sup> The necessity test would for example require case-by-case consideration of the likelihood of absconding based upon objective evidence or past experience. As the ECtHR stressed in a non-immigration context:

“[t]he detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances”.<sup>196</sup>

To assess the necessity or potential arbitrariness of detention measures, questions of proportionality are typically raised.<sup>197</sup> Proportionality facilitates the “search for a

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190. *A. and others v The United Kingdom* App no 3455/05 (ECtHR, G.C., 19 February 2009), para 164.

191. *Ibid.*

192. *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006).

193. *Riad and Idiab v Belgium* App no 29787/03 and 29810/03 (ECtHR, 24 January 2008).

194. F. Sudre, *Droit européen et international des droits de l’homme* (10<sup>e</sup> edn, Presses Universitaires de France 2011) 355-375.

195. D. Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge University Press 2012) 336.

196. *Witold Litwa v Poland* App no 26629/95 (ECtHR, 4 April 2000), para 78.

197. M. Flynn, ‘Who must be detained? Proportionality as a tool for critiquing immigration detention policy’ (2012) 31(3) RSQ 40.



fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".<sup>198</sup>

According to EU law, an individualised detention decision requires an assessment of whether detention would be both necessary and proportional; the two principles are interlinked and intrinsic to the assessment.<sup>199</sup> The HRC also endorses such an approach. Its jurisprudence points to an individualised assessment requiring that, after an initial period, detention would be arbitrary absent "particular reasons specific to the individual".<sup>200</sup> Alternatives to detention play a central role in such an individualised assessment. National authorities should verify for each profile whether "there were not less invasive means of achieving the same ends".<sup>201</sup>

The ECtHR takes a different approach. The Court has found that no necessity test applies to immigration-related detention, whether in the framework of return or in preventing an unauthorised entry, a factual situation which might or might not include examination of an asylum claim.<sup>202</sup> Thus, according to the ECtHR, authorities need not look into whether detention is necessary "for example to prevent the person concerned from committing an offence or fleeing".<sup>203</sup> However, the Court applies the principle of proportionality to an extent in these situations by requiring good faith in the application of the measure, close connection to the purpose, appropriate place and conditions of detention and a duration which does not exceed that reasonably required for the purpose pursued.<sup>204</sup>

The approach taken by the Court to separate arbitrariness from necessity has been criticised as leading to a false dichotomy.<sup>205</sup> General assumptions on proportionality cannot replace a test of necessity in each individual case.<sup>206</sup> Indeed, the absence of a necessity test in the ECHR implies that there is no obligation to consider less severe measures in each case.<sup>207</sup> However, through the four "proportionality criteria" mentioned above, the Court has found detention to be arbitrary in cases of unaccompanied

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198. *Soering v the UK* App no 14038/88 (ECtHR, 7 July 1989), para 89.

199. See Recital 15 and Art. 8§2, recast RCD.

200. *F.K.A.G. versus Australia* Communication no 2094/2011(HRC), para 9.3 where the Committee notes that "to detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security".

201. *C. versus Australia* Communication no 900/1999 (HRC), para 8.2; See also, *Baban versus Australia* Communication no 1014/2011 (HRC), para 7.2; *Shams and others versus Australia* Communication no 1255/2004 (HRC), para 7.2; *F.K.A.G. versus Australia* Communication no 2094/2011(HRC), para 9.3; *Zeyad Khalaf Hamadie Al-Gertanie versus Bosnia and Herzegovina* Communication no 1955/2010 (HRC), para 10.4.

202. See for example *Chahal v the United Kingdom* App no 22414/93 (ECtHR, G.C., 15 November 1996); *Saadi v the United Kingdom* App no 13229/03 (ECtHR, G.C., 29 January 2008).

203. *Chahal v the United Kingdom* App no 22414/93 (ECtHR, G.C., 15 November 1996), para 112.

204. *Saadi v the United Kingdom* App no 13229/03 (ECtHR, G.C., 29 January 2008), para 74.

205. H. O'Nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' (2004) 10 EJML 149, 173.

206. V. Moreno-Lax, 'Beyond Saadi v UK: Why the 'Unnecessary' Detention of Asylum Seekers is Inadmissible under EU Law' (2011) 2 Human Rights and International Legal Discourse 166, 184.

207. *Saadi v the United Kingdom* App no 13229/03 (ECtHR, G.C., 29 January 2008), paras 70-73.

minors, or minors held with their parents or other vulnerable individuals as well as in cases when States did not pursue the return with “due diligence”.<sup>208</sup>

Some of those cases specify alternatives to detention. In *Mubilanzila Mayeka and Kaniki Mitunga*, concerning unaccompanied children detained in Belgium, the Court stated that: “[o]ther measures could have been taken. [...] These included her placement in a specialised centre or with foster parents”.<sup>209</sup> In the case of *Mikolenko*, which concerned an adult male held in Estonia with a view to return, the Court also took into account the fact that after his release the applicant was submitted to reporting requirements. The Court thus concluded that “[t]he authorities in fact had at their disposal measures other than the applicant’s protracted detention in the deportation centre in the absence of any immediate prospect of his expulsion”.<sup>210</sup>

The proportionality considerations encompassed in the ECtHR’s jurisprudence only partly counteract the lack of a necessity requirement. Thus, EU law’s clear endorsements of a necessity test as part of an individualised assessment leading to an obligation to examine alternative measures protect individuals better against arbitrary detention. On a practical level, it is important to stress that the *Saadi* scenario, i.e. detention to expedite the examination of asylum claims, would not be compatible with the standards established by the recast RCD.

### 2.3.4. The specific case of “return” detention

According to Article 13, paragraph 2 of the Universal Declaration of Human Rights: “[e]veryone has the right to leave any country, including his own”. However, there is no fundamental right to enter another country. The ECtHR recognises that “[a]s a matter of well-established international law [States have the right] to control the entry, residence and expulsions of aliens”.<sup>211</sup> Detention of migrants thus appears to be a means to manage national borders.

Although “international [and European] human rights law limits detention, we see that the protection afforded to migrants is often weaker than in other contexts”.<sup>212</sup> In its General Comment n° 15 on the position of aliens under the ICCPR, the HRC emphasises that “States have often failed to take into account that each State party must ensure the rights in the Covenant to all individuals within its territory and subject to its jurisdiction”,<sup>213</sup> as stated in Article 2, paragraph 1 of the ICCPR. In addition, the HRC in its general comment n° 8 on the right to liberty and security of persons emphasises

208. See Chapter 1 Section 2 Part 3.6 on vulnerability and Chapter 1 Section 2 Part 2.3.4. on pre-return detention.

209. *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 [ECtHR, 12 October 2006], para 83.

210. *Mikolenko v Estonia* App no 10664/05 [ECtHR, 8 October 2009], para 67.

211. *Chahal v the United Kingdom* App no 22414/93 [ECtHR, G.C., 15 November 1996], para 73.

212. C. Costello, ‘Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law’ (2012) 10(1) *Indiana Journal of Global Legal Studies* 257, 258.

213. HRC, ‘General Comment No 15 on the position of aliens under the Covenant’ [11 April 1986], para 1.

that Article 9, paragraph 1 of the Covenant “is applicable to all deprivation of liberty, whether in criminal cases or in other cases such as [...] immigration control”.<sup>214</sup>

Article 5, paragraph 1, indent a) to f) of the ECHR foresees some exceptions to the right to liberty and security. Two of these grounds for detention may relate to immigration detention, namely b) “[t]he lawful arrest or detention of a person [...] in order to secure the fulfilment of any obligation prescribed by law”<sup>215</sup> and f) “[t]he lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition”.<sup>216</sup>

The ECtHR has clarified that detention must be necessary to secure compliance with an obligation provided under national law if it is to conform to Article 5, paragraph 1, indent b) of the ECHR.<sup>217</sup> This condition could be met if there is a duty under domestic law to prove identity when asked by the authorities, a person is unable or unwilling to do so and national law provides that a person may be detained for the fulfilment of this obligation.<sup>218</sup> In such a situation, procedural safeguards must be in place to ensure that detention is not prolonged indefinitely,<sup>219</sup> and the proportionality principle requires balancing the importance in a democratic society of securing the fulfilment of the obligation in question against the right to liberty.<sup>220</sup>

The second relevant ground for immigration detention is enshrined in Article 5, paragraph 1, indent f) of the ECHR. This authorises “[t]he lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition”. This addresses two situations: pre-admission detention and pre-deportation detention. Indeed, “[t]he European system recognises the regulation of entry and removal as legitimate reasons for States to have recourse to immigration detention”.<sup>221</sup> Although detention in the framework of Article 5§1, indent b) has to be necessary and proportional, the ECtHR has not adopted a similar position in the context of indent f).

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214. HRC, ‘General Comment No 8 on the right to liberty and security of person’ [30 June 1982], para 1.

215. Art. 5§1(b), ECHR.

216. Art. 5§1(f), ECHR.

217. *Foka v Turkey* App no 28940/95 (ECtHR, 24 June 2008), para 87. See also *Vasileva v Denmark* App no 52792/99 (ECtHR, 25 September 2003), para 36 where the Court notes that “there must be an unfulfilled obligation incumbent on the person concerned and the arrest and detention must be for the purpose of securing its fulfilment and not punitive in character”.

218. N. Mole and C. Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe Publishing 2010) 291.

219. *Ibid.*

220. *Vasileva v Denmark* App no 52792/99 (ECtHR, 25 September 2003), para 37.

221. G. Cornelisse, *Immigration detention and Human rights – Rethinking territorial sovereignty* (Martinus Nijhoff publishers 2010) 277.

### 2.3.4.a. Pre-return detention in the ECHR

Even if the principle of necessity does not apply to immigration detention following the jurisprudence of the ECtHR, detention should be lawful and non-arbitrary.<sup>222</sup> Thus, detention under Article 5, paragraph 1, indent f) of the ECHR should be closely linked to an imminent return.<sup>223</sup> In this context, detention may be justified, regardless of its duration, only if States conduct the relevant proceedings with due diligence.<sup>224</sup> In order to ensure due diligence, States may be required to provide evidence of steps taken in pursuit of the imminent deportation.<sup>225</sup> If deportation is no longer feasible, detention is arbitrary and unlawful.

The Council of Europe in its guidelines on forced return emphasises that “[d]etention pending removal shall be justified only for as long as removal arrangements are in progress. If such arrangements are not executed with due diligence the detention will cease to be permissible”.<sup>226</sup> This essential rule “derives from the fact that Article 5, paragraph 1 ECHR imposes a restrictive reading of the situations where such deprivation of liberty is authorised, as these are exceptions to the fundamental right to liberty and security”.<sup>227</sup> The Human Rights Committee adopted the same position and stated in *Jalloh versus the Netherlands* that “once a reasonable prospect of expelling [the applicant] no longer existed his detention was terminated. In the circumstances, the Committee finds that the author’s detention was not arbitrary and thus not in violation of Article 9 of the ICCPR”.<sup>228</sup>

### 2.3.4.b. The detention framework of the Return Directive

Pre-return detention is regulated under EU law through the Return Directive. This instrument also foresees that the use of detention should be limited and interpreted narrowly.<sup>229</sup> The aim of detention can only be either the preparation of the return or the execution of the removal process, in particular when there is a risk of absconding, or if the individual avoids or hampers the return procedure. Finally, the Directive clearly establishes that States may resort to detention only if less coercive measures cannot be applied effectively. Thus unlike under the ECHR, pre-removal detention has to be necessary.

222. For instance, see *Bozano v France* App no 9990/82 (ECtHR, 18 December 1986) where deprivation of liberty was a hidden measure of deportation and not a detention in the framework of a normal expulsion process.

223. N. Mole and C. Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe Publishing 2010).

224. *Quinn v France* App no 18580/91 (ECtHR, 22 March 1995), para 48; *Singh v the Czech Republic* App no 60538/00 (ECtHR, 25 January 2005), para 61; *Djalti v Bulgaria* App no 31206/05 (ECtHR, 12 March 2013), para 48.

225. N. Mole and C. Meredith, *Asylum and the European Convention on Human Rights* (Council of Europe Publishing 2010).

226. Council of Europe, ‘Twenty guidelines on forced return’ (2005) Guideline 7.

227. *Ibid.*

228. *Jalloh v the Netherlands* Communication no 794/1998 (HRC), para 8.2.

229. Art. 15, Return Directive.

The Directive apparently uses “to prepare the return” as a collective term for all stages of return procedures between a return decision, such as a final denial of asylum, and the issuance of an actual, executable expulsion order.<sup>230</sup> The *travaux préparatoires* show that the insertion of “in particular” (instead of merely “when”) before the two necessity grounds was a mere linguistic exercise without any deliberate far-reaching consequences.<sup>231</sup>

In addition, “[a]ny detention shall be as short as possible and only maintained as long as removal arrangements are in progress and executed with due diligence”.<sup>232</sup> Furthermore, “[w]hen it appears that a reasonable prospect of removal no longer exists [...] detention ceases to be justified and the person concerned shall be released immediately”.<sup>233</sup> The Directive foresees a maximum length of detention of 18 months.<sup>234</sup> Extension is only possible where regardless of all the reasonable efforts undertaken by Member States the removal operation is likely to last longer owing to: “(a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries”.<sup>235</sup>

#### **2.3.4.c. Focus on the obligation to examine alternatives to detention**

Recital 16 of the Return Directive states that:

“[d]etention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only [...] if the application of less coercive measures would not be sufficient”.

The principles of necessity and proportionality again play a crucial role. Article 15(1) allows for detention only if it is necessary, which is only the case if other sufficient but less coercive measures cannot be applied effectively in a specific case. Member States thus must examine alternative measures before resorting to the detention of returnees.

However, unlike the recast RCD, the Return Directive does not explicitly require Member States to establish national rules concerning alternative schemes, nor does it list examples of alternatives to detention. However, Article 7 (relating to voluntary departure) enumerates in its paragraph 3 measures that could be imposed on a third-country national benefiting from a period of voluntary departure to avoid the risk of absconding. This provision stresses that “[c]ertain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an

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230. P. De Bruycker, S. Mananashvili, G. Renaudière, ‘The Extent of Judicial Control of Pre-Removal Detention in the EU: Synthesis Report of the Project CONTENTION’ (2014) 10.

231. Ibid 15.

232. Art. 15§1 indent 2), Return Directive.

233. Art. 15§4, Return Directive.

234. Art. 15§6, Return Directive.

235. Ibid.

adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure". However, while Member States may apply these measures to avoid the risk of absconding, they do not constitute an alternative to detention as, at this point, the persons concerned are not liable for detention.

### 2.3.5. Detention of asylum seekers

When States detain asylum seekers they are treating them as unauthorised migrants rather than as presumptive refugees.<sup>236</sup> However, refugees, who have had to flee their country of origin, are rarely in a position to comply with administrative formalities linked to legal entry in a country of refuge.<sup>237</sup> The first important question is whether an asylum seeker may be detained.

#### 2.3.5.a. The norms under the 1951 Refugee Convention and the ICCPR

The most relevant legal text is the 1951 Refugee Convention.<sup>238</sup> As explained above, refugee status is declaratory. Freedom from arbitrary detention and non-penalisation of illegal entry is therefore a right which accrues to refugees who are "physically present" and thus to asylum seekers, as presumptive refugees.<sup>239</sup> Article 31 of the 1951 Refugee Convention provides for protection against penalisation for refugees who are in a host State without authorisation.<sup>240</sup> The first paragraph emphasises the intention of the drafters to insulate refugees from penalties<sup>241</sup> for the act of crossing a border without authorisation.<sup>242</sup> Article 31 does not, however, prohibit altogether the detention of refugees. Indeed, "[t]he reference in paragraph 1 to penalties did not rule out any provisional detention that might be necessary to investigate the circumstances in which a refugee has entered a country".<sup>243</sup> Hence, the most frequently invoked exception to the duty of non-penalisation is the right to detain refugees who enter without authorisation, pursuant to Article 31§2.<sup>244</sup>

That provision enshrines protection against arbitrary limitation of refugees' right to liberty and security. Its formulation prescribes an individualised assessment based on the principle of necessity.<sup>245</sup> Thus, States should not resort to the detention of asylum

236. J.-Y. Carlier, 'L'accès au territoire et la détention de l'étranger demandeur d'asile' (2009) RTDH 795-810.

237. A. Grahl-Madsen, UNHCR, 'Commentary on the Refugee Convention' (October 1997).

238. The Refugee Convention has been completed with one protocol in 1967, the New-York Protocol, which extends the geographic and temporal scope of the Convention.

239. J.C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 171-173.

240. See also *infra* Chapter 1 Section 2, Subsection 2.2..

241. See the debates on the scope of the term "penalties" in G.S. Goodwin-Gill, 'L'article 31 de la Convention de 1951 relative au statut des réfugiés: l'absence de sanctions pénales, la détention et la protection, in E. Feller, V Türk and F. Nicholson (dir), *La protection des réfugiés en droit international* (Larcier 2008) 223-300.

242. J.C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 405.

243. A. Grahl-Madsen, UNHCR, 'Commentary on the Geneva Convention' (October 1997) 98.

244. J.C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 413.

245. G. Noll, 'Article 31' in A. Zimmermann (dir), *The 1951 Refugee Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, (Oxford University Press 2011) 1268-1269.

seekers if there is no appropriate justification. However, neither this provision, nor the Convention in general, contains an exhaustive list of permissible detention grounds. The UNHCR, through its guidelines, has sought to define permissible grounds for detention, while insisting that detention should be an exceptional measure, as there is a presumption against its application.<sup>246</sup>

The provision applies to refugees whose status has not yet been regularised. But, what is the meaning of the word “regularised”? J. C. Hathaway examining the *travaux préparatoires* of the Convention notes that “regularisation” under Article 31§2, was not predicated on formal recognition as a refugee.<sup>247</sup> The drafters of the 1951 Refugee Convention recognised that refugees who travel without pre-authorisation to a State but who are admitted to a refugee status determination procedure should be considered to have been regularly admitted.<sup>248</sup> In other words, according to Article 31§2 of the 1951 Refugee Convention, the detention of asylum seekers is only permissible when it is necessary, on the basis of specific reasons pertaining to the individual, i.e. that they constitute a threat to public order or they present a risk of absconding on the basis of objective criteria.

The Human Rights Committee has adopted a similar position. In 1997, in *A. versus Australia*, the HRC underlined that “[t]here is no basis for the author’s claim that it is *per se* arbitrary to detain individuals requesting for asylum”.<sup>249</sup> Hence, detention of asylum applicants is not *per se* in breach of Article 9§1 of the ICCPR, but deprivation of liberty of an asylum applicant is only justified “for an initial period for the purposes of ascertaining identity”<sup>250</sup> and “in order to document their entry, record their claims”,<sup>251</sup> and “to detain [the asylum seekers] further while their claims are being resolved would be arbitrary, absent particular reasons specific to the individual”.<sup>252</sup>

### 3.2.5.b. The position of the ECHR and the European Court of Human Rights

The situation is quite different under the ECHR. In *Saadi versus the United Kingdom*, the ECtHR held that until a State has “authorised” entry to the country, any entry is “unauthorised”. Therefore, the detention of a person who wishes to effect entry but does not yet have authorisation to do so, can be to “prevent his effecting an unauthorised entry”.<sup>253</sup> The Court did not accept that as soon as an asylum seeker has surrendered himself to the immigration authorities, he is seeking to effect an “authorised” entry, with the result that detention cannot be justified under the first limb of Article 5

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246. See UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012); UNHCR, *Detention Guidelines* (1999); UNHCR, *Detention of refugees and asylum-seekers*, ExCom no44 (XXXVII) (1986).

247. J.C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 413.

248. *Ibid* 175.

249. *A. versus Australia* Communication no 560/1993 (HRC), para 9.3.

250. *Bakhtiyari versus Australia* Communication no 1069/2002 (HRC), para 9.3.

251. *F.K.A.G. versus Australia* Communication no 2094/2011 (HRC), para 9.3.

252. *Ibid.*, para 9.3.

253. *Saadi v the United Kingdom* App no 13229/03 (ECtHR, G.C., 29 January 2008), para 65.



§ 1 (f).<sup>254</sup> As in *Chahal versus the United Kingdom*,<sup>255</sup> the Court concluded that detention of asylum seekers under the scope of the first limb of Article 5§1, indent f) does not have to be considered necessary, for example to prevent the person concerned from committing an offence or fleeing.<sup>256</sup>

In *Saadi*, the Court stated that, in essence, entry does not become authorised merely when an asylum seeker voluntarily approaches the authorities. Can this passage, however, be understood as authorising States to detain asylum seekers during the entire processing of a claim? Several important caveats can be drawn from the Court's own jurisprudence. First, one of the reasons the Court allowed the applicant's detention in *Saadi* was its relatively short length, 7 days, which did not exceed "that reasonably required for the purpose pursued".<sup>257</sup> In contrast, in *Suso Musa v. Malta*, the Court found that "it cannot consider a period of 6 months to be reasonable" and in *Kanagaratnam v. Belgium* it considered that a period of 3 months was "unreasonably lengthy".<sup>258</sup> The Court also took into account the detention conditions the applicants were subjected to.<sup>259</sup>

More importantly, in *Suso Musa*, the Court nuanced its approach regarding the point when entry becomes "authorised". It held that where a State enacts legislation (of its own volition or pursuant to European Union law)<sup>260</sup> explicitly authorising the entry or stay of asylum seekers, an ensuing detention to prevent illegal entry may raise an issue of lawfulness under Article 5§1(f).<sup>261</sup> According to the Court in such circumstances it would be hard to consider the measure as "closely connected to the purpose of the detention" and it would in fact be arbitrary to interpret "clear and precise domestic law provisions in a manner contrary to their meaning".<sup>262</sup> The Court concluded that the question of when a person has been granted formal authorisation to enter or to stay is largely dependent on the provisions of national law and the rights they bestow upon asylum seekers.<sup>263</sup>

States can thus detain an asylum seeker. However, detention should last only the time needed for the purpose pursued. Lengthier periods of detention as well as inappropriate detention conditions will come under the close scrutiny of the Court and may render detention arbitrary and thus in contravention of Article 5 of the ECHR. In addition, even if procedures are speedy and conditions are appropriate, the Court has not legitimised detention for the entirety of asylum procedures. Indeed, if it becomes

254. Ibid.

255. *Chahal v the United Kingdom* App no 22414/93 (ECtHR, G.C., 15 November 1996).

256. Ibid paras 72-73.

257. Ibid para 79.

258. *Suso Musa v Malta* App no 22414/93 (ECtHR, 23 July 2013), para 102; *Kanagaratnam v Belgium*, App no 15297/09 (ECtHR, 13 December 2011 ), paras 94-95.

259. Ibid.

260. For example national rules transposing the Asylum Procedures Directive.

261. *Suso Musa v Malta* App no 22414/93 (ECtHR, 23 July 2013), para 97.

262. Ibid.

263. Ibid.



clear that the State has formally authorised entry or stay during the examination of the asylum claim, detention under this heading would be arbitrary.

### **3.3.5.c. The detention framework of the recast Reception Conditions Directive (RCD)**

A few precisions on the detention of asylum seekers were contained in the 2003 Reception Conditions Directive which provided:

“[w]hen it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law”.<sup>264</sup>

It has been observed that to allow Member States to confine asylum seekers for “legal reasons” or “reasons of public order” almost gives *carte blanche*. Indeed, the fact that these are only *examples* suggests an area of State discretion, limited only by the requirement to show the necessity of such detention.<sup>265</sup> The recast RCD aims to fill this gap. Detention is conceived as an exception. The recast Directive explicitly states that a person may not be held in detention solely because they have applied for international protection.<sup>266</sup> Detention must conform to the principles of necessity and proportionality and can only be ordered on the basis of an individual assessment of each case.<sup>267</sup> This goes beyond the obligations of Member States under Article 5, paragraph 1, indent f) of the ECHR, which does not foresee a necessity test, unless it is established under national law.

Moreover, one of the main advances of the recast is the establishment of an exhaustive list of grounds for detention in Article 8§3. Detention of asylum seekers is only permissible in order to pursue one of these 6 grounds. According to Article 8, paragraph 3 of the recast, the grounds for detention are:

- (a) “in order to determine or verify his or her identity or nationality;
- (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
- (c) in order to decide, in the context of a procedure, on the applicant’s right to enter the territory;
- (d) when he or she is detained subject to a return procedure under [the Return Directive], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable

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264. Art. 7§3, RCD.

265. J. Handoll, ‘Directive 2003/9 on Reception Conditions of Asylum Seekers: Ensuring ‘Mere Subsistence’ or a ‘Dignified Standard of Living?’ in A. Baldacinni, E. Guild, H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* (Hart Publishing 2007) 213.

266. Art. 8§1, recast RCD.

267. Art. 8§2, recast RCD.

- grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;
- (e) when protection of national security or public order so requires;
- (f) in accordance with Article 28 of [the recast Dublin Regulation].

The maximum permissible duration of detention is not specified. However, several elements point towards a short period. Article 9, paragraph 1 stipulates that:

“[a]n applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable. Administrative procedures relevant to the grounds for detention set out in Article 8(3) shall be executed with due diligence. Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention”.

Recital 16 further enhances this obligation by providing that:

“[w]ith regard to administrative procedures relating to the grounds for detention, the notion of ‘due diligence’ at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures”.

It is important to note that in the framework of asylum, and unlike the return framework, ‘due diligence’ does not refer to a timely processing of asylum claims, as detention is not authorised for effecting the assessment, or for administrative convenience. Due diligence relates to speedily and efficiently verifying the reasons why it is considered necessary to detain the asylum seeker.<sup>268</sup>

#### 2.3.5.d. Testing the compatibility of the grounds with Member States’ obligations

##### i) Article 8§3 (c) recast RCD

The ground under point c), “in order to decide, in the context of a procedure, on the applicant’s right to enter the territory”, fits within the exhaustive list of exceptions to the right to liberty and security in the ECHR as interpreted by the ECtHR. More specifically, as explained above, the ECtHR considered in the *Saadi v. UK* case, that asylum seekers’ detention could be understood as falling under the scope of detention so as to prevent a person from “effecting an unauthorised entry into the country”.<sup>269</sup>

However, some clarifications should be made on this point. Apart from the fact that the full array of guarantees developed by the ECtHR applies, EU law, unlike the

268. ECRE, ‘Not There Yet: An NGO perspective on Challenges to a Fair and Effective Common European Asylum System’ (2013) 34.

269. Article 5(1)(f), ECHR.

ECHR, also establishes a requirement of necessity. Thus, the *Saadi v. UK* scenario, where detention was permitted in order to swiftly process claims so as to prevent an “unauthorised entry”, is not applicable in EU law. The ECtHR explicitly stated that its finding was premised on the fact that “there was no requirement that the detention be reasonably considered necessary”, as in the case of pre-removal detention.<sup>270</sup> Put plainly, the absence of a requirement of necessity was the premise on which the ECtHR allowed detention for the purpose of administrative expediency. By contrast, under EU law Member States have to objectively justify why detention is necessary in each case.

Moreover, the ECtHR only allowed detention on this limb of Article 5, paragraph 1(f) ECHR in cases where a State had not “formally authorised” entry or stay pending the examination of the asylum claim. Member States according to the Asylum Procedures Directive (APD) and its recast have to accord asylum seekers the right to remain pending the examination of the application.<sup>271</sup> The fact that both provisions clarify that the right to remain “shall not constitute an entitlement to a residence permit”,<sup>272</sup> does not necessarily mean that the stay has not been authorised. In fact, in the case of *Suso Musa* the Court noted that obligations under EU law, such as those contracted through the APD, might be relevant and that this was an issue predicated on national law to be interpreted in each national context.<sup>273</sup> The only clear exception is contained in Article 43§2 of the recast APD about border procedures which states that:

“Member States shall ensure that a decision in the framework of the procedures provided for in paragraph 1 is taken within a reasonable time. When a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the Member State in order for his or her application to be processed in accordance with the other provisions of this Directive”.

A *contrario* then, normally, entry to the territory is granted to all asylum seekers in order for the application to be processed. Only in the case of applications lodged at the border or in transit zones can entry be withheld, and then only for 4 weeks. Still this does not result in blanket permission to detain all applicants at the border for 4 weeks. The requirements of necessity and proportionality and the principle of an individualised assessment also apply.

## ii) Article 8§3 (a), (b), recast RCD

The grounds of Article 8, paragraph 3 of the recast RCD concerning (a) determination or verification of the asylum seeker’s identity or nationality and (b) determination of

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270. *Saadi v the United Kingdom* App no 13229/03 [ECtHR, G.C., 29 January 2008], paras 72-73.

271. Art. 7§1, APD and Art. 9§1, recast APD.

272. *Ibid.*

273. *Suso Musa v Malta* App no 22414/93 [ECtHR, 23 July 2013], paras 94-99. Although in that case the Court could come to a definitive conclusion because the national Courts and the government had a different interpretation as to the effects of their national law, the ECtHR very clearly noted that if national provisions authorize stay pending the examination of an asylum claim it would be hard to consider the measure “closely connected to the purpose”.

the elements on which an asylum application is based which could not be obtained in the absence of detention could be invoked if determination or verification of identity or nationality and determination of the elements on which an asylum application is based, can be understood as “an obligation by law” and detention comes to “secure its fulfilment” as foreseen in Article 5(1)(b) of the ECHR. However, detention must be necessary and proportional. Thus Member States have to justify why recourse to detention is necessary in the individual case, such as objectively substantiating a risk of absconding, and prove that less invasive measures would not have been effective.

As discussed above, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty.<sup>274</sup> Moreover, in the asylum framework, unlike the return framework, information cannot be sought through the authorities of the country of origin. Thus the principle of “due diligence” in ascertaining the existence of one of grounds (a) or (b) of Article 8§3 of the recast RCD would mean that they could be invoked only for a short period to collect information from the applicant and process any documentation the national authorities might provide. As the UNHCR notes, this exception to the general principle that detention of asylum seekers is a measure of last resort cannot be used to justify detention for the entire determination procedure, or for an unlimited period of time.<sup>275</sup>

### iii) Article 8§3 (e) recast RCD

Ground (e), protection of national security or public order, is enounced in a series of provisions contained in soft-law instruments on the detention of asylum seekers.<sup>276</sup> The scope and content of the term ‘public order’ is far from clear. The UNHCR guidelines understand the following situations as public order protection: “to prevent absconding and/or in cases of likelihood of non-cooperation”; “in connection with accelerated procedures for manifestly unfounded or clearly abusive claims”; “for initial identity and/or security verification” and “in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention”.<sup>277</sup> Some of these overlap with grounds listed in the recast RCD under Article 8(3)(a) and (b). The guidelines also note that “determining what constitutes a national security threat lies primarily within the domain of the government” but stress that the standards included in the guidelines, in particular that the detention is necessary, proportionate

274. See Chapter 1 Section 2 Part 2.3.3 on the principles of necessity and proportionality.

275. UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012), para 28.

276. See Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers (16 April 2003), para 3; UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012), paras 22-28 and 30.

277. UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012), paras 22-28.

to the threat, non-discriminatory, and subject to judicial oversight apply also in this framework.<sup>278</sup>

However, given the exhaustive enumeration of exceptions to the right to liberty and security under the ECHR this cannot be invoked by Member States, except if a Member State initiated criminal proceedings against a specific individual and the relevant provisions of criminal law, rather than those concerning reception of asylum seekers, would come into play.<sup>279</sup>

The only other way this ground could be invoked in compatibility with the ECHR is in strict relation to the ground contained in Article 8(3)(c), i.e. procedure on the applicant's right to enter, which reflects Article 5§1(f) of the ECHR. This would mean however that all the guarantees related to ground (c) would apply and that Member States would have to prove that detention is closely connected to deciding upon the entry of the individual. A parallel can be drawn with the case of *A and others v. UK*, which concerned suspected terrorists held in view of their deportation. The UK had derogated from its Convention obligations using the procedure of Article 15 of the ECHR. When examining if the measures, i.e. long-term detention of non-nationals, were "strictly required by the exigencies of the situation", the ECtHR noted that:

"[t]he choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists".<sup>280</sup>

#### iv) Article 8§3 (d) recast RCD

The ground contemplated under point d) of Article 8§3 of the recast RCD reveals the overlap between EU asylum and migration policies. Some third country nationals detained with a view to enforcing a return decision file an asylum claim. Cognisant of this, the Member States wanted a means to prevent what they considered "abusive" claims that aim exclusively to obstruct the return process. In practice it is possible that the individual has not had the possibility to access an asylum procedure before being served with a return order, for example at the border where expedited return takes place, or in Member States facing particular migratory pressures and structural problems in their asylum system which render access to an asylum procedure problematic.<sup>281</sup> The wording of this ground takes into consideration such situations; however it is important that it is implemented correctly at the national level and that

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278. UNHCR, 'UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012), para 30.

279. Detention could therefore be covered under the scope of Art. 5(c) ECHR which concerns detention on remand.

280. *A and others v the UK* App no 3455/05 (ECtHR, G.C., 19 February 2009), para 186.

281. See for example ECRE, ICJ, 'Second Joint Submission of the International Commission of Jurists (ICJ) and of the European Council on Refugees and Exiles (ECRE) to the Committee of Ministers of the Council of Europe in the case of *M.S.S. v Belgium and Greece* (Application no 30696/09) and related cases' (February 2013) 18-20.

the burden of proving fraudulent motives, namely “merely in order to delay or frustrate the enforcement of the return decision” will indeed rest on the Member State.

In order for it to be compatible with the exhaustive list of detention grounds contained in the ECHR, the ground under paragraph d) must be raised in relation to ground c) (deciding upon the entry of the individual) or to grounds a) and b) (verification of identity and/or nationality or determination of the elements of an application). The legal analysis under those points also applies here.

That is because despite the link with the return process, detention cannot be understood as being authorised in order to secure removal in such cases. The ECtHR has stated that:<sup>282</sup>

“[t]he applicant’s detention pending asylum proceedings could not have been undertaken for the purposes of deportation, given that national law did not allow for deportation pending a decision on asylum”.

In addition, the Court of Justice of the EU has already addressed similar questions. In *Kadzoev*, it stressed that detention for the purpose of removal and detention of an asylum seeker and the applicable national provisions fall under different legal rules.<sup>283</sup> In *Arslan*, the Court clarified that during the examination of the asylum claim the Return Directive is not applicable.<sup>284</sup> The CJEU observed also that at the point of rendering its decision, there were no harmonised grounds for detaining asylum seekers at European level and thus it fell to the Member States to adopt such lists, in full compliance with their obligations arising from both international law and European Union law.<sup>285</sup> The Court found that, on the basis of the text of the 2003 Directive, it is possible to keep an asylum seeker in detention on the basis of a provision of national law, if it appears that this claim was made solely to delay or jeopardise the enforcement of the return decision.<sup>286</sup> However, in that case the Member State needs to assess on a case-by-case basis all the relevant circumstances and it must be objectively necessary to maintain detention to prevent the person concerned from permanently evading return.<sup>287</sup>

#### v) Article 8§3 (f) recast RCD

The last ground, point f) of Article 8§3 of the recast RCD, contemplates detention of asylum seekers who are subject to a ‘Dublin transfer’; this refers to the recast Dublin Regulation, according to which an asylum seeker should not be held in detention for the sole reason that she is subject to a ‘Dublin procedure’.<sup>288</sup> The only recognised

282. See *Ahmade v Greece* App no 50520/09 (ECtHR, 25 September 2012), paras 142-144; *R.U. v Greece* App no 2237/08 (ECtHR, 7 June 2011), paras 88-96.

283. Case C-357/09 *Kadzoev v Bulgaria* [2009], para 45.

284. Case C-534/11 *Arslan v Czech Republic* [2013], para 49.

285. *Ibid* paras 55-56.

286. *Ibid* para 63.

287. *Ibid*.

288. Art. 28§1, Recast Dublin Regulation.

ground for detention is ‘a significant risk of absconding’ on the basis of an individual assessment.<sup>289</sup> The Regulation stresses that the principles of necessity and proportionality need to be respected in the application of this ground.<sup>290</sup> It sets strict deadlines for submitting a request to the Member State deemed responsible and for realising the transfer.<sup>291</sup> Finally, as regards detention conditions and the guarantees applicable to persons detained, the relevant provisions of the recast RCD are fully applicable.<sup>292</sup>

The Dublin Regulation defines a risk of absconding as “the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond”.<sup>293</sup> This definition is almost identical to that contained in the 2008 Return Directive.<sup>294</sup> The wording suggests that without national laws of Member States specifying objectively when such a risk exists, it cannot be relied upon for the pre-transfer deprivation of liberty.<sup>295</sup> In this regard, Germany’s Federal Court of Justice stated<sup>296</sup> that paragraph 62 of the Residence Act did not entail any objective criteria defining a risk of absconding<sup>297</sup> and declared as a result that Dublin transfers could no longer be based on a risk (or intention) of absconding.<sup>298</sup>

The 2012 UNHCR detention guidelines state that:

“[f]actors to balance in an overall assessment of the necessity of such detention could include, for example, a past history of cooperation or non-cooperation, past compliance or non-compliance with conditions of release or bail, family or community links or other support networks in the country of asylum, the willingness or refusal to provide information about the basic elements of their claim, or whether the claim is considered manifestly unfounded or abusive”.<sup>299</sup>

This detention in view of the transfer of the applicant to another Member State for the functioning of the EU responsibility-allocation regime could be contemplated as “pre-removal” detention; the removal however referring to the transfer to the Member State responsible and not to the country of origin of the applicant. It should

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289. Art 28 § 2, Recast Dublin Regulation.

290. Ibid.

291. Art. 28§3, Recast Dublin Regulation; a ‘take charge’ request applies where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application. A ‘take back’ request applies where an individual applies for international protection or is present on the territory of a Member State while his application is already under examination in another Member State.

292. Art. 28§4, Recast Dublin Regulation.

293. Art. 2(n), Recast Dublin Regulation.

294. Art. 3(7), Return Directive.

295. P. De Bruycker, S. Mananashvili, G. Renaudière, ‘The Extent of Judicial Control of Pre-Removal Detention in the EU: Synthesis Report of the Project CONTENTION’ (2014) 23.

296. Bundesgerichtshof, Decision V ZB 31/14 26 June 2014.

297. § 62(3) 1<sup>st</sup> Sentence, No. 5 mentions merely an intention of absconding without providing further specifics.

298. P. De Bruycker, S. Mananashvili, G. Renaudière, ‘The Extent of Judicial Control of Pre-Removal Detention in the EU: Synthesis Report of the Project CONTENTION’ (2014) 23.

299. UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012), para 22.



be borne in mind that the asylum claim has still not been examined on its merits and the individual continues to be an asylum seeker with the right to remain in the EU, albeit in another Member State.

### **2.3.5.e. The obligation to examine alternatives to detention**

The recast RCD requires Member States to consider alternatives to detention before subjecting asylum seekers to detention. Article 8, paragraph 2 states that “[w]hen it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively”, and Recital 15 emphasises that “[a]pplicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principles of necessity and proportionality with regard to both to the manner and the purpose of such detention”. Even without this explicit obligation, however, international law and the EU Charter still require Member States to examine alternatives, as an application of the principles of necessity and proportionality in order to avoid arbitrary deprivation of liberty.<sup>300</sup>

Under the recast Directive Member States must not only operationalise in practice alternative schemes, but must also enact such schemes via their national rules transposing the Directive. The recast Directive adopts an open ended-list, mentioning measures “such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place”.<sup>301</sup> This means that Member States may contemplate further schemes. Finally, Recital 20 is of paramount importance. It gives legal guidance on the understanding of an alternative to detention under EU law. It stresses that:

“[i]n order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants”.

This recital adds new elements. Alternative measures should be non-custodial; any scheme whose application deprives the applicant of their liberty cannot be regarded as an alternative to detention. Moreover, the operationalisation of such schemes should not infringe on the fundamental rights of asylum seekers; thus also rights other than the right to liberty and security must be protected.

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300. Art. 6, EU Charter read together with Arts. 52§3 and 53, EU Charter.

301. Art. 8§4, recast RCD.

### 3.6. The necessity to take into account vulnerability

The recast RCD does not define vulnerability but adopts the approach of a non-exhaustive list of types of persons who should be considered as vulnerable. Under Article 21:

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

Three categories have been added since the previous version of the Directive: victims of trafficking, persons with serious illnesses and persons with mental disorders. In addition, the recast RCD introduces a specific example to illustrate the category of victims of sexual violence: victims of female genital mutilation. The groups listed explicitly in the Directive can be considered as *de jure* vulnerable. However, given that the list is non-exhaustive, as indicated by the wording “such as”, further categories of persons may need particular attention.<sup>302</sup>

However, the special protective regime of the Directive is not afforded to all vulnerable asylum seekers but to applicants with special reception needs. According to Article 2 indent k) of the recast RCD, applicant with special reception needs:

“means a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive”.

It becomes apparent that there is a close link between vulnerability and the existence of special needs.<sup>303</sup> As the recast RCD states:<sup>304</sup>

“[o]nly vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive”.

To be considered vulnerable and thus to benefit from the specific support provided for by the recast, an asylum seeker should have special needs. Identification of vulnerability and of special needs is essential to ensure that these categories of asylum applicants will access adequate support, as required by Article 22 of the recast.

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302. In the framework of the recast APD, we notice that gender, gender identity or sexual orientation are factors that should lead to the implementation of special procedural guarantees. Thus, these individuals may also require special reception needs. See i.e. Recital 29 and Art. 15§3(a), recast APD.

303. L. De Bauche, *Vulnerability in European law on asylum: a conceptualization under construction – Study on reception conditions for asylum-seekers* (Bruylant 2012).

304. Art. 22§3, recast RCD.

Identification is the cornerstone of the protective system envisaged for vulnerable asylum seekers. The European Commission considered identification a core element without which the provisions aimed at special treatment of vulnerable persons would lose any meaning.<sup>305</sup> Some forms of vulnerability are obvious, such as old age or physical disability, but others are less so, such as mental disorders or trauma resulting from torture or rape.

Article 22 of the recast RCD requires Member States to “assess whether the applicant [has] special reception needs”.<sup>306</sup> Such an assessment must be “initiated within a reasonable period of time” after an application is lodged. Special needs that emerge later in the procedure must also be addressed.<sup>307</sup> Article 22 also specifies that the assessment need not take the form of an administrative procedure.<sup>308</sup> It can be integrated into existing national procedures.<sup>309</sup> This provision does not establish a clear obligation to identify vulnerability. Member States have an obligation to assess the special needs of vulnerable asylum applicants. Although the word “assessment” has been preferred over “identification”, in practice, special needs have to be detected in order to implement the support provided for by the Directive. Indeed, once special needs are detected and assessed, Member States have to ensure that adequate support “specifically designed to meet their special reception needs”<sup>310</sup> is provided to asylum seekers in accordance with their specific needs.

These needs must be taken into consideration “throughout the duration of the asylum procedure and an appropriate monitoring of the situation has to be provided”.<sup>311</sup> However, “special reception needs” are not defined. This leaves a considerable margin of discretion to Member States and could lead to vulnerable applicants not having access to such support in practice. There are however specific provisions concerning the guarantees and special services that three specific categories of vulnerable asylum seekers should have, namely minors, unaccompanied minors and victims of torture and violence.<sup>312</sup>

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305. Commission, ‘Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers’ COM(2007) 745 final 9; see also Art. 17§2, RCD.

306. Article 24 recast APD provides also that Member States shall assess the applicants’ need for special procedural guarantees. The same basic principles are provided in this provision, as regards to Article 22 of the recast RCD.

307. Art. 22§1 indent 2, recast RCD. The wording of the provision does not mean that there is an obligation to reassess the existence of special needs. It means that vulnerability can be revealed by the applicant himself or by an actor working with him during the asylum determination process.

308. Art. 22§2, recast RCD. The PROTECT Questionnaire, elaborated in the framework of the PROTECT project, may be an interesting tool in order to assess the special needs and vulnerability of an asylum seeker having suffered traumatic experiences < <http://protect-able.eu/wp-content/uploads/2013/01/protect-questionnaire-english.pdf>. In addition, Recital 31 of the recast APD states that Member States may use the Istanbul Protocol.

309. Art. 22§1 indent 2, recast RCD.

310. Recital 14, recast RCD.

311. Art. 22§1 indent 3, recast RCD.

312. Arts. 23, 24 and 25, recast RCD.

The recast RCD introduces a provision establishing specific guarantees for vulnerable applicants when they are detained.<sup>313</sup> Article 11 does not prohibit detention of vulnerable asylum seekers. In general “[t]he health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities”.<sup>314</sup> Thus, vulnerability and the existence of special reception needs, e.g. need of rehabilitation or psychological services, are of paramount importance while taking a decision of placement in detention, or deciding on its continuation. The lack of such services in detention centres may require the implementation of an alternative to detention; otherwise it could reach the threshold of inhumane or degrading treatment.<sup>315</sup> Article 11 paragraphs 2 and 3 provide special guarantees for minors and unaccompanied minors, stating, *inter alia*, that their detention must be a measure of last resort. Paragraphs 4 and 5 stipulate that families and women should be provided with separate accommodation.<sup>316</sup>

While the recast RCD talks about “special reception needs”, the recast APD uses the notion of “special procedural guarantees”. The recast APD recognises that “[c]ertain applicants may be in need of special procedural guarantees due, *inter alia*, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence”. In this sense, Article 24 of the recast applies basically the same principles as those included in the recast RCD concerning the assessment of special needs. Once an asylum seeker has been identified as “an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances”,<sup>317</sup> she must be provided with adequate support.

According to the recast Directives these two notions do not automatically correlate. “Special procedural guarantees” must be clearly distinguished from “special reception needs”.<sup>318</sup> These are different concepts and their wording reinforces this. The fact that the indicative lists of vulnerable applicants in both Directives differ strengthens this position.<sup>319</sup> Another argument can be adduced from the wording employed in Article 31, paragraph 7 indent b) of the recast APD. This provision states that “Member States may prioritise an examination of an application for international protection [...] in particular [...] where the applicant is vulnerable, within the meaning of Article 22 of Directive 2013/33/EU, or is in need of special procedural guarantees”.

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313. This provision also applies to detention in the framework of the recast Dublin Regulation.

314. Art. 11§1, recast RCD.

315. See for instance *Khubodin v Russia* App no 59696/00 (ECtHR, 26 October 2006).

316. We note that women are not listed as *de jure* vulnerable, according to Article 21 of the recast RCD, but they may need special accommodation. Women can be considered as in need of special reception needs in specific circumstances.

317. Art. 2(d), recast APD.

318. Speech of A. Cășan-Catalin on the occasion of the final conference of the PROTECT-ABLE project in Brussels (European Parliament) 20 March 2014.

319. Art. 2(d), recast APD and Art. 2(k), recast RCD.

A vulnerable applicant may have special procedural needs and special reception needs. However, some vulnerable applicants will most likely be in need of special guarantees both in terms of their reception and the processing of their claim. Indeed, an asylum seeker who has been victim of torture will in all likelihood require “appropriate medical and psychological treatment and care”<sup>320</sup> provided for by the recast RCD and, at the same time, special procedural guarantees, such as the possible exclusion from an accelerated procedure<sup>321</sup> or the prioritisation of the examination of her claim.<sup>322</sup>

### 3. DEFINING ALTERNATIVES TO DETENTION

Despite the growing interest of States in implementing alternatives, there is no single legal definition of ‘alternative to detention’ and therefore in practice there are different understandings of the concept. This section outlines existing definitions. It then advances an understanding of alternatives to administrative detention in the EU legal framework.

#### 3.1. Existing definitions of alternatives to detention

Alternatives to detention entail both a policy choice with regard to migration management and a response to a legal obligation. Non-governmental and international organisations, as well as academics, have put forward definitions. The International Detention Coalition (IDC) and the majority of civil society organisations understand alternatives to immigration detention to include:

“[a]ny legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country”.<sup>323</sup>

This definition considers alternatives to detention in the framework of migration management as a whole. It serves the pragmatic aim of discussing the purpose of detention and advocating for its reduction, and a policy shift from enforcement to early engagement and collaboration with migrants. Indeed, research conducted by the same organisation revealed that the most significant elements are “the process of determining who should be detained and the reasons for their detention”<sup>324</sup> as well as “the strength of existing mechanisms to manage migrants from a community

320. Art. 25, recast RCD.

321. Art. 24§3 indent 2, recast APD.

322. Art. 31§7, recast APD; Special procedural guarantees can be found in other provisions of the recast APD. See for instance: possibility to seek advice from experts on particular issues, such as medical, child related issues (Art. 10§3(d)); specific safeguards concerning the gender specific approach of the personal interview (Art. 15§3); specific guarantees for unaccompanied minors (Art. 25).

323. IDC and La Trobe Refugee Research Center, ‘There are alternatives, a handbook for preventing unnecessary detention’ (2011) 12.

324. Ibid 16.

setting”.<sup>325</sup> The Jesuit Refugee Service has adopted a similar approach.<sup>326</sup> Such an approach is particularly fitting in contexts where detention is used as the predominant migration-management response, leading to policies of automatic detention without an individualised assessment.

For their study on behalf of UNHCR, C. Costello and E. Kaytaz describe a narrow and a broad definition of alternatives to detention:

“ATD is not a term of art, but rather refers to a range of different practices. It is used in at least two distinct senses. In the narrow sense, it refers to a practice used where detention has a legitimate basis, in particular where a justified ground for detention is identified in the individual case, yet a less restrictive means of control is at the State’s disposal and should therefore be used. In the broader sense, ATD refers to any of a range of policies and practices that States use to manage the migration process, which fall short of detention, but typically involve some restrictions”.<sup>327</sup>

In the EU context, where reception conditions are regulated as part of the CEAS, this approach could create legal confusion. For example, under this broader understanding open reception arrangements for asylum seekers could also be understood as an ATD, as they constitute a way to manage the migration process (in what concerns seeking asylum) which falls short of detention, but involves some restrictions (for example a potential curfew at a reception centre).

Another important element is the correct implementation of such schemes. The 2012 UNHCR Guidelines provide detailed guidance on this aspect.<sup>328</sup> The guidelines include an annex with a non-exhaustive list on individual schemes, such as reporting conditions or release on bail/bond.<sup>329</sup> Among other elements the agency highlights that “[a]lternatives to detention should not be used as alternative *forms* of detention; nor should alternatives to detention become alternatives to release”.<sup>330</sup> In her 2011 study on behalf of UNHCR, A. Edwards underlines a series of guarantees for the implementation of ATD, the most basic of which is:

“[m]any ‘alternatives to detention’ involve some form of restriction on movement or deprive an individual of some of his or her liberty and must therefore be subject to human rights safeguards. [...] The greater the loss of or interference with

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325. Ibid.

326. See JRS Europe, ‘Policy Position on Alternatives to Detention’ (2012).

327. C. Costello and E. Kaytas, UNHCR, ‘Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva’ (June 2013) 10-11.

328. UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) 35-42.

329. Ibid Annex A.

330. Ibid 38.

liberty, the more human rights safeguards must be put in place to guard against executive excess, arbitrariness and unfair punishment”.<sup>331</sup>

## 3.2. Definition of alternatives to detention in EU law

This section proposes an understanding of what constitutes an alternative to detention, informed by the positions advanced by other organisations and scholars as well as by recent developments in the EU legal framework. Our understanding of an alternative to detention takes into account the particular EU legal framework as our study is focused on this region and seeks to provide clarity regarding Member States’ obligations on this issue.

In compliance, to a great extent, with the 1951 Refugee Convention and Member States’ international legal obligations,<sup>332</sup> the recast Reception Conditions Directive confirms the principle of freedom of movement of asylum seekers.<sup>333</sup> According to the EU legal framework, asylum seekers should be allowed to live in the society or in designated centres where services are provided centrally<sup>334</sup> while waiting for the result of their application. A part of what several non-governmental organisations understand as ‘alternatives to detention’,<sup>335</sup> or some authors as “the broader sense of alternatives to detention”,<sup>336</sup> is thus guaranteed in EU law. As UNHCR stresses in its 2012 detention guidelines, alternatives to detention:

“should not become substitutes for normal open reception arrangements that do not involve restrictions on the freedom of movement of asylum-seekers”.<sup>337</sup>

Detention should therefore be an exceptional last-resort measure, applicable only if a ground for detention exists and only when found necessary and proportionate after an individual examination of the case.<sup>338</sup> Detention cannot constitute a migration-management tool applicable automatically to asylum seekers or to particular groups of asylum seekers (for example those subject to Dublin proceedings or of a particular nationality). Such practices are observed in certain Member States, however they violate the international legal obligations of those States and the EU legal framework in particular.

331. A. Edwards, UNHCR, ‘Back to Basics: The Right to Liberty and Security of Persons and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants’ (April 2011) 8-9.

332. See *infra* Chapter 1 Section 2 Part 2.2 on freedom of movement.

333. Art. 7, recast RCD.

334. Therein asylum seekers could either enjoy their freedom of movement completely or potentially have to comply with some restrictions inherent with the running of centres such as for example not being absent for more than 3 days in a row.

335. See *infra* Chapter 1 Section 3 Part 3.1 the definition advanced by IDC.

336. See *infra* Chapter 1 Section 3 Part 3.1 the definition advanced by C. Costello and E. Kaytaz.

337. UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) 38.

338. Arts. 8-11, recast RCD; See Chapter 1 Section 2 Part 2.3.3.



National authorities should therefore undertake, for every individual, both a needs and a risk assessment. The needs assessment examines the vulnerability of the individual and of their eventual special reception or procedural needs.<sup>339</sup> The risk assessment entails an examination of whether the individual is exceptionally liable to detention. Alternatives to detention therefore come into play when an individual is exceptionally liable to detention on the basis of one of the six grounds enumerated in the recast RCD or the two grounds enumerated in the Return Directive.<sup>340</sup> Where there is no legal basis to detain an asylum seeker, there is also no legal basis to apply an alternative to detention. The individual should simply be released. Where an individual is exceptionally liable to detention, Member States are obliged to consider whether detention is necessary or whether the same result could be achieved through a less coercive measure, i.e. the application of an alternative.

Alternatives to detention could entail obligations involving different levels of coerciveness. Such obligations often include restrictions on the freedom of movement, such as for example a daily curfew at the designated residence or an obligation to reside in the house of the guarantor in case of bail.<sup>341</sup> These obligations are part and parcel of the implementation of the scheme. Their aim is to mitigate the risk factors identified by the authorities who considered that the particular individual was liable to detention. They should therefore be distinguished from obligations that concern the totality of asylum seekers and the normal running of reception and procedural systems, such as obligations to declare the address of stay to the authorities or to remain in a specific district.

However for a scheme to be characterised as an alternative it must “fall short” of deprivation of liberty and constitute a non-custodial measure,<sup>342</sup> or it would be an alternative form of detention. Alternative forms of detention could be authorised only in the same circumstances as detention and following the same guarantees. The fact that a person is not held at a detention facility does not necessarily mean that she is not deprived of her liberty. In addition, the characterisation or understanding by national authorities that a scheme constitutes an alternative to detention is not in itself enough to conclude that it is non-custodial.

As discussed above, the difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance.<sup>343</sup> Therefore, an examination of the implementation of each scheme is necessary before concluding whether it is, in practice, a non-custodial measure. For example, in Slovenia national authorities

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339. See *infra* Chapter 1 Section 2 Part 3.6. on vulnerability.

340. Art. 8§3, recast RCD and Art.15§1, Return Directive.

341. See *infra* Chapter 1 Section 2 Part 2.2. for an analysis of the legal nature of restrictions in the freedom of movement as well as the regime of the recast RCD.

342. See also Recital 20, recast RCD. The term ‘non-custodial’ concerns the physical liberty of the person; a non-custodial measure is one that does not dispossess someone of this liberty whether at a detention centre or at another location.

343. See *infra* Chapter 1 Section 2 Introduction.

consider the practice of depriving asylum seekers of their liberty in a reception centre to constitute an alternative to detention. In the view of the Directorate for Migration, this complete restriction to the premises of the Asylum Home could be considered as 'designated residence' since asylum seekers with limited scope of freedom of movement in the premises of the Asylum Home have exactly the same rights and duties as others accommodated in the same facility, except the right to leave the Asylum Home.<sup>344</sup> However, this regime deprives them in fact of their liberty. By contrast, in Belgium asylum seeking families with minor children who file their claim at the border receive a detention order but then are sent to return houses where they benefit from the right to freedom of movement with restrictions (for example they have to respect a curfew from 22:00-08:00 but can leave the housing units during the day).<sup>345</sup>

Therefore, the scheme in Slovenia is an alternative form of detention. Even if they are not held in a detention centre but in a reception centre, the fact that they are not allowed to leave the premises means that asylum seekers are deprived of their liberty. In contrast, the scheme applied in Belgium is an alternative to detention. Despite the fact that legally they received a detention order, asylum seekers can circulate freely during the day. This means that they are not deprived of their liberty but that they are subject to restrictions in their freedom of movement.

Not only should alternatives to detention be non-custodial but they should also respect the fundamental rights of asylum seekers as enshrined in international legal instruments, the ECHR and the EU Charter.<sup>346</sup> Therefore, the implementation of such schemes should not violate in particular the prohibition of torture, inhuman or degrading treatment, the right to human dignity, the right to private and family life and the right to an effective remedy. Electronic tagging could lead to such violations, depending on the profile of the individual it is applied to and the daily frequency of reporting.<sup>347</sup>

As long as they comply with these requirements, Member States are free to set up different alternative to detention schemes. However, the range of alternatives should not lead to the conclusion that there is a simple menu of options for governments and for decision-makers.<sup>348</sup> Rather, there are measures of different degrees of coerciveness. Decision-makers must only use means that are necessary, reasonable and proportionate to the legitimate aim being pursued.<sup>349</sup> Namely, the principles of necessity and proportionality call for the examination of the individual profile in order to decide

344. See Annex 1 Country Profiles: Slovenia.

345. See Annex 1 Country Profiles: Belgium. See also Belgium Practices Questionnaire, Q.12.

346. See Recitals 20, 35, recast RCD.

347. See Chapter 2 Section 2 Part 2.5 on electronic tagging.

348. C. Costello and E. Kaytas, UNHCR, 'Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva' (June 2013) 11.

349. Ibid. See also A. Edwards, UNHCR, 'Back to Basics: The Right to Liberty and Security of Persons and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' (April 2011) 8-10; UNHCR, 'UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012) 39-40.

on the type of alternative to apply as well as the variation within a given alternative (e.g. if an applicant will be subjected to a reporting requirement, the frequency of such an obligation).

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## DEFINITION IN THE FRAMEWORK OF THE CEAS

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Alternatives to detention come into play when an individual is exceptionally liable to detention on the basis of one of the six grounds enumerated exhaustively in the recast Reception Conditions Directive. They should therefore not be conflated with permissible restrictions on the freedom of movement which are sometimes applicable to asylum seekers. They are non-custodial measures which respect the fundamental rights of asylum seekers. The principles of necessity and proportionality call for the examination of the individual profile in order to decide on the type of alternative to be applied as well as the level of coerciveness within each scheme.

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## CHAPTER 2

# IMPLEMENTATION OF ALTERNATIVES TO DETENTION IN SELECTED MEMBER STATES

**This chapter will analyse the results of the national research through transversal themes: decision-making, implementation of alternative to detention schemes and access to rights for those placed in these schemes. The last section pulls together findings on the evaluation and available data on the running of such schemes.**

## 1. ANALYSIS OF DECISION-MAKING ON ALTERNATIVES TO DETENTION

Decision-makers and practitioners are called to apply in practice the legal principles analysed in the previous section. This section analyses the challenges and good practices relative to decision-making by administrative and judicial authorities observed in the 6 Member States researched. It also seeks to elaborate, on the basis of this research, some general principles that would render the implementation of the legal principles more effective in practice. This chapter will examine the way grounds for detention are established in these Member States, the way the necessity and proportionality test is applied in practice and the right to effective remedy for those individuals placed in an ATD.

In the countries researched, decision-making on detention and alternatives to detention is undertaken by administrative bodies under the responsibility of the Ministry of Interior or by courts and tribunals. Courts are mainly in charge of appeals apart from Lithuania and Sweden where they were also in charge of validating decisions of administrative authorities who only have jurisdiction to propose recourse to detention or an alternative. Where administrative institutions are in charge of the initial decision, they are also in charge of implementing and monitoring the implementation of alternatives to detention.

### 1.1. The existence of a ground for detention

In order to impose an alternative to detention, national authorities must first prove there are grounds for detaining the individual. National jurisprudence has confirmed this approach. For instance, the Svencionys district Court in Lithuania ruled that an alternative to detention could not be applied as there were no grounds for detention.<sup>350</sup>

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350. Svencionys district Court (Lithuania), 7 December 2012, A-1601-665/2012; See also Svencionys district Court (Lithuania), 4 January 2013, A-80-405/2013 and 21 March 2013, A-384-405/2013.

In Sweden and the UK, asylum seekers may be detained on the same legal basis as others who are subject to immigration control. UK authorities have a large margin of appreciation when deciding to place an individual in detention. In addition, the Detained Fast-Track Procedure allows the Home Office to detain asylum seekers where it deems that their claim is capable of being decided quickly, thus for reasons of administrative expedience.<sup>351</sup>

However, not all the national legislation researched has yet transposed the recast RCD; therefore some of the grounds established go beyond the scope of this instrument.<sup>352</sup> The grounds currently established at national level include detention for the purpose of identity verification,<sup>353</sup> protection of public health<sup>354</sup> and protection of national security and public order.<sup>355</sup>

The fact that a case falls within the scope of a specific detention ground should not be considered as a reason to exclude the implementation of an alternative. Each case needs to be assessed individually, taking into account the necessity of the measure and the specific circumstances of the individual. For instance, the Supreme Administrative Court of Lithuania has stated that non-established identity was not a ground for failing to consider alternatives to detention, as the court may impose an alternative taking into consideration other relevant circumstances.<sup>356</sup>

Similarly, national legislation or practice which foresees detention of entire groups of asylum seekers in specific situations, such as in border procedures, accelerated procedures or Dublin transfers,<sup>357</sup> should not impede the implementation of alternatives and in fact should be modified to allow for an individualised assessment. Nonetheless, for example, alternatives to detention are not considered in the

351. These rules are included in policy guidelines; see Home Office, 'Enforcement Instructions and Guidance', Chapter 55 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/307995/Chapter55.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307995/Chapter55.pdf). According to British public law such guidelines are binding on the government. See also UK Legal Questionnaire, Q.6. Furthermore, very serious problems with the Detained Fast Track procedures have been evidenced by research including: Human Rights Watch, 'Fast-Track Unfairness: Detention and Denial of Women Asylum Seekers in the UK' (2010); UNHCR, 'Quality Integration Project: Key Observations and Recommendations' (August 2010). The operation of the DFT in the UK has just been found by the High Court in 2014 to give rise to sufficient unfairness as to be unlawful, although the process itself has not been found to be unlawful < <http://themigrantslawproject.org/about-us/news/>.

352. See for example the understanding of risk of absconding in Lithuania Legal Questionnaire, Q.3.

353. It is however interesting to underline that the practice in Slovenia is that an asylum seeker cannot be detained on the sole ground that he has no valid identification document (Supreme Administrative Court (Slovenia), case no I U 1780/2010).

