



# Detention of third-country nationals in return procedures

The report addresses matters related to the right to liberty and security (Article 6), the right to asylum (Article 18), protection in the event of removal, expulsion or extradition (Article 19), the rights of the child (Article 24) and the right to an effective remedy and to a fair trial (Article 47) falling under the Chapters II 'Freedoms', III 'Equality' and VI 'Justice' of the Charter of Fundamental Rights of the European Union.

Cover image:  
© iStockphoto

A great deal of information on the European Union Agency for Fundamental Rights is available on the Internet.  
It can be accessed through the FRA website at [fra.europa.eu](http://fra.europa.eu)

Cataloguing data can be found at the end of this publication.

FRA - European Union Agency for Fundamental Rights  
Schwarzenbergplatz 11  
1040 - Wien  
Austria  
Tel.: +43 (0)1 580 30 - 0  
Fax: +43 (0)1 580 30 - 691  
Email: [information@fra.europa.eu](mailto:information@fra.europa.eu)  
[fra.europa.eu](http://fra.europa.eu)

Reproduction is authorised, except for commercial purposes, provided the source is acknowledged.

*Printed in Luxembourg*

PRINTED ON WHITE CHLORINE-FREE PAPER



# **Detention of third-country nationals in return procedures**



## Foreword

Detention of a person constitutes a major interference with personal liberty. Any deprivation of liberty must therefore respect the safeguards which have been established to prevent unlawful and arbitrary detention. This is also the case when detention is resorted to in order to facilitate the removal of irregular migrants. Thus, while pre-removal detention is not in itself a violation of human rights law, it can become so. This would, for instance, be the case when the grounds justifying detention are not laid down in national legislation in a clear and exhaustive manner, or when the detention was not carried out in compliance with the procedural or substantive rules as stipulated by law.

Detention of irregular migrants in return procedures has been subject to heated discussions during the negotiations of the Return Directive. This report tries to deconstruct the various elements of the right to liberty and the prohibition of arbitrary detention. It presents for each of those elements an overview of applicable international law standards, as well as state practice with the aim of facilitating an objective discussion on these issues.

This report has to be seen against the background of the work by the European Union Agency for Fundamental Rights (FRA) in the context of the Contact Committee of the Return Directive, to which the Agency has been invited to participate in meetings by the Commission. The FRA shared preliminary considerations on selected fundamental rights issues covered by the Return Directive with members of the Contact Committee in September 2009. A draft version of this report has also been shared with the Committee members for comments which have been taken into account when drafting this report. It is thus based on information up until September 2010.

Member States are required to transpose the Return Directive by the end of 2010. With its engagement with the Contact Committee and through this report, the FRA hopes to assist Member States in dealing with the fundamental rights challenges raised by the complexity of the subject.

**Morten Kjaerum**  
Director



# Contents

<b>FOREWORD</b> .....	<b>3</b>
<b>EXECUTIVE SUMMARY</b> .....	<b>7</b>
<b>OPINIONS</b> .....	<b>9</b>
<b>INTRODUCTION</b> .....	<b>13</b>
<b>1. EXHAUSTIVE LIST OF GROUNDS</b> .....	<b>15</b>
1.1. Legitimate grounds .....	15
1.2. Grounds found in national legislation .....	16
1.3. Grounds not covered by Article 5.1(f) ECHR .....	19
<b>2. NECESSITY AND PROPORTIONALITY</b> .....	<b>21</b>
2.1. Balancing .....	21
2.2. Mandatory detention .....	23
2.3. Due diligence in preparing and implementing removal .....	24
2.4. Real prospects for removal .....	25
2.5. Legal bars to removal .....	26
2.6. Risk of absconding .....	27
2.7. Personal characteristics and vulnerabilities .....	28
<b>3. MAXIMUM LENGTH OF DETENTION</b> .....	<b>31</b>
3.1. Time limits set out in national law .....	31
3.2. As short as possible .....	35
3.3. Automatic periodic reviews .....	37
<b>4. PROCEDURAL GUARANTEES</b> .....	<b>39</b>
4.1. Right to be informed .....	39
4.2. Judicial review .....	40
4.3. Legal assistance .....	45
4.4. Access to asylum procedures from detention .....	47
<b>5. ALTERNATIVES TO DETENTION</b> .....	<b>49</b>
5.1. Alternatives found in national legislation .....	49
5.2. Duty to examine alternatives before detaining .....	53
<b>6. DETENTION OF CHILDREN</b> .....	<b>55</b>
6.1. Measure of last resort .....	55
6.2. Guarantees against separation from parents .....	57
6.3. Detention of separated children .....	58
6.4. Separation of children from unrelated adults .....	61
6.5. Legal representation for children detained alone .....	61
<b>ANNEX</b> .....	<b>64</b>

## Figures and tables

Figure 1: Maximum length of detention set by law, EU27 .....	32
Figure 2: Maximum length of detention, by country (month)* .....	33
Figure 3: EU Member States with two upper time limits (month) .....	34
Figure 4: Maximum length of detention – Trends 2009-2010 (month) .....	35
Figure 5: Court endorsement of detention order, EU27 .....	41
Figure 6: Existence of alternatives to detention in national law, EU27 .....	50
Table 1: Types of alternatives applied by EU Member States .....	52
Figure 7: Pre-removal detention of separated children (excluding entry points), EU27 .....	59
Table A1: National legislations – full references and short name, EU27 .....	64



## Executive summary

This report deals with deprivation of liberty of irregular migrants pending return. It examines six broad issues: the grounds for detention; the principles of necessity and proportionality; maximum length of detention; procedural safeguards to prevent arbitrary detention; alternatives to detention; and detention of children.

The grounds for any deprivation of liberty must be set forth in law in a clear and exhaustive manner. Such grounds must also be legitimate in light of Article 5.1 of the European Convention of Human Rights (ECHR). Parameters for detention in order to prevent unauthorised entry or to facilitate removal have also been set out in European Union law through Article 15 of the Return Directive, which requires that the individual is subject to return procedures. Nevertheless, in some cases the fact of being an irregular migrant appears sufficient to justify detention. In other cases, domestic immigration or aliens acts envisage the detention of foreigners for grounds that are unrelated to prevention of unauthorised entry or facilitation of removal.

Even when based on legitimate grounds, detention has to fulfil certain additional requirements in order not to be arbitrary. Return proceedings have to be carried out with due diligence and there must be realistic prospects of removal. In addition, Article 9 of the International Covenant on Civil and Political Rights (ICCPR) has been interpreted to require that, in order not to be branded as arbitrary, detention has to be necessary, for example, to prevent absconding or interference with evidence. Similarly, Article 15.5 of the Return Directive states that detention shall be maintained for as long as it is necessary to ensure successful removal. These requirements should be examined in each individual case. In addition, once released, migrants are entitled to basic fundamental rights.

Indefinite pre-removal detention is arbitrary. After a certain period of time has elapsed and the removal has not been implemented, deprivation of liberty loses its initial purpose. The Return Directive is the first binding supra-national document providing a maximum length of pre-removal detention: it sets the time limit at six months and exceptionally at 18 months, for which, however,

the directive was strongly criticised internationally, as well as by civil society. The duration of detention has to be determined in light of the circumstances of each individual case. Several European Union Member States have established mechanisms for automatic periodic reviews of detention, which are a useful tool to prevent detention being unduly prolonged.

A number of procedural safeguards have been set up to reduce the risk of unlawful or arbitrary detention. These include the right to be informed of the reasons for detention in a language the person understands, the right to judicial review of the detention decision and legal assistance. As the findings of this FRA research show, in practice, there may be obstacles to the exercise of these rights. Another issue that requires improvement is information and counselling on the right to seek asylum for persons deprived of their liberty.

Detention can become arbitrary if the purpose for which it was ordered can also be achieved by applying less restrictive measures, such as regular reporting to the police or residence restrictions. Although many EU Member States provide for the possibility of imposing alternatives to detention, this is often done only exceptionally and primarily for particularly vulnerable groups. At the same time, some good practices that combine release with individual counselling by case workers are emerging.

International law strongly discourages the detention of children. Detention has to be a measure of last resort and for the shortest appropriate period of time, both for separated children as well as children with their parents or primary caregiver. At the same time, however, detention of children to prevent unauthorised entry or to facilitate their removal is not uncommon in Europe, including in facilities that are not equipped to cater for their needs.

For each of these issues, this report provides suggestions in the form of FRA opinions on how to bridge some of the existing gaps. These are set forth at the end of each section and reproduced in a consolidated manner in the next section.



## Opinions

### Exhaustive list of grounds

Grounds for pre-removal detention must be exhaustively listed in national legislation and defined in a clear manner. The simple fact of being an irregular migrant should never be considered as a sufficient ground for detention.

European Union Member States should ensure that grounds for detention established at a national level do not extend beyond the exhaustive list of legitimate grounds foreseen in Article 5.1 of the European Convention on Human Rights (ECHR). Deprivation of liberty based on crime prevention, public health considerations or vagrancy should be governed by the same rules, regardless of the legal status the person concerned has in the host country. These grounds should therefore not be regulated by aliens or immigration laws but by other pieces of legislation. Otherwise, there is a risk that this will lead to the application of different standards based on the legal status of the person in the country.

### Necessity and proportionality

Any instance of mandatory detention for irregular migrants should be abolished as it would be in contradiction with the requirement to examine whether less coercive measures can be applied in the specific case or whether detention is necessary in the first place.

To avoid situations that may be in conflict with the requirements of Article 5.1 ECHR as interpreted by the European Court of Human Rights (ECtHR), as well as with Article 15.1 of the Return Directive, EU Member States should consider including in domestic law the need to initiate and carry out the return and removal process with due diligence in order for the deprivation of liberty to be lawful.

Pre-removal detention is not lawful in the absence of realistic prospects for removal. It would normally be up to the administration and the courts to decide when this is the case. In order to prevent prolonged detention, legislators may, however, consider introducing presumptions against pre-removal detention for *de facto* stateless persons, where it is evident from past experience that the country of nationality will refuse any cooperation in establishing the citizenship and issuing related travel documents.

EU Member States are encouraged, when reviewing their aliens or immigration laws, to establish mechanisms to avoid situations of legal limbo by acknowledging the presence in the country of persons

who are not removable and ensuring that they enjoy applicable fundamental rights. Furthermore, it would be important to start a reflection at European level to identify ways to put an end to protracted situations of legal limbo. Such reflection should not have the effect of rewarding lack of collaboration, but create legal certainty and respect fundamental rights.

Pre-removal detention should essentially only be resorted to if there is a risk of absconding or of other serious interference with the return or removal process, such as interference with evidence or destruction of documents. EU Member States may consider making this explicit when reviewing their national legislation.

The FRA welcomes domestic law provisions existing in some EU Member States that require the authorities to take into account the individual characteristics of the person concerned when deciding if a person should be detained, and encourages others to follow this example. Such provisions can help to ensure that particular caution is taken before depriving the liberty of particularly vulnerable persons or persons with specific needs and that alternatives to detention are duly considered.

### Maximum length of detention

The FRA encourages EU Member States not to extend the maximum periods of detention beyond six months. Where – in line with the Return Directive – such a possibility is introduced or maintained, national legislation should include strict safeguards to ensure that such a possibility is only used in extremely exceptional cases. A delay in obtaining necessary documentation should not justify an extension of deprivation of liberty, if it is clear from the outset that the third country concerned will not collaborate or where there are no reasonable expectations that the necessary documents will be issued in time as in such cases, detention would not anymore pursue the legitimate objective of facilitating the removal.

The six-month and very exceptionally 18-month period set forth in the Return Directive has to be seen as a ceiling. Given the interference that detention has on personal dignity, it is of utmost importance to regulate in national legislation that detention shall be ordered or maintained only for as long as it is strictly necessary to ensure successful removal. National legislation should be drafted in a manner so as to ensure that the individual circumstances of the person concerned are evaluated in each case, thus making the systematic application of the maximum time limit for detention unlawful.

Automatic periodic judicial reviews are an important safeguard to ensure that detention is kept as short as possible. Reviews should be carried out by a court at regular intervals, preferably not less than once a month.

## Procedural guarantees

Given the challenges to implement Article 5.2 ECHR in practice, it may be advisable to specify expressly in national legislation that the reason for detention as contained in the detention order and the procedure to access judicial review be translated in a language the detainee understands. The reasons should also be given to him/her in written form as well as read out with the help of an interpreter, if necessary.

The right to judicial review of the detention order must be effectively available in all cases. This can best be achieved by requiring a judge to endorse each detention order, as many EU Member States already do. Moreover, measures to alleviate practical barriers restricting access to judicial review procedure should be put in place, including as regards information, language assistance, and the simplification of procedural requirements. Courts or tribunals reviewing the detention order must have the power and be adequately equipped to examine the lawfulness of detention. Reasonable deadlines should also be introduced to avoid protracted review proceedings without undermining their fairness.

In light of the variety of obstacles that irregular migrants need to overcome to access legal assistance, EU Member States are encouraged when reviewing their aliens or immigration laws to enter into a dialogue with civil society organisations as well as bar associations in order to find pragmatic legislative and practical solutions to the obstacles encountered which are non-discriminatory and remain in compliance with international obligations. Furthermore, detailed comparative research on whether legal assistance is accessible in practice should be undertaken covering all European Union countries.

Information on asylum should be readily available in detention facilities. EU Member States should allow non-governmental organisations (NGOs) and those who provide legal advice access to detention facilities and the possibility to provide counselling. Where immediate release upon submission of a request for international protection is not envisaged, the applicant should be released as soon as the claim is neither considered inadmissible nor abusive or manifestly unfounded.

## Alternatives to detention

EU Member States, who have not yet done so, are encouraged to set out in national legislation rules dealing with alternatives to detention, without disproportionately restricting other fundamental rights. Innovative forms of alternatives, which include counselling the individual on the immigration outcome should be explored wherever possible. By contrast, given the restrictions on fundamental rights derived from electronic tagging, such an alternative should normally be avoided.

Detention should not be resorted to when less intrusive measures are sufficient to achieve the legitimate objective pursued. To ensure that less coercive measures are applied in practice, EU Member States are encouraged to set out in national legislation rules dealing with alternatives to detention. Such rules should require that the authorities examine in each individual case whether the objective of securing the removal can be achieved through less coercive measures before issuing a detention order, and provide reasons if this is not the case.

## Detention of children

EU Member States are encouraged to include in their national legislation a strong presumption against detention and in favour of alternatives to detention for families with children, giving a primary consideration to the best interests of the child. Children should not be deprived of their liberty if they cannot be held in facilities that can cater for their specific needs. Safeguards should also be considered to ensure that when children are deprived of their liberty, detention is not unduly prolonged. These could include lower maximum time limits or more frequent reviews. When determining whether families with children should be detained with their parents or primary caregiver, paramount importance has to be given to the child's best interests and alternatives to detention actively considered. Where, exceptionally, alternatives are not sufficient and it is considered necessary to detain the parent(s), children should only be detained with their parents, if – after a careful assessment of all individual circumstances and having given due weight to the views of the child in accordance with his/her age and maturity – keeping the child with them is considered to be in the child's best interests. This should be clarified in national legislation.

Several EU Member States currently prohibit the detention of separated and/or unaccompanied children,

whereas others allow it only in very exceptional circumstances. This is a good practice that should be maintained and followed by other states, also in light of the provision at Article 4.3 of the Return Directive which allows adopting or maintaining more favourable provisions. It is namely difficult to imagine a case in which the detention of a separated or unaccompanied child simply for securing his or her removal would comply with the requirements of the Convention of the Rights of the Child (CRC).

Under no circumstances should separated children be deprived of their liberty if it is not possible to ensure that they are kept in appropriate facilities where separate accommodation from adults can be guaranteed.

Where legislation exceptionally allows for the deprivation of liberty of a separated child, domestic law should require appointing immediately a legal representative at no cost, unless the child already has one, in addition to an independent guardian.



## Introduction

The 2009 Work Programme of the European Union Agency for Fundamental Rights (FRA) includes a project on the rights of irregular immigrants in voluntary and involuntary return procedures. The FRA has been asked to examine existing legislation and practice in light of the standards set forth in the Return Directive. A number of fundamental rights issues relating to the treatment of persons to be removed from the territory of European Union Member States will be analysed as part of this project. The first issue that the FRA has looked at is deprivation of liberty of irregular migrants<sup>1</sup> pending return, which is dealt with in this report.

The report examines the practice of states in the 27 European Union Member States in light of the relevant international human rights law framework (primarily the 1966 International Covenant on Civil and Political Rights and, for children, the 1989 Convention on the Rights of the Child), and the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR). In addition, significant soft law documents such as, for example, the Council of Europe Twenty Guidelines on Forced Return as well as relevant statements by United Nations (UN) Treaty Bodies and by the UN Working Group on Arbitrary Detention have also been used as guidance.

Detention and deprivation of liberty are used as synonyms in this report. They encompass all different forms of deprivation of liberty of non-nationals of the European Union (including stateless persons) with a view to facilitating their removal, regardless of how such measures are defined in national law. They include, for instance, the French term *rétenion*, or the restriction of movement provided for in Article 56 of the Slovenian Aliens Act which, although not termed as deprivation of liberty in domestic law, in practice is tantamount to detention.<sup>2</sup>

Detention has to be distinguished from restriction on the right to freedom of movement, although the difference is essentially one of degree or intensity, and not one of nature or substance, as the European Court of Human Rights has clarified.<sup>3</sup> A person is not deprived of liberty in case of residence restrictions, unless these are so serious

to be considered as tantamount to detention. This would be the case of persons held in airport transit zones, who, although having in theory the possibility to leave the country, must be considered as having been deprived of their liberty.<sup>4</sup>

It is important to note that detention of asylum seekers is not covered by this report. The report focuses primarily on pre-removal detention to facilitate removal of third-country nationals who find themselves already in the territory of the European Union, although references to deprivation of liberty at entry points such as, for instance, confinement at an airport, to prevent unauthorised entry, is touched upon in selected sections. Detention of persons whose removal has been ordered by a court in the context of criminal proceedings is also not covered in this report.

Neither does the report cover the conditions in facilities used for pre-removal detention, except where these are directly linked to the question of whether detention is arbitrary or not.

Regarding children, this report complements the research recently issued by the FRA on *Separated asylum-seeking children in European Union Member States*, the summary report of which was published in April 2010.<sup>5</sup>

Information on national legislation and practice was collected by the FRA from national legal experts. The draft report was shared for comments with Member States representatives in the Return Directive Contact Committee. Fourteen countries provided feedback, including Austria, Belgium, the Czech Republic, Germany, Ireland, Latvia, Lithuania, Malta, the Netherlands, Poland, Slovakia, Slovenia, Sweden and the UK. In addition, comments on the draft were received from the European Court of Human Rights, the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Children's Fund (UNICEF), as well as from the International Detention Coalition, the Jesuit Refugee Service Europe and Save the Children.

1 This report uses the term 'irregular migrant' as a synonym of 'illegally staying third-country nationals', as defined in Article 3.1(2) of the Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive).

2 See 12th Annual Report by the Slovenian Human Rights Ombudsmen, July 2007, p. 37, available online at: [http://www.varuh-rs.si/fileadmin/user\\_upload/pdf/lp/Varuh\\_LP\\_2006\\_ANG.pdf](http://www.varuh-rs.si/fileadmin/user_upload/pdf/lp/Varuh_LP_2006_ANG.pdf) (all hyperlinks in this document have been accessed on 24 August 2010).

3 European Court of Human Rights (ECtHR), *Guzzardi v. Italy*, No. 7367/76, 6 November 1980, paragraph 93.

4 See ECtHR, *Amuur v. France*, No. 19776/92, 25 June 1996, at paragraph 49. The Court concluded that holding asylum seekers in the transit zone of Paris-Orly Airport (and its extension, the floor of the Hotel Arcade adapted for this purpose) for twenty days was equivalent to a deprivation of liberty, although it was in principle possible for the asylum seekers to leave voluntarily the country.

5 FRA, *Separated asylum-seeking children in European Union Member States – Summary report*, Luxembourg: Publications Office of the European Union, April 2010, available online at: [fra.europa.eu/fraWebsite/attachments/SEPAC-SUMMARY-REPORT-conference-edition\\_en.pdf](http://fra.europa.eu/fraWebsite/attachments/SEPAC-SUMMARY-REPORT-conference-edition_en.pdf).



# 1. Exhaustive list of grounds

The ground for any deprivation of liberty must be set forth in law in a clear and exhaustive manner. This is required by both Article 9.1 of the International Covenant on Civil and Political Rights (ICCPR)<sup>6</sup> as well as Article 5.1 of the ECHR.<sup>7</sup>

To be lawful, detention to prevent unauthorised entry into the country or to facilitate removal must be provided for by national law. The legality of the deprivation of liberty of migrants pending their removal is normally not an issue: In all countries of the European Union, grounds allowing for detention are laid down in legislation, normally in national immigration or aliens acts. Lists of grounds are generally laid down in national legislation in an exhaustive manner.<sup>8</sup>

## 1.1. Legitimate grounds

### European Convention on Human Rights

#### Article 5.1 (f)

**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: [...]**

**(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.**

Grounds must, however, not only be exhaustively listed in national legislation. They must also be legitimate, for the deprivation of liberty not to be arbitrary. While the ICCPR does not contain a list of grounds, Article 5.1 of the ECHR allows deprivation of liberty on six grounds only. Such list is exhaustive and has to be interpreted restrictively.<sup>9</sup> According to it, deprivation of liberty can only be resorted to:

- after conviction by a competent court;
- for failure to comply with a specific obligation prescribed by law;
- pending trial;
- in specific situations concerning minors;

- for certain social protection grounds relating to vulnerable groups;
- for the prevention of irregular entry or to facilitate removal.

It is this latter ground, which is laid down in Article 5.1(f) that sets the frame for the deprivation of liberty covered by this report. More specifically, Article 5.1(f) allows for the deprivation of liberty of a person either:

- to prevent his effecting an unauthorised entry into the country; or
- against whom action is being taken with a view to deportation or extradition.

In order to comply with the ECHR, it must be possible to subsume the grounds foreseen in national law to justify pre-entry or pre-removal detention under one of the two limbs of Article 5.1(f). Otherwise, national law would be in contradiction with the ECHR. More stringent safeguards are namely required for pre-trial or other forms of deprivation of liberty foreseen in Article 5.1(a)–(e).<sup>10</sup>

In European Union law, deprivation of liberty falling under the scope of Article 5.1(f) of the ECHR is essentially regulated in the asylum *acquis*<sup>11</sup> and in the Return Directive. Article 15.1 of the Return Directive, only allows the detention of third-country nationals who are “subject of return procedures”. Deprivation of liberty is permitted for two reasons: (i) “in order to prepare return” and (ii) “to carry out the removal process”, in particular when there is risk of absconding or of other serious interferences with the return or removal process. These reasons fall under the grounds included in Article 5.1(f) of the ECHR.

6 See second sentence: “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

7 “No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.”

8 Example of exhaustive lists of ground for detention can be found in Article 113 of the Lithuanian Law on the Legal Status of Aliens (Aliens Act) or Article 121 of the Finnish Aliens Act (Aliens Act).

9 See ECtHR, *Ciulla v. Italy*, No. 11152/84, 22 February 2002, at paragraph 41; and ECtHR, *Wloch v. Poland*, No. 27785/95, 19 October 2000, at paragraph 108.

10 See below at 1.3.

11 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status at Article 18 and Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, at Recital 10 and Articles 6.2, 13.2 and 14.8. See also Proposal for a Regulation of the European Parliament and of the Council 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, COM(2008) 820 at Section V.

## 1.2. Grounds found in national legislation

### European Court of Human Rights

#### ***H.L. v. United Kingdom, 2004, paragraph 114***

**Further, given the importance of personal liberty, the relevant national law must meet the standard of “lawfulness” set by the Convention which requires that all law be sufficiently precise to allow the citizen – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action might entail.**

Generally speaking, at a national level, one can distinguish three broad approaches regarding the way in which grounds for pre-removal detention are laid down in legislation. In a first group of countries, specific and sometimes quite detailed lists of situations which justify detention are included in national law.<sup>12</sup> In a second group of countries, the grounds allowing for pre-removal detention are described in general terms.<sup>13</sup> Finally, a third group of countries have a relatively general description in the law, but more specific clarifications in the form of examples in the implementing regulations<sup>14</sup> or other guidance note.<sup>15</sup>

A specific list may provide concrete guidance to officers in charge of taking a detention decision thus reducing the risk of arbitrary detention. If too prescriptive, it may, however, also undermine the margin of appreciations by

the administration or by courts to determine if detention is appropriate in the individual case. In the same vein, a fairly general definition of detention may encourage a weighing of the different relevant factors in each individual case, but the larger margin of discretion given to officers may lead to inconsistent approaches. Where the grounds for detention are stated in a general manner, examples may though be useful.

A wide range of grounds are foreseen in national law to justify the deprivation of liberty of irregular migrants. The following pages illustrate the more common grounds found in national legislation. While it is difficult to compare the different formulations included in domestic legislation, the six different categories of grounds outlined below do recurrently appear in national legislation.

Pre-removal detention ordered by a court in the context of criminal proceedings is not covered in this report.<sup>16</sup> Similarly, other grounds found in aliens or immigration laws which are not related to prevention of unauthorised entry or facilitation of return and removal are dealt with separately in the next section.

The presence of one of the following grounds does not necessarily mean that detention is justified under national law. Other conditions, such as a necessity or proportionality test may be required by domestic legislation or jurisprudence.

### Detention to prevent unauthorised entry

The Schengen Borders Code<sup>17</sup> specifies the categories of persons who shall be refused entry into the EU and entrusts border guards with the duty to prevent irregular entry of such third-country nationals.<sup>18</sup> Short term deprivation of liberty at the border in order to prevent unauthorised entry is essentially allowed in all European Union countries.<sup>19</sup>

12 This is for instance the case in Hungary, where Section 54 (1) of the Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (TCN Act) allows detention of a third-country national to secure expulsion in five circumstances expressly listed in the law, ranging from obstructing or delaying the removal to disrespecting of reporting duties. Similarly, Section 62.2 of the German Residence Act of 30 July 2004 (Residence Act) lists six reasons for detention pending removal which include among others the failure to appear at an appointment with the authorities unless good cause is given and a well-founded suspicion that the foreigner will evade deportation. In Lithuania, Article 113 of the Law on the Legal Status of Aliens of 29 April 2004 (Aliens Act) lists seven grounds for detention, including, for instance, the suspicion of using forged documents.

13 In Malta, for instance, Article 14 of the Immigration Act prescribed mandatory detention for all “prohibited alien”, which essentially means anybody lacking the right of entry, stay or residence (see Article 5 of the same Act). In Portugal, Article 161 of the Act 23/2007 approving the legal framework of entry, permanence, exit and removal of foreigners into and out of national territory (Act 23/2007) allows for detention in case of disobedience to the removal decision. Article 13.2 of the 2001 Aliens and Immigration Act in Cyprus (Aliens Act) entrusts the authorities with the right to detain those persons deemed prohibited immigrants to whom an order to leave the territory has been issued.

14 This is, for example, the case in the Netherlands, which allows detention with the aim of forcibly removing irregular migrants when this is in the interest of public order or national security (Aliens Act, Article 59). The 2000 Implementing Guidelines of the Aliens Act at (A) 5.3.3.1 contain a long list of examples of when this can be in the interest of public order, e.g. risk of absconding to avoid forcible removal and past criminal record. These examples are not exhaustive as highlighted by the Administrative Jurisdiction Division of the Council of State (see decision of 4 May 2004, 200402389/1, consideration 2.1.1.).

15 See, for example, UK Border Agency, *Operational Enforcement Manual*, Chapter 55, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/>.

16 See, for example, the provisions in Article 97 of the Romanian Emergency Ordinance No. 194 from 12 December 2002 on the status of aliens in Romania (Emergency Ordinance) which allows for the detention of an alien declared undesirable; Article 62.1(a) Slovak Residence of Aliens Act No. 48/2002 (Aliens Act) which envisages detention due to criminal removal of a person or Section 54.1 of the Hungarian TCN Act, which allow the detention of a person released from imprisonment having been sentenced for a deliberate crime; and Section 51.1(4) of the Latvian Immigration Law of 20 November 2002 (Immigration Law).

17 Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

18 *Ibid.*, at Article 13.

19 See, for instance, Austrian Aliens Police Act at Sections 41-43; France, Law 92-625 of 6 July 1992, which established a special detention regime for transit zones; Section 41.1 Hungarian TCN Act, which establishes a maximum of 72 hours in case of stay at a designated place at the land border or a maximum of 8 days at a designated zone of the airport; Lithuanian Aliens Act, Article 113.1. In Slovakia a separate provision regulates the detention in case of return on the basis of a bilateral agreement, usually a readmission agreement (Aliens Act, Article 62.5 and 62.1 (c)); Slovenia, National Border Control Act 60/07 of 6 June 2007, Article 32.

In practice, this occurs more frequently at airports, where it may not be possible to immediately return the person to the country he or she came from. In these cases the person may be asked to remain in the transit zone or in other designated facilities to wait for the next return flight. Confinement at the border is usually limited to a short period of time. When the departure cannot be organised, the person is normally transferred to other facilities outside the transit area.

### Detention to effect removal

All European Union countries allow detention of third-country nationals in order to prepare return or implement removal, although different wording to define such ground for deprivation of liberty is used in domestic law. About two thirds of the countries expressly provide for facilitation of return or removal as a ground for detention. Other countries use different language to justify detention as described below. Among those countries which make express reference to facilitation of return or removal as a ground for detention in national law, some refer to the need to ensure the return or removal of the person concerned.<sup>20</sup> Other countries use a broader language and entrust the authorities with the power to detain an individual if a decision of expulsion has been taken.<sup>21</sup> Detention to execute return or removal proceedings is sometimes the sole ground,<sup>22</sup> sometimes listed as one of several grounds<sup>23</sup> or among one of more cumulative grounds.<sup>24</sup>

20 See, for instance, Austrian Aliens Police Act, Section 76.1; Belgium, *Loi du 15 Décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* (Law on Foreigners), Article 7.11; Denmark, Aliens (Consolidation) Act No. 785 of 10 August 2009 (Aliens Act) Article 35.1; Estonia, Obligation to Leave and Prohibition on Entry Act of 21 October 1998 (OLPEA) Section 15.1 read in light of Supreme Court decision 3-3-1-45-06 of 13 November 2006; Ireland, Immigration, Residence and Protection Bill 2008, Section 55; Latvia, Immigration Law 2002, Article 51.1(2-3); the Netherlands, Aliens Act, Article 59; Poland, Act on Aliens of 13 June 2003 (Act on Aliens), Article 102.1 (1); Slovakia, Aliens Act at 62.1(a); Spain, Law 4/2000 of 11 January 2000, *Sobre Derechos y Libertades de los Extranjeros en España y su Integración Social* (BOE No. 10, of 12 January 2000) (as amended up to 12 December 2009) (Law 4/2000), Art. 62; Sweden, Aliens Act 2005:716 (Aliens Act), Article 10.1 lists the need to assess the right of the alien to remain in the country as one of the grounds for detention; the UK, 2002 Nationality, Immigration and Asylum Act, Section 62.

