FREEDOMS

European legal and policy framework on immigration detention of children

FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

The report addresses matters related to the right to liberty and security (Article 6), to education (Article 14), to healthcare (Article 35), and the rights of the child (Article 24), falling under Title II 'Freedoms', Title III 'Equality', and Title IV 'Solidarity' of the Charter of Fundamental Rights of the European Union.

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FRA – European Union Agency for Fundamental Rights
Schwarzenbergplatz 11 – 1040 Vienna – Austria
Tel. +43 158030-0 – Fax +43 158030-699
Email: info@fra.europa.eu – fra.europa.eu

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Foreword

Children have represented up to a third of migrant arrivals in the European Union (EU) since the summer of 2015. Upon arrival, they need and have a right to protection, in line with EU and international law. Detaining children for migration management or asylum reasons – with or without family members – is difficult to justify, practically very challenging to implement in line with fundamental rights and clearly not in the child's best interests.

Current efforts to speed up asylum processing and make returns more effective may prompt an increased use of immigration detention, possibly also affecting children. This can entail serious risks of violating children's right to liberty and security if the strict safeguards protecting children from arbitrary detention are disregarded. Children should be placed in open centres that provide for the necessary protection and care to which they are entitled, and which promote their best interests.

This report takes the rights of the child to protection and care set forth in Article 24 of the EU Charter of Fundamental Rights as a starting point when examining the content of the right to liberty and security. It outlines the main fundamental rights safeguards provided for in EU and human rights law to prevent unlawful and arbitrary detention. It also describes practical examples from the Member States, drawing on promising practices wherever possible. In so doing, it aims to assist asylum and migration practitioners in implementing policies in line with the law, so that immigration detention of children ends or becomes truly exceptional.

Michael O'Flaherty
Director

Country codes

Country code	Country
AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SK	Slovakia
SI	Slovenia
UK	United Kingdom

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Executive summary and FRA opinions

A significant number of children are detained in the European Union (EU) during their asylum and return procedures or to secure their removal. Detention undeniably affects children, including their immediate and long-term mental health, experts report – and it can affect them long after their release.

Immigration detention of children remains a major fundamental rights challenge in the EU. A person's right to liberty and security is a fundamental right, as enshrined in Article 6 of the EU Charter of Fundamental Rights (the Charter), Article 5 of the European Convention on Human Rights (ECHR) and in several UN treaty instruments. Any restriction of this right must respect the requirements established by international, European and domestic law, which are particularly strict for children. Although EU law does not prohibit immigration detention of children, the stringent requirements flowing from the Charter and the ECHR mean that deprivation of liberty will only be in line with EU law in exceptional cases.

Children's right to protection and care and the principle of the best interests of the child are the starting points when examining deprivation of liberty of children.

To be lawful, national law must provide for the possibility of detention. It must also be closely connected to one of the exhaustive grounds listed in EU law and in Article 5 of the ECHR. To avoid being deemed arbitrary, detention must be for the shortest period of time that is reasonably required to fulfil the purpose of detention, namely "to prevent [a person] effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition" (Article 5 (1) (f)).

EU and human rights law prohibit automatic detention. An individual examination is always needed before ordering or extending detention. Such examination must assess if deprivation of liberty is necessary and proportionate in the individual case. When it concerns children, a primary consideration must be given to the best interests of the child, taking into account that immigration detention is not in the child's best interests.

Respecting the right to liberty and security requires states to adopt less intrusive alternatives to detention. Where the authorities fail to examine all alternatives – including placement in an open facility without restrictions to the child's fundamental rights – the detention of a child will be considered arbitrary and a violation of their right to liberty and security.

Strict procedural safeguards – such as the right to judicial review, access to free legal aid and linguistic assistance – protect all individuals from arbitrary deprivation of liberty. For children, these general safeguards are complemented by the duty to conduct procedures and provide information in a child-friendly manner. Moreover, a legal guardian must be assigned to unaccompanied children.

When EU Member States exceptionally resort to deprivation of liberty, people must be held in a place and under conditions that are appropriate. Most EU Member States that allow for the possibility of detaining children have established specialised facilities, either separately or as distinct parts of existing detention facilities. Conditions in these facilities vary significantly and change over time. One of the characteristics of detention facilities adapted to host children is the presence of child-friendly spaces. However, many facilities are like prisons: officers wear fatigues; there is barbed wire; and handcuffs are used for transport. Very few of the specialised facilities employ staff who have received specific training on child protection.

Short-term holding facilities are often not equipped for holding children and are usually not subject to the same level of independent monitoring as immigration detention facilities. The quality of services and treatment is particularly difficult to uphold when arrivals increase and authorities have to use facilities not intended for detention.

National Human Rights Institutions, particularly National Preventive Mechanisms set up by EU Member States under the Optional Protocol to the UN Convention Against Torture, are important in preventing unlawful or arbitrary detention. They complement the work done by international monitoring bodies, principally the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

National child protection authorities could play an important role in safeguarding children's right to liberty and in promoting the well-being of detained children. They could help assess the child's best interests when authorities consider detaining children together with their parents, oversee child detention standards and run complaint mechanisms smoothly. However, in many Member States, child protection authorities do not actively take part in deciding whether or not a child should be detained, or in monitoring detention facilities.

FRA opinions

Ensuring children's right to protection and care

The right of children to protection and care and the principle of the best interests of the child as set out in Article 24 of the EU Charter of Fundamental Rights are the starting points when examining deprivation of liberty of children. As noted by the European Commission in its 2017 Communication on the protection of children in migration, in some instances, children have been accommodated in closed facilities due to a shortage of suitable alternative reception facilities.

Prompt identification of children is needed to trigger the special protection to which children are entitled.

FRA opinion 1

To promote children's right to protection and care, the EU and its Member States should develop credible and effective systems that would make it unnecessary to detain children for asylum or return purposes, regardless of whether they are in the EU alone or with their families. This could include building on, for example, case management, alternative housing, counselling and coaching.

EU Member States should use age assessments only where there are grounds for serious doubt about an individual's age. Age assessment procedures should take into account children's rights. Independent experts, familiar with the respective child's cultural background and fully respecting the child's dignity, should undertake in a gender-appropriate manner age assessments. Recognising that age assessments cannot be precise, in cases of doubt, authorities should treat the person as a child. They should also permit appeals against age assessment decisions. The forthcoming European Asylum Support Office (EASO) guidance should provide further advice to EU Member States on how to apply these considerations in practice.

Fully respecting children's right to liberty and security

A person's right to liberty and security, as enshrined in EU, Council of Europe and UN instruments, is a fundamental right. Any restriction of this right must respect the requirements established by international, European and national law, which are particularly strict for children. Neither EU law nor the ECHR prohibit immigration detention of children. The stringent requirements flowing from the Charter and the case law of the European Court of Human Rights (ECtHR) mean, however, that only in exceptional cases depriving children of liberty will be in line with EU law.

FRA opinion 2

To protect the right to liberty and security (Article 6 of the Charter), EU Member States are encouraged to introduce more favourable provisions in national laws – as envisaged in Article 4 (3) of the Return Directive and Article 4 of the Reception Conditions Directive – either prohibiting or further restricting the possibility to detain children for immigration purposes. This would significantly contribute to avoiding the risk of arbitrary detention of children.

Concerning asylum detention, the current reform of the asylum acquis is an opportunity for EU legislators to take a stronger stand against child detention.

EU Member States should systematically collect disaggregate data on children in immigration detention, while the European Commission should encourage the comparability of such data through Eurostat.

Establishing clear legal basis for detention in national law

For detention to be lawful, it is essential under EU law, the ECHR and international law that national law provides for the possibility to detain non-nationals for immigration or asylum purposes. In the absence of a clear domestic legal basis, no detention whatsoever can be deemed lawful. Several EU Member States manage their asylum and return policies without resorting to deprivation of liberty.

FRA opinion 3

The European Commission should disseminate information about and promote EU Member States' positive experiences with managing their asylum and return policies without resorting to child detention or resorting to it in very exceptional cases only. The forthcoming 2017 European Forum on the Rights of the Child could be an ideal venue for taking the first step regarding this.

Adhering strictly to the exhaustive list of detention grounds

The ECHR and EU law list exhaustive but not identical permissible grounds for detention, which apply to everyone regardless of age. EU Member States must strictly adhere to these detention grounds, which have to be

interpreted restrictively, according to Article 18 of the ECHR. In practice, immigration detention is sometimes imposed for public order-based reasons.

FRA opinion 4

Domestic legislation regulating immigration or asylum should not be used to detain individuals on grounds of public order, thereby circumventing the safeguards established under human rights law for criminal detention. EU Member States should ensure that grounds for immigration detention established at national level do not extend beyond the exhaustive list of legitimate grounds listed in Article 5 (1) of the ECHR, as well as those permissible under the EU asylum and return acquis.

Detention to secure return is not lawful in the absence of realistic prospects for removal. EU Member States could consider introducing a presumption against pre-removal detention for de jure as well as de facto stateless persons, including children. This should be one in cases where it is evident from past experience that the country of former habitual residence will not readmit the person or, for de facto stateless persons, the country of nationality will refuse any cooperation in establishing the citizenship and issuing related travel documents.

Given its short- and long-term consequences on children's development, EU Member States should not use deprivation of liberty as a means to protect children from exploitation and to mitigate risks of them going missing. These risks should be countered by improving reception conditions (including by assigning specialised support staff on a 24/7 basis); strengthening guardianship systems; and gaining a better understanding of why children go missing and what can be done to prevent their disappearance. These efforts should be accompanied by effective mechanisms to record when a child goes missing and to follow up when the child is found again, as FRA points out in its Opinion on the impact on fundamental rights of the proposal for a revised Eurodac Regulation.

Assessing necessity and proportionality

EU and human rights law prohibit automatic detention; an individual examination is therefore always needed before ordering detention. In practice, detention decisions involving children are not necessarily based on careful, individual assessments of necessity and proportionality, as required by Articles 6 and 52 (1) of the Charter. In addition, they do not always give primary consideration to the best interests of the child. Regarding the length of detention, for all persons and not just children, European and international law require immigration detention to be only as long as necessary and to last for the shortest appropriate period.

FRA opinion 5

Where they have not yet done so, EU Member States should issue simple and practicable instructions to support officers responsible for preparing or issuing detention decisions. These instructions should advise officers on the steps to take to ensure that necessity and proportionality are adequately assessed in each individual case, giving primary consideration to the best interests of the child.