354. The Lithuanian Aliens' Act explicitly contains this ground for detention, even if according to our partners, it is only used occasionally. See Art. 113(1)(6) Lithuanian Aliens' Act (the authorities may resort to detention in order to prevent the spread of dangerous and particularly dangerous contagious diseases).

355. In most countries, this ground applies where there is already a criminal conviction. In Sweden, however, aliens are not charged with criminal offences. The procedure relating to detention on the ground of the protection of public order is established in the Act concerning the special control in respect of aliens (ASCA) which is the text governing the expulsion of aliens suspected of being terrorists or being of concern for the authorities as threatening national security. The ASCA concerns individuals who have not yet committed a crime but are considered dangerous based on what is known about their previous activity.

356. Supreme Administrative Court (Lithuania), case no 143-3536/2008; However, the Lithuanian Aliens' Act clearly states that the imposition of an alternative to detention is prohibited if there is any threat to national security and public order, whereas in Sweden the authorities may apply supervision even if an individual should be detained on the ground of the protection of public order.

357. More details relating to the use of detention in each of these specific situations are available in the questionnaires filled by our partners: Legal Questionnaire, Q.4 and Practices Questionnaire, Q.2.

framework of the detained fast track (DFT) in the UK. In Austria, unlike in Belgium, alternatives to detention are not applied in the framework of border procedures. In this case, asylum seekers are confined for more than 48 hours in the transit zone of the international airport of Vienna, until a decision is taken on their right to enter the territory. The absolute limit for this detention is six weeks.<sup>358</sup> Even if the airport procedure is rarely used,<sup>359</sup> the impossibility to apply alternatives to detention renders this practice non-compliant with the recast.

It is necessary to distinguish between short (for example, up to 48 hours) initial detention periods at the border for the purposes of registration and identity verification, and lengthier periods of detention. The international human rights and refugee law frameworks, when read together, afford the flexibility to States to apply extremely short initial detention periods for such purposes, even to large groups, but necessitate an objective reason based on an assessment of the individual profile for any longer detention.<sup>360</sup> For instance, in Slovenia where detention at the border is permissible for 48 hours for registration purposes, alternatives to detention are not foreseen in law.

It was found that, even in countries where the practice of detaining asylum seekers is rare, people subject to Dublin procedure were more regularly detained, especially during the transfer phase. While alternatives to detention schemes were applied to this category, in Austria and Belgium they are treated legally as returnees after a decision finding that another Member State is responsible, although this position contravenes EU law. This can have an influence on their access to rights.

In addition to legal rules, practical considerations also influence decisions on whether to implement an alternative scheme or not. For example, the perceived administrative convenience of having a person detained in the framework of the Detained Fast Track overwhelms arguments about human rights or cost.<sup>361</sup> In Lithuania “subjecting a person to detention is largely based on him/her having no place of residence”.<sup>362</sup> The lack of alternative accommodation is particularly relevant, because one of the usual alternative measures – defining an alternative place of residence and requiring the person to regularly appear at the territorial police agency – can only be applied if the person has a place to stay. This is illustrated by a case rendered by the Svencionys district Court of Lithuania on 23 June 2011 where the detention of a rejected asylum seeker had been ordered because he had no place of residence in Lithuania and no one to sustain him; despite the fact that his identity had been established, and that he had assisted the authorities in determining his legal status and fulfilled other

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358. Forum Réfugiés, ‘Dublin II: National asylum procedure in Austria’ 7 < <http://www.dublin-project.eu/dublin/Dublin-Project/Dublin-Project-Part-II>.

359. Austria Practices Questionnaire, Q.2.

360. See *infra* Chapter 1 Section 2 Part 2.3. on the right to liberty and security.

361. UK Legal Questionnaire, Q.36.

362. Lithuania Legal Questionnaire, Q.32.



conditions required for the use of an alternative to detention.<sup>363</sup> Similarly, in the UK release on bail for those who cannot secure private housing depends on the availability of social housing.

Such practical barriers to the implementation of alternatives to detention may be discriminatory because they are based only on the financial and social resources of the individual. The absence of a place of residence or lack of material support should not be an impediment to the application of alternatives to detention. According to the CJEU, the RCD “must be interpreted as not allowing, where the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that [...] he has no means of supporting himself and no accommodation or means supplied by the Member State”.<sup>364</sup>

### 1.1.1. Focus on the risk of absconding

The risk of absconding is often cited to justify detention of asylum seekers and migrants. Yet it appears that the assessment of the perceived risk of absconding is particularly problematic. In practice, IPRIS in Slovenia outlined the lack of adequacy between the measure taken by the authorities and the risk posed by the individual as, in practice, ATD seem to be applied to individuals with an objective higher risk of absconding.<sup>365</sup> BID in the UK also noted serious concerns about the quality of Home Office assessments of the risk of individuals absconding, or re-offending where they have criminal convictions.<sup>366</sup>

Legally, this risk is a ground for detention in most EU countries and in EU legislation on migration and asylum – in the recast RCD,<sup>367</sup> the recast Dublin Regulation<sup>368</sup> and the Return Directive.<sup>369</sup> The risk of absconding may be considered a legally vague notion.<sup>370</sup> Among the Member States studied, the risk of absconding constitutes a ground for detention in Austria, Belgium, and the UK. In Slovenia, Lithuania and Sweden it is not enumerated as a ground for detention in itself but rather forms a part of the individual assessment conducted by the authorities to decide on detention

363. See developments on barriers and concerns for the implementation of alternatives to detention in Lithuania. Lithuanian Red Cross, ‘Detention of asylum seekers and alternatives to detention in Lithuania’ (2011) 26-27.

364. Case C-357/09 *Kadzoev v Bulgaria* [2009], para 71.

365. Page 18, Slovenia Practical Questionnaire.

366. Question 15, UK Practices Questionnaire. References include : HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration “The effectiveness and impact of immigration detention casework”, December 2012; BID “Fractured Childhoods”, 2013

367. Art. 8§2(b), recast RCD: “an applicant may be detained only [...] in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant”.

368. Art. 28, Recast Dublin Regulation: “when there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation”.

369. Art. 15§1(a), Return Directive: “Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when : there is a risk of absconding ”.

370. See Chapter 2 Section 1 Part 1.1.1 on the risk of absconding.

measures. The fact that Austria, Lithuania, Sweden and the UK have established criteria to assess the risk of absconding in their national legislations or policies can be regarded as positive.<sup>371</sup>

As this ground can be assessed in a relatively subjective manner, based for example on the applicant's nationality, it is important to have an objective, transparent and individualised assessment of the likelihood the applicant will disappear during or after the asylum procedure.<sup>372</sup> In this respect, the Swedish Supreme Migration Court stressed that a simple declaration of unwillingness to return voluntarily by an alien about to be removed would not suffice to pronounce a detention decision.<sup>373</sup> Analysing the risk of absconding in such manner could result in the justification of placing the majority of refused asylum seekers in detention. Indeed, the Swedish Migration Board has applied this ground on the basis that the applicant had declared during their asylum interview that they did not want to return to their country of origin for fear of persecution or ill-treatment. A 2013 judgment of the Supreme Administrative Court of Slovenia confirmed that the existence of concrete and personal circumstances is necessary to detain an applicant.<sup>374</sup> The Court ruled that illegal border crossing was not sufficient to establish a risk of absconding.

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371. For further information on what criteria are used to assess of risk of absconding in EU Member States, see Commission, 'Communication from the Commission to the Council and the Parliament on the return Policy' COM(2014)199 final 15.

372. An interesting tool has been developed by the Lutheran Immigration and Refugee Service, 'Unlocking liberty – A way forward for U.S. Immigration Detention Policy', see appendix D and section titled "Predict likelihood that a person will appear at and comply with immigration court proceedings" < <http://lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf>.

373. Supreme Migration Court (Sweden), case no MIG 2008:23 UM1610-08.

374. Supreme Administrative Court (Slovenia), case no I U 128/2013.

The following grounds are applicable to all third country nationals, including asylum seekers:

### 1.1.2. Criteria used by selected Member States to assess the risk of absconding

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#### AUSTRIA<sup>375</sup>

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- The asylum seeker has left the initial reception centre without a valid reason;
  - if an enforceable but not final return decision has been rendered;
  - if an expulsion procedure has been initiated;
  - if an expulsion or deportation procedure had been initiated before the application for protection was filed;
  - another State is responsible for the examination of the claim;
  - an asylum seeker “evades the procedure”: The individual did not inform the authorities about the place of residence or the place of residence is not easily detectable;
  - previous attempts to abscond;
  - violation of reporting obligations.
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#### LITHUANIA<sup>376</sup>

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The person hampers the return procedure;

- the person applies for asylum after a pre-trial investigation has been initiated against her on the ground of illegal entry;
  - the person is illegally in the country, and does not have : means to ensure self-sufficiency; place to stay; social ties or relatives in the country;
  - the person has used Lithuania as a transit country (her destination was another Schengen country);
  - the person is not in possession of identity documents or has submitted forged documents;
  - the person has not complied with the procedure for leaving temporarily the Foreigners Registration Centre (FRC);
  - the person does not cooperate or in the past did not cooperate with the Lithuanian authorities;
  - the person has not complied with the voluntary return order and an ATD is not applicable;
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375. Austria Legal Questionnaire, Q.3.

376. Lithuania Legal Questionnaire, Q.3 and Practices Questionnaire, Q.6. These criteria are used in practice but not established in official documents.

- the asylum seeker has left Lithuania and returns to the country under the Dublin process;
- the asylum seeker during the first interview indicated that his final destination was another Member State.

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### **SWEDEN**<sup>377</sup>

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The individual has previously absconded;

- the individual has stated that he will not return voluntarily;
- the individual has acted under a false identity;
- the individual has not cooperated with the authorities in establishing his identity;
- the individual has given false information or withheld significant information;
- the individual has previously violated a prohibition of re-entering Sweden;
- the individual has been convicted of a criminal offence which is punishable with imprisonment;
- the individual has been expelled by a court due to criminal activity.

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### **UK**<sup>378</sup>

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- The individual do not have a enough close ties (for example, family or friends) to make it likely that he will stay in one place;
- the individual has previously failed to comply with conditions of his stay, temporary admission or release;
- the individual has previously absconded or escaped;
- the individual has used or attempted to use deception in a way that leads the Home Office to consider that he may continue to deceive;
- the individual has failed to give satisfactory or reliable answers to an immigration officer's enquiries;
- the individual has already failed or refused to leave the UK when required to do so.

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377. Sweden Legal Questionnaire, Q.3.

378. UK Practices Questionnaire, Q.13.

Beyond the fact that some criteria are questionable, asylum seekers or returnees may fall easily into one of these categories. Therefore, for practitioners there are difficulties to dispel doubts regarding whether there is or not a risk of absconding, which is usually considered a prerequisite for applying an alternative to detention.<sup>379</sup> The burden of proof should normally lie with the authorities who are invoking a detention ground. Jurisprudence can help to reveal the criteria used to assess the risk of absconding.<sup>380</sup> In Austria for example, in 2008, the High Administrative Court indicated the following elements as relevant: previous attempt to abscond; behaviour of the applicant; previous criminal law violations; illegal entry; illegal entry shortly after deportation; entry despite a residence ban; attempts to hinder the expulsion and escape.<sup>381</sup>

Finally, absconding does not necessarily reflect bad faith, as in many cases it may actually be caused by absence of sufficient reception conditions, lack of taking into account vulnerability or trauma and lack of information on the procedures or on administrative obligations.<sup>382</sup>

## 1.2. The necessity and proportionality requirements

As analysed above, according to international and European human rights and EU law, the lawfulness of detention is conditioned on respect for the principles of necessity and proportionality. In addition, in some Member States, such as Austria and Slovenia, the proportionality principle is enshrined in the Constitution and applies in all administrative procedures.<sup>383</sup>

In Austria and Lithuania, the national courts have played a crucial role in applying these principles in relation to detention and alternatives to detention. As stated by CSSS, our Lithuanian partners:

“[i]mpressive case law has been developed, and some Lithuanian judges, notably those working in the Svencionys district court have gained a solid experience of applying alternatives to detention. [...] The level of legal discussion usually taking place in this court reflects that experience”.<sup>384</sup>

However, in practice, most partners consulted, expressed concerns with regards to the initial quality of decision-making on both detention and ATD, especially when conducted by the national administration. In countries such as the UK or Sweden, partners underlined that authorities are failing to properly assess if detention is achieving its stated aim and whether alternatives could be used. This was reflected

379. Lithuania Legal Questionnaire, Q.32.

380. See e.g. Supreme Court (Belgium), 20 November 2013 App no P.13.1735.F; Indictment Chamber of Brussels (Belgium), 18 October 2013 App no 3577.

381. High Administrative Court (Austria), 28 May 2008 App no 2007/21/0246.

382. Lithuania Practices Questionnaire, Q.40.

383. Constitutional Court (Austria), 20 September 2011 case Vfslg.19472.

384. Question 40, Lithuania Practices Questionnaire.

in the stereotypical and non-substantiated decisions available publicly in all Member States researched. In Sweden, research conducted by the Red Cross in national decision-making concluded that the “lack of application of the principle of proportionality leads to the fact that supervision is not used to the extent intended by the legislator”.<sup>385</sup> This led the organisation to conclude also that:

“[c]learer and more detailed decisions and resolutions can contribute to higher transparency, predictability and greater uniformity in the application of the law. Therefore, a codification of the principle, which clearly sets forth that balancing interests must precede both a decision regarding a control or enforcement measure and its implementation, is desirable”.<sup>386</sup>

### 1.2.1 The obligation to conduct an individual assessment

In all Member States researched but Lithuania, there is an obligation in law to conduct an individual assessment before resorting to detention. In Lithuania, case law establishes this requirement. On 22 June 2012,<sup>387</sup> the Svencionys district Court annulled a detention decision, applying instead an obligation to report to the police on the basis that the individual had a place of residence and sufficient resources to ensure subsistence until the removal took place. In addition, the Supreme Administrative Court of Lithuania quashed a detention decision imposed on the basis of a threat to public order due to previous criminal convictions and substituted an alternative, because it considered the risk to be low because the applicant had a spouse in Lithuania and guarantees concerning the place of residence, was unwilling to return to his country of origin, and made efforts to regularise his status.<sup>388</sup>

Although the obligation to conduct an individual assessment is established by law in most countries studied, in practice there are shortcomings. In Sweden for example, “in the absolute majority of the decisions, no individual assessment is made about whether the mildest measure for the individual [...] can be employed instead of detention”.<sup>389</sup>

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385. Sweden Practices Questionnaire, Q.40.

386. Ibid.

387. Svencionys district Court (Lithuania), 22 June 2012, A-810-617/2012.

388. Supreme Administrative Court (Lithuania), 22 November 2012 App no 575-1317/2012.

389. Our partners from the Swedish Red Cross noted that decisions from the police authority were not justified whereas other authorities simply mentioned that ‘supervision’ was not sufficient (without any further argumentation). Swedish Red Cross, ‘Detention under scrutiny – A study of the due process for detained asylum seekers’ (2013) 2. As an indication, Sweden examines each year a large number of asylum applications. In 2013, the Swedish Migration Board issued 49870 decisions < <http://www.migrationsverket.se/download/18.7c00d8e6143101d166dda8/1390234104754/Avgjorda+asyl%C3%A4renden+2013+-+Asylum+desicions+2013.pdf>. During the first semester of 2014, the Migration Board received 31915 asylum applications < <http://www.migrationsverket.se/download/18.7c00d8e6143101d166d1aab/1404200266472/Inkomna+ans%C3%B6kningar+om+asyl+2014+-+Applications+for+asylum+received+2014.pdf>.

### 1.2.2. Detention as a measure of last resort

The research revealed a legal obligation to consider detention as a measure of last resort only in Austria, Sweden and the UK. In Sweden, the Aliens Act states that, in case of minors' detention, the authorities must assess the suitability of supervision for children before resorting to detention.<sup>390</sup> There is no equivalent provision for adults, as "it would be too restrictive", and a combination of: the necessity principle; the possibility of appeal; and regular follow-up "are enough to secure the rule of law and respect the personal integrity of the individual".<sup>391</sup> The Swedish Red Cross therefore calls for the introduction of an equivalent provision concerning adults, arguing that without an explicit legal requirement, the authorities will not consider whether the purposes of detention would be achieved by placing the migrant under supervision.<sup>392</sup>

In Lithuania, constitutional jurisprudence rather than law establishes the obligation to consider detention as a measure of last resort. For instance, in February 1999 the Lithuanian Constitutional Court ruled that restriction on freedom of movement must be necessary and indispensable, which means detention is a measure of last resort applicable only if the objectives of detention cannot be reached by others means.<sup>393</sup>

In Belgian asylum law, there is no explicit obligation to resort to detention only if less invasive measures cannot be applied, except in family cases.<sup>394</sup> Jurisprudence does not fill this gap. Jurisprudence regarding return considers unanimously that "no illegality can be inferred from the mere fact that the administrative authority imposes a detention measure to the third country national, despite the fact that other less coercive measures could be applied".<sup>395</sup> Furthermore, the Indictment Chamber of Brussels emphasised on 14 August 2012 that the administration does not have to explain why it did not opt for less invasive measures, if it duly motivates its detention decision.<sup>396</sup> This practice poses questions regarding the compatibility of the Belgian decision-making system with international and European law.<sup>397</sup>

### 1.2.3. The assessment of vulnerability

Vulnerability is one of the individual circumstances decision-makers should consider when examining the necessity and proportionality of detention. The particular

390. Sweden Legal Questionnaire, Q.10.

391. Ibid.

392. Sweden Practices Questionnaire, Q.44.

393. Lithuania Legal Questionnaire, Q.9. The Court issued a Resolution, making a binding determination on a point of law raised as a question by a lower court, akin to the EU preliminary ruling procedure.

394. Belgium Legal Questionnaire, Q.9.

395. Indictment Chamber of Brussels (Belgium), 14 August 2012 App no 2772; Indictment Chamber of Brussels (Belgium), 14 August 2012 App no 2773; Indictment Chamber of Brussels (Belgium), 30 October 2012 App no 3717; Indictment Chamber of Brussels (Belgium), 17 October 2012 App no 3539; Indictment Chamber of Mons (Belgium), 21 August 2012 App no 664/12; Indictment Chamber of Brussels (Belgium), 14 August 2013 App no 2760; Indictment Chamber of Mons (Belgium), 28 June 2013 App no 453/13.

396. Indictment Chamber of Brussels (Belgium), 14 August 2012 App no 2772.

397. Belgium Legal Questionnaire, Q.23.



vulnerability of an individual may impede the imposition of a detention decision as it could amount to inhuman or degrading treatment. For this safeguard to be effective, the authorities must first identify vulnerability and assess the special reception needs of an individual as mentioned in article 22 of the recast RCD.<sup>398</sup> According to our partners, there is, however, no specific identification procedure or mechanism in place to identify vulnerable asylum seekers in the 6 Member States studied here.

Vulnerability may be detected at the beginning of the asylum procedure or at a later stage. In Austria and Slovenia, a medical screening is conducted at the first stage of the procedure,<sup>399</sup> while a social inquiry to detect vulnerable applicants is undertaken in Sweden from the outset.<sup>400</sup> In Belgium, medical screening takes place in reception centres or within two days in “return houses”. In detention centres, an initial medical check is performed. However, the person will be released only if she is in danger of death or is about to give birth, or has a particularly severe medical condition which cannot be treated in the centre.<sup>401</sup>

Only Belgium and Austria have clearly outlawed the detention of minors (unaccompanied or not), with the effect of systematically placing families with children in open accommodation.<sup>402</sup> No other group is completely exempt from detention although there are legal provisions to restrict, to a greater or lesser extent, the detention of vulnerable groups. Whether these rules effectively limit the detention of vulnerable persons depends on both the efficiency of the identification procedure and the attitude of decision makers. In the Member States studied, it appears that the existence of vulnerability does not hamper detention, except in cases of extreme or “visible” vulnerability, such as unaccompanied minors and women at the end of their pregnancy.<sup>403</sup>

The UK made a political commitment to ending detention of children in the context of migration processes in 2010. Unfortunately, this practice continues, although both the number and the length of time families are subject to detention have decreased. Some families with children are held in a Short Term Holding Facility called CEDARS, which the Home Office describes as “pre-departure accommodation”. According to the government, families are only referred to CEDARS on the advice of the Family Returns Panel, an independent body of child welfare experts, and stay for no more

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398. See Chapter 1 Section 2 Part 3.6 on vulnerability.

399. Austria and Slovenia Practices Questionnaire, Q.7.

400. Sweden Legal Questionnaire, Q.6.

401. Belgium Practices Questionnaire, Q.7.

402. In Austria, the absolute prohibition of detention only concerns children under the age of 14.

403. Lithuania Practices Questionnaire, Q.40. In the case of unaccompanied minors, the question of age dispute is problematic in many of States and unaccompanied minors may be detained during this process.

than 72 hours before their departure from the UK.<sup>404</sup> In exceptional circumstances, with ministerial authority, this may be extended to one week.<sup>405</sup>

Furthermore, both Belgian and British project partners expressed concerns regarding the expansion of the practice of separating families by detaining parents without their children as a way to avoid the detention of children. According to BID, UK courts have found in two cases that parents were unlawfully held in detention and separated from their children. BID is also aware of cases where legal proceedings were commenced around this topic but the government paid tens of thousands of pounds in compensation prior to the cases reaching trial.<sup>406</sup>

In Lithuania, Article 114 (3) of the Aliens law states that “[v]ulnerable persons and families with minor aliens may be detained only in an extreme case, taking into consideration the best interests of the child and vulnerable persons”. Even if there is a list of vulnerable asylum seekers established in law, national legislation does not explicitly require the authorities to refrain from detaining or to initiate the imposition of an alternative to detention. In practice, there are cases where unaccompanied minors and families with children were detained:

“[t]his is due firstly to the fact that the guardianship system for UAMs is not clearly articulated and thus it is not sufficiently clear for officials what to do with an UAM once she is identified on the territory. Secondly, there is a lack of understanding/common approach as to what to do with children accompanied by parents. The options are: a) to separate from parents or b) to detain the entire family with adults. The problem is that there is a lack of infrastructure at the Foreign Registration Centre, which would allow for accommodating families and would be adapted for family/children needs”.<sup>407</sup>

However, as in Lithuania the judiciary is responsible for approving each detention order and is competent to impose an alternative scheme instead, vulnerability was an important factor in some cases in deciding to impose an alternative. For instance, the Svencionys district court on 18 April 2013 considered that detention of the applicant with his 4 minor children and his pregnant wife was not reasonable.<sup>408</sup> The Court released the family without applying an alternative to detention.

On numerous occasions, the British authorities have failed to take vulnerability into account in the decision-making process on detention and alternatives to detention,

404. See Immigration Enforcement, Information about Cedars, Immigration Enforcement’s pre-departure accommodation near Gatwick Airport for families, February 2014 < <https://www.gov.uk/government/publications/guidance-on-cedars-pre-departure-accommodation/cedars-pre-departure-accommodation-information-accommodation>.

405. Ibid.

406. BID, ‘Fractured Childhoods’, p19. [www.biduk.org/download.php?id=236](http://www.biduk.org/download.php?id=236)

407. Lithuania Legal Questionnaire, Q.32.

408. Svencionys district Court (Lithuania), 18 April 2013 A-540-617/2013.

according to the 2012 HM Inspectorate of Prisons report.<sup>409</sup> The main mechanism to identify seriously ill persons and victims of torture in detention in the UK is Rule 35 of the Detention Centre Rules 2001.<sup>410</sup> Under this instrument, the medical practitioner must report to the manager of the detention centre any case of a detained person whose health is likely to be seriously affected by continued detention, any detained person suspected of having suicidal intentions and any detained person who might have been a victim of torture. The purpose of Rule 35 is “to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention”.<sup>411</sup>

The effectiveness of this rule is disputed. Only 6% of the Rule 35 reports made in the third quarter of 2012 resulted in a detainee being released.<sup>412</sup> This leads to judicial challenges. For example, the High Court found in May 2013 that 4 victims of torture were unlawfully detained by the Home Office.<sup>413</sup> Furthermore, identification of victims of trafficking is an issue of concern. BID is aware of cases detained whereas the Home Office recognised that there were reasonable grounds to believe that the persons were victims of trafficking.<sup>414</sup>

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409. UK Practices Questionnaire, Q.15, which makes reference to the HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration’s report. HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration, ‘The effectiveness and impact of immigration detention casework’ (December 2012).

410. The Detention Centre Rules 2001 < [http://www.legislation.gov.uk/uksi/2001/238/pdfs/uksi\\_20010238\\_en.pdf](http://www.legislation.gov.uk/uksi/2001/238/pdfs/uksi_20010238_en.pdf); See also Guidance on Detention Rule 35 Process < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257437/rule35reports.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257437/rule35reports.pdf).

411. Home Office’s Enforcement Instructions and Guidance, Chapter 55.8A, < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/307995/Chapter55.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307995/Chapter55.pdf).

412. UK Practices Questionnaire, Q.14.

413. Case R. v SSHC ([2013] EWHC 1236 [Admin]).

414. UK Practices Questionnaire, Q.14.

### **PRACTICAL EXAMPLE OF STATE PRACTICE ON ADMINISTRATIVE DECISION-MAKING: UK GUIDELINES ON FACTORS INFLUENCING A DECISION TO DETAIN<sup>415</sup>**

The following factors must be taken into account when considering the need for initial or continued detention.

- What is the likelihood of the person being removed and, if so, after what timescale?
- Is there any evidence of previous absconding?
- Is there any evidence of a previous failure to comply with conditions of temporary release or bail?
- Has the subject taken part in a determined attempt to breach the immigration laws (e.g. entry in breach of a deportation order, attempted or actual clandestine entry)?
- Is there a previous history of complying with the requirements of immigration control (e.g. by applying for a visa, further leave, etc)?
- What are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? If the dependant is a child or vulnerable adult, do they depend heavily on public welfare services for their daily care needs in lieu of support from the detainee? Does the person have a settled address/employment?
- What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?
- Is the subject under 18?
- Does the subject have a history of torture?
- Does the subject have a history of physical or mental ill health?

In conclusion, vulnerability often loses the battle with the perceived necessity to detain.<sup>416</sup> Usually only extreme or visible vulnerability, such late stage pregnancy or minority, are taken into account. Other individuals with vulnerable profiles are deprived of their liberty, whereas their placement in non-custodial facilities would be more human rights compliant and adequate to address the reasons detention is seen as necessary. In addition, guidelines for early identification of vulnerable applicants and relevant training can assist in avoiding detention of particularly vulnerable

415. Enforcement Instructions and Guidance, 'Factors influencing a decision to detain' Chapter 55.3.1.

416. Lithuania Practices Questionnaire, Q.40.

asylum seekers.<sup>417</sup> In this respect, the PROTECT Questionnaire for early identification of victims of torture may be a useful tool.<sup>418</sup>

### 1.3. Right to an effective remedy

The right to an effective remedy is an important guarantee to address potential shortcomings in the initial decision-making process. The percentages of initial detention decisions that are found unlawful on appeal attest to this. In Austria, around 30% of the detention decisions appealed were found unlawful in 2013<sup>419</sup> because the proportionality assessment was inadequate.<sup>420</sup> In addition, in the UK, the fact that significant numbers of people are detained and subsequently released on bail raises serious questions about why they were detained in the first place, and whether all alternatives were considered when the decision to detain was made, and as detention progressed.<sup>421</sup> From April 2012 to March 2013, the First-tier Tribunal (Immigration & Asylum Chamber) received 11976 applications for release on bail. Of these 4302 (35.9%) were withdrawn before or during the hearing, meaning no decision was taken.<sup>422</sup> Release on bail was refused in 5010 of the cases heard, and granted in 2591.<sup>423</sup>

Regarding the remedies that are available at national level, all Member States provide for the possibility to contest detention before courts and tribunals. In Belgium and the UK, in addition to a judicial remedy, administrative appeal is possible.<sup>424</sup> In the UK, the judicial challenge is by way of bail where the argument is usually that detention (while lawful) was the wrong choice, in light of the alternatives available and the presumption against detention.<sup>425</sup>

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417. See for instance guidelines for the age assessment in the UK < [https://www.govuk/government/uploads/system/uploads/attachment\\_data/file/257462/assessing-age.pdf](https://www.govuk/government/uploads/system/uploads/attachment_data/file/257462/assessing-age.pdf). For further information on age assessment, see the report from EASO, 'Age assessment practice in Europe' (December 2013) Chapter 3 on age assessment tools and methods; For developments relating to the identification of victims of trafficking in human beings, see the study from the EMN, 'Identification of victims of trafficking in human beings in international protection and forced return procedures' (March 2014).

418. PROTECT Questionnaire < <http://protect-able.eu/wp-content/uploads/2013/01/protect-questionnaire-english.pdf>; The Istanbul Protocol may be also useful for the identification of victims of torture.

419. Source: Internal Statistics from our NGO partner Diakonie Flüchtlingsdienst.

420. Austria Practices Questionnaire, Q.5.

421. UK Practices Questionnaire, Q.15.

422. HM Courts & Tribunals Service Presidents' Stakeholder Group, 'Bail management information Period April 2012 to March 2013' (2013).

423. Ibid.

424. UK Legal Questionnaire, Q.27 and Belgium Legal Questionnaire, Q.24.

425. UK Legal Questionnaire, Q.28.

## FOCUS ON BAIL PROCEEDINGS IN THE UK: EXTRACTS FROM THE BAIL GUIDANCE FOR JUDGES<sup>426</sup>

*When is a first-tier tribunal judge likely to grant bail?*

§4. In essence, a First-tier Tribunal Judge will grant bail where there is no sufficiently good reason to detain a person and lesser measures can provide adequate alternative means of control. A First-tier Tribunal Judge will focus in particular on the following five criteria (which are in no particular order) when deciding whether to grant immigration bail.

- a. The reason or reasons why the person has been detained.
- b. The length of the detention to date and its likely future duration.
- c. The available alternatives to detention including any circumstances relevant to the person that makes specific alternatives suitable or unsuitable.
- d. The effect of detention upon the person and his/her family (see para 20 below).
- e. The likelihood of the person complying with conditions of bail.

In practice it is often not possible to separate one issue from the others and First-tier Tribunal Judges will need to look at all the information in the round.

§5. A First-tier Tribunal Judge's power is simply to grant bail, which is itself a restriction of liberty. The judge has no power to declare the detention unlawful and give any relief if it is considered to be; such matters need to be decided in the Administrative Court or in a claim for damages. Given the wide-ranging powers of the immigration authorities in relation to the detention of non-nationals, First-tier Tribunal Judges should normally assume that a person applying for immigration bail has been detained in accordance with the immigration laws. However, it will be a good reason to grant bail if for one reason or another continued detention might well be successfully challenged elsewhere.

In all Member States examined, there is no specific procedure to object to placement in detention instead of the imposition of an alternative, but such arguments can be raised before judicial or administrative authorities that assess the legality of detention or a request for bail. In Austria, Sweden and the UK administrative authorities undertake periodic *ex officio* review of detention orders. The resulting decisions can be appealed before a court. In Belgium, Lithuania<sup>427</sup> and Slovenia there is no periodic review foreseen, but it can be initiated on the application of the detainee. In all three

426. Presidential Guidance Note No 1 of 2012, 'Bail guidance for judges presiding over immigration and asylum hearings' (June 2012) < <https://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/bail-guidance-immigration-judges.pdf>.

427. In Lithuania Article 118(1) of Aliens law provides that : "Upon the cessation of the grounds for the alien's detention, the alien shall be entitled to, whereas the institution which initiated the alien's detention must immediately apply to the local court of the location of the alien's residence with an application for review of the decision to detain the alien". Thus, although there is no periodic review, the detention review procedure can be initiated also by the institution who ordered detention, if they establish that the detention grounds have ceased.