21 See Cyprus, Aliens Act at 13.2 which allows for the detention of any prohibited immigrant who has received an order to leave the country. See also Czech Republic, Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Territory of the Czech Republic (FORA), Article 124.1; Estonia, OLPEA, Section 15.1; German Residence Act at 62.2(1); Poland, Act on Aliens, Art. 102.1 (2) if there is a risk that the return decision will not be executed voluntarily; Romania, Emergency Ordinance, Art. 97. France, Italy and Luxembourg allow for the detention when it is not possible to execute immediately the removal (see France, *Code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA) at 551-1; Italy, *Decreto legislativo of 25 luglio 1998*, No. 286 (last amended by law of 15 July 2009, n. 94) (LD 1998/286), Article 14; Luxembourg, *Loi portant sur la libre circulation des personnes et immigration*, 28 August 2008 (Immigration Law) at Art. 120.

22 See Belgium, Law on Foreigners at Art. 7.11.

23 See Slovak Aliens Act, Section 62.1(a); Italy, LD 286/98 which uses however the term 'return', Article 14; Sweden, Aliens Act, Article 10.1.

24 This is, for example, the case in the Netherlands, where deprivation of

### Detention for irregular entry, exit or stay

Legislation in some countries list irregular entry or stay as grounds for detention. This is the case of Latvia, Lithuania, Malta and Poland. According to Section 51.1(1) of the Latvian Immigration Law a third-country national can be detained if he/she "has illegally crossed the State border [...] or otherwise violated the procedures [...] for entry or residence". In Lithuania, an alien may be detained if he/she "has illegally entered into or stays in the Republic of Lithuania".<sup>25</sup> In Malta, detention is essentially mandatory for those persons defined as prohibited aliens and in respect to whom a removal order has been issued. These include, among other categories, third-country nationals who violated the rules for entry or stay in Malta.<sup>26</sup> Finally, in Poland, Article 102.1(3) of the Act of Aliens allows for the detention of an alien who has crossed or attempted to cross the border in an irregular manner.

At first sight, these provisions appear problematic as they seem to authorize the administration to deprive the liberty of a foreigner solely for reasons of being an irregular migrant, without requiring the need for actions in view of his/her return or removal. Safeguards can be found in some of these countries to reduce the risk of arbitrary detention. For instance, in Latvia, any detention decision by the administration has to be reviewed by a judge who will need to assess different factors, including whether the foreigner is concealing his/her identity or if he/she does not cooperate.<sup>27</sup>

### Detention to establish identity and nationality

A common ground for the deprivation of liberty is the need to establish the identity of the person concerned. In practice, the identification and documentation of irregular migrants remains a significant challenge for the administration. It is also one of the main practical obstacles preventing the authorities from removing a person who is not entitled to stay. It is therefore not surprising that several countries explicitly allow the detention of an irregular migrant for the purpose of establishing or confirming, through the issuance of relevant documents, his or her identity and nationality.<sup>28</sup>

liberty must fulfill two conditions: it has to be with the aim of forcibly removing an irregular migrant and it has to be in the interest of public order or national security. See Aliens Act at Article 59.

25 Lithuanian Aliens Act, Chapter VII, Article 113.2.

26 Malta, Immigration Act, Article 5.

27 See Article 54.1(1) Latvia, Immigration Law; other factors include the lack of means, the risk of committing a crime, the threat to public order or national security and safety, the conviction for crimes against humanity, crimes against peace or war crimes and the existence of information which prohibits entry into Latvia.

28 See, for instance, Bulgaria, Foreigners in the Republic of Bulgaria Act of 5 July 1999 (Law on Foreigners), at 44(6); Finland, Aliens Act at 121.1(2) and 121.2; Hungarian TCN Act at 55; Italy, LD 286/98 at Article 14 which also includes the preparation of transport documentation among the allowed grounds for detention; Latvia, Immigration Law, Section 54.1(1) as

There are different reasons that render the identification and documentation difficult. These include the lack of cooperation by the consular authorities of the country of origin, the non-cooperation by the individual concerned, communication difficulties (for instance, in the case of children) or the fact that the person is *de jure* or *de facto* stateless.<sup>29</sup>

It is interesting to note that, in most cases, the authority to detain in order to establish identity is formulated in general terms, regardless of whether the obstacles to identification or documentation lie within the responsibility of the irregular migrant or not. Even in cases in which national legislation expressly refers to situations caused by the irregular migrant, such as the use of false or forged documents,<sup>30</sup> the destruction of travel documents,<sup>31</sup> the provision of false information or the refusal to provide any information.<sup>32</sup> Such situations often represent additional clarifications, which do not exclude the detention in case the obstacles for identification are based on reasons outside the sphere of the irregular migrant, such as the lack of cooperation by consular authorities.

### Detention to prevent absconding

Risk of absconding and other action to avoid the return or the removal process are the two specific cases listed in the Return Directive to illustrate when the detention of a foreigner in order to prepare his/her return or removal can be resorted to.<sup>33</sup> Securing the presence of the person until the day of the removal is in practice the most important rationale of pre-removal detention.

The existence of a risk of absconding is normally one of the concrete factors to consider when resorting to

---

a factor to be considered when deciding on the extension of the detention decision; Lithuania, Aliens Act at 113.4 in case the foreigner is suspected of using forged documents; Malta, Immigration Act at 25A.11(a); Slovenia, Aliens Act, Official Gazette, No. 64/09, 10.8.2009 (Aliens Act) at 56.2; Sweden, Aliens Act at 10.1(1); the UK, Detention Centre Rules 2001 SI 238 (02.04.2001), available at: <http://www.opsi.gov.uk/SI/si2001/20010238.htm>.

- 29 A *de jure* stateless person is defined in the 1954 Convention relating to the Status of Stateless Persons at Article 1 as someone "who is not considered as a national by any State under the operation of its law". The International Law Commission has stated that this definition now forms part of customary international law; see the report of the International Law Commission, Text of the draft articles on diplomatic protection adopted by the Commission on first reading: Commentary on Article 8, General Assembly, Fifty-ninth session, Supplement No. 10 (A/59/10), 2004, p. 46. *De facto* stateless persons include persons who though formally holding a nationality are outside the country of their nationality and are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. It includes persons who, in practice, are unable to prove or establish their nationality and thus unable to return to their country.
- 30 See Malta, Immigration Act at 25A.11(a); Irish Illegal Immigrants (Trafficking) Act, 2000 at 10(b).
- 31 See Malta, Immigration Act at 25A.11(a).
- 32 See Finnish Aliens Act 301/2004 (Aliens Act) at 121.2; Denmark Aliens Act, Section 36.4 whereby aliens to whom alternatives to detention are applied and who obstruct the procuring of information can be detained.
- 33 See Article 15.1(a) and (b).

detention in all those countries which allow detention based on the need to facilitate return or removal. In addition, a number of countries expressly list the risk that the foreigner will evade the return or removal process<sup>34</sup>, whereas few make express reference to the risk of absconding as a ground for detention in their legislation<sup>35</sup>. A few countries also list failure to appear at an appointment with the administration as a separate ground for detention.<sup>36</sup>

### Disrespect of alternatives and non-departure after voluntary period is expired

Many countries can give the option to irregular migrants to depart on their own initiative or with the help of organisations supporting voluntary returns. This possibility may be given almost automatically to certain categories of irregular migrants or to selected individuals who fulfil certain conditions.

Should the person not depart within the agreed period of time, legislation in several countries explicitly foresees the possibility to resort to detention.<sup>37</sup> Similarly, some of those countries which provide in their legislation for the possibility to apply alternatives to detention, also expressly envisage the possibility to deprive the foreigner of his/her liberty in case he/she disregards the measures imposed<sup>38</sup> (for instance fails to report to the police at regular intervals).

- 
- 34 See, for example, Bulgaria, Law on Foreigners at 44.6; Greece, Codification of legislation on entry, residence and social integration of third-country nationals on Greek territory, Law 3386/2005 last amended by Law 3801/2009 (TCN Act) at Article 76.3; German Residence Act at 62.2(4)-(5); Finnish Aliens Act at 121.2; Hungarian TCN Act at 54.1(a) provides for the detention of third-country nationals who are hiding from the authorities; Irish Immigration Act, 2003 at 5(b)(d), Poland, Act on Aliens Article 102.1.
- 35 See, for example, Bulgaria, Law on Foreigners at 44.6; see also Dutch Aliens Act Implementation Guidelines at (A), 5.3.3.1 where risk of absconding is listed as an example of when detention can be considered to be in the interest of public order.
- 36 See Danish Aliens Act at 36.2; German Residence Act at 63.2, which however expressly excludes situations in which the foreigner can provide a good cause for such failure to appear (e.g. health reasons).
- 37 See, for instance, the German Residence Act at 63.2, which provides for the possibility of detention when the time limit for voluntary departure expired and the person changed place of residence without giving notice. In Italy, a 5 or 15 days deadline to leave the country may be given, which once expired allows the authorities to detain the migrant if he/she is still in the country. In the Netherlands, rejected asylum seekers and those whose application for a residence permit is refused are usually granted a 28 days period to depart voluntarily; the Aliens Act Implementation Guidelines at (A), 5.3.3.1 lists failure to depart as one of the examples of when detention can be considered as contrary to public order. The Polish Act on Aliens, Art. 101.1, provides for the possibility of apprehension for 48 hours when an alien did not leave Poland on the basis of a return decision within an indicated time limit (max within 14 days). See also in Portugal, Act 23/2007, Article 146.5; Article 56.1 Slovenian Aliens Act; Article 59.1(a) Slovak Aliens Act No. 48/2002.
- 38 See, for instance, Austria, Aliens Police Act at 77.4; Danish Aliens Act at 36.2 or Hungarian TCN Act at 54.1(d).

As illustrated above, there is considerable diversity on how grounds for detention are reflected in national laws. While in general terms the different grounds reviewed can all be linked in one way or another to Article 5.1(f) ECHR, the wording sometimes used does not necessarily imply that the deprivation of liberty is resorted to in order to prepare the return or implement removal. This is in particular the case when irregular entry or stay constitutes a ground for detention.

### FRA Opinion

**Grounds for pre-removal detention must be exhaustively listed in national legislation and defined in a clear manner. The simple fact of being an irregular migrant should never be considered as a sufficient ground for detention.**

## 1.3. Grounds not covered by Article 5.1(f) ECHR

### Court of Justice of the European Union

#### *Kadzoev*, 2009, paragraph 70

**The possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115 [the Return Directive].**

The European Court of Human Rights (ECtHR) held that the lawfulness of detention also implies that the deprivation of liberty is in keeping with the purpose of the restrictions permissible under Article 5.1 of the Convention.<sup>39</sup> Article 5.1(f) ECHR allows for the deprivation of liberty of a person either to prevent his effecting an unauthorised entry into the country or against whom action is being taken with a view to deportation or extradition. Detention of non-nationals on other grounds, such as crime prevention, public health or vagrancy, is not admissible under this provision of the Convention. Stricter safeguards need to be fulfilled to justify detention on criminal grounds;<sup>40</sup> whereas detention for reasons of public health is allowed only as a last resort for diseases, which spreading is dangerous for public health or safety.<sup>41</sup> It should also be recalled that national security or public order are *per se* not sufficient to justify a deprivation of

liberty, which, according to the Convention, has to be based on one of the exhaustive grounds foreseen in Article 5.1 and formulated in a clear manner.

Similarly, the Return Directive only allows for detention of an irregular migrant in order to prepare the return and/or in order to carry out the removal process. It provides two circumstances – risk of absconding and other actions by the person concerned which avoids or hampers the return or removal process – which illustrate when deprivation of liberty can be resorted to.<sup>42</sup>

In a number of countries, however, alien legislation is used as a basis to provide for the detention of third-country nationals also for public health, public order or national security reasons or when there is a risk that the persons concerned may commit a crime. Based on a review of national legislative provisions accessible to the Agency, several countries contain in their immigration or aliens laws references to public health, public order or national security considerations.

In a first group of countries, these considerations describe in greater detail circumstances in which detention for the purpose of removal is allowed. In the Czech Republic, aliens in return or removal proceedings can be detained in three different situations, including if there is a risk that the person might endanger the security of the state or might materially disrupt public order. This includes, for example, situations in which the foreigner might endanger state security by using violence for political aims or situations in which the foreigner endangers public health, due to his/her suffering from a serious disease.<sup>43</sup> In Finland, an alien may be detained to prevent his/her entry or facilitate removal, if taking account of the alien's personal and other circumstances, there are reasonable grounds to believe that he or she will commit an offence in Finland.<sup>44</sup> In Greece, the provision on administrative expulsion allows detention of an alien considered dangerous for the public order.<sup>45</sup> In Germany, detention can be applied in case of well-founded suspicion of terrorism, although only if the deprivation of liberty is necessary to ensure his/her removal.<sup>46</sup> In Hungary, detention to secure expulsion is admissible in case the third-country national has seriously or repeatedly violated the code of conduct of the place of compulsory confinement.<sup>47</sup>

In a second group of countries, public health, public order or national security considerations seem to justify detention regardless of whether action is being taken

39 ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988, at 50.

40 Article 5.1(a) requires a conviction by a competent court, whereas Article 5.1(c) on the arrest of a person suspected to have committed a crime in order to bring him/her before a court necessitates a 'reasonableness' test, which would require "the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence", ECtHR, *Fox, Campbell and Hartley v. the United Kingdom*, Nos. 12244/86, 12245/86 and 12383/86, 30 August 1990, paragraph 32.

41 See ECtHR, *Enhorn v. Sweden*, No. 56529/00, 25 January 2005, paragraph 44.

42 Return Directive, Article 15.1.

43 Act No. 326/1999 on the Residence of Foreign Nationals in the Territory of the Czech Republic; Section 124 (1).

44 Aliens Act, Section 121.1 read in conjunction with Section 118.

45 TCN Act at Article 76.3.

46 German Residence Act, Section 58a read in conjunction with Section 62(2)1a and 62(2).

47 TCN Act, Section 54.1(c).

by the authorities to remove the person concerned or not. Such grounds are clearly not foreseen in the Return Directive, nor are they covered by Article 5.1(f) of the ECHR. In Latvia, for instance, the fact of being an irregular migrant is *per se* one of the grounds for detention. When courts are asked to decide on a possible extension of detention they have to consider a number of circumstances, including risk of criminal behaviour and threats to national security public order and safety.<sup>48</sup> In Lithuania, an alien may be detained (i) in order to stop the spread of dangerous and especially dangerous communicable diseases; (ii) when the alien's stay in the Republic of Lithuania constitutes a threat to public security, public policy or public health.<sup>49</sup> In Malta, prohibited immigrants, against whom a removal order has been issued, shall be detained and may not be released by the Immigration Appeals Board if they could pose a threat to public security or public order.<sup>50</sup>

### **FRA Opinion**

**EU Member States should ensure that grounds for detention established at a national level do not extend beyond the exhaustive list of legitimate grounds foreseen in Article 5.1 ECHR. Deprivation of liberty based on crime prevention, public health considerations or vagrancy should be governed by the same rules, regardless of the legal status the person concerned has in the host country. These grounds should therefore not be regulated by aliens or immigration laws, but in other pieces of legislation. Otherwise, there is a risk that this will lead to the application of different standards based on the legal status of the person in the country.**

48 2007 Immigration Law, Section 51.1 and 54.1 (points 4 -7).

49 Aliens Act, Article 113.1 at (6) and (7).

50 Maltese Immigration Act, Articles 14.2 and 25A.11 (c). The Maltese Ministry for Justice and Home Affairs informed the FRA that if a removal order is issued detention is mandatory, as it is considered necessary in order to prevent the person from absconding.

## 2. Necessity and proportionality

In most countries, when grounds for detention are present, the administration can, but is not obliged to issue a detention order or prolong the deprivation of liberty. The administration is thus given a margin of appreciation in each individual case. The question is whether the authorities can freely decide whether to impose or prolong detention or whether they are bound by other considerations.

This chapter deals with various situations in which pre-removal detention, though based on grounds foreseen in national law can become arbitrary. The first set of issues examines what could be considered as pre-conditions required for the deprivation of liberty to be ordered or prolonged. These include the duty by the administration to carry out removal proceedings with due diligence and the existence of real and tangible prospects for removal, including the presence of legal or factual bars to removal. These conditions are generally not controversial.

A second set of issues concern relevant factors to weigh before depriving a person of his or her liberty. Tests may be needed in order to find in each individual case an adequate balance between the interests of the state and the person's right to liberty. However, not all legal systems in Europe require such weighing to take place. Where a weighing of individual circumstances is required, this may be for one or both of the following purposes.

The first purpose is to assess whether it is **necessary** to restrict or deprive a person of his/her liberty, in light of the individual circumstances of the case. The main factors that are considered to establish this is the likelihood of absconding and the risk of other interferences with the removal process, in case the person is not detained.

The second purpose of such weighing exercise is to establish whether the deprivation of liberty is **proportional** to the objective to be achieved, or whether removal could be implemented successfully also by imposing less restrictive measures, i.e. alternatives to detention, or a shorter period of detention. Such proportionality test may be required for all detention decisions or only for certain categories of persons who can only be deprived of their liberty as a measure of last resort, such as for instance children.

This chapter will first describe such weighing, review examples of mandatory detention and then examine four different circumstances that play a role in determining whether detention is a legitimate measure in the individual case. These circumstances may be framed in national legislation as pre-conditions for detention or reviewed when determining if detention is necessary or proportional.

### 2.1. Balancing

#### Return Directive

##### Article 15.5

**Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal.**

At the international level, the ICCPR contains an express prohibition of arbitrariness of deprivation of liberty, which was included as an alternative to an exhaustive list of grounds for detention.<sup>51</sup> This prohibition has been interpreted to include the fact that a deprivation of liberty must not be inappropriate and disproportional in view of the circumstances of the individual case.<sup>52</sup> In this context, a deprivation of liberty which is not arbitrary at the beginning may become so after a certain period of time.<sup>53</sup> In its guidelines concerning the detention of persons seeking asylum, UNHCR also requires that the deprivation of liberty be reasonable and proportional to the objectives to be achieved.<sup>54</sup>

By contrast, the European Court of Human Rights has accepted that states have a broader discretion when detaining a person under Article 5.1(f) of the ECHR, compared to other interferences with the right to liberty. The Court stressed that in this case there is no requirement to examine that detention be reasonably considered necessary, for example, to prevent committing an offence or fleeing.<sup>55</sup> Nevertheless, the Court posed a limit to such

51 See discussions in the 3rd Committee of the General Assembly, A/4045 at paras. 43ff reported in M.J. Bossut, *Guide to the travaux préparatoires of the International Covenant on Civil and Political Rights*, 1987 at p. 199.

52 See UN Human Rights Committee, Communication No. 305/1988, *van Alphen v. The Netherlands*, 23 July 1990 at paragraphs 5.8: "The drafting history of Article 9, paragraph 1, confirms that arbitrariness is not to be equated with 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 the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime."

53 See UN Human Rights Committee, Communication No. 560/1993, *A. v. Australia*, at 9.2. The case concerned an asylum seeker who had been kept in detention for over four years. See also the following communications concerning detention of a period of more than two years: Communication No. 900/1999, *C. v. Australia*, at paragraph 8.2, detention for six years; Communication No. 1014/2001, *Baban et al v. Australia*, paragraph 7.2; Communication No. 1069/2002; *Bakhtiyari et al v. Australia*, paragraph 9.3, detention period for almost three years.

54 UNHCR, *UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, February 1999: "In assessing whether detention of asylum seekers is necessary, account should be taken of whether it is reasonable to do so and whether it is proportional to the objectives to be achieved."

55 ECtHR (Grand Chamber), *Saadi v. UK*, No. 13229/03, 29 January 2008 at 72-73. Recently, however, the Court has found a violation of Article 5.1(f) in case of the detention of four children, one of whom was showing

discretion, establishing certain requirements to avoid that detention be branded as arbitrary: detention must be carried out in good faith, be closely connected to the purpose of preventing unauthorised entry and its length should not exceed that reasonably required for the purpose pursued.<sup>56</sup> Based on these considerations, detention would, for example, not be justified if the administration would not initiate or execute return proceedings with due diligence or in the absence of prospects for removal.

At least in almost half of the EU Member States, there is a clear requirement for the administration and/or the courts ordering or prolonging detention to balance the interests of the state and those of the individual when filling the margin of discretion given to them by the law. In some countries, this is reflected in legislation either in the form of a general proportionality test<sup>57</sup> or with a list of criteria to consider when ordering or extending an order for deprivation of liberty.<sup>58</sup> In other countries, courts have elaborated the need for a proportionality test<sup>59</sup> or otherwise require a weighing of different factors.<sup>60</sup> Concrete factors that are considered

serious psychological and psycho-traumatic symptoms in a closed centre designed for adults and ill-suited to their extreme vulnerability, see ECtHR, *Muskhadzhiyeva and others v. Belgium*, No. 41442/07, 19 January 2010, paragraphs 69-75 concerning the detention of a Chechen family seeking asylum in the context of the Dublin procedure. See also ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006.

- 56 ECtHR (Grand Chamber), *Saadi v. UK*, No. 13229/03, 29 January 2008, paragraph 74.
- 57 See Austria, Constitutional law on the protection of personal freedom [Bundesverfassungsgesetz über den Schutz der persönlichen Freiheit], Article 3; and Finland, Aliens Act, Section 5.
- 58 See, for example, Ireland, Immigration Act 1999, Section 3(6) (a)-(k), Sweden, Aliens Act, Chapter 10.1. In Latvia, the law lists the criteria that the judge has to evaluate when deciding on the extension of a detention order (Immigration Law, Section 54.1).
- 59 See, for example, Constitutional Court BVerfG, Decision 27/02/2009, 2 BvR 538/07, [http://www.bundesverfassungsgericht.de/entscheidungen/rk20090227\\_2bvr053807.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20090227_2bvr053807.html). In Germany, the proportionality test is derived from the constitutional rule-of-law principle (*Rechtsstaatsprinzip*). According to the Constitutional Court, the constitutional principle of proportionality requires that the authorities refrain from detention where the deportation cannot be effectuated and the deprivation of liberty is not required (see Bundesverfassungsgericht [Constitutional Court] (BVerfG), Informationsbrief Ausländerrecht 2000, p. 221; see also General Administrative Regulations to the Residence Act (*Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz*), 26 October 2009, at 62.0.3.1 and 62.0.3.2).
- 60 See, for Estonia, Riigikohus/3-3-1-45-06 (13.11.2006), paragraph 10; Estonia/Riigikohus/3-3-1-2-07 (22.03.2007), paragraphs 20-21. In Greece, the compilation of case law of the Administrative Court of 1st Instance of Athens – Decision 2001-2004, Nomiki Bibliothiki 2006 contains the list of factors for review by courts. For the Netherlands, see Administrative Jurisdiction Division of the Council of State [Afdeling Bestuursrechtspraak van de Raad van State], decisions 200603830/1 of 23 June 2006, decisions 200909865/1/V3, 05 February 2010, paragraph 2.1.2 and 200908127/1/V3, 07 January 2010, at paragraph 2.3, in which the Council of State recognises the margin of appreciation of the administration, but limits the review of the courts to whether grounds for detention exist, but does not allow them to replace the weighing by the authorities with its own weighing. In Denmark, the courts include ordinary considerations of proportionality when assessing the duration of the deprivation of liberty; see Denmark/Rigspolitiets Udlændingefdeling, Det retlige grundlag for politiets udsendelsesarbejde i asylsager og politiets praktiske udsendelsesarbejde, 2009 [*The legal foundation for return procedures and the practical*

vary considerably between countries, but may include risk of absconding, personal circumstances of the individual (for example, age or health status) and considerations of public order or national security,<sup>61</sup> as well as crime prevention concerns<sup>62</sup>. A useful checklist with factors which must be taken into account when balancing the necessity for initial or continued detention against the person's right to liberty has been developed by the UK Border Agency.<sup>63</sup>

## UK Border Agency – Enforcement instructions and guidance

### Chapter 55.3.1 Factors influencing a decision to detain

All relevant factors must be taken into account when considering the need for initial or continued detention, including:

- 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? (for example 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? (for example 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 there a risk of offending or harm to the public (this requires consideration of the likelihood of harm and the seriousness of the harm if the person does offend)?
- 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?

*return measures of the police*], p. 10, available in Danish at: <http://www.politi.dk/NR/rdonlyres/81FB7CD9-47F7-4658-8D28-52C4EF0D327B/0/Bilag1Detretligegrundlagapril.pdf>.

61 See, for example, the Czech Republic, FORA at 124.1; Ireland, Immigration Act 1999, Section 3(6) (a)-(k); UK Border Agency, *Operational Enforcement Manual*, at 55.3.1.

62 Latvia, Immigration Law, Section 5.

63 See UK Border Agency, *Operational Enforcement Manual*, at 55.3.1, available online at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/>.

Limited or no room for weighing of the competing interests of the state and the individual is available in other countries. This concerns first of all those cases in which there is no margin of discretion given to the administration of whether to order detention or not.<sup>64</sup> In addition, some countries which allow for a relatively short maximum period of detention tend not to include personal circumstances or risk of absconding among the factors to consider when ordering or continuing detention, but focus their assessment on the likelihood of removal during the timeframe foreseen for detention.<sup>65</sup> No express reference to the necessity to balance the interest of the state with those of the individual was found to exist in a third group of countries, where the prevention of arbitrary detention seem to rest primarily on stating clear grounds for detention and prohibiting it under certain circumstances.<sup>66</sup>

## 2.2. Mandatory detention

### Return Directive

#### Recital 6

**According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay.**

Decisions to detain irregular migrants should not be taken without assessing if such a measure is necessary to ensure successful removal in the individual case.

The Return Directive provides that “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” (Article 15.1). Furthermore, detention “shall be maintained for as long as [...] it is necessary to ensure successful removal” (Article 15.5). Reading such provisions in light of Recital 6 of the Directive, which requires that decisions be adopted

on a case-by-case basis, national law provisions which establish a duty on the administration to detain appear problematic.

Legislation in four countries suggests that limited or no room of discretion is given to the administration when ordering detention. In Estonia, the text of the law required that from the moment that certain conditions are fulfilled, the administration “shall detain the alien and organise the aliens’ departure from Estonia”<sup>67</sup> In 2006, the Supreme Court, however, clarified that detention is a discretionary measure which cannot be applied automatically.<sup>68</sup>

The Maltese Immigration Act provides in Article 14.2 that a person against whom a removal order is made “shall be detained in custody until he is removed from Malta”. Moreover, the law forbids the Immigration Appeals Board to release such a person, in case of certain circumstances such as the need to verify identity, or where the person poses a threat to national security or public order.<sup>69</sup> In practice, this results in a situation of systematic detention for irregular migrants in Malta, as these are in most cases undocumented and their identity not established.<sup>70</sup>

In Italy, the law does not explicitly provide for a margin of discretion by the authorities. As soon as the circumstances listed in the law are fulfilled, detention has to be ordered.<sup>71</sup> In Poland, Article 102 provides that an alien shall be detained if it is necessary to ensure the effectiveness of the expulsion proceedings, there is a well-founded risk of absconding or entry was irregular.

### FRA Opinion

**Any instance of mandatory detention for irregular migrants should be abolished as it would be in contradiction with the requirement to examine whether less coercive measures can be applied in the specific case or whether detention is necessary in the first place.**

<sup>64</sup> Maltese Immigration Act at 14.2; Italy, LD 286/98, Article 14.

<sup>65</sup> This is the case of France, where the judge must determine if the arrest was lawful, whether the removal can be executed during the time of detention and whether the police implements the expulsion with due diligence. In Spain, the main requirement is that detention order must be proportionate to the time required to carry out the removal (Article 62.2 of the Law 4/2000).

<sup>66</sup> This seems to be the case in Poland, where Article 103 Act on Aliens forbids detention when it can cause a threat to irregular immigrant’s life or health and Art. 107.1(2) and (3) orders to release a person where the deprivation of liberty can cause a threat to his/her life or health or where there are other circumstances making the detention impossible; and in Slovakia where Articles 62.3 and 63 of the Aliens Act No 48/2002 do not allow an extension of detention in case of family with children or persons otherwise vulnerable. No evidence of the need to balance the interests of the state and those of the individual were found in Hungary and Romania.

<sup>67</sup> Article 15.1, OLPEA.

<sup>68</sup> See Estonia, *Riigikohus*, 3-3-1-45-06 of 13 November 2006, paragraph 10.

<sup>69</sup> Maltese Immigration Act Article 25A.11.

<sup>70</sup> UN Working Group on Arbitrary Detention, see UNDOC A/HRC/13/30/Add.2; Human Rights Council, 13th session, *Report of the Working Group on Arbitrary Detention*, Mission to Malta, 19-23 January 2009.

<sup>71</sup> See Article 14 LD 286/98. In practice, the absence of capacity in detention facilities for irregular migrants gives a certain margin of discretion to the authorities. If there is a space problem in the detention facility, a five days voluntary return period is granted. Once this period has expired and the alien did not depart voluntarily, he/she is likely to be detained.

## 2.3. Due diligence in preparing and implementing removal

### Return Directive

#### Article 15.1

**[...] Any detention shall [...] only [be] maintained as long as removal arrangements are in progress and executed with due diligence.**

In order for the deprivation of liberty of an irregular migrant to be in accordance with Article 5.1(f) ECHR, the person concerned must be the object of action to prevent unauthorized entry or “with a view to deportation or extradition”. In other words, the authorities need to initiate and implement removal proceedings and do this with due diligence. In *Chahal v. UK*, the European Court of Human Rights held that detention to prevent unauthorised entry or to facilitate removal “will be justified only for as long as deportation proceedings are in progress. If such proceedings are not carried out with due diligence, the detention will cease to be permissible under Article 5 paragraph 1(f)”.<sup>72</sup> It will become arbitrary.

An assessment of whether all reasonable measures have been taken by the authorities to prepare and execute the removal of a person is an important factor when reviewing the length of detention. Such consideration could however also be relevant when taking the initial detention decision. If the administration has no intention to initiate removal arrangements (for instance, due to the absence of means of transportation to a particular country), it would be difficult to imagine how the deprivation of liberty could be considered necessary to effect the removal.

The need to initiate and implement the removal with due diligence is also recognised by the Return Directive. Article 15.1 of the Directive stresses that any detention shall only be maintained as long as removal arrangements are in progress and executed with due diligence.