EU Member States must take adequate legislative and policy measures to ensure that alternatives to detention are not only available on paper but also used in practice for families and children. In the absence of such measures, national authorities cannot justify the use of detention as a last resort.

When deciding whether or not to detain a family with children, EU Member States should always thoroughly assess the best interests of the child, which means being with the parents in open facilities that enable the family to live with dignity. If they are detained, detention has to take place in facilities adequately equipped to host families, also duly taking into account the length of the deprivation of liberty.

EU Member States that allow immigration detention of children should consider fixing a maximum length of child detention. This should be coupled with regular judicial reviews of the necessity and proportionality of detention, which should be based on an individual assessment of the child's situation by the competent national child protection authorities.

Applying child-specific procedural safeguards

To ensure that detention is neither unlawful nor arbitrary and, when imposed, does not limit fundamental rights unduly, European and international law provides a set of procedural safeguards. These include the right to judicial review, access to free legal aid and linguistic assistance. Alongside these general safeguards, child-specific safeguards exist, such as appointing guardians for unaccompanied children, as well as conducting procedures and providing information in a child-friendly manner.

FRA opinion 6

To ensure children's right to be heard, which is a general principle of EU law, EU Member States should develop and use child-friendly information and materials, and train officers and other relevant staff to conduct procedures in a child-appropriate manner and facilitate children's involvement.

In light of Article 24 of the Charter (rights of the child), EU Member States should appoint a guardian as soon as an unaccompanied child is identified and before they decide on deprivation of liberty.

Ensuring humane and dignified detention conditions

Every detention facility at which children are held as asylum seekers or for the purpose of removal must ensure humane and dignified detention conditions. Strict legal standards have been developed at EU, Council of Europe and international levels. Even if detention in the migration context is based on valid grounds prescribed by law and fulfils the formal criteria of legality, the conditions of detention may result in breaches of EU law and render deprivation of liberty arbitrary.

FRA opinion 7

Asylum-seeking children and children in return procedures must not be deprived of liberty if available facilities do not guarantee minimum standards for the child's well-being. To achieve this, EU Member States must create child-friendly spaces and take effective measures to prevent holding facilities from being like prisons. This affects infrastructure (such as removing barbed wire or bars on windows), the use of force (e.g. avoiding systematic handcuffing of children or their parents during transport), reducing the number of uniformed and armed staff, and adopting flexible house rules (e.g. free access to the yard).

To guarantee the right to education set out in Article 14 of the Charter, EU Member States must provide children with access to education. Where detention lasts longer than a very short period, education must be provided. Children should have access to a formal education system, taught by qualified teachers through programmes integrated in the country's education system. Priority should be given to providing education outside of detention facilities.

EU Member States should take proactive measures to guarantee detained children the right to healthcare enshrined in Article 35 of the Charter. To that end, they should ensure regular visits by paediatricians from outside the facilities, provide effective interpretation services and ensure accessibility of medicines. Medical consultations and medical information must be confidential and child-appropriate.

Using effective oversight mechanisms

Persons deprived of liberty are confined to locations that are not subject to public scrutiny, so are at a higher risk of facing human rights violations. Therefore, effective oversight mechanisms are necessary to prevent abuse and essential to ensure accountability for potential human rights violations. These oversight systems include international, EU (Schengen evaluations under Regulation (EU) No. 1053/2013) and national mechanisms, such as independent monitoring bodies or child protection authorities. In addition, effective complaints procedures represent a basic safeguard against ill-treatment in detention.

FRA opinion 8

When designing approaches to immigration detention of children, EU Member State authorities should make full use of the advice and engage the participation of ombuds institutions and National Human Rights Institutions, especially those with child-specific mandates.

Child protection authorities in EU Member States should devote primary attention to children deprived of liberty for immigration purposes. Responsible authorities should consult child protection agencies, at least when assessing whether or not to detain a child together with their parents. Child protection authorities should also regularly visit children held in immigration detention.

The European Commission could consider undertaking unannounced Schengen evaluation visits if there is evidence of arbitrary use of child detention pending removal in a given EU Member State.

EU Member States should ensure that each detention or other holding facility offers child-accessible ways to submit complaints, for example through a complaint box, and that they inform children in a child-friendly manner about their right to lodge a complaint. Responsible authorities should follow up on each individual complaint.

Introduction

Since 2016, various EU Member States have been attempting to speed up asylum processing and to make returns more effective. Such efforts are likely to prompt an increase in the use of detention, including to prevent absconding – possibly also affecting children. This report takes a closer look at detention of third-country national children for migration management or asylum purposes – referred to as 'immigration detention'.

The report covers unaccompanied children – children who are not accompanied by their parents or a primary caregiver – and children who are detained together with their parents. A child is any person under the age of 18 years. The report does not address detention for criminal offences.

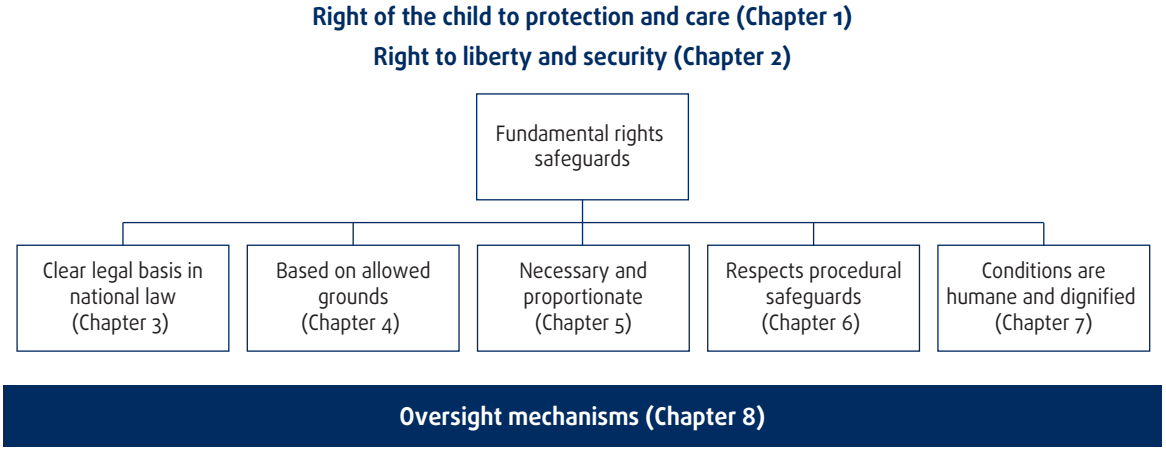
Detention and deprivation of liberty are used as synonyms throughout the report. They describe any form of confinement of a person within a particular place. They encompass all forms of deprivation of liberty of non-EU nationals on immigration-related grounds, regardless of what these measures are termed under national law. This includes, for example, the French *retention* or the "restriction of liberty" in hotspots on the Greek islands under Article 14 (2) of Law 4375/2016.

The report presents the European and international legal framework on immigration detention of children. It gives an overview of such detention in the EU, highlighting practices of unlawful and arbitrary detention. The report also presents opinions and promising practices to assist those involved in the implementation of asylum and immigration policies, with the ultimate aim of ensuring that immigration detention of children ends completely or is truly only applied in exceptional circumstances.

This report is structured in eight chapters. After introducing the right to liberty and security, it examines five sets of fundamental rights safeguards to prevent unlawful and arbitrary detention. It ends with a chapter on oversight. Figure 1 illustrates the report's structure.

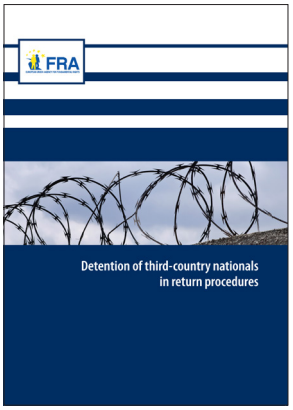
The report builds on previous FRA work on *Separated, asylum-seeking children in European Union Member States* (2010), *Detention of third-country nationals in return procedures* (2010), the *Handbook on Guardianship for children deprived of parental care* (2014) and its *comparative report* (2015).

Figure 1: Overview of the report's structure



Source: FRA, 2017

In 2010, FRA published a report on *Detention of third-country nationals in return procedures*, focusing on the detention of persons pending removal in the then 27 EU Member States. One chapter of the 2010 report is devoted to detention of children. Various parts of this report refer to FRA's 2010 report where it is useful to illustrate trends.



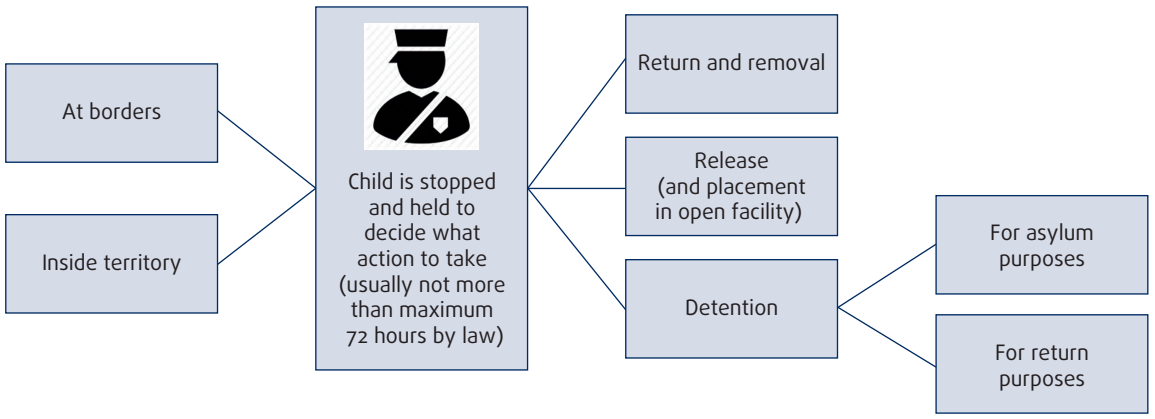
Like the 2010 report, the current report is based primarily on desk research carried out through FRA's research network, FRANET – for this report, between January and May 2016 – and is complemented by information obtained from public authorities, national human rights institutions, and other relevant organisations. National legislation referenced in this report is up to date to April 2017, unless specified otherwise.