Member States, judicial authorities may perform such a review. During such reviews the judicial or administrative authorities also consider whether alternative measures should be applied.

An area of focus is whether Member States foresee a procedure under national law to allow asylum seekers to object to being subjected to an alternative to detention. In Austria, a complaint was introduced before the Federal Administrative Court in January 2014.<sup>428</sup> In Belgium, because asylum seekers placed in a return home are, legally speaking, detained,<sup>429</sup> the procedure available is the review of the detention order before judicial authorities.<sup>430</sup> In Lithuania, asylum seekers can object to the assignment of the alternative measure during the court hearing where that assignment is discussed, or during an appeal to a district court against an administrative order assigning an alternative to detention.<sup>431</sup>

In Slovenia, where asylum seekers under what the authorities consider to be an alternative to detention are deprived of their liberty in the Asylum Home, the legal avenue to challenge the imposition of this measure is identical to that used to challenge detention.<sup>432</sup> Regarding alternatives to detention in the framework of return, Slovenian law does not prescribe a specific procedure but does not prevent an appeal, which can be made under the General Administrative Procedure Act.<sup>433</sup> In practice, that has not happened yet.<sup>434</sup> In Sweden, asylum seekers may use the procedure for challenging detention to challenge a supervision order as well. Finally, in the UK, there is the general procedure of 'representations to the administrative authorities' against alternatives to detention, by for example seeking modification of bail conditions such as mandatory place of residence, frequency of reporting requirements, etc.<sup>435</sup> However, this procedure is regulated under the Presidential Guidance for First Tier Tribunal judges, not primary legislation.<sup>436</sup>

There is periodic and individual review of alternative to detention measures in Sweden. It is undertaken by administrative authorities but can be appealed in court. In Austria, there is no explicit provision as in the case of detention. Arguably however, national legislation which obliges administrative authorities to render a procedural order if the application of more lenient measures is no longer considered necessary entails

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428. Austria Legal Questionnaire, Q.24.

429. However, in practice, they benefit from freedom of movement with restrictions, thus the scheme constitutes an alternative to detention.

430. Belgium Legal Questionnaire, Q.27.

431. Lithuania Legal Questionnaire, Q.27.

432. Slovenia Legal Questionnaire, Part C.

433. Ibid.

434. Slovenia Practices Questionnaire, Part D.

435. UK Legal Questionnaire, Q.30. This is an administrative procedure whereby the person or her representatives can make representations for release (temporary admission/release or bail) to the Immigration Officer or Chief Immigration Officer or the Home Office (depending on which part of the system is responsible for the detention decision).

436. Presidential Guidance Note No 1 of 2012, 'Bail guidance for judges presiding over immigration and asylum hearings' (June 2012).



the obligation of such review.<sup>437</sup> As these provisions are recently adopted, there is no relevant practice yet.<sup>438</sup>

In Belgium and Slovenia, the same review rules apply as for review of the detention order. Legislation in Lithuania does not establish a separate procedure to review assigned alternatives to detention. However, the Aliens' Law provides that, in deciding on an alternative measure, the court must establish a time limit for its application.<sup>439</sup> The institution which first approached the court demanding an alternative to detention should apply again for its extension.<sup>440</sup> The applicant cannot petition the court on this issue.

The following box contains judicial practice from Lithuania on the application of the necessity and proportionality principles on detention decision-making in concrete cases.

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437. Austria Legal Questionnaire, Q.25.

438. Ibid.

439. Lithuania Legal Questionnaire, Q.28.

440. Ibid.

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## JUDICIAL APPRECIATION OF PROPORTIONALITY IN LITHUANIA IN ASYLUM AND RETURN CASES

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- *(Decision A-270-617/2012 of the Svencionys district court, 03/02/2012)*  
In considering the prolongation of detention, the Court ruled that detention would not be proportionate because the identity of the person was established and there was no evidence that he had failed to cooperate in establishing his legal status or posed a risk to national security or public order. It decided to apply periodic registration at the police office.
- *(Decision A-624-617/2012 of the Svencionys district court, 27/04/2012)*  
The court decided to apply an alternative measure (registration at police office) considering that the applicant had three minor children who needed to stay with their mother and that her spouse was living in Lithuania.
- *(Decision A-540-617/2013 of the Svencionys district court, 18/04/2013)*  
The court reviewed the detention of an applicant with minor children who were returned to Lithuania, under the Dublin Regulation and found that detention was not reasonable. It took into account the vulnerability of the applicant (a family with four minor children and a pregnant mother) and decided that they should be released from detention without applying alternative measures. This departed from the previous practice of the Supreme Administrative Court of Lithuania to apply detention in Dublin cases whereby the applicants were considered to have misused asylum procedures and to have obstructed the adoption of final decisions. The court stated that each case should be examined individually.
- *(Decision N<sup>575</sup> – 1317/2012 of the Supreme Administrative Court, 22/11/2012)*  
The applicant appealed against detention ordered by the lower-instance court, while the authorities claimed he posed a threat to public order due to a previous conviction. The Supreme Administrative Court imposed an alternative instead of detention because it considered the risk to public order to be low. Furthermore, the applicant had a spouse in Lithuania, guarantees concerning his place of residence, was unwilling to return to his home country and made efforts to regularise his legal status in Lithuania.
- The Supreme Administrative Court emphasised the change of circumstances since the adoption of the first-instance court decision on detention and ordered an alternative measure. However, for lack of evidence confirming the family links to his sponsor, the Supreme Court imposed two alternatives: trusting the foreigner

to the guardianship of another person and reporting to a police office by telephone. (Decision N<sup>575</sup> – 52/2013 of the Supreme Administrative Court, 15/05/2013)

- Decision of the Supreme Administrative Court of 21 July 2014 in administrative case No. N662 - 85/2014

The Court assigned an alternative measure (accommodation in the FRC) and considered detention unnecessary even though the applicant was abusing the asylum procedure. The Court took into account that the applicant was cooperating in establishing his identity and referred to the case of *F.N. v. Sweden* (decision of 18-04-2013) where the ECtHR ruled that in the absence of identity documents, other documents could also be used to determine identity. The Lithuanian court was of the opinion that even if copies of documents do not serve as formal proof of identity, they cannot be disregarded and it would not be possible to reach the unambiguous conclusion that identity is not established. Thus detention would not be proportionate to the objective sought by the law.

# PRINCIPLES OF DECISION-MAKING ON DETENTION AND ALTERNATIVES TO DETENTION

GENERAL ASSESSMENT OF THE INDIVIDUAL  
PROFILE (NEEDS AND RISKS ASSESSMENT)

Is there a ground  
for detention?

**NO.**  
This means that there  
is also no legal basis to  
impose an alternative.

**YES.**  
Can the aims pursued be achieved  
through a less coercive measure,  
according to the individual profile?

**NO.**  
Detention is imposed.  
It can be challenged  
and should be regularly  
reviewed.

**YES.**  
The individual is subject  
to an ATD.

The type of alternative and the variation  
is decided on the basis of the individual  
profile. It can be challenged and should  
be regularly reviewed.

## 2. SCHEMES CURRENTLY USED AS ALTERNATIVES TO DETENTION

Article 8§4 of the recast Reception Conditions Directive mentions:

- regular reporting to the authorities;
- the deposit of a financial guarantee;
- an obligation to stay at an assigned place.

However, this is a non-exhaustive list. Member States already use some other types of schemes, and remain free to create measures which best fit the local context. Alternatives can be used in combination and different schemes could be applied to the same person depending on her individual situation and her degree of compliance with the obligations attached to it. Finally, in the EU legal framework, alternatives to detention need not entail restrictions on the freedom of movement. Individuals can be placed in the community with dedicated follow-up (so-called ‘community supervision’).

In this study we have only covered those schemes which have been operationalised in the Member States where we conducted research. These have been classified into the following categories:

1. reporting;
2. sponsorship by the citizen of the country or by a long-term resident;
3. personal financial guarantee;
4. designated residence (which includes: designation to reception centres for asylum seekers, publicly-run centres with or without a coaching component, centres for unaccompanied minors and private accommodation) and finally
5. electronic tagging.

All countries researched have included alternatives to detention in their national law. However, they are, on the whole, poorly regulated, except for the UK and Belgium. In Belgium, the applicable rules on return houses are described in detail in a Royal Decree,<sup>441</sup> i.e. the purpose of the measure, the role of the coach, the material conditions and the sanctions in case of non-compliance. The UK, on the other hand, is the only country where detailed policy guidelines on how to apply measures, such as reporting, have been issued. In most of the countries researched, we found that both the choice of the measure and the details of its implementation are left entirely to the decision-making body, i.e. the administrative authorities or the courts. In Sweden for example, no public document (law or guidelines) specifies which criteria may be used to determine when supervision is sufficient or detention is necessary. Similarly, in Austria, our partners noted that the absence of minimum standards and instructions led to major disparities in the practical implementation of ATD.

441. Particularly the Royal Decree of 14 May 2009 establishing the regime and the operating rules applicable to the housing units as referred to in Article 74/8, § 2 of the Act of 15 December 1980 on access to the territory, residence, establishment and removal of aliens, *Moniteur belge*, 27 May 2009, p. 38857 < [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=2009051406&table\\_name=loi](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2009051406&table_name=loi).

Alternatives to detention are developed more in return than in asylum procedures, either because asylum seekers are rarely detained (in countries such as Sweden) or because of national specificities. These disparities can also be explained by the fact that the Return Directive, which includes an obligation to examine alternatives to detention for individuals in a return procedure, entered into force in 2010. While Belgium, Sweden, the UK and Austria apply their alternative measures to asylum seekers and migrants alike, Slovenia and Lithuania's practice differs considerably between these two groups. Lithuania mainly allows migrants with specific links to the country (cultural, historical, and linguistic) to remain in the community while addressing issues related to their legal status. Similarly, Slovenia has adopted a more lenient policy on return vis-à-vis citizens from ex-Yugoslavia.

Most existing alternatives to detention are applicable to all groups (gender, age, asylum seekers at the border, in Dublin procedures, people in return procedures). However, specific alternatives are increasingly being developed to avoid the detention of children in both asylum and return procedures. Open accommodation options for families with minor children who are liable for detention are currently in place in Belgium and Austria. In the UK there is a specific procedure for families: the "family returns process". However, the approach adopted in the implementation of schemes for families, and particularly the level of individual follow-up, is not the same in these three countries.

The research found that very few external actors – private or non-governmental organisations- were involved in implementing these schemes. The UK is the only country using the services of a private company to subcontract aspects of the family returns and electronic monitoring process. In the case of electronic monitoring, a private company is responsible for the operational aspects of tagging migrants and asylum seekers but if the person submitted to this scheme breaks her curfew conditions, the company reports this to the Home Office which decides what action to take. In most countries, the role of NGOs is to provide services (legal, social, medical and psychological support as well as in kind and financial assistance) to both asylum seekers and migrants placed in certain structures.

Regarding the maximum length for the imposition of an alternative to detention, Belgium, Lithuania and Slovenia equate this with the maximum permissible period for detaining an individual. Third country nationals can be subject to an ATD for longer periods than the maximum permissible period of detention in Sweden. In Austria, there are no explicit time limits for the application of alternatives for detention enshrined in law but it appears that, in practice, a person can be submitted to an ATD for a maximum period of 20 months. In Sweden, as there is no time limit for the "supervision scheme" in law, it is often applied once the maximum detention period has been reached. In the UK, there is no maximum period in law, for detention or for alternatives.

**Table 1 - Types of alternatives to detention in research countries**

	AUSTRIA		BELGIUM		LITHUANIA		SLOVENIA		SWEDEN		UK	
	Law	Practice	Law	Practice	Law	Practice	Law	Practice	Law	Practice	Law	Practice
Reporting	x	x			x	x	x only return	x only return	x	x	x	x
Financial guarantee	x										x	x
Guarantor / sponsor					x	x only return		x			x	x
Surrender document									x	x		
Electronic tagging											x	x
Designated residence (in private housing)			x only return				x only return	x only return			x	x
Designated open centre (for asylum seekers and returnees)	x	x	x	x only families	x only asylum seekers	x only asylum seekers	x House Arrest	x House arrest			x only return	

## 2.1. Reporting

An obligation to report regularly to the authorities is the most frequently applied alternative to detention, implemented in all countries studied except Belgium. Reporting consists of an obligation to present oneself to the authorities at specified times. Reporting can even be performed via telephone, a scheme that was formerly in place in the UK and is also mentioned in Lithuanian law.<sup>442</sup> Reporting is often combined with designated residence or surrender of documents. It can be performed in local representations of the migration authority (Sweden and the UK have decentralised offices of, respectively, the Migration Board and the Home Office) or to police stations. In the UK, in some cases, unaccompanied children are also able to report via their social worker, whom the Home Office will contact to check that the child is living at her designated address and maintaining contact with the social worker.

Although not currently applied in practice, telephonic voice recognition was envisaged to address situations such as where the person had difficulties travelling to the reporting centre, either because of their personal situation (for example those who are ill, disabled persons or pregnant women) or because of distance from their residence. In its policy, the UK Home Office mentions that telephone reporting is used mainly with those “where the risk of non-compliance is lower” and is applied “in conjunction with physical reporting at reporting centres”.

442. Art.115 of the Lithuanian Alien’s law mentions the possibility to “report by means of communication at certain time to the territorial police Office his/her place of stay”.



The frequency of reporting can range from once a day to once or a month or even less. In Slovenia, Lithuania, Sweden and Austria, the authorities or the courts deciding on the alternative measure have a large margin of appreciation to decide the frequency of reporting.

Although it is the most widely used alternative to detention, little research and evaluation has been conducted on the efficiency and impact of reporting schemes. In the UK, some NGOs examined how asylum seekers and migrants perceived these measures. Research issued in 2007 by Refugee and Migrants' Forum on the implementation of reporting obligations in Manchester found that "some people who were reporting monthly felt reporting was just a part of the law and no problem". However, the research also revealed that:

"[m]any people recounted experiences of depression, anxiety and fear as a result of going to report at Dallas Court particularly because of the possibility of being detained [...] There was concern over the length of time people were asked to continue reporting without review. Several people mentioned reporting for three years or more, one person had been reporting for six years. People felt that they should be recognised as low risk if they report for long periods and should report less often or not at all".<sup>443</sup>

Other research points out the difficulties posed by the cost of transportation to the reporting venue and the limits that reporting places on an individual's choice of professional and other activities as one is restrained to only those which allow enough flexibility to be able to comply with the requirements.<sup>444</sup> All emphasise that a major source of stress linked to reporting comes from the possibility of being (re)detained when presenting one's self to the police. Finally, BID expressed concerns about the way these measures were applied in practice – specifically, why some people were required to report more frequently than others, and in some cases, the fact that the authorities refused requests to reduce reporting frequency, even when objective justification was provided.<sup>445</sup>

Reporting is one of the cheapest and least constraining ways for States to monitor individuals they consider liable for detention, especially if they live in their own accommodation. However, its level of coerciveness can vary considerably depending on how it is applied. Important factors include the environment (if reporting takes place at an administration or at a police station); the frequency (daily reporting poses greater challenges than weekly or monthly); and how the authorities impose sanctions for non-compliance. In Sweden for example, the authorities show some

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443. Refugee and Migrant's Forum, 'Report on the Refugee & Migrant's Forum consultation into people's experiences of the UK Immigration Service at Dallas Court reporting centre and short-term holding facility October 2006 – January 2007' (2007).

444. Chris, 'My Local Border Post' (Border Criminologies, 20 January 2015) < <http://bordercriminologies.law.ox.ac.uk/my-local-border-post/>; BID and The Children's Society, 'Last Resort or First Resort: Immigration detention of children in the UK' (2011) 87-88.

445. UK Practices Questionnaire, Q.19 Part on Reporting Requirements.

flexibility in applying sanctions if the person has a valid explanation for not reporting. Similarly in the UK, a person may contact the Home Office if he is unable to report.<sup>446</sup> Reasons considered valid by the guidance note include medical reasons and asylum interviews.<sup>447</sup>

Furthermore, in countries where reporting events also serve the purpose of distributing financial support, such as the UK and Sweden, the adjournment of an event should not unduly sanction the person by depriving her of her allocation.<sup>448</sup>

To be compatible with the fundamental rights of asylum applicants, as required by the Recast RCD,<sup>449</sup> a reporting system should be regulated precisely in law,<sup>450</sup> further developed by policy instructions if necessary, and include guidance on whom to apply it to and at what frequency. Daily reporting could potentially infringe rights such as the right to family life. In line with the principle of proportionality, high frequency reporting should only be applied exceptionally, bearing in mind the individual profile including any vulnerability. To this end, special measures should be developed for vulnerable persons. Such individuals could for example be exempt from having to report physically (through voice recognition) or at least be subjected to a low frequency of reporting. The system should also enable the modulation of the reporting frequency according to the compliance of the individual, especially if reporting is applied for a long time. Finally, the State should cover travel costs to the reporting centre, as the UK does for those eligible for asylum support, and individuals should be informed of this right.<sup>451</sup> Additionally, according to BID, it is important to provide child care for parents who must report, so the child does not have to undergo this experience.

Specific reporting sessions may not be necessary if the asylum seeker has regular contacts with the administration through the procedure (to renew documentation, conduct the asylum interview or receive financial allowances). Adding reporting requirements to regular appointments could constitute an unnecessary burden. This is particularly the case where the asylum seeker or returnee is in a reception centre managed by the State. In this case, the State probably would not need to complement it with a reporting system as the person is traceable from the outset. In Sweden for example, asylum seekers are followed by both a reception and a procedure case officer, who are representatives of the Migration Board, until their case is resolved. Our partners noted that one reason supervision is not used extensively is that the

446. In the case of the UK, BID noted that it was, in practice, difficult for individuals, especially when unrepresented by a lawyer, to correct mistakes by the Home Office on alleged failure to report.

447. Home Office, 'Enforcement Instructions and guidance - Contact Management', Chapter 22 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/269986/chapter22acontactmanagement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269986/chapter22acontactmanagement.pdf).

448. UK Practices Questionnaire, Q.27.

449. See Recital 20 and Art. 8, recast RCD.

450. See Art. 8§4, recast RCD.

451. Travel expenses are reimbursed when the person lives more than 3 miles away from the Contact centre and when the person is entitled to Asylum support. For more details see Home Office, 'Enforcement Instructions and guidance - Contact Management', Chapter 22. In practice though, research has shown that asylum seekers were not always aware of this right and that individual reporting needed to improve their translation facilities and complaints processes. See UK Practices Questionnaire, Q.19 and Q.42.

asylum and reception system is organised around regular meetings with the authorities and additional reporting would be superfluous in most cases. As pointed out in the UNHCR Detention guidelines, overly onerous reporting conditions can lead to non-cooperation and set up individuals willing to comply to instead fail.<sup>452</sup>

## **2.2. Sponsorship by a citizen of the country or by a long term resident**

The second most frequently used alternative to detention is to place the person liable for detention under the care of a sponsor or a guarantor. This can be required by the authorities from the outset or as a condition for release. In the UK, the system of bail with “sureties” in the immigration setting is only applied to detainees and is standard practice in both asylum and return procedures. In both Lithuania and Slovenia, the sponsorship system is used in the return framework and can be applied independently of release.

In all three countries, the guarantor needs to hold the nationality of the host country or to be a long-term resident or have a residence permit. In most cases, the existence of family ties between the applicant and the “sponsor” is positively assessed. In Lithuania, only a few cases were reported when non-relatives, namely the Caritas Shelter in Vilnius and the Orthodox monastery of the Holy Spirit, took responsibility for sponsoring and accommodating a foreigner.<sup>453</sup> In the latter case, the Foreigners’ Registration Centre approached the court with the monastery’s letter confirming its readiness to receive the person. In all other judgments, the Lithuanian courts granted release on the basis of family relations or, if there was insufficient evidence to establish family links, ordered it in combination with reporting.<sup>454</sup> In the UK, the role of the sponsor could be undertaken by friends, family members or other contact persons, such as a detention visitor who has been supporting the person. The detainee can also present several sureties to strengthen her application. A surety needs, however, to meet certain criteria as stated in the bail guidance for judges:

“[a] surety who has no immigration status, regular address, means of subsistence or knowledge of the applicant may well be unsuitable to act as such, as will a surety who has criminal convictions that are not spent”.<sup>455</sup>

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452. UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) Annex A 41.

453. Lithuania Legal Questionnaire, Q.32.

454. Lithuania Legal Questionnaire, Q.19.

455. Presidential Guidance Note No 1 of 2012, ‘Bail guidance for judges presiding over immigration and asylum hearings’ (June 2012), para 42.

## WHAT IS REQUIRED FROM A SPONSOR OR SURETY? THE CASE OF LITHUANIA, SLOVENIA AND THE UK

In Slovenia and Lithuania, the sponsor has to demonstrate that they can provide for the third country national's accommodation and daily subsistence. The sponsor has to submit a certificate of the registry regarding the property and a consent form approved by a notary that he agrees to take care of the third country national. In Slovenia, the sponsor also has to produce a letter guaranteeing that he will provide accommodation and cover the costs of living in Slovenia including medical expenses, costs of returning to the country of return, potential cost of accommodating the alien in the Alien's Centre or the Asylum Home and potential costs of deportation. The sponsor may also be asked to provide further documents substantiating their statements (for example, bank statements). In both countries, there are no provisions on administrative or criminal charges against the sponsor if the third country national absconds. However, this scheme can be combined with reporting or police visits to the sponsor's home.

In the UK, the bail system requires elements from the sponsor – called “surety” – additional to the proof that he can meet the person's needs. Unlike Slovenia or Lithuania, a surety in the UK need not necessarily agree to house the detainee.<sup>456</sup> The surety may also provide accommodation. Alternatively, accommodation may be provided by another individual or by the Home Office in the form of Section 4 (1)(c) bail accommodation.<sup>457</sup> Sureties are however financial guarantors who agree to be bound by a sum of money which may be forfeited in part or entirely if the detainee fails to report as required.

According to BID, the surety, while choosing the amount of money they wish to be bound by, has to prove that the amount is significant relative to their means, and would cause them hardship if forfeited.<sup>458</sup> The surety must also show that they could pay the forfeit if required. The Tribunal has the power to bind the surety in full or in part to forfeit the amount they have offered if the ex-detainee fails to report as required. This decision will be influenced by the level of responsibility the surety is considered to have for the failure to report, and the steps taken by the surety to ensure compliance

456. The surety may provide accommodation, but alternatively it may be provided by another individual or indeed by the Home Office in the form of Section 4(1)(c) bail accommodation. This point is also clarified by the Presidential Guidance Note No 1 of 2012, 'Bail guidance for judges presiding over immigration and asylum hearings' (June 2012), para 40 which stipulates that: 'A surety need not reside at the same address as the applicant'. For example, for 2013, 53% of BID's bail clients were housed by the Home Office on release.

457. See also Presidential Guidance Note No 1 of 2012, 'Bail guidance for judges presiding over immigration and asylum hearings' (June 2012), para 40.

458. See BID, 'How to get out of detention: a free guide for detainees' (2013). In BID's view the amount of any financial guarantee should not be viewed in absolute terms but rather in relation to the means of the surety. See also Presidential Guidance Note No 1 of 2012, 'Bail guidance for judges presiding over immigration and asylum hearings' (June 2012), para 41 which notes that 'confidence in a surety may be increased by the amount of the recognisance offered that should remind the surety of the principal duty'.

and to report non-compliance.<sup>459</sup> According to BID's 2013 research, the recognisance offered ranged from £50 to £6000, and was, on average, £817.

This system is beneficial for applicants with family or community links in the host country. It enables the applicant to stay out of detention and to remain in a familiar environment. In all 3 countries where it is applied, authorities report a low rate of absconding. From the point of view of the authorities, as it is usually combined with the obligation for the sponsor to take charge of all expenses related to the applicant, sponsorship is a cost-free measure. Sponsorship is likely to be easier to apply in countries with large immigrant communities. It may also be easier for foreigners in a return procedure to find a sponsor, as they have been longer on the territory than asylum seekers. This measure can therefore be discriminatory against newly arrived applicants with fewer links in the country. Furthermore, previous research has raised the risks of exploitation inherent in the dependency between the applicant and the "sponsor", especially when there is no pre-existing link between the parties.<sup>460</sup>

A more flexible interpretation of who can be a sponsor coupled with the development of an institutionally organised system of sponsorship would help more people benefit from this measure and address the gaps in the system. The involvement of independent third parties could facilitate the process and ensure more transparency. For example, BID provides legal support and representation to detainees to be released on temporary admission or bail. The Canadian Toronto Bail Program (TBP) presents an example that could be emulated:

"[i]t is described by its director as 'professional bail' in contrast to the more ad-hoc community models in Canada, where diaspora groups or community organisations may post bail or offer their names as guarantors for particular individuals. The TBP operates differently to normal bond/bail systems in so far as no money is paid over to the authorities to secure the release of any migrants from detention under the programme, and no guarantee of compliance is signed. Instead, the TBP, under an agreement with the [Canadian Border Services Agency], acts as the bondsperson for particular individuals who could not otherwise be released. The TBP accepts both asylum applicants as well as persons pending deportation".<sup>461</sup>

Additionally, making some financial and material support available for those asylum seekers who wish to live outside the reception system would facilitate the development of such an alternative as it would be less onerous on the sponsor to take full responsibility for the applicant. As mentioned above, Member States bound by the

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459. BID, 'How to get out of detention: a free guide for detainees' (2013).

460. A. Edwards, UNHCR, 'Back to Basics: The Right to Liberty and Security of Persons and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' (April 2011) 60.

461. Ibid 57; C. Costello and E. Kaytas, UNHCR, 'Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva' (June 2013) 31.

RCD can opt to fulfil their obligations vis-à-vis asylum seekers on their territory by providing accommodation and services solely inside State-run reception centres. However, alternative solutions could be developed to allow an applicant submitted to an alternative to detention to choose to live in the community with the financial and material support of a sponsor and of the State.

Finally, to address the risk of discrimination, Member States should not rely only on this possibility but should develop alternative systems for those who do not have pre-existing links in the country. In that respect, a positive feature of the British system is that bail can be granted without a surety and therefore release is not dependent entirely on the existence of family or other social links with the UK.<sup>462</sup> Furthermore, the detainee may ask for social housing while in detention and be released to an address provided by the State.

### 2.3. Personal financial guarantee

The possibility of requesting the deposit of a financial amount which would be forfeited if the person absconds is only put in practice in the UK but is mentioned as well in Austrian law. In the UK, the bail application form allows the detained applicant to agree to be bound by a sum of money for their own recognisance. In practice, many detainees have very limited or no means, and may only be able to offer small sums, as little as £5. In Austria, the Ordinance implementing the Aliens Police act, which mentions the possibility of a financial guarantee,<sup>463</sup> also specifies that the amount has to be decided in each individual case and has to be proportionate. As it is not used in practice, it is difficult to draw conclusions on how this measure would be applied in Austria.<sup>464</sup>

This system should not be discriminatory in its application by benefitting only those who can afford it. It is therefore important that the sum is proportional to the means of the applicant. If a person has made a financial deposit, the person needs to understand how it can be recovered.<sup>465</sup> Civil society actors can help in this process, for example by helping to guide bailees through sometimes complex administrative processes.

462. 46% of BID's represented clients in 2013 were bailed without a surety.

463. There is a provision in law on the maximum amount of the deposit (2 x 853.73 € = 1717.46 €). The provision refers to the Act on general social insurance which mentions a certain amount also used as a basis for calculation for various social insurance benefits.

464. An interesting parallel can be made with the Belgian system where the authorities can ask an individual to deposit a financial guarantee during his voluntary departure. A Royal Decree defines in detail the amount of the guarantee and correlates it with actual costs (i.e. the daily cost of keeping a person in detention – for a maximum cost of 30 days). See Art. 110 *quaterdecies*, § 1, of the Royale Decree of 1981 (arrêté royal du 8 octobre 1981 concernant l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, M.B., 27 octobre 1981).

465. The money is not always deposited. In the UK for example, the sum of money is not passed by the detainee to the authorities, but may have to be paid in full or in part by the guarantor in the event of absconding.

## 2.4. Designated residence

Another alternative to detention is for authorities to designate a place where the person has to reside. This can be a State-run centre, State-funded accommodation, or a private home (of the individual or the guarantor). What characterises this scheme is that the person does not have the choice to live in another place than the one designated. In the UK, if bailed to a private address, a change in private address is possible, but it is treated as a variation in bail conditions and must be notified to the First-tier Tribunal (if the bailee is still under the authority of the Tribunal e.g. an appeal is outstanding) and the Home Office.

### 2.4.1. Reception centres for asylum seekers

In Lithuania, Austria and Slovenia, asylum seekers may be required to stay in a public reception centre, managed by the State or by service providers and NGOs, as an alternative to placement in detention. In all the cases mentioned below, authorities have decided to mainstream asylum seekers subject to an ATD into the pre-existing collective reception system. In this case, they would have no other choice than to stay in a given reception centre. These alternatives to detention usually allow asylum seekers to benefit from the same services as those not under an alternative scheme. However, as detailed below, some differentiation in treatment persists.

In Lithuania, an adult asylum seeker released from detention by the courts will be placed in the only reception centre for asylum seekers in the country – the Foreigners' Registration Centre – while unaccompanied minors are placed in the Refugee Reception Centre. In both cases, she will have the same rights and obligations as other asylum seekers, including access to services, but if she does not respect the rules of the centre, she could be placed in detention, unlike other asylum seekers. Our partners reported that although Lithuanian law specifies that only asylum seekers can be housed in the FRC, individuals in a return procedure were allowed in some cases to stay in the FRC without restrictions on their freedom of movement instead of being placed in detention, which is a good practice, especially when the implementation of an expulsion decision takes several months.<sup>466</sup>

A similar system exists in Austria as asylum seekers subject to an alternative to detention will be placed in ordinary reception centres, which can be small housing units managed by NGOs such as Diakonie. At the time of the report, while NGOs running these centres provide the same services to all, the services they provide are not funded by the same administration according to whether they are asylum seekers under an alternative to detention or not. While those placed under an alternative to detention are under the responsibility of the police, other asylum seekers are under the BFA (Federal office for aliens and refugees). As a consequence, prolonged absence

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466. Lithuania Legal Questionnaire, Q.31.



(usually 3 days) of someone under an alternative to detention has to be reported to the police, which is not the case for other asylum seekers. With the recent hand over of detention decisions to the Asylum Office, this may change.

### 2.4.2. Publicly run centres with or without a coaching component

While all EU Member States have set up a reception system for asylum seekers, as required by the Reception Conditions Directive, a small number of open or semi-open structures managed by the State to accommodate individuals or families in a return procedure have been developed. The fact that there are no explicit legal provisions in the Return Directive for States to provide material support to this group outside the detention framework may partly explain why this scheme is underdeveloped. Furthermore, it is mainly in place for families with minor children, due to the controversy about the legality of detaining children. While setting up open structures is more costly than establishing a reporting obligation or a sponsorship system, it is cheaper than detention, respectful of fundamental rights and can be more effective, as shown by the Belgian model.

The Belgian “return houses” entail designated residence in a centre providing a high level of services and coaching. Although initially designed for families in a return procedure, it was opened up to families filing an asylum claim at the border and families in a Dublin transfer. This use of the units for families in an asylum determination procedure has been criticised by organisations pleading for them to be granted access to the normal reception system. This is mainly due to the fact that, when placed in these family units, the families are formally detained and that the type of support is not always geared to their needs as asylum seekers (e.g. support in the asylum procedure).<sup>467</sup>

The regime is described in detail in the law.<sup>468</sup> The families are required to remain in a given return house. They may leave the premises between 8 AM and 10 PM. Unlike in other comparable programmes, families are placed in well-equipped houses in the community and retain their privacy and independence. For example, they cook their own food and can lock their flat at night, and can meet lawyers and NGO representatives freely. Furthermore, they benefit from individual follow-up by coaches assigned by the State, whose role is to help resolve the case (see box below). Coaches are instructed to examine all available options, exploring possibilities for regularisation as well as return options. This can create difficulties because asylum seekers and returnees are housed in the same location but require different approaches.