At a national level, such requirement is sometimes set forth in legislation. This is, for example, the case in Belgium, where the administration can decide to prolong the detention beyond two months only when the necessary preparatory work to implement the removal has been undertaken within a delay of seven days from the detention and when it has been pursued with due diligence.<sup>73</sup>

More often, however, this requirement has been highlighted by courts, primarily when reviewing the

length of detention. In Austria, for example, detention may only last for as long as there is a real possibility of affecting the return within the maximum time limit allowed by law. If, from the very beginning, there is no real chance of affecting the return within this limit, the detention would be unjustified.<sup>74</sup> In Denmark, when assessing the duration of the deprivation of liberty, the courts apply ordinary considerations of proportionality and take into account, among other things, whether the return proceedings are progressing.<sup>75</sup> The French Constitutional Council allowed an extension of detention only if the repatriation measure taken against him/her could not be executed “despite the diligence of the Administration”, because of a faulty delivery or delayed delivery of the travel documents by his/her consulate or by the lack of transportation.<sup>76</sup> In Luxembourg, the administrative tribunals order the release when they consider that the administration has not taken all steps necessary for removal.<sup>77</sup> In the UK, in the case of *Hardial Singh*, the High Court (England and Wales) ordered the applicant’s release, finding that the Home Office had not taken the action it should have taken and nor had it taken that action sufficiently promptly. It required the Secretary of State to “exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time”.<sup>78</sup>

In Germany, the principle of expedience (*Beschleunigungsgrundsatz*) obliges the administration to take all possible measures not to unduly prolong a deprivation of liberty.<sup>79</sup> Detention is only justified for as long as meaningful measures to prepare the removal are taken.<sup>80</sup> The following two cases provide an illustration of this principle in practice. The Higher Regional Court (*Oberlandesgericht*) in Karlsruhe rejected the extension of detention in a case where the authorities waited for three weeks before contacting the administration of the detainee’s home country.<sup>81</sup> Similarly, the Higher Regional

<sup>74</sup> See, for example, rulings by the Constitutional Court [Verfassungsgerichtshof – VfGH] 5.12.1994, B 1075/94, B 1274/94; and the Highest Administrative Court [Verwaltungsgerichtshof VwGH] 26.9.2007, 2007/21/0253; 23.10.2008, 2006/21/0128; 18.12.2008, 2008/21/0582.

<sup>75</sup> Denmark/Rigspolitiets Udlændingeafdeling, Det retlige grundlag for politiets udsendelsesarbejde i asylsager og politiets praktiske udsendelsesarbejde, 2009 [*The legal foundation for return procedures and the practical return measures of the police*], p. 10. (Available in Danish at: <http://www.politi.dk/NR/rdonlyres/81FB7CD9-47F7-4658-8D28-52C4EF0D327B/0/Bilag1Detretligegrundlagapril.pdf>).

<sup>76</sup> France/Conseil Constitutionnel, 2003-484 (20.11.2003), p. 438, available online: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/2003/2003-484-dc/decision-n-2003-484-dc-du-20-novembre-2003.871.html>.

<sup>77</sup> Luxembourg, *Question parlementaire N° 3071* (12.01.2009), see reply to question relating to Dublin II.

<sup>78</sup> *R v. Governor of Durham Prison ex p. Hardial Singh* [1983] Imm AR 198, p.202.

<sup>79</sup> German Constitutional Court [Bundesverfassungsgericht], *Entscheidungen*, decision number 2 BvR 66/ 00 from 3 February 2000 (BVerfGE) 61, pp. 28 and 34f.

<sup>80</sup> See General Administrative Regulations to the Residence Act (Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz), 26 October 2009 at 62.0.2.

<sup>81</sup> Germany/Oberlandesgericht [Higher Regional Court] Karlsruhe, decision of

<sup>72</sup> ECtHR, *Chahal v. UK*, No. 70/1995/576/662, 15 November 1996, paragraph 113. See also ECtHR, *Tabesh v. Greece*, No. 8256/07, 26 November 2009, paragraph 56.

<sup>73</sup> Law on Foreigners, Article 7.11.

Court in Celle held that the detention of a person was unlawful where the aliens department was unable, after a three months period, to inform the court whether (and how) they had sought to obtain the requisite documentation from the authorities of the State of return within the “necessary expedience”.<sup>82</sup>

In several countries, however, this research did not find any evidence that carrying out removal proceedings with due diligence is considered as a pre-condition in order for the detention to be justified.

### FRA Opinion

**To avoid situations that may be in conflict with the requirements of Article 5.1 ECHR as interpreted by the ECtHR, as well as with Article 15.1 of the Return Directive, EU Member States should consider including in domestic law the need to initiate and carry out the return and removal process with due diligence in order for the deprivation of liberty to be lawful.**

## 2.4. Real prospects for removal

### Court of Justice of the European Union

#### *Kadzoev*, 2009, paragraph 63

**It should be pointed out that, under Article 15(4) of Directive 2008/115, detention ceases to be justified and the person concerned must be released immediately when it appears that, for legal or other considerations, a reasonable prospect of removal no longer exists.**

There are situations in which practical obstacles can substantially delay or obstruct the removal of a person. These can be within the sphere of responsibility of the migrant, such as for instance lack of cooperation to establish identity and nationality or outside his or her sphere of influence. Examples of the latter situation are the lack of cooperation from the consular representation of the country of origin, a situation of statelessness, or the mere absence of means of transportation.

While in most cases the existence of reasonable prospects of removal will arise in the context of extending the period of detention,<sup>83</sup> in some cases, it will be clear from

the outset that the likelihood of successful removal is slim. This, as highlighted by the Estonian Supreme Court, could, for example, be the case of a stateless person, if there is no receiving state.<sup>84</sup> It could however also be the case when countries of former habitual residence systematically deny admission to stateless persons who have left.

In this context, a central question relates to the threshold which needs to be fulfilled in order to consider that there are sufficient prospects for removal to justify ordering or maintaining detention. The Return Directive provides that detention can be maintained as long as removal arrangements are in progress and that it is necessary to ensure successful removal (Article 15.1 and 15.5). In *Kadzoev*, the Court of Justice of the European Union (CJEU; previously the European Court of Justice) clarified that a “real prospect” is required for the removal to be carried out successfully and that a reasonable prospect “does not exist, where it appears unlikely that the persons concerned will be admitted to a third country”. The ECtHR required “realistic prospects of expulsion”.<sup>85</sup> Similarly, in its report to the Human Rights Council, the UN Working Group on Arbitrary Detention stressed that a legitimate aim for the detention “would not exist if there were no longer a real and tangible prospect of removal”.<sup>86</sup>

The following selected cases provide an illustration of approaches taken by national courts when defining the required threshold. In the UK, the Court of Appeal required ‘some prospect’ of being removed within a reasonable period in order for the power to detain to exist.<sup>87</sup> It also indicated that “there must be something more than ‘hope’ that these negotiations would produce results”.<sup>88</sup> In another case, the England and Wales High Court did not approve the continuation of detention after 10 months when “nothing but fruitless negotiations have been carried out”.<sup>89</sup> Concerning documentation,

*udsendelsesarbejde*], 2009, p. 10. (available in Danish at: <http://www.politi.dk/NR/rdonlyres/81FB7CD9-47F7-4658-8D28-52C4EF0D327B/0/Bilag1Detretligegrundlagapril.pdf>).

- 84 See the following cases by the Estonian Supreme Court: Estonia/Riigikohus/3-3-1-45-06 (13.11.2006), para 10.-12; Estonia/Riigikohus/3-3-1-6-06 (09.05.2006), paragraph 28; Estonia/Riigikohus/3-3-1-53-06 (16.10.2006), paragraph 13. See also the test required in France (Footnote 66).
- 85 ECtHR, *Mikolenko v. Estonia*, No. 10664/05, 8 October 2009, at paragraph 68.
- 86 See Human Rights Council, 13th session, Report of the Working Group on Arbitrary Detention, paragraph 64 (UN General Assembly, A/HRC/13/30, 18 January 2010). See also the opinion by the Working Group in *Mustafa Abdi v. United Kingdom of Great Britain and Northern Ireland*, Opinion No. 45/2006, UN Doc A/HRC/7/4/Add.1 at 40 (2007).
- 87 *Appellant A v. SSHD* [2007] EWCA Civ 804, <http://www.bailii.org/ew/cases/EWCA/Civ/2007/804.html>.
- 88 See *R (on the application of I) v. SSHD* [2002] EWCA Civ 888, at p. 206, paragraphs 37-38, available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2002/888.html>. The case concerned a detainee who was awaiting deportation to Afghanistan at the end of his criminal sentence and where the Home Office was engaged in negotiations with neighbouring countries as at the time no flights from the UK to Afghanistan existed.
- 89 *In re Mahmud (Wasfi Suleman)* [1995] Imm AR 311, available online at: <http://www.bailii.org/ew/cases/EWHC/Admin/1994/3.html>. Mr Mahmud

20 April 2009, case number 11Wx 38/09.

82 Germany/Oberlandesgericht [Higher Regional Court] Celle, InfAusR 2003, 351-352.

83 In Denmark, for instance, the courts will typically examine whether the return proceedings are progressing and whether there are prospects of a return within a reasonable time frame. See Rigspolitiets Udlændingefdeling, The legal foundation for return procedures and the practical return measures of the police [*Det retlige grundlag for politiets udsendelsesarbejde i asylsager og politiets praktiske*

the German Regional Court in Bochum was not satisfied that real prospects for return existed in a case in which the aliens department intended to return the person on a German *laisser-passer* bypassing the receiving state.<sup>90</sup>

Real prospects for return must exist within the timeframe foreseen for detention. With this regard, the Irish High Court held, for example, that imprisonment pending deportation is only justified for so long as it is necessary for immediate or reasonably immediate deportation. The Court ruled that it would be an abuse of power to continue detention if it was clear it could not be carried out within the eight week period in which detention is allowed.<sup>91</sup> In Belgium, the law allows for an extension of detention beyond the initial two months, only if certain conditions are fulfilled, one being the possibility to remove the person within a reasonable delay.<sup>92</sup> In Germany, the Higher Regional Court in Celle dealt with delays caused by the state of return and held that if the German authorities knew that a deportation was not enforceable within the given time limit due to the delay of the state of return, this would not be justified.<sup>93</sup>

### FRA Opinion

**Pre-removal detention is not lawful in the absence of realistic prospects for removal. It would normally be up to the administration and the courts to decide when this is the case. In order to prevent prolonged detention, legislators may, however, consider introducing presumptions against pre-removal detention for *de facto* stateless persons, where it is evident from past experience that the country of nationality will refuse any cooperation in establishing the citizenship and issuing related travel documents.**

## 2.5. Legal bars to removal

### Return Directive

#### Article 5

**When implementing this Directive, Member States shall [...] respect the principle of non-refoulement.**

Closely linked to the issue of real prospects for removal is the discussion on legal bars to removal. These include first

of all the need to respect the principle of *non-refoulement*, i.e. the prohibition to return a person to torture, inhuman and degrading treatment or punishment as well as the prohibition of return to persecution and other serious harm.<sup>94</sup> Legal bars to removal may however also be based on considerations relating to family life<sup>95</sup> and, exceptionally, to the state of health of an irregular migrant.<sup>96</sup> Other legal bars may concern children or relate to other considerations that may have been established in national law.

Normally, any legal bar to removal should have been examined before issuing a return decision. There may however be circumstances in which such bars emerge at a later stage, such as, for instance, in case of sudden deterioration of the security situation in the country of origin. The question arises whether detention for the purpose of removal can still be justified.

Based on the considerations presented in the previous paragraph, this would depend on whether real and tangible prospects for removal still exist within the timeframe foreseen for detention. This would have to be examined in each individual case. Experience, however, tends to indicate that in situations of armed conflict, civil strife or serious disturbances of public order it is unlikely that the impediments to removal will be of a short-term nature.

In most cases, the deterioration of the security or humanitarian situation in the country of origin would be considered during a regular periodic review or when deciding on the extension of detention, and not as soon as legal bars to removal arise. A different approach has recently been taken in the new detention guidelines issued in North-Rhine Westphalia (NRW). In Germany, the Minister of Interior has the power to declare a general suspension of deportation to a particular area based on international protection or humanitarian grounds.<sup>97</sup> Following the new guidelines, whenever such declaration is announced, in NRW a special review of the detention has to take place immediately to determine if extending the deprivation of liberty beyond the period for which the suspension was declared (this amounts in general to six months) is still proportionate, and thus justified.<sup>98</sup>

had been held for 10 months while the UK Home Office was trying to convince Germany to take him back as he had been granted asylum in Germany; however, he had been convicted of a criminal offence while being on a visit to the UK.

90 Germany/Regional Court [Landgericht] Bochum, decision of 23/3/2004, case number 7 T 77/04.

91 Gutrani v. Minister for Justice [1993] 2 IR 427.

92 Belgium, Law on Foreigners, Article 7.11.

93 Germany/Higher Regional Court, [Oberlandesgericht] Celle, InfAuslR 2004, p.306.

94 The principle of *non-refoulement* is set forth in Article 33 of the 1951 Convention relating to the Status of Refugees to which all European Union Member States are parties. In addition, the ECtHR has interpreted Article 3 of the ECHR to prohibit the return to torture, degrading or inhuman treatment or punishment, see, for example, ECtHR (Grand Chamber), *Saadi v. Italy*, No. 37201/06, 28 February 2008, paragraphs 125 and 138-140.

95 See, for example, ECtHR, *Omojudi v. the United Kingdom*, No. 1820/08, 24 November 2009, paragraph 41.

96 See, for example, ECtHR (Grand Chamber), *N. v. the United Kingdom*, No. 26565/05, 27 May 2008, paragraphs 42-45.

97 See German Residence Act, Article at 60a.

98 Richtlinien für den Abschiebungsgewahrsam im Land Nordrhein-Westfalen, Decree of the Ministry of the Interior of 19 January 2009, at 3.2.5.3 Az.-15-39.21.01-5-AHaftRL, available in German online at: <http://www.abschiebungshaft.de/Abschiebungshaft%20Rechtsprechung/Abschiebungshaftrichtlinie%20NRW%2019.01.2009.pdf>.

A different question is whether upon release, the persons are granted a right to stay for the time in which a legal bar to removal exists or whether their presence is simply tolerated by the authorities. In principle, in all European countries the third-country national has the option of submitting an asylum application. In case the individual had already submitted an application in the past, his/her subsequent application may however undergo a preliminary examination.<sup>99</sup> In addition, many countries have provisions that allow the granting of a permit on humanitarian grounds for reasons which go beyond refugee status and subsidiary protection status.<sup>100</sup>

However, the granting of a permit is by far not automatic in these cases. Once released from detention, irregular migrants are often not provided with lawful stay, either in order to avoid rewarding their lack of collaboration or for other considerations. Such individuals may be *de facto* tolerated, but remain in a legal limbo situation, sometimes for years. Without legal access to the labour market and with limited or no public assistance they are dependent on employment in an informal economy or on the support of charitable organisations or community members.

### FRA Opinion

**EU Member States are encouraged, when reviewing their aliens or immigration laws, to establish mechanisms to avoid situations of legal limbo by acknowledging the presence in the country of persons who are not removable and ensuring that they enjoy applicable fundamental rights.**

**It would furthermore be important to start a reflection at European level to identify ways to put an end to protracted situations of legal limbo. Such reflection should not have the effect of rewarding lack of collaboration but create legal certainty and respect fundamental rights.**

<sup>99</sup> The possibility to examine in a specific procedure whether there are new elements or findings is foreseen in Article 32.2 of the Asylum Procedure Directive.

<sup>100</sup> Refugee and subsidiary protection status are the two protection statuses which have been harmonised in the Qualification Directive. For non-harmonised statuses, see recent study by the European Migration Network on the different national practices concerning granting of non-harmonised protection statuses, national reports available online at <http://emn.sarenet.es/Downloads/prepareShowFiles.do?sessionId=92281108565ACFDBB6234CD4F4ED9B66?directoryID=113>, as well as ECRE, *Survey on Complementary Protection*, July 2009.

## 2.6. Risk of absconding

### Return Directive

#### Article 3.7

**'[R]isk of absconding' means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond; [...].**

When applying Article 9 ICCPR, the Human Rights Committee concluded that detention "could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence".<sup>101</sup> Contrary to this, the European Court of Human Rights did not require that the deprivation of liberty be reasonably considered necessary.<sup>102</sup> The Twenty Guidelines on Forced Returns, however, recommend to States to resort to deprivation of liberty only when the authorities "have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures".<sup>103</sup>

Article 15.1 of the Return Directive, which lays down the grounds for detention, explicitly refers to risk of absconding and to other serious interferences with the return or removal process as illustrations of when the deprivation of liberty may be justified to prepare the return or carry out removal. Risk of absconding is defined in Article 3.7 and requires the existence of objective reasons in the individual case that the person will abscond. Article 15.5 states that detention shall be maintained for as long as "it is necessary to ensure successful removal". The directive also requires that such risks be assessed on a "case-by-case basis", underlining that "consideration should go beyond the mere fact of an illegal stay".<sup>104</sup>

Although the Return Directive does not explicitly define the assessment required in the individual case, a combined reading of these provisions makes it difficult to imagine a situation which could justify the deprivation of liberty if there is neither a risk of absconding nor a risk of other serious interferences with the return or removal process.

<sup>101</sup> UN Human Rights Committee, *A. v. Australia*, No. 560/199, paragraph 9.2 (see also Footnote 53), available online at: <http://www1.umn.edu/humanrts/undocs/html/vws560.html>.

<sup>102</sup> ECtHR, *Saadi v. UK*, No. 13229/03, 29 January 2008, paragraphs 72-73. Recently, however, the Court has found a violation of Article 5.1(f) in the case of the detention of four children one of whom was showing serious psychological and psycho-traumatic symptoms in a closed centre designed for adults and ill-suited to their extreme vulnerability. ECtHR, *Muskhadzhiyeva and others v. Belgium*, No. 41442/07, 19 January 2010, paragraphs 69-75 concerning the detention of a Chechen family seeking asylum in the context of the Dublin procedure. For both cases, see also Footnote 55.

<sup>103</sup> See Council of Europe, *Twenty Guidelines on Forced Returns*, Guideline 6.1.

<sup>104</sup> Return Directive, Recital 6.

As outlined in Chapter 1 Section 2, national legislation in a number of countries enumerates risk of absconding or, more generally, a risk that the alien will evade or otherwise hinder the removal as one among different grounds for detention. Elsewhere, risk of absconding is listed as a condition to make detention lawful.<sup>105</sup> In other countries it is one of the factors to consider in the context of a proportionality test<sup>106</sup> or otherwise, when determining if detention shall be ordered or prolonged in the individual case,<sup>107</sup> whereby evidence of previous failure to comply with immigration control requirements may also be a factor favouring a detention decision.<sup>108</sup>

A combined reading of Articles 15.1 and 3.7 of the Return Directive – which requires that the criteria for the existence of a risk of absconding be defined by law – may encourage national legislators to establish exhaustive lists of situations objectively giving rise to a risk of absconding. Establishing a risk of absconding requires however also an individual assessment of the particular circumstances of each case. Factors such as non-compliance with voluntary departure deadlines, failure to respect reporting duties, or a change of address after expiration of the time limit for departure which has not been notified to the authorities may all point to the need of resorting to deprivation of liberty. However, these should be assessed in light of the individual circumstances of each case in order to determine if they can be considered as signs of the existence of a risk of absconding or not. For example, failure to respect time limits for return or reporting duties, may be based on good reasons, such as serious health grounds requiring hospitalisation or the need to remain at rest.

Thus, if lists of situations giving rise to a risk of absconding are drawn up, these should be limited to situations objectively constituting evidence of the existence of a risk of absconding, such as those listed in the commentary to Council of Europe Twenty

Guidelines on Forced Return, Guideline 6.1. In these cases, deprivation of liberty should not be automatic and the authorities must be required to examine if in the particular case there are good reasons to rebut the presumption of the existence of a risk of absconding.

### FRA Opinion

**Pre-removal detention should essentially only be resorted to if there is a risk of absconding or of other serious interference with the return or removal process, such as interference with evidence or destruction of documents. EU Member States may consider making this explicit when reviewing their national legislation.**

## 2.7. Personal characteristics and vulnerabilities

### Return Directive

#### Recital 6

**According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay.**

Detention is a major interference with the right to liberty of any individual. However, its impact on persons with specific health needs, survivors of torture and other groups at risk may be proportionally higher than for others. It has been documented that deprivation of liberty, particularly if extended, can give rise to mental health problems<sup>109</sup> or lead to a re-emergence of past trauma. Specific dietary needs and other preventive health care measures are generally more difficult to uphold whilst in detention.

The Return Directive contains a list of vulnerable persons (Article 3.9). While the detention of children will be examined in detail in Chapter 6, the situation of other groups of persons generally defined as vulnerable needs consideration. Although the Return Directive does not ban the deprivation of liberty of vulnerable persons, it requires that, if detained attention is paid to their specific needs (Article 16.3). This would suggest that

<sup>105</sup> See Sweden, Aliens Act, Section 10.1. In the Czech Republic (FORA at Section 124.1) and in Poland (Act on Aliens at Article 102.1), a danger that the person might obstruct or hinder the execution of expulsion is one (of three) justifications for detention. In Slovenia, Aliens Act (Article 57.2) risk of absconding is listed as one among other justifications for applying a stricter detention regime.

<sup>106</sup> See Austria, Higher Administrative Court decisions 2007/21/0078 of 28 June 2007 and 2008/21/0036 of 27 May 2009; Finland, Aliens Act, Section 5; German Residence Act Section 62(2) 5: "a well founded suspicion exists that he or she intends to evade deportation."

<sup>107</sup> See, for example, Dutch Aliens Act Implementation Guidelines at (A), 5.3.3.3; Greece, the compilation of case law of the Administrative Court of 1st Instance of Athens – Decision 2001–2004, Nomiki Bibliothiki 2006 which lists the risk of flight among the factors for review by court; UK Border Agency, *Operational Enforcement Manual*, at 55.3.1. In Ireland, although not expressly included among the criteria listed in Section 3(6) (a)–(k) of the 1999 Immigration Act, the relevance of a risk of absconding can be implicitly deduced from some of the other considerations, including those relating to character and conduct of the person or to the public good.

<sup>108</sup> UK Border Agency, *Operational Enforcement Manual*, at 55.3.1.

<sup>109</sup> See, for example, Jesuit Refugee Service – Europe, *Becoming vulnerable in Detention*, June 2010, pages 66ff. Attention to this issue was given also in Australia, see Australian Human Rights Commission Immigration Detention Report 2008, pages 25 and following, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=category&docid=4a2e34692&skip=0&category=POLICY&querysi=detention&searchin=title&display=10&sort=date>; Newman (et al), 'Asylum, Detention and Mental Health in Australia', in *Refugee Surveys Quarterly*, Oxford Journals, 2008, Vol. 27, pp. 110–127.

when deciding whether to detain a vulnerable person, the possibility to cater for his or her specific needs should be taken into consideration.

Legislation, case law or policy documents in a number of countries expressly require those who order or prolong an extension decision to give due weight to the personal circumstances of the person concerned. These may include a history of physical or mental health,<sup>110</sup> a history of torture,<sup>111</sup> family,<sup>112</sup> age and duration of residence,<sup>113</sup> pregnancy,<sup>114</sup> whether anyone is reliant on the person for support<sup>115</sup> as well as the character or the conduct of the person<sup>116</sup>. In addition, domestic legislation may provide for special safeguards for victims of human trafficking.

### **FRA Opinion**

**The FRA welcomes domestic law provisions existing in some EU Member States that require the authorities to take into account the individual characteristics of the person concerned when deciding if a person should be detained, and encourages others to follow this example. Such provisions can help to ensure that particular caution is taken before depriving the liberty of particularly vulnerable persons or persons with specific needs and that alternatives to detention are duly considered.**

110 See, for example, Estonia, Riigikohus/3-3-1-45-06 (13.11.2006), paragraph 10; Estonia/Riigikohus/3-3-1-2-07 (22.03.2007), paras. 20-21, Poland, where Article 103 Poland/Dz.U.03.128.1175 at 103; UK Border Agency, *Operational Enforcement Manual*, at 55.3.1.

111 UK Border Agency, *Operational Enforcement Manual*, at 55.3.1.

112 Bulgaria, Law on Foreigners, at 44.2; Ireland, Immigration Act 1999, Section 3(6) (c).

113 Ireland, Immigration Act 1999, Section 3(6) (a)-(b); Germany, General Administrative Regulations to the Residence Act [Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz], 26 October 2009 at 62.0.5.

114 Germany, General Administrative Regulations to the Residence Act [Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz], 26 October 2009 at 62.0.5.

115 UK Border Agency, *Operational Enforcement Manual*, at 55.3.1; Germany, General Administrative Regulations to the Residence Act [Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz], 26 Oct. 2009 at 62.0.5 as regards mothers under maternity protection.

116 Ireland, Immigration Act 1999, Section 3(6) (g).



### 3. Maximum length of detention

The Return Directive is the first binding supra-national document providing for a maximum length of pre-removal detention. The rationale for an upper limit of detention is the desire to prevent instances of indefinite detention. It is based on the consideration that after a certain period of time has elapsed and the removal has not been implemented, the deprivation of liberty loses its initial purpose and becomes a punitive measure.

Cases of long-term detention have not been uncommon in European countries, as the following examples illustrate. In Lithuania, an individual was detained in 2002 for more than four years.<sup>117</sup> Similarly, in Estonia, the maximum has been close to four years (1,436 days). In Bulgaria, Romania and the UK, there have been cases around three years of detention.<sup>118</sup> In Cyprus, the Ombudsman has reported cases of detention lasting for two years.<sup>119</sup> In Sweden, the Migration Court accepted that two years and eight months of detention were exceptionally justified in case of an irregular immigrant that had an expulsion order due to criminal offences.<sup>120</sup>

While these cases exemplify situations of clearly excessive duration of pre-removal detention, it is more difficult to draw a line beyond which no case, whatever exceptional its circumstances are, the length of detention loses its initial purpose and becomes arbitrary. The Return Directive has established such line at 18 months for which it was strongly criticised internationally and by civil society.<sup>121</sup>

To be more precise, the Return Directive foresees two ceilings. The first ceiling is set at six months (Article 15.5). Pre-removal detention should normally not be extended beyond such period. In exceptional cases, Article 15.6 of the Directive provides for two exceptions in which detention can be extended for a further 12 months, provided such possibility is set forth in national law and all reasonable efforts to carry out the removal operation are undertaken by the authorities. The first exception is when the removal is likely to last longer owing to a lack of cooperation by the person concerned. The second exception lies outside the sphere of influence of the person as it relates to a delay by the country of return in issuing the necessary documentation.

#### 3.1. Time limits set out in national law

##### **UN Working Group on Arbitrary Detention**

##### **Report to the 13th session of the Human Rights Council, paragraph 61**

**Further guarantees include the fact that a maximum period of detention must be established by law and that upon expiry of this period the detainee must be automatically released.**

Nine EU Member States have not laid down by law a maximum time limit for pre-removal detention<sup>122</sup> or for certain types of pre-removal detention as shown in the map in Figure 1.<sup>123</sup> Without a maximum period of detention stipulated by law, the rights of irregular migrant detainees are protected only to the extent that they can exercise rights of judicial review.

117 Information provided by the Foreigners' Registration Centre in Lithuania to the national FRALEX expert. The longest case of detention corresponded to 1,523 days.

118 For Bulgaria, see the case of Mr Kadzoev, who was in detention for over three years (ECJ, *Kadzoev*, Case C-357/09). For Romania, see the recent judgment by the ECtHR (Grand Chamber), *Al-Agha v. Romania*, 2010, No. 40933/02 concerning a Palestinian detained for three years and five months. For the UK, see *R (on the application of Wang) v. Secretary of State for the Home Department*, [2009] EWHC 1578 (Admin), United Kingdom: High Court (England and Wales), 5 June 2009, concerning an Iranian detained for 34 months.

119 See, for instance, the Ombudsman report for 2006, p. 103-105, available at: [http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/32C49D97734F1624C22575B20045BB24/\\$file/ETHZIA%20EKOEΣH%202006.pdf?OpenElement](http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/32C49D97734F1624C22575B20045BB24/$file/ETHZIA%20EKOEΣH%202006.pdf?OpenElement).

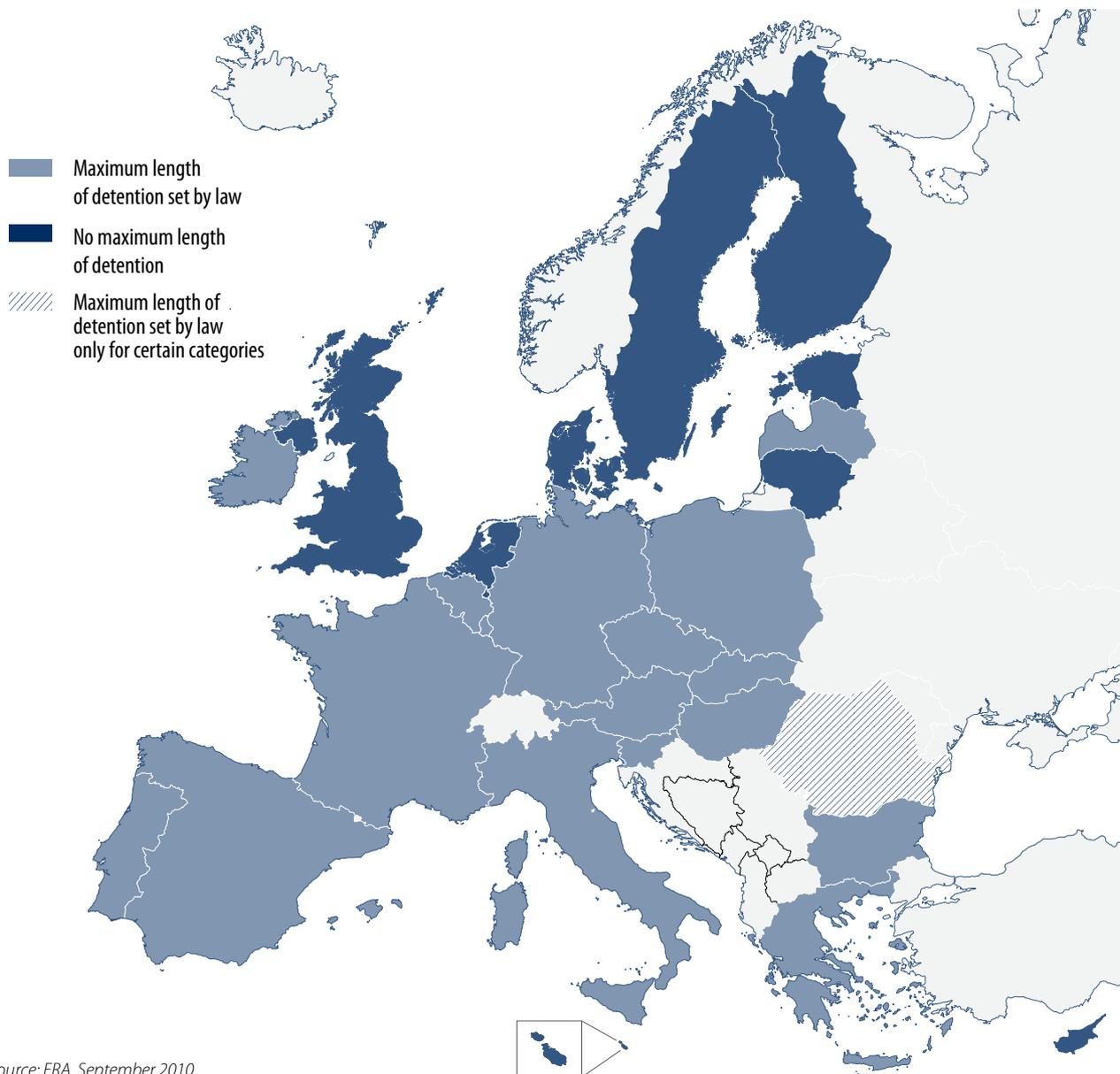
120 See MIG 2008:44, SOU 2009:60, p. 169.

