4.7. Detention

This section provides an overview of the developments concerning detention, focusing on the areas of grounds for detention, time limit for detention, alternatives to detention, and applicants' freedom of movement. It then presents the most significant shifts in detention capacity in EU+ countries. It continues with a presentation of conditions in detention facilities, before turning to issues raised by civil society actors in general. The section concludes with an overview of developments on the issue of detention before the European Court of Human Rights throughout 2018.

Detention[514] of asylum seekers is governed by specific provisions of EU asylum law, namely by the recast Reception Conditions Directive, recast Asylum Procedure Directive and Dublin III Regulation, which include a permissible exhaustive list of grounds under which applicants can be detained during the asylum procedure[515], detailed procedural safeguards (for instance, regarding the length of detention and judicial review) and conditions of detention, including of vulnerable applicants. Return Directive also establishes common rules concerning detention for the purpose of removal in order to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.

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

- at the start of the procedure, when an individual placed in detention submits an application for international protection from detention and the grounds for their detention remain;
- pending the examination of the claim - when an applicant is placed in detention facility, based on grounds enlisted in the EU acquis, for instance, in order to determine or verify his or her identity or nationality; decide, in the context of a procedure, on the applicant's right to enter the territory; or organise a Dublin transfer;
- upon completion of procedure - when a former applicant is detained pending return.

In addition, Member States shall ensure that the rules concerning alternatives to detention are laid down in national law.

The European Convention of Human Rights supplements the existing legal framework by setting additional constraints and safeguards during detention, mainly based on Articles 3 on inhuman or degrading treatment and Article 2 Protocol 4 ECHR on liberty of movement.

In 2018, no significant changes were reported in respect of detention during the asylum procedure and pending return in **Germany**, **Spain**, **Ireland**, **Latvia**, **Malta**, **Netherlands,**[516] **Poland**, **Portugal**, **Slovenia**, **Slovakia** whereas the following developments occurred in EU+ countries:

Legislative changes - Grounds for detention

New laws, amendments, or governmental instructions which, in many cases, broadened the grounds for detention were introduced in the following EU+ countries:

The provisions governing detention pending removal were amended through the Act Amending the Aliens Law 2018[517] in **Austria**, which regulates detention if an asylum seeker represents a potential danger for public order or safety, or when there is a risk of absconding and detention is a proportionate measure (Article 76(2)(1) of the Aliens Police Act 2005).[518] This amendment was made after a ruling by the Supreme Administrative Court (Ro 2017/21/0009 of 5 October 2017[519]), in which the court found that Article 76 of the Aliens Police Act 2005 in its previous form did not conform to the requirements for detaining individuals during international protection procedures as set out in the Reception Conditions Directive (2013/33/EU). Thus, detention-pending removal could not be ordered and imposed on foreign nationals during asylum procedures, except in Dublin-related cases and in the case where the individual was already in detention when applying for protection. Consequently, national law adapted Article 8(3)(e) of the Reception Conditions Directive clearly structuring the grounds for detention pending removal.[520] The amendments became effective as of 1 September 2018.

In **Belgium**, the Law amending the Belgian Immigration Act, which was adopted on 21 November 2017, entered into force on 22 March 2018. The law transposes *inter alia* the provisions of the recast Reception Conditions Directive, affirms that no foreigner can be put in detention for the mere reason he has applied for asylum unless apprehended and detained in the context of forced return[521], stipulates alternatives to detention, and outlines the grounds for detention for applicants for international protection on the Belgian territory[522] and at the border.[523] In the latter case, a decision has to be taken by the Commissioner General for Refugees and Stateless Persons (CGRS) within four weeks upon the file receipt from the Immigration Office. The law further defines the risk of absconding according to set criteria.[524] Following the entry into force of the Royal Decree of 22 July 2018 on 11 August 2018[525], irregularly staying families with minor children can be detained with a view to removal in family housing on the grounds of the closed detention centre 127bis.[526] This Royal Decree was then partially suspended by the Belgian Council of State.[527]

Following the amendments introduced in Decree No 129 of 5 July 2018[528] in **Bulgaria**, new proceedings were introduced for the immediate transfer of UAMs residing in the temporary closed accommodation centres to adequate accommodation in social services.

Croatia also amended the Act on amending the Immigration Act (OG, No 46/18) broadening the list of risks of absconding, or in which cases the detention can be determined, including cases that a third-country national has no identity or travel document, has no ensured accommodation, has no registered residence, has stated that he will not comply with the return decision or that he will obstruct return etc.[529]

In **France**, the new law adopted on 20 March 2018 was declared in conformity with the Constitution[530] by the French Constitutional Court on 15 March 2018. The law specifies the criteria justifying detention, including significant risk of absconding, proportionality of the detention measure and impossibility of applying house arrest. A new Law of 10 September 2018 introduced the prolongation of detention when an asylum application is submitted late in detention: it is now possible to request the judge to exceptionally extend the detention for two additional periods of fifteen days, raising the maximum duration of detention to 90 days. The appeal will not automatically have a suspensive effect and it will be up to the administrative judge to suspend the execution of the removal order until the CNDA reaches a decision.