467. See report from Plateforme Mineurs en Exil, ‘Unité d’habitation ouverte et coaches pour les familles avec enfants mineurs, comme alternative à l’enfermement – Evaluation après quatre ans de fonctionnement’ (2012) 19 < [http://www.sdj.be/IMG/pdf/evaluationmaisonretour2012def\\_-\\_lay\\_out.pdf](http://www.sdj.be/IMG/pdf/evaluationmaisonretour2012def_-_lay_out.pdf).

468. See Royal Decree of 2<sup>nd</sup> August 2002 [Arrêté royal fixant le régime et les règles de fonctionnement applicables aux lieux situés sur le territoire belge, gérés par l’Office des étrangers, où un étranger est détenu, mis à la disposition du Gouvernement ou maintenu, en application des dispositions citées dans l’article 74/8, § 1, de la loi du 15 décembre 1980 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers, 2 August 2002 < [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=2002080275&table\\_name=loi](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2002080275&table_name=loi).

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## THE ROLE OF THE COACHES IN THE FAMILY UNITS (BELGIUM)<sup>469</sup>

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In article 7 of the 2002 Royal Decree establishing the rules of the family units (“return houses”), the role of the coach is defined clearly. He/she is tasked with:

- explaining the rights and duties to the families;
- undertaking the necessary steps to obtain ID documents or prepare their return, deportation, transfer to another EU Member State, authorisation on the territory or transfer to the territory;
- informing the families about the state of their legal procedure;
- serving as a bridge between the Belgian authorities and private and public partners involved in the accommodation or procedure of the family;
- assisting the members of the family psychologically and socially.

Therefore, the coaches are there both to address the family’s everyday needs and to accompany them in their administrative processes. One of their essential roles is to coordinate the actions which are taken around the family, ensure coherence of the process and make sure the family members understand the process. For example, they take care of all necessary appointments with lawyers, schools, communal administration, police services, medical practitioners, local merchants, pharmacies etc. They are also the first person the family meets when arriving in the return houses, and ensure provision of information on the procedure from the beginning. Interpreting services are available by phone if language problems arise. As they work on-site, they are present during all weekdays. Each coach takes care of about 3 families, a much higher ratio than social workers in Belgian reception centres.

An added value of the system is that the coaches are civil servants of the Belgian Office for Foreigners and can therefore liaise with the different services in charge of the family’s file. They are not police personnel. Although they are not social workers, they have experience with this particular public. The latest evaluation report written by Belgian NGOs however emphasizes that since the system relies heavily on the involvement and professionalism of the coaches, more training and psychological support should be available to them.<sup>470</sup>

In Austria, the authorities have also recently developed alternatives to detention in the form of open accommodation for families with minor children. Families waiting to be returned to their country of origin or transferred to another Member State under the Dublin Regulation are placed in a semi-open centre in Vienna, ‘*Familienunterkunft Zinnergasse*’. This structure, while providing families with freedom of movement, is a detention facility partly used as an open centre and managed by police in uniform.

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469. The title of this position in french is “agent de soutien” which could also be translated as “supporting officer”.

470. Plateforme Mineurs en Exil, ‘Unité d’habitation ouverte et coaches pour les familles avec enfants mineurs, comme alternative à l’enfermement – Evaluation après quatre ans de fonctionnement’ (2012).

It is composed of two open sections, one for families and one for single males, and a closed section for families. Families are usually transferred to the closed section 48 hours before the execution of their return. In the open section, families can leave the premises (only during the day), have full board and access to the same services as detainees (legal advice mainly).<sup>471</sup> Unlike the Belgian model, they do not get individual follow-up of their case with a coach. While avoiding the detention of families, this environment is not conducive to building trust and facilitating a smooth transition. This case shows that placing individuals with freedom of movement is a necessary step but not sufficient to promote an efficient model.

The results of the 2006 Solihull pilot project further demonstrated the effectiveness of early engagement.<sup>472</sup> The project aimed to demonstrate the effects of allowing claimants access to information and advice from legal advisors from the earliest stages of the asylum process. According to the evaluation report, the results showed that close case management that maximised the provision of information and understanding on the part of both the persons concerned and the authorities assessing their case helped to raise the quality of decisions (as indicated by fewer decisions being overturned on appeal) while also reducing the rate of applicants absconding during the process.<sup>473</sup> If an application was ultimately refused, the ongoing close contact and understanding also facilitated a more cooperative return process.<sup>474</sup> These results might inform similar efforts in the context of coaching during the asylum or return process, possibly anchored by the provision of housing.

In previous years, there have been trial projects in the UK, which involved placing families subject to return procedures in open housing. The Millbank pilot project which ran from November 2007 to August 2008 and the Glasgow 'Family Returns' pilot which ran between 2009 and 2011 sought to explore supervised accommodation for families.<sup>475</sup> Although these initiatives did not lead to a permanent system, the latest Home Office guidelines mention open accommodation as a possibility for families in the return process:

“[o]pen accommodation is residential accommodation housing families on full board and without cash support. It seeks to encourage compliance by moving families away from community ties, signalling that departure from the UK is imminent. There are no restrictions on families' ability to come and go”.<sup>476</sup>

471. Families from other parts of Austria are often brought to this closed section 48 hours before their detention.

472. For information on the Solihull Pilot Project, see B. Anderson and S. Conlan, 'Providing Protection: Access to early legal advice for asylum seekers' (2014) < <http://www.irishrefugeecouncil.ie/wp-content/uploads/2014/07/Providing-Protection-Access-to-ELA-for-asylum-seekers.pdf>.

473. J. Aspden, 'Evaluation of the Solihull Pilot for the UK Border Agency and the Legal Services Commission' (2008). 0.4% of the 242 pilot cases absconded, compared to 6.8% of non-pilot cases in the same region, and 4.2% non-pilot cases in a different region.

474. Ibid 15-17.

475. UK Practices Questionnaire, Q.37.

476. Home Office, 'Enforcement Instructions and Guidance' Chapter 45 Section 4.7 < [https://www.govuk/government/uploads/system/uploads/attachment\\_data/file/275017/chapter45returns.pdf](https://www.govuk/government/uploads/system/uploads/attachment_data/file/275017/chapter45returns.pdf).

As with the return houses in Belgium, these structures are conceived as a final step in the process of return. The fact that the beneficiaries move from their own housing to a centre, usually far from where they used to live, is a strong measure to signal departure. In practice, in the UK these pilot projects have not proven effective as most families had not had their profiles assessed correctly and were not returned, often because they had pending legal procedures or medical concerns. While in Belgium the perception of return houses by NGOs and UNHCR has been overly positive, even if an evaluation made by 10 NGOs points to certain gaps,<sup>477</sup> the system has been criticised by our NGO partners in the UK and Austria.

BID and The Children's Society evaluated the Millbank project and concluded that:

"[e]stablishing the pilot in a separate accommodation centre was unhelpful - thought must be given to the appropriateness of trying to explore return options for families in a designated centre rather than in the community. The housing of families who had been refused asylum in one place did not create a calm environment. A future pilot should seriously consider whether upheaval is a helpful way to build trust with families considering return. Allowing families to remain in the community with their normal routines intact seems a much more helpful way of building a trusting relationship, and enabling families to think through the options available to them in a calm way".<sup>478</sup>

As pointed out by this evaluation, the way in which this scheme is implemented is crucial. First of all, the creation of a non-carceral environment helps create an atmosphere conducive to dialogue. In this respect, building an open centre next to a detention centre, with the threat of being transferred there at any moment, could be counterproductive. Furthermore, links with the local community, contact with external actors (NGOs, networks of lawyers, local schools) and the provision of independent legal advice are some of the elements which previous research has shown to make the scheme more humane and efficient.<sup>479</sup> Finally, one of the key elements of success pointed out by recent research by IDC and UNHCR<sup>480</sup> is that compliance is closely linked to the amount of trust built between the individual and the administration. For this reason, the exploration of all possible outcomes and early engagement with the individual will link to higher rates of case resolution.

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477. Plateforme Mineurs en Exil, 'Unité d'habitation ouverte et coaches pour les familles avec enfants mineurs, comme alternative à l'enfermement - Evaluation après quatre ans de fonctionnement' (2012).

478. BID and The Children's Society "An evaluative report on the Millbank Alternative to Detention Pilot" (2009); for further information see the Home Office commissioned evaluation: A. Cranfield, 'Review of the Alternative to Detention Project' (2009).

479. A. Edwards, UNHCR, 'Back to Basics: The Right to Liberty and Security of Persons and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' (April 2011) 57.

480. IDC, 'There are alternatives - A handbook for preventing unnecessary immigration detention' (2011); C. Costello and E. Kaytas, UNHCR, 'Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva' (June 2013).

### 2.4.3. Centres for unaccompanied minors

The possibility to place unaccompanied minors in specialised open structures as an alternative to detention exists in Slovenian and Lithuanian law. In Slovenia, the law applicable to returnees stipulates that an unaccompanied minor, in agreement with a guardian (assigned by a social work centre), must be accommodated at adequate facilities for minors if possible. In Lithuania, an unaccompanied minor can be placed in a social institution as an alternative to detention. In practice, all unaccompanied minors are placed in the Refugee Reception Centre, an open centre which is not specialised in child protection and also houses recognised refugees. In Lithuania, the existence of an alternative to detention designed for unaccompanied minors has led to the good practice of never detaining them. By contrast, in Slovenia unaccompanied minors are put in detention at the Aliens Centre because no open institutions suitable for children exist in practice. The lack of structures for children should not justify the use of detention.

Regardless of the conditions in which children are held, studies have shown that detention has a profound and negative impact on child health and development. Even very short periods of detention can undermine children's psychological and physical well-being and compromise their cognitive development. Furthermore, international and European regional standards provide that the best interest of the child must be the primary concern in decisions that affect children (CRC Article 3 and Article 24 (2) of the European Charter of Fundamental Rights), regardless of their migration status. As a consequence, States should develop special housing arrangements for families with children and separated children, to avoid placing them in detention.

### 2.4.4. Private accommodation<sup>481</sup>

Asylum seekers and refugees may also be required to stay at a given address. In its less coercive form, asylum seekers or returnees are only required to inform the police if they change residences. In Slovenia, the authorities sometimes apply this condition to returnees.

Currently the family returns process in the UK is initiated while the families are staying in their own homes. Belgian law foresees the possibility for these families to stay in their private home during the return procedure as an alternative to detention but it has been very scarcely applied so far.<sup>482</sup> The Belgian authorities have expressed willingness to allow families to stay in their own home during the procedure, with coaches meeting the families in a neutral place. The lack of means has

481. This section covers private accommodation paid for by the individual or by the State.

482. Art. 74/9, Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Belgium): "La famille visée au § 1er a la possibilité de résider, sous certaines conditions, dans une habitation personnelle, à moins qu'un des membres de la famille se trouve dans l'un des cas prévus à l'article 3, alinéa 1er, 5° à 7°. Si la famille est dans l'impossibilité de résider dans une habitation personnelle, elle se verra attribuer, dans les mêmes conditions, un lieu de résidence dans un lieu tel que visé à l'article 74/8, § 2, adapté aux besoins des familles avec enfants ».

for now hampered this initiative.<sup>483</sup> If families in a return procedure already have a home and wish to stay there, implementing an intermediary step such as this would be less disruptive for their family life. However, subjecting individuals to designated residence in their private homes should not deprive them of a proper follow-up and access to the support of NGOs (such as legal advice). In most countries, there is little government-funded NGO support outside detention centres for those under a return procedure. In the UK, it appears in some cases that families are detained in order to access this support.<sup>484</sup> This can be explained by the fact that the Return Directive obliges Member States to provide services in detention, but that should not hamper the development of other initiatives in the community.

## 2.5. Electronic tagging

The most coercive alternative to detention currently in place is electronic monitoring. This is used extensively in the criminal context, but thus far only seldom in the migration context. In the UK, the only research State where electronic monitoring has been applied to asylum seekers and migrants, it can, in theory, take 2 forms: voice recognition and electronic tagging. Only the latter is currently used. Tagging is linked to a nearby sensor, or undertaken via satellite tracking. However, the Home Office rarely uses satellite tracking. In most cases, a receiver is placed in the individual's home and an electronic bracelet is fitted around the individual's ankle to report whether she is in her home at specific times.

When it introduced electronic tagging in 2006, the Home Office set out a larger target population. It has since decided to tag only persons with criminal records, mostly due to cost.<sup>485</sup> Although it is difficult to obtain information on how it is applied in practice, the Home Office has indicated that under "regional contact management strategies", monitoring frequency and duration should be specified case by case, and can be flexible "as appropriate".<sup>486</sup> When queried, the Home Office further stated that monitoring was at first applied so as not to "impact on an individual's movements, for example, monitoring periods of two hours early in the day, twice a week", but that its frequency has since been increased and the times varied, "to demonstrate to those who are not detained that we intend to exercise a high level of control pending their removal".<sup>487</sup>

Electronic tagging visually associates migrants and asylum seekers with criminality, and can lead States to breach their human rights obligations. In assessing the implications of electronic tagging, E. Guild raised concerns relating to Articles 3, 5 and 8

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483. Plateforme Mineurs en Exil, 'Unité d'habitation ouverte et coaches pour les familles avec enfants mineurs, comme alternative à l'enfermement – Evaluation après quatre ans de fonctionnement' (2012) 55.

484. See UK Practices Questionnaire, Q.19 which mentions that according to the evaluation commissioned by the Home Office, one of the key reasons given for detaining families was 'for Barnardo's [a third sector organisation] to provide preparatory support for children before the return.' Such support is not available to families in the returns process who are not detained.

485. UK Practices Questionnaire, Q.18.

486. Home Office, 'Electronic Monitoring Policy: Criminality and Detention Group v. 2.8' (2010) 5.

487. Home Office's answer to BID in response to a Freedom of Information Act request, Ref 11132 [23 February 2009].

of the ECHR.<sup>488</sup> Tagging might violate Article 3's prohibition on inhuman or degrading treatment, by the pain or psychological harm the device can cause an individual, especially one with particular vulnerabilities, or through the prospect of constant surveillance. It could contravene Article 5, as arbitrary "detention in another form", if it forces the individual to remain at a particular place all or most of the time. Finally, tagging can violate Article 8's protection of private and family life if it enforces restrictions that interfere with the individual's ability to carry out the normal activities of a family life, or that reveal private information. Home Office guidelines seek to address the Article 8 concern by requiring that "the monitoring frequency [...] should be a reasonable and proportionate measure against the risk of offending behaviour or an individual absconding".<sup>489</sup>

Electronic tagging has been criticised widely for its stigmatising effect and the psychological distress it creates. Many testimonials show how an electronic bracelet can be a source of stress and social exclusion. BID found that tagging of parents "had a detrimental effect on their children" because the parents could not "attend school sports games or birthday parties with their children, and could not take their children outside the vicinity of their home because" they had to stay nearby so as "to be in the house at certain hours. [...] Parents also reported that the stigma and restrictions of electronic tagging had contributed to their social isolation [and] that they suffered from stress and anxiety as a result of being tagged".<sup>490</sup>

The Jesuit Refugee Service's report on ATD quotes the following account of electronic tagging in the UK, which underlines the physical discomfort caused by the bracelet:

*"[w]hen I was released, I had to wear a tag. I was supposed to be indoors from 6:00pm to 6:00am – twelve hours. The tag really hurt. You can see the black spot here [he shows the interviewer evidence of skin rash on his left ankle as a result of the tag]. That's from the tag. It wasn't tight, but if you're walking it causes friction. It rubs against the skin from the sweat. Most of the time I had to wear something to keep it up high on my ankle, but it still affected my blood circulation".*<sup>491</sup>

Depending on how it is implemented, electronic tagging can become an alternative form of detention, depriving individuals of their right to liberty. However, even beyond that, in view of its stigmatising effect, the psychological distress it creates, its possible human rights implications, and its high cost, it would be preferable to use less coercive alternatives to detention. If the UK will not abandon the practice, it should at least introduce a time limit on the use of electronic tagging for immigration control, and limit how long people are required to remain in their homes every day for electronic monitoring.

488. UK Legal Questionnaire, Q.26.

489. Home Office, 'Electronic Monitoring Policy: Criminality and Detention Group v. 2.8' (2010) 5.

490. BID and The Children's Society, 'Last Resort or First Resort: Immigration detention of children in the UK' (2011) 89-90.

491. JRS, 'From Deprivation to Liberty: Alternative to detention in Belgium, Germany and the UK' (December 2011) 33-34.



### 3. ACCESS TO RIGHTS FOR INDIVIDUALS PLACED UNDER ALTERNATIVES TO DETENTION

In our research, it was important to examine the issue of access to rights, especially in the framework of the recast RCD, pursuant to which Member States should ensure adequate material support for applicants for international protection. Therefore, nothing in the legal provisions of the recast RCD restricts asylum seekers under an alternative to detention from benefitting from the full range of material support provided by the Directive. However, in practice, some differences in treatment exist for asylum seekers who are subject to an alternative to detention.

It is important however to distinguish between the obligations of Member States towards asylum seekers and returnees. According to Article 7§3 of the recast RCD Member States may make provision of material reception conditions subject to actual residence by the applicants in a specific place, to be determined by the Member States. In addition, the CJEU in *Saciri* stated that “[t]he provisions of Directive 2003/9 cannot be interpreted as meaning that it is appropriate to leave the asylum seekers to make their own choice of housing suitable for themselves”.<sup>492</sup> However, Member States should foresee access to adequate material support for asylum seekers under an alternative scheme, when they have been allowed to live in the community rather than in a State-run centre.

The Return Directive, in situations other than detention, imposes obligations of support only during the voluntary departure period and periods during which return has been postponed.<sup>493</sup> These obligations are limited to emergency health care and essential treatment of illness, access to the basic education system for minors depending on the length of their stay, and family unity.<sup>494</sup> Member States should also ensure that the special needs of vulnerable persons are taken into account.<sup>495</sup>

Recently, the CJEU in *Abdida* interpreted these obligations to mean that Member States should provide all the safeguards contained in Article 14 of the Return Directive to a third country national suffering from a serious illness who has appealed against a return decision whose enforcement may expose him to a serious risk of grave and irreversible deterioration in his state of health.<sup>496</sup> The CJEU also found that in such a case Member States should foresee an effective remedy with suspensive effect.<sup>497</sup> It underlined that:

“[t]he requirement to provide emergency health care and essential treatment of illness under Article 14(1)(b) of Directive 2008/115 may, in such a situation, be

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492. Case C-79/13, *Saciri a.e.* [2014], para 43.

493. Art. 14§1, Return Directive.

494. *Ibid.*

495. See Art. 14§1(d), Return Directive.

496. Case C-562/13 *Abdida* [2014], para 58.

497. *Ibid* para 57.



rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third country national concerned”.<sup>498</sup>

This paves the way for a more expansive understanding of Member States obligations during the period of voluntary departure as well as of postponement, to include elements such as material support, which entails in the least in the least accommodation and minimum subsistence. The Court did not specify what such basic needs include but noted that it “is for the Member States to determine the form in which such provision for the basic needs of the third country national concerned is to be made”.<sup>499</sup> Future litigation on this point is expected to bring further clarity on the scope of Member States’ obligations.

### 3.1. Access to social and economic rights

In Belgium, although families with minor children that file an asylum claim at the border are not placed in open reception centres, they benefit from a high level of services such as health care, education, in kind/financial assistance and social/psychological assistance, in or around the return houses.<sup>500</sup> Each family benefits from the support of a coach, who is in charge of their case and *inter alia* of any social support.

In Austria, where those subject to an alternative to detention are accommodated in reception facilities for asylum seekers, managed by the State or NGOs, all services provided in the centre are available to both groups.<sup>501</sup> However, in terms of access to healthcare, asylum seekers subject to an ATD are subject to discriminatory treatment, as they do not benefit from the health insurance coverage available to other asylum seekers. As for those detained, the alien’s police is supposed to pay for their treatment, which in practice happens rarely.<sup>502</sup> As a consequence, only emergency health care is provided to them.

With regard to psychological support, in Austria, there are several projects for victims of torture and heavily traumatised persons, run by NGOs and co-financed by the European Refugee Fund, but asylum seekers subject to an ATD do not usually have access to them. This is because they are mostly subject to a Dublin procedure, and are therefore not in the target group of these projects.<sup>503</sup> As with asylum seekers in general, psychological support is weak in most countries, including for severe psychiatric cases. In Sweden, it was reported that individuals with psychiatric issues could be transferred from detention centres managed by the Migration Board to ordinary

498. Ibid para 61.

499. Ibid para 61.

500. Belgium Practices Questionnaire, Q.21.

501. Austria Practices Questionnaire, Q.42.

502. Austria Practices Questionnaire, Q.22.

503. Ibid.

prisons when considered a threat to others or to themselves because of the lack of adequate support in immigration detention centres.<sup>504</sup>

In Lithuania and Slovenia, asylum seekers under an alternative to detention are accommodated in State-run centres, namely the Foreigner Registration Centre (Lithuania) and the Asylum Home (Slovenia) and therefore mainstreamed in the reception system.<sup>505</sup> In this case, they benefit from the same rights as other asylum seekers. In practice, alternatives to detention for asylum seekers outside the reception centre have so far been applied in Lithuania in a single case.<sup>506</sup> However, if asylum applicants – whether they are under an alternative to detention or not – are not accommodated in the State-run centre in Lithuania, they are excluded from any support as “[t]here is no appropriate legal framework concerning the coverage of health care services, monthly allowances etc.”.<sup>507</sup> To address this gap, asylum seekers who have chosen to live outside the centre can get material support from the Lithuanian Red Cross – notably for medical expenses, but this depends on available funding. This lack of structural support outside reception centres hampers the development of any other alternatives to detention. Similarly, in the UK, asylum seekers and returnees who are not placed in accommodation funded by the Home Office, and who do not have the means to support themselves, face destitution.<sup>508</sup> They have to apply and fulfil specific criteria to receive help and support.

For people subject to a return procedure, in most countries studied, *de facto*, only those staying in open State-run centres (in Austria and Belgium) benefit from State support. In Slovenia for example, in addition to the fact that they do not have access to the labour market, migrants subject to more lenient measures in the framework of a return procedure, do not have access to financial or in-kind assistance. Services (including basic medical assistance) are provided solely inside the detention centre.<sup>509</sup> Therefore, the alternative to detention is *de facto* available only to those who have some kind of social network, and in particular a sponsor ready to support them financially. Setting up a system whereby migrants in the return procedure would receive adequate follow-up and support, even when living in the community, would enhance the cooperation of migrants, enable other legal avenues to be explored (such as

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504. This transfer is usually enacted when one is considered a threat to others. In some cases it was used when individuals had a suicidal and/or self-harm behaviour. For further details, see Sweden Practices Questionnaire, Q.44.

505. This type of accommodation should not be considered as an alternative to detention. See Chapter 1 Section 3 Subsection 3.2 on the EU understanding of an ATD.

506. Lithuania Practices Questionnaire, Q.21.

507. Lithuania Legal Questionnaire, Q.32.

508. For a useful overview of the system, see the leaflet of BID, ‘Guide to release from detention – Accommodation and financial support – What happens when I get released from detention’ (February 2012) < <http://uklgig.org.uk/wp-content/uploads/2014/02/2012-accommodation-on-release.pdf>. In addition, from 1<sup>st</sup> April 2014, applications for support of refused asylum seekers have to be done by phone or online. < <http://www.asylumineurope.org/reports/country/united-kingdom/overview-main-changes-previous-report-update>.

509. In Slovenia, aliens with permission to stay have a right to basic treatment and a minimum financial assistance (about 260,00 €). But no returnee submitted to a more lenient measure is entitled to the aforementioned financial assistance.

access to a residence permit under family or work motives) and ultimately facilitate the resolution of their cases.

Apart from these legal limitations, our research reveals that most difficulties in terms of access to rights are linked to restrictions on the freedom of movement. Although each Member State studied establishes a right to education for minors, practical barriers may impede effective access to this right. In Belgium, minors between the age of 6 and 12 have good access to schooling as agreements have been concluded between the “return houses” and primary schools, for instance in Sint-Gillis-Waas and Zulte.<sup>510</sup> However, agreements with secondary schools do not exist and children between 12 and 17 have difficulties to access education.

Another practical obstacle to education for minors is that their stay in the return houses is too short to register them in schools.<sup>511</sup> In this respect, some Belgian NGOs called for the implementation of alternative educational activities in return houses, when minors cannot be registered at local schools.<sup>512</sup> In the UK, BID emphasises that, in some cases, individuals with heavy reporting or electronic monitoring restrictions may not be able to bring their children to school, or attend classes, such as vocational training,<sup>513</sup> during the period when they are required to be at home or attend a Home Office reporting centre.<sup>514</sup>

Regarding access to the labour market, asylum seekers subject to an alternative to detention are treated in the same way as the majority of asylum seekers, including waiting periods or labour market tests. In Slovenia, where asylum seekers are deprived of their liberty in the Asylum Home, they are *de facto* excluded from the labour market. In Belgium, where asylum seekers who stay at the return homes formally receive a detention decision, the maximum period of stay in the homes is 2 months; if their application has not been examined within this time, they are channelled to the normal reception system.<sup>515</sup> Given that all asylum seekers have a waiting period of 6 months before they can access the labour market, in practice no differentiation is created.<sup>516</sup>

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510. Plateforme Mineurs en Exil, ‘Unité d’habitation ouverte et coaches pour les familles avec enfants mineurs, comme alternative à l’enfermement – Evaluation après quatre ans de fonctionnement’ (2012) 30.

511. Ibid 29.

512. Belgium Practices Questionnaire, Q.23. In Slovenia, for instance, educational programs are organised in the premises of the Asylum Home: Slovenian language course; Slovenian history; etc.

513. Article 12 provides Member States with the possibility to “allow asylum seekers access to vocational training irrespective of whether they have access to the labour market”.

514. UK Practices Questionnaire, Q.19. See also BID and The Children’s Society, ‘Last Resort or First Resort: Immigration detention of children in the UK’ (2011) 89.

515. Belgium Practices Questionnaire, Q.21.

516. Ibid.

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## THE EXAMPLE OF SWEDEN<sup>517</sup>

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In Sweden, a large majority of asylum seekers are neither detained nor subjected to an alternative to detention. Furthermore, the few asylum seekers<sup>518</sup> placed under supervision benefit from the same rights as other asylum seekers,<sup>519</sup> and may live in the community. The Migration Board offers housing in an apartment or in a reception centre. Asylum seekers can choose to live at a reception centre but in that case they will need to move to a town where the Migration Board can offer them a place.<sup>520</sup> In addition, asylum seekers may get a financial allowance even if they are not accommodated in a State-run centre. The daily financial allowance is deemed sufficient to pay for food, clothes and shoes. They can apply for more allowances for extra expenses (e.g. winter clothes).<sup>521</sup>

Minors receive the same access to health care services as do Swedish residents.<sup>522</sup> Adults benefit from health services for treatments that cannot be postponed.<sup>523</sup> These services may include psychological assistance, but it is not systematically provided. The challenge for accessing psychological support is probably greater for asylum seekers who do not stay at the reception facilities of the Migration Board, as it depends on the discretion of the care-giver.<sup>524</sup> Therefore, the involvement of NGOs and civil society is important.

Regarding access to education, even if adults do not have access to the educational system, minors may attend classes in public schools.<sup>525</sup> A child attending school who turns 18 is allowed to finish her schooling. Finally, the Swedish system is a good example with regards to access to work.<sup>526</sup> Asylum seekers have immediate access to the labour market if they can prove their identity or help the authorities in establishing their identity. They do not have to apply for a work permit.

The right to work and access to financial support normally last until the individual gets a residence permit or leaves the county. All benefits are however lost if the individual absconds in order to obstruct return.<sup>527</sup> This enables a number of individuals in a return procedure to obtain some support from the State while being in the community and possibly subject to an ATD.

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517. Sweden Legal Questionnaire, Q.20 and Practices Questionnaire, Q.21, 22 and 23.

518. The vast majority of persons under supervision are failed asylum seekers and returnees. However, legally speaking, asylum seekers can be placed under supervision too.

519. Sweden Practices Questionnaire, Q.21.

520. Quote from < <http://www.asylumineurope.org/reports/country/sweden/forms-and-levels-material-reception-conditions>; ECRE, Asylum Information Database, 'National Country Report – Sweden' (2013).

521. Ibid.

522. In Slovenia, minors are also entitled to receive the same health care services as citizens and residents. In addition, in Lithuania, since 1 October 2013, unaccompanied minors are fully integrated in the health insurance system and are covered by the mandatory health insurance founded by the State budget.

523. As in other Member States involved in the project.

524. Sweden Legal Questionnaire, Q.20.

525. ECRE, Asylum Information Database, 'National Country Report – Sweden' (2013) 40.

526. Ibid 37.

527. Absconding or non-cooperation which makes investigations around the eligibility for asylum difficult lead to a decrease in the assistance to a bare minimum.

## 3.2. Access to information

Knowledge of the reasons why an alternative scheme has been imposed, awareness of the rights, obligations and consequences of non-compliance with the restrictions imposed are key factors that strengthen the efficiency of alternatives to detention. Furthermore, according to Article 5 of the recast RCD,<sup>528</sup> Member States have the duty to inform asylum seekers about their rights and obligations. According to Article 10 of the recast Asylum Procedures Directive, Member States also have an obligation to provide information on the procedure. Article 5§2 recast RCD states that “Member States shall ensure that the information [...] is in writing and, as far as possible, in a language that the applicants may reasonably be supposed to understand. When appropriate, this information may also be supplied orally”.<sup>529</sup>

In all six Member States researched, asylum seekers under an alternative to detention are given a document attesting that they are applicants for international protection, in accordance with Article 6§1 RCD, as well as information relating to their claim. In most countries, such as Sweden and the UK, this information is also available online.<sup>530</sup> The UK provides asylum seekers with a leaflet about what to expect from the asylum process, and their rights and responsibilities. The website of the Swedish Migration Board constitutes a good example as it provides asylum information in 15 different languages.<sup>531</sup> Online information nevertheless requires access to the internet as well as computer literacy.

Asylum seekers under an alternative to detention also obtain a decision specifying they are subject to a more lenient measure in all countries researched except Belgium where they receive a detention decision. Indeed, from a legal point of view, individuals placed in return houses are detained. In practice, they are placed under a regime of restrictions in their freedom of movement, for example curfew, but they are not deprived of their liberty.

The written decision is often the only document available to persons subjected to ATD so as to understand why they have been placed in a certain scheme and what the obligations they have to comply with are. However, both Slovenian and Swedish partners emphasised that decisions on detention and alternatives to decision were short and not adequately motivated. According to an interview with an Administrative Court judge in Slovenia, authorities at first level do not include an explanation of why an alternative to detention was necessary. Additionally, in case of detention orders, there is no explanation of why more lenient measures could not apply.

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528. Art.5§1, recast RCD.

529. Art.5§2, recast RCD.

530. See for the UK < <https://www.govuk/claim-asylum>; for Sweden < <http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden.html>.

531. < <http://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/If-you-have-sought-protection-or-asylum-.html>

Furthermore, most partners indicated that a written explanation is not sufficient to ensure a proper understanding of an alternative measure. As stressed by the Swedish Red Cross, many individuals do not understand the meaning of decisions because of the bureaucratic language and technical legal references.