121 See UN press release, *UN experts express concern about proposed EU Return Directive*, 18 July 2008, UNHCR, *UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, 16 June 2008, p. 2. See also joint press release by ECRE and Amnesty International, 'Returns' Directive: European Parliament and Member States risk compromising respect for migrants' rights', 20 May 2008 as well as the attached letter to European Parliament Members, available at <http://www.ecre.org/files/ECRE%20AI%20Joint%20PR%20Returns%20Directive.pdf>.

122 No upper time limit is set forth in law in Cyprus, Denmark, Estonia, Finland, Lithuania, Malta, Sweden and the UK. In these countries, the time limit is set by courts in individual cases or by policy, as is the case of the 18-month limit set in Malta. See Annual Report 2010 of the Working Group on Arbitrary Detention, A/HRC/13/30. In the Netherlands, no upper limit is foreseen in law for deprivation of liberty resulting from Article 59.1(a) of the Aliens Act 2000, which is by far the most common ground for alien detention, whereas time-limits exist for detention pursuant to Article 59.1(b) and 59.2 (four or six weeks as per Article 59.4).

123 In Romania, no time limits have been established for the detention of undesirable aliens (Emergency Ordinance Article 97.4), while a two-year limit is laid down in law for detention of aliens against whom a measure of expulsion has been ordered (Article 97.3).

**Figure 1: Maximum length of detention set by law, EU27**



Source: FRA, September 2010

All other EU Member States provide for upper time limits ranging from 32 days in France<sup>124</sup> or 60 days in Spain<sup>125</sup> to 20 months in Latvia<sup>126</sup> or two years in Romania<sup>127</sup> for deprivation of liberty of aliens who have been issued an expulsion order. Figure 2 provides an overview of existing upper time limits as stipulated by national law in 19 EU Member States. In countries where more than one time limit exists, the longest possible period of detention has been selected. Countries that

have an upper time limit only for certain situations of pre-removal detention have been included in the list – this is the case of the Netherlands and Romania. As the Figure 2 shows, the national legislation of two countries, Latvia and Romania, have an upper time limit beyond the maximum limit of 18 months foreseen in the Return Directive.

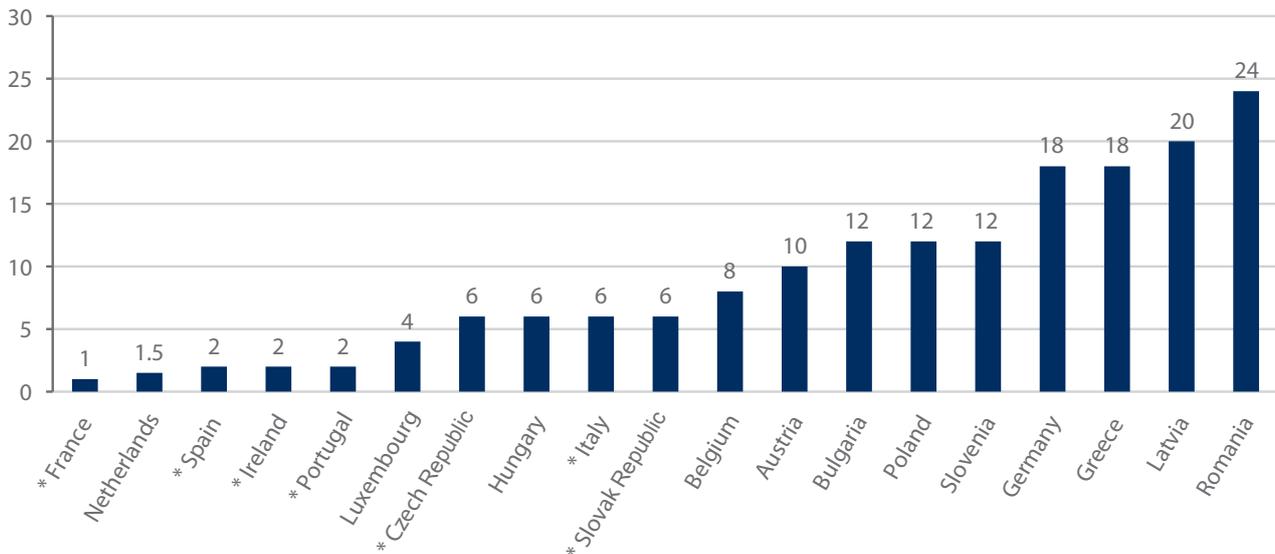
About one out of three EU Member States has established in domestic legislation two time limits as regards the maximum length of pre-removal detention. These include a shorter general rule and a longer maximum time frame to be applied in specific circumstances. In these countries, the general time limit

124 The law of 26 November 2003 amended the rules governing the retention centres and extended the maximum length of detention from 12 to 32 days (CESEDA, Article 552-7).

125 The upper limit of 40 days foreseen in the 2000 law has been extended to 60 days in 2009 (see Article 62.2 of Law 4/2000).

126 Article 54.4 of the Immigration Law.

127 Emergency Ordinance, Article 97.3.

**Figure 2: Maximum length of detention, by country (month)\***

Note: \* Lengths of detention expressed in days or weeks in national legislation are provided in months in the graph.

Source: FRA, September 2010

ranges from 60 days to six months<sup>128</sup> and the upper limit from six to 18 months.<sup>129</sup> In three of these countries, the only justification to resort to the upper time limit lies in the conduct of the person concerned.<sup>130</sup> In two other countries, in addition to reasons which lie in the sphere of the migrant, it is also possible to apply the upper limit in case of delays by the authorities of the country of return in preparing the necessary documents.<sup>131</sup> Finally, in three countries, requirements of public order or national security are referred to.<sup>132</sup>

128 In Austria, there are in fact three time limits. Normally, the upper time limit is two months (Section 80.2 Aliens Police Act) which can however be extended to 6 months (cumulative in a two years period) in a variety of cases, Section 80 (3) Aliens Police Act. In Belgium, there is a time limit of two months which can be prolonged for further two months and subsequently for another month in under certain circumstances and up to eight months for public order or national security reasons, Law on Foreigners, Article 7.11. See also Bulgaria up to six months (Law on Foreigners, Article 44, paragraph 8, sentence 2 as amended on 15.05.2009); Germany, up to six months Residence Act at Section 62(3); Greece up to six months, TCN Act at 76.3; Italy 30 days which can be prolonged for further 30 days; Art. 14 of LD 286/98; Poland up to 90 days, Act on Aliens at 106.1; and Slovenia up to six months, Aliens Act at Section 56.1.

129 Austria 10 months (cumulative in a two years period), Sec 80 (4) Aliens Police Act; Belgium 8 months, Law on Foreigners, Article 7.11; Bulgaria 18 months, Law on Foreigners, Article 44, paragraph 8, sentence 2 (as amended on 15.05.2009); Germany 18 months, Residence Act at Section 62(3); Greece 18 months, TCN Act at 76.3; Italy the period of 30 + 30 days can be extended twice for additional 60 days each time, which leads to a total of approximately six months, Article 14.5 of LD 286/98 (as revised in 2009); Poland 12 months, Act on Aliens at 106.2; and Slovenia 12 months, Aliens Act at Section 58.4.

130 In Austria (as regards the extension up to 10 months, Aliens Police Act at 80.4), Germany (Residence Act Section 62.3) and Poland (Act on Aliens at 106.2), the extension of the pre-removal detention is only possible if the alien frustrated the removal.

131 Greece, TCN Act at Article 76.3; Italy Art. 14.5 LD 286/98 (as revised in 2009).

132 Belgium, Law on Foreigners at 7.11, last sentence. In Slovenia, Section 58.4 of the Aliens Act allows the police to extend detention for a further six

Figure 3 provides an overview of EU Member States with two or more upper time limits in terms of the maximum length of pre-removal detention. It does not include countries, such as the Netherlands or Romania, where different upper time limits are foreseen for different groups. Nor does it include those countries, such as Luxembourg or Latvia where detention is ordered for one or two months at a time up to the maximum limit allowed under national law.

Four countries have changed their domestic legal provisions on the maximum length of detention after the adoption of the Return Directive. As illustrated in Figure 4, in three EU Member States the allowed length of detention was increased,<sup>133</sup> whereas in one EU Member State, Bulgaria, no time limit existed before the transposition of the Return Directive and the upper time limit allowed by the directive was introduced.<sup>134</sup>

An upper time limit of detention would not be meaningful if the authorities could circumvent it by re-detaining the person immediately or soon after his or her release.<sup>135</sup> In one country, safeguards have been introduced in national

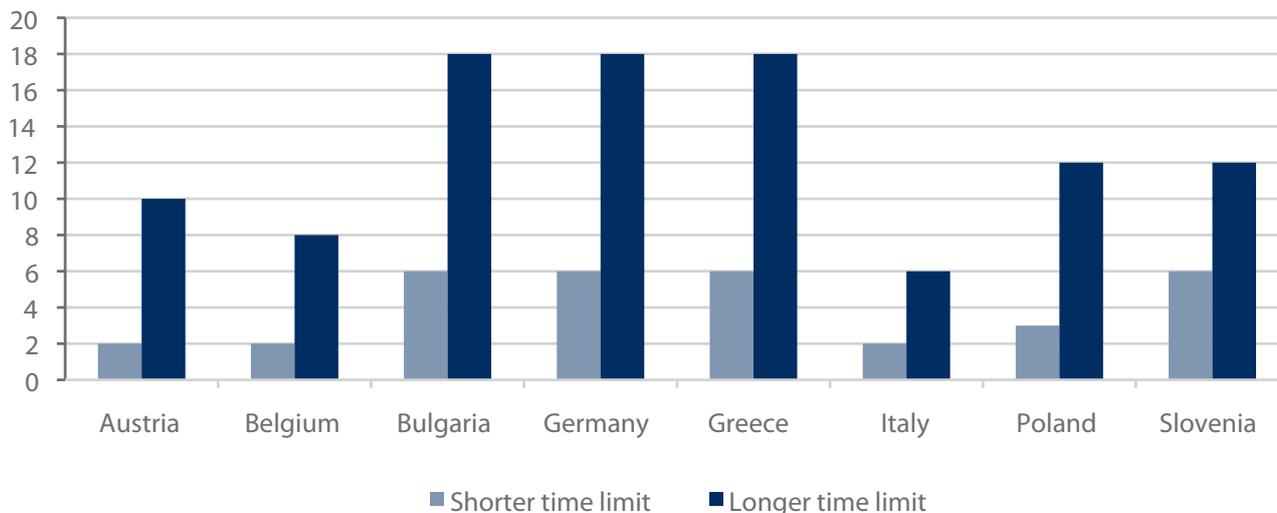
months if it is realistic to expect that it will be possible to deport the alien within this time and, in particular, if the procedure for determining identity or the acquisition of documents for the deportation of the alien are still in progress, or if the extension is necessary for security reasons. See also Bulgaria, Law on Foreigners at 44.8.

133 See Greece, TCN act at Article 76.3; Article 62.2 Law 4/2000 as amended by Law 2/2009; Italy, Art. 14.5 LD 286/98 (as revised in 2009).

134 Law on Foreigners, Art. 44, paragraph 8, sentence 2 (as amended on 15.05.2009).

135 See ECtHR, *John v. Greece*, No. 199/05, 10 May 2007, paragraph 33, where the Court found a circumvention of a domestic law provision on maximum length of detention with a view to expulsion by re-detaining person 10 minutes after release.

**Figure 3: EU Member States with two upper time limits (month)**



Source: FRA, September 2010

law providing that an alien can be detained for up to six and exceptionally 10 months within a two-year period.<sup>136</sup> In some other countries, courts or other bodies have declared the practice of re-detaining the person illegal. This has, for example, been the case in Portugal<sup>137</sup> and Greece.<sup>138</sup>

By contrast, re-detention can occur in other countries, such as in Malta, where this possibility is explicitly foreseen in the Immigration Act.<sup>139</sup> In Belgium, the time is counted by detention facilities and starts anew whenever a foreigner is transferred. Similarly, the objection to an expulsion attempt leads to a new detention decision. Thus, despite the fact

that Belgian law sets the upper time limit for detention at five months, a man has been detained in the centre of Bruges for more than 13 months.<sup>140</sup>

Only few EU Member States currently have maximum time limits of 18 months or more. Detention of a period as long as 18 months constitutes a serious interference with a person's right to liberty. As has been documented outside Europe, long-term detention can also lead to serious mental health consequences for the persons concerned. A recent study in Australia revealed that 40% of those held for two years or longer developed new mental health symptoms.<sup>141</sup>

The length of detention pending removal should be

136 Austrian Aliens Police Act at Section 80 (4). The alien has also the right to be issued at no cost a certificate indicating the time that he or she has spent in detention (Aliens' Police Act, Section 81).

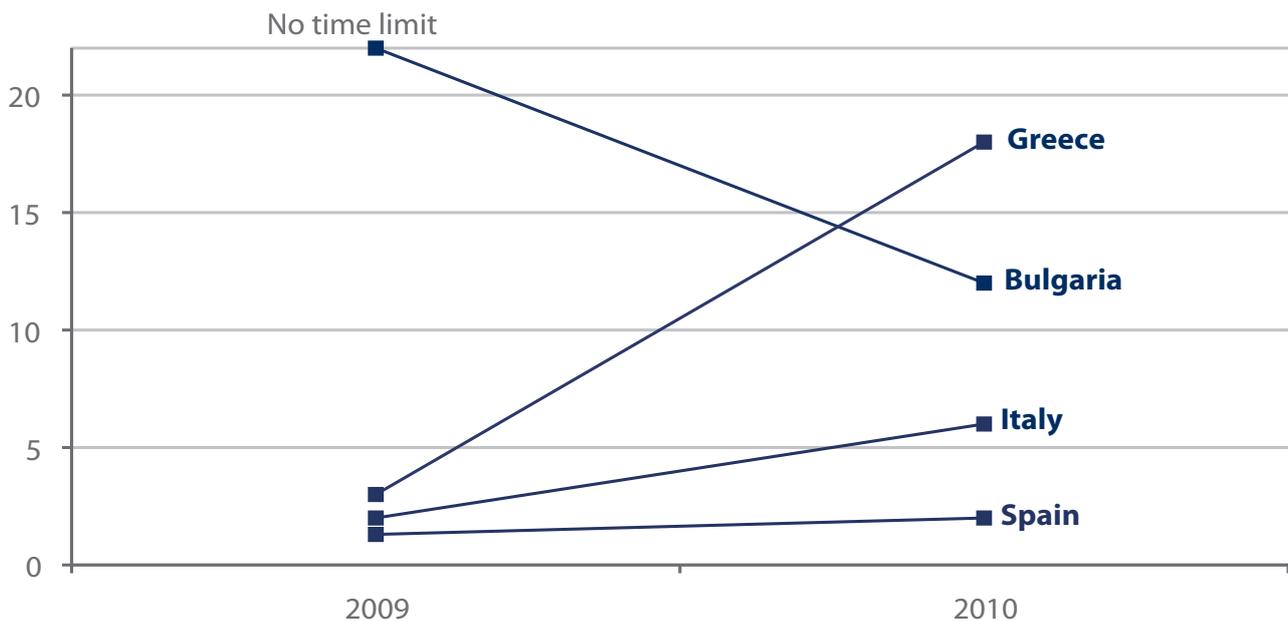
137 In Portugal, the Supreme Court decided that it is illegal to maintain in a detention centre or in prison an illegal immigrant that has already been detained in a Centre of Temporary Detention for 60 days, which is the time allowed according to the law. Supreme Court [Supremo Tribunal de Justiça] available at: <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/5d58a7ea0581ce80802573640058fee7?OpenDocument>.

138 Similarly, in Greece, the Ombudsmen criticised the practice of "successive" deportation orders and subsequent detention decisions by the administration in order to detain irregular immigrants for another period of three months and considered such practice illegal. See Press release, "Successive deportation in a 'legal vacuum'. Actions of the Greek Ombudsman to stop successive deportations of aliens", Athens, 7 January 2008, available online in Greek at: [www.synigoros.gr](http://www.synigoros.gr).

139 The Principal Immigration Officer can, irrespective of the order of the Immigration Appeals Board, re-apply administrative detention if he is satisfied that there exists a reasonable prospect of deportation and there are no pending procedures under the Refugees Act. See Immigration Act at Article 25(A)(12). The FRA was, however, informed by the Ministry for Justice and Home Affairs, that in practice, re-detention only takes place once arrangements for return have been made or there are reasonable prospects of imminent removal namely when the documents have been procured or are about to be procured.

140 Belgium, Aide aux Personnes Déplacées, Caritas International Belgique, le Centre Social Protestant, le CIRE, Jesuit Refugee Service Belgium, la Ligue des droits de l'homme asbl, le MRAX, Point d'Appui, le Service Social de Solidarité Socialiste, Vluchtelingenwerk Vlaanderen (2006), *Centres fermés pour étrangers : Etat des lieux*, available in French online at: [http://www.liguedh.be/images/PDF/documentation/analyses\\_juridiques/Etat\\_des\\_lieux\\_sur\\_les\\_centres\\_fermes%20.pdf?766a6a4a76f17874a59bb7f42f2bb3fa=34024efaaf6f00230dbbba6f3b9027a7](http://www.liguedh.be/images/PDF/documentation/analyses_juridiques/Etat_des_lieux_sur_les_centres_fermes%20.pdf?766a6a4a76f17874a59bb7f42f2bb3fa=34024efaaf6f00230dbbba6f3b9027a7), p. 22. See also European Parliament, *Report on a visit to closed detention centres for asylum seekers and immigrants in Belgium*, LIBE Committee delegation visit to Belgium on 11 October 2007, PE404.456v01-00, available online at: [http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/pv/714/714008/714008en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pv/714/714008/714008en.pdf). The LIBE delegation concluded that, although the legal limit for the length of detention was fixed at five months with the possibility of extending this to eight months for reasons of public order or national security, in practice, "detention has no limit in Belgium since a new time limit commences when a person appeals against his/her deportation" (p. 3).

141 See J. p. Green and K. Eagar, *The health of people in Australian immigration detention centers*, University of Wollongong, New South Wales, 2010. The research analysed health records of 720 of the 7,375 people in detention in the financial year 1 July 2005–30 June 2006, with oversampling of those detained for more than three months.

**Figure 4: Maximum length of detention – Trends 2009-2010 (month)**

Source: FRA, September 2010

seen in comparison with sanctions provided for criminal offences. In this context, it is worth noting that assault causing bodily harm may, in many European jurisdictions, be sanctioned with imprisonment of duration shorter than 18 months.<sup>142</sup>

### FRA Opinion

**The FRA encourages EU Member States not to extend the maximum period of detention beyond six months. Where – in line with the Return Directive – such a possibility is introduced or maintained, national legislation should include strict safeguards to ensure that such a possibility is only used in extremely exceptional cases. A delay in obtaining necessary documentation should not justify an extension of deprivation of liberty, if it is clear from the outset that the third country concerned will not collaborate or where there are no reasonable expectations that the necessary documents will be issued in time as in such cases, detention would not anymore pursue the legitimate objective of facilitating the removal.**

### 3.2. As short as possible

#### Return Directive

##### Article 15.1, last sentence

**Any detention shall be for as short a period as possible [...]**

The Return Directive (Article 15.1) states that the deprivation of liberty to facilitate the return and removal process should be as short as possible. It thus introduces an obligation for States to put in place mechanisms or procedures to ensure that detention is not unduly prolonged. The six-month time limit laid down in Article 15.5 of the Directive and exceptional further extension up to a maximum of 18 months for the cases foreseen in Article 15.6 are upper time limits. The authority ordering or prolonging detention has to examine how long the deprivation of liberty can be upheld in light of the individual circumstances of the case at hand, whereby in no circumstances the upper limits set forth in Article 15.5 and 15.6 can be disregarded.

In a number of EU Member States, the principle of proportionality requires the authorities ordering detention to examine that the deprivation of liberty does not exceed the time strictly required to carry out the removal.<sup>143</sup>

<sup>142</sup> The punishment for bodily harm foreseen in the Austrian Criminal Code (Section 83) is up to one year of imprisonment. The same length is provided for by Article 133 of the Slovenian Penal Code for light bodily harm. The national laws in other countries provide for imprisonment of up to two years for the most serious cases of bodily harm, see Hungarian Penal Code, Art. 170 (1); Swedish Penal Code, Chapter 3 Section 5 (if the crime is petty, a fine or imprisonment of up to six months is foreseen); or Finnish Penal Code, Chapter 21 Section 5(1).

<sup>143</sup> The Irish High Court held that imprisonment pending deportation is only justified for so long as is necessary for immediate or reasonably immediate deportation. The Court ruled that it would be an abuse of power to continue detention if it was clear it could not be carried out within the eight week period; see *Gutrani v. Minister for Justice* [1993] 2

The requirement that the detention be kept as short as possible is sometimes expressly contained in national legislation or guidelines.<sup>144</sup> As described in Section 3.3, the possibility to extend detention only for a short period at a time<sup>145</sup> as well as periodic reviews, are important tools to ensure that detention is kept as short as possible.

By far not all countries collect statistics on the average length of pre-removal detention. In the 10 countries where the FRA could collect some data, the average length of pre-removal detention in 2008 ranged from 13 days in France<sup>146</sup> or Hungary<sup>147</sup> to 111 days in Poland.<sup>148</sup> Although the available data is limited and not necessarily comparable as it does not always relate to the same timeframe, overall, two general comments can be made. First, the average length of detention of irregular migrants tends to be shorter in countries which allowed for a limited maximum duration of detention at the time when data was collected.<sup>149</sup> Secondly, detention tends to be shorter in countries where removals can also take place by land.<sup>150</sup>

---

IR 427, available at [www.courts.ie](http://www.courts.ie). In the Netherlands, after a period of six months the interest of the migrant to be released is usually considered by courts to outweigh the interest of the state to continue detention, although detention can be extended in a number of cases listed in Vc 2000 A6/5.3.5. In Sweden, the Supreme Administrative Court (RÅ 1993 ref 15) ruled that, as an overarching principle, prolongation of detention should be restrictively applied. See also the general principle of proportionality included in the Finnish Aliens Act at Section 5.

144 Austria, Aliens Police Act, Section 80(1); Hungary Governmental Decree No. 114/2007 (V.24.) Section 126 (5) Hungary/114/2007 (V.24.) *Korm. rendelet/* (24.05.2007). In addition, in the UK, the UKBA (2008) *Operational Enforcement Manual*, Chapter 55.1.3 states that detention must be used sparingly, and for the shortest period necessary. In Germany (Residence Act at Section 62.2), detention pending deportation shall not be permissible if it is established that it will not be possible to carry out deportation within the next three months for reasons for which the foreigner is not responsible.

145 This is, for instance, the case for Denmark (four weeks), Estonia and Latvia (two months).

146 Contrôleur général des Lieux de Privation de Liberté, *Annual Report 2008*, p. 19, available online at: <http://lesrapports.ladocumentationfrancaise.fr/BRP/094000191/0000.pdf>.

147 According to the National Police Headquarters (Letter No. 20361/1/2009 of 17.06.2009), the average length of alien policing detention executed by the police – detention prior to expulsion or under immigration laws – was 13 days in 2008.

148 Statistics provided by the Polish police headquarters. A considerable difference exists between facilities, for instance, in Włocławek the average duration of detention was 43 days and in Konin 240 days.

149 The average duration of detention was 13 days in France (compared to a maximum time limit of 32 days); 22 days in Greece (compared with a three-month time limit allowed in 2008), data provided in writing by the Hellenic Ministry of the Interior, Aliens Directorate Department for Migration and Administrative measures; 35 days in Portugal (compared to a maximum length of 60 days, according to Article 146.5), information provided orally by Borders and Foreigners Office to the national FRALEX expert.

150 For example, Hungary (13 days) and Romania (between 2005 and 2008, the average was 10–12 days, see Response 2869110 provided by the Romanian National Office for Immigrations on 7 May 2008, on file with FRALEX national expert). In Finland, comprehensive statistics on the detention of irregular immigrants have not been collected by the Finnish authorities and as such, the average length of detention of irregular immigrants in Finland cannot be conclusively determined. At present, there is only one facility for the detention of immigrants under the Aliens Act in Finland which officially began operating in September 2002. The

Limited information could be collected on the breakdown of detainees by length of detention. In Austria, the average duration of detention in the first seven months of 2008 was 20.44 days. Some 41% of the people detained (1,299 persons) were released within the first week; further 36% of the persons detained were released between the second and fourth week and for the remaining 23% of persons detention lasted between one and 10 months.<sup>151</sup> In the UK, of the 2,800 persons detained on 31 March 2010 slightly over half (56%) had been in detention for less than two months, 690 persons (25%) were in detention between two and six months and 540 persons (almost 20%) for longer, including 105 persons for over 18 months.<sup>152</sup>

Only a detailed review of a sufficient number of case files examining the time required to implement the removal could give a clearer picture on when the likelihood of a successful removal begins to become slim so as not to justify anymore a deprivation of liberty. However, limited studies of this kind are available. One example is a recent study in the UK carried out with persons detained for one year or more whose fate was followed for 20 months. The study revealed that only 18% of the migrants had been removed within the 20 month time frame. For four out of five persons, the deprivation of liberty had not led to the removal objective.<sup>153</sup>

---

statistics compiled by the Metsälä Detention Unit indicate that the average length of detention has varied between 10.3 days in 2003 and 28.8 days in 2007, see Metsälä Reception Centre/Detention Unit/Instruction Manual (11.09.2008), paragraph 1.2.1. [*Metsälän vastaanottokeskus/säilöönottoyksikkö/perehdytyskansio* (11.09.2008)].

151 Human Rights Advisory Board (2008) *Rechtsschutz für Schubhäftlinge*, pp. 16f, available in German online at: [http://www.menschenrechtsbeirat.at/cms15/mrb\\_pdf/thematische\\_berichte/2008\\_rechtsschutz.pdf](http://www.menschenrechtsbeirat.at/cms15/mrb_pdf/thematische_berichte/2008_rechtsschutz.pdf).

152 UK Home Office, *Control of Immigration: Quarterly Statistical Summary, United Kingdom. National Statistics. January–March 2010* p. 45, available online at: <http://rds.homeoffice.gov.uk/rds/pdfs10/imm10.pdf>.

153 London Detainee Support Group (2009) *Detained Lives: The Real Cost of Indefinite Immigration Detention*, p. 5, available online at: <http://www.detainedlives.org/wp-content/uploads/detainedlives.pdf>.

An important element to ensure that detention remains as short as possible is the automatic release once the grounds for detention disappear. Normally, all countries provide for the automatic release of the person. An exception is, however, Lithuania, where the institution which initiates an alien's detention is obliged to immediately apply to the local court of the locality of his/her residence with a request for ordering the release of the alien.<sup>154</sup>

### FRA Opinion

**The six-month and very exceptionally 18-month period set forth in the Return Directive has to be seen as a ceiling. Given the interference that detention has on personal dignity, it is of utmost importance to regulate in national legislation that detention shall be ordered or maintained only for as long as it is strictly necessary to ensure successful removal. National legislation should be drafted in a manner so as to ensure that the individual circumstances of the person concerned are evaluated in each case, thus making the systematic application of the maximum time limit for detention unlawful.**

### 3.3. Automatic periodic reviews

#### Return Directive

##### Article 15.3

**In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.**

Automatic periodic reviews by the administration or by courts are one tool to ensure that detention is kept as short as possible. Two ways of implementing such automatic periodic reviews can be distinguished. The first option is for the law to allow the imposition of detention for the period of time envisaged to implement the removal, but provide for regular periodic reviews. The second option is to allow detention only for a short period of time after which the detention will be reviewed and extended only in case this is still warranted.

A mechanism to review at regular intervals if the deprivation of liberty is still justified is also included in Article 15.3 of the Return Directive. In addition, the Parliamentary Assembly of the Council of Europe recently called for detention to be subject to periodic judicial reviews.<sup>155</sup> The provision in the Return Directive requires

the involvement of courts in case of “prolonged detention periods”. The directive leaves some flexibility to states to define exact timelines for regular reviews and to determine when detention periods can be considered as prolonged. Current state practice might help in defining such length.

The research found that eight countries<sup>156</sup> have laid down specific timelines which require courts to review the lawfulness of detention. In three other countries, regular reviews can or must be undertaken by the administration.<sup>157</sup> In two countries, Austria and Denmark, periodic reviews only start after the expiration of a certain period of time.<sup>158</sup> Among those countries that provide for automatic periodic reviews, over half foresee timelines which are shorter or correspond to one month,<sup>159</sup> whereas in five countries the deadline for review is set at two months.<sup>160</sup>

Excluding those EU Member States in which the maximum length of detention does normally not exceed

<sup>156</sup> Austrian Aliens Police Act, Section 80.6; Estonia, OLPEA, Section 25; Denmark, Aliens Act, Section 37.3; France, CESEDA at 552.7; Hungary, TCN Act at 55.3 and 58.2; Italy LD 286/98 at Article 14; Latvia, Immigration Law, Section 54.2-4; Luxemburg, Immigration Law, Articles 120.1 and 120.3.

