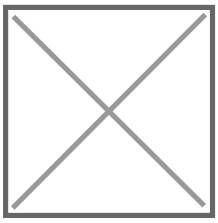
Please cite as: EUAA, 'Section 4.8 Detention during the asylum procedure' in *EASO Asylum Report 2021*, Gennaio 2022.

Section 4.8 Detention during the asylum procedure



Detention is defined as the confinement of an applicant for international protection by a Member State, where the applicant is deprived of the 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 substantiate with objective criteria that there are reasonable grounds to believe that the person tried to delay or frustrate a return by introducing an asylum application;
- For the protection of national security or public order; and
- In the determination of the Member State responsible for an asylum application under the Dublin III Regulation when there is a significant risk of absconding.

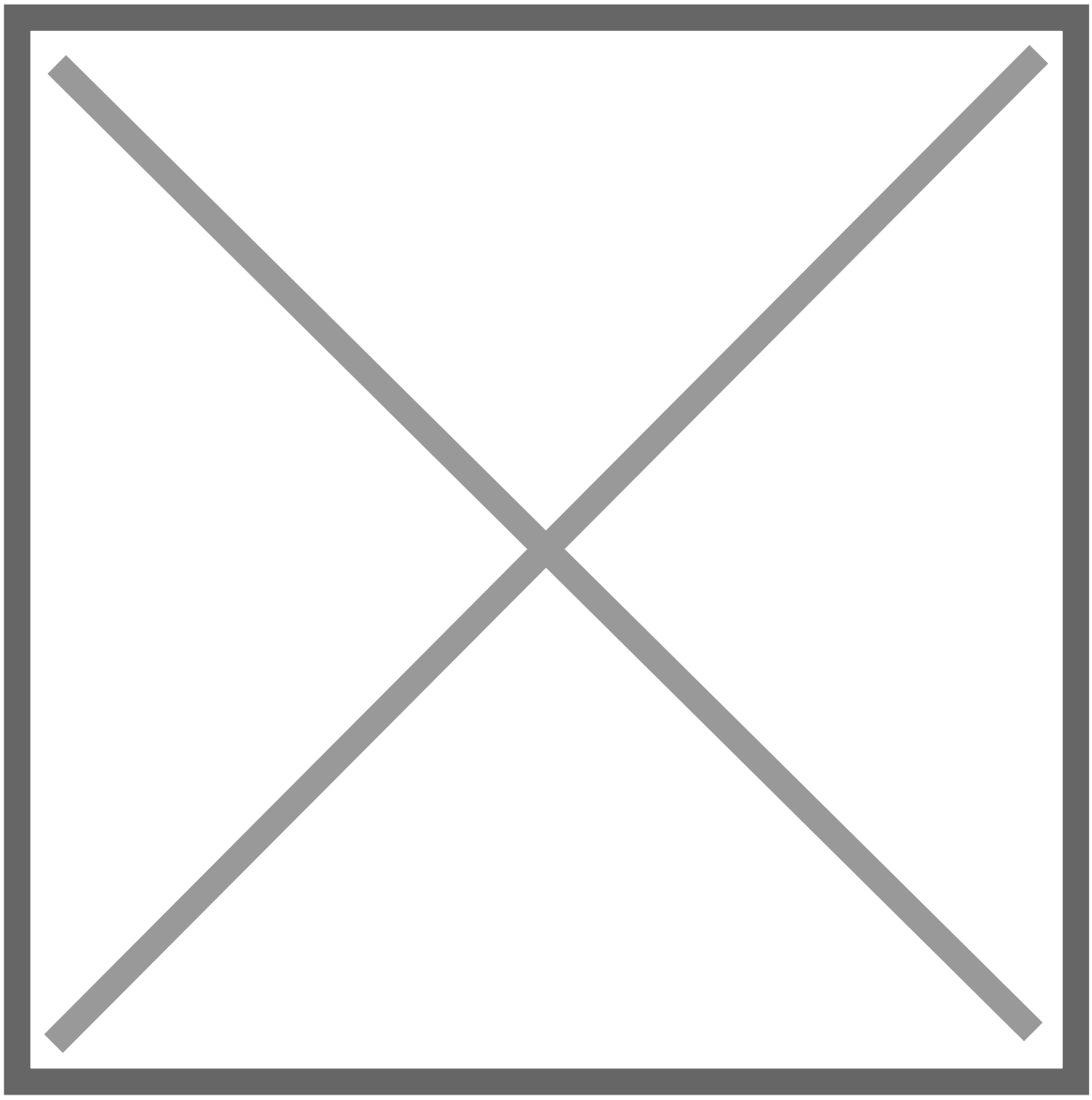
The recast Asylum Procedures Directive, Article 26 refers back to the grounds and the procedure outlined in the recast Reception Conditions Directive.
The Return Directive establishes common rules concerning detention as a last resort in order to prepare the return of a rejected applicant or carry out 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;

- [x] 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; or
- [x] *Upon completion of the asylum procedure*, when a former applicant is detained pending a return.