This report complements existing studies. These include the 2015 European Migration Network (EMN) report *Policies, practices and data on unaccompanied minors in the EU Member States and Norway* and its 2014 report *The use of detention and alternatives to detention in the context of immigration policies*, which analyse provisions in EU Member States regulating alternatives to detention, including for vulnerable people. This report also adds to the work of international and civil society organisations, such as the United Nations High Commissioner for Refugees (UNHCR) *Global strategy: Beyond detention 2014–2019*, including the Strategy's *Baseline report* as well as the *Progress report mid-2016*, all of which aim to support governments in ending the practice of detaining asylum-seekers and refugees, including children. It also adds to the 2015 report of the Global Detention Project and Access Info Europe *The uncounted: The detention of migrants and asylum seekers in Europe*, which collected statistical data on immigration detention practices in 33 European and North American countries.

Situations in which children are detained

In practice, children are stopped – either together with, or without, their families – and held for a short period to clarify what actions are to be taken. This may happen at borders or inside a state's territory. The children are held at police stations, special holding rooms at the borders or other facilities, usually for a few hours or overnight – pending a decision as to whether they are to be released, ordered into detention or returned. Where EU Member States need to extend the deprivation of liberty because it is considered absolutely necessary for the asylum procedure or to prepare an individual's removal from the EU, they are obliged to order the deprivation of liberty and notify the person concerned of this decision. This must happen swiftly. In EU Member States that require the involvement of judicial authorities to order detention, the judge must normally confirm the deprivation of liberty within a maximum of

Figure 2: Situations in which children are deprived of liberty for immigration-related reasons



Source: FRA, 2017

72 hours.[1] Figure 2 illustrates the situations in which children are detained for immigration-related purposes.

EU law- and human rights law-based legal safeguards to protect the right to liberty apply from the moment a person is physically held by the authorities and not from the time a detention order is issued or notified. In practice, the risk of unlawful or arbitrary detention is higher during the time period between the authorities stopping a person and the point they issue a detention order. Facilities used for temporary holding – such as police cells or holding rooms at border crossing points – may not be equipped to host vulnerable people, even for a short time period. Moreover, temporary facilities used for this purpose are not subject to the same level of scrutiny by independent actors as immigration detention facilities or prisons. As a result, children deprived of liberty in these situations often remain off the radar.

Data about children in immigration detention

There are no comparable and reliable data on how many children are detained for immigration-related purposes in the EU. The UN General Assembly recognised the need for better data on children and commissioned a Global Study on Children Deprived of Liberty, which could also offer an opportunity to provide better data on children in detention.[2]

For this report, FRA collected figures from EU Member States on the number of children detained on 31 December 2015, 31 March 2016 and 1 September 2016. These figures were subsequently compared with those received through an ad hoc query by the EMN, launched by the European Commission at FRA's request in autumn 2016, through which the number of children in detention on two specific dates, namely 15 November 2016 and 1 December 2016, were collected.

Table 1 provides an overview of the figures gathered. These figures exclude children temporarily confined to facilities other than formal detention centres, such as cells in police stations, border crossing points or airports. The numbers collected are a rough indication of the scope of child detention in EU Member States. They are not comprehensive or directly comparable. They reflect only the number of children in detention at a specific point in time and not the number of children detained over the course of a certain period. Children detained with their parents may not always have been subject of a detention order but deprived of liberty to keep them together with their parents.

According to the data provided by Member States for the different time points, the largest number of children in detention was found in Bulgaria on 1 September 2016 and high numbers of children were also detained in Greece, Hungary, Poland and Slovakia. Among the 180 children reported to be detained on 15 November 2016, 103 were boys and 77 were girls; among the 160 children held on 1 December 2016, 86 were boys and 74 were girls. Almost all unaccompanied children reported to be in detention on those two dates were boys. No children were detained on the days examined in Cyprus, Denmark, Estonia, Germany, Ireland, Italy, Malta, Spain or the United Kingdom.

FRA also sought information on the children who had spent the most time in immigration detention on each of those dates. Table 2 outlines the results.

In 18 EU Member States the authorities reported that a child was detained on one of the specific dates, and 14 of them provided some data about the children who had spent the most time in detention on those dates. The number of detention days varied across Member States, from a few hours to several months. Only four EU Member States (Belgium, Luxembourg, Slovenia and Sweden) had held those children for 15 days or less. The reasons for the prolonged detention included doubts about the age of the child (Belgium), irregular border crossing (Bulgaria, Croatia, Latvia and Poland), detention pending removal (Hungary) or waiting for appointment of guardian (Slovenia). Mainly boys were detained and in three cases authorities detained infants less than two years old together with their families (Luxembourg, Poland and Slovakia). The unaccompanied children detained longest were a 15-years old boy in Latvia (195 days, nationality not reported) and a 16-year old Syrian boy in Poland (151 days).

1 See FRA (2010), *Detention of third-country nationals in return procedures*, Luxembourg, Publications Office of the European Union (Publications Office), Section 4.2.

2 United Nations (UN), General Assembly, Resolution 69/157, Rights of the child, 18 December 2014, A/RES/69/157, paras. 48 (f) and 52 (d).

Table 1: Number of children in immigration detention on various dates, as reported by 28 EU Member States

EU Member State	31 December 2015		31 March 2016		1 September 2016		15 November 2016		1 December 2016	
	Children in immigration detention, including those detained at borders but excluding children stopped and held in police stations pending further action						Children in immigration detention, excluding individuals temporarily held in facilities other than detention centres, such as in holding rooms in border areas or police cells			
	UAC	AC	UAC	AC	UAC	AC	UAC	AC	UAC	AC
AT	–	–	–	–	–	–	–	–	–	–
BE	*7*[a]	*120*[a]	*0*[b]	*2*[b]	1	0	0	0	0	0
BG	0	175	0	37	0	458	–	–	–	–
CY	0	0	0	0	0	0	–	–	–	–
CZ	0	0	0	7	0	19	0	0	0	0
DE	0	0	0	0	0	0	0	0	0	0
DK	0	0	0	0	0	0	–	–	–	–
EE	0	0	0	0	0	0	0	0	0	0
EL	–	–	–	–	7	248	–	–	–	–
ES	0	0	0	0	–	–	–	–	–	–
FI	0	3	0	0	0	0	0	0	0	0
FR	0	120	–	–	–	–	–	–	–	–
HU	0	199	–	–	0	0	0	38	0	19
HR	0	2	0	1	0	0	0	0	0	0
IE***	0	0	0	0	–	–	–	–	–	–
IT	0	0	0	0	0*	0*	–	–	–	–
LT	0	0	0	0	0**	2**	–	–	–	–
LU	0	44	0	0	0	0	0	0	0	0
LV	6	1	2	0	6	4	10	1	11	1
MT	0	0	0	0	0	0	–	–	–	–
NL	0	0	0	9	4	1	1	2	1	1
PL	5	16	0	51	1	46	10	99	3	94
PT	–	–	–	–	–	–	–	–	–	–
RO	17	0	5	0	–	–	–	–	–	–
SE	0	0	0	0	0	0	0	1	0	0
SI	0	0	0	0	0	0	1	0	13	0
SK	0	4	0	9	0	24	0	17	0	17
UK	0	0	0	0	–	–	–	–	–	–

Notes: *AC = children detained with their family.*
UAC = unaccompanied children.
– indicates that there are no data.
Data in italics refer to a period, not a specific day.
[a] Refers to the period between 1 January 2015 and 31 December 2015 (persons whose age was disputed).
[b] Refers to the period between 1 March 2016 and 31 March 2016.
** Refers to 9 November 2016.*
*** Refers to 1 October 2016.*
**** Ireland does not detain children for immigration or asylum purposes.*

Source: *FRA (based on information provided by EU Member States) and EMN ad hoc query, 2017*

Table 2: Longest period of detention of children detained on the reference dates, as reported by 14 EU Member States

EU Member State	31 December 2015	31 March 2016	15 November 2016	1 December 2016
BE	UAC:15 days,[a] AC: 3[a] days	A few hours[b]	n.a.	n.a.
BG	AC: 27 days	AC: 5 days	n.a.	n.a.
CZ	0	AC: 34 days	n.a.	n.a.
FI	AC: 57 days	0	0	0
HU	AC: 8 days	n.a.	AC: 18 days	AC: 10 days
HR	AC: 3 days	16 days	n.a.	n.a.
LV	UAC: 195 days, AC: 178 days	UAC: 109 days	AC: 224 days[d]	AC: 241 days[d]
LT	AC: 112 days,[c]	0	n.a.	n.a.
LU	AC: 2 days	0	n.a.	n.a.
NL	0	UAC: 10 days, AC: 3 days	AC 14 days	AC 30 days
PL	UAC: 151 days, AC: 151 days	AC: 82 days	AC: 23 days	AC: 38 days
SE	0	0	AC: 14 days	n.a.
SI	0	0	UAC: 1 day	UAC: 4 days
SK	AC: 56 days	n.a.	AC: 15 days	AC: 30 days

Notes: *AC = accompanied child.*
UAC = unaccompanied child.
n.a. = not available.
[a] *Cumulative figures that refer to the period between 1 January 2015 and 31 December 2015.*
[b] *Refers to the period from 1 March 2016 to 31 March 2016.*
[c] *Refers to the period 1 January 2015 to 31 December 2015.*
[d] *Subsequently found by the State Border Guard to be an adult.*
Source: *FRA (based on information provided by EU Member States) and EMN ad hoc query, 2017*

- The data collected are not comprehensive and not directly comparable among EU Member States, but they show that detention of children – alone, and particularly together with their families – is relatively common. This indicates that deprivation of liberty is not necessarily used as a measure of a last resort. At the same time, the data also show that, in most cases, detention does not go beyond 15 days, although in specific cases deprivation of liberty can become protracted. Whether or not a child will be placed in immigration detention and how long he or she will stay there depend on several factors, including the EU Member State, whether the child is travelling alone or with parents, the child's age, the type of procedures the child is involved in and considerations of public order or national security.

Health, development and well-being effects of detention on children

Detention has a negative impact on children, no matter the context in which it takes place, research has shown. Deprivation of liberty can also have an irreversible impact on the child's well-being and development, protected under Article 6 of the United Nations (UN) Convention on the Rights of the Child (CRC). Such impact further exacerbates existing consequences of forced migration on children and may affect Article 4 prohibition of torture and inhuman or degrading treatment or punishment), Article 24 (rights of the child) and Article 35 (health care) of the Charter. This section provides an overview of some of the findings of research done on children in administrative detention.

