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7.8 Detention

Detention is defined as the confinement of an applicant for international protection by a Member State, where the applicant is deprived of his or her freedom of movement. The detention of asylum seekers is governed by specific provisions of EU law, namely by the recast Reception Conditions Directive, recast Asylum Procedure Directive and the Dublin III Regulation. They include an exhaustive list of grounds under which applicants can be detained during the asylum procedure, detailed procedural safeguards (e.g. regarding the length of detention and judicial review) and conditions of detention, including for vulnerable applicants.

The recast Reception Conditions Directive, Article 8 foresees a list of six grounds that may justify the detention of asylum applicants:

> To determine the identity or nationality of the person;
> To determine the elements of the asylum application that could not be obtained in the absence of detention (in particular, if there is a risk of absconding);
> To decide, in the context of a procedure, on the asylum seeker's right to enter the territory;
> In the framework of a return procedure, when the Member State concerned can substantixate on the basis of objective criteria that there are reasonable grounds to believe that the person tried to delay or frustrate it by introducing an asylum application;
> For the protection of national security or public order; and
> In the framework of a procedure for the determination of the Member State responsible for the asylum application under the Dublin III Regulation when there is a significant risk of absconding.

The Return Directive establishes common rules concerning detention as a last resort in order to prepare the return of a rejected applicant or carry out a removal process.

In practice, detention may occur at different stages of the asylum procedure:

> *At the start of the asylum procedure*, when an individual lodges an application for international protection;
> *Pending the examination of a claim for international protection*, based on grounds set out in the EU acquis, for example in order to determine or verify the applicant's identity or nationality, decide on the applicant's right to enter the territory or organise a transfer to another Member States under the Dublin procedure.
> *Upon completion of the asylum procedure*, when a former applicant is detained pending return.

Member States must ensure that the rules concerning alternatives to detention are defined in national law. The ECHR supplements existing legal frameworks in countries by setting additional constraints and safeguards during detention, mainly based on Article 3 on inhuman or degrading treatment and Article 2 on the liberty of movement.

7.8.1 Legislative changes and recourse to detention in practice

Several EU+ countries amended their national legislations concerning detention in the asylum procedure in 2019. For example, Hungary added new criteria for compulsory confinement of third country nationals under the Aliens Policing Procedure with a legal amendment in 2018, which entered into force in 2019
(HU LEG 03).

Lithuania introduced non-cooperation with authorities during the asylum application as a ground for detention. As of 1 July 2019, when grounds for detention are established, the Migration Department must inform the SBGS, and the SBGS refers to a district court requesting to sanction the detention of an asylum applicant. Prior to 1 July 2019, the institution in charge of accepting an asylum application referred to the court.

Luxembourg addressed the prolongation of detention by initiating a systemic verification process by administrative jurisdictions on the conditions for prolonged administrative detention of third country nationals in case of a fourth and fifth renewal of the decision to detain (LU LEG 03).

The issue of asylum seekers posing a threat or a danger to national security was of particular concern to various EU+ countries in the context of applying detention, such as Austria, Czechia and Cyprus.

Recourse to detention within the Dublin procedure reportedly increased in Belgium due to the legal modification of the criteria for the risk of absconding and in the Netherlands for applicants whose disruptive and aggressive behaviour regularly caused nuisance in the reception centres. They are placed in detention by the DT&V during the appeal stage of their procedure, provided there are sufficient grounds for detention. Following a ruling by the Council of State, the Dutch Aliens Act (*Vw, Vreemdelingenwet*) was amended (Article 50a) to permit applicants to be stopped, transferred to a place to be questioned, questioned and kept in custody for a maximum of six hours if it is necessary for the assessment of whether detention is necessary in the framework of the Dublin procedure (decision on the responsible state and implementation of the Dublin transfer) (NL LEG 01). Previously this was only possible when there was a reasonable suspicion of irregular stay.

Similarly, the United Kingdom Supreme Court ruling on the risk of absconding affected the detention of applicants in the asylum procedure between January 2014, when the Dublin III Regulation came into force and March 2017 when the United Kingdom regulations were changed.[502]

Detention was further linked to the acceleration of asylum procedures and the enforcement of return. Germany enhanced its framework by amending the prerequisites for placing a person in detention pending deportation to prevent absconding. Cyprus reported an increase in migrants who submitted applications for international protection while in detention to halt deportation. This concerned a few specific nationalities, for example, Georgians.

France strengthened various follow-up measures based on a new protocol model in order to improve the effectiveness of the supervision of foreign nationals subject to a return decision and extend the scope of return assistance to third country nationals in detention for irregular stay. This model was introduced with the Inter-Ministerial Instruction dated 16 August 2019 on improved coordination of follow-up on detained foreign nationals for whom a removal order has been issued and stipulates the procedures for registration and follow-up of asylum applications submitted in detention. This new protocol model sets forth that the registration and follow-up of asylum applications submitted in detention are to be performed without the foreign detainee leaving the detention centre. The entire asylum application is thus managed remotely and in written form. The detention centre is notified by the *préfecture* of the *département* about the outcomes of the asylum application procedure. Once OFPRA has processed the application, the decision is sent to the head of the detention centre, who then delivers it in a sealed envelope to the applicant, who in turn counter-signs the official notification.

To address the disappearance of minors, the Netherlands announced that its policy will be amended relating to unaccompanied minors whose departure can in principle be effected within no more than four weeks and can be detained in the secure family facility.[503] In the context of return, discussions took place Greece[504] to transform reception centres into departure centres. In Austria, targeted activities were carried out to identify asylum seekers who had absconded after receiving a negative decision and to take security measures,[505] while the average time for detention was estimated at 42 days.

Detention practices and conditions are monitored by human rights treaty bodies, specifically by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and CAT. In addition, national practices have been strongly criticised by civil society organisations. For example, the Border Violence Monitoring Network (BVMN) has raised concerns about detention conditions and detention in informal facilities breaching CPT standards.[506]

In Spain,[507] detention pending removal has been criticised to further increase the vulnerability of stateless persons, although according to Spanish National Police no stateless persons were detained as of 10 October 2019.[508] In Poland, criticism was aimed at the detention of minors and the procedures to identify victims of torture. There is an explicit prohibition under Polish law to detain victims of torture, however survivors of torture are often identified during detention due to complexity of the identification process.[509], [510]

Concern was also raised on the lack of identification mechanisms for detained applicants and removal without legal orders in Germany,[511] the detention of vulnerables in Austria[512] and the prolonged detention of minors in Greece,[513], [514] and Switzerland.[515] General conditions for detention in Hungary,[516] including chain refoulement,[517] was also criticised. The lack of interpreters in detention facilities was noted in some countries, for example in Bulgaria.[518] France was criticised for prolonged detention.[519]

7.8.2 Capacity in detention facilities

In 2019, EU+ countries took various measures to increase detention capacity. For example, a detention centre for women staying irregularly was opened in Holsbeek (Leuven), Belgium. The centre has capacity for 28 women (to be extended to 50 women in 2020).

In order to address a shortage in Germany, detainees can be placed in any detention facility as a temporary solution pending deportation. The law still stipulates that, within such facilities, detainees will be kept separately from criminal offenders (DE LEG 03).

The Swedish Migration Agency was mandated to increase detention capacity and by the end of December 2019, the number of places had risen from 417 to 528. The occupancy rate varied from 97 % to 100 % in the six detention centres. In late April, it opened a new detention centre in the town of Ljungbyhed. The new centre has a capacity of 44 detainees, and the Migration Agency recruited around 60 employees to ensure the operation of the centre.

Changes were also reported in Slovakia, where third country nationals were temporarily transferred from PDCF Medveďov to PDCF Sečovce within the implementation of the extraordinary measure.