<sup>157</sup> In Belgium (Law on Foreigners at Article 7.11), detention is ordered for two months and subsequently extended for another two if the administration has initiated removal proceedings with due diligence within seven working days from the detention. In Sweden a detention order shall be re-examined by the police or the Migration Board. Sweden Aliens Act, Chapter 10, Section 9. In the UK, operational guidance sets out that after the initial decision to detain, continued detention must be subject to periodic review according to a timetable of reviews, namely after 24 hours, then seven days, 14 days, 21 days, 28 days, and then monthly, with increasing levels of responsibility to higher administrative officials for the decision to continue detention; see Operational Enforcement Manual, Chapter 55.8, available online at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals>.

<sup>158</sup> In Austria, detention has to be reviewed by courts every eight weeks only when it lasts for longer than six months (Austria Aliens Police Act, Section 80.6). In Denmark, if the court finds the detention legal it will set a deadline which can be prolonged by the court at a later stage however no more than four weeks at a time (Aliens Act, Section 37.3).

<sup>159</sup> In France, detention is approved after 48 hours for a period of 15 days and can be extended for additional 15 days in certain circumstances (see CESEDA at 552-7) In Italy detention is initially ordered for 30 days, extended once for another 30 days and, if special circumstances are present it can further be extended twice for 60 days each time (see LD 286/98 at Article 14). In Hungary, the prolongation of detention shall be reviewed every 30 days upon the motivated initiative of the immigration authorities – see TCN Act at 55.3 and 58.2. In Luxembourg, detention is ordered for one month and can be extended for an additional month for three times (Immigration Law at Article 120.1 and 120.3). In Denmark (Aliens Act, Section 37.3) if the court finds the detention legal it will set a deadline for how long it can be upheld. This deadline can be prolonged by the court at a later stage however no more than 4 weeks at a time. In Sweden a detention order shall be re-examined by the police or the Migration Board within two weeks from the date on which enforcement of the order began (Aliens Act Chapter 10, Section 9). For the UK see above footnote 158.

<sup>160</sup> Reviews of two months are foreseen in Estonia (OLPEA, Section 25), Latvia (Immigration Law, , Section 54.2-4) and Sweden concerning refusal-of-entry or expulsion order (Aliens Act Chapter 10, Section 9 – although not necessarily by a court, Section 12). Austria foresees a compulsory judicial review every eight weeks for all detainees held for more than six months (Austria Aliens Police Act, Section 80.6). In Belgium, detention is ordered for two months initially and can be extended by the administration for further two months (Law on Foreigners, Article 7.11).

<sup>154</sup> Lithuania, Law on Legal Status of Aliens, Article 118, p. 1.

<sup>155</sup> Parliamentary Assembly of the Council of Europe, Resolution 1707 (2010) at 9.1.3.

two months,<sup>161</sup> almost half of the Member States have not introduced timelines for automatic reviews of detention. Even if national law in these countries establishes a duty by the administration to confirm *ex officio* the continuing existence of grounds for detention throughout the entire period,<sup>162</sup> this guarantee cannot be considered as effective as automatic periodic reviews in ensuring that detention is kept as short as possible.

Where countries provide for specific deadlines to review the detention and order an extension, the courts shall be given the flexibility to define the future period of detention according to the circumstances of the specific case. A situation, such as the one currently existing in Italy, where after the initial 60 days, the deprivation of liberty is either terminated or extended for 90 days (and subsequently for further 90 days) does not facilitate that detention is maintained for as short as possible a period.<sup>163</sup>

### **FRA Opinion**

**Automatic periodic judicial reviews are an important safeguard to ensure that detention is kept as short as possible. Reviews should be carried out by a court at regular intervals, preferably not less than once a month.**

---

<sup>161</sup> In addition to France, this includes, Ireland Portugal and Spain (see Chapter 3.1).

<sup>162</sup> See, for example, Czech Republic, Article 126 FORA. See also Slovak Aliens Act, Article 63(e) and Germany, General Administrative Regulations to the Residence Act [*Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz*], 26 October 2009, at 62.3.0.1 and 62.3.3.

<sup>163</sup> Italy, LD 286/98 at Article 14.

## 4. Procedural guarantees

To reduce the risk of unlawful or arbitrary detention, human rights law foresees a number of procedural safeguards. This chapter will touch upon these. It will first look at the right to be informed of the reasons for the deprivation of liberty. Subsequently, it will examine the authority ordering detention and judicial review guarantees as well as legal assistance. A final section will be devoted to the right to asylum and the possibility to submit an asylum application for persons in detention. Safeguards regarding children are addressed in Chapter 6.

### 4.1. Right to be informed

#### European Convention on Human Rights

##### Article 5.2

**Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.**

The right of every detainee to be informed of the reasons for their deprivation of liberty is laid down in Article 9.2 of the ICCPR as well as Article 5.2 of the ECHR. Both provisions underline that such information shall be provided 'promptly'. In *Saadi v. UK*, the European Court of Human Rights found that a delay of 76 hours in providing reasons for detention was too long.<sup>164</sup>

The information provided shall also include the procedure to challenge the detention order.<sup>165</sup> Without this, it would render the *habeas corpus* guarantees included in Article 9.4 ICCPR and Article 5.4 ECHR meaningless.

Translation or interpretation plays an important role in the context of pre-removal detention, as in many cases the detainee's command of the host country language may be limited or non-existent. In this context, Article 5.2 ECHR sets a very clear requirement, whereby the information has to be provided in a language which the person understands.

In principle, the duty to inform the person about the reasons for detention in a language that he or she understands can be found in all European Union countries, either in general human rights documents as in

the UK<sup>166</sup> or in the aliens act as is in Poland.<sup>167</sup> However, in practice this requirement becomes often challenging to comply with, as detention orders are often not translated into a language that the person understands. The following examples give an illustration of the different types of obstacles that may exist.

In Austria, information on remedies against a detention decision is contained in the detention decision itself which is only in German and not in the information leaflet which has been translated into some 40 languages.<sup>168</sup> Finnish law provides for an immigrant to be notified of a decision concerning him/her either in his/her mother tongue or in a language which, on reasonable grounds, he/she may be expected to understand. This is lower than the requirement by the ECHR ('a language he understands').<sup>169</sup> Existing literature suggests that in Hungary detention decisions are only issued in Hungarian.<sup>170</sup> In Ireland, irregular immigrants receive no written notification of the fact that they have the right to bring court proceedings to challenge the validity of their detention.<sup>171</sup> More generally, as regards interpretation, in Latvia, there have been several cases when detainees were provided with an interpreter to the court who did not speak the language which the person could understand.<sup>172</sup>

More proactively, in Luxemburg the police does not limit itself to notify the foreigners in writing in the language which it is reasonable to assume that he/she understands. The notifying officer also draws up a report which contains among other things a statement by the foreigner that he/she has been informed of his/her rights as well as the language in which the detainee made his/her statements. The detainee is asked to sign the report, but if he/she refuses to sign, the report states the reasons for the refusal. The report is sent to the ministry with a copy being given to the detainee.<sup>173</sup>

166 UK, Human Rights Act 1998 c.42 (09.11.1998), Sched. 1, Art. 5(2).

167 Act on Aliens at Article 105.2.

168 Human Rights Advisory Board, *Rechtsschutz für Schubhäftlinge*, pp. 15-18.

169 Finnish Aliens Act, Section 203(5).

170 J. Mink, (2007) *Detention of asylum seekers in Hungary, Legal framework and practice*, Budapest: Hungarian Helsinki Committee, p. 41. General information leaflets are, however, provided by the police in different languages.

171 Kelly, *Immigration-related detention in Ireland: A research report of the Irish Refugee Council, the Irish Penal Reform Trust and the Immigrant Council of Ireland*, Dublin: Human Rights Consultants, 2005, pp. 40-41, available online at: [http://www.immigrantcouncil.ie/images/3217\\_immigrationdetention.pdf](http://www.immigrantcouncil.ie/images/3217_immigrationdetention.pdf). See also Jesuit Refugee Service – Europe, *Becoming vulnerable in detention*, p. 238.

172 Information of the LCHR obtained from its case work in February – May 2008 and in the framework of the project on 'Legal Assistance for Asylum Seekers – Precondition for Improvement of The Quality of Asylum Procedure in Latvia' funded by the European Refugee Fund (January–December 2009) in April–May 2009.

173 Luxembourg, Immigration Law at Article 121.

164 ECtHR (Grand Chamber), *Saadi v. UK*, No. 13229/03, 29 January 2008, paragraph 84.

165 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Twenty years of combating torture, 19th annual report, paragraph 86. See the recent report to the Human Rights Council by the UN Working Group on Arbitrary Detention (Human Rights Council, 13th session UN General Assembly, A/HRC/13/30, 18 January 2010), paragraph 61.

## FRA Opinion

**Given the challenges to implement Article 5.2 ECHR in practice, it may be advisable to specify expressly in national legislation that the reason for detention as contained in the detention order and the procedure to access judicial review be translated in a language the detainee understands. The reasons should also be given to him/her in written form as well as read out with the help of an interpreter, if necessary.**

## 4.2. Judicial review

### European Convention on Human Rights

#### Article 5.4

**Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.**

The right to judicial review is a “cornerstone”<sup>174</sup> guarantee to prevent arbitrary detention. Article 9.4 of the ICCPR provides that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”. A similar provision is contained in Article 5.4 of the ECHR. The Charter on Fundamental Rights of the European Union provides at Article 47 for a right to an effective remedy before a tribunal.

The ICCPR as well as the ECHR require that the review extend to the lawfulness of detention and not be limited merely to its reasonableness or other lower standards. This has also been highlighted by the UN Working Group on Arbitrary Detention.<sup>175</sup> The court or tribunal must have the authority to order the release of the person.<sup>176</sup> Release should be immediately carried out upon the order of the court by the detaining authority without the latter having to wait for an order by the supervising authority.

Before examining judicial review practices it is useful to review whether the detention is ordered by the administration or by a court. Existing practices in EU Member States show that in over half of the states

the initial detention order, as well as subsequent extensions, have to be endorsed by a court, whenever the deprivation of liberty goes beyond short term arrest.<sup>177</sup> In these cases, the administration is under the obligation to bring the case before a judge who has to endorse the deprivation of liberty. Time limits to obtain a court endorsement are normally very short, ranging from 48-72 hours (and in one case four days);<sup>178</sup> in a few countries, however, deadlines are longer.<sup>179</sup> Another guarantee to ensure a swift processing consists in provisions that limit the possibility to postpone the court hearing.<sup>180</sup> The map in Figure 5 shows which countries require a judge to approve the deprivation of liberty going beyond short term arrest and which countries do not.

When the decision to order or extend the deprivation of liberty is taken by the immigration or police authorities, the individual has normally the right to appeal such decision to a court or tribunal.<sup>181</sup> In Malta, the law foresees that appeals are lodged with the Immigration Appeals Board.<sup>182</sup> In 2005 the Court of Criminal Appeal overturned

177 Cyprus, Aliens Act at Section 13.2; Germany, Residence Act at 62.4, Denmark, Aliens Act, Article 37.1; Estonia, OLPEA at Sections 18.1 and 23.1; Spain, Law 4/2000 at 62.1; Finland, Aliens Act, Article 124.1; France, CESEDA at Article 552.1; Hungary, TCN Act at 54.3; Italy, LD 286/98 at Article 14; Latvia, Immigration Law at 54.2; Lithuania, Aliens Act at 116.2; Dutch Aliens Act at 94.1; Poland, Act on Aliens, Article 104.1 and 104.2; Portugal, Act 23/2007, Article 146.1; Romania, Emergency Ordinance at Article 97.2.

178 In Estonia (OLPEA, Sections 18.1 and 23), Italy (LD 286/98 at Article 14.3), Poland (Act on Aliens, Article 101.3a) Portugal (Act 23/2007, Article 146.1) and Romania (Emergency Ordinance at 88.7 and 97.2) the judge has to validate the order within 48 hours. In France the judge must be seized within 48 hours (CESEDA at 552.1). In Denmark (Aliens Act, Article 37.1) and in Hungary (TCN Act at Article 54.3) and in Spain (Law 4/2000 at 60.1 and 62) the deadline is 72 hours. In Germany, Residence Act, Section 62.4 requires an immediate referral. In Lithuania (Aliens Act at 116.1), the court pronounces its decision during the oral hearing which should take place within 48 hours. In Finland, the court has four days to decide (Aliens Act, Article 124.2).

179 In Cyprus any detention beyond eight days has to be approved by the court (Aliens Act, Section 13.2). In Latvia, the district/city court has to endorse any detention that lasts for more than 10 days (Immigration Law, Article 54.1-2). In the Netherlands, after 28 days, the court reviews automatically any detention decision which has meanwhile not been appealed by the detainee (Aliens Act at 94.1).

180 See, for example, Finland, Aliens Act Article 125.3 which allows the postponement of a hearing only in case of special circumstances.

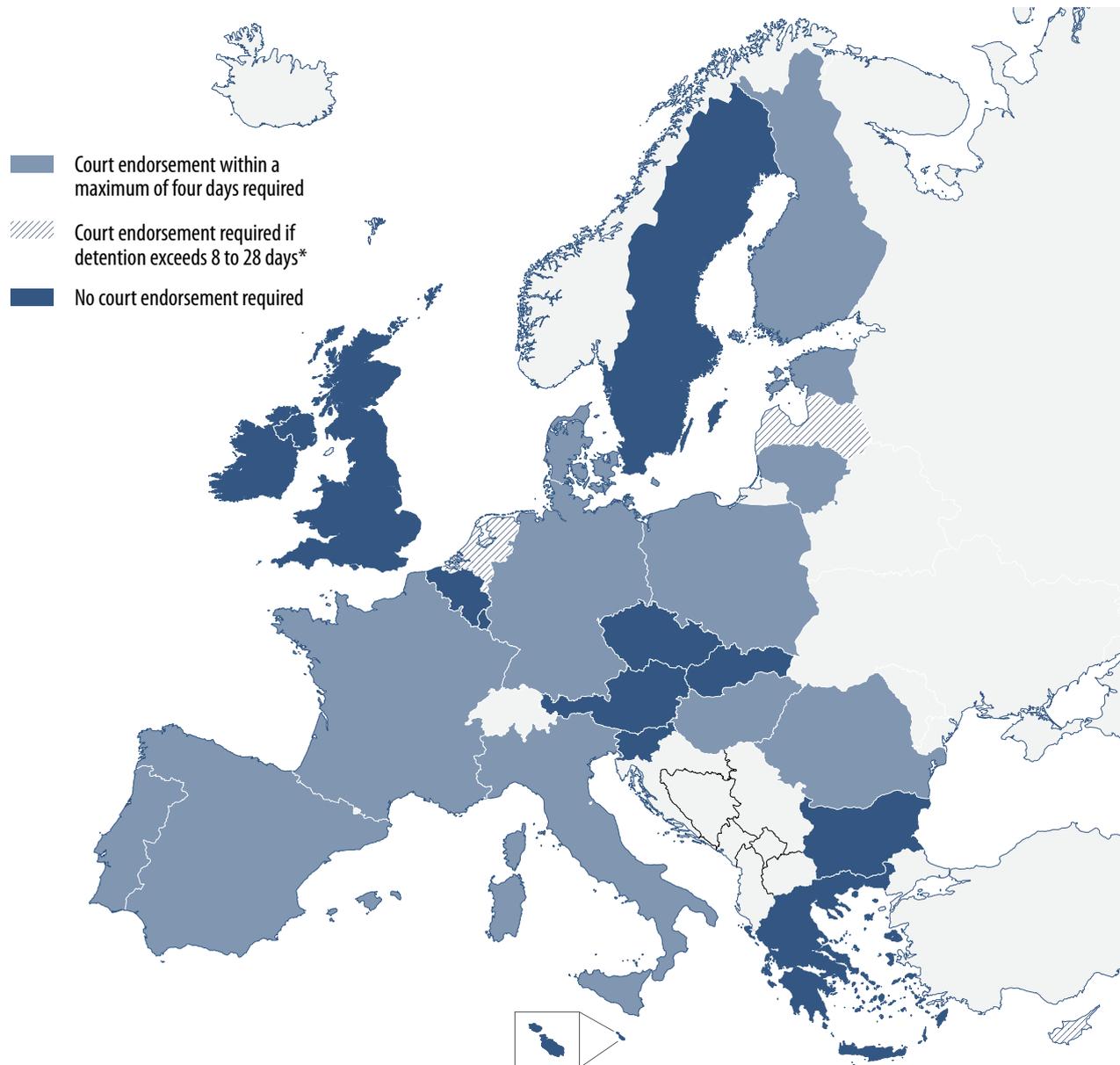
181 Austrian Aliens Police Act at Sections 76.7 and 82; Belgium, Law on Foreigners, Article 71; Bulgaria, Law on Foreigners, Article 46a.; Czech Republic, FORA, Article 124.5 (see also Section 200o et seq. of the Code of Civil Procedure); Greece, TCN Act, Article 76.3; Luxembourg, Immigration Law, Article 123; Sweden, Aliens Act, Chapter 14, Section 9; Slovenia, Aliens Act at Article 58.3; Slovakia, Aliens Act, Article 62. In Ireland and the UK a *habeas corpus* application is possible (Article 40.4 of the Irish Constitution and for the UK the Human Rights Act 1998, Sched.1, Article 5.4, but also the writ of *habeas corpus* under common law).

182 Malta, Immigration Act at 25A.5. While an information leaflet on how to challenge detention is provided to all detainees and contacts with NGOs can be established by detention staff, the UN Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, Mission to Malta 19 to 23 January 2009 (Human Rights Council, 13th session UN General Assembly, A/HRC/13/30/Add.2, 18 January 2010, paragraph 45) reported practical difficulties in accessing the Board, indicating that the “Board has no registry or office, and there are no clear, publicly available instructions explaining where to file an application or what procedures should be followed”.

174 ECtHR, *Rakevich v. Russia*, No. 58973/00, 28 October 2003, paragraph 43; see also ECtHR, *Shamsa v. Poland*, Nos. 45355/99 and 45357/99, 27 November 2003, paragraphs 58-60.

175 See also the Report of the Working Group on Arbitrary Detention (Human Rights Council, 13th session, UN General Assembly, A/HRC/13/30, 18 January 2010), paragraph 61.

176 UN Human Rights Committee, Communication No. 560/1993, A.v. *Australia* at 9.5.

**Figure 5: Court endorsement of detention order, EU27**

Note: In Cyprus, a court has to approve detention exceeding eight days; the same applies to Latvia for detention exceeding 10 days. In the Netherlands, a court has to review the detention decision after 28 days, unless the detainee has appealed the detention order.

Source: FRA, September 2010

a decision of the Court of Magistrates, which had granted *habeas corpus* review under Article 409 A of the Criminal Code, arguing that once it was established that the detention was lawful under the Immigration Act the criminal courts are not competent to test whether the detention is unlawful under any other laws.<sup>183</sup> A judicial review of the legality of the detention is in principle possible under the Fundamental Human Rights provisions in Chapter IV of the Constitution of Malta and under the

European Convention Act.<sup>184</sup> Such judicial review tends however to be rather lengthy in time normally lasting over 18 months. This may be one reason why it is rarely used in practice.<sup>185</sup>

<sup>184</sup> Constitution of Malta Act, Article 46; Chapter 319 of the Laws of Malta, European Convention Act, Article 4.

<sup>185</sup> See UNDOC A/HRC/13/30/Add.2; Human Rights Council, 13th session, Report of the Working Group on Arbitrary Detention, Mission to Malta 19 to 23 January 2009, paragraph 48: "It takes approximately two years for a final decision to be handed down, which exceeds the maximum immigration detention period in terms of Government policy, as described above. The Government referred the Working Group to other cases in which judgment was delivered by the court of first instance within four or five months and the appeal heard and decided within the following

<sup>183</sup> Report of Working Group on Arbitrary Detention, Mission to Malta, paragraph 47, available at <http://www2.ohchr.org/english/issues/detention/docs/A-HRC-13-30-Add2.pdf>.

The present report also shows that domestic law usually provides for an appeal possibility, also when the deprivation of liberty is ordered or prolonged by a judge.<sup>186</sup> There are four countries where this is limited. In Finland and Hungary detention orders endorsed by the competent court are final.<sup>187</sup> In Romania, detention decisions of persons with an expulsion order over 30 days are issued by the territorially competent court of appeal against which no appeal is possible.<sup>188</sup> In Cyprus, the only possibility of judicial review is the extraordinary recourse to the Supreme Court under Article 146 of the Cypriot Constitution.

Depending on the domestic legal system, detention decisions are usually reviewed by general (civil or criminal) courts or by administrative courts. Three countries, France, Sweden and the UK, have established specialised bodies, namely the *juge de liberté et de la détention* in France, the Migration Courts in Sweden and the First-tier Tribunal (Asylum and Immigration Chamber) in the UK. In some countries, it has been argued that the judges entrusted with the review of detention decisions are not sufficiently equipped to determine the lawfulness of detention. The Spanish Ombudsmen<sup>189</sup> and researchers in Hungary<sup>190</sup>, for example, have expressed concerns about the involvement of the criminal courts in ordering pre-removal detention. In Italy, detention decisions are taken by a justice of the peace who, being a non-professional judge, may not have the adequate legal competence and specialized knowledge of foreigner's rights.

The following paragraphs will examine four different aspects of the review process, including the requirement of a speedy review, the accessibility of review procedures, the principle of equality of arms and the scope of the review.

five months."The UN WGAD (*ibid* at paragraph 50) further reported that it "is unaware of a single case in which a legal challenge to immigration detention was successful" which may be another reason why in practice such remedy is not often used.

186 See Denmark, Administrative of Justice Act, Chapter 43a, Section 475; German Residence Act, Section 106.2 read in conjunction with Article 7 of the Federal Law on the judicial procedure in case of deprivation of liberty [Gesetz über das gerichtliche Verfahren bei Freiheitsentziehungen], dated 29. June 1956 (BGBl. I S. 599), last amended by Article 8.6 of Law 27.04.2001 (BGBl. I, S. 751); Estonia, OLPEA, at Section 13; France, CESEDA at Article L552-9; Italy, LD 1998/286 at Article 13.5bis; Lithuania, Aliens Act, Article 117; Latvia, Immigration Law at Article 56.1; Netherlands Aliens Act at Articles 94 and 95; Poland, Act on Aliens at Article 106.4; Portugal, Articles 27.1 and 31 of the Portuguese Constitution as clarified by the Portuguese Supreme Court on 19 July 2007, decision 07P2836; Spain, Law 4/2000 Article 21.

187 Finland, Aliens Act at Article 129; Hungary, TCN Act, Section 59 (10).

188 See Aliens Act Article 97.5. However, an appeal against decisions taken by the Prosecutor's Office of the Bucharest Court of Appeal is possible (Emergency Ordinance, Article 97.9).

189 See *Informe sobre asistencia jurídica a los extranjeros en España*, Defensor del Pueblo, Madrid, text in Spanish available online at: <http://www.defensordelpueblo.es/index.asp?destino=informes2.asp>.

190 J. Mink, *Detention of asylum seekers in Hungary, Legal framework and practice*, Budapest: Hungarian Helsinki Committee, 2007, p. 41.

## Speedily

In order to be considered effective, judicial review processes must fulfil certain conditions. First, the review procedure has to be swift. Article 5.4 of the ECHR requires that decisions be taken *speedily*. While the concrete circumstances of the case may impact on the length of time, such reviews are normally relatively simple. In one case, the ECtHR found a delay of thirty-one and forty-six days to review the lawfulness of detention to be excessive.<sup>191</sup>

As indicated above, short deadlines are usually given to courts when they need to approve the first detention decision. In approximately half of the EU countries, it is also possible to find a commitment in law for swift detention appeal reviews. In these cases relatively short time frames of five to 14 days from the moment the file reaches the court are given to the court to hear and decide on the case.<sup>192</sup> A few states, more generally, provide that such complaints be given priority or dealt with urgently.<sup>193</sup> General references to the need for courts to decide with no delays do not necessarily lead to short appeals procedures. For example, according to information provided by NGOs in the Czech Republic and in Slovakia, court proceedings may last longer than the six months foreseen by law as maximum time limit for detention.<sup>194</sup>

## Accessibility

Several EU Member States have established time limits for appealing the detention order.<sup>195</sup> These are in some case rather short, such as 72 hours in Hungary<sup>196</sup>, three days in Romania or Bulgaria,<sup>197</sup> seven days in Poland,<sup>198</sup>

191 ECtHR, *Sanchez-Reisse v. Switzerland*, No. 9862/82, 21 October 1986, paragraphs 59 and 60.

192 Austrian Aliens Police Act at 83.2(2) (1 week from the time the appeal is handed in; if submitted to the aliens police, the latter has two days to forward it to the court, in which case the court has effectively five days to decide); Belgium, Law on Foreigners at 72 (five days); Estonia, OLPEA at 13.3 (10 days); Lithuania, Aliens Act at 117.2 (10 days); Slovenia, Aliens Act at 58.3 (8 days). In the Netherlands the total period is 14 days (hearing not later than 7 days; decision not later than 7 days), Dutch Aliens Act at 94.2-3. In other cases, the time given to the court can be substantially longer, such as in Bulgaria, where it amounts to one month (Law on Foreigners, Article 46a).

193 See Sections 200o and Sec. 200u of Czech Civil Procedure Code; Section 129.2 of Finnish Aliens Act; Slovakia Aliens Act at Article 62 (no delay); Hungary, TCN Act at Section 57.6(a) (immediately).

194 Information provided by NGOs in the Czech Republic and Slovakia to the FRALEX national experts. According to information received from the Czech Ministry of Interior, a proposed amendment to the Aliens and Asylum Act foresees a 7 working days for the court to review the detention decision.

195 See, for example, Bulgaria, Law on Foreigners, Article 46a; Denmark (every four weeks the detention order is automatically reviewed by the court); Hungary, TCN Act at Section 57; Ireland, Section 5(2)(a), *Illegal Immigrants (Trafficking) Act 2000*; Italy (60 days), LD 286/98 at Article 14; Lithuania, Aliens Act, Article 55.7; Luxemburg, Immigration Law, Article 123.3 (one months); Poland, Act on Aliens at Article 106.4; Romania, Emergency Ordinance, Article 97.9; Slovakia, Aliens Act Article 62.

196 Hungary, TCN Act at Section 57.

197 Romania, Emergency Ordinance, Article 97.9; Bulgaria, Law on Foreigners at 46a.

198 Poland, Act on Aliens at Article 106.4.

14 days in Ireland<sup>199</sup> or 15 days in Slovakia.<sup>200</sup> Taking into account existing language barriers, possible obstacles to obtain legal assistance as well as the inherent restrictions connected with detention, it can be questioned whether these deadlines can reasonably be met. In this context, the deadline of 24 hours to request judicial review of a detention decision was considered too short by the former European Commission on Human Rights.<sup>201</sup>

Applicants must be provided with a realistic possibility of using the remedy.<sup>202</sup> The closed nature of a detention setting poses additional hurdles to file an appeal. Not only is access to information, to interpretation services<sup>203</sup> and to legal assistance more complicated, but also practical obstacles may interfere in the preparation or submission of an appeal. Not in all countries can appeals be handed in to the prison administration.<sup>204</sup> In Latvia, for instance, difficulties to obtain envelopes and stamps to submit the appeal to the Regional Court have been reported.<sup>205</sup>

Contacts and correspondence with the outside world can also be severely constrained, thus preventing detainees to obtain information as well as evidence needed to substantiate their appeal submissions.<sup>206</sup> For example, in some countries mobile phones (where persons have stored important contact numbers) are prohibited or can only be used in the presence of authorities.<sup>207</sup> More generally, the research recently undertaken by the Jesuit Refugee Service who interviewed almost 700 persons in immigration detention showed that only 2% of those interviewed, had access to the Internet and

that 80% do not receive visits from the outside world.<sup>208</sup> Thus, detainees must often rely on the information that detention staff provides to them.

In other cases, detention conditions can adversely affect health, including mental health of detainees.<sup>209</sup> Situations of anxiety, post-traumatic stress disorder or trauma may make it difficult for detainees, even if informed, to understand their rights, thus in fact preventing them to make effective use of existing review mechanisms.

### Equality of arms

The review procedure must be adversarial and must always ensure “equality of arms” between the parties, the Attorney General or other entity competent to represent the State and the detained person.<sup>210</sup> This includes normally the possibility for the detainee and/or his/her legal representative to be heard by a judge. The right to judicial review of a court decision originates from the *habeas corpus* writ, which implies that the person be brought before the court.<sup>211</sup>

Legislation in a few countries suggests that a hearing is normally required,<sup>212</sup> whereas in others it can be omitted if the situation is clear from the acts.<sup>213</sup> The research did not collect comprehensive information on whether hearings actually take place in practice, although evidence indicates that obstacles do exist. In Poland, for instance, it was noted that practical obstacles may not allow for transporting a person to the court.<sup>214</sup>

The circumstances under which a hearing is carried out can also have an impact on the quality of the review. In Hungary and Italy, for instance, the judge can travel to the detention facility to hear the person.<sup>215</sup> In France, the hearing can take place in the waiting zone at the

199 Section 5(2)(a), *Illegal Immigrants (Trafficking) Act 2000*.

200 See Article 62 *Aliens Act*.

201 See ECtHR, *Farmakopoulos v. Belgium*, No 11683/85, report by the European Commission on Human Rights to the Court, paragraphs 53-54. The case was subsequently struck from the list and the Court did not pronounce itself, there are obstacles to access the case.

202 See ECtHR, *Conka v. Belgium*, No. 51564/99, 5 February 2002, paragraphs 46 and 55.

203 Lack of access to translators was raised by detainees interviewed by the Jesuit Refugee Service, see Jesuit Refugee Service – Europe, *Becoming vulnerable in detention*, 2010, p. 5.

204 This is, for instance, the case in Austria, where the administration has to forward the appeal within two days to the court (*Austrian Aliens Police Act*, at 83.2 and 83).

205 Information obtained from the Latvian Centre for Human Rights.

206 The research by the Jesuit Refugee Service indicates that the environment of detention is a serious obstacle for the obtainment of good information: Detainees must rely on what detention centre staff provides to them; otherwise, they have limited means to independently access information. Only two percent of those interviewed, had access to the Internet (p.72). 80% said they don't receive visits from the 'outside world' (p.73).

207 Regulations were introduced in Latvia in 2008, following which mobile phones can only be used in the presence of officials, see Latvia, *Izmitināšanas centra iekšējās kārtības noteikumi* No. 742 of 15 September 2008, 5.pielikums. available online at [http://www.likumi.lv/doc.php?id=181286&version\\_date=01.07.2009](http://www.likumi.lv/doc.php?id=181286&version_date=01.07.2009). Mobile phones are also not allowed in the Czech Republic (FORA, Section 136/3) and Slovenia, Poročilo Evropskega odbora za preprečevanje mučenja in nečloveškega ali ponižujočega ravnanja ali kaznovanja Vladi Republike Slovenije o obisku v Republiki Sloveniji med 31. januarjem in 8. februarjem 2006, at paragraph 42, available at: [http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/slike/novice/2008\\_02\\_15\\_cpt\\_porocilo.pdf](http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/slike/novice/2008_02_15_cpt_porocilo.pdf).