- Deprivation of liberty can have short- and long-term negative effects on the physical, psychological, social and general development of a child. Empirical research on the consequences of detention on children of different ages leads to this conclusion.

  Various factors can result in these physical and psychological effects on children in detention. They include inadequate educational activities; lack of physical and mental stimulation, and little opportunity for play; lack of privacy; and an interference with normal family routines.[3] Children are also exposed to violence and injury, which can have physical and psychological health effects.[4]

For example, a study on the mental and physical health difficulties of children in UK immigration centres noted developmental, educational and child protection concerns.[5] Immigration detention has harmful effects on the physical and mental health of children, a report to the Australian Human Rights Commission found, through observation, interviews and formal testing.[6] The detention environment can have a serious and detrimental impact on children's development and mental health, the Australian Human Rights Commission concluded, based on a range of evidence and testimonies. It found that one in three children had mental health disorders.[7]

Harmful consequences for a child's psychological health include stuttering and attachment problems.[8] Detention is associated with high levels of anxiety, psychological distress, affective and post-traumatic stress disorder, and deliberate self-harm, according to a study on the mental health of detained asylum-seeking children in the EU.[9] All of the children held within a UK immigration detention centre suffered from depression and anxiety, and other behavioural problems and global distress were common, a study of their mental health showed.[10]

In addition to the psychological impact, doctors specialising in child health examined 24 children in an immigration removal centre in the United Kingdom and found that the children had developed physical problems relating to their detention.[11] Other studies have observed incontinence and food refusal in detained children.[12] Further, sleep problems, somatic complaints and weight loss were common.[13]

The impact of detention varies and often depends on the child's age.[14] The Committee on the Rights of the Child has recognised that psychological stress on the parents is also likely to affect the well-being of young children and babies.[15]

3 Australian Human Rights Commission (2014), *The Forgotten Children: National Inquiry into Children in Immigration Detention,* Sydney, Australian Human Rights Commission, p.36.
4 Barnert, E.S., Perry, R., *et al.* (2016), 'Juvenile Incarceration and Health', *Academic pediatrics*, Vol.16, No. 2, pp. 99–109.
5 Lorek, A., Ehntholt, K., *et.al.* (2009), 'The mental and physical health difficulties of children held within a British immigration detention center: A pilot study', *Child Abuse and Neglect,* Vol. 33, No. 9, pp. 573-585.
6 Eliot, AM E., Gunasekera, H., (2015), 'The health and well-being of children in immigration detention', *Report to the Australian Human Rights Commission Monitoring Visit to Wickham Point Detention Centre Darwin, NT, October 16th – 18th 2015,* p.3.
7 Australian Human Rights Commission (2014), *The Forgotten Children: National Inquiry into Children in Immigration Detention,* Sydney, Australian Human Rights Commission, pp. 59-61.
8 Silove, D., Austin, P., Steel, Z., (2007), 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia', *Transcult Psychiatry*, Vol. 44, No. 3, p. 369.
9 Hodes, M. (2010), 'The mental health of detained asylum seeking children', *European Child and Adolescent Psychiatry*, Vol. 19, No.7, pp.621–623.
10 Lorek, A., Ehntholt, K., *et.al.* (2009), 'The mental and physical health difficulties of children held within a British immigration detention center: A pilot study', *Child Abuse and Neglect,* Vol. 33, No. 9, pp. 573-585.
11 Mooney, H. (2009), 'Detention centres are bad for immigrant children's health, study finds', *British Medical Journal*, p 339.
12 Silove, D., Austin, P., Steel, Z., (2007),'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia', *Transcult Psychiatry*, Vol. 44, No. 3, p.369.
13 Lorek, A., Ehntholt, K., et.al. (2009), 'The mental and physical health difficulties of children held within a British immigration detention center: A pilot study', *Child abuse and neglect,* Vol. 33, No. 9, pp. 573-585
14 Australian Human Rights Commission (2014), *The Forgotten Children: National Inquiry into Children in Immigration Detention*, Sydney, Australian Human Rights Commission, p.87.
15 UN, Committee on the Rights of the Child, *General Comment No. 7 (2005): Implementing child rights in early childhood,* 20 September 2006, CRC/C/GC/7/Rev.1, para. 18.

If pre-school children are detained, it can potentially have lifelong effects on their learning and socialisation, and their attachment to family members and other persons.[16] Developmental delays can be common if children are detained when aged less than 5 years.[17]

If children of primary school age see their parents disempowered and with deteriorating mental health, it can affect them negatively. So can a lack of access to age-appropriate toys and play activities.[18]

Detention interferes with the social and emotional development of teenagers, and puts them at risk of developing mental illness, emotional distress and self-harming behaviour. The detention environment does not provide them with the safe and supportive environment that children need at this stage of their life. As teenagers tend to imitate the behaviour of others, detention with adults who may be displaying self-harming behaviour is particularly concerning.[19] Unaccompanied children are particularly vulnerable in detention facilities, as they do not have the support of a parent.[20]

Studies have also shown that, the more time a child spends in detention, the more likely it is that they will suffer psychological harm.[21] There is a correlation between the amount of time in detention and the severity of the psychological implications.[22]

- The impact of detention can persist long after the child has been released. Detention has undeniable immediate and long-term mental-health impacts on asylum-seeking children, mental-health experts report.[23] Although some children recover, mental-health effects may continue to affect others for a long time, according to child psychiatrists who work with children after their release.[24]

Finally, the psychological impact of detention can affect the capacity of individuals to present their asylum claims and hence has adverse implications for the assessment of their credibility.

16 Australian Human Rights Commission (2014), *The Forgotten Children: National Inquiry into Children in Immigration Detention*, Sydney, Australian Human Rights Commission, p. 118.
17 Mares S, and Jureidini, J., (2004) 'Psychiatric assessment of children and families in immigration detention clinical, administrative and ethical issues', *Australian and New Zealand Journal of Public Health,* Vol. 28, No. 6, pp. 520 - 6.
18 Australian Human Rights Commission (2014), *The Forgotten Children: National Inquiry into Children in Immigration Detention*, Sydney, Australian Human Rights Commission, p. 134.
19 *Ibid*, p. 148.
20 *Ibid*, p. 169.
21 *Ibid*, p. 75.
22 Robjant, K., Hassan, R., *et. al.* (2009), 'Mental health implications of detaining asylum seekers: systematic review', *The British Journal of Psychiatry*, Vol. 194, No.4, pp. 306-312.
23 Dudley, K., Steel, Z., Mares, S., Newman, L. (2012), 'Children and young people in immigration detention', *Current Opinion in Psychiatry*, Vol. 25, No. 4, p. 290.
24 Newman, L. (2013), 'Seeking Asylum – Trauma, Mental Health and Human Rights: An Australian Perspective', *Journal of Trauma and Dissociation*, Vol. 14, No. 2, p. 218.

1 Children's right to protection and care

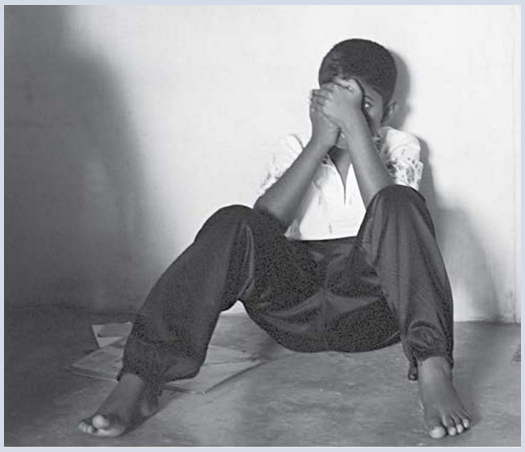
As noted in the introduction, deprivation of liberty may have significant short- and long-term consequences on a child's development. It stands in contradiction with the duty to provide care to children, which derives from the EU Charter of Fundamental Rights (the Charter) and the CRC.

Article 24 of the Charter provides for the right of children to such protection and care as is necessary for their well-being. The CRC imposes a special duty to provide protection and assistance to children deprived of their family environment (Article 20) as well as to children seeking asylum or in need of refugee protection (Article 22).

In the context of migration, this means that children should be placed in open facilities at which they can access the necessary support. To promote such an approach, a coalition of non-governmental organisations (NGOs) has produced a tool to prevent the detention of children.

Placement in an open facility alone is not enough to protect a child from the risk of abuse or neglect. Additional protective measures are necessary to support children, including the provision of adequate services, information, legal and linguistic support as well as preventive measures to counter the risk of exploitation and child trafficking. As noted in Section 4.4, the protection risks for children, particularly unaccompanied children, should not be addressed by detaining them – but instead by putting in place a functioning safety net in the locations at which they stay.

Tools and guidance: promoting children's placement in the community



The International Detention Coalition, a network of over 300 NGOs, has developed the child-sensitive community assessment and placement model (CCAP) to help countries make decisions on the best interest of the child and avoid immigration detention of children. It is based on five elements: (1) prevention, (2) assessment and referral, (3) management and processing, (4) reviewing and safeguarding and (5) case resolution.

For more information, see the International Detention Coalition's website

This chapter first discusses the importance of identifying children as a pre-condition to ensuring their protection. It then examines the principle of the child's best interests in connection with the deprivation of liberty.

1.1. Establishing whether an individual is a child

Detention constitutes the most severe limitation on the right to liberty set out in Article 6 of the Charter and Article 5 of the European Convention on Human Rights (ECHR). Any deprivation of liberty must respect the strict safeguards that have been established to prevent unlawful and arbitrary detention. Being a child makes a significant difference in this context (see Chapter 2).

Child protection efforts can only be applied if authorities promptly identify and register children. Therefore, it is important to establish if an individual is under 18 and thus considered a child under the CRC. Article 8 of the CRC obliges states to respect children's right to identity. Age is an integral component of a person's identity. It is essential to ensure access to, and adequate protection of, child rights. The right to identity implies an obligation to assist a person in asserting their identity, which may involve confirming the person's age and/or their minority.