Similarly, **Norway** broadened standards of risk of absconding, according which applicants who fall into the Dublin case category due to lodging an asylum claim or are found to have a former connection to an EU member country, will be risk-evaluated with regards to absconding, with a view to reduce the number of disappearances and further illegal stay in the country.

Italian Law Decree No 113 of October 2018, converted in Law No 132 of 1 December 2018 envisages detention in order to establish an asylum seeker's identity[531] and temporary detention in police facilities or at

the border once pre-removal centres have reached their full capacity. Detention may also be applied beyond the end of identification procedure for a period of maximum thirty days. If it needs to be extended, one may be detained in the CPR (permanent Centres for the repatriation) for a maximum period of 180 days.

In **Greece**, Law 4540/2018 [532] transposed Articles 8-11 of Directive 2013/33/EU with regard to rights and guarantees during detention, including special provisions for vulnerable persons and applicants with special needs as well as the possibility to impose geographical restrictions to applicants for international protection to ensure fast process of applications.

United Kingdom announced reforms to immigration detention by the Home Secretary in July, including work with charities, faith groups, communities and other stakeholders to develop alternatives to detention, strengthening support for vulnerable detainees and increasing transparency around immigration detention. These reforms aim to improve facilities for detainees in immigration removal centres and training for staff to enable them to work with detainees more closely.

Time limit for detention

In **Belgium**, the new law also defines the duration of detention for a maximum of two months. It can be prolonged for two months if risks for national security or public order and then on a month-by-month basis by decision of the Minister (with a maximum period of six months). When determining the responsible EU state in the course of Dublin procedure, the maximum detention is set to six weeks extended by another six weeks for the transfer.[533]

The Law of 10 September 2018 in **France** increased the maximum duration of administrative detention of irregular migrants and asylum seekers under the Dublin procedure from 45 to 90 days.[534] This time limit[535] also applies to last minute applications of detainees pending return (please see the section Legislative changes – Grounds for detention for more details about last minute applications in detention). Similarly, **Italy** increased the time limit for detention from 90 to 180 days in the detention centres for repatriation as well as to establish ones identity and nationality. **Poland** adjusted detention period in accordance with Article 15 of Directive 2008/115/EC, prolonging the foreigner's detention to 18 months. The possibility to extend detention period pending return was envisaged in **Luxembourg**. Following the adoption of Bill No°7238 amending the Immigration Law, the minister may decide to extend detention due to the length of the removal operation.[536]

Following CJEU Judgment[537], **Sweden** also adjusted the maximum time in detention in accordance with the Dublin Regulation (when a person is not detained when the request is accepted) to two months.

Alternatives to detention

Several EU+ countries introduced or were planning to introduce new forms of alternatives to detention, in the context of both asylum and return procedures. In some cases this was to counterbalance stricter rules on the detention of applicants.

In **Belgium**, Article 74/6(1) now provides a designation of a mandatory residence as an alternative to detention. A Royal Decree will further outline the other alternatives to detention in Belgium for the applicants for international protection, such as, the deposit of a financial guarantee and the duty to report regularly. However, in 2018, no other alternatives were regulated.

Following the amendments introduced at the end of 2017 in **Bulgaria**, two new alternatives to detention were introduced, namely; deposit of a monetary guarantee and submission as a temporary pledge of a valid passport or another travel document, which he/she shall receive back after being removed from the country in

pursuant the return or the expulsion order. The amendments and supplements of the Rules on the Application of the FRBA (SG ??. 57/10.07.2018) illustrated the additional measures to guarantee alternatives to detention in centres of closed type. In this regard, it specifies the implementation of 'weekly appearance in the territorial structure of the Ministry of the Interior' which applies to foreigners who are exempt from the special homes for temporary accommodation of foreigners after the expiry of the maximum period for compulsory accommodation according to the law or are released by a court decision. Measures were also introduced in order to establish a mechanism for the control of illegally staying foreigners, who are accommodated in hotels, hostels and other accommodation according to the Law on Tourism.

Luxembourg proclaimed that the new semi–open facility that will replace the Kirchberg Return Sturcture will also serve as an alternative to the Detention Centre taking into account the needs of various different groups.[538]

A pilot project at the **Swedish** Migration Agency to further develop supervision as an alternative to detention, started in 2018. This project is implemented at two different asylum reception units of the Migration Agency with a view to improve detention standards and achieve humane and dignified returns.

In practice, **Lithuania** and **Croatia** resorted to alternative measures to detention. In the latter case, appearance at the Reception Centre at a specific time was used. Further, a project on 'Alternatives to Detention' in return procedures was initiated to be funded through (AMIF). The aim of the project is to increase open accommodation capacity through the creation 9 facilities in Mala Gorica near Petrinja for third-country nationals in the return process and one facility for administrative purposes. Discussions with the local community were ongoing at the end of 2018.[539]

Alternatives to detention were used in **Cyprus** in cases where the Director of Civil, Registry and Migration Department, or the Minister of Interior, decided that there is no prospect of removal, in accordance with the Return Directive under the condition that there were no reasons of public safety or public order involved.