In the UK, the Home Office document entitled “Contact Management Policy” sets out the reasons why asylum applicants and returnees have an obligation to report and stresses their rights and obligations as well as the consequences of non-compliance.<sup>532</sup> In addition, the applicant is provided with a relatively detailed written decision informing her that she is liable to detention and has been released or granted temporary admission with restrictions, which may include electronic monitoring and reporting. The decision also contains information such as the place and frequency of reporting or the curfew period when the individual is required to stay at a designated address. However, this information is not translated, which could constitute a major obstacle to understanding such documents.

While the most recent publicly disclosed version of the Home Office’s policy on electronic monitoring (dating from 2010) makes no mention of a requirement to inform returnees and asylum seekers of the reasons why they are monitored, the Home Office, consulted in the framework of this project, says it provides full information about why the tag is applied and how it operates.<sup>533</sup> However, BID’s report “*Last resort or first resort? Immigration detention of children in the UK*” stated that 11 out of the 23 families interviewed did not have a clear understanding of the reasons for the reporting or electronic tagging requirements imposed on them.<sup>534</sup>

“Peter and his wife were electronically tagged and were required to stay in their house from 10am–12 noon and 6–8pm. When interviewed for this research, Peter said he did not understand the reasons why they were being tagged, particularly as the family had an ongoing legal case and were reporting every week. He reported that he had written to the Home Office twice asking to be informed of the reasons why he was tagged, but had received no reply”.<sup>535</sup>

In this respect, the role played by the coaches in return houses in Belgium needs to be stressed once again. In the framework of an asylum procedure, the coaches prepare families for the asylum interview, ensure they will get access to a lawyer and make

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532. Home Office, ‘Enforcement Instructions and guidance - Contact Management’ Chapter 22.

533. “Prior to the application of the electronic tag, the Home Office contacts the individual in writing to inform them why, when and where they are to be tagged. The individual is informed that they are liable to be detained and have been granted temporary admission restrictions which include the requirement to be monitored electronically by means of tagging. The individual is also informed of the curfew period that the equipment will operate within and is instructed to ensure that they remain within a specified boundary during that time period. The subject is introduced onto the system and the tag is applied. During this appointment, the electronic monitoring provider supplies additional literature to explain how the equipment works. The tag is fitted to the individual and a home monitoring unit installed. The subject is further informed that they may use the home monitoring unit to contact the service provider’s contact centre should they require further information or clarification on how the equipment and process works.” Source: information sent to BID by Karen Gallagher, assistant director of the Asylum team of the Home Office, email dated 4 April 2014.

534. BID and The Children’s Society, ‘Last Resort or First Resort: Immigration detention of children in the UK’ (2011).

535. Ibid 86-88.

sure that each step of the procedure is explained in detail.<sup>536</sup> The coaches also explain the rules of the return houses and the rights and obligations of the individuals accommodated there as well as the possible consequences of non-compliance with their obligations. According to CIRE, the fact that coaches provide families with complete information on their rights creates trust.<sup>537</sup>

In Lithuania, problems have been recorded with regard to translation and interpretation. Social workers in the Foreigner Registration Centre primarily speak Lithuanian and Russian, which some asylum seekers do not speak.<sup>538</sup> Recent sociological research confirmed that insufficient information about the procedure and relevant rights and obligations was provided to asylum seekers and that counselling by fellow asylum seekers was a *de facto* arrangement the asylum seekers frequently relied on.<sup>539</sup> In Austria, there are no specific arrangements but, in practice, organisations in charge of legal counselling in detention, such as Diakonie, are the ones explaining the requirements of the measures.

This overview of current practices therefore reveals a risk that asylum seekers do not get adequate information on the ATD they are subject to, which may affect their compliance with the program.

### 3.3. Access to (free) legal assistance

Legal assistance for those in detention, in the form of the preparation of a case and representation, is crucial to access an alternative to detention. For example, BID's research shows a "representation premium" in immigration bail hearings, as in other court hearings: 31% of applicants whose bail case was prepared by BID and who were then represented by a pro-bono barrister were granted bail, while only 11% of unrepresented applicants secured their release.<sup>540</sup> Given that many asylum seekers and returnees do not have sufficient means to ensure their representation, it is important that they have access to free legal assistance.

As the imposition of an alternative often arises in the context of a challenge to the detention order, the relevant provisions of the recast RCD are noteworthy. In cases of judicial review of a detention order by an administrative authority, Member States must ensure that applicants have access to free legal assistance and representation.<sup>541</sup> This may, however, be limited to only those who lack sufficient resources; or only through the services provided by legal advisers or other counsellors specifically

536. Plateforme Mineurs en Exil, 'Unité d'habitation ouverte et coaches pour les familles avec enfants mineurs, comme alternative à l'enfermement – Evaluation après quatre ans de fonctionnement' (2012) 21.

537. Belgium Practices Questionnaire, Q.42.

538. Lithuania Practices Questionnaire, Q.22.

539. Report from Lithuania: '[Iš]gyvenimas Lietuvoje: prieglobs io ieškan i ir prieglobst gavusi užsienie i patirtis' (translation: *Survival in Lithuania: the experiences of asylum-seekers and foreigners granted asylum*) (2013) 1 Etniškumo studijos 94, < [http://www.ces.lt/wp-content/uploads/2013/05/EtSt\\_Aleknevi%C4%8Dien%C4%97\\_2013\\_1.pdf](http://www.ces.lt/wp-content/uploads/2013/05/EtSt_Aleknevi%C4%8Dien%C4%97_2013_1.pdf).

540. UK Practices Questionnaire, Q.18.

541. Art. 9§6, recast RCD.



designated by national law.<sup>542</sup> Member States may impose monetary or time limits on the provision of free legal assistance and representation, provided the limits do not arbitrarily restrict access to the aid.<sup>543</sup> However, the Directive does not permit the Member States to establish a “merits test”.

All six Member States researched provide for the possibility of free legal assistance in their national law for asylum seekers objecting to their detention. In this respect, the Austrian legal aid system is a good practice. Free legal aid is available automatically and ex officio during the detention proceedings. Cases are assigned to two non-governmental organisations contracted by the State. If requested, legal aid is usually granted if the person does not have the means to pay the fees for the complaint and the lawyer.<sup>544</sup> However, there is no legal aid available in the first instance alien’s law procedure in general and therefore there is no free legal assistance to object to an imposition of an alternative to detention.

However, some legal frameworks impose restrictions. In Sweden, the relevant authorities, i.e. the Migration Board or the police, may decide to allow free legal assistance to either asylum seekers to challenge their detention in cases concerning refusal of entry or to refused asylum seekers in the execution of their return when they have been detained for more than three days, or to challenge a supervision order.<sup>545</sup> However, it remains a discretionary power of the relevant authorities. In practice, legal aid is granted to the great majority of detainees and the cases where free legal aid was not provided to individuals who were deprived of their liberty for very short periods of time.<sup>546</sup>

In the UK, free legal aid is still available if there is an issue of deprivation of liberty, such as to modify bail conditions, but subject to both an income and a merits test. Following recent cuts to immigration legal aid, detainees have faced increasing obstacles to access legal aid.<sup>547</sup> BID’s research revealed that the share of interviewees with a legal representative dropped from 79% in November 2012 to 43% in May 2013, while the number of detained interviewees who had no legal representative while in detention rose from 9% to 26%.<sup>548</sup> Further changes to the fee arrangements for judicial review were introduced in April 2014. The Criminal Justice and Courts Bill aims to further reduce access to legal aid during judicial review.<sup>549</sup>

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542. Art. 9§7, recast RCD.

543. Art. 9§8, recast RCD.

544. Austria Legal Questionnaire, Q.24.

545. Sweden Legal Questionnaire, Q.22.

546. Sweden Practices Questionnaire, Q.28.

547. UK Legal Questionnaire, Q.27 and Practices Questionnaire, Q.32.

548. BID, ‘Summary findings of survey of levels of legal representation for immigration detainees across the UK detention estate (Surveys 1 - 6)’ (2013).

549. The Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014 came into force on 22 April 2014. Judicial review proceedings commenced on or after that day will not be funded unless: (a) the High Court or Upper Tribunal grants permission; or, (b) permission is neither granted nor refused and the Lord Chancellor considers that it is reasonable to pay remuneration in the circumstances of the case. The effect of these changes is to require lawyers working under legal aid to carry out all legal work on the early stages of judicial review at risk.



In Slovenia, free legal assistance for returnees to challenge their detention order is not provided by law.<sup>550</sup> Free assistance is provided only in proceedings before courts relating to the decision of the Ministry of Interior on the appeal against a return decision.<sup>551</sup> In practice, free legal aid might be available through NGOs.<sup>552</sup> Since in Belgium and Slovenia a detention decision is issued to asylum seekers under an alternative, the procedure to appeal the imposition of an ATD is the same as the procedure to appeal detention, and the same legal aid rules apply.

In addition, some issues relate to the effectiveness and access to such legal aid as is foreseen in the law. For example, in Lithuania State-guaranteed free legal assistance is provided with respect to court decisions to detain or assign an alternative measure.<sup>553</sup> However the Lithuanian Red Cross reports that such assistance covers only representation in the court and not preparation or counselling before the court session.<sup>554</sup> This can reduce the effectiveness of assistance, since the client and the lawyer only meet during the court hearing.<sup>555</sup> Moreover, obstacles have been reported as regards accessibility of legal services for detained asylum seekers who wish to initiate judicial proceedings to review their detention order.<sup>556</sup>

## 4. MONITORING AND STATISTICS

Throughout the research, we noted a lack of monitoring tools and regular evaluation of alternative schemes. Some evaluations were carried out by the authorities or by NGOs in the UK and Belgium, but they were not always made public.

In all researched countries, collecting accurate and comparable figures is challenging. Figures obtained on the cost of running a detention centre and alternatives to detention schemes were either unavailable or not comparable.<sup>557</sup> The only figure which is easily exploitable comes from Belgium where the return houses, although providing a wide array of services and high accommodation standards, present significantly lower running costs (about 50% less) than detention centres. When alternatives are not run in a State-managed facility, costs are more difficult to evaluate as services and accommodation are dispersed and do not always depend on one single actor.

Similarly, absconding rates were rarely publicly available and usually unreliable. In the UK for example, several individuals accounted for in statistics as absconders were

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550. Slovenia Legal Questionnaire, Part C on returnees.

551. Ibid.

552. Slovenia Practices Questionnaire, Part D on returnees.

553. Lithuania Legal Questionnaire, Q.22.

554. Lithuania Legal Questionnaire, Q.28.

555. Ibid; see also L. Biekša, G. Bružaitis, E. Samuchovaitis (for the Lithuanian Red Cross Society), 'Detention of asylum seekers and alternatives to detention in Lithuania' (2011) 30.

556. Lithuania Practices Questionnaire, Q.27.

557. For more information on costs, please refer to Chapter 1.3 or the annex 1 of the present report.

“subsequently encountered” and were reintegrated into the system.<sup>558</sup> Furthermore, absconding rates included all those – migrants and asylum seekers – that could be no longer traced or had left the procedure.

When analysing absconding figures at our disposal, a stark contrast appeared in rates between Lithuania and Slovenia on the one hand, and the UK, Sweden and Belgium on the other hand. In the UK, according to estimates, only 7 out of 155 families in the family returns process and less than 10% for those under telephone and electronic tagging requirements absconded; in Sweden, 22.9% of those under supervision absconded, a rate close to Belgium (23% absconded from return homes).<sup>559</sup> These figures show the success of these schemes as more than 75% of all those placed in these alternatives complied in all 3 countries.

On the contrary, in Lithuania, in 2012, 60.2% of all asylum seekers placed in a reception centre disappeared as well as 80 out of the 81 unaccompanied minors. Similarly, in Slovenia, 85% of those placed in the asylum home without freedom of movement absconded. Beyond the characterisation of these countries as “countries of transit” or “countries of destination” within Europe, one has to analyse these figures with caution as several factors come into play. These include geographical location, presence of home communities, quality of reception conditions, types of alternatives implemented, profile of the individuals placed in such schemes, and integration prospects. In Slovenia, for example, our partners noted the lack of adequacy between the measure taken by the authorities and the risk posed by the individual as, in practice, ATD seem to be applied to individuals with an objectively higher risk of absconding.<sup>560</sup> In Lithuania, substandard reception conditions and lack of integration prospects could help explain such a phenomenon.

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558. UK Practices Questionnaire, Q.36.

559. For more information on the absconding rate, please refer to the country profiles contained in the Annex 1 of the report.

560. Page 18, Slovenia Practices Questionnaire.

## **CONCLUSIONS**

# CONCLUSIONS

Overall, our research revealed that alternatives to detention are underused and only a small number of individuals are submitted to these schemes. The only Member State that is using alternatives to detention almost as much as detention is Austria. However, some good practices are in place in all six Member States we researched. The successful implementation of open accommodation for families, sponsorship programs and reporting schemes have shown that it is possible to develop solutions outside detention which are functional, less costly and compliant with human rights.

Nevertheless, setting up alternatives to detention cannot be considered an end in itself. Developing alternatives to detention must go hand in hand with the rationalisation of the national migration control systems thereby reducing detention, or else they lose their purpose. In this vein, policies to reduce or outlaw the detention of families in Belgium, Austria and the UK have clearly led to reductions in the overall numbers of people detained. In addition, alternatives to detention should only be applied to those who are exceptionally liable to detention in the first place; such control measures should not be extended to those who are currently not liable to detention. When evaluating the “success” of alternatives to detention and their efficiency, such elements should be part of the analysis.

## 1. Highlights from the research findings

### *i. Scope of the term “alternative to detention”*

There was confusion around the meaning of the alternatives to detention. Alternative forms of detention are considered alternatives to detention in Slovenia, a Member State which also considers tolerated stay - a temporary status which allows an alien who cannot be deported to remain in the country- as an alternative to detention. The use of electronic tagging was also considered by some partners as an alternative form of detention because of the level of coerciveness it entails. Confusion also arises from the fact that some alternatives to detention take the same form as restrictions or conditions imposed on asylum seekers or returnees, notably during the voluntary departure period or during their stay in a reception centre.

### *ii. Decision-making*

#### → Responsible bodies

In the countries researched, decision-making on detention and alternatives to detention is undertaken by administrative bodies under the responsibility of the Ministry of Interior or by courts and tribunals. Courts are in charge of appeals, apart from Lithuania and Sweden where they validate decisions of administrative authorities who only propose recourse to detention or an alternative.

→ Detention grounds

National jurisprudence confirmed that in order to impose an alternative to detention, authorities must first prove there are grounds for detaining the individual. It was further found that, even in countries where the practice of detaining asylum seekers is rare, people subject to Dublin procedures were more regularly detained, especially during the transfer phase. The risk of absconding is often cited to justify detention of asylum seekers and migrants. Our comparative study of national legislation and judicial practice revealed a multitude of criteria that are employed at national level to assess the risk of absconding, some of which are legally vague or lack objectivity. In addition to legal rules, practical considerations also influence decisions on whether to implement an alternative scheme or not, for example, the perceived administrative convenience for processing the claim or the lack of alternative accommodation through own resources or through a guarantor.

→ The necessity and proportionality requirements

Most national partners expressed concerns with regards to the initial quality of decision-making on both detention and alternatives to detention, especially when conducted by the national administration, and reported the use of stereotypical and non-substantiated decisions. Only three Member States, namely Austria, Sweden and the UK, have adopted legislation establishing a legal obligation to consider detention as a measure of last resort. In Lithuania, constitutional jurisprudence rather than law establishes this obligation. In all six Member States studied there was no specific identification procedure or mechanism in place to identify vulnerable asylum seekers. Although there are legal provisions to restrict, to a greater or lesser extent, the detention of vulnerable groups, it appears that, in the countries of study, the existence of vulnerability does not hamper detention, except in cases of extreme or “visible” vulnerability, such as unaccompanied minors and women at the end of their pregnancy.<sup>561</sup>

→ Right to an effective remedy

The right to an effective remedy is an important guarantee to address potential shortcomings in the initial decision-making process; for example in Austria, around 30% of the detention decisions appealed were found unlawful in 2013<sup>562</sup> because the proportionality assessment was inadequate.<sup>563</sup> All Member States provide for the possibility to appeal detention before courts and tribunals through, however, different means such as specialised bail hearings. In all Member States examined, there is no specific procedure to object to placement in detention instead of the imposition of an alternative, but such arguments can be raised before judicial or administrative authorities that assess the legality of detention

561. Lithuania Practices Questionnaire, Q.40. In the case of unaccompanied minors, the question of age dispute is problematic in many of States and unaccompanied minors may be detained during this process.

562. Source: Internal Statistics from our NGO partner Diakonie Flüchtlingsdienst.

563. Austria Practices Questionnaire, Q.5.

or a request for bail. Finally, a specific procedure allowing asylum seekers to object to being subjected to an alternative to detention exists only in Austria, although in the other Member States it is possible to contest this using the same appeal procedures as are used to object to detention.

### *iii. Implementation of specific schemes*

Schemes operationalised so far in the Member States of study can be classified into the following categories:

1. reporting;
2. sponsorship by the citizen of the country or by a permanent foreign resident;
3. personal financial guarantee;
4. designated residence (which includes: designation to reception centres for asylum seekers, publicly-run centres with or without a coaching component, centres for unaccompanied minors and private accommodation); and
5. electronic tagging.

All Member States researched have included alternatives to detention in their national law; however, they are, on the whole, poorly regulated, except for the UK and Belgium. Most existing alternatives to detention are applicable to all groups (irrespective of gender, age, whether it concerns asylum seekers at the border, in Dublin procedures or people in return procedures). Alternatives to detention are developed more in return than in asylum procedures, either because asylum seekers are rarely detained (such as for example in Sweden) or because of national specificities. The research found that very few external actors – private or non-governmental organisations – were involved in implementing these schemes.

There is no uniform approach regarding the maximum length for the imposition of an alternative to detention with some Member States equating this with the maximum permissible period for detaining an individual and others subjecting third country nationals to alternatives to detention for longer periods. Regarding access to rights and more specifically to economic rights, to information and to free legal assistance the research revealed that, in practice, some differences in treatment exist between asylum seekers who are subject to an alternative to detention and other asylum seekers.

Overall, we observed a lack of monitoring tools and regular evaluations of alternative schemes. In all researched countries, collecting accurate and comparable figures is challenging. The only figure which is easily exploitable comes from Belgium where the return houses, although providing a wide array of services and high accommodation standards, present significantly lower running costs (about 50% less) than detention centres. Similarly, absconding rates were rarely publicly available and usually unreliable. When analysing absconding figures at our disposal, a stark contrast appeared in rates between Lithuania and Slovenia on the one hand which were elevated, and the UK, Sweden and Belgium on the other hand, which were relatively low. Beyond the

characterisation of these countries as “countries of transit” or “countries of destination” within Europe, one has to analyse these figures with caution as several factors come into play such as the presence of home communities, the quality of reception conditions, the types of alternatives implemented, the profile of the individuals who are placed in such schemes, and future integration prospects.

## **2. Alternatives to detention: towards an effective implementation**

Ultimately, alternatives to detention should always be analysed in their context. There is no “fit for all” solution. Building alternatives to detention is a complex task, which requires a good knowledge of the national reception and detention system. To understand what kind of alternatives fit best in the national context, one needs to first understand the rationale behind the use of detention and formulate clearly the objectives of setting up alternatives to detention. Concerns about alternatives to detention could stem from the fact that national authorities feel they cannot achieve their migration control objectives outside detention. Alternatives to detention need, to the extent possible, to address these objectives while respecting individuals’ human rights. Then, one has to identify the advantages of the existing approaches and to pool existing financial and human resources at national level, including resources from institutions, civil society, local communities and diasporas. In Europe, civil society is very active in the field of migration and asylum and heavily involved in providing support to individuals.

In such a process, the EU legal framework establishes basic principles which lay a good basis for the use of detention as a last resort and the development of alternatives. The ongoing transposition of the recast Reception Conditions Directive provides a good opportunity to enhance the implementation of additional alternatives for asylum seekers who are currently detained. Discussions at national level, which involve a wide array of actors, such as representatives of relevant institutions, judicial authorities, and civil society, need to be initiated so that common solutions can be identified.

Another important element is the gradual development of clear guidelines that could support fair decision-making and ensure better transparency and consistency in the implementation of such schemes. These should be coupled with awareness-raising sessions and training of both national administrations and judges on the implementation of alternatives to detention. The end result should be the reform of the decision-making process so as to become a case-by-case assessment on both the needs the individual has and the risks they pose. Such a process entails the establishment of whether grounds for detention exist, the assessment of the personal situation and eventual vulnerability of the individual in a motivated decision. The right to an effective remedy against a detention decision or one imposing an alternative should

always be available to safeguard control over the quality and legality of the initial decision-making.

In terms of the practical implementation of schemes, a wide range of possibilities should be made available to the decision-maker so as to ensure that the type of alternative chosen corresponds to the individual's profile. It should also be born in mind that conditions such as reporting, financial guarantees and designated residence cannot be taken as stand-alone measures. Legal assistance, interpretation and meeting basic needs constitute conditions for a successful program of alternatives to detention.<sup>564</sup> We highlight that in any case, providing access to legal, social, medical and psychological support for asylum seekers is a legal obligation under the recast RCD, applicable to all asylum seekers, including those under an alternative scheme. More generally, the authorities should engage with the migrants or asylum seekers as much as possible as previous research has shown that the person would comply more if she felt empowered and listened to.<sup>565</sup> In time, regular evaluation of the functioning of existing schemes would be necessary in order to measure their efficiency objectively in an effort to improve them.

Without political will to make alternatives to immigration detention work effectively and proper analysis of the local context, they could become political tokens, used only when detention centres are full, or exclusively for particular groups such as children, or even remain a dead letter in EU law. It is hoped that the findings and analysis of the present study can support the process of gradual realisation of alternatives to immigration detention.

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564. See for example IDC and La Trobe Refugee Research Centre, 'There are alternatives, a handbook for preventing unnecessary detention' (2011).

565. C. Costello and E. Kaytas, UNHCR, 'Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva' (June 2013).



## **RECOMMENDATIONS**

# RECOMMENDATIONS

**As there is little practice on alternatives to detention in Europe, a number of gaps and challenges need to be addressed, with regards to both decision-making on detention and implementation of alternatives to detention. This research proposes a series of recommendations based on the analysis of existing practices which could assist this process.**

## **General**

- Housing arrangements for families with children and for separated children should be developed to avoid placing them in detention. However, this should not hamper the development of alternatives to detention for other groups.
- National authorities should reach a common understanding of what constitutes an alternative to detention on the basis of EU law and prevent the establishment of alternative forms of detention as alternatives to detention.
- Regular evaluation of the efficiency of these schemes is essential to improve the system and learn lessons from past experiences. It would also be important to understand why certain alternatives do not work, especially when there is a high rate of absconding. In these evaluations, consultations with asylum seekers and migrants are essential.
- It would be important to centralise data both at national and European level regarding:
  1. the number of people detained and the grounds for the detention decisions;
  2. the average length individuals are placed in detention and alternatives to detention;
  3. the number of individuals submitted to alternatives and the type of scheme;
  4. the cost of detention and alternatives to detention per individual; and
  5. the absconding rates.

National authorities should pay particular attention to correctly recording absconding rates, taking into account the fact that a single “no show” does not equate to absconding.

## **Decision-making and access to an effective remedy**

- All conditions imposed on an individual subject to an ATD should be regulated precisely in law, further developed by policy instructions and, if necessary, should include guidance on who to apply it to and how, in order to ensure better transparency and consistency in the implementation of ATD.
- It is important to raise awareness and to conduct training with national administrations and judges involved in decision-making and control of detention

around the importance of examining detention decisions closely and implementing ATD on the basis of the principles of necessity and proportionality.

- Publishing the list of criteria and using a clear methodology to assess the risk of absconding would help achieve an objective and transparent examination and avoid arbitrary and systematic recourse to detention. The implementation of these criteria by Member State authorities' needs to be monitored by judges.
- The detention or ATD decision should be communicated in a written form, be adequately motivated and state the detention ground invoked to justify its implementation.
- There should be a possibility to appeal both the imposition and the non-imposition of an ATD.
- All ATD are not equivalent and their level of coerciveness must be taken into account when choosing which one to apply to a particular individual.
- The fact that ATD should be non-custodial and respect fundamental rights requires scrutiny to avoid alternative forms of detention and violating fundamental rights.
- Alternatives to detention could include obligations involving different levels of coerciveness and of restrictions on the freedom of movement. Such restrictions should be necessary and proportionate.
- A wide range of alternatives should be available to adapt the measure to the individual profiles and ensure that ATD are accessible to all (including those without resources or prior contacts in the country).
- When deciding or reviewing the imposition of an ATD, authorities have to pay attention to its type, duration and effect on the individual as well as the way the measure is implemented.
- Member States should introduce time limits on both detention and alternatives to detention, especially with regard to particularly constraining methods such as electronic tagging.
- In case the individual does not comply with the obligations imposed, there should be a new review of the case. Detention should be not imposed automatically.
- Research shows that represented applicants are more successful in achieving their release; free legal aid should thus be provided in order to ensure respect for the applicant's right to liberty.

## **Implementation in practice**

- ATD cannot function if they are not accompanied by a range of approaches and strategies, such as regular follow-up by social workers to support individuals in complying with administrative obligations.
- Those subjected to ATD should have access to services and support by the State, even if they are living in the community.
- The involvement of independent third parties, like NGOs, ensures more transparency in the implementation of alternatives to detention and proper access to rights as well as a better understanding of the process by the individuals.
- In cases where non-governmental actors are involved, it is important to define their role precisely vis-à-vis national authorities. To maintain the high level of trust essential for NGOs to conduct their work, it would be important to also explain the division of roles to the beneficiaries of the schemes.
- Decisions on alternatives to detention should be explained to the person subjected to them, in a language they understand.

## **Specific points on the schemes**

### *Reporting:*

- A reporting system should be regulated precisely in law, further developed by policy instructions, and should include guidance on whom to apply it to and at what frequency.
- Reporting once a day should be applied exceptionally if at all, in light of the principle of proportionality.
- Special measures should be developed for vulnerable individuals in accordance with their profile, such as reporting via telephone (voice recognition) and lower reporting frequencies.
- Reporting frequency should be reviewed and modulated to take into account the compliance or non-compliance of the individuals.
- Travel costs should be covered if the reporting post is far from the residence of the individual.
- The authorities should not apply sanctions if the person has a valid explanation for not reporting.
- In countries where reporting events also serve the purpose of distributing financial

support, the adjournment of an event should not unduly sanction the person by depriving her of her allocation.

*Sponsorship/guarantor:*

- Securing a guarantor should not be a necessary condition for release from detention as it would discriminate against those without social ties in the country.
- Ideally, an organisation should also be able to sponsor an applicant so that this measure is not only available to those with previous social links in the country.
- The system set up should prevent the risks of exploitation inherent in the dependency created between the applicant and his “sponsor”.

*Financial guarantee:*

- The sum of the financial guarantee should be decided in line with the principle of proportionality, bearing in mind the means of the applicant.
- This measure needs to be explained clearly to the person as being a deposit which can be recovered.

*Designated residence in a public reception centre:*

- Asylum seekers subject to an ATD placed in an ordinary reception centre should have access to the same rights as other asylum seekers.
- The environment needs to be non-carceral and conducive to building trust between the individuals subjected to such measures and the authorities. The same premises should not be used as both an open reception centre and a detention facility.
- It is important to build links with the local community, contact with external actors (NGOs, networks of lawyers, local schools) and to provide independent legal advice.

*Designated residence in private accommodation:*

- Requiring individuals to reside in their private homes should not deprive them of proper follow-up and of access to the support of NGOs (such as legal advice).

*Electronic tagging:*

- Depending on how it is implemented, electronic tagging can become an alternative form of detention, depriving individuals of their right to liberty. In view of its stigmatising effect, the psychological distress it creates, its possible human rights implications, and its high cost, it would be preferable to use less coercive alternatives to detention.
- The period of time during which the individual is required to stay every day at home should be limited.
- A maximum time limit should be introduced on the use of electronic tagging.

# ANNEXES

# ANNEX 1: COUNTRY PROFILES

The country profiles aim to provide a snapshot of the national situations with regards to detention and alternatives to detention. Research was conducted by our partners and Odysseus members in 6 selected Member States in the framework of the Made Real project. Most information is taken from the questionnaires filled in by our partners, which can be referred to for more information.

## AUSTRIA

### GENERAL

**Context:** Austria is ranked 11<sup>th</sup> by UNHCR in the number of asylum seekers received in 2013 among industrialised countries,<sup>566</sup> with a bit more than 11% of Dublin cases.<sup>567</sup> The immigration and asylum legislative framework in Austria is in constant evolution. Since January 2014, detention decisions no longer fall under the responsibility of the Aliens Police but under the BFA, i.e. the Federal Office for Aliens and Asylum, an administrative body. While the concrete impact of this change still remains to be seen it is significant as, until now, all detention decisions have been taken by the police.

Detention is an important feature of the system when it comes to return procedures. In the case of asylum, it is used mainly in the framework of the Dublin Regulation. The majority of asylum seekers are housed in open centres. The system is characterised by strong judicial oversight with regional courts that overturn up to 30% of initial detention decisions taken by the police.<sup>568</sup> This is facilitated by the fact that free legal aid provided by NGOs is granted to all asylum seekers in order to challenge the detention decision. With regard to alternatives to detention, designated residence with reporting requirements is used regularly and the system functions in collaboration with NGOs running the housing facilities.

**Number of new asylum requests submitted in 2013:** 17442.<sup>569</sup>

**Top nationalities of AS:** Russia, Afghanistan, Syria, Pakistan and Algeria.

**Recognition rate in 2012:** 28% first instance and 19,4% second instance.

5995 people were granted refugee, subsidiary protection and humanitarian status.<sup>570</sup>

566. UNHCR, 'Asylum trends 2013 – levels and trends in industrialized countries' (March 2014) < <http://www.unhcr.org/5329b15a9.html>.

567. There were 2030 Dublin transfers from Austria to other European Countries in 2012 (there are no official statistics but a parliamentary request was answered for the year 2012).

568. Austria Practices Questionnaire, Q.5.

569. Eurostat, 'Asylum applicants and 1<sup>st</sup> instance decisions on asylum applications' (2013) 12 < [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF).

570. Eurostat, 'EU Member States granted protection to more than 100 000 asylum seekers in 2012' Newsrelease 96/2013 18 June 2013 < <http://ec.europa.eu/eurostat/documents/2995521/5164782/3-18062013-AP-EN.PDF/24ec940c-ccfa-4bfd-bd77-c9c18b7335af?version=1.0>.

## DETENTION

**Regulated by:** The Aliens Police Act (January 2006) and the Act on Procedures before the Federal Administrative Office for Immigration and Asylum (January 2014).<sup>571</sup>

### Who is detained?

- Asylum seekers subject to Dublin procedures (used often during the transfer phase).
- Asylum seekers at the airport upon entry (used rarely; most come through land borders).
- Asylum seekers in the territory (posing a threat to public order/national security, abusive claims) but rarely used.
- People in a return procedure.

### Are certain groups exempt from detention?

Minors under 14 are generally exempt from detention according to legislation. Children between 14 and 16 years old can only be detained in exceptional cases, if the authorities decide that the object and purpose of detention cannot be reached through a more lenient measure and if there is a high risk of absconding.

**Maximum detention periods:** Two months for minors between the ages of 14 and 18, and four months in other cases.<sup>572</sup> Detention may last six months in certain expulsion proceedings. If expulsion proceedings cannot be carried out for reasons attributable to the applicant, detention may last for a maximum of 10 months within an 18 months period.

**Average detention period in practice:** The average detention period is currently short, because the majority of cases are EU citizens who have filed an asylum claim and asylum seekers under Dublin procedures. EU citizens are detained for a few days while, in Dublin cases, the duration is on average between 10 and 20 days.