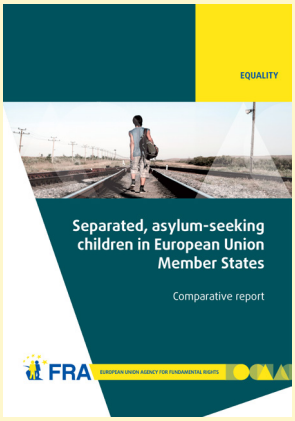
- In the absence of reliable documentary evidence, there are no conclusive medical methods to establish the exact age of a child. Age assessment methods have a margin of error of 1–2 years.[25] It may, therefore, be challenging to establish whether or not a person is a child. Pending age assessment, a person should be treated as a child.

Age assessment procedures should only be used when there are serious doubts about a child's age. Normally, authorities should register the age that the person declares. In practice, three situations can necessitate assessing a child's age. First, a child may not know their age and no documentary or other evidence may be available. Second, someone older than 18 years may claim to be a child. Third, a child may insist that they are over 18 years to avoid national child protection systems; for example, Nigerian girls at risk of trafficking have done this upon reaching southern Italy.[26]

Age assessments are in principle carried out by national authorities, but Frontex may also be involved when it supports national authorities in screening new arrivals. Under Regulation (EU) 2016/1624, Frontex has significant responsibilities in terms of facilitating child protection. According to Article 14 (3), for example, operational plans must include procedures to direct unaccompanied children to the competent national authorities for appropriate assistance. An erroneous recording of a child's age during Frontex-supported screening can result in the deprivation of the child's liberty.[27]

FRA ACTIVITY

Promoting a fundamental rights approach to age assessments



Already in its 2010 report on separated children seeking asylum, FRA emphasised that age assessments should be used only where there are grounds for serious doubt regarding someone's age. Age assessments should be gender-appropriate, conducted by independent experts who are familiar with the child's cultural background, and fully respect the child's dignity. Recognising that age assessments cannot be precise, when in doubt, authorities should treat a person as a child and should permit appeals against age assessment decisions.

Source: FRA (2010), Separated, asylum-seeking children in European Union Member States, Luxembourg, Publications Office

Article 25 (5) of the Asylum Procedures Directive provides that, before proceeding to medical examinations to determine the age of asylum-seeking unaccompanied children, consideration must be given to general statements and other relevant indications.[28] If Member States are still in doubt regarding the age after the medical examination, they must consider the applicant to be a child. Article 13 (2) of the Anti-Trafficking Directive underlines that, where there are reasons to believe that a person is under 18, he or she should be

25 See e.g. UNICEF (2011), *Age assessment practices: a literature review and annotated bibliography*, Discussion paper, April 2011.

26 FRA (2016), *Opinion on fundamental rights in the 'hotspots' set up in Greece and Italy*, Luxembourg, Publications Office. ee also International Organisation for Migration (IOM) (2015), *Rapporto sulle vittime di tratta nell'ambito dei flussi migratori misti in arrivo via mare, aprile 2014-ottobre 2015*.

27 See in this context European Court of Human Rights (ECtHR), *Mohamad v. Greece*, No. 70586/11, 11 December 2014, paras. 6 and 13.

28 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180, pp. 60-95 (Asylum Procedures Directive).

presumed to be a child and receive immediate assistance, support and protection.[29]

Applying restrictive age assessment approaches to treat children as adults in asylum procedures may result in violations of their rights under international human rights law, according to the UNHCR.[30] The UNHCR suggests that age assessments should take into account not only the physical appearance of the child but also their psychological maturity. Likewise, the UN Committee on the Rights of the Child requires assessments to be conducted in a scientific, safe, child- and gender-sensitive and fair manner, avoiding any risk of violating the child's physical integrity, and giving due respect to human dignity.[31]

Having a proper age assessment procedure in place helps ensure children's access to rights, including placement in age-appropriate facilities, and promotes respect for child-specific safeguards against arbitrary detention.

Tools and guidance: EASO tool advising Member States on age assessment

The EASO is producing a tool to highlight the key points to consider when undertaking age assessments in accordance with international, European and national legislation. The tool, which is expected to be made available in 2017, aims to serve as a guide for policymakers and officials dealing with the development, review or implementation of age assessment policies and procedures. The tool complements an overview of age assessment practices published by EASO in December 2013.

For more information, see EASO's website

In all cases involving age disputes regarding a person who claims to be a child, a guardian should be appointed to support and represent the individual throughout the procedure. Where medical examinations are used, unaccompanied children and/or their representatives must consent to the procedure (Asylum Procedure Directive, Article 25 (5)). Despite existing legal provisions, in practice, age assessment procedures frequently take place without the prior appointment of a guardian, FRA has found.[32]

A lack of appropriate age assessment procedures may result in child detention. For example, in the United Kingdom, reports from Her Majesty's Inspectorate of Prisons (HMIP)[33] and from the Refugee Council[34] indicate that immigration officers – who have not been appropriately trained – make swift decisions regarding the age of applicants, without involving the local authorities, who are officially entrusted with age assessment and bound by strict legal requirements.[35] In Hungary, during three monitoring visits to detention facilities in 2014, the Hungarian Helsinki Committee found at least 30 unaccompanied children who looked very young and claimed to be under 18, but were deemed adults by the authorities.[36] Reports from Bulgaria, Spain and Italy suggest that children there are also improperly identified as adults or attached to and registered with unrelated adults and, as a result, being detained.[37]

Children are also detained when their age is disputed and while they wait for age assessments to be completed. Pending age assessment, a person should be treated as a child. Some Member States ban the detention of unaccompanied children for immigration-related purposes, but allow it when age is disputed. For example, in Belgium, a person who claims to be a child can be

29 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, OJ 2011 L 101 , pp. 1–11 (Anti-Trafficking Directive). See also Council of Europe, Convention on Action against Trafficking in Human Beings, CETS No. 197, 2005, Article 10.

30 UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection: Child Asylum Claims under Articles 1 (A) 2 and 1 (F) of the 1951 Convention relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, para. 75.

31 UNHCR, *UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum*, 1 June 2015, para. 9; UN, Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 31 (i). See also, UNICEF (2013), *Age Assessment: A Technical Note,* Working paper, Geneva.

32 FRA (2015*), Guardianship systems for children deprived of parental care in the European Union: With a particular focus on their role in responding to child trafficking*, Luxembourg, Publications Office. See also FRA (2016), Monthly overviews of current migration situation, Thematic focus: Children, Luxembourg, Publications Office.

33 United Kingdom, HM Inspectorate of Prisons (2016) 'Report on an unannounced inspection of the short-term holding facilities at Longport freight shed, Dover Seaport and Frontier House 7 September, 1–2 and 5–6 October 2015', page 15.

34 See Refugee Council, 'Not a minor offence: unaccompanied children locked up as part of the asylum system', May 2012.

35 See in this context also EASO (2013), Age assessment practice in Europe, December 2013, p.85.

36 Hungarian Helsinki Committee (2014), 'Information Note on Asylum-Seekers in Detention and in Dublin Procedures in Hungary', May 2014, p. 12.

37 Bulgaria, Ombudsman of the Republic of Bulgaria (*Омбудсман на Република България*) (2016), Annual Report of the Ombudsman of the Republic of Bulgaria as a National Preventive Mechanism 2015 (*Годишен доклад на Омбудсмана на Република България като Национален превантивен механизъм 2015*), 15 February 2016, p. 22, See also Human Rights Watch (2014), *Universal Periodic Review Submission: Bulgaria*, September 2014. Spain, Pueblos Unidos, *Situación actual de los centros de internamiento de extranjeros en España y su adecuación al marco legal vigente*, June 2015. Italy, ASGI (Associazione Studi Giuridici Immigrazione) and the association 'Antigone' have expressed serious concerns about this kind of situations, which, according to their experience, are increasingly frequent.

detained at the border for three working days during an age assessment (extendable for another three working days in exceptional cases), but immigration detention of unaccompanied children is forbidden.[38] In Hungary and Slovakia, in cases of age disputes, applicants are considered adults until their age is confirmed and can be subject to detention during this period.[39] In Poland and Slovakia, if applicants for international protection refuse to undergo medical examinations to determine their age, the applicants are considered adults.[40]

1.2. The 'best interests of the child' principle

The best interests of the child is one of the four guiding principles of the CRC and a central element of the rights of the child protected by the Charter. Article 24 (2) of the Charter provides that, "[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

The principle of the best interests of the child is mirrored in secondary EU legislation concerning immigration detention. The Reception Conditions Directive and the Return Directive specify that the best interests of the child must be a primary consideration in the detention of children.[41] This means that these must be given significant weight when assessing whether or not to detain a child.

- As clarified by the UN Committee on the Rights of the Child, the principle of the best interests of the child applies at two different levels, as illustrated in Figure 3. First, it applies when making a decision that affects an individual child. Second, the principle also obliges states to reflect it in laws and policies.[42] It requires EU Member States to take proactive measures, ensuring that the best interests of the child are a primary consideration in legislation, policies and practices at all levels of government.[43] For example, in the context of migration management, it requires states to develop alternative measures to detention. A state cannot justify the use of detention as a last resort if it has not first taken adequate legislative and policy measures to establish alternatives.

The principle of the best interests of the child (Article 3 of the CRC) is not only an interpretative legal principle; it is also a right and a rule of procedure.[44] This requires EU Member States to set up procedures to assess the best interests of the child before any decision affecting the child is taken and to ensure that they receive primary consideration. The individual decision-making process must carefully consider the irreversible negative impact of detention on the life of the child and give primary consideration to this when weighing the different interests at stake. For more on this, see Chapter 4.

38 Belgium, Act of 12 January 2007 on the reception of asylum seekers and other specific categories of foreigners (The Reception Act) (*Loi du 12 janvier 2007 sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers (loi sur l'accueil) / Wet van 12 Januari 2007 betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen)*, 12 January 2007, Article 41(2); Plate-forme Mineurs en exil/Platform Kinderen op de vlucht (2015), Detentie van kinderen in gezinnen in belgie: analyse van de theorie en de praktijk December 2015, , p. 44–50; European Migration Network (EMN) (2014), *The use of detention and alternatives to detention in the context of immigration policies in Belgium*, Brussels, European Migration Network , p. 14.