In January, the **United Kingdom** introduced new immigration bail which repealed and replaced the previous complex legal framework contained in Schedules 2 and 3 to the Immigration Act 1971. The new framework defines who can be bailed, the conditions and the consequences if an individual breaches bail conditions, as well as conditions for the termination of bail. Further, the Home Office has partnered with the United Nations High Commissioner for Refugees to work with charities, faith groups and local communities to develop a number of pilot schemes that will provide support to a wide range of migrants in the community, including both men and women. These pilot schemes will begin in 2019 for two years to support different groups of migrants at risk of immigration detention. Based on the project results, the Home Office will explore their implementation on a larger scale.[540]

Developments regarding freedom of movement

According to AIDA report[541], concerns were raised for first-time applicants are systematically detained in **Bulgaria** and the majority of asylum seekers apply from pre-removal detention centres for irregular migrants. Further, the State Agency for Refugees (SAR) continued to perform registration and interviews of asylum seekers in pre-removal detention centres. This practice has been disputed as illegal by civil society organisations[542], and national courts[543]. In November 2018, the European Commission decided to send a letter of formal notice to **Bulgaria** concerning the incorrect implementation of EU asylum legislation in relation *inter alia* to the detention of asylum seekers as well as safeguards within the detention procedure.[544] Concerns on detention grounds and effective judicial control by the Special Representative of the Secretary General on migration and refugees (Council of Europe)[545] reiterating the Committee of Ministers position on the urgency to adopt legislative reforms.[546]

Similarly, the Human Rights Committee (UN) expressed concerns on the restriction of asylum seekers in transit zones in **Hungary** due to 'the extensive use of automatic immigration detention in holding facilities and claims that restrictions on personal liberty have been used as a general deterrent against unlawful entry rather than in response to an individualised determination of risk'.[547] The measures are also subject to a European Commission infringement procedure.

Following the Council of State's ruling[548] in **Greece**, which annulled the decision of the Director of Greek Asylum Authority imposing geographical restriction due to lack of reasoning, decision on the geographical restriction of newly arrived asylum seekers in Kos, Leros, Samos, Chios, Lesvos (hotspot islands) as well as Rodos were issued.[549] [550] According this Decision, the restriction is imposed due to reasons of public interest and in particular, for the implementation of the EU-Turkey Statement of 18 March 2016, in order to attain a faster and more efficient management of applications for international protection. It is clarified that vulnerable applicants and Dublin cases do not fall under this restriction.

Detention of vulnerable groups

In **Belgium**, the Royal Decree of 22 July 2018 provides the possibility to detain irregularly staying families with minor children with a view to removal in family housing on the grounds of the closed detention centre 127bis of Steenokkerzeel (next to Brussels National airport). This is envisaged as a measure of last resort (a 'cascading system' applies) and for the shortest appropriate period of time.[551] The Royal Decree specifies that the families may be detained for a maximum of two weeks (which may be extended by an additional two weeks). This measure was intensely debated at the national level, and many organisations[552] have published their views on this measure.[553] In response to the legislative reform, the Commissioner for Human Rights of the Council of Europe raised concerns about the possibility that migrant families with children may be detained and underlined the need to continue their efforts to develop alternatives to detention for families with children following their former positive practices.[554] [555] The Royal Decree was partially suspended by the Belgian Council of State in its judgement No 244 190 of 4 April 2019.[556]

As of July 2018, in **Bulgaria** unaccompanied children below the age of 14 are exempted from screening by the State Agency of National Security and sent directly to reception centres.[557] Similarly, in **Cyprus** unaccompanied children and/or families with children or vulnerable groups were not detained in Menoyia Detention Centre. In cases where a parent is detained and the child has no guardian or other place to stay, the Department of Social Services undertakes responsibility while the minor retains the right to visit its parent. In 2018, **Slovakia** amended the Act No 305/2005 Coll. on Social and Legal Protection bringing changes for UAMs.

In the latest legislative amendments[558], France emphasised that minors cannot be detained, except when they are accompanying an adult who falls under the specific situations listed under L551-1 of CESEDA. The **Hungarian** law that entered into force on 1 January 2018, envisages that special attention should given to LGBT asylum seekers in detention.

Norway specified provisions for the detention of minors as part of the return procedure, ensuring that minors are only arrested or detained as a last resort and for the shortest possible period of time. Further, on 14 May 2018, several articles of the Norwegian Immigration Act and the Criminal Procedure Act were revised, In this context, Section 106(c) regarding the arrest and detention of minors was added. It specifies that minors can only be detained in extraordinary situations as a last resort and absolutely necessary measure in order to ensure identity checks or the minor's deportation. This section also states that children under the age of 18 cannot be held in detention for more than 72 hours at a time and more than 144 hours including the arrest prior to detention. An exception may be made in exceptional cases which may last only one week at a time. [559]

In **Greece**, minors may be deprived of their liberty for the purpose of reception and identification as a measure of last resort that should not exceed 25 days.[560] In exceptional cases, such as the mass influx of minors, if the safe referral of children to appropriate accommodation is not feasible within the above period, it can be extended for an additional period of twenty (20) days. However, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) report [561] on Greece noted that as of 31 May 2018, out of the estimated number of 3 500 unaccompanied children currently in Greece, less than 1 000 were accommodated in dedicated shelter facilities and reiterated its previous recommendation that the Greek authorities pursue their efforts to increase significantly and rapidly the number of dedicated open (or semi-open) shelter facilities for unaccompanied children.