208 Jesuit Refugee Service – Europe, *Becoming vulnerable in detention*, 2010, pp. 72-73.

209 See, for example, UN DOC A/HRC/13/30/Add.2; Human Rights Council, 13th session, Report of the Working Group on Arbitrary Detention, Mission to Malta 19 to 23 January 2009 at paragraph 53.

210 ECtHR (Grand Chamber) *Nikolova v. Bulgaria*, No. 31195/96, 25 March 1999, paragraph 58.

211 In ECtHR, *Sanchez-Reisse v. Switzerland*, No. 9862/82, 21 October 1986 (paragraph 51); however, the ECtHR indicated that the requirements of an adversarial procedure could also be met by giving the opportunity to the detainee to submit written comments on the authorities' opinions.

212 This is for instance the case in Belgium, Law on Foreigners at 72; Denmark, Aliens Act at 37.2 and 3 (court review is usually automatic and not dependent on the submission of an appeal); Finland Aliens Act at 125.2 (as regards the first court review).

213 This is, for example, the case in Austria, where Aliens Police Act at 83.2(1) requires a hearing unless the situation is clear from the acts; in Hungary TCN Act, Section 59.7-8. For the practice prior to 2007, see J. Mink, *Detention of asylum seekers in Hungary, Legal framework and practice*, Budapest: Hungarian Helsinki Committee, 2007, p. 41.

214 Information provided by Centrum Pomocy Prawnej im. H. Nieć [H. Nieć Centre for Legal Aid]. The centre implements a support programme in detention facilities in cooperation with UNHCR.

215 See Hungary, TCN Act at 59.6 and Italy, LD 1998/286 Article 13.5-ter.

airport.<sup>216</sup> Establishing a neutral setting for the hearing in the detention facility may be challenging, considering that the judge will normally depend on the police to arrange access and that the foreigner may be intimidated, particularly when the same or similar rooms to those used for police interrogation are used.

## Review lawfulness of detention

The judicial review can have a narrow or a broader scope, depending on the country. At a minimum, the judge must have the possibility to review the lawfulness of detention and the power to order the release. In Greece, before the 2009 amendments the European Court of Human Rights expressed concern that the courts did not review the lawfulness of detention.<sup>217</sup> In Malta, the Working Group on Arbitrary Detention indicated that the Immigration Appeals Board applies a test of reasonableness of detention only, rather than examining the lawfulness of the deprivation of liberty.<sup>218</sup>

When analysing the situation more in detail, a number of factors influence the exact scope of the judicial review. These range from general considerations flowing from the domestic legal culture or constitutional principles to specific features of the immigration legislation, such as the way detention grounds are formulated or whether necessity or proportionality requirements are included in the law. Thus, in some countries the courts substantially interfere in the margin of discretion that is given to the administration to determine when to resort to detention by reviewing if the deprivation of liberty was indeed necessary and proportional.<sup>219</sup> In other cases, the review will focus on the formal requirements, such as whether the deprivation of liberty was ordered based on grounds foreseen in the law and whether procedural rights were respected, but not examine, for instance, whether the administration has correctly balanced all factors when determining that there is a risk of absconding.<sup>220</sup>

In different countries, the effectiveness of the judicial review has been questioned, indicating that it is merely formal and that decisions are rendered automatically.<sup>221</sup> A comprehensive examination of appeals statistics would be required to substantiate this. The two countries for which figures are available to the FRA indicate that the number of detention orders which are not confirmed or which are overturned by the court are quite limited. In Finland, in 2008, the district courts upheld an administrative decision to detain in 791 cases, and in only seven cases was the matter either rejected or quashed.<sup>222</sup> In Poland, the District Court in Warsaw (first instance) upheld the deprivation of liberty requested by the administration in 202 out of 208 cases decided between 1 January and 26 June 2009, whereas out of the 15 cases reviewed by the Regional Court in Warsaw (second instance) between 1 January and 23 June 2009, detention was continued in all cases but one, due to the pregnancy of the irregular immigrant.<sup>223</sup>

## FRA Opinion

**The right to judicial review of the detention order must be effectively available in all cases. This can best be achieved by requiring a judge to endorse each detention order, as many EU Member States already do. Moreover, measures to alleviate practical barriers restricting access to judicial review procedure should be put in place, including as regards information, language assistance, and the simplification of procedural requirements. Courts or tribunals reviewing the detention order must have the power and be adequately equipped to examine the lawfulness of detention. Reasonable deadlines should also be introduced to avoid protracted review proceedings without undermining their fairness.**

216 CESEDA, at Article 222.4.

217 ECtHR, *S.D. v. Greece*, No. 53541/07, 11 June 2009, paragraph 76. This has been corrected with the introduction of the provision in the new Article 76.3 of the Law on Entry, Residence and Social Integration of Third-Country Nationals on Greek Territory.

218 See UN DOC A/HRC/13/30/Add.2; Human Rights Council, 13th session, Report of the Working Group on Arbitrary Detention, Mission to Malta 19 to 23 January 2009 at paragraph 43. See also European Commission against Racism and Intolerance (ECRI), Third report on Malta, 14 Dec. 2007 at paragraph 40.

219 Austria, Aliens Police Act, Sections 80.6 and 83.4; Ireland, Section 5(4) Immigration Act 2003. In the UK, the judge examines whether the detention is lawful as well as whether the deprivation of liberty is reasonable.

220 See, for example, Belgium, Law on Foreigners, Article 72(2). In the Netherlands, Administrative Jurisdiction Division of the Council of State [Afdeling Bestuursrechtspraak van de Raad van State], decisions 200603830/1 of 23 June 2006, decisions 200909865/1/V3, 5 February 2010 at paragraph 2.1.2 and 200908127/1/V3, 07 January 2010, at paragraph 2.3, in which the Council of State recognises the margin of appreciation of the administration, but limits the review of the courts to whether grounds for detention exist, but does not allow them to replace the weighing by the

authorities with its own weighing.

221 For Finland, such information was provided by phone on 14 May 2009 by the Office for the Ombudsman for Minorities to the FRALEX national expert; however, it can also be found in a document by Amnesty International Finland on the detention of immigrants (8 April 2009) available at <http://www.amnesty.fi/uutishuone/tiedotearkisto/2009/ulkomaalaisten-sailoonoton-kynnysta-nostettava>, [Amnesty Internationalin Suomen osaston kannanotto: Ulkomaalaisten säilöönoton kynnystä nostettava ja käytäntöjä valvottava]. See for Denmark, *Grundloven og menneskerettigheder i et dansk og europæisk perspektiv*, Morten Kjærum mfl., p. 265. For Ireland, see Kelly, *Immigration-related detention in Ireland: A research report of the Irish Refugee Council, the Irish Penal Reform Trust and the Immigrant Council of Ireland*, Dublin: Human Rights Consultants, 2005, paragraph 28. Available online at: [http://www.immigrantcouncil.ie/images/3217\\_immigrationdetention.pdf](http://www.immigrantcouncil.ie/images/3217_immigrationdetention.pdf).

222 Statistics provided by the Finnish Ministry of Justice on 26 May 2009.

223 Unofficial data collected by the researchers from the District and the Regional Courts in Warsaw on 23 June 2009. Article 121 of the Polish Act of Aliens states that women up to seven months of pregnancy can be held for the purpose of removal; after this time, pregnant women are transferred to the guarded centre.

### 4.3. Legal assistance

#### Return Directive

##### Article 13.4

**Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.**

Judicial review proceedings are generally quite complex and require a certain familiarity with domestic aliens' law to be accessed in an effective manner. The European Commission on Human Rights concluded in a case of pre-removal detention (that was subsequently struck from the list) that "it would be unreasonable to expect the applicant to present his own case in the light of the complexity of the procedures involved and his limited command of English".<sup>224</sup> The importance of legal assistance is also stressed in Guideline 9 of the Council of Europe Twenty Guidelines on Forced Return, which indicates that "legal aid should be provided for in accordance with national legislation".

The provisions on legal assistance and representation were subject to considerable debate during the negotiations of the Return Directive. This is illustrated by the fact that States are granted one additional year to transpose the legal assistance guarantees included in Article 13.4.<sup>225</sup> As highlighted in the box above, the Return Directive requires the provision of free legal assistance under the same conditions as foreseen in the Asylum Procedure Directive. In essence, this means that free legal assistance can be subject to a means test,<sup>226</sup> be limited to specifically designated legal advisors<sup>227</sup> or for cases where the review is likely to succeed.<sup>228</sup> Domestic law may further regulate the modalities of free legal assistance and impose monetary or time limits.<sup>229</sup>

While some of these restrictions (such as for instance the means test) may not be particularly relevant in practice, others could substantially restrict access to free legal assistance. This is in particular the case for the possibility to limit legal assistance only to cases which are likely to succeed. Given the large discretion that the provision at Article 15.3(c) of the Asylum Procedure Directive gives to the authorities, the proposal for a recast Asylum Procedure Directive<sup>230</sup> suggests to delete the possibility to deny legal assistance in the absence of likelihood of success. It remains to be seen, if the reference to "Article 15(3) to (6) of Directive 2005/85/EC" contained in the Return Directive will be interpreted in a static manner or whether the developments in the field of asylum law will be taken into consideration in interpreting the Return Directive.

At national level, rules and practices governing free legal assistance to detained irregular migrants are quite diverse. Separate research would be required to map existing practices in detail. Moreover, to assess their effectiveness, it would be necessary to examine how often detainees make use of the right to judicial review. Figures on the frequency in which the right to judicial review was exercised are only available to the Agency for one country, Austria, covering 2007. There 630 complaints were filed out of a total number of 6,960 detention orders.<sup>231</sup>

At least in principle, all countries allow for some forms of access to free legal assistance to a person in pre-removal detention who wishes to challenge their decision. However, such access is subject to different conditions which vary from one country to another or may be restricted by practical obstacles. The following examples intend to illustrate existing diversity.

Legal aid can be provided through the appointment of a lawyer *ex officio*, such as for example in Denmark.<sup>232</sup> In other countries, free legal assistance may be subject to certain conditions, such as for example, a means test.<sup>233</sup> Elsewhere, practical difficulties hinder effective access to a lawyer: In Ireland, an irregular migrant can contact a lawyer, but is not expressly informed about it in writing.<sup>234</sup>

224 European Commission of Human Rights, *Mohammed Zamir v. the United Kingdom*, No. 9174/80, Report of the Commission adopted 11 October 1983, paragraph 113. See also ECtHR, *Chahal v. the UK*, No. 22414/93, 15 November 1996, paragraph 130 and ECtHR, *Conka v. Belgium*, No. 51564/99, 5 February 2002, paragraphs 44-45 where the Court gave considerable importance to the lack of legal representation when determining whether an existing remedy was to be considered as effective.

225 See Article 20.1 of the Return Directive.

226 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (Asylum Procedures Directive), at Article 15.3(b).

227 Article 15.3(c) Asylum Procedures Directive.

228 Article 15.3(d) Asylum Procedures Directive.

229 Article 15.4-5 Asylum Procedures Directive.

230 See European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast)*, COM(2009) 554 final, Brussels, 21 October 2009, proposed amendments to Article 15 (new Article 18).

231 Austria/Menschenrechtsbeirat (2008) *Rechtsschutz für Schubhäftlinge*, p. 17.

232 Denmark, Art. 37.2 Aliens Act, see also Finland, Legal Aid Act 257/2002, Section 2(2).

233 See for example Finland, Legal Aid Act 257/2002, Section 3; Spain, Article 22(2) of Law 4/2000.

234 See Kelly, *Immigration-related detention in Ireland: A research report of the Irish Refugee Council, the Irish Penal Reform Trust and the Immigrant Council of Ireland*, (Dublin: Human Rights Consultants, 2005) at p. 23 (paragraph 36), available at: [http://www.immigrantcouncil.ie/images/3217\\_immigrationdetention.pdf](http://www.immigrantcouncil.ie/images/3217_immigrationdetention.pdf).

The Spanish Ombudsman identified inadequate communication between interned immigrants and their legal advisers as one of the main obstacles to an effective judicial review of internment measures,<sup>235</sup> whereas an NGO raised that legal representative appointed *ex officio* very often do not make contact with the interned immigrant for several days.<sup>236</sup> In Romania, the Jesuit Refugee Service expressed concern about the lack of funds for NGOs providing legal assistance to detained immigrants.<sup>237</sup> In Estonia, applications for free legal assistance have to be submitted in the Estonian language.<sup>238</sup> NGOs contracted in Austria to provide return counselling in all pre-removal detention facilities, do not offer legal assistance or referrals to lawyers.<sup>239</sup> In other cases, finding names of lawyers to contact may be difficult, as usually no access to the internet is available.<sup>240</sup>

Rules governing visits, communication and correspondence with lawyers can also considerably impact on the effectiveness of judicial review. While restrictions to receive visitors do normally not apply (or not apply to the same degree) to lawyers or consular staff,<sup>241</sup> and correspondence with lawyers should in theory not be supervised or screened,<sup>242</sup> detainees may often lack the means or knowledge to contact a lawyer. Only in a few countries do the authorities bear the costs of calls or correspondence

with a lawyer.<sup>243</sup> In some facilities detainees are not allowed to keep their mobile phones,<sup>244</sup> thus limiting the possibilities to be contacted by or to contact a lawyer.

Effective access to legal assistance is a key safeguard of the right to a judicial review of pre-removal detention. More comprehensive research would be needed to identify the different types of obstacles existing in law and in practice as well as to document best practices on how these have been addressed by States. In the absence of a comparative overview, advantage should be taken of the experiences collected at national level.

### FRA Opinion

**In light of the variety of obstacles that irregular migrants need to overcome to access legal assistance, EU Member States are encouraged when reviewing their aliens or immigration laws to enter into a dialogue with civil society organisations as well as bar associations in order to find pragmatic legislative and practical solutions to the obstacles encountered which are non-discriminatory and remain in compliance with international obligations.**

**Furthermore, detailed comparative research on whether legal assistance is accessible in practice should be undertaken covering all European Union countries.**

235 See *Informe sobre asistencia jurídica a los extranjeros en España*, Defensor del Pueblo, Madrid, text in Spanish available at: <http://www.defensordelpueblo.es/index.asp?destino=informes2.asp>.

236 APDHA (2009): Observaciones iniciales de la Asociación Pro-Derechos Humanos de Andalucía al quinto informe periódico del estado español presentado al Comité de derechos humanos en lo relativo a la inmigración, in Spanish, available at: <http://www.apdha.org/media/inmigraAPDHAONU.pdf>.

237 Jesuit Refugee Service, Detention News 2007-2008: Romania, available at: <http://detention-in-europe.org/images/stories/docs/dvproject/news/detention%20jrs%20romania%20may%202008.pdf>.

238 State Legal Aid Act, Section 12(5) which allows only persons who have a residence or citizenship of another EU Member State to use English language, Riigikantslei (15.07.2004) Riigi Teataja I, 56, 403.

239 See Section 1a (8) *Anhalteordnung* (AnhO) [Order of the Federal Minister of the Interior concerning the Detention of Persons by the Security Authorities and by Agents of the Public Security Service], Austria/BGBl II 128/1999, last amended by BGBl II 439/2005 (22.12.2005). Unofficial English translation by UNHCR available at: [http://www.unhcr.at/fileadmin/unhcr\\_data/pdfs\\_at/information\\_in\\_english/Detention\\_Regulation.pdf](http://www.unhcr.at/fileadmin/unhcr_data/pdfs_at/information_in_english/Detention_Regulation.pdf).

240 See Jesuit Refugee Service – Europe, *Becoming vulnerable in detention*, 2010, pp. 73 and 75.

241 See, for example, Austria, Detention Regulations [*Anhalteordnung*] at 21.3; Spain, Law 4/2000 Article 62bis; Netherlands, Penitentiary Principles Act (*Penitentiaire beginselenwet*), 18 juni 1998 at 38.7 which stress that visits by lawyers should take place in a confidential setting. According to information received by the FRA, in Luxembourg lawyers and diplomatic representatives can see the detainee once a day.

242 See, for example, Austria, Detention Regulations, at 20; Dutch Penitentiare Beginselenwet at 37.1 (i) and 39.4 (which only allows checks to establish the identity of the lawyer); Swedish Aliens Law, Chapter 11, Section 10.

243 As an illustration, in Belgium, the detainee has the right to contact his/her lawyer every day free of charge from 8.00 – 22.00, see Article 63 of Royal Decree of 2 August 2002 (published on 12 September 2002). In Luxembourg they can call their lawyer free of charge once per day. In Austria, where correspondence is for the purpose of contacting relatives, legal representatives, representatives of the pre-removal detainee care service, authorities or diplomatic or consular representatives, costs of postage shall in such cases be borne by the authority, Detention Regulation at Section 20.2.

244 See Footnote 210.

## 4.4. Access to asylum procedures from detention

### **Council Regulation (EC) No. 343/2003 – Dublin II**

#### **Article 3.1**

**Member States shall examine the application of any third-country national who applies at the border or in their territory [...] for asylum.**

All EU Member States are State Parties to the 1951 Convention relating to the Status of Refugees. As such, they are bound to guarantee to refugees the rights enshrined in the Convention. To do this, fair and efficient procedures must be put in place to determine who qualifies as a refugee. There has to be unimpeded access to such procedures.<sup>245</sup>

Article 18 of the EU Charter of Fundamental Rights enshrines a right to asylum. In addition, Article 19 of the Charter contains a prohibition of return to torture, degrading and inhuman treatment or punishment, which reaffirms the obligations of Article 3 ECHR. The Asylum Procedures Directive<sup>246</sup> sets forth minimum standards for the processing of applications for international protection and the Dublin II Regulation establishes a mechanism to ensure that each application for international protection is reviewed, regardless of where these are submitted.<sup>247</sup>

In principle, no EU country prohibits request for international protection by persons in detention. However, in practice a number of obstacles may render this difficult. This section will touch upon some of these, without, however, commenting on the fairness or efficiency of domestic asylum procedures as such.

One obstacle relates to information and legal counselling, which is generally more difficult to access for a person in detention as compared to persons hosted in open facilities. In consideration of such difficulties, the Asylum Procedures Directive explicitly foresees a duty by states to allow access by legal counsellors to detained asylum

seekers.<sup>248</sup> This is in practice not always the case. For example, in Austria, the Human Rights Advisory Board concluded that due to limited access to legal counselling and legal information, legal advice and representation depends heavily on the self-initiative of the person detained and adequate financial means.<sup>249</sup> In Hungary, if asylum seekers wish to contact a lawyer in the guarded shelter for foreigners in Nyírbátor, they need to write an official request to the commander in advance and then wait for the lawyer's visit.<sup>250</sup> In Latvia, information leaflets on asylum are not freely available, but distributed only on an *ad hoc* basis or upon request.<sup>251</sup>

A second obstacle derives from restrictions in the communication with the outside world, including access to telephones and restrictions to receive visits. In Cyprus, for example, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) found that some detainees were forbidden any contacts with the outside world<sup>252</sup> in order to prevent the submission of an asylum application.

Finally, a third set of obstacles is of a procedural nature. Domestic legislation may require persons who entered in an irregular manner to submit an application for asylum immediately or within a short time frame,<sup>253</sup> something which is difficult to achieve in the absence of legal counselling, as is often the case in detention facilities. Moreover, applications submitted by persons in detention may be considered as abusive and processed in an

248 At Article 16.2. The Commission has tabled amendments to the Directive suggesting to strengthen information and counselling in detention facilities, see Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast), COM(2009) 554 final, 21 October 2009, proposed Article 7.

249 Austria, Menschenrechtsbeirat, Rechtsschutz für Schubhäftlinge, 2008, pp. 12f.

250 Information regarding the need for written requests was provided to the researchers by the Hungarian Helsinki Committee as regards the facility in Nyírbátor. See also UNHCR, *Being a Refugee How Refugees and Asylum Seekers Experience Life in Central Europe*, July 2009, p. 22.

251 Information provided by the Latvian State Border Guards. See also: I. Pūce (2005) Report on the Situation of Fundamental Rights in Latvia, EU Network of Experts on Fundamental Rights, available online at: <http://cridho.cpd.ucl.ac.be/documents/Download.Rep/Reports2005/NationalReport/CFRLatvia2005.pdf>, p. 26.

252 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, visit 8-17 December 2004, paragraph 37.

253 See, for example, Estonia, OLPEA Section 20 16 or Slovakia (Aliens Act, Article 12(2)), where applications can be rejected as ill-founded if they are not submitted immediately after crossing the border. In Slovenia, the Supreme Court held that applying for an international protection only 5 days after an alien's placement in detention amounts to abuse of the asylum procedure (decision VS18555, 11. 4. 2007, available at: <http://ius.info/Baze/sovs/ji000572.htm>). In Belgium, applications for international protection have to be launched within 8 days from the irregular entry into the territory, (Law on Foreigners, Article 50). In the Czech Republic, the law stipulates a term of seven days for applying for international protection from detention, which is counted from providing the information of the possibility to seek protection by police (Section 3b/1 Asylum Act).

245 This obligation has been consistently reaffirmed by the Executive Committee of the UNHCR Programme. See Conclusions on International Protection No. 71 (XLIV) – 1993 at (i), No. 74 (XLV) – 1994 at (i), No. 82 (XLVIII) – 1997 at (d) (ii), No. 85 (XLIX) – 1998 at (p), No. 87 (L) – 1999 at (j) and No. 100 (LV) – 2004.

246 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. Article 3 specifies that the minimum standards set forth in the Directive shall apply to all applications for asylum made in the territory, including at the border or in the transit zones of the Member States.

247 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 at Article 3.1.

accelerated manner with less procedural safeguards.<sup>254</sup> In France and Italy a special procedure for applications from detention has been set up which is different from the regular procedure and offers less guarantees.<sup>255</sup>

Requests for international protection submitted from detention facilities do normally not entitle the applicant to be released, although there are exceptions, such as, for example, in Romania, where a first application for asylum ceases the detention, except if deprivation of liberty is deemed necessary for public order and national security. Subsequent applications lead to release after a positive admissibility decision.<sup>256</sup>

## **FRA Opinion**

**Information on asylum should be readily available in detention facilities. EU Member States should allow NGOs and those who provide legal advice access to detention facilities and the possibility to provide counselling. Where immediate release upon submission of a request for international protection is not envisaged, the applicant should be released as soon as the claim is neither considered inadmissible nor abusive or manifestly unfounded.**

---

254 See, for example, Czech Republic, Section 16/2 Asylum Act; Greece, Presidential Decree 90/2008, Article 17.3.

255 Article L.741-4 of the French CESEDA, aliens are entitled to apply only within 5 days from their detention and written notification of their rights. Applications have to be submitted in French and the applicant is not entitled to the service of a translator free of charge. In Italy applications from detention are considered on a priority basis and stricter deadlines apply: 7 days for the interview 2 days for decision, as compared to 30 days and 3 days in the normal procedure (see Articles 27 and 28 Legislative Decree n. 25 of 28/01/2008 as modified by Legislative Decree n. 159 3/10/2008).

256 Emergency Ordinance, Article 97(7).

## 5. Alternatives to detention

Alternatives to detention have to be distinguished from unconditional release. They include a wide array of measures, most of which imply restrictions on freedom of movement. Although many countries provide for the possibility of imposing alternatives to detention, this is often done only exceptionally and primarily for particularly vulnerable groups.

Compared to deprivation of liberty, alternatives are less intrusive. Nevertheless, alternatives to detention imply restrictions of fundamental rights, including freedom of movement and in some cases the right to privacy. Any restrictions to these rights must be in conformity with human rights law.

With the exception of the study published by UNHCR in April 2006 which focuses on asylum seekers, limited comparative materials on alternatives to detention exist.<sup>257</sup> There is little exchange of experience between state authorities on alternatives and examples of practices generally considered as successful by governments and civil society are limited.

This section first examines the types of alternatives to detention that are foreseen in various European countries, whereas the next section will review considerations of proportionality relating to the duty to examine the viability of alternatives before resorting to detention. Children-specific information is covered in Chapter 6.

### 5.1. Alternatives found in national legislation

#### **Council of Europe, Twenty Guidelines on Forced Return**

##### **Guideline 6.1**

**A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if [...] the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems.**

<sup>257</sup> O. Field and A. Edwards, *Alternatives to Detention of Asylum-Seekers and Refugees*, UNHCR, POLAS/2006/03, April 2006; other materials include the Jesuit Refugee Service: Alternatives to Detention (working paper), October 2008 available at: [http://www.detention-in-europe.org/images/stories/jrs%20europe%20paper\\_alternatives%20to%20detention.pdf](http://www.detention-in-europe.org/images/stories/jrs%20europe%20paper_alternatives%20to%20detention.pdf); see also the EC-funded *Survey on Alternatives to Detention* by the Regional Coalition 2006, edited by N. Chmelickova.

About two thirds of the European Union countries provide for the possibility to impose alternatives to detention, either before resorting to detention or when reviewing if the time of detention should be prolonged (see Figure 6).

Different types of alternatives have been developed which may also be applied in combination. They can be grouped in the following clusters.

#### **Obligation to surrender passport or travel documents**

This possibility is foreseen in the national legislation of a few countries.<sup>258</sup> It may be imposed alone or together with other alternatives, such as for instance the duty to stay in a particular location or area. It is a soft measure which essentially serves to ensure that valid identity and travel documents are not lost or destroyed during the time required to prepare the return and removal process or that the person concerned travels.

#### **Residence restrictions<sup>259</sup>**

This includes the duty to stay at a particular address or the obligation to reside in a specific geographical area of the country, often combined with regular reporting requirements. Designated places can be open or semi-open facilities run by the government or NGOs, hotels or hostels as well as private addresses provided by the person concerned. The regime imposed can vary, but usually persons have to stay at the designated location at certain times and absences may normally only be allowed if good reason is given.

#### **Release on bail and provision of sureties by third parties**

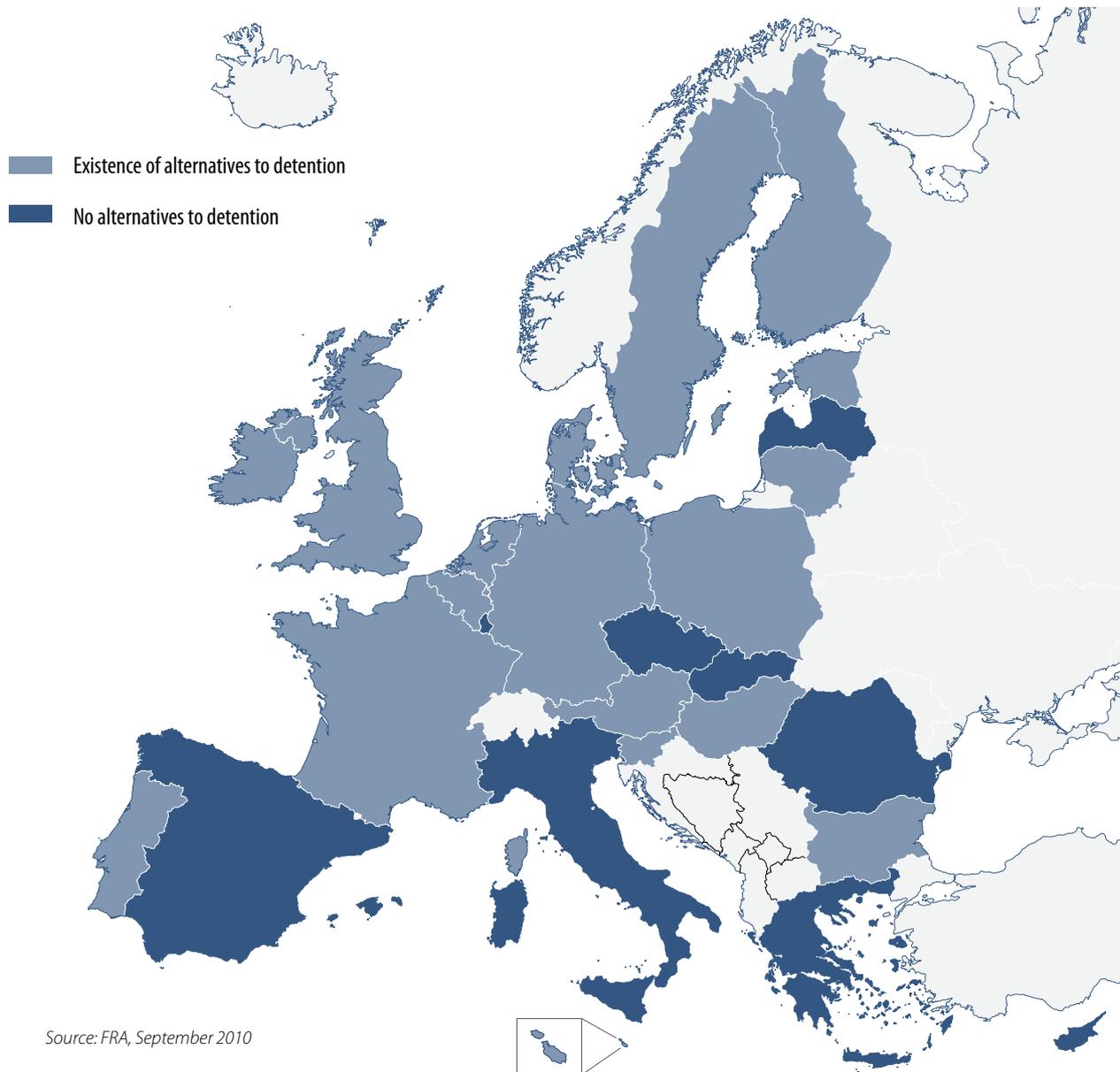
In the context of criminal law it is not uncommon to allow for the release of a detained person upon pledges of money which will be forfeited if the person does not report to the authorities. In pre-removal proceedings, release based on financial guarantees is not frequently used,<sup>260</sup> in part also because it is assumed that many foreigners in removal proceedings would not have the necessary means. It is therefore not surprising that in

<sup>258</sup> See Denmark, Aliens Act at Section 34.1; Finland, Aliens Act at 119.1; France, CESEDA at Article 552-4; Ireland, 2003 Immigration Act at 5.4(c).