39 Slovakia, Aliens Act (Zakon o pobyte cudzincov), Article 127 (1) ; FRA (2016), *Key migration issues: one year on from initial reporting*, October 2016, Luxembourg, Publications Office, p. 4. Hungary, Article 31/A (8) c) of the Act No 80 of 2007 on Asylum and Article 36/B of Government Decree No 301/2007 (V.31) implementing the Asylum Act. These legal provisions are quite vague and leave room for improper administrative practices as regards their application see Hungarian Helsinki Committee (2016), *Monitoring the Situation of Unaccompanied Asylum Seeking Children in Hungary*, pp. 6–8; Hungarian Helsinki Committee (2017), *The detention of asylum seeking children in Hungary: Dire tendencies in upholding the basic rights of children*.

40 Poland, the Act on Foreigners, Article 397(6). (*Ustawa z dnia 13 grudnia 2013 r. o cudzoziemcach*), 13 December 2013, Slovakia, Asylum Act (*Zakon o azyle*), Section 23 (7).

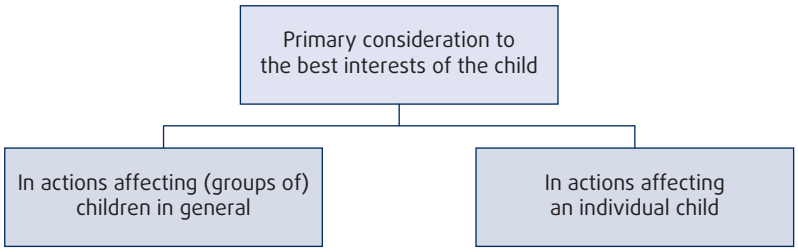
41 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ 2013 L 180, pp. 96-116 (Reception Conditions Directive), Article 11 (2); Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348, pp. 98-107 (Return Directive), Article 17 (5).

42 UN, Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para. 1)*, 29 May 2013, CRC/C/GC/14, para. 15a.

43 UN, Committee on the Rights of the Child, *General comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para. 12.

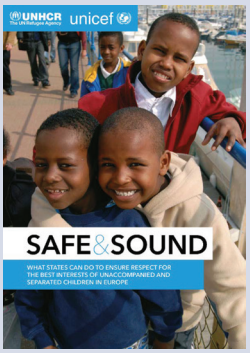
44 UN, Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para. 1)*, 29 May 2013, CRC/C/GC/14.

Figure 3: Scope of the principle of the best interests of the child



Source: FRA, 2017

Tools and guidance: Assessing the best interests of the child



The UN High Commissioner for Refugees (UNHCR) and the United Nations Children's Fund (UNICEF) developed guidance to assess what the child's best interests are. The guidance reflects the factors to consider for such assessments, as identified by the UN Committee on the Rights of the Child in its General Comment No. 14 (2013). Factors to consider when assessing the best interests of the child are also listed in Article 23 (2) of the Reception Conditions Directive (2013/33/EU).

The UNHCR and UNICEF tool also contains guidance on how to weigh the different factors that must be considered, as well as on balancing the best interests of the child with other interests.

Source: UNHCR and UNICEF (2014), Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe, October 2014

Deprivation of liberty is rarely in a child's best interests. Exceptionally, it can be the case – for example, when necessary to protect the child's health or safety. In the context of immigration, UN expert bodies have stated that immigration detention is never in the best interests of the child (see Chapter 2).

The weight to give to the best interests of the child varies according to the type of decision involved. Decisions on parental rights, custody or adoption must follow what is in the best interests of the child, which in these cases is not just primary but paramount.[45]

For other decisions, including deprivation of liberty, the best interests of the child are a central but not the only factor to consider. Article 3 of the CRC and Article 24 of the Charter require that they be given primary consideration, which means that the child's best interests must bear more weight than other factors. This does not exclude, however, balancing them against other legitimate interests or rights and, under specific circumstances, these other considerations – when rights-based – could outweigh the best interests of the child.[46] This requires a formal procedure to assess the different interests at stake when deciding on the necessity and proportionality of detaining a child for migration purposes. In this regard, the ECtHR ruled that the extreme vulnerability of a child takes precedence over the person's status as a migrant in an irregular situation.[47]

45 Convention on the Rights of a Child (CRC), Articles 9 and 21.

46 UN, Committee on the Rights of a Child, *General Comment No. 14, (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para. 1)*, 29 May 2013, CRC/C/GC/14,paras. 37 and 39; *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para. 82.

47 ECtHR, *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, para. 56; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, para. 55.

Conclusion

The right of children to protection and care and the principle of the best interests of the child are the starting points when examining deprivation of liberty of children. As noted by the European Commission in its 2017 Communication on the protection of children in migration,[48] in some instances, children have been accommodated in closed facilities due to a shortage of suitable alternative reception facilities. Prompt identification of children is needed to trigger the special protection to which children are entitled.

FRA opinion 1

To promote children's right to protection and care, the EU and its Member States should develop credible and effective systems that would make it unnecessary to detain children for asylum or return purposes, regardless of whether they are in the EU alone or with their families. This could include building on, for example, case management, alternative housing, counselling and coaching.

EU Member States should use age assessments only where there are grounds for serious doubt about an individual's age. Age assessment procedures should take into account children's rights. Independent experts, familiar with the respective child's cultural background and fully respecting the child's dignity, should undertake in a gender-appropriate manner age assessments. Recognising that age assessments cannot be precise, in cases of doubt, authorities should treat the person as a child. They should also permit appeals against age assessment decisions. The forthcoming European Asylum Support Office (EASO) guidance should provide further advice to EU Member States on how to apply these considerations in practice.

48 European Commission, *The protection of children in migration*, COM/2017/0211 final, 12 April 2014, point 4.

2 The right to liberty and security

A person's right to liberty and security, including the prohibition of arbitrary detention, is a fundamental right enshrined at all three levels of the multi-layered regulatory scheme in the area of human rights law: that of the UN, the Council of Europe and the EU. This right also extends to non-nationals, regardless of their residence status.

Legal norms and principles enshrined in various Council of Europe and UN instruments to which all EU Member States are party are binding under international law, regardless of whether or not they are mirrored in EU legislation. Table 3 provides an overview of the relevant provisions of the core instruments from the three regulatory regimes.

The UDHR and the conventions listed in Table 3 are complemented by non-binding soft law documents, such as declarations, guidelines, general comments by UN treaty bodies or principles. They help to understand the content of the legal obligations under the different human rights law instruments and are therefore used recurrently in this report.

The right to liberty and security is not absolute and may therefore be restricted. However, in line with Article 18 of the ECHR, any restriction on the right to liberty must be strictly construed. Any restriction must respect the strict safeguards established by international, European and domestic law. This chapter first presents the safeguards applicable to all persons, and then those specific

Table 3: Legal provisions relating to the right to liberty and security, and prohibition of arbitrary detention

	EU (primary law)	Council of Europe	UN
Right to liberty and security	EU Charter (Article 6)	ECHR (Article 5 (1), first sentence)	UDHR (Article 3) ICCPR (Article 9, first limb) CRPD (Article 14)
Prohibition of arbitrary detention		ECHR (Article 5 (1), second sentence) Fourth Protocol to ECHR (Article 1)	UDHR (Article 9) ICCPR (Article 9, second limb) CRC (Article 37 (b)) ICRMW (Article 16 (4)) 1951 Geneva Convention (Article 31 – implicit)

Notes: *CRC = Convention on the Rights of the Child, 20 November 1989*
CRPD = Convention on the Rights of Persons with Disabilities, 13 December 2006
ICCPR = International Covenant on Civil and Political Rights, 16 December 1966
ICRMW = International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990
UDHR = Universal Declaration of Human Rights, General Assembly Resolution 217 A(III) of 10 December 1948

Source: *FRA, 2017 (based on human rights law instruments)*

to children at all three levels of inter-state regulation (EU, Council of Europe and UN normative layers), showing where they converge and where they differ.

2.1. Provisions applicable to all

Most requirements deriving from the right to liberty and security apply to anyone, including children. In broad terms such requirements are similar under EU law, Council of Europe law and under international human rights law, although important differences exist. For example, whereas European law contains a list of exhaustive grounds for deprivation of liberty, which are to be interpreted restrictively (see Chapter 4), international human rights law requires that grounds for detention be set forth in national law in an exhaustive manner (see Article 9 (1) of the ICCPR).

2.1.1. EU law

The Charter proclaims the right to liberty and security (Article 6). As this right corresponds to an ECHR right (Article 5, right to liberty and security), its meaning and scope must be the same as laid down in the ECHR and interpreted by the European Court of Human Rights (ECtHR) – although, under Article 52 (3) of the Charter, EU law may provide more extensive protection. Its scope and content as shaped by the ECtHR thus represent a minimum threshold of protection under EU law.

Any possible limitations on the exercise of the right to liberty and security must be provided for by law, must respect the essence of that right and must be subject to the principle of proportionality (Article 52 (1)). Such guarantees have also been echoed by the Court of Justice of the European Union (CJEU).[49] The CJEU recalled in *J.N. v. Staatssecretaris voor Veiligheid en Justitie* that "in view of the importance of the right to liberty enshrined in Article 6 of the Charter and the gravity of the interference with that right which detention represents, limitations on the exercise of the right must apply only in so far as is strictly necessary."[50] The CJEU addressed several key questions relating to the interpretation of detention rules under EU law. The court emphasised that, as detention in the context of migration constitutes a serious interference with the right to liberty, it must be "subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness."[51]

- The Return Directive regulates the detention of migrants in an irregular situation pending removal (Articles 15-17) and the Reception Conditions Directive governs how applicants for international protection are detained and the related safeguards (Articles 8-11). Article 28 of the Dublin Regulation on the detention of Dublin transferees complements these directive articles.[52]

  Asylum-related detention and return-related detention are thus covered by two different legal regimes under EU law. The Reception Conditions Directive defines detention as "confinement of an applicant by [an EU] Member State within a particular place, where the applicant is deprived of his or her freedom of movement" (Article 2 h)). The Return Directive does not define detention for persons involved in return procedures.

2.1.2. Council of Europe

Article 1 of the ECHR requires that states secure the rights and freedoms of the convention for everyone within their jurisdiction. The human rights that the ECtHR most commonly refers to in cases concerning the detention of migrant children are the prohibition of torture or inhuman or degrading treatment or punishment (Article 3 of the ECHR), the right to liberty and security (Article 5) and the right to respect for private and family life (Article 8).

Article 3 of the ECHR absolutely prohibits torture or inhuman or degrading treatment or punishment. The ECtHR has stressed that this positively obliges states to protect individuals in vulnerable situations.[53] Such a positive obligation entails taking reasonable and suitable measures to safeguard the rights of an individual.