A new pilot scheme, called Action Access, was announced in December 2018 in the **UK**. The initiative aims to accommodate vulnerable women within the communities instead of exposing them to immigration detention. Working in partnership with Action Foundation, a charity, which provides support to asylum seekers, migrants, and refugees, the first phase began in 2019 and will cover up to 50 women within two years.

Detention capacity

Accommodation capacity remained stable in **Croatia**, **Greece**[562] while increased and improved capacities were reported in the **Czechia** specifically designed to address the special needs of vulnerable groups[563], **Estonia**[564] in line with the Schengen evaluation which was carried out, **Finland**[565] and **Sweden.**[566]

In May 2017, the Council of Ministers in **Belgium** also decided to gradually increase the detention capacity for irregular migrants, which amounts to 600 places for 2018 and will gradually increase to 1 066 places by the year 2022.[567] New family units were eventually opened on 11 August 2018 in the Repatriation centre 127bis, which are intended for the stay of families with underage children in view of their return.[568] Currently, there are four family units at the detention centre 127bis, two of which can accommodate six people and another two for eight people.

In **Bulgaria**, two pre-removal detention centres operate in Busmantsi and Lyubimets, whereas the Elhovo allocation centre was closed in April 2018.[569]

As reported in 2017, plans were progressed for the development of a dedicated immigration detention facility at Dublin Airport in **Ireland**, which entails the refurbishment of an existing facility in Garda station, office accommodation and detention facilities. Works started on 8 May 2018 by the Office of Public Works on behalf of An Garda Síochána (national police force) and is expected to be completed in April 2019.[570]

Conditions in detention facilities

The family units introduced in the Repatriation centre 127bis in **Belgium** are supported by a multidisciplinary team composed of coaches, educators, a teacher, a medical professional, a psychologist and security staff is responsible for the daily monitoring of the families who live in the family units. Every day, an interdisciplinary meeting is organised in which the main issues are discussed. 19 staff members are responsible for these family units.

During 2018, the **Croatian** Legal Centre also monitored detention condition in three detention centres, based on an Agreement on monitoring of forced returns.

AMIF continued to co-finance in **Cyprus** the operational expenses, improvement measures, recreational activities and health (including mental health) services in Menoyia Detention Center and Kofinou Reception Centre under different projects. These projects improved significantly the mental and health condition of

residents of these two centres by funding i.e. and the overtime salaries for clinical psychologists visiting the centres in order to provide psychological support and counselling, their travelling costs and equipment and nursing services. Cyprus noted that the rights of foreign nationals are guaranteed based on the governing Law and Regulations, and the human rights driven policy in line with the reports and recommendations of the Ombudsman, CPT, UNHCR, and other national or European bodies.

Special provisions regarding free legal counselling in the detention facilities were enacted in the **Czechia**. This new system of the free legal counselling is different from the legal counselling provided by the NGOs and funded by the AMIF, which is also available.

The new detention facility in **Estonia** improved the living conditions of TCNs particularly with regard to the housing of families, recreational activities[571], material conditions[572] and services[573] provided.

On the other side, **Greece** was on the spotlight of the latest CPT periodic review regarding detention conditions.[574] The latest report pointed out the conditions of detention in police and border guard stations, the overcrowded conditions at Fylakio RIC and pre-removal centres, which on same cases could amount to inhuman and degrading treatment.[575]

The living conditions in detention centres were also under review before the European Court for Human Rights.

Judicial review of the detention order

The Constitutional Court in the **Czechia** repealed legal provisions according which, there was no possibility of repealing a decision restricting personal liberty when that limitation of personal freedom had ceased to exist. The contested provisions led to the complete exclusion of judicial review of a decision on the restriction of personal liberty, unless that limitation ends before the administrative court decides to proceed against such a decision.[576]

Concerns regarding widespread use of detention practices

Restriction of freedom and de facto detention in transit zones[577], hotspots or under 'protective custody'[578] or on public health grounds[579] as well as the duration of detention[580] was strongly criticised by civil society organisations. In this regard, the Hungarian Helsinki Committee, in conjunction with ECRE and a number of European project partners, launched a report examining the situation in Bulgaria, Greece, Hungary and Italy, with a specific focus on de facto detention.[581] Further, ECRE issued a Policy Note[582] highlighting that 'states are likely to exploit additional opportunities to generalise movement restrictions and expand detention for reasons of administrative convenience'.[583]

Detention in the jurisprudence of the European Court of Human Rights (ECHR)

The ECHR dealt with detention practices and conditions on various cases. Indicatively[584], in the case **J.R. and Others v. Greece** [585] concerning three Afghan nationals, who were held in the Vial reception centre, on the Greek island of Chios, and the circumstances of their detention, the Court found no violation for the one-month period of detention as it aimed to guarantee the possibility of removing the applicants under the EU-Turkey Declaration, which was regarded not arbitrary and nor 'unlawful'. The Court held however that there had been a violation of Article 5(2) (right to be informed promptly of the reasons for arrest) of the Convention, finding that the applicants had not been appropriately informed about the reasons for their arrest or the remedies available in order to challenge that detention. Similarly, the Court found no violation in the **O.S.A. and others v. Greece**[586] concerning the applicants' conditions of detention in the Vial centre on the island of Chios, and the issues of the lawfulness of their detention, the courts' review of their case and the

information provided to them.