<sup>259</sup> See Austria, Section 77.3 Aliens Police Act; Germany, Section 61.1 Residence Act; Denmark, Section 34.1 Aliens Act; Estonia, Section 10.1-2 of the OLPEA; France, Article L 552-4 and L 552-5 CESEDA; Hungary, Section 62 TCN Act; Ireland, Section 14 (1) a)-b) Immigration Act 2004 and Section 5(4) Immigration Act 2003; Netherlands, Article 57 Aliens Act; Poland, Article 90.1(3) Act on Aliens; Portugal, Act 23/2007 Article 142.1; Slovenia Article 56 Aliens Act; UK, 1971 Immigration Act, Schedule 3, paragraph 2(5).

<sup>260</sup> France, CESEDA at Article 552-4 (combined with the need to stay at a designated place); UK, Operational Enforcement Manual 2008, at 55.20.

**Figure 6: Existence of alternatives to detention in national law, EU27**



the UK (Scotland), where normally a bail bond between £2000-£5000 would be required, the authorities are allowed to accept a symbolic amount, for instance of £5.<sup>261</sup> The authorities may also request sureties from people who are willing to stand in for the applicant. The UK is one of the few countries where this is foreseen, but sureties can only be requested “if that will have the consequence that a person who might not otherwise be granted his liberty will be granted it.”<sup>262</sup>

### Regular reporting requirements to the authorities

The obligation to report at regular intervals to the police or immigration authorities is one of the more recurrent forms of alternatives found in national legislation.<sup>263</sup> Reporting duties may be imposed as an additional requirement to the duty to reside in a specified area or location.

<sup>263</sup> See, for example, Austria, Aliens Police Act, Section 77.3; Bulgaria, Law on Foreigners at 44.5; Germany, Residence Act at Section 61.1; Denmark, Aliens Act at Article 34.1; Finland, Aliens Act at Article 118; France, CESEDA at Art. 552-4; Ireland, 2003 Immigration Act at 5.4.(b) and 2004 Immigration Act at 14.1(b); Lithuania Aliens Act at 115.1; Malta, Immigration Act at 25A.13; Poland Act on Aliens at 90.1 at 3; Portugal 23/2007 Act at 142; Slovenia, Aliens Act at 59.2 and 59.3 where duty to reside at a particular location can be combined with reporting requirements.

<sup>261</sup> See UK, Operational Enforcement Manual 2008 at 57.6.  
<sup>262</sup> UK, Operational Enforcement Manual 2008 at 57.6. These should not be routinely required, as the persons concerned may not have relatives or friends in the country.

## Release to case worker support

Based on the experience in reception centres for asylum seekers, in the late '90s Sweden introduced caseworkers with the task of informing detainees of their rights and ensuring these were upheld and their well-being catered for. Based on an individual assessment, the case worker recommends placement options to the authorities and advises them on the need to detain and when to apply alternatives. The approach consists in involving the individual throughout the process and preparing him/her for all possible immigration outcomes. If refused asylum or the right to stay, the person is supported to make his/her own departure arrangements with dignity.

In late 2008, the Belgian authorities introduced an innovative form of alternative, whereby families with children were no longer placed in detention facilities, but in open housing and provided with a coach. The role of the coach is to prepare the family for the return. This pilot project draws from the successful experience in Australia, where immigrants were released in community care (see Textbox 2). Absconding rates have remained relatively low at about 20%.<sup>264</sup> The difference with other forms of alternatives consists in the integrated approach which includes individualised counselling. Differently, from the Swedish and Australian experiences, the Belgian pilot focuses primarily on promoting return rather than exploring all possible immigration outcomes, although recently the role of the coacher has been expanded.<sup>265</sup>

## Electronic monitoring

Electronic monitoring or tagging is primarily applied in the context of criminal law. Its use as a surrogate for immigration detention is limited. Electronic monitoring is probably the most intrusive among the various forms of alternatives to detention, as it substantially interferes with a person's right to privacy, restricts freedom of movement and can deprive people of dignity. It can also lead to discrimination, as persons wearing an electronic device can be associated with criminals.<sup>266</sup> Electronic monitoring as an alternative to immigration detention has been primarily used in North America. In the US, ankle bracelets fitted with a global positioning device were frequently used in the past. For the first 30 days after release

immigrants had to wear the bracelets and were subject to intensive supervision, including frequent face-to-face meetings, telephone calls, unannounced home visits and curfews. A recent revision of the system has reduced the use of electronic monitoring.<sup>267</sup>

In the European Union, there is limited use of electronic monitoring for immigration purposes. Only three EU Member States provide for the use of electronic devices as an alternative for pre-removal detention, Denmark, Portugal and the UK. In Denmark, the authorities are obliged to resort to electronic tagging in cases of repeated disrespect of the duty to reside at a particular place.<sup>268</sup> Given the interference with the right to privacy, the use of electronic monitoring must be accompanied by the necessary safeguards. In Denmark, the tagging can only last for one month and the foreigner can request a judicial review of this measure.

Table 1 provides an overview of the type of alternatives existing in European Member States. In the countries that are not listed in Table 1, the FRA did not find any evidence in legislation or policy about the possibility to make use of alternatives; this, however, does not exclude alternatives may be applied on a pilot basis or in exceptional circumstances.

Statistics on the use of alternatives could only be collected from a limited number of countries. In France, according to a survey carried out in May 2007, alternatives to detention were used in 7.2% of the cases.<sup>269</sup> In Austria, alternatives are used more frequently, particularly for families and children.<sup>270</sup> In 2008, alternatives were used for approximately 25% of those potentially subject to

<sup>264</sup> See a short version of the report at <http://www.vluchtelingenwerk.be/bestanden/2009-12-02-AN-ALTERNATIVE-TO-DETENTION-OF-FAMILIES-WITH-CHILDREN.pdf> (in English) and the full report at: <http://www.vluchtelingenwerk.be/bestanden/publicaties/2009-12-02-Nota-evaluatie-terugkeerwoningen.pdf> (in Dutch).

<sup>265</sup> See Royal Decree 22 Avril 2010 - Arrêté royal modifiant l'arrêté royal du 14 mai 2009 fixant le régime et les règles de fonctionnement applicables aux lieux d'hébergement au sens de l'Article 74/8, § 2, de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

<sup>266</sup> See the statement by an asylum seekers interviewed by UNHCR in the US, US initiative offers asylum-seekers an alternative to detention, 25 November 2009 available at <http://www.unhcr.org/cgi-bin/texis/vtx/se/arch?page=search&docid=4b0d643a6&query=baltimore>.

<sup>267</sup> In the autumn of 2009, US Immigration and Customs Enforcement awarded a contract for a new program, called Intensive Supervision Appearance Program II or "ISAP II", which has replaced previous programs on alternatives to detention. ISAP II maintains the case management and community referral components of the previous program but does not include as onerous reporting and supervision requirements in that it does not require the use of ankle bracelets until a participant has a final order of removal and removal is actually reasonably foreseeable. Also, contrary to the first ISAP program, in ISAP II supervision becomes more intensive in later phases once removal is ordered. For a brief overview on alternatives to detention in the US, see the webpage of the US Immigration and Customs Enforcement at: <http://www.ice.gov/pi/news/factsheets/alternativestodetention.htm> (dated 23 October 2009). For a detailed description of the Intensive Supervision Appearance Program (ISAP) II, see the tender documents 'Statement of work, Part I' and 'Statement of work, Part II' available online at the US Federal Business Opportunities Website: <https://www.fbo.gov/index?tab=documents&tabmode=form&subtab=core&tabid=54bf2246732a754a20787d9e4d031acf>.

<sup>268</sup> See Danish Aliens Act at 34a.1.

<sup>269</sup> The figure is 7.2% for May 2007, according to a survey of the French Ministry of Justice; see Ministry of Justice (2008), *Le contentieux judiciaire des étrangers*, Enquête statistique sur les décisions prononcées du 1er au 31 mai 2007 par les juges des libertés et de la détention et les cours d'appel statuant sur des demandes de prolongation du maintien en rétention ou en zone d'attente, January 2008, p. 33.

<sup>270</sup> See Austria, Ministry of Interior (*Fremdenwesen*), Expert discussion with the Minister of the Interior Maria Fekter on 10 June 2009, p. 114, available in German online at: [http://www.bmi.gv.at/cms/BMI/aus\\_dem\\_innere/files/Fremdenwesen.pdf](http://www.bmi.gv.at/cms/BMI/aus_dem_innere/files/Fremdenwesen.pdf).

**Table 1: Types of alternatives applied by EU Member States**

	Duty to surrender documents	Residence restrictions	Bail / sureties	Regular reporting	Release to case worker	Electronic monitoring
<b>Austria</b> <sup>273</sup>		X		X		
<b>Belgium</b> <sup>274</sup>					X	
<b>Bulgaria</b> <sup>275</sup>				X		
<b>Germany</b> <sup>276</sup>		X		X		
<b>Denmark</b> <sup>277</sup>	X	X	X	X		X
<b>Estonia</b> <sup>278</sup>		X		X		
<b>Finland</b> <sup>279</sup>	X		X	X		
<b>France</b> <sup>280</sup>	X	X	X	X		
<b>Hungary</b> <sup>281</sup>		X				
<b>Ireland</b> <sup>282</sup>	X	X		X		
<b>Lithuania</b> <sup>283</sup>				X		
<b>Malta</b> <sup>284</sup>				X		
<b>Netherlands</b> <sup>285</sup>		X		X		
<b>Poland</b> <sup>286</sup>		X		X		
<b>Portugal</b> <sup>287</sup>		X		X		X
<b>Slovenia</b> <sup>288</sup>	X			X		
<b>Sweden</b> <sup>289</sup>		X		X		
<b>UK</b> <sup>290</sup>		X	X	X		X

Source: FRA, September 2010

pre-removal detention, which includes irregular migrants and asylum seekers. In 2009, the rate has increased to around 30%.<sup>271</sup> In 24 out of 28 regional directorates of the Bulgarian Ministry of Interior, alternatives were applied to 198 foreigners between 1 January and 26 November 2010. In the Netherlands, the Council for the Administration of Criminal Justice and Protection of Juveniles in their Advice on Detention of Aliens highlighted that even though detention of foreign nationals is officially a measure of last resort, alternatives are used rarely and the government is not actively looking for alternatives.<sup>272</sup>

Although not comprehensive, this information suggests that alternatives are not frequently used. One of the main policy reasons for favouring a deprivation of liberty over the use of alternatives to detention is fear of absconding. There is however a notable scarcity of data on absconding rates of individuals to whom alternatives were applied.

Statistics from two pilot projects relating to alternatives to detention suggest that alternatives do not necessarily increase the absconding rate and can lead to increased voluntary return. In Belgium, 79% of the families who were put in the housing units as part of a recent pilot project which combined placement in designated accommodation with individual coaching, have remained in contact with the authorities<sup>291</sup>. Similarly, recent experiences with community placement combined with individual case management in Australia had an absconding rate of 6%, whereas 67% of those not granted the right to stay departed voluntarily. The innovative approach tested in Australia is outlined in Textbox 2.

271 In 2008, alternatives were used for 1,809 persons, whereas detention was applied to 5,398 individuals. In 2009, alternatives were resorted to for 1,877 persons and pre-removal detention to 5,991 persons. See the official Ministry of Interior statistics, available for 2008 online at: [http://www.bmi.gv.at/cms/BMI\\_Niederlassung/statistiken/files/Fremde\\_Jahresstatistik\\_2008.pdf](http://www.bmi.gv.at/cms/BMI_Niederlassung/statistiken/files/Fremde_Jahresstatistik_2008.pdf); and for 2009 at: [http://www.bmi.gv.at/cms/BMI\\_Niederlassung/statistiken/files/Fremde\\_Jahresstatistik\\_2009.pdf](http://www.bmi.gv.at/cms/BMI_Niederlassung/statistiken/files/Fremde_Jahresstatistik_2009.pdf).

272 Advies Vreemdelingenbewaring by the Raad voor Strafrechtstoepassing en Jeugdbescherming, 16 June 2008, available online at: <http://www.rsj.nl/advies/adviezen/index.aspx>.

273 Section 77.1 and 77.3 Aliens Police Act.

274 Arrêté royal fixant le régime et les règles de fonctionnement applicables aux lieux d'hébergement au sens de l'article 74/8, § 1er, de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, établissement et l'éloignement des étrangers, 14 May 2009.

275 Art. 44.5 Law on Foreigners.

276 Germany, Residence Act at Section 61.1.

277 Danish Aliens Act at Section 34.1 and Section 34.a.1.

278 Estonia, OLPEA, at 10.1 – 2.

279 Finnish Aliens Act, at Articles 118, 119 and 120.

280 Art. L 552-4 & L 552-5 CESEDA.

281 Hungarian TCN Act, at Section 62.

282 Section 14(1), Immigration Act 2004 and section 5(4) Immigration Act 2003.

283 Aliens Act, Section 115.2.

284 Immigration Act at Article 25(A)(13).

285 Aliens Act at Article 57.

286 Act on Aliens, Article 90.1(3).

287 Law 23/2007, Article 142.1.

288 Aliens Act, Article 56 (regarding restrictions of movement) and Article 59 on more lenient measures.

289 Aliens Act, Chapter 10, Section 8.

290 UK 1971 Immigration Act Schedule 3, paragraph 2(5) Operational Enforcement Manual 2008, Chapter 55.20, Immigration and Asylum (Treatment of Claimants, etc) Act 2004 at Section 36.

291 See <http://www.vluchtelingenwerk.be/bestanden/2009-12-02-AN-ALTERNATIVE-TO-DETENTION-OF-FAMILIES-WITH-CHILDREN.pdf>, p. 2.

## Australia

### Case management in the community as an alternative to detention<sup>292</sup>

Over the past three years a number of alternatives to detention were piloted in Australia. Release or placement in the community is combined with the introduction of case managers that work within enforcement authorities who make a case-by-case risk assessment of the need to detain. The case manager prepares and supports the migrant throughout the immigration process, helping him/her understand and cope with the often limited options available. The person concerned is thus assisted in making informed decisions. Independent legal advice, welfare assistance and the active involvement of community organisations in partnership with the government have also been key elements.

On average, 94% of people within the programmes complied with their reporting requirements and did not abscond. Some 67% of those not granted a visa to remain in the country voluntarily departed.<sup>293</sup> In addition, 3 years following the release of all families from detention centres, less than 1% had absconded, with no other reported violation of conditions.<sup>294</sup> Furthermore, the use of alternatives to detention has also proved a cost saving to government, at one-third the cost of traditional detention and removal practices.<sup>295</sup>

## FRA Opinion

EU Member States, which have not yet done so, are encouraged to set out in national legislation rules dealing with alternatives to detention, without disproportionately restricting other fundamental rights. Innovative forms of alternatives which include counselling the individual on the immigration outcome should be explored wherever possible. By contrast, given the restrictions on fundamental rights derived from electronic tagging, such an alternative should normally be avoided.

## 5.2. Duty to examine alternatives before detaining

### Return Directive

#### Recital 16

**Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.**

In interpreting the prohibition of arbitrary detention contained in Article 9.1 ICCPR the Human Rights Committee observed that deprivation of liberty cannot be considered as necessary, if the possibility to apply invasive means to achieve the same ends does not exist.<sup>296</sup> The Council of Europe Twenty Guidelines on Forced Return indicate at Guideline 6.1 that detention should only be resorted to after the authorities have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures.

Building on this Guideline, the Return Directive stipulates at Article 15.1 that deprivation of liberty may be ordered “unless other sufficient but less coercive measures can be applied effectively in a specific case”. Read in conjunction with Recital 16 (quoted in the above box), Article 15.1 establishes a duty to examine in each individual case whether alternatives to detention would suffice before resorting to deprivation of liberty.

This is an area where the standard set forth in the Return Directive is higher compared to what takes place currently in practice. Except for those countries which require an individualised test to verify if the deprivation of liberty is proportional to the removal objective, the requirement to review alternatives first, before resorting to detention, is not that common and mainly concerns categories of persons deemed to be particularly vulnerable, such as, for instance, children.

As the following examples illustrate, the duty to examine alternatives first can either be based in law or, more frequently derive from case law. In Austria, the administration is obliged to apply more lenient measures in all cases where deprivation of liberty is not necessary to achieve the purpose. The reasons why these measures could not be applied have to be stated in the detention decision.<sup>297</sup> Similar duties to examine the viability of alternatives before detaining can be found in Germany,<sup>298</sup>

292 See, for more details, an overview of these initiatives provided by the International Detention Coalition, Detention reform and alternatives in Australia, Case management in the community as an alternative to detention, the Australian Experience, June 2009 available at: <http://idcoalition.org/wp-content/uploads/2010/02/a2daustraliabrief1feb2010.pdf>.

293 Department for Immigration and Citizenship, Final Activity Report, October 2008, pp. 11-12. Department for Immigration and Citizenship CCP Report, March 2009 at, p. 2.

294 Department for Immigration and Citizenship, Submission to the Joint Commission on Migration Inquiry in Immigration Detention Sub 129c, Q41, October 2008.

295 See [http://www.aph.gov.au/senate/committee/legcon\\_ctte/estimates/add\\_0809/diac/38.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/add_0809/diac/38.pdf).

296 UN Human Rights Committee, Communication No. 900/1999, C.v. *Australia* at 8.2.

297 See, for example, the following judgements by the Austrian Higher Administrative Court: 30 August 2007, 2007/21/0043; 17 March 2009, 2007/21/0542; 25 March 2010, 2009/21/0276 available online at: <http://www.ris.bka.gv.at/Vwgh>.

298 See the evaluation of the immigration legislation by the German Ministry of Interior, *Bericht zur Evaluierung des Gesetzes zur*

Denmark,<sup>299</sup> the Netherlands<sup>300</sup> and Slovenia.<sup>301</sup> In the UK, there is in principle a presumption against detention, which means that, where possible, alternatives should be applied.<sup>302</sup> Foreigners have a right to apply for bail<sup>303</sup> and must be informed of this right.<sup>304</sup>

### **FRA Opinion**

**Detention should not be resorted to when less intrusive measures are sufficient to achieve the legitimate objective pursued. In order to ensure that less coercive measures are applied in practice, EU Member States are encouraged to set out in national legislation rules dealing with alternatives to detention that require the authorities to examine in each individual case whether the objective of securing the removal can be achieved through less coercive measures before issuing a detention order, and provide reasons if this is not the case.**

---

*Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz)*, July 2006, p. 160: „Insbesondere wird zu prüfen sein, ob anstelle von Abschiebungshaft mildere Maßnahmen [...] angeordnet werden können“. The report is available in German online at: [http://www.bmi.bund.de/cae/servlet/contentblob/151396/publicationFile/14810/evaluierungsbericht\\_zum\\_zuwanderungsgesetz.pdf](http://www.bmi.bund.de/cae/servlet/contentblob/151396/publicationFile/14810/evaluierungsbericht_zum_zuwanderungsgesetz.pdf).

299 While the Aliens Act foresees a duty to examine alternatives before resorting to detention under Section 36.1, no obligation to that effect appear to exist when ordering detention under Section 36.5 of the Aliens Act, i.e. when it is required to prevent absconding of aliens who committed certain types of criminal offences or aliens who entered Denmark in an irregular manner.

300 See Council of State, decision of 23 June 2006, Case No. 200603830/1, JV 2006/323 as well as Vreemdelingencirculaire 2000, A6/1.

301 Slovenia, Constitutional Court U-I-297/95, 28.10. 1998.

302 UKBA, *Operational Enforcement Manual*, Ch. 55.1, available at: <http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/enforcement/>. It is a Common Law presumption, now reinforced by the *Human Rights Act 1998*, but is not otherwise reflected in Statute or Immigration Rules.

303 1971 Act Sch 2 paragraphs 22 and 29 and 1999 Act s.54.

304 Unlike criminal cases, there is no automatic bail hearing however. The Bail Circlly at <http://www.ctbi.org.uk/CHA/94> brings together lawyers and others ready to support release on bail.

## 6. Detention of children

International law strongly discourages the deprivation of liberty of children for whatever reason. Article 37 of the United Nations Convention on the Rights of the Child allows detention only as a measure of last resort and for the shortest appropriate period of time. Alternatives to institutional care should be used in order to ensure that children alleged as, accused of, or recognised as having infringed the penal law are dealt with in a manner appropriate to their well-being.<sup>305</sup> Minimum rules for the administration of juvenile justice<sup>306</sup> and non-custodial measures<sup>307</sup> have been developed in the context of the United Nations to promote the creation of adequate juvenile justice systems.

This chapter deals with detention of children to facilitate removal. It will first deal with the detention of children in general, including the detention of children accompanied by their parents or primary caregiver, and subsequently with the situation of separated children.

Children are defined as any person below the age of 18 years, in line with Article 1 of the Convention of the Rights of the Child. Issues relating to age assessment and the detention of children whose age is disputed are not covered by this report.<sup>308</sup>

### 6.1. Measure of last resort

#### **Convention on the Rights of the Child**

##### **Article 37**

**(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; [...].**

It follows from Article 37 of the Convention on the Rights of the Child that pre-removal detention of children cannot be lawful when no safeguards are in place to ensure that it is used only as a measure of last resort. In addition, Article 3 of the same Convention requires that a primary consideration be given to the best interests of

the child, when determining if and how a child should be deprived of his or her liberty.

The use of pre-removal detention for children has to be viewed in light of the more general overall commitment to use deprivation of liberty for children in conflict with the law only as a measure of last resort. Given that the Convention strongly discourages deprivation of liberty for children alleged as, accused of, or recognized as having infringed penal legislation, the question arises whether detention of children who are not in conflict with criminal law can be justified at all, unless the deprivation of liberty is used as a measure to protect children from harm in accordance with the best interests principle. Against this background, the UN Working Group on Arbitrary Detention stressed that additional justification beyond the mere status as irregular migrant is required when resorting to the detention of minors.<sup>309</sup>

Provided all substantial and procedural safeguards are applied, the European human rights system does in principle not prohibit the detention of children to prevent unauthorised entry or facilitate their removal. Although specific grounds for the detention of children are foreseen in Article 5.1(d) of the ECHR, such a list is according to the European Court of Human Rights not exhaustive as children can also be deprived of liberty on other grounds foreseen in Article 5.1 of the ECHR.<sup>310</sup> The European Court of Human Rights requires, however, a relationship between the ground of deprivation of liberty and the place and conditions of detention. As regards pre-removal detention, it held that a closed centre intended for adult irregular immigrants was not appropriate to cater for the specific needs of children.<sup>311</sup>

The Council of Europe Twenty Guidelines on Forced Return provide that children should be deprived of liberty only as a measure of last resort and for the shortest appropriate period of time and that a primary consideration should be given to the best interests of the child. If deprived of liberty, children must have access to education and leisure, and be held in institutions that can cater for their specific needs.<sup>312</sup>

Having observed the impact that deprivation of liberty can have on the child's development, the European Committee for the Prevention of Torture and Inhuman

<sup>305</sup> See Article 40.3 of the Convention on the Rights of the Child as well as General Comment No.10 of the Committee on the Rights of the Child on Children's rights in juvenile justice, CRC/C/GC/10, 2007.

<sup>306</sup> UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), adopted by General Assembly resolution 40/33 of 29 November 1985.

<sup>307</sup> UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) adopted by General Assembly resolution 45/110 of 14 December 1990.

<sup>308</sup> See, however, on this issue, FRA (2010) *Separated, asylum-seeking children in European Union Member States*, Summary Report, Luxembourg: Publications Office, pp. 35-37.

<sup>309</sup> See A/HRC/13/30 at paragraph 60.

<sup>310</sup> ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, paragraphs 100-101.

<sup>311</sup> *Ibid* at 102, which concerned an unaccompanied girl from the Democratic Republic of Congo. See also ECtHR, *Muskhadyhiyeva and others v Belgium*, No. 41442/07, 19 January 2010 (also quoted in Footnote 55), concerning four young girls, detained with their mother, one of whom had documented signs of trauma.

<sup>312</sup> See Guideline 11.

or Degrading Treatment or Punishment took a stricter approach in its 19th General Report issued in 2009. The Committee considers that deprivation of liberty of an irregular migrant who is a child is “rarely justified and, in the Committee’s view, can certainly not be motivated solely by the absence of residence status”. The Committee also recommended that when a child is exceptionally detained, all efforts should be made to allow immediate release. Additional safeguards should be put in place to cater for the specific needs of children.<sup>313</sup>

European Union law does not exclude the possibility to detain children to facilitate removal, though this should not be the rule. Article 17 of the Return Directive which is devoted to the detention of minors and families reaffirms that children shall only be detained as a measure of last resort and for the shortest appropriate period of time. Reference is also made to the need to give a primary consideration to the best interests of the child.

At national level most European Union countries<sup>314</sup> allow the detention of children on immigration grounds, although in some there is a prohibition to detain unaccompanied children (see next section). Only three countries have a provision within their aliens or immigration legislation explicitly prohibiting keeping children in pre-removal detention.<sup>315</sup> Although the official policy in Belgium,<sup>316</sup> Cyprus<sup>317</sup> as well as Malta<sup>318</sup> is that children under the age of 18 years should not be kept in detention, this policy is not specifically reflected in national legislation. The practice shows further that

detention of children does take place in Malta while waiting for the age verification and health assessment to be finalized.<sup>319</sup> Similarly, cases of children detained to prepare their removal were documented also in Cyprus.<sup>320</sup>

Different safeguards have however been introduced at a national level to protect children from arbitrary detention. These can aim at allowing detention only in exceptional cases, at reducing the length of child detention or at ensuring that children are only held in facilities which are properly equipped to host families with children.

Explicit provisions in national law may require that detention of children be resorted to only if it is in the best interests of the child. A good example in this regard is Lithuania, where children can only be detained in extreme cases when it is in their best interests.<sup>321</sup> A tool to promote that detention is only used as a measure of last resort is the duty to actively consider alternatives to detention, which in some countries is formulated with stronger wording when it concerns children (as compared to adults). As an illustration, in Austria, the discretion by the authorities is much more limited in relation to children, as the law requires that they ‘must apply more lenient measures to minors, unless they have reasons to assume that the purpose of detention cannot be reached in this way.’<sup>322</sup> Similar duties can be also found in Hungary,<sup>323</sup> or the UK.<sup>324</sup> In Belgium, since the introduction of alternatives to detention, families with children are placed in open housing units.

In other countries shorter time limits have been established for the detention of children. In Sweden, a child can only be detained for a maximum of six days (72 hours which can further be extended for an additional 72 hours), whereas no upper time limit exists for pre-removal detention of adults.<sup>325</sup> In Bulgaria,<sup>326</sup> children can only be detained up to three months, which is shorter if compared to the maximum length of detention foreseen for adults.

313 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *20 years of combating torture*, 19th General Report, 1 August 2008-31 July 2009, paragraph 97.

314 Austria, Aliens Police Act (*Fremdenpolizeigesetz*, Article 79 (2)); Bulgaria, Law on Foreigners, Article 44 (9); Czech Republic, FORA, Section 124(1); Denmark Aliens Act, Article 36 and the Administrative Act of Justice, Ch. 75(b) paragraph 821(a); Estonia, OLPEA Article 265 (4); Finland, Aliens Act 301/2004, Article 121 and 122; France, CESEDA, L 221-1 – L224-4 and L 511-4; Latvia, Immigration Law, Ch. VII, Art. 51; Lithuania, Aliens Act, Article 114 (3); Luxembourg, Immigration Law, Article 120; The Netherlands, *Vreemdelingenwet 2000 (Vc 2000) A6/1.5. a-c* (the Implementation Guidelines); Poland, The Aliens Act, Articles 101 and 102; Portugal, Act 23/2007, Article 146; Romania, Emergency Ordinance, Article 97; Sweden, Aliens Act, Ch. 10, Sec. 2; Spain, Law No. 4/2000, Article 35.3; Slovakia, Aliens Act, Article 62 (7); UK, Operational Enforcement Instructions and Guidance (OEIG), Ch. 55.9.3. Legislation in Belgium, Germany, Greece, Malta and Slovenia does not make a specific reference to detention of children, although the Slovenian Aliens Act does contain a provision relating to unaccompanied children, who be temporarily accommodated at the special department responsible for minors at the Aliens Centre.

315 Hungary, TCN Act, Section 56 Act; Italy, Article 26(6) LD 25/2008; Ireland, Section 5 (2) (b) Immigration Act 2003.

316 See statement by the Belgian Federal Minister of Asylum and Migration, available online at: <http://annemieturteboom.be/NL/asielbeleid/08/22.htm>.

317 Interview with the Cyprus immigration police on 24 June 2009.

318 The Maltese government Policy Paper on *Irregular Immigrants, Refugees and Integration* states that “Irregular immigrants who, by virtue of their age [...] are considered to be vulnerable are exempt from detention and are accommodated in alternative centres”; see Ministry of Justice and Home Affairs and Ministry for the Family and Social Solidarity (2005) *Irregular Immigrants, Refugees and Integration: Policy Document*, p. 11.

319 See UN Working Group on Arbitrary Detention, UNDOC A/HRC/13/30/Add.2, Human Rights Council, 13th session, Report of the Working Group on Arbitrary Detention, Mission to Malta 19 to 23 January 2009, paragraph 78.

320 Ombudsman Annual Report 2006, p.63, available online at: [http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/32C49D97734F1624C22575B20045BB24/\\$file/ETHΣIA%20EKΘΕΣΗ%202006.pdf?OpenElement](http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/32C49D97734F1624C22575B20045BB24/$file/ETHΣIA%20EKΘΕΣΗ%202006.pdf?OpenElement).

321 Lithuania, Aliens Act, at 114.3.

322 Aliens Police Act, at 77.1. A similar duty exists in the Netherlands, however only for children aged 16 years or less, see Vc 2000 A6/5.1.5.

323 TCN Act at Section 62.1.

324 UKBA (2009) Code of Practice for Keeping Children Safe from Harm while in the UK, p.10.

325 Aliens Act, Chapter 10, Section 5.

326 See Article 44.9 of the Law on Foreigners.

Finally, legislative provisions may require that children be held only in specially designated areas or places which are properly equipped to host children.<sup>327</sup> Such approach may help in securing children's enjoyment of their rights under the Convention on the Rights of the Child whilst deprived of liberty.

### FRA Opinion

**EU Member States are encouraged to include in their national legislation a strong presumption against detention and in favour of alternatives to detention for families with children, giving a primary consideration to the best interests of the child. Children should not be deprived of their liberty if they cannot be held in facilities that can cater for their specific needs. Safeguards should also be considered to ensure that when children are deprived of their liberty, detention is not unduly prolonged. These could include lower maximum time limits or more frequent reviews.**

## 6.2. Guarantees against separation from parents

### Convention on the Rights of the Child

#### Article 9.1

**States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.**

This section refers to the situation in which the deprivation of liberty of a family with children is considered. The right to family unity is a basic human right set forth in a number of international instruments, including among others the ICCPR (Article 17), the ECHR (Article 8) and the EU Charter on Fundamental Rights (Article 7). Although this right can be subject to certain restrictions, the Convention on the Rights of the Child allows the separation from parents only under very strict conditions and exclusively if it is in the best interests of the child. Similarly, in light of the right to family life and the existing bond between siblings, their separation should normally be avoided, unless in their best interests.