**Immigration detention capacity**<sup>573</sup>: About 1600 places but the occupation rate currently is lower.

### Number of immigration detainees in 2013:<sup>574</sup>

- Foreigners who are not asylum seekers: 3430.
- Asylum seekers: 741 (including 229 expected to be transferred under the Dublin Regulation).

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571. Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln, (Fremdenpolizeigesetz 2005 - FPG), BGBl. I Nr. 100/2005; Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden (BFA-Verfahrensgesetz – BFA-VG), BGBl. I Nr. 87/2012.

572. This measure applies to all minors regardless of their status.

573. The detention capacity refers to the number of places dedicated to immigration detention, which includes both asylum seekers and people subject to a return procedure, in a given country.

574. All figures are taken from the Ministry of Interior official figures for 2013 <[http://www.bmi.gvat/cms/BMI\\_Niederlassung/statistiken/files/FrP\\_Massnahmen\\_Jahresstatistik\\_2013.pdf](http://www.bmi.gvat/cms/BMI_Niederlassung/statistiken/files/FrP_Massnahmen_Jahresstatistik_2013.pdf).



## ALTERNATIVES TO DETENTION

**Is there a legal obligation to examine alternatives to detention?** Yes. There is an explicit obligation that a “more lenient measure” has to be applied if it can achieve the aim of the intended detention.

### Which alternatives to detention exist?

The non-exhaustive list of alternatives to detention contained in the law includes reporting and designated residence, which consists, in the case of asylum seekers of private accommodation or NGO-run accommodation. Usually both schemes are used in combination. The possibility to deposit a financial guarantee is foreseen in law but it is not used in practice.

### Who is responsible for this scheme?

Since 1/1/2014, the Federal Office for Aliens and Asylum, an administrative body, takes decisions on detention and alternatives to detention, ex officio. The reporting is done at police stations and, therefore, is under the authority of the regional federal police directorates. Residence can be designated in centres run either by the State or by private actors (such as NGO or private companies). The latter are paid per person housed. If the person leaves the accommodation place, the NGO or the owner of the facility has to report this to the authorities (usually after 3 days).

### What are the sanctions if the conditions are not respected?

Detention, as mentioned in the law (AA 77 (3)). The only exception is where there is an impossibility to detain (in case for example of severe illness).

**Maximum period:** 20 months, although usually applied during 2-3 months.

**Number of Asylum seekers submitted to this scheme in 2013:** 490<sup>575</sup> In total, there were 771 foreigners (including AS) submitted to ATD.

**Absconding rate:** Not available

**Cost:** There are no precise costs for detention available but officials estimated that detention costs 120€/day/person.<sup>576</sup> The reimbursement for NGOs running ATD facilities is between 17 and 24€/day and per person, an amount close to the one received by NGOs for asylum seekers who are not in an ATD.<sup>577</sup>

575. The same person can be put into an ATD more than once a year.

576. Official answer to a parliamentary request of the Green Party in the years 2010 and 2011.

577. For asylum seekers who are not in an ATD, NGOs are given a maximum of 19 € per day, which includes approximately 5,50 € for food (in cash or goods or provided meals).

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## BELGIUM

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### GENERAL

**Context:** According to UNHCR's latest report on asylum in industrialised countries, between 2009 and 2013, Belgium ranked 9<sup>th</sup> in terms of the ratio of asylum seekers in the general population (8,6 asylum seekers for 1000 inhabitants), after Sweden and Austria.<sup>578</sup> Belgian authorities detain all asylum seekers at the border and a high number of Dublin cases (about 50% of Dublin cases are detained at some point in the procedure). Although there has been a recent decrease in the overall detention capacity – from 635 to 516 places- the number of migrants and asylum seekers detained has remained about the same.<sup>579</sup> In October 2008, Belgium decided to end the detention of children in the return procedure and in October 2009, children in border asylum procedures, following a condemnation from ECHR<sup>580</sup> and pressure from NGOs.

Currently, all children and their families liable to be detained (asylum seekers and returnees) are placed in open housing units. Recently, there has been a fall in the number of asylum applications at the border, and most of the cases in return houses are families in a return procedure. Following the recent policy emphasis on promoting and enforcing return, about two third of the families in return houses are at the end of the procedure, having exhausted all remedies and refused voluntary departure programs.<sup>581</sup> Although the law includes the possibility for families with minor children on the territory to stay in their house under certain conditions, it is not yet in effect. No other alternatives to detention are therefore currently in use in Belgium.

**Number of new asylum requests submitted in 2013:** 11965.<sup>582</sup>

**Nationalities of AS most represented:** Afghanistan, Guinea, DRC, Russia & Syria.<sup>583</sup>

**Recognition rate in 2012:** 22,6% at first instance and 2,6% at second instance. 5880 people were granted refugee, subsidiary protection and humanitarian status.<sup>584</sup>

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578. UNHCR, 'Asylum trends 2013 – levels and trends in industrialized countries' (March 2014).

579. In 2012, 6 712 foreigners received a detention order, compared to 7 034 in 2011, 6 553 in 2010 and 6 439 in 2009.

580. *Mubilanzila Mayeka v Belgium* See for example App no 13178/03 (ECtHR, 12 October 2006); *Muskhadzhiyeva and others v Belgium* App no 41442/07 (ECtHR, 19 January 2010).

581. G. Verbauwheide, "Attaché" at the Office for foreigners, IDC Regional Europe workshop power point presentation, 28 March 2014. In copy with the author.

582. Eurostat, 'Asylum applicants and 1<sup>st</sup> instance decisions on asylum applications' (2013) 12 <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF).

583. CGRA, 'Statistiques d'asile, bilan 2013' <[http://www.cgvs.be/fr/binaries/Statistiques\\_asile\\_d%C3%A9cembre\\_2013\\_Ext%C3%A9rieur\\_tcm126-240110.pdf](http://www.cgvs.be/fr/binaries/Statistiques_asile_d%C3%A9cembre_2013_Ext%C3%A9rieur_tcm126-240110.pdf).

584. Eurostat, 'EU Member States granted protection to more than 100 000 asylum seekers in 2012' Newsrelease 96/2013 18 June 2013 <<http://ec.europa.eu/eurostat/documents/2995521/5164782/3-18062013-AP-EN.PDF/24ec940c-ccfa-4bfd-bd77-c9c18b7335af?version=1.0>.

## DETENTION

### Regulated mainly by:

- Law 15<sup>th</sup> December 1980 on access to the territory, residence, establishment and removal of aliens<sup>585</sup>
- Royal Decree of the 8<sup>th</sup> October 1981 on access to the territory, residence, establishment and removal of aliens<sup>586</sup>
- Royal Decree of 2<sup>nd</sup> August 2002<sup>587</sup>

### Who is detained?

- All asylum seekers at the border except families with minor children.
- Asylum seekers subject to Dublin procedures (primarily during the transfer phase).
- Asylum seekers on the territory (posing a threat to public order/national security, abusive claims) but rarely used.
- People in the return procedure at the border and on the territory.

### Are certain groups exempt from detention?

Yes, unaccompanied children (under 18) cannot be detained in law or in practice<sup>588</sup>. Detention could be used for families with minor children and single parents only as a last resort when alternatives have failed and in “appropriate housing” within detention. However, such units are currently not available. Doctors can also end detention if they consider it seriously compromises the physical and mental health of the detainee.

### Maximum detention period in law:

- Asylum seekers: max 2 months (2.5 in case of an appeal)
- Dublin: 2-3 months
- Immigrants in return procedure: 5 months (if an individual is detained on a public order ground, then he can be detained 8 months)

**Average detention duration for all in practice:** In 2012, the average detention period was 35 days<sup>589</sup>.

**Detention capacity:** 516 places.

585. Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers <[http://www.ejustice.just.fgovbe/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=1980121530&table\\_name=loi](http://www.ejustice.just.fgovbe/cgi_loi/change_lg.pl?language=fr&la=F&cn=1980121530&table_name=loi)>

586. Arrêté royal sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers <[http://www.ejustice.just.fgovbe/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=1981100831&table\\_name=loi](http://www.ejustice.just.fgovbe/cgi_loi/change_lg.pl?language=fr&la=F&cn=1981100831&table_name=loi)>

587. Arrêté royal fixant le régime et les règles de fonctionnement applicables aux lieux situés sur le territoire belge, gérés par l'Office des étrangers, où un étranger est détenu, mis à la disposition du Gouvernement ou maintenu, en application des dispositions citées dans l'article 74/8, § 1er, de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, 2 August 2002 <[http://www.ejustice.just.fgovbe/cgi\\_loi/change\\_lg.pl?language=fr&la=F&cn=2002080275&table\\_name=loi](http://www.ejustice.just.fgovbe/cgi_loi/change_lg.pl?language=fr&la=F&cn=2002080275&table_name=loi)>

588. Detention is allowed for 6 days if there is a doubt on the age of the person and a bone age test has to be conducted.

589. IDC Regional Europe workshop, 'Detention context forms - Belgium' (March 2014) 12.

**Number of immigration detainees per year:** 6797 in 2012<sup>590</sup> (numbers of decision on detention taken in 2012). In 2011, there was an average of 458 people detained at any given time.

*Including the number of asylum seekers detained:*<sup>591</sup>

- Number of asylum seekers detained at the border: 502 (including 31 families in the “return houses”)<sup>592</sup>
- Number of asylum seekers detained in a Dublin procedure: a minimum of 546 cases.
- Number of asylum seekers detained under other motives on the territory: (art 74/6 paragraph 1): 170 cases.

→ In all, there are between 1000 and 1500 asylum seekers detained per year.<sup>593</sup>

## ALTERNATIVES TO DETENTION

**Is there a legal obligation to examine alternatives to detention?** There is no explicit obligation to establish ATD for asylum seekers in law.<sup>594</sup> However, in what concerns specifically families with minor children it is implicit in the statement that they cannot be detained unless the authorities have examined more lenient measures. In the return framework, the obligation is explicit.

### Which alternatives to detention exist?

- Family units (or return houses) for all families liable to be detained (including asylum seeking families at the border). There are housing units where families enjoy freedom of movement and are supervised by a coach designated by the Immigration Office.
- Designated residence is also mentioned in law but only for families in a return procedure. This is not applied in practice.

### Who is responsible for this scheme?

The Immigration Office decides on the placement in return houses ex officio and implements the scheme. It works in collaboration with a network of lawyers (for the provision legal aid), local schools (for the education of children), childhood protection organisations and NGOs such as JRS Belgium (for monitoring purposes).

### What are the sanctions if the conditions are not respected?

According to the legislation, if families do not respect the internal rules of the housing

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590. Rapport d'activité 2012 de l'Office des Etrangers [2013]160 < [https://dofi.ibz.be/sites/dvzoe/FR/Documents/2012\\_FR.pdf](https://dofi.ibz.be/sites/dvzoe/FR/Documents/2012_FR.pdf).

591. Belgium Practices Questionnaire, Q.31.

592. As we will discuss further, return houses are considered legally as detention places but in practice families enjoy complete freedom of movement.

593. This is an estimation given by CIRE, our project partner.

594. The situation is different concerning the detention of third country nationals in return proceedings; Arts 7 and 27 of the 15 December 1980 Law establish an obligation to examine first whether less coercive measure could be applied instead of detention.

units, it does not lead immediately to detention. They can only be detained if the authorities show that other less coercive measures could not be applied effectively.<sup>595</sup> In practice, currently few sanctions are implemented. The coaches can be stricter in the distribution of food (by distributing for example the coupons only day by day). In extreme circumstances (domestic violence, putting the children in danger, or threatening the coach), one of the parents could be transferred to a closed centre. Although a paragraph in the law stipulates that families could be detained as a last resort, this is not applied as there are currently no detention centres adapted to the needs of families with minor children.<sup>596</sup>

**Maximum detention period in law:** Same as the maximum period of detention as the placement in a “Return house” is legally a detention decision.<sup>597</sup>

**Average stay:** 23 days. For families in a Dublin transfer, the average is one week.

**Number of asylum seekers in return houses in 2013:** 42 families (out of 159 families in total).

**Absconding rate:** In total, the absconding rate is 23%. In 2013, out of the 58 families in a border procedure (including 31 having asked for asylum) 10 disappeared – i.e. 17%. For Dublin cases, 3 out of the 6 families absconded- i.e. 50%.

**Human resources involved:** There are 25 houses in 5 locations. In total there are 9 coaches, a coordinator, a logistical support and a logistical supervisor.

**Cost:** 90€ per person per day (while detention costs 186€ per person per day).

595. Art. 74/9, § 3, al. 4, Law 15 December 1980.

596. Belgium Practices Questionnaire, Q.14.

597. Although families in the return houses are free to move, they are legally and formally detained. Therefore all procedural elements linked to detention apply in this case: accelerated treatment of their asylum application, 15 instead of 30 days for their appeal. Furthermore, they are not considered to be “on the territory”.

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## LITHUANIA

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### GENERAL

**Context:** Most irregular arrivals are intercepted at the land border with Belarus. As “illegal border crossing” is a criminal offense, many of those intercepted are incarcerated in ordinary prisons before being sent back or transferred to a specialised facility.<sup>598</sup> The number of asylum seekers is low but there are serious problems with regard to access to the asylum procedure both at the borders and on the territory. A large number of migrants and asylum seekers arriving in Lithuania come from Russian-speaking countries. As such, several alternatives to detention were developed in the context of return for foreigners who have a family and further social links in the country.

With regards to asylum seekers, until recently, only two options were available in practice: placement in an open reception centre or in detention. Both structures are situated in the same location and are run by the border guards’ service. The judicial system plays a central role in the control of detention and the development of alternatives, as detention has to be authorised by judicial authorities within 48 hours. A recent judgment releasing an asylum seeker from detention with the condition of reporting opens the possibility for asylum seekers to access other forms of alternatives to detention.<sup>599</sup> In October 2013, substantial changes were made to the Alien’s Law, introducing grounds for the detention of asylum seekers.

**Number of asylum requests submitted in 2013:** 250. Positive outcome: 55.<sup>600</sup>

**Top nationalities of AS:** Georgia, Afghanistan, Russia, Vietnam, India<sup>601</sup>

**Recognition rates:** In 2012: 13,9% recognition rate.<sup>602</sup>

55 people were granted refugee, subsidiary protection or humanitarian status.

### DETENTION

**Regulated by:** Law on the Legal Status of Aliens of the Republic of Lithuania (Alien’s Law) 2004.<sup>603</sup>

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598. It is important to mention that according to the Criminal Code, asylum seekers are exempted from the criminal liability of illegal entry. Therefore, in theory imprisonment as a penalty for illegal entry cannot be applied to asylum seekers. In practice however, asylum seekers are almost regularly penalised for illegal border crossing.

599. Supreme Administrative Court (Lithuania), case no N<sup>575</sup>-102/2013 4 December 2013.

600. Eurostat, ‘Asylum applicants and 1<sup>st</sup> instance decisions on asylum applications’ (2013) 12 <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF).

601. Eurostat, ‘Figures for the last quarter of 2013’ <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF).

602. Eurostat, ‘Figures from 2012’ <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/3-18062013-AP/EN/3-18062013-AP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-18062013-AP/EN/3-18062013-AP-EN.PDF).

603. DĖL UŽSIENIEČIŲ TEISINĖS PADĖTIES, 2004 m. balandžio 29 d. Nr. IX-2206 <[http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=478037](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=478037).

**Who is detained?**

- Asylum seekers in the territory including those considered to present manifestly unfounded cases or to pose a danger to public health and national security/public order.
- Asylum seekers at the border for 48 hours only (waiting for a decision on temporary territorial asylum).<sup>604</sup>
- Asylum seekers subject to Dublin procedures (mostly those returned to Lithuania under the Dublin procedure)
- People in the return procedure (it could include refused asylum seekers and undocumented migrants)

Asylum seekers who have arrived legally in Lithuania are exempted from detention on the grounds of illegal entry or stay.

**Are certain groups exempt from detention?**

According to national law, no single group is completely exempt from detention but there is a provision that vulnerable individuals (which include minors, persons with disabilities, persons above 75 years old, single parent families with minor children, pregnant women, victims of torture, rape or other serious psychological, physical or sexual violence) and families with minor children may be detained in very exceptional cases, taking into consideration the best interests of the child. All UAMs having asked for asylum are transferred to an open centre (the Refugee Reception Centre) and families with children are rarely detained.

**Maximum detention periods in law:** 18 months for both asylum seekers and returnees.

**Average detention for all in practice:** The period of detention, which is decided by the courts, is usually around 2-3 months (which corresponds to the usual timeframe for first instance asylum decisions).

**Immigration detention capacity:** The Foreigners' Registration Centre, the only immigration detention centre in the country, has a capacity of a maximum of 76 places.

**Number of immigration detainees per year in 2013:** 363 foreigners in total.<sup>605</sup>

**Including the number of asylum seekers detained:** According to the Foreigners' Registration Centre in 2013, 106 asylum seekers were detained in the Foreigners' Registration Centre (and 156 asylum seekers were accommodated in this centre without restrictions on their freedom of movement).<sup>606</sup>

604. Decision for temporary territorial asylum: decision allowing the person to stay on the territory of Lithuania during the examination of his/her asylum application. This decision is taken by the Migration Department within 48 hours following the lodging of an application. See Lithuania Practices Questionnaire, Q.2.

605. Official data from the Migration Department.

606. Including 44 asylum seekers who applied for asylum before the court decision to detain them and 62 asylum seekers who applied for asylum already being detained in the Foreigners' Registration Centre as irregular migrants. Figures provided by the Foreigners' Registration Centre in an interview with our Lithuanian partner but not published.

## ALTERNATIVE TO DETENTION

**Is there a legal obligation to examine ATD?** No, there is no explicit obligation. However, the authorities have the obligation to approach the district court within 48 hours so the court can examine if there are grounds for detention or alternatives to detention.

### Which alternatives to detention exist?

The exhaustive list of alternatives to detention contained in the law includes:

1. Periodic reporting to the territorial police office. The reporting frequency is decided by the court.
2. Reporting about her place of stay by means of communication at certain times to the territorial police office.
3. Placement of an unaccompanied minor in a social institution. In theory, minors could be placed in any national social centre, including a foster home, but, in practice, they are placed in the Refugee Reception Centre, a reception centre not specialised in child protection which also houses recognised refugees.
4. Trusting the foreigner to the guardianship of a citizen of Lithuania or a foreigner legally residing in Lithuania. If there is insufficient evidence to establish family links, the court can order this ATD in combination with another measure.
5. Accommodating the foreigner at the Foreigners' Registration Centre without applying restrictions on the freedom of movement.

Other than alternatives 3 and 5, applicable only to unaccompanied minors and asylum seekers respectively, all other alternative measures are applicable to all foreigners. In practice however, reporting and sponsorship are used for returnees as they are decided on the basis of family links, availability of accommodation and means of subsistence. Furthermore, medical assistance and social assistance as well as monthly payments are provided only to those asylum seekers who stay in the governmental centres.

### Who is responsible for that scheme?

ATDs are assigned by the district court of the place of stay of the foreigner but submission to the court has to be made either by the police, or other law enforcement authorities or by the asylum seeker himself. The territorial police runs the reporting scheme. NGOs (the Lithuanian Red Cross and Caritas) as well as social and healthcare services provide services to asylum seekers in both the Foreigners' Registration Centre and the Refugee Reception Centre.

### What are the sanctions if the conditions are not respected?

The territorial police can ask the court to apply detention.<sup>607</sup> The order on accommodation of foreigners and the internal rules of the Foreigners' Registration Centre lay down obligations that have to be respected by asylum seekers and sanctions to be applied if they are not respected. However, the sanction for disrespecting the internal rules for .....

<sup>607</sup> Art. 115(3), Lithuanian Alien's Law.



asylum seekers placed in the Foreigners' Registration Centre after a decision of the court (i.e. as an ATD) can be detention. Other categories of asylum seekers can only have disciplinary sanctions imposed on them, ranging from cleaning chores or reduction of financial allocation up to solitary confinement for 48 hours. These sanctions are decided by the head of the centre and are used widely. Apart from disciplinary sanctions, delays to report back to the centre may also lead to the suspension or termination of the asylum procedure. UAMs housed in the Refugee Reception Centre also have internal rules to comply with but they are not subjected to disciplinary sanctions.<sup>608</sup>

**Maximum period:** It is the same as detention.

**Number of asylum seekers submitted to an ATD:** 10 according to the court and 5 according to the Foreigners' Registration Centre.<sup>609</sup> In 2013, there was also a case of guardianship and reporting applied but it was the first time such a scheme was used for an asylum seeker.

**Absconding rate:** There are no figures available on the rate of absconding for AS submitted to an ATD. However, more general figures on the rate of absconding of asylum seekers are available. In 2012, 60,2% asylum seekers housed in the open reception centre absconded.

Year	Total number accommodated in the Foreigners' Registration Centre	Number of applicants subject to the accelerated procedure	Number of absconded asylum seekers
2010	433	94	279
2011	494	160	248
2012	656	240	395

Source: Information submitted by the Foreigners' Registration Centre

608. Lithuania Practices Questionnaire, Q.12.

609. Statistics differ according to the different sources. According to the available Court judgments, an alternative to detention in 2013 was imposed to 10 asylum seekers: 8 asylum seekers in the Foreigners' Registration Centre; one asylum seeker was obliged by the Court to register at the police office and in one case the court entrusted the guardianship of asylum seeker to a citizen of the Republic of Lithuania with the obligation to inform, by means of communication, the appropriate territorial police office about his whereabouts. According to official data of the FRC, ATD were imposed to 5 asylum seekers.

All UAMs housed in the Refugee Reception Centre (RRC) in 2013 absconded:

Year	2010	2011	2012	2013
<b>Number of UAM accommodated in the RRC</b>	8	4	81	9
<b>Number of UAM which absconded from the RRC</b>	8	4	80	9

Source: Information submitted by the Refugee Reception Centre

**Cost:** Open accommodation in the Foreigners' Registration Centre cost 50 litas per day per person (15€) whereas the closed part of the centre costs 62 litas per day per person (about 18.6€).<sup>610</sup> The above numbers cover the supply of water and other utilities, laundry services, meals, etc. Asylum seekers under the open regime receive some services for free in the Caritas day centre (legal assistance, Lithuanian language training, activities with children, use of computer) which are not included in the calculation.

For the unaccompanied minors in the Refugee Reception Centre, an average estimate is about 94 litas per person per day (28.3€) including education and health costs. These estimates do not include the human resources necessary to run the centre and flat costs of the buildings.

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610. Euro values of litas are estimated based on the final exchange rate before Lithuania joined the Euro zone on 1 January 2015, i.e. 1 litas per 0.30 euros.

## SLOVENIA

### GENERAL

**Context:** Asylum and migration issues are not at the centre of the Slovenian public debate, with very low numbers of asylum seekers and most migrants and refugees transiting through the country. In 2012, 1.385 irregular crossings were accounted for by the Slovenian Ministry of Interior, which includes individuals from refugee-producing countries such as Afghanistan or Somalia.<sup>611</sup> According to the same source, 36% of asylum seekers absconded. With the entry of Croatia into the EU, Slovenia is no longer at the external border of the EU and changes in the migratory routes means that numbers have fallen further. Issues around the citizenship of individuals coming from ex-Yugoslav republics with longstanding family ties in Slovenia remain unresolved. As a result, the authorities developed some flexibility in the application of return procedures and alternatives to detention in particular for foreigners in an irregular situation, most of whom are from ex-Yugoslavia. In this context, many asylum seekers are detained (about a quarter in 2013), and alternatives to detention have not been developed for this category.

**Number of new asylum requests submitted in 2013:** 240.<sup>612</sup>

**Top nationalities of asylum seekers:** Syria, Kosovo, Algeria, Afghanistan, Pakistan.

**Recognition rates in 2012:** 15,6 % at 1<sup>st</sup> instance (no second instance)  
35 persons were granted refugee, subsidiary protection and humanitarian status.<sup>613</sup>

### DETENTION

**Regulated by:** The International Protection Act of 2007,<sup>614</sup> while the detention of other foreigners is regulated by the Aliens Act of 2011.<sup>615</sup>

#### Who is detained?

- Asylum seekers subject to Dublin transfers.
- Asylum seekers under an accelerated procedure.
- Asylum seekers at the border, for 48 hours maximum.
- Migrants in a return procedure

611. Annual Police report 2012, 'Illegal Migration' <<http://www.policija.si/index.php/delovna-podroja/mejne-zadeve-in-tujci/622>>.

612. Eurostat, 'Asylum applicants and 1<sup>st</sup> instance decisions on asylum applications' (2013) 12 <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF)>.

613. Eurostat, 'EU Member States granted protection to more than 100 000 asylum seekers in 2012' Newsrelease 96/2013 18 June 2013 <<http://ec.europa.eu/eurostat/documents/2995521/5164782/3-18062013-AP-EN.PDF/24ec940c-ccfa-4bfd-bd77-c9c18b7335af?version=1.0>>.

614. Zakon o mednarodni zašiti - ZMZ, 2006-1711-0047 <[http://zakonodaja.govsi/rpsi/r01/predpis\\_ZAKO4911.html](http://zakonodaja.govsi/rpsi/r01/predpis_ZAKO4911.html)>.

615. Zakon o tujcih - ZTUJ- 2010-1711-0004 <[http://zakonodaja.govsi/rpsi/r01/predpis\\_ZAKO5761.html](http://zakonodaja.govsi/rpsi/r01/predpis_ZAKO5761.html)>.

**Are certain groups exempt from detention?** No. However, UAMs who have made an asylum application cannot be kept in the immigration detention centre (the Alien's Centre) but can be deprived of their liberty in the Asylum Home. In practice, this is rarely used. UAMs who do not apply for asylum can be detained if no other appropriate facility is available, which is de facto the case.

Similarly, vulnerable groups (minors, UAMs, disabled persons, elderly, pregnant women, single parents with minor children, victims of trafficking, persons with mental health disorders and victims of rape, torture and other serious forms of psychological, physical or sexual violence) are rarely detained. If they are detained, their needs have to be taken into account in detention with the purpose of ensuring appropriate privacy: special wings in both the Aliens centre and the Asylum home. In rare cases, elderly and people with health problems were transferred to medical or social facilities.

**Maximum detention period:** 3 months, extensible for 1 additional month for asylum seekers. 6 months, extensible for 6 additional months for returnees.

**Average detention for all in practice:** According to the Aliens Centre, the average period of detention in the Aliens Centre in 2013 is 16,3 days.

**Immigration detention capacity:** The Alien's Centre in the city of Postojna (the only immigration detention centre in the country) has the capacity to hold 220 foreigners. There are 72 spaces in the section for vulnerable people, 24 in the section for unaccompanied minors and 48 in the section with stricter police control.

#### **Number of immigration detainees per year:**

In 2013, 425 foreigners (including asylum seekers) were detained in the Aliens Centre in Postojna.<sup>616</sup>

*Number of AS detained:* From January to November 2013, 62 decisions on detention were issued to asylum seekers, of which 49 cases of detention were carried out in the Aliens Centre in Postojna and 13 in the premises of the Asylum Home in Ljubljana.

## **ALTERNATIVES TO DETENTION**

**Is there a legal obligation to examine ATD?** For asylum seekers and returnees, there is no explicit obligation to examine ATD.

#### **Which alternatives to detention exist?**

- For **asylum seekers**, authorities consider that they apply alternatives to detention when they deprive them of their liberty in the asylum reception centre (the Asylum Home). The person concerned has access to all services provided, including health and psycho-social care, language courses and daily access to legal aid

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<sup>616</sup>. Number of people submitted to this scheme: 359 in 2012, 250 in 2011, and 313 in 2010.

provided by NGOs. Although the level of services is good and the non-prison like environment is more favourable to the asylum seeker in the Asylum Home than in the Aliens centre, this nevertheless amounts to deprivation of liberty.

- For **returnees**, the Alien's Act draws an indicative list of more lenient measures (Art 81):

1. Designated residence:<sup>617</sup> In practice, the police check approximately once a month if the alien still lives there. The person has the obligation to inform the police if they move.
2. Restriction to the place of residence (vague term which could be also a village/town): this is not used in practice.
3. Obligation to report to the nearest police station. Usually, the interval for reporting is once per month with one or two days' delay.

The Aliens Law also includes provisions relating to the accommodation of vulnerable groups outside detention. Exceptionally, returnees can be accommodated in a medical facility or a social care centre due to poor health. Applied rarely, this measure can be decided by the physician who determines that a particular individual is not capable of staying in the Aliens Centre. In these cases, the police will determine *ex officio* an address for the alien to stay and the centre will have to find appropriate other accommodation (home for elderly persons, mental institution, or accommodation in agreement with the social work centre). The costs are covered entirely by the Aliens Centre. According to the law, UAMs should be accommodated in adequate accommodation for minors in agreement with a guardian but this has not been put into practice. The law also provides the possibility to accommodate the UAMs in the Aliens Centre if accommodation in adequate facilities is not possible.<sup>618</sup> Families with children can sometimes be accommodated in student dormitories in the city of Postojna but this is an ad hoc measure.

In practice, there is also a possibility to ask for the placement of the foreigner under the responsibility of a citizen of Slovenia or a person with permission to reside in Slovenia. This can be combined with reporting to the authorities or visits of the police to the sponsor's place of residence. TCNs who are able to secure a sponsor are usually returnees with family connections in Slovenia.

According to the Aliens Centre, the determination of an address with a monthly check by the police is usually used as an ATD but regular reporting and determination of a sponsor is also used occasionally.

### Who is responsible for this scheme?

The institution in charge of taking and implementing the decision regarding asylum seekers is the internal administrative affairs, migration and naturalisation directorate of the Ministry of Interior.

617. The exact wording is: "The police may allow the alien to reside outside the centre and in such cases it may also determine the place of his/her residence".

618. Art. 82(32), Slovenian Alien's Act.

In the case of returnees, the police or the Aliens Centre (a police institution also ultimately under the Ministry of Interior) is in charge of deciding and implementing more lenient measures.

### **What are the sanctions if the conditions are not respected?**

No sanctions are specified in law. Both asylum seekers and returnees may be detained in the Aliens Centre based on a case-to-case examination. Whenever an asylum seeker (whether under an alternative to detention or not) leaves the Asylum Home and does not return within 3 days, their application may be considered withdrawn, in which case the asylum procedure is terminated.

**Maximum period:** For both asylum seekers and returnees, it is the same as for detention.

### **How many people were submitted to an ATD in 2013?**

There were 13 decisions ordering deprivation of liberty to the Asylum Home. For returnees, detention in the Aliens Centre was replaced with an alternative in 4 cases.

**Absconding rate:** Eleven out of 13 A/S absconded from the Asylum Home.<sup>619</sup> The rate of absconding among returnees submitted to one of the alternative measures is, according to the police, very low and does not differ between the schemes.

**Cost:** According to the Slovenian authorities, detention in the Aliens Centre costs 15,10€ per day per person but this does not include human resources or the costs of the building. The cost for housing an asylum seeker in the Asylum Home is 7,20€ per day which has to be added to the 18,00€ allowance per month provided to every asylum seeker. The costs of placing an asylum seeker in the Aliens Centre or the Asylum Home (with or without restrictions on movement) are more or less the same, as they have similar services and human resources.

In the case of returnees, alternatives cost practically nothing since reporting and supervision activities are part of the police's daily tasks. The supervision of a returnee with designated residence is usually done simultaneously with other police work in the area. According to police estimates, such activities cost on average 15€ per case. Only returnees with "permission to stay" are granted social help, of 260€ per month. Other categories of returnees do not receive any financial support from the State.

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619. Information given by the Slovenian Internal Administrative Affairs, Migration and Naturalization Directorate, interview with Matja Dovan and Peter Škulj on 19 December 2013.