Regarding the grounds of detention in the case **K.G. v. Belgium**[587] regarding an asylum-seeker who was placed and kept in detention under four decisions, for security reasons, while his asylum application was pending for approximately 13 months, the Court held that there had been no violation of Article 5(1) (right to liberty and security) of the Convention. It found in particular that public interest considerations had weighed heavily in the decision to keep the applicant in detention, and saw no evidence of arbitrariness in the assessment made by the domestic authorities. Lastly, the Court found that, in view of the issues at stake and the fact that the domestic authorities had acted with the requisite diligence, the length of time for which the applicant had been placed at the Government's disposal could not be regarded as excessive.

Detention of UAMs was reviewed by ECHR in the case **H.A. and Others v. Greece**.[588] This case concerned the placement of nine migrants, unaccompanied minors, in different police stations in Greece, for periods ranging between 21 and 33 days, their subsequent transfer to the Diavata reception centre and then to special facilities for minors. The Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention on account of the conditions of the applicants' detention in the police stations as the detention conditions to which the applicants had been subjected in the 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. The Court also held that the living conditions in the Diavata centre, which had a safe zone for unaccompanied minors, had not exceeded the threshold of seriousness required to engage Article 3 of the Convention. It further took the view that the applicants had not had an effective remedy and therefore held that there had been a violation of Article 13 (right to an effective remedy) of the Convention taken together with Article 3. Lastly, the Court held that there had been a violation of Article 5 §§ 1 and 4 (right to liberty and security / right to a speedy decision on the lawfulness of a detention measure) of the Convention, finding in particular that the applicants' placement in border posts and police stations could be regarded as a deprivation of liberty which was not lawful. The Court also noted that the applicants had spent several weeks in police stations before the National Service of Social Solidarity ("EKKA") recommended their placement in reception centres for unaccompanied minors; and that the public prosecutor at the Criminal Court, who was their statutory guardian, had not put them in contact with a lawyer and had not lodged an appeal on their behalf for the purpose of discontinuing their detention in the police stations in order to speed up their transfer to the appropriate facilities.

Noteworthy Pending Applications

The border zone detention of asylum seekers in Hungary is pending review in the case of **Ilias and Ahmed**.[589] The case referred to the Grand Chamber in September 2017. The applicants allege in particular that the 23 days they had spent in the transit zone amounted to a deprivation of liberty which had no legal basis and which could not be remedied by appropriate judicial review. In its Chamber judgment the Court held, unanimously, that there had been a violation of Article 5(1) and (4) (right to liberty and security) of the Convention, finding that the applicants' confinement in the Röszke border-zone had amounted to detention, meaning they had effectively been deprived of their liberty without any formal, reasoned decision and without appropriate judicial review. On 18 September 2017 the Grand Chamber Panel accepted the Hungarian Government's request that the case be referred to the Grand Chamber. On 18 April 2018 the Grand Chamber held a hearing on the case.

The application **Kaak and Others v Greece**[590] was communicated to the Greek Government on 7 September 2017. This case concerns 51 adults, young persons and children from Afghanistan and Syria, who entered Greece between 20 March and 15 April 2016. They complain in particular of the conditions and the lawfulness of their detention in the VIAL and SOUDA hotspots on the island of Chios. Further, in the **Sh. D. and Others v Greece**[591] the case concerns five applicants, unaccompanied minors from Afghanistan, who entered Greece in early 2016. The first applicant complains of the conditions and the legality of his detention

in Polygyros police station, while the four other applicants complain of the living conditions in the camp of Idomeni.

Similarly, **A.E. and T.B. v Italy** applications were communicated to the Italian Government on 24 November 2017 concerning four Sudanese nationals arrested in Ventimiglia and then transferred to the hotspot of Taranto. They were subsequently transferred to Turin in order to be boarded on a plane to Sudan. The Court gave notice of the applications to the Italian Government and put questions to the parties under Article 3 (prohibition of inhuman or degrading treatment), Article 5(1), (2), (3) and (4) (right to liberty and security), Article 8 (right to respect for private and family life and home) and Article 13 (right to an effective remedy) of the Convention. In the case **Bilalova v Poland**[592] communicated to the Polish Government, the detention for three months of the applicant and her five children, aged between four and ten years, in a supervised centre for foreigners in Poland pending their expulsion to Russia is under review whereas in the cases M.K. v Poland (No 40503/17), M.A. and others v Poland (No 42902/17), M.K. and others v Poland (No 43643/17), and D.A. and others v Poland (No 51246/17)[593] pending applications, concern Chechen (first three cases) and Syrian nationals (D.A. and others) who travelled to the Terespol border crossing (at the Polish-Belarusian border) in order to seek asylum in Poland. They tried to lodge applications for international protection numerous times but were denied entry to the country and were sent back to Belarus without the asylum proceedings being instigated. In all cases the Court, under Rule 39 of its Rules of Court, issued interim measures indicating to the Government that the applicants should not be removed to Belarus.