49 CJEU, C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others*, 15 March 2017, para. 37.

50 CJEU, C601/15 PPU, *J.N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016, para. 56.

51 CJEU, C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others*, 15 March 2017, para. 40.

52 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ 2013 L 180, pp. 31-59 (Dublin Regulation).

53 ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011, para. 87. These principles have also been enshrined by the Council of Europe, Parliamentary Assembly (PACE), Resolution 1810 (2011), Unaccompanied children in Europe: issues of arrival, stay and return, paras. 5.2 and 5.15.

Article 5 (1) of the ECHR protects the right to liberty and security, providing an exhaustive list of permissible exceptions, which Chapter 3 describes.

To be permissible under the convention, it also follows from ECtHR case law that detention must be carried out in good faith; must be closely connected to the ground of detention relied upon; be in a place and under conditions that are appropriate; and be for the shortest period of time that is reasonably required to fulfil the purpose of detention.[54] In addition, when assessing the legality of migration-related detention, the ECtHR looks at whether or not a less intrusive measure could have been imposed before detention (see Chapter 5).

2.1.3. International law

International human rights law affirms that no one must be subject to arbitrary arrest or detention. The right to liberty and security and/or the prohibition of arbitrary detention appears in a number of international human rights instruments, beginning with the 1948 Universal Declaration of Human Rights (UDHR) and continuing through core UN human rights conventions. Table 4 lists core provisions of the legally binding international instruments relating to detention adopted under the aegis of the UN, which apply to all persons regardless of their age.

Table 4: Main human rights law provisions on deprivation of liberty and prohibition of arbitrary detention

Instrument	Main provision	Ratification
UDHR, Articles 3, 9	"Everyone has the right to [...] liberty and security of person." "No one shall be subjected to arbitrary arrest, detention or exile."	UN General Assembly resolution, having general customary international law character
ICCPR, Article 9 (1)	"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."	All EU Member States
ICRMW, Article 16 (4)	"Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law."	No EU Member States
CRPD, Article 14 (1)	"States Parties shall ensure that persons with disabilities, on an equal basis with others: a) Enjoy the right to liberty and security of person; b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty."	All EU Member States except Ireland
1951 Geneva Convention, Article 31 (1)	"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."	All EU Member States

Source: FRA, 2017

54 ECtHR, *Saadi v. the United Kingdom* [GC], No.13229/03, 29 January 2008, para. 74; *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, para. 164; *Louled Massoud v. Malta*, No. 24340/08, 27 July 2010, para. 62; *Thimothawes v. Belgium*, No. 39061/11, 4 April 2017, para. 64.

These are complemented by several non-binding documents, such as general comments of the treaty bodies of the UN conventions, UN General Assembly resolutions,[55] reports by the UN Working Group on Arbitrary Detention,[56] conclusions of the Executive Committee of the Programme of the UNHCR,[57] and the UNHCR guidelines.[58] These documents describe what the obligations deriving from human rights and refugee law are, providing useful guidance to states on how to apply rights and principles in practice.

2.2. Specific provisions for children

Children are protected against arbitrary detention not only by the general safeguards applicable to adults, but also by additional measures specifically designed to safeguard their specific needs as vulnerable persons. These largely derive from the principle of the best interests of the child, the right of the child to development and the right to respect for family life.

In addition, there are special safeguards that apply only to unaccompanied children. Unaccompanied children are particularly vulnerable and, therefore, entitled to special protection. As regards deprivation of liberty, unaccompanied children enjoy additional safeguards, including procedural ones, as Chapter 5 highlights. In line with the best interests of the child, every child deprived of parental care must have a legal guardian.[59]

Although there is no legal norm in human rights or EU law explicitly prohibiting immigration detention of children, there is an increasing consensus among international organisations, treaty bodies and other human rights protection mechanism, in considering that immigration detention of children is in contradiction with the duty to provide care imposed by the CRC. As international human rights law is evolving, an increasing gap is emerging between EU law and the way international human rights law is interpreted.

2.2.1. EU law

EU law imposes significant limitations on the detention of children for immigration-related purposes, but does not prohibit it. As of April 2017, there has been no CJEU case law on the detention of migrant children.

The Reception Conditions Directive (Article 11) and the Return Directive (Articles 16–17) both include children in their lists of vulnerable persons.[60] Both directives include provisions that require detailed attention to be paid to the particular situation of child migrants when they are detained.[61]

- The Reception Conditions Directive and the Return Directive both emphasise that children are to be detained only as a last resort and only if less coercive measures cannot be applied effectively. Such detention must be for the shortest period of time possible[62] and, in the asylum context, all efforts must be made to release those detained and to place them in suitable accommodation.[63]

Concerning unaccompanied children, in the asylum context, Article 11 (3) of the Reception Conditions Directive does not completely prohibit the detention of unaccompanied children applying for asylum, but allows it only in exceptional circumstances and if they are detained separately from adults, and never in prison accommodation.[64] However, in practice, detention of unaccompanied children seeking asylum at airports or other borders is not uncommon. The border procedures, as regulated under the Asylum Procedures Directive (Article 43) and the Reception Conditions Directive (Article 8 (3) (c)), permit the detention of an asylum applicant at the border in order to decide on the admissibility or the substance of an asylum claim. This accelerated asylum procedure entails deprivation of liberty at the border. When applicants come from a "safe country of origin", unaccompanied children are not exempted from this.[65]

55 See, for example, UN, General Assembly, Resolution 43/173, *Body of Principles for the Protection of all persons under any forms of detention or imprisonment,* 9 December 1988, A/RES/43/173.

56 See, for example, the UN, *Report of the Working Group on Arbitrary Detention*, 10 January 2008, A/HRC/7/4; *Report of the Working Group on Arbitrary Detention*, 16 February 2009, A/HRC/10/21; or *Report of the Working Group on Arbitrary Detention*, 18 January 2010, A/HRC/13/30.

57 Executive Committee of the High Commissioner's Programme (1986), *Conclusions on International Protection: Detention of Refugees and Asylum-Seekers No. 44 (XXXVII)*, 13 October 1986, No. 44 (XXXVII).

58 UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.

59 UN, Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 21.

60 Reception Conditions Directive, Article 21; Return Directive, Article 3 (9).

61 Reception Conditions Directive, Article 11; Return Directive, Articles 16 (3) and 17.

62 Reception Conditions Directive, Article 11 (2); Return Directive, Article 17 (1).

63 Reception Conditions Directive, Article 11 (2).

64 Reception Conditions Directive, Article 11 (3).

65 See Asylum Procedures Directive, Article 31 (8).

For unaccompanied children detained pending removal, the Return Directive provides the same guarantees as for children detained together with families.[66] Article 17 (4) of the Return Directive requires that unaccompanied children be placed in institutions with staff and facilities that respond to the needs of persons of their age. This is, however, qualified by "as far as possible" (see further in Chapter 6).

2.2.2. Council of Europe

The ECHR does not contain specific provisions for the detention of children, but as described in Chapters 2-6, the ECtHR applies a very strict test when examining cases of children detained for immigration-related reasons, whether accompanied by their families or detained alone. The ECtHR recurrently emphasises the extreme vulnerability of children and the inherently intimidating nature of detention, which would cause them stress and anxiety.[67] Children in detention are extremely vulnerable as a result of the feelings of suffering and inferiority in such situations, which may endanger their development.[68]

Building on the case law of the ECtHR, a few years ago the Parliamentary Assembly of the Council of Europe called upon Member States to end immigration detention of children who are unaccompanied.[69] In March 2015, the Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly extended its call to end immigration detention of all children; it started a campaign to this end, appointing a General Rapporteur.[70]

The Council of Europe Commissioner for Human Rights is of the view that, as a principle, migrant children should not be subjected to immigration detention.[71] The Commissioner has also stressed that "[t]he fact of having a dependent child must be ground[s] for an adult not to be detained except in accordance with the lawful order of a criminal court."[72]

Finally, the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) also considers that every effort should be made to avoid resorting to the deprivation of liberty of a migrant in an irregular situation who is a child.[73] Following the principle of the best interests of the child as formulated in Article 3 of the UN Convention on the Rights of the Child, detention of children cannot be justified solely on the basis of the children being unaccompanied or separated, or on their migratory or residence status, or lack thereof. This applies to accompanied as well as unaccompanied children.[74]

2.2.3. International law

Article 37 of the CRC provides that no child shall be deprived of liberty unlawfully or arbitrarily and sets strict conditions underlining that "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". The purpose is to ensure that the child's right to development is fully respected.[75] As the Committee on the Rights of the Child affirms, the underlying approach should be to provide 'care' and not 'detention'.[76]

Following this, the UN Member States – in the New York Declaration for Refugees and Migrants (2016) – recognise that "detention for the purposes of determining migration status is seldom, if ever, in the best interests of the child", and have committed themselves to "work towards the ending of this practice".[77] This commitment follows the Inter-American Court of Human Rights (IACtHR) advisory opinion concluding that states should never deprive children of their liberty solely on the basis of their or their parents' or guardians' irregular immigration status. Rather, in response to situations of

66 Return Directive, Article 17 (1).
67 See, for example, ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, Nos. 25794/13 and 28151/13, 22 November 2016, para. 104; *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014, para. 99.
68 ECtHR, *Kanagaratnam and Others v. Belgium*, No. 15297/09, 13 December 2011, para. 67–69.
69 PACE, Resolution 1810 (2011), Unaccompanied children in Europe: issues of arrival, stay and return, para. 5.9; PACE, Recommendation 1985 (2011), Undocumented migrant children in an irregular situation: a real cause for concern, para. 9.4.5; PACE, Resolution 1707 (2010), Detention of asylum seekers and irregular migrants in Europe, para. 9.1.9.
70 Council of Europe, PACE, 'The Parliamentary Campaign to End Immigration Detention of Children', web page.
71 See the Commissioner's Positions on the Rights of Minor Migrants in an Irregular Situation, 2010. See also the Commissioner's Recommendation concerning the rights of aliens wishing to enter a Council of Europe member state and the enforcement of expulsion orders, 2001, section II and Letter from the Council of Europe Commissioner for Human Rights, Nils Muižnieks, to the Secretary of State for Migration and Asylum of Belgium, Theo Francken, concerning the detention of migrant children, 19 December 2016, CommDH (2016)43.
72 See the Commissioner's Issue Paper, Criminalisation of Migration in Europe – Human Rights Implications, 2010. See also, inter alia, the Commissioner's Report following his visit to Denmark, 2014, and his Report following his visit to The Netherlands, 2014.
73 Council of Europe, CPT (2009), *Safeguards for irregular migrants deprived of their liberty*, Extract from the 19th General Report of the CPT CPT/Inf(2009)27-part, para. 97.
74 Council of Europe, CPT, Factsheet on Immigration detention, CPT/Inf(2017)3, March 2017.
75 Committee on the Rights of the Child, *General Comment No. 10 (2007): Children's rights in juvenile justice*, 25 April 2007, CRC/C/GC/10, para. 11.
76 UN, Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 63.
77 UN, General Assembly, Resolution 71/1, *New York Declaration for Refugees and Migrants*, 3 October 2016, A/RES/71/1, para. 33.