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## SWEDEN

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### GENERAL

**Context:** In the mid 1990's, the Swedish government reformed its immigration system to make it more respectful of human rights, in consultation with academics and NGOs. Nowadays, the reception and integration of migrants and asylum seekers is based on a case-management approach with individual follow-up by the Migration Board (by a reception officer and a procedure officer). Most asylum seekers are housed by the State in individual units in the community while substantial numbers find housing themselves.<sup>620</sup> One of the most prominent features of this reform was the reduction in the use of detention, which was handed over from the police to the Migration Board. Projects to reduce detention to its strict necessity, such as the LEAN project carried out by the Swedish authorities with the University of Uppsala, are ongoing.<sup>621</sup>

Although Sweden has one of the highest numbers of asylum applications per year in the EU (ranked 4<sup>th</sup> in terms of share of asylum applications in industrialised country by UNHCR between 2009 and 2013),<sup>622</sup> asylum seekers are placed in detention very rarely and in exceptional situations. Sweden is a popular destination for refugees from Eritrea, Syria and Iraq. The only alternative to detention in place, namely supervision, is hardly used and poorly regulated. Furthermore, statistics are difficult to obtain as decision-making on detention and alternatives to detention is fragmented between the Migration Board, the 21 police authorities and the courts.

**Number of new asylum requests submitted in 2013:** 54 255.<sup>623</sup>

**Top nationalities:** Syria, Afghanistan, Somalia, Eritrea, Serbia and Iraq.

**Recognition rates in 2012:** 39,3 % first instance and 18,1 % second instance. 15290 persons were granted refugee, subsidiary protection or humanitarian status<sup>624</sup>.

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620. According to the Migration Board statistics, 34 663 people are placed in facilities provided by the Migration Board and 16 350 have chosen their own house. See Sweden Practices Questionnaire, Q.12.

621. LEAN is an umbrella framework under which several projects are implemented with a focus on reducing time of processing. Example: Kortare väntan - Introduktion och bosättning (Shorter waiting periods- Introduction and residence (establishing oneself)) < [http://www.migrationsverket.se/download/18.5e83388f141c129ba631335a/1381926436728/projekt\\_erf2010.pdf](http://www.migrationsverket.se/download/18.5e83388f141c129ba631335a/1381926436728/projekt_erf2010.pdf).

622. UNHCR, 'Asylum trends 2013 – levels and trends in industrialized countries' (March 2014).

623. Eurostat, 'Asylum applicants and 1<sup>st</sup> instance decisions on asylum applications' (2013) 12 <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF).

624. Eurostat, 'EU Member States granted protection to more than 100 000 asylum seekers in 2012' News release 96/2013 18 June 2013 <<http://ec.europa.eu/eurostat/documents/2995521/5164782/3-18062013-AP-EN.PDF/24ec940c-ccfa-4bfd-bd77-c9c18b7335af?version=1.0>.

## DETENTION

**Regulated by:** the Swedish Aliens' Act (2005:716).<sup>625</sup>

### Who is detained?

- People subject to a return procedure (refused asylum seekers and undocumented migrants) on the territory.
- Asylum seekers subject to Dublin procedures (for the purposes of transfer)
- Asylum seekers on the territory or at the border (for the purposes of identity verification or investigation of the right to stay in Sweden) but very rarely.

The first two only if there is a risk of criminal activity, absconding or if the person obstructs the execution of the decisions.

### Are certain groups exempt from detention?

No group is exempt from detention. However, detention of children is greatly restricted. UAMs are detained only on exceptional grounds. Children in general (with at least one custodian) can only be detained if supervision is deemed insufficient or has failed and only in appropriate housing. Furthermore, for children there is a time limit of 72 hours (extensible once if there are exceptional grounds).

**Maximum detention period in law:** 48 hours for investigation, 2 weeks for identity verification and probability of refusal of entry or expulsion, 12 months for deportation if there are exceptional reasons and the execution is delayed due to the detainee's lack of cooperation (time periods defined on the basis of the legal grounds for detention).

**Average detention period in practice:** 11,2 days. (2012)<sup>626</sup>

**Immigration detention capacity:** 235 places

**Number of immigration detainees in 2013:** 2893. On average, 219 persons were detained per month.<sup>627</sup>

**Number of asylum seekers detained not available**<sup>628</sup>. However, partners have stated that the number of asylum seekers detained in Sweden is low. Statistics show that, in 2013, 92% of decisions on detention and supervision taken by both the police and the Migration Board were taken in the framework of the return procedure.<sup>629</sup>

**Total number of decisions on detention in 2013:** 4546<sup>630</sup> (by both the Migration Board and police authorities)

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625. Utlänningslag (2005:716) <<http://www.government.se/sb/d/5805/a/66122>.

626. <<http://www.migrationsverket.se/English/About-the-Migration-Board/Facts-and-statistics-/Statistics/2012.html>.

627. Source: Swedish police. See the introduction of the Swedish Practices Questionnaire.

628. The statistics relate to the grounds for detention; not distinguishing between categories such as asylum seekers, failed asylum seekers, irregular migrants etc. The only ground that is recorded in official statistics is detention for the purposes of Dublin transfers. However, it is rather rare that asylum seekers are detained whilst in the asylum procedure and statistics show that the vast majority of foreigners detained are in a return and/or Dublin procedure.

629. See the introduction of the Swedish Practices Questionnaire.

630. Number of decisions taken – one person can have more than one detention decision.



## ALTERNATIVES TO DETENTION

**Is there a legal obligation to examine alternatives to detention?** Yes. The law stipulates that “the act is to be applied so as not to limit the freedom of aliens more than is necessary in each individual case”.

### Which alternatives to detention exist?

The law mentions only “supervision” which combines regular reporting with surrender of documents. It is often decided for people who are in detention with no prospect of being returned (61% of the cases). In practice however, it is equivalent to reporting, as asylum seekers surrender documents anyway at the beginning of their procedure. The frequency of reporting is decided case by case and there is no standardised procedure regarding its application. It usually ranges from reporting once a week to once every two weeks but can be once a day if the authorities have found there is a high risk of absconding.

### Who is responsible for this scheme?

Decision-making on this issue is fragmented. Authorities (Migration Board and 21 police directorates) or the 4 courts handling the case can decide on this measure. The implementation of supervision is undertaken by the Migration Board, with the collaboration of the police, if it concerns a forced return or a transfer under a Dublin procedure.

### What are the sanctions if the conditions are not respected?

According to the law, “the supervision shall immediately be revoked if the grounds no longer apply”. Authorities have to take a new decision if they find that supervision is no longer sufficient to satisfy the purpose of the restrictions. However, as the decision is at the discretion of the authorities, failure to report regularly or to hand over ID documents does not automatically lead to a detention decision. If an individual fails to report, a new investigation will take place and, if there is risk of absconding, a detention decision can be taken.

**Maximum period of placement in an ATD:** There is no maximum period for being placed under supervision. A supervision order is valid for six months and that period can be prolonged by new decisions.

**Number of people submitted to an ATD in 2013:** Among the 4 546 decisions on detention rendered by various authorities in 2013, 405 decisions on supervision were taken. These included 249 persons<sup>631</sup> who were released from detention and subsequently subject to supervision.

**Absconding rate:** 93 were registered as having absconded in March 2014, i.e. 22,9%.

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<sup>631</sup>. This might not correspond to the previous numbers since one person can have more than one decision on detention.

**Subject to decision of detention (during 2013), and thereafter released under supervision (during 2013 or after)**

Detention		Thereafter supervision*
Swedish Migration Board	1 998	110
Swedish Police	2 543	138
Other authorities*	5	1
<b>Total</b>	<b>4 546</b>	<b>249</b>

\*Other authorities means in practice administrative courts of law of first or second instance.

\*Please note that this statistic relates to all foreigners, not just asylum seekers.

**Subject to decision of supervision (during 2013), and thereafter registered as absconded**

Supervision		Thereafter absconded
Swedish Migration Board	273	82
Swedish Police	115	7
Other authorities*	17	4
<b>Total</b>	<b>405</b>	<b>93</b>

**Cost:** 3782 SEK place/day (about 410€) in detention in 2013 <sup>632</sup>

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632. Migration Board Annual Report (2013) 159 < <http://www.migrationsverket.se/download/18.7c00d8e6143101d166d29f5/1393235256561/%C3%85rsredovisning+2013.pdf>.

## UNITED KINGDOM

## GENERAL

**Context:** As the UK is not bound by the recast Reception Conditions Directive and the Return Directive, British legislation does not impose a time limit on detention. In practice, British authorities apply detention widely and the UK has one of the highest detention capacities in Europe (about 4000 places). About 9% of asylum seekers are placed in detention by the Home Office under the “Detained Fast Track” Procedure.<sup>633</sup>

The UK employs the largest variety of methods for monitoring non-detained migrants and asylum seekers. These measures are regulated by a series of instructions on their application and target groups. Following a number of campaigns led by NGOs, the government promised in 2010 to end child detention.<sup>634</sup> Although there has been a significant reduction in the number of children detained, the practice continues.<sup>635</sup> Programs to enforce return procedures on families without resorting to detention, such as the “family returns process”,<sup>636</sup> were initiated in 2011. However, the general tendency runs toward more restrictions in immigration and asylum law. The UK Immigration Act 2014<sup>637</sup> has, among other changes, greatly reduced rights of appeal while limiting the right of those in detention to apply for immigration bail.<sup>638</sup>

**Number of asylum requests submitted in 2013:** 28950.<sup>639</sup>

**Top nationalities of AS:** Pakistan, Iran, Eritrea, Sri Lanka, Syria.

**Recognition rate:** in 2012, 35,4% at first instance, 43,7% at second instance. 14570 persons were granted refugee, subsidiary protection or humanitarian status.<sup>640</sup>

633. AIDA, ‘National Report for UK’ (last up-date April 2014) 66 <[http://www.asylumineurope.org/sites/default/files/report-download/aida\\_-\\_uk\\_second\\_update\\_final\\_uploaded.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_-_uk_second_update_final_uploaded.pdf)>.

634. See for instance the campaign ‘End child detention now’ <<http://ecdn.org>>. See also <http://www.childrenssociety.org.uk/what-you-can-do/campaign-join/past-campaigns/outcry>; <http://www.irr.org.uk/news/no-place-for-a-child-a-campaign-to-free-children-in-detention/>.

635. For example, in the first three months of 2013, 37 children were detained. See T. Sanderson, ‘Child detention goes on the UK regardless of government claims to have ended it’ (End Child Detention Now, 12 June 2013) <<http://ecdn.org/2013/06/12/boy-locked-up-for-months-in-adult-immigration-jail/>>.

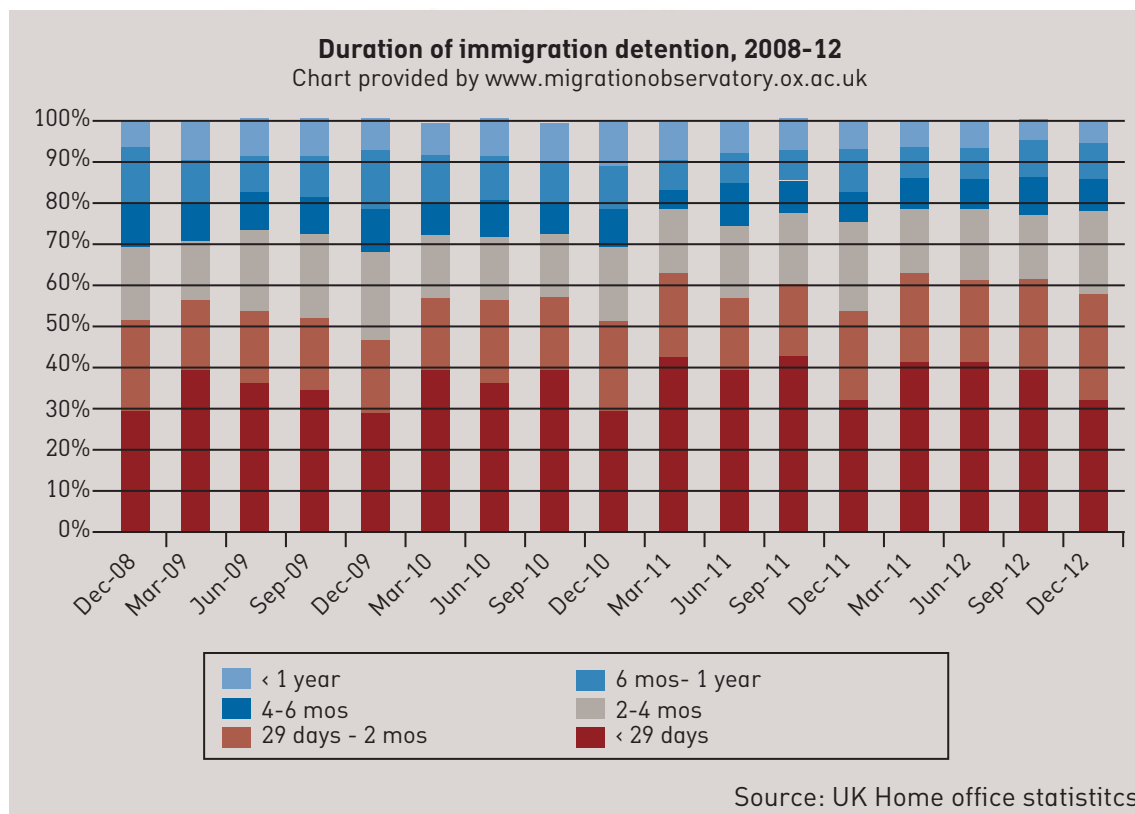
636. For more information on this process and the concerns voiced by BID on how it is currently run, please refer to the UK questionnaire. UK Practices Questionnaire, Q.19.

637. To have access to the full text of the Immigration Act <<http://www.legislation.gov.uk/ukpga/2014/22/contents/enacted>>.

638. It has also given the Secretary of State (a party to all bail hearings before the independent First-tier Tribunal IAC) new powers to veto release on bail under certain circumstances. For a description of the measures contained in this new text, please refer to the following article: A. Aliverti, ‘The New Immigration Act 2014 and the Banality of Immigration Controls’ (Border Criminologies, 2014) <<http://bordercriminologies.law.ox.ac.uk/banality-of-immigration-controls/>>.

639. Eurostat, ‘Asylum applicants and 1<sup>st</sup> instance decisions on asylum applications’ (2013) 12 <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-14-003/EN/KS-QA-14-003-EN.PDF)>.

640. Eurostat, ‘EU Member States granted protection to more than 100 000 asylum seekers in 2012’ Newsrelease 96/2013 18 June 2013 <<http://ec.europa.eu/eurostat/documents/2995521/5164782/3-18062013-AP-EN.PDF/24ec940c-ccfa-4bfd-bd77-c9c18b7335af?version=1.0>>.



## DETENTION

**Regulated by:** Immigration act 1971 (Chapter 77)

### Who is detained?

Home Office policy guidelines state that detention is most usually appropriate: to effect removal; initially to establish a person's identity or basis of claim; or where there are reasons to believe the person will fail to comply with any condition attached to the grant of temporary admission or release.

In practice the following categories are detained:

- Persons who applied for asylum at the port of entry or when they were on the territory but without permission to be in the UK. They can either be put in detention or be subjected to a temporary admission regime i.e. released.
- Asylum seekers placed in the detained fast-track (DFT) process as their claims appeared to the Home Office to be straightforward and capable of being decided quickly or in DNSA cases (non-suspensive appeal).<sup>641</sup>
- Asylum seekers subject to Dublin procedures.
- Refused asylum seekers, undocumented migrants, foreign nationals with a criminal record in the return/expulsion procedure at the border or on the territory.

641. The Home Office's procedures are outlined in the instruction 'Detained Fast Track Processes', within the 'Asylum Process Guidance' <<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/detention/>>.

If someone present in the UK with current leave (for instance a student, worker, family member of UK citizen or resident) applies for asylum, she is not liable for detention. The asylum application has the effect of extending her permission to stay until a decision is taken on it. Because the person was lawfully in the UK at the time of the application, they do not come within the temporary admission regime.

### Are certain groups exempt from detention?

No. However, the Home Office considers the following “unlikely to be suitable for entry” into the detained fast track process:

- “Women who are 24 or more weeks pregnant;
- Family cases (see 2.3.1 Family Cases and Family Splits – Further Information);
- Children (whether applicants or dependants), whose claimed date of birth is accepted by the Home Office (see below for further information about Age Dispute Cases);
- Those with a disability which cannot be adequately managed within a detained environment;
- Those with a physical or mental medical condition which cannot be adequately treated within a detained environment, or which for practical reasons, including infectiousness or contagiousness, cannot be properly managed within a detained environment;
- Those who clearly lack the mental capacity or coherence to sufficiently understand the asylum process and/or cogently present their claim. This consideration will usually be based on medical information, but where medical information is unavailable, officers must apply their judgement as to an individual’s apparent capacity;
- Those for whom there has been a reasonable grounds decision taken (and maintained) by a competent authority stating that the applicant is a potential victim of trafficking or where there has been a conclusive decision taken by a competent authority stating that the applicant is a victim of trafficking;
- Those in respect of whom there is independent evidence of torture.”<sup>642</sup>

In practice however, NGO research, media reports and litigation have pointed out to problems with age assessment or identification of specific groups such as victims of trafficking or torture. Several pregnant women and people with severe mental health problems were found to be detained despite the fact that they had been identified as

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<sup>642</sup>. Home Office, ‘Detained Fast Track Processes’ Chapter 2.3 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/370322/Detained\\_Fast\\_Track\\_Processes\\_v6\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/370322/Detained_Fast_Track_Processes_v6_0.pdf)>.

belonging to one of the categories mentioned above.<sup>643</sup> Furthermore, the Home Office policy guidance itself has been subject to heavy criticism.<sup>644</sup>

**Maximum detention period in law:** No maximum time limit in law

**Average detention for all:** According to the Migration Observatory, 62% of immigration detainees were held less than 2 months in 2012. It is also not uncommon for detention to span from two to six months. A small but consistent minority of detainees – about 5% – are held for more than one year.<sup>645</sup>

**Immigration detention capacity:** Approximately 4000 places in 15 centres.<sup>646</sup> The centres consist of 11 Immigration Removal Centres, 3 short-term holding facilities, and Cedars,<sup>647</sup> for families only.<sup>648</sup>

**Number of immigration detainees per year:** 30,387 people entered immigration detention in the UK in the year ending September 2013.<sup>649</sup> 242 children were detained during 2012.<sup>650</sup> Between 2008 and 2012, there have been between 2,000 and 3,000 migrants detained at any given time. As a snapshot example, 2,685 non-citizens were detained in UK facilities as of 31 December 2012<sup>651</sup> and 1214 immigration detainees were held in prisons as of 31 December 2013.<sup>652</sup>

**Number of asylum seekers detained in 2013:** 14145 asylum seekers (including those detained in the course of the asylum procedure and those who applied for asylum from detention).<sup>653</sup> The Home Office stated that in 2013, 2482 asylum main applicants

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643. For more information on this point, see UK Practices Questionnaire, Q.10.

644. For example, individual clinicians and the Royal College of Psychiatrists Working Group on mental health and asylum seekers and migrants have reaffirmed the fact that the continued detention of people with mental health problems was not necessary or appropriate.

645. <<http://migrationobservatory.ox.ac.uk/briefings/immigration-detention-uk>. On 31 December 2013, 35 foreign nationals had been administratively detained under sole Immigration Act powers in prisons in the UK for between 24 and 60 months. A further 10 foreign nationals had been administratively detained under sole Immigration Act powers in prisons in the United Kingdom for periods exceeding 60 months. Source: House of Commons, Written Answers to Questions, Hansard 13 May 2014, c 459W.

646. AIDA, 'National Report for UK' (last up-date April 2014) 66 <[http://www.asylumineurope.org/sites/default/files/report-download/aida\\_-\\_uk\\_second\\_update\\_final\\_uploaded.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_-_uk_second_update_final_uploaded.pdf).

647. Cedars are immigration detention centres opened in August 2011 for families with children. Located near Gatwick Airport in West Sussex, it can accommodate up to 9 families at a time in self-contained apartments, with a range of activities provided by the charity Barnardo's. <<https://www.govuk/government/publications/guidance-on-cedars-pre-departure-accommodation>.

648. The Verne in Dorset, which had a prison status till September 2014 has been re-roled as an IRC in September 2014. It had a capacity of 595 places as a prison.

649. Home Office, 'Immigration statistics, July to September 2013' [2013] <<https://www.govuk/government/publications/immigration-statistics-july-to-september-2013/immigration-statistics-july-to-september-2013#detention-1>. These statistics do not include people detained under the Immigration Act powers in prisons.

650. Home Office, 'Immigration Statistics, April to June 2013' [2013] <<https://www.govuk/government/publications/immigration-statistics-april-to-june-2013/immigration-statistics-april-to-june-2013#detention-2>.

651. These statistics do not include persons detained in police cells, prison service establishments, short term holding rooms at ports and airports (for less than 24 hours), and those detained under both criminal and immigration powers and their dependants. Source <<http://migrationobservatory.ox.ac.uk/briefings/immigration-detention-uk>.

652. House of Commons, Written Answers to Questions, Hansard 9 April 2014, c249W.

653. AIDA, 'National Report for UK' (last up-date April 2014) 66 <[http://www.asylumineurope.org/sites/default/files/report-download/aida\\_-\\_uk\\_second\\_update\\_final\\_uploaded.pdf](http://www.asylumineurope.org/sites/default/files/report-download/aida_-_uk_second_update_final_uploaded.pdf).

were put on the Detained Fast Track. About 60% of foreigners in immigration detention are asylum seekers.<sup>654</sup>

## ALTERNATIVES TO DETENTION

**Is there a legal obligation to examine ATD?** Yes, as there is a presumption against detention which applies to all cases except where there are administrative reasons for detention (Detained Fast Track, DNSA). UK Immigration policy guidance states that:

“the power to detain must be retained in the interest of maintaining effective immigration control. However, there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used”.<sup>655</sup>

### Which alternatives to detention exist?

The law specifies temporary admission, release with restrictions and bail as an exhaustive list of alternatives to detention. The fundamental difference among the 3 measures is that temporary admission can be granted without the person concerned having being detained, while the release with restrictions and bail can only be granted once an individual has been detained. All three may be subject (or not) to conditions – residence, employment, occupation, reporting to police (or immigration authorities) or electronic monitoring.

*Some of these restrictions are detailed below:*

- **Reporting:** Asylum seekers and irregular migrants are regularly required to report either to Home Office local offices or, more rarely, to police stations. Although regulated in their instruction “Reporting – Standards of Operational Practice”,<sup>656</sup> the frequency of reporting can vary considerably, usually between once a day to once a month.
- **Electronic monitoring or tagging:** Home Office instructions state that electronic monitoring should be applied to asylum seekers or returnees with criminal convictions or to other groups, ‘when the [Home Office] case owner can present an evidence-based justification for electronic monitoring based on risk and benefit’.
- **Bail with sureties and financial guarantee:** Where bail is granted by a court, it may require sureties who can pledge an amount of money against the possibility that the person will abscond. However, this is not a necessary requirement; bail could also be granted in the absence of sureties. In addition to the surety system, the bail

654. Ibid.

655. Home Office, ‘Enforcement Instructions and Guidance’, Chapter 55.1.1 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/307995/Chapter55.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307995/Chapter55.pdf)>.

656. UK Practices Questionnaire, Q.18. Answer taken from Home Office, ‘Reporting – Standards of Operational Practice’ (2012) 11-12.

application form allows the detained applicant to agree to be bound by a sum of money for their own recognisance.

- Designated residence is applied to asylum seekers who have been served papers as illegal entrants and had restrictions imposed as regards to occupation, employment, residency and reporting, or those asylum seekers who made an application in-country and have had such restrictions imposed.

For return specifically, a whole process has been developed to reduce detention of families with children called the “family returns process”. It is a staged approach in the return decision-making process which is meant to include:

1. A conference with families who have exhausted their appeals: discussion on the obstacles to return, family welfare and medical issues and the assisted voluntary return options.
2. Two weeks later, a family ‘departure meeting’ to discuss the family’s thoughts regarding their options.
3. Two weeks later, they receive a notice of return and must fully prepare themselves for departure.
4. The plan is reviewed by an independent panel.

If the family does not return voluntarily, they can face:

- A limited notice period (could be returned in next 21 days at any time).
- A no further notice removal.
- Separation with one parent placed in detention.
- Increased restrictions: electronic tagging, enhanced reporting requirements.
- Accommodation in open centres with full board and no cash support. In this case, they would have no choice as to the place of residence. The latter scheme is currently not used.

### **Who is responsible for this scheme?**

Immigration Officers, with the authority of a Chief Immigration Officer, may grant ex officio temporary admission and release on restrictions in all illegal entry and administrative removal cases liable to detention, except if the person is detained on embarkation. Bail can be granted by the Home Office or by a First-tier Tribunal judge (on the basis of the evidence put forward by both the detainee and the Home Office presenting officer).

The Home Office is also in charge of the implementation of most alternatives to detention but subcontracts some aspects of these schemes to private companies. For the return procedure, “open accommodation” and transport of family members are subcontracted to private sector companies. The operational aspects of electronic



monitoring are subcontracted to private companies but decision-making linked to non-compliance remains with the Home Office.<sup>657</sup>

### What are the sanctions if the conditions are not respected?

Failure to comply with restrictions is a criminal offense<sup>658</sup> and the person is liable for arrest. Detailed information is available on how the Home Office defines absconding and how it manages it.<sup>659</sup> In the Home Office's enforcement instructions and guidance on reporting, in cases where individuals fail to report, staff is instructed to phone the person and seek an explanation. If they cannot get through or a reasonable explanation is not given they are to schedule a further reporting event a week later. If this is not complied with they are instructed to complete either a compliance or an arrest visit. A number of steps can be taken including removing access to asylum support payments, increasing the reporting frequency or notifying the police, who will arrest the person.<sup>660</sup>

**Maximum period:** There is no maximum period specified in the law.

### Number of foreigners submitted to these measures:

- No figure on reporting is available but it is widely used on all asylum seekers. In 2010, the Refugee Council published the findings of a small-scale research on reporting, which found that, of 46 clients surveyed, 12 did not have to report, 15 reported monthly, 6 reported fortnightly and 13 were required to report once a week.<sup>661</sup>
- According to the Home Office, between 400–600 individuals are electronically tagged every year, for anything from a few days to several months.<sup>662</sup>
- Between April 2012 and March 2013, the First-tier Tribunal (Immigration & Asylum Chamber) received 11976 applications for release on bail. Of these 4302 (35.9%) were withdrawn before or during the hearing, meaning no decision was taken. In 5010 cases release on bail was refused, while in 2591 it was granted.<sup>663</sup>

### Absconding rate:

The absconding rate found in the Home Office's family returns evaluation was very low: 7 out of 155 families.<sup>664</sup> Similarly, the Government-commissioned evaluation of the Solihull pilot on early legal advice found that only 0.4% of the 242 pilot cases absconded,

657. "The contractors' involvement would stop at reporting non-compliance to us. We would then take whatever action we would have taken had non-compliance come to our attention through the normal route". Source: Home Office, 'Electronic Monitoring in IND: Evaluation of pilot October 2004-February 2005' (summary provided to BID on 23 February 2009 in response to Freedom of Information Act request (Ref 11132)).

658. Section 24(1), Immigration Act 1971.

659. <<https://www.gov.uk/government/publications/chapters-19-to-22a-restrictions>>.

660. Home Office, 'Enforcement Instructions and guidance - Contact Management', Chapter 22 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/269986/chapter22acontactmanagement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269986/chapter22acontactmanagement.pdf)>.

661. Refugee Council, 'Refugee Council client experiences in the asylum process' (2010).

662. Information sent to BID by Karen Gallagher, assistant director of the Asylum team of the Home Office, email dated 4 April 2014.

663. HM Courts and Tribunals Service Presidents' Stakeholder Group, 'Bail management information Period April 2012 to March 2013' (2013).

664. UK Practices Questionnaire, Q.38.

compared to 6.8% of non-pilot cases in the same region, and 4.2% non-pilot cases in a different region.<sup>665</sup>

Regarding electronic tagging, on 23<sup>rd</sup> February 2009, the Home Office provided the following information to BID: “The compliance rate for both tagging and telephone reporting is currently around 90%”.<sup>666</sup>

Regarding bail, if at any point following release the individual does not answer bail as directed (i.e. if they do not continue to meet the conditions of their bail, typically if they fail to report), then forfeiture proceedings may commence against the surety or sureties in the Tribunal. From April 2012 to March 2013, there were 65 bail forfeiture hearings before the First-tier Tribunal in England and Wales and 28 in Scotland.<sup>667</sup>

**Cost:** In a recent report, it was mentioned that detention cost an average cost per night of £164.<sup>668</sup> A 2006 report by UNHCR states that: ‘The Home Office calculates that an average 45-day curfew under the electronic monitoring scheme for remand prisoners costs approximately £1,300 – i.e. £ 28,8/day.’<sup>669</sup>

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665. UK Practices Questionnaire, Q.37.

666. Home Office’s answer to BID in response to a Freedom of Information Act request, Ref 11132, 23 February 2009.

667. HM Courts and Tribunals Service Presidents’ Stakeholder Group, ‘Bail management information Period April 2012 to March 2013’ [2013].

668. <<http://icinspector.independent.govuk/wp-content/uploads/2014/03/An-Inspection-of-the-Emergency-Travel-Document-Process-Final-Web-Version.pdf>>. See footnote 4 on page 4; quotes based on the Home Office Returns Directorate Business Plan 2012/13.

669. A. Edwards and O. Field, UNHCR, ‘Alternatives to detention of asylum seekers and refugees’ (2006) 216.

## ANNEX 2: LIST OF ABBREVIATIONS

<b>AIDA:</b> Asylum Information Database	<b>MSF:</b> Médecins Sans Frontières (Doctors without Borders)
<b>APD:</b> Asylum Procedures Directive	<b>NGO:</b> Non-Governmental Organisation
<b>APT:</b> Association for the prevention of torture	<b>NPM:</b> National Preventive Mechanism
<b>AS:</b> Asylum Seeker	<b>OPCAT:</b> Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
<b>ATD:</b> Alternative to detention	<b>PICUM:</b> Platform for International Cooperation on Undocumented Migrants
<b>Art. :</b> Article	<b>PTSD:</b> Post Traumatic Stress Disorder
<b>BID:</b> Bail for Immigration Detainees	<b>Q.:</b> Question
<b>CEAS:</b> Common European Asylum System	<b>QD:</b> Qualification Directive
<b>CJEU:</b> Court of Justice of the European Union	<b>RCD:</b> Reception Conditions Directive
<b>DFT:</b> Detained Fast Track	<b>RQD:</b> Recast Qualification Directive
<b>DNSA:</b> Detained Non Suspensive Appeal	<b>RSD:</b> Refugee Status Determination
<b>EASO:</b> European Asylum Support Office	<b>TFEU:</b> Treaty on the Functioning of the European Union
<b>ECHR:</b> European Convention on Human Rights	<b>UAM:</b> Unaccompanied minor
<b>EComHR:</b> European Commission of Human Rights	<b>UDHR:</b> Universal Declaration of Human Rights
<b>ECtHR:</b> European Court of Human Rights	<b>UK:</b> United Kingdom
<b>ECRE:</b> European Council for Refugees and Exiles	<b>UN:</b> United Nations
<b>EU:</b> European Union	<b>UNHCR:</b> United Nations High Commissioner for Refugees
<b>FRA:</b> European Union Agency for Fundamental Rights	
<b>FRC:</b> Foreigners' Registration Centre	
<b>HRC:</b> Human Rights Committee	
<b>ICCPR:</b> International Covenant on Civil and Political Rights	
<b>ICJ:</b> International Commission of Jurists	
<b>IDC:</b> International Detention Coalition	
<b>JRS:</b> Jesuit Refugee Service	