According to information available to the FRA, it appears that Sweden is the only country which explicitly prohibits the separation of a child from both its parents in its aliens act.<sup>328</sup> Examples from other countries indicate that separation from the child's parents may not be subject to the strict conditions imposed by the Convention of the Rights of the Child. In the Czech Republic, for instance, the law allows for the separation of a family if one family member is placed in the 'specially guarded' part of the facility. The law does not exclude that this may also be undertaken if it would result in a child remaining alone.<sup>329</sup> The wording of the Polish Act on Aliens stipulates that children and parents will 'if possible' be kept together.<sup>330</sup>

When parents are detained, the presumption against separating a child from his or her parents is in conflict with the duty to ensure that a child should only be deprived of liberty as a measure of last resort. While this conflict can be easily resolved by avoiding the use of detention for families in favour of alternatives to detention, there may be cases where the detention of the parents to secure their removal is considered necessary by the authorities.

The reference to the best interests of the child principle in Article 17 of the Return Directive would suggest that in case parents are detained, the fate of the child should be determined on the basis of what is in the child's best interests (i.e. detention together with the parents or alternative care). This conclusion is also supported by the European Prison Rules, which require that infants (meaning children up to three years) should be allowed to stay in prison with a parent only when this is in their best interests.<sup>331</sup>

A review of state practice suggests that different approaches are taken. Some countries, such as France, Portugal or Latvia<sup>332</sup> normally presume that it is better for the child to remain with the family, provided they can be hosted in facilities which can cater for their specific needs. By contrast, those countries that ban the placement of children in pre-removal detention would usually separate the child in those cases where the parent(s) are detained, although exceptions may be envisaged.<sup>333</sup> Finally, it is not infrequent that only the father is detained, whereas the rest of the family is accommodated elsewhere.<sup>334</sup>

<sup>328</sup> Chapter 10, Section 3, Aliens Act 2006.

<sup>329</sup> FORA, Section 139.

<sup>330</sup> Article 115.2 Aliens Act of 2003.

<sup>331</sup> European Prison Rules, Council of Europe, Committee of Ministers, Recommendation Rec(2006)2, adopted by the Committee of Ministers on 11 January 2006 at 36.1.

<sup>332</sup> Latvian Immigration Law at Section 59, paragraph 5.

<sup>333</sup> In Italy, children may exceptionally be allowed to stay with their mothers in identification centers, see Article 19.2, LD 286/1998. See also, for Ireland, the provision relating to children under the age of 12 month set forth in Article 17(1), Prison Rules 2007.

<sup>334</sup> See Germany, General Administrative Regulations to the Residence Act [*Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz*],

<sup>327</sup> See, for example, Austria, but only for children under the age of 16 years of age which can only be detained if 'accommodation and care adequate to age and stage of development' of the minors can be guaranteed (Sec 79 (2) Aliens' Police Act); Bulgaria, Law on Foreigners, Article 44, paragraph 11; Czech Republic, FORA at 138.2 (which requires for the conditions to be laid down in internal rules); Finland, 2002 Act on the Treatment of Aliens Placed in Detention and Detention Units, Chapter 3, Article 11; Luxembourg, Immigration Law at Article 120; Spain, Law 4/2000, Article 62bis.1(i).

This research could not document any good practices on type and methodology of the assessment required in order to determine in each individual case whether detention with the parents or separation is in the best interests of the child.

### FRA Opinion

**When determining whether families with children should be detained with their parents or primary caregiver, paramount importance has to be given to the child's best interests and alternatives to detention actively considered. Where, exceptionally, alternatives are not sufficient and it is considered necessary to detain the parent(s), children should only be detained with their parents, if – after a careful assessment of all individual circumstances and having given due weight to the views of the child in accordance with his/her age and maturity – keeping the child with them is considered to be in the child's best interests. This should be clarified in national legislation.**

## 6.3. Detention of separated children

### Committee on the Rights of the Child, General Comment No. 6

#### Paragraph 61

**Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.**

This section relates to children who are separated from their parents or primary caregiver (but not necessarily from other family members).<sup>335</sup> Pre-removal detention of separated children is controversial under international law.

According to Article 20 of the Convention on the Rights of the Child, children deprived of their family environment are entitled to special protection and assistance to be provided by the State. A joint reading of the restrictions to resort to detention included in Article 37, the protection provision of Article 20, and the best interests principle enshrined in Article 3, can lead to the conclusion that in principle separated children should not be deprived of their liberty for the purpose of facilitating their removal, unless this is considered to be in the child's best interests (for example, to prevent harm to the child).

26 October 2009 at 62.0.5, as well as for Denmark, Danish Institute for Human Rights, *Afviste asylansøgere og andre udlændinge i udsendelsesposition i Danmark* [Rejected asylum seekers and other aliens in return positions in Denmark], 2009.

335 See on the detention of separated asylum seeking children, FRA, *Separated, asylum-seeking children in European Union Member States*, Summary Report, April 2010, pp. 45-47.

In this sense, as highlighted in the box above, the Committee on the Rights of the Child rejects detention of unaccompanied or separated children, if based only on the lack of residence status.<sup>336</sup> The UN Working Group on Arbitrary Detention takes the same approach, albeit using a more cautious language. It indicated that "[g]iven the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirements stipulated in Article 37 (b), clause 2, of the Convention on the Rights of the Child".<sup>337</sup>

While not excluding the possibility of resorting to deprivation of liberty, the Council of Europe Twenty Guidelines on Forced Return recommend that separated children be accommodated in institutions equipped with "personnel and facilities which take into account the needs of persons of their age".<sup>338</sup> In *Mitunga v. Belgium*, the ECtHR concluded that the closed centre in which the applicant was detained was not suitable for the extreme vulnerability of an unaccompanied foreign minor, thus attaching particular importance to the fact that the facility used to accommodate separated children must cater for the specific needs of the child.<sup>339</sup>

The recent EU Action Plan on Unaccompanied Minors envisages that where detention is exceptionally justified, it is to be used only as a measure of last resort, for the shortest appropriate period of time, and taking into account the best interests of the child as a primary consideration.<sup>340</sup> In addition, Article 17.3 of the Return Directive reaffirms the duty to accommodate separated children in institutions equipped with personnel and facilities which take into account the needs of persons of their age. Such duty is however qualified by 'as far as possible'.

Regarding state practice, in one third of the EU Member States, separated children cannot be kept in pre-removal detention.<sup>341</sup> These include the three countries which prohibit the detention of children in general,<sup>342</sup> as well as an additional six countries that allow the detention

336 Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6 at 61.

337 See Report of the Working Group on Arbitrary Detention, paragraph 64 (Human Rights Council, 13th session UN General Assembly, A/HRC/13/30, 18 January 2010), paragraph 60.

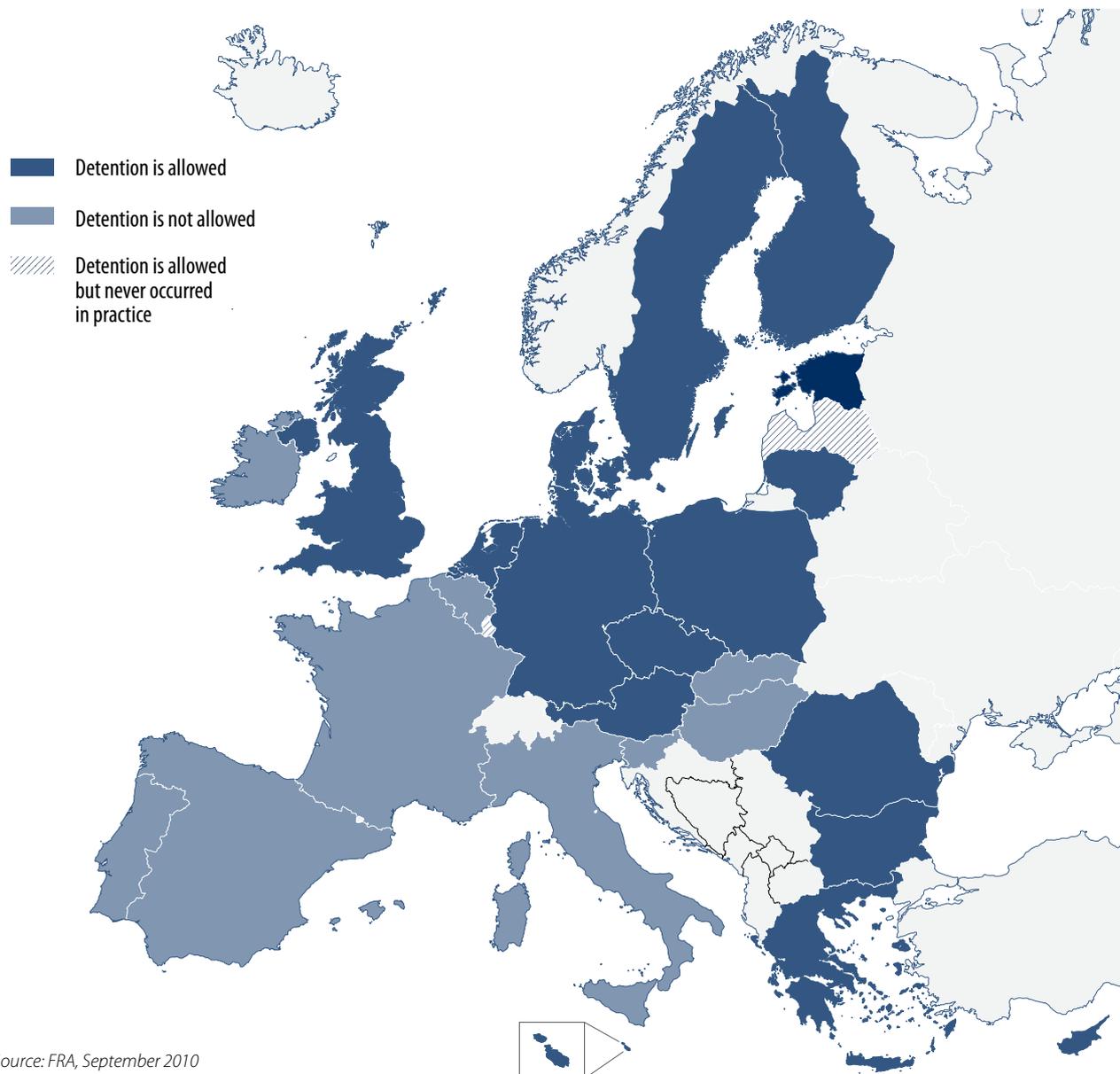
338 See Guideline 11.3

339 See Footnote 55.

340 Communication by the Commission to the European Council and the Parliament, *Action Plan on Unaccompanied Minors (2010–2014)*, COM(2010)213 final, Brussels, 6 May 2010, p. 9.

341 More detailed information on detention of separated children can be found in the recent study undertaken by the European Migration Network, which covered most European Union countries, see country reports as well as synthesis report on *Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study*, 2009-2010.

342 This is the case of Hungary, Italy and Ireland (see Footnote 320).

**Figure 7: Pre-removal detention of separated children (excluding entry points), EU27**

Source: FRA, September 2010

of children only when these are accompanied by their parents or legal representative.<sup>343</sup> In some cases,

343 Belgium, Act of 12 January 2007, *Loi sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers*, 12 January 2007, *Moniteur belge* (31.12.2002), available online at: <http://www.ejustice.just.fgov.be/loi/loi.htm>, which organises the reception of unaccompanied minors. In France, unaccompanied minors who are inside the country can never be required to leave the territory (CESEDA at Article 511.4) and thus cannot be detained in administrative holding centres. See, moreover, Slovenia, Aliens Act, Article 60.1, Slovakia, Article 62 (7) Aliens Act and Spain, Articles 35 and 62.4 of the Law No. 4/2000. In Portugal, Article 31.6 of Law 23/2007 includes a duty to grant to unaccompanied minors all material support and necessary assistance to fulfil their basic needs of food, hygiene, accommodation and medical assistance. It is understood that this provision is used as a basis for the policy not to detain separated children. In addition, the refugee law excludes the detention of unaccompanied minors seeking asylum seekers in the (Law 20/2006 of 23 June on reception conditions at Article 19.1 and Article 78.1 of Law 23.2007).

unaccompanied children may only be detained in the waiting zones at entry points (primarily airports), but not in the administrative holding centres for persons pending removal.<sup>344</sup> It should be recalled that safeguards against arbitrary detention also apply to children held at entry points who are also entitled to enjoy the rights set forth in the Convention on the Rights of the Child.<sup>345</sup>

As illustrated in Figure 7, if one excludes deprivation of liberty at entry points – which this FRA research has not systematically analysed – pre-removal detention of separated children is in principle possible in two thirds of the European Union countries.<sup>346</sup> In at least two of

344 This is for example the case in France, see L221-5 CESEDA.

345 See CRC General Comment No. 6, paragraph 12.

346 Bulgaria, Law on Foreigners, Article 44(9); Czech Republic, FORA,

these countries, Latvia and Luxembourg, the research did however not find any evidence confirming that a separated child has ever been kept in pre-removal detention.<sup>347</sup>

Among those countries that allow the detention of separated children some make express reference in their national laws to the fact that detention is only allowed exceptionally.<sup>348</sup> Policy guidance in the UK states that unaccompanied minors “must only ever be detained in the most exceptional circumstances and, then, only overnight, with appropriate care, whilst alternative arrangements for their safety are made.”<sup>349</sup>

Various other safeguards to limit the detention of separated children can be found in domestic law as the following examples illustrate. The Austrian Higher Administrative Court as well as a German court has required a higher threshold, as compared to adults, in order to conclude that alternatives to detention would not suffice.<sup>350</sup> In Finland, before a child is placed in detention, the representative of the social welfare authorities shall be heard<sup>351</sup> and the best interests of the child shall be duly considered.<sup>352</sup>

Furthermore, pre-removal detention of separated children below a certain age is prohibited in at least six countries. Such age can, however, be rather low; as for example the prohibition to detain separated children below 12 years in Greece or the Netherlands.<sup>353</sup> Austria,

Denmark and Latvia have set the bar at 14 years,<sup>354</sup> whereas in the Czech Republic separated children below 15 years cannot be detained.<sup>355</sup>

A few countries require in their legislation that facilities where separated children are held are equipped to cater for the needs of children and thus ensuring enjoyment of their rights under the Convention on the Rights of the Child while they are deprived of liberty.

In the Netherlands, for example, unaccompanied children between the ages of 12 and 16 years can only be detained if they can be transferred to a detention centre for youth within four days.<sup>356</sup> In Luxembourg, unaccompanied children shall be placed in detention in an appropriate place.<sup>357</sup> In Finland, unaccompanied children may not be placed in a Police or Border Guard detention facility, even in exceptional circumstances and a representative of the social welfare authorities has to be heard before detaining a child.<sup>358</sup> In Bulgaria, special areas designed for the needs of children have to be set up within the detention facility.<sup>359</sup>

### FRA Opinion

**Several EU Member States currently prohibit the detention of separated and/or unaccompanied children, whereas others allow it only in very exceptional circumstances. This is a good practice that should be maintained and followed by other states, also in light of the provision at Article 4.3 of the Return Directive which allows adopting or maintaining more favourable provisions. It is namely difficult to imagine a case in which the detention of a separated or unaccompanied child simply for securing his or her removal would comply with the requirements of the Convention of the Rights of the Child.**

Articles 124(1) and 125(1) read in conjunction with Section 178; Finland, Aliens Act, Section 123 (not keeping unaccompanied minors in police detention); Greece, Presidential Decree No. 140/91 at Article 118; Poland, Act on Aliens, Article 101 and Article 102; Latvia; Immigration Law, Ch. VII, Article 51; Lithuania, Aliens Act, Article 114 (3); Luxembourg, Immigration Law, Article 120; The Netherlands, Vc 2000 A6/1.5. a-c. (unaccompanied minors between the ages of 12 and 16 years can only be detained if they can be transferred to a detention centre for youth within four days); Sweden, Aliens Act, Chapter 10, Section 3; and the UK, UK Border Agency Code of Practice for keeping children safe from harm, p. 5. Malta and Romania do not have a specific legal provision making reference to detention of separated children. In Malta, children are detained until medical clearance is given and age assessment concluded. For Denmark see below, footnote 347.

347 Communication of 5 June 2009 from Caritas, Luxembourg.

348 Bulgaria, Article 44(9) of the Law on Foreigners and Sweden, Ch. 10, Sec. 3, Aliens Act.

349 UKBA, Operational Enforcement Manual, Ch. 26.1.

350 See, for Austria, decisions by the Verwaltungsgerichtshof [Higher Administrative Court] of 24 October 2007, 2007/21/0370 and 29 April 2008, 2007/21/0079 referring to Section 77(2) of the Aliens Police Act available online at: <http://www.ris.bka.gv.at/Vwgh>, and for Germany, Oberlandesgericht [Regional Court] Cologne, decision of 11 September 2002, case No. 16 Wx 164/02, <http://www.abschiebungshaft.de/home/R125.html>. See also the Danish Administrative of Justice Act, Chapter 75(b), paragraph 821(a), available online at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=105378>: the act provides that before deciding to detain a child, it must be confirmed that it is impossible to achieve the purpose of the detention by less intervening measures.

351 Aliens Act, Section 122.

352 Aliens Act, Section 6(1).

353 Greece, Presidential Decree No. 140/91, at Article 118, Netherlands, Vc 2000 A6/5.1.5.

354 The Austrian Ministry of Interior reported the existence of an internal ministerial decree prohibiting the detention of children under 14. See *Anfragebeantwortung* 748/AB XXIII. GP, answer in response to questions 1 and 2. For Denmark, see Written replies by the government of Denmark concerning the list of issues (CRC/C/Q/DNK/3) received by the Committee on the Rights of the Child relating to the consideration of the third periodic report of Denmark (CRC/C/129/Add.3), 18 August 2005 at page 55 according to which under part 69 of the Act on Administration of Justice part a child younger than 15 can never be detained for more than 24 hours. For Latvia, see Immigration Law at Section 51.1.

355 See FORA Article 124.1 read in conjunction with Section 178.

356 Vc 2000 A6/5.1.5.

357 Immigration Law, Article 120.

358 Aliens Act, sections 122 and 123(5), as amended 581/2005 (in force 15.07.2005).

359 Law on Foreigners, Article 44.9.

## 6.4. Separation of children from unrelated adults

### Convention on the Rights of the Child

#### Article 37

(c) [...] In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.

The requirement to separate children from adults other than their parents 'unless it is considered in the child's best interest not to do so' is a well-established rule under international law. Prior to the adoption of Article 37(c) of the Convention on the Rights of the Child quoted in the box above, already in 1966 the ICCPR recognized the need to separate children from adults in the criminal justice context.<sup>360</sup> The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) stress that "juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults."<sup>361</sup> Similarly, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty which apply to any form of deprivation of liberty take a very strict approach in this regard.<sup>362</sup>

The 2006 European Prison Rules also indicate the need to separate children from adults, unless it is considered that the separation is against the best interests of the child.<sup>363</sup> The European CPT Standards similarly call for special arrangements for children, including the separation from adults, unless otherwise required by the 'best interests' principle, for example, when children are in the company of their parents or other close relatives.<sup>364</sup>

A number of the European countries have provisions within their national legislations requiring that unaccompanied children shall be separated from adults while in detention.<sup>365</sup> However, such safeguard is not

systematically reflected throughout Europe. Cases of separated children placed together with adults have been documented, for instance, in Malta and Greece.<sup>366</sup>

### FRA Opinion

**Under no circumstances should separated children be deprived of their liberty if it is not possible to ensure that they are kept in appropriate facilities where separate accommodation from adults can be guaranteed.**

## 6.5. Legal representation for children detained alone

### 19th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 1 August 2008-31 July 2009

#### Paragraph 98

**Unaccompanied or separated children deprived of their liberty should be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a guardian or legal representative. Review mechanisms should also be introduced to monitor the ongoing quality of the guardianship.**

The procedural guarantees set forth in Chapter 4 of this report, such as the right to judicial review, the right to submit an application for asylum, and access to legal assistance, also apply to children, when they are exceptionally held in pre-removal detention. Due to their age and maturity, separated children are usually in a less favourable position compared to adults to access such rights, as procedures may not be child-friendly. In addition, if below a certain age, children may not have the legal capacity to initiate or act in specific procedures.

Building on the duty set forth in Article 20.1 of the Convention on the Rights of the Child to provide special protection and assistance to separated children, the Committee proposed that where children are involved

360 Article 10.2(b). See also UN Human Rights Committee, General Comment No. 9: Humane treatment of persons deprived of liberty (Art. 10), 30/07/1982 which states that deviations from this obligation cannot be justified by any consideration whatsoever.

361 At paragraph 26.3.

362 Paragraph 29 requires that in all detention facilities juveniles be separated from adults, unless they are members of the same family. Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned. See United Nations Rules for the Protection of Juveniles Deprived of their Liberty, UNGA, A/RES/45/113 of 14 December 1990.

363 Council of Europe, Committee of Ministers, Recommendation Rec(2006)2, adopted by the Committee of Ministers on 11 January 2006 at paragraphs 18.8 and 35.4.

364 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), The CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2009, at paragraph 100.

365 See, for example, Austria, Sec. 79 (3) Aliens Police Act and Sec. 4 (3) of the

Detention Regulation (*Ahhalteordnung*); Bulgaria, Article 44 (9) of the Law on Foreigners; Estonia, Sec. 265 (4) OLPEA; Poland, Article 115.3 Act on Aliens; UK, Sec. 55.9.3 Operational Enforcement Instructions and Guidance.

366 See for Malta, Médecins Sans Frontières, "Not Criminals" *Medecins Sans Frontières Exposes Conditions for Undocumented Migrants and Asylum Seekers in Maltese Detention Centres*, April 2009, p. 27; UN High Commissioner for Refugees, *The Detention of Refugees and Asylum-Seekers by Reason of Their Unauthorised Entry or Presence*, July 2007, p. 5 <http://www.unhcr.org/refworld/docid/4950f39f2.html>. For Greece, see Human Rights Watch Report *Left to Survive, Systematic Failure to Protect Unaccompanied Migrant Children in Greece*, 2008, p. 60.

in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.<sup>367</sup>

Access to legal representation is crucial to allow children to make effective use of existing legal procedures. Such access may be difficult where children have access to legal assistance in the same way as adults.<sup>368</sup> While separated children deprived of their liberty may often be entitled to benefit from the same protection safeguards as those not detained, in practice legal representation for detained children can be challenging. Different obstacles can exist. As an illustration, in Austria, the Youth Welfare Agency is not always informed when separated children are deprived of their liberty,<sup>369</sup> whereas at the Roissy-Charles de Gaulle (CDG) airport in Paris the appointed representatives had only the capacity to take responsibility of 75% of minors in 2007.<sup>370</sup>

### FRA Opinion

**Where legislation exceptionally allows for the deprivation of liberty of a separated child, domestic law should require appointing immediately a legal representative at no cost, unless the child already has one, in addition to an independent guardian.**

367 Committee on the Rights of the Child, General comment No. 6 (2005), Treatment of Unaccompanied and Separated Children outside their country of origin, CRC/GC/2005/6 at paragraph 36.

368 Less than one out of four of the 28 children aged 10-17 interviewed by the Jesuit Refugee Service reported having seen a lawyer. By comparison, for other age groups the percentage of respondents who had been visited by a lawyer ranged from 51-65. See Jesuit Refugee Service, *Becoming vulnerable in detention*, pages 30 and 74.

369 Assessment of a Country Questionnaire, Improving Guardianship for Separated Children in Europe: Regional survey on current legislation and practices, survey conducted in context of a UNHCR project by the Children and Youth Ombudsman of Styria in cooperation with *Asylkoordination Österreich*, question 19, available in English online at: [http://www.asyl.at/umf/umf/guardianship\\_austria.pdf](http://www.asyl.at/umf/umf/guardianship_austria.pdf).

370 ANAFE, *Statistiques relatives aux étrangers à la frontière*, 2008, p. 10, available online at: <http://www.anafe.org/download/generalites/stats-za-nov2008.pdf>. See also Human Rights Watch, *Lost in Transit Insufficient Protection for Unaccompanied Migrant Children at Roissy Charles de Gaulle Airport*, October 2009, p. 25ff.



## Annex

This Annex provides an overview of the most relevant domestic legislation relating to the subjects covered in this report. Hyperlinks to the original language document or, where available, to English translations of the legislation are also provided. To increase the readability of the report, references to national laws have been replaced by acronyms or short names throughout, all of which are outlined in Table A1.

**Table A1: National legislations – full references and short name, EU27**

Country	Acronym / Short name	Full reference to national legislation
<b>Austria</b>	-	2005 Aliens Police Act (in German – amendments up to BGBl I No. 135/2009 included)
<b>Belgium</b>	Law on Foreigners	Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers Coordination Loi du 15/12/1980 Version 09/06/2010
<b>Bulgaria</b>	Law on Foreigners	Foreigners in the Republic of Bulgaria Act of 5 July 1999 (in Bulgarian)
<b>Cyprus</b>	Aliens Act	Aliens and Immigration Act, 2001
<b>Czech Republic</b>	FORA	Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Territory of the Czech Republic last amended by judgement of the Constitutional Court promulgated under No. 47/2009 Coll. (unofficial English translation)
<b>Denmark</b>	Aliens Act	Aliens (Consolidation) Act No. 785 of 10 August 2009 (English translation)
<b>Estonia</b>	OLPEA	Obligation to Leave and Prohibition on Entry Act 21 October 1998 (unofficial translation with amendments up to 9 June 2004 included)
<b>Finland</b>	-	Aliens Act (301/2004) (unofficial English translation – amendments up to 1426/2009 included)
<b>France</b>	CESEDA	Code de l'entrée et du séjour des étrangers et du droit d'asile (in French – amendments up to 11 March 2010 included)
<b>Germany</b>	Residence Act	Residence Act of 30 July 2004 (Federal Law Gazette I, p. 1950) as promulgated on 25 February 2008 (Federal Law Gazette I, p. 162) (in German – Amendments up to 30 July 2009 (BGBl. I S. 2437) included)
<b>Greece</b>	TCN Act	Codification of legislation on entry, residence and social integration of third-country nationals on Greek territory, Law 3386/2005 (Government Gazette-GG A 212), (unofficial English translation at <a href="http://www.mfa.gr/softlib/Aliens%20Law%20Grk%20(N3386%20-%202005)%20(EN)%20Codification%202009.09.pdf">http://www.mfa.gr/softlib/Aliens%20Law%20Grk%20(N3386%20-%202005)%20(EN)%20Codification%202009.09.pdf</a> – amendments up to 3801/2009 (GG A 163) included)
<b>Hungary</b>	TCN Act	Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (unofficial English translation)
<b>Italy</b>	LD 1998/286	Decreto Legislativo, 25 luglio 1998, n. 286 (in Italian – amendments up to law of 15 July 2009, No. 94)

<b>Ireland</b>	- - - - -	Illegal Immigrants (Trafficking) Act, 2000 Immigration, Residence and Protection Bill, 2008 Immigration Act 1999 Immigration Act 2003 Immigration Act 2004
<b>Latvia</b>	Immigration Law	Immigration Law of 20 November 2002 last amended on 26 February 2009
<b>Lithuania</b>	Aliens Act	Law on the Legal Status of Aliens, 29 April 2004 No. IX-2206 (English translation)
<b>Luxembourg</b>	Immigration Law	Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration, Mémorial A-No 138, 10 September 2008 (in French)
<b>Malta</b>	-	Immigration Act (Chapter 217) of 21 September 1970 (in English – amendments up to Act XXIII of 2002)
<b>Netherlands</b>	Aliens Act	Netherlands Aliens Act 2000 (in Dutch – version as of 23 August 2010)
<b>Poland</b>	Act on Aliens	Act on Aliens of 13 June 2003, Dz.U.03.128.1175 (unofficial English translation – amendments up to 2002 No 113, it. 984 and No 127, it. 1090)
<b>Portugal</b>	Act 23/2007	Act 23/2007 Act approving the legal framework of entry, permanence, exit and removal of foreigners into and out of national territory (English translation)
<b>Romania</b>	Emergency Ordinance	Emergency Ordinance No. 194 from 12 December 2002 on the status of aliens in Romania (English translation – version as of 26 June 2007)
<b>Slovak Republic</b>	Aliens Act	No. 48/2002 on the Residence of Aliens (in Slovak, click on "Vyhľadat" – amendments up to 594/2009)
<b>Slovenia</b>	Aliens Act	Aliens Act, Official Gazette, No. 64/09, 10.8.2009 (unofficial English translation with amendments up to 21/10-2005)
<b>Spain</b>	Law 4/2000	Law 4/2000 of 11 January 2000 (in Spanish – as amended up to 12 December 2009)
<b>Sweden</b>	Aliens Act	Aliens Act (2005:716) (in English – with amendments up to and including Swedish Code of Statutes 2009:16)
<b>United Kingdom</b>	- -	Immigration Act 1971 Nationality, Immigration and Asylum Act 2002

Source: FRA, September 2010





European Union Agency for Fundamental Rights

**Detention of third-country nationals in return procedures**

2011 — 65 pp — 21 x 29.7 cm

ISBN 978-92-9192-639-8

doi: 10.2811/85200

**Europe Direct is a service to help you find answers  
to your questions about the European Union**

Freephone number (\*):  
00 800 6 7 8 9 10 11

(\* Certain mobile telephone operators do not allow access to 00 800 numbers or these calls may be billed.

This report deals with deprivation of liberty of irregular migrants pending return. The grounds for any deprivation of liberty must be set forth in law in a clear and exhaustive manner. Even when based on legitimate grounds, detention has to fulfil additional requirements in order not to be arbitrary. For example, return proceedings have to be carried out with due diligence and there must be realistic prospects of removal. Indefinite pre-removal detention is arbitrary. Detention can also become arbitrary if the purpose for which it was ordered can be achieved by applying less restrictive measures, such as regular reporting requirements or residence restrictions. A number of procedural safeguards have been set up to reduce the risk of unlawful or arbitrary detention. These include the right to be informed of the reasons for detention in a language the person understands, the right to judicial review of the detention decision and legal assistance.

FRA - European Union Agency for Fundamental Rights  
Schwarzenbergplatz 11  
1040 - Wien  
Austria  
Tel.: +43 (0)1 580 30 - 0  
Fax: +43 (0)1 580 30 - 691  
Email: [information@fra.europa.eu](mailto:information@fra.europa.eu)  
[fra.europa.eu](http://fra.europa.eu)