vulnerability and to protect the rights of children in the context of migration, the court held that states have an obligation to take measures to promote "the well-being and development of the child".[78]

This call is supported by the views of several UN human rights mechanisms, who consider immigration detention of children to never be in the best interests of the child and to always constitute a violation of the rights of the child. The UN Working Group on Arbitrary Detention stressed that additional justification – beyond merely being a migrant in an irregular situation – is needed for the detention of children.[79] The UN Committee on the Rights of the Child and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have called on all states to cease the detention of children on the basis of their immigration status, and to establish alternatives to detention in law and in practice, in accordance with the best interests of the child and their right to liberty.[80] Detention of children on the sole basis of their or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child, the Committee on the Rights of the Child concludes.[81] A similar call to end detention of migrant children and their families has been addressed to UN Member States by the Report of the Special Representative of the Secretary-General on Migration of February 2017.[82] UNHCR takes a similar position,[83] as does the OHCHR.[84]

Soft law calling for an end to immigration detention of children dates back more than a decade, particularly for unaccompanied children. Such calls are increasing rapidly. An illustration of this trend is the forthcoming *Joint General Comment on the Human Rights of Children in the Context of International Migration,* currently under preparation by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, which is also expected to confirm that immigration detention is never in the best interests of the child and constitutes a child rights violation. The Joint General Comment is expected to call on states to expeditiously and completely stop detaining children on the basis on their, or their parents', immigration status and to instead implement community-based alternatives.[85]

Conclusion

A person's right to liberty and security, as enshrined in EU, Council of Europe and UN instruments, is a fundamental right. Any restriction of this right must respect the requirements established by international, European and domestic law, which are particularly strict for children.

Neither EU law nor the ECHR prohibit immigration detention of children. The stringent requirements flowing from the Charter and the case law of the European Court of Human Rights (ECtHR) mean, however, that only in exceptional cases depriving children of liberty will be in line with EU law.

78 IACtHR, Advisory Opinion OC-21/14, *Rights and guarantees of children in the context of migration and / or in need international protection*, 19 August 2014, para. 164.

79 UN, *Report of the Working Group on Arbitrary Detention*, 18 January 2010, A/HRC/13/30, para. 30.

80 UN, Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration*, paras. 79 and 84. Human Rights Council, *Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/28/68, 5 March 2015, para. 85.

81 UN, Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration*. On detention of unaccompanied children see also UN, Committee on the Rights of the Child, *No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para. 61.

82 UN, General Assembly, *Note by the Secretary General transmitting Report of the Special Representative of the Secretary-General on Migration*, 3 February 2017, A/71/728, para. 52 (b).

83 UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 9 (for unaccompanied children) and UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017 (for all children in the context of migration).

84 UN, Office of the Commissioner for Human Rights (OHCHR), *Situation of migrants in transit*, A/HRC/31/35, 27 January 2015, paras. 44-45.

85 See *Joint General comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their* Families and No. 21 of the Committee on the Rights of the Child on the Human Rights of Children in the Context of International Migration, draft, 24 April 2017.

In addition, international human rights law strongly discourages deprivation of liberty of children alleged, accused or recognised as having infringed penal law. That raises the question of whether or not detention of children who are not in conflict with criminal law can be justified at all on immigration-related grounds. Immigration detention of children is contrary to international human rights law, in the opinion of the UN Working Group on Arbitrary Detention, the UN Committee on the Rights of the Child and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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To protect the right to liberty and security (Article 6 of the Charter), EU Member States are encouraged to introduce more favourable provisions in national laws – as envisaged in Article 4 (3) of the Return Directive and Article 4 of the Reception Conditions Directive – either prohibiting or further restricting the possibility to detain children for immigration purposes. This would significantly contribute to avoiding the risk of arbitrary detention of children.

Concerning asylum detention, the current reform of the asylum acquis is an opportunity for EU legislators to take a stronger stand against child detention.

EU Member States should systematically collect disaggregate data on children in immigration detention, while the European Commission should encourage the comparability of such data through Eurostat.

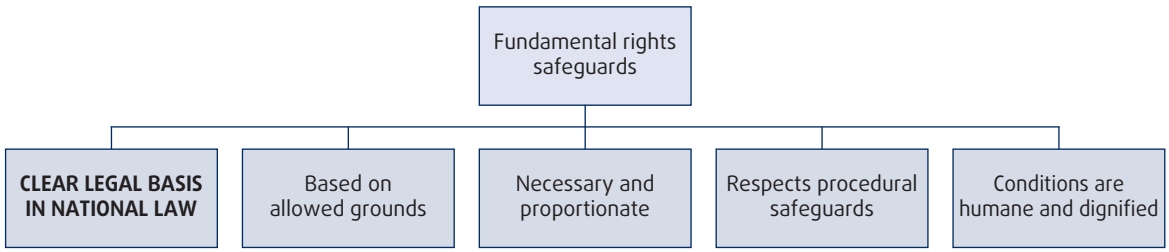
3 Legal basis in national law

Detention is a serious limitation to the right to liberty and security and must respect strict safeguards. Otherwise, the deprivation of liberty is unlawful or arbitrary. To help analyse these safeguards established by the European and international legal framework, this report has grouped them in five categories (Figure 4). Chapters 2–6 deal with each of them in turn.

Under international and European law, the first requirement for any exception to the right to liberty and security is that any deprivation or restriction must have a clear legal basis. If national law does not envisage the possibility of detention, it is unlawful. This chapter deals with the requirement that any deprivation of liberty must be prescribed by law.

Article 5 (1) of the ECHR provides that "no one shall be deprived of his liberty" unless "in accordance with a procedure prescribed by law". It is also a requirement under other international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) (Article 9 (1)) or the CRC (Article 37 (b)). This means that national law must lay down substantive and procedural rules prescribing when and in what circumstances an individual may be detained. Similarly, pursuant to Article 52 (1) of the Charter, any limitation on the exercise of a Charter right, namely the right to liberty and security in this context, must be provided for by law.

Figure 4: Five conditions that deprivation of liberty must meet not to be unlawful and arbitrary



Source: FRA, 2017

➢ The CJEU has underlined that any deprivation of liberty must have a legal basis in national law and that such legal basis must be of a certain quality.[86] Similarly, the ECtHR requires the national legal basis to be compatible with the rule of law, a concept inherent in all articles of the ECHR. For the law to be of a certain quality, it must be sufficiently accessible, and precise and foreseeable in its application to avoid a risk of arbitrariness. Any deprivation of liberty has to be in line with the purpose of Article 5 of the ECHR to protect the individual from arbitrariness.[87]

3.1. National laws on immigration detention of children

Several EU Member States' provisions against immigration detention of children give more protection than the minimum requirement of EU law. Ireland prohibits child detention altogether, and more EU Member States forbid it for unaccompanied children. This section does not deal with detention of migrant children for violating national criminal law, even if in some cases such detention is very closely linked to immigration.

In 2013, 17 EU Member States allowed imprisonment and/or fine for irregular entry, and 10 EU Member States allowed it for irregular stay, as illustrated in FRA's report *Criminalisation of migrants in an irregular situation and of persons engaging with them*.[88] In principle, children above the minimum age of criminal responsibility (set at 14 years or above in 24 out of 28 Member States)[89] are not exempted from these sanctions.

- Hungary criminalised crossing the border fence without authorisation and seriously damaging the border fence with a penalty of imprisonment for up to 3 and 5 years, respectively.[90]
- An example from Lithuania details the case of two asylum-seeking children who were held in a regular prison for more than four months by mistake. They were held on charges related to irregular border crossing, since a doctor assessed their age on the basis of x-ray images without seeing the children themselves. The children were kept with adult men in a pre-trial detention prison, were not allowed to contact relatives, had restricted access to their legal representative with an interpreter and faced constant harassment.[91]

3.1.1. Immigration detention of children under national law

This sub-section examines immigration detention of children who are with their parents.

Ireland is the only EU Member State that prohibits immigration detention of children for asylum as well as for return purposes. Section 20 (6) of the 2015 International Protection Act clarifies that the relevant provisions regarding detention do not apply to persons under the age of 18 years.

Other Member States do not permit detention in principle, but do not forbid it completely. In Belgium, for example, the principle is to maintain the family unit and avoid the detention of children. Children accompanied by their parents should not be held in detention but be transferred together in return houses – form of designated residence – or, if they were living irregularly in the territory, they can stay in their own residence or be transferred to an open reception centre.[92] Article 74/9 (1) of the Immigration Act states that families with children (irregularly staying in the territory or applying for asylum at the border) are in principle not detained. However, the same legal provision makes exceptions possible "if the detention facilities are adapted to the needs of families with minor children."[93] Furthermore, if families with children try to enter Belgian territory

86 CJEU, C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others*, 15 March 2017, para. 38.
87 ECtHR, *Del Río Prada v. Spain* [GC], No. 42750/09, 21 October 2013, para. 125; *Amuur v. France*, No. 19776/92, 25 June 1996, para. 50; *Dougoz v. Greece*, No. 40907/98, 6 March 2001, para. 55.
88 FRA (2014), *Criminalisation of migrants in an irregular situation and of persons engaging with them*, Luxembourg, Publications Office.
89 The exceptions are France (13 years for serious crime), Ireland, the Netherlands and the United Kingdom. See European Commission (2014), *Summary of contextual overviews on children's involvement in criminal judicial proceedings in the 28 Member States of the European Union*, Table 3.1, p. 7.
90 Hungary, Articles 352/A and 352/B of Act C of 2012 on the Criminal Code (*2012. évi C. törvény a Büntető