Refusal of short-stay visas on humanitarian grounds is challenged before the Grand Chamber in the case **M.N. and Others v Belgium**[594] with regard to a Syrian family who requested visas from the Belgian consulate in Beirut with a view to apply for asylum. 11 States and several national and international non-governmental organisations were given leave to intervene in the procedure before the Court.

Interim Measures

The ECtHR indicated interim measures to Greece in the case of two unaccompanied girls who were detained in the Pre-removal Centre of Tavros in view of their transfer to an accommodation facility for minors. In particular, the Court indicated to the Greek authorities to transfer the minors immediately to a shelter for unaccompanied minors and to ensure that the reception conditions provided to them would be in accordance with Article 3 of the ECHR.[595]

The ECtHR has issued several interim measures ordering the Government of Hungary to provide food for people held in the transit zones.[596]

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514 According to Article 2 (h) of the Reception Conditions Directive (recast), detention is defined as a confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.

515 The Reception Conditions Directive (recast) foresees in article 8 a limited exhaustive list of six grounds that may justify the detention of asylum seekers: (1) to determine the identity or nationality of the person; (2) 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); (3) to decide, in the context of a procedure, on the asylum seeker's right to enter the territory; (4) in the framework of a return procedure when the Member State concerned can substantiate on the basis of objective criteria that there are reasonable grounds to believe that the person tries to delay or frustrate it by introducing an asylum application; (5) for the protection of national security or public order; (6) in the framework of a procedure for the determination of the Member State responsible for the asylum application under the so-called "Dublin III" Regulation when there is a significant risk of absconding.

516 A legislative proposal for the detention and return of foreign nationals is under discussion. The legislative proposal will provide a new administrative framework for the detention of foreign nationals pending involuntary return.

517 Republic of Austria, Parliament Directorate, Explanatory Notes, Government Proposal, Aliens Law Amendment Act 2018 (in German), pp. 22–23.

[518] AT LEG 04: FPG, Aliens Police Act.
[519] AT VwGH, Ro 2017/21/0009.
[520] Republic of Austria, Parliament Directorate, Explanatory Notes, Government Proposal, Aliens Law Amendment Act 2018 (in German), pp. 18–19.
[521] Irregularly staying persons who are apprehended and detained in a detention facility in view of a forced return can apply for international protection but will not be released due to the mere fact they have applied for international protection. The procedure for international protection in such cases is prioritised and the person is released if granted an international protection status.
[522] BE LEG 02: Law of 21 November 2017, amending the Asylum Act and the Reception Act (entry into force on 22 March 2018), Article 57 (altering Article 74/6 of the Immigration Act).
[523] BE LEG 02: Law of 21 November 2017, amending the Asylum Act and the Reception Act (entry into force on 22 March 2018), Article 56 (altering Article 74/5 of the Immigration Act).
[524] According these criteria, there is a risk of absconding when:
(1) the person concerned has not lodged a request for residence, as a result of his illegal entry or during his illegal stay, or has not submitted his application for international protection within the period provided for;
(2) the person concerned used false or misleading information or false or falsified documents, or resorted to fraud or other illegal means in the procedure for international protection, residence, removal or refoulement;
(3) the person concerned does not collaborate or has not collaborated in his relations with the authorities responsible for the execution and/ or the monitoring of compliance with the regulations regarding the access to the territory, the stay, the establishment and removal of foreigners;
(4) the person concerned has shown his will not to comply or has already contravened one of the following measures:
(a) a transfer or a removal;
(b) an entry ban that has not been lifted or suspended;
(c) a less coercive measure than a measure of deprivation of liberty to secure his transfer or removal;
(d) a restrictive measure of liberty aimed at guaranteeing public order or national security;
(e) a measure equivalent to the measures referred to in (a), (b), (c) or (d) taken by another Member State;
(5) the person concerned is the subject of an entry ban in the Kingdom and/ or in another Member State, which is neither withdrawn nor suspended;
(6) the person concerned has lodged a new application for residence or international protection immediately after having been the subject of a decision refusing its entry or staying or terminating his stay or immediately after having been the subject of a measure of removal;
(7) when questioned on this point, the person concerned concealed having already given his fingerprints in another State bound by the European regulation relating to the determination of the State responsible for examining an application for international protection;
(8) the applicant has lodged several applications for international protection and/ or residence in the Kingdom or in one or more other Member States which gave rise to a negative decision or which did not give rise to the grant of a residence permit;
(9) although he was questioned on this point, he concealed that he had already lodged an application for international protection in another State bound by the European rules on the determination of the State responsible for the examination of an application for international protection;
(10) the person concerned has stated or it appears from his file that he has come to the Kingdom for purposes other than those for which he has lodged an application for international protection or residence;
(11) the person concerned is fined for having lodged an obviously abusive appeal with the Council for Alien Law Litigation (CALL).
[525] Royal Decree amending the Royal Decree of 2 August 2002 laying down the regime and measures applicable to the places on the Belgian territory, managed by the Immigration Department, where a foreigner is detained, in accordance with the provisions of Article 74/8(1) of the Act of 15 December 1980 on access to the territory, residence, settlement and removal of foreign nationals. Available at http://www.ejustice.just.fgov.be/eli/besluit/2018/07/22/2018031606/staatsblad
[526] Read more on Detention of vulnerable groups.
[527] BE Council of State, Decision n° 244 190.
[528] BG LEG 01: Decree ? 129 of 5 July 2018 amending the rules for implementing the Law on Foreigners in the Republic of Bulgaria.
[529] HR LEG 02: Law amending the Law on Foreigners.
[530] FR LEG 05: Decision n° 2018-762 DC of 15 March 2018.
[531] IT LEG 01: Immigration and Security Decree.
[532] EL LEG 02: L 4540/2018, Reception Act.
[533] BE LEG 01: Aliens Act or Immigration Act, Art. 51/5. The period of 6 weeks is interrupted when an appeal is lodged against the decision to transfer.