Member States must ensure that the rules concerning alternatives to detention are defined in national law.
International human rights law supplements the legal framework in countries by setting additional constraints and safeguards during detention. Accordingly, international human rights bodies at the regional and international levels, for example the ECHR, CPT, UN Human Rights Committee and the UN Committee against Torture (CAT), remain guardians of detention practices against any arbitrary revision of international and European standards.

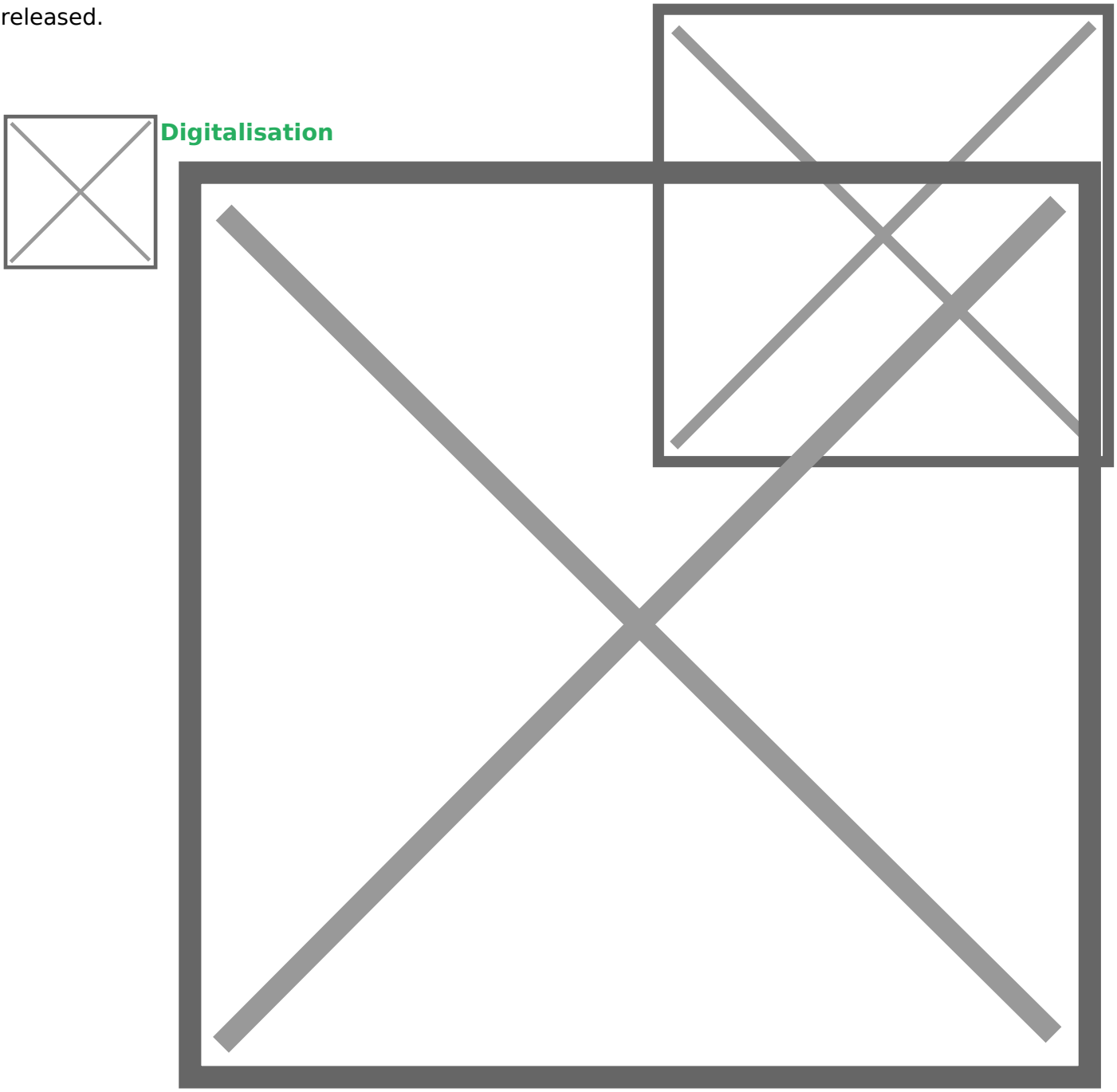
- [x] **COVID-19**



General emergency measures and public health restrictions affected the situation of asylum seekers in detention, in particular with delays in procedures and time in detention as a result of