Institutional changes in the Hungarian Immigration and Asylum Office affected the Asylum Detention Reception Centres (with facilities at Békéscsaba, Kiskunhalas, Nyírbátor and Röszke) which ceased to exist as independent legal entities with their own budget. Instead, operations remained at the following facilities: Community Shelter at Balassagyarmat, Asylum Detention Centre at Nyírbátor, Reception Centre at Vámosszabadi and the transit zones at Röszke and Tompa.

In Greece, the number of detained persons in the pre-detention centre, Fylakio, increased by 160 to 180 people by the end of October 2019. The average time under pre-RIC detention was 8 to 12 days before new arrivals are transferred to the RIC. Transfers were conducted in order to maintain free space in the Fylakio pre-detention centre for new arrivals, and thus, the full asylum registration may take place only after a transfer to a new pre-detention centre.[520]

7.8.3 Services in detention facilities

Many EU+ countries took measures to renovate or update existing facilities and services. In Austria, improvements were made to the provision of services in the Fieberbrunn and Schwechat facilities, for example medical and psychological support and expanding the shuttle service.[521]

In Estonia, a legal counsellor was assigned to the detention centre to ensure legal aid for detainees. Croatia, renovated the Centre for Foreigners to add functional common areas and equipment, while the monitoring of detention conditions in three centres was funded under AMIF.

7.8.4 Duration of detention

In 2019, the maximum length of retention was extended from 45 to 90 days in France, with a judge's approval. Nevertheless, less than 10 % of applicants stayed more than 45 days. In order to improve the conditions of detention, psychologists have been hired to work in the centres a few days each week. Also, activities like music or sport classes have been implemented in order to improve the conditions of detention.

In 2019, 276 children were retained in the country with their parents; unaccompanied minor children are not retained. An NGO reported that this situation resulted in tensions and violence in the centres.[522]

Concerns were also raised about the United Kingdom's use of detention without a time limit, including SOGI minorities.[523]

Among case law developments, in Cyprus, an application by a Georgian national led to his prolonged detention. Given his delay in making an asylum application, the claim was considered to have been made for the sole purpose of delaying or frustrating removal, however the Constitutional Court ruled that delays in the asylum procedure which cannot be imputed to the applicant do not justify the continuation of detention.

7.8.5 Alternatives to detention

Various EU+ countries started to shift policies to find alternatives to detention. For example, Hungary started detaining persons within the reception centre, within police stations in Cyprus and Lithuania, and in a designated residence with regular checks in Czechia (CZ LEG 01). Lithuania also introduced guardianship of a foreigner by a citizen.

A range of alternatives to detention was practiced in Malta, where 1 375 orders were issued. In contrast, the number of detention orders issued by the police to asylum applicants amounted to 256. In July 2019, the United Kingdom Immigration Minister issued a statement on improvements and continued reforms made to immigration detention, including promoting voluntary return and a pilot project to support vulnerable women outside of detention while their cases are resolved. Practical changes have also been made to Immigration Removal Centres, such as reducing the number of beds and rolling out the use of Skype.

Poland applied alternatives to detention to a majority of foreigners and the infrastructure of guarded centres for aliens with families has been adjusted to the needs of minors. Following pressure from the Helsinki Foundation for Human Rights, the Polish authorities indicated that the number of children placed in the administrative detention is decreasing and the use of alternatives to detention is on the rise.[524]

However, the Finnish Government Programme included a proposal on the technical monitoring of persons whose applications have been refused. According to the proposal, this would serve as an alternative to detention and the residence obligation, constituting a less restrictive and more appropriate precautionary measure.[525] Similar initiatives to enhance alternatives to detention was reported in Luxembourg.

7.8.6 Jurisprudential developments

The role of jurisprudence in detention is decisive in interpreting the law and amending practices. The ECtHR[liv] reviews detention practices and conditions on the basis of the EU Charter and grants interim measures to address urgent situations, for example in Greece[526] and Hungary.[527]

In 2019, the Court reaffirmed the right to a rapid decision on the lawfulness of detention for example in *O.S.A. and Others vs Greece* and *Haghilo vs Cyprus*, the requirements of a "reasonable" interval in the context of periodic judicial review of detention in asylum proceedings and the availability of remedies. In particular regarding the detention of unaccompanied minors in police stations, the Court ruled in H.A and Others vs Greece that the detention conditions to which the minor applicants had been subjected in various police stations represented degrading treatment and explained that detention on those premises could have caused them to feel isolated from the outside world, with potentially negative consequences for their physical and moral well-being.

Similar deliberations were reached in another case involving five unaccompanied minors from Afghanistan. In another case involving the United Kingdom, it urged that the minors be placed in reception centres for unaccompanied minors as a priority. As in the case of vulnerable people, authorities have to act with appropriate due diligence.

In other cases, the Court ruled in *Kaak and Others vs Greece* and in *O.S.A. and Others vs Greece* that remedies proposed to detained migrants in emergency reception centres were neither accessible nor sufficient.

The long-awaited *Ilias Ahmed vs Hungary* was ruled in November 2019. Upon request from Hungary, the case had gone from the ECtHR to the Grand Chamber for decision. The Grand Chamber held unanimously that there had been a violation of the ECHR, Article 3 (prohibition of torture or inhuman or degrading treatment) regarding the removal of the applicants to Serbia and found no violation of
Article 3 on the conditions in the transit zone. The Court found in particular that the Hungarian authorities had failed in their duty to assess the risks of the applicants not having proper access to asylum proceedings in Serbia or being subjected to chain refoulement, most likely to Greece where conditions in refugee camps had already been found to be in violation of Article 3. The Chamber held that Article 5 was not applicable to the case as there had been no *de facto* deprivation of liberty in the transit zone. The Court found that the applicants had entered the transit zone of their own initiative and it had been possible in practice for them to return to Serbia, where they had not previously faced any danger. Their fears of a lack of access to Serbia's asylum system or refoulement to Greece were not considered to make the stay in the transit zone involuntary.[lv]

Progress on the execution of ECtHR cases regarding detention conditions is followed closely by the Committee of Ministers within the Council of Europe. Under the enhanced supervision procedure, compliance by Member States is periodically reviewed, as was done in 2019 in

Greece,[528] Lithuania,[529] and Poland.[530]

Decisions by national courts

Judges in national courts can review detention practices which have direct impact on national policies. Following the Gnandi judgement, the decision in *Case C. et al.* and related judgment by the Administrative Law Division of the Council of State of 5 June 2019 in the Netherlands, a proposal was submitted to amend the Aliens Act (Vw) (NL LEG 04). The aim of the amendment was to address the void in legislation regarding third country nationals who submitted an asylum application at the border. They cannot be held in detention after a negative decision if they have the right to appeal.

Similarly, the Council of State in Belgium suspended the decree about the detention of children in the 'family home' of the closed centre 127bis as they were exposed to noise pollution due to its proximity to the airport.[531]

In other cases, national courts clarified practical elements and key concepts. In particular, jurisprudence addressed the detention of applicants for international protection with falsified documents, applicants for international protection with regard to subsequent applications, the strict prerequisites for detention of applicants subject to a return procedure when there are reasonable grounds to believe that the application is merely in order to delay or frustrate the enforcement of the return decision, the proportionality and possibility to implement less coercive alternatives when detention exceeds reasonable time limits, the obligation to review changes that might result in continued restriction of personal freedom, judicial remedies against a detention order, detention at the borders, and the calculation of maximum limits.

The implementation of the Dublin III Regulation in relation to detention was also brought before the courts addressing its legality and the interpretation of the risk of absconding in the United Kingdom.

[liv] To avoid issues on arbitrary presentation/interpretation of cases, wording is similar to press releases.

[lv] Read more on differences or similarities between the two judgments at: Council of Europe, ECHR. (2019). Q & A : Ilias and Ahmed v. Hungary, Grand Chamber judgment of 21 November 2019. https://echr.coe.int/Documents/Press_Q_A_Ilias_and_Ahmed_Hungary_ENG.pdf

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