534 FR LEG 01: Law of 10 September 2018.
535 Article 552-7 allows, when an asylum application is submitted, in the last fifteen days of the second period of prolongation of detention, to ask the judge for liberty and detention (JLD) to extend exceptional retention for two additional periods of fifteen days, within the overall limit of ninety days. This provision guarantees the examination of the asylum application and address late requests for asylum made for the sole purpose of delaying the execution of the expulsion measure. In these cases, OFPRA shall rule within 96 hours. In the event of negative decision, the appeal will not be automatically suspensive and the administrative court will rule on suspending the execution of the expulsion measure. If suspension is granted, detention is not terminated.
536 In this case, the minister must lodge a request with the president of the First Instance Administrative Court within five days of the notification of decision. The president of the court will rule as a trial judge as a matter of urgency and within ten days of the introduction of the request. The decision of the president can be appealed in the Second Instance Administrative Court. If the minister does not file a request with the court within the foreseen deadlines, the detained person will be set free.
537 CJEU, C-60/16.
538 DP, LSAP and déi gréng, Accord de coalition 2018-2023 (in French), p.233.
539 However, the Croatian Ministry of the Interior underlined that the responsible authority for AMIF annulled the relevant decision on the allocation of funds on 24 May 2019 and the city council of Petrinja denied permission for the construction. Thus, the financial sources were reassigned for the enhancement of the capacities of the two available reception facilities.
540 gov.uk, New pilot schemes to support migrants at risk of detention.
541 AIDA, Country Report Bulgaria 2018 Update.
542 AIDA, Country Report Bulgaria 2018 Update, p. 59.
543 Indicatively, see: BG Supreme Administrative Court, Decision No 77, 4 January 2018.
544 European Commission, November infringements package: key decisions.
545 Council of Europe, Report of the fact-finding mission by Ambassador Tomáš Bo?ek, Special Representative of the Secretary General on migration and refugees, to Bulgaria, 13-17 November 2017.
546 Council of Europe, Ministers' Deputies Decision CM/Del/Dec(2017)1302/H46-8.
547 UN HRC, Concluding observations on the sixth periodic report of Hungary.
548 ECLI:EL:COS:2018:0417A805.17E2806.
549 EL LEG 04: Decision No. 8269.
550 EL LEG 05: Decision No. 18984.
551 The family units in the 127bis center are only used as a last resort when other alternatives to detention have failed. EMN Belgium National Input Information obtained from the Immigration Office on 11 February 2019.
552 See, for example: Myria, Ouverture imminente des unités familiales dans le centre fermé 127bis. For more information see: http://www.youdontlockupachild.be .
553 EMN, Detention of irregularly staying families with children in family housing in a closed centre.
554 Council of Europe, Commissioner for Human Rights, Letter to Mr Theo Francken, Secretary of State for Migration and Asylum, Belgium.
555 State Secretary for Asylum and Migration and Administrative Simplification, Letter to Dunja Mijatovic, Commissioner for Human Rights – Council of Europe.
556 BE Council of State, Decision n° 244 190.
557 AIDA, Country Report Bulgaria 2018 Update.
558 Article L.551-1 of the CESEDA.
559 Contribution to EPS monthly data collection: Norway; Norwegian Directorate of Immigration (UDI) Kapittel 12. Behandling av fingeravtrykk mv., tvangsmidler og straff (paragraphs 99 - 108).
560 EL LEG 02: L 4540/2018, Reception Act, Article 10.
561 Council of Europe, Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 19 April 2018. See also: Council of Europe, Response of the Greek Government to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Greece from 10 to 19 April 2018.
562 The function of the pre-removal Detention Centres for TCNs was extended until 31.12.2022. EL LEG 06: Decision No. 8038/23/22-PZ.
563 The new building C in the Foreigner Detention Facility B?lá-Jezová was built in 2018. It has the accommodation capacity for 112 persons, of which 104 beds are located in the accommodation part and eight beds are reserved for the medical isolation ward. There are four-bed rooms, a common dining hall in the building, a laundry and bathroom on every floor, a lounge for mothers with children, and a classroom on the ground floor. There is a room for interviews and consultancy for clients, Internet kiosks, and a common room for leisure time activities. One part of the ground floor has been turned into an isolation ward and a workplace for medical staff of the Medical Institution of the Ministry of the

Interior (MI MOI). In addition, there is a workplace for a general practitioner and a paediatrician. The main advantage of the C building is the existence of its own catering facility to which foreign nationals do not have to be escorted.