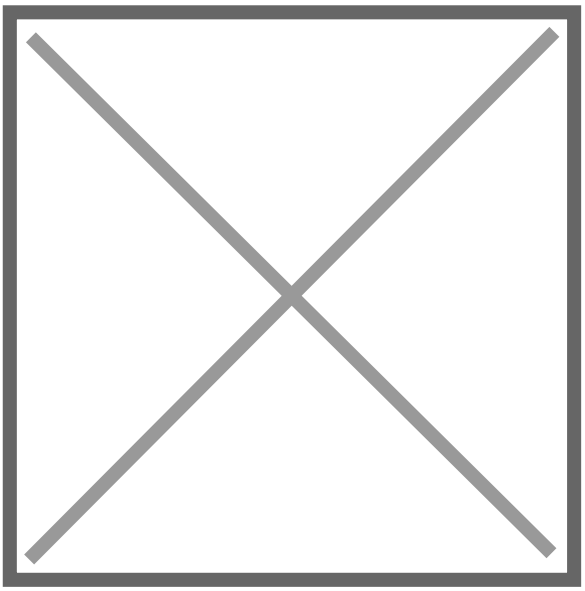
postponed returns. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) issued a statement of principles which underlined that measures should not result in inhuman or degrading treatment of persons deprived of their liberty in the context of the COVID-19 pandemic. As a result of new health protocols, preventative measures were put in place in detention and services were reorganised or temporarily discontinued.

In the majority of EU+ countries, detention centres became less occupied due to COVID-19 restrictions as the removal of rejected applicants was suspended and third-country nationals were released.



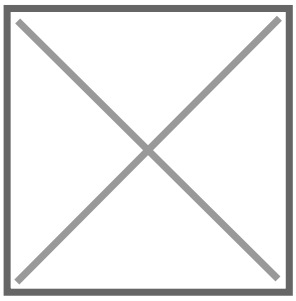
Digitalisation

No developments were reported on the digitalisation of procedures in detention by EU+ countries.



In 2020, some EU+ countries amended their legislation regarding detention in the context of mass arrivals of third-country nationals and return procedures. The main challenges continued to be recourse to detention, conditions in detention and the placement of minors in detention, while alternatives remained limited. During the year, courts analysed detention policies and practices interpreting the law in practice and setting standards.

The new proposal for the Pact on Migration and Asylum builds on the provisional agreement between the European Parliament and the European Council. Detention provisions are further endorsed in the return crisis management procedure,[646] asylum border procedure and the new border procedure for carrying out the return of a rejected asylum applicant.[647], [648] The European Parliament recently noted[649] that the proposal to recast the Return Directive would bring a major change to the detention of returnees by compounding the grounds for detaining a person subject to a return procedure. The directive would include a non-exhaustive list of grounds for detention and introduce new grounds for detention unrelated to the return procedure and linked to national or public security concerns. The proposal also calls for some Member States to prolong the detention period established in national law, from a maximum detention period of 3 to 6 months. It would further limit the automatic suspensive effect of the enforcement of return decisions. Civil society organisations and academia have voiced their concerns on expanding detention practices for longer periods and with fewer safeguards, while criticising the provisions on the detention of minors.[650]



[646] Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM/2020/613 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601295614020&uri=COM%3A2020%3A613%3AFIN

[647] Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2020/611 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:611:FIN

[648] See also: Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast); A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM/2018/634 final. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0634

[649] European Parliament. (March 2021). *Briefing, EU Legislation in Progress: Recasting the Return Directive* .

https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637901/EPRS_BRI(2019)637901_EN.pdf
[650] See for example: Human Rights Watch. (2020, October 8). *The Pact on Migration and Asylum*. https://www.hrw.org/news/2020/10/08/pact-migration-and-asylum ; Platform for International Cooperation on Undocumented Migrants. (2020, October 14). *More detention, fewer safeguards: How the new EU Pact on Migration and Asylum creates new loopholes to ignore human rights obligations*. https://picum.org/more-detention-fewer-safeguards-how-the-new-eu-pact-on-migration-and-asylum-creates-new-loopholes-to-ignore-human-rights-obligations/; EuroMed Rights. (2020, November 13). *New Pact, wrong impact: simulation shows EU Migration Pact won't work*. https://euromedrights.org/publication/new-pact-wrong-impact-simulation-shows-eu-migration-pact-wont-work/ ; Terres des Hommes at al. (December 2020). *Joint statement on the impact of the Pact on Migration and Asylum on children in migration* . https://www.terredeshommes.org/wp-content/uploads/2020/12/Joint-Statement-on-EU-Pact-on-Migration-and-Asylum.pdf ; Cornelisse, G. (2021, January 6). The Pact and Detention: An Empty Promise of 'certainty, clarity and decent conditions. *EU Immigration and Asylum Law Policy*. https://eumigrationlawblog.eu/the-pact-and-detention-an-empty-promise-of-certainty-clarity-and-decent-conditions/

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