564 In the end of 2018, a new detention centre was opened in Rae municipality, which replaced the previous detention centre in Harku. The new detention centre accommodates up to 123 returnees and asylum seekers, previous had places for 80 persons and has more comfortable living conditions compared to the old centre.

565 Finland originally aimed to establish a new detention unit in Heikinharju in connection with the Oulu reception centre by summer of 2019 with a capacity of 30 beds. However, since the need to increase detention capacity has not been as high as anticipated, no new separate detention unit will be established. At the moment, Finland maintains two detention units; one in Helsinki and the other in Konnunsuo connected to the Joutseno reception centre. Both centres have a total of 109 beds. The Finnish Immigration Service has decided to remodel the facilities of the Oulu reception centre to accommodate TCNs who are placed in detention, if required.

566 The EMN Bulletin April-June 2018 reported that occupancy at detention centres in Sweden has been high throughout 2018 with an average occupancy-rate between 97 % and 100 %. Following instructions by the Government, the Swedish Migration Agency is expanding capacity at its detention centres. In May and June 2018, additional places were created at the detention centres in the cities of Flen and Märsta. Until the end of the year 2018, the number of spots at detention centres is intended to increase from approximately 350 to almost 450. As the number of asylum applicants who have been rejected increases, the Migration Agency and the Swedish Police have estimated that there will be a need for roughly 900 spots at detention centres in 2019 and 2020. At the same time, the Migration Agency is downscaling the capacity at ordinary reception facilities for asylum seekers following a strong decrease in the number of new applicants. It should be noted, however, that detention is most often used as part of the return process and not during asylum procedures.
The Swedish Migration Agency reported in April 2019 a revised estimate of the spots need, increased to 1100-1200 spots.

567 Belgian House of Representatives, General Policy Note on Asylum and Migration, 26 October 2018, p.8.

568 To the date of 31 December 2018, four families, with respectively five, four, two and three children were detained in the family units. All four families returned to their country of origin.

569 AIDA, Country Report Bulgaria 2018 Update, p.59.

570 Correspondence with Department of Justice and Equality, Irish Naturalisation and Immigration Service, Border Management Unit, February 2019.

571 An activity leader is present and engages with the detained persons every day. There are board games, PlayStation, sports, facilities (i.e. football and different ballgames), computer is also usable (internet is open to limited pages for ex. IOM, UNHCR etc.)

572 Toilet in the rooms; the conditions of lightning, sound isolation and ventilation has improved; more and bigger guestrooms; separate prayer room, where joint prayers can be done if needed.

573 The visiting days have been increased from 2 to 5 days a week and packages can be sent every working day. PBGB also provides the detained a 5€ calling card once a month. This service depends on the state budget.

574 Council of Europe, Report to the Greek Government on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 19 April 2018.

575 Among its recommendations, CPT emphasised the need to reduce the occupancy levels drastically so as not to exceed an establishment's capacity, clean and repair facilities and provide to every detained person with appropriate food, a mattress and clean bedding, and sufficient hygiene products. Immediate action should be also taken to ensure that vulnerable persons are transferred to suitable open reception facilities and that women and children are never detained together with unrelated men. Unrestricted access to outdoor exercise throughout the day should also be extended to all pre-removal centres in Greece.

576 ECLI:CZ:US:2018:Pl.US.41.17.1.

577 AIDA, Country Report Hungary, 2018 Update.

578 AIDA, Country Report Greece, 2018 Update.

579 AIDA, Country Report Malta, 2018 Update.

580 AIDA, Country Report Cyprus, 2018 Update.

581 Red Line project, Crossing a Red Line: How EU Countries Undermine the Right to Liberty by Expanding the Use of Detention of Asylum Seekers upon Entry.

582 ECRE, Taking Liberties: Detention and Asylum Law Reform.

583 See also: Global Detention Project, Immigration Detention in Denmark: Where Officials Celebrate the Deprivation of Liberty of "Rejected Asylum Seekers".

584 See also: ECtHR, Factsheet - Migrants in Detention, March 2019.

585 ECtHR, J.R. and Others vs Greece, ECLI:CE:ECHR:2018:0125JUD002269616.

586 ECtHR, O.S.A. and Others vs Greece, ECLI:CE:ECHR:2019:0321JUD003906516.

587 ECtHR, K.G. vs Belgium, ECLI:CE:ECHR:2018:1106JUD005254815.

588 ECtHR, H.A. and others vs Greece, ECLI:CE:ECHR:2019:0228JUD001995116.

589 ECtHR, Ilias and Ahmed vs Hungary, ECLI:CE:ECHR:2017:0314JUD004728715.

590 ECtHR, Allaa Kaak and others vs. Greece, 34215/16, Communicated Case.
591 ECtHR, Sh. D. and others vs. Greece, 14165/16, Communicated Case.
592 ECtHR, Bilalova vs. Poland, 23685/14, Communicated Case.
593 ECtHR, D.A. and others vs. Poland, 51246/17, Communicated Case.
594 ECtHR, M.N. and others vs. Belgium, 3599/18, Communicated Case.
595 Greek Council for Refugees, The European Court of Human Rights grants interim measures in favour of two detained unaccompanied girls.
596 Hungarian Helsinki Committee, European Court of Human Rights orders Hungarian government to give food to detained migrants in eighth emergency case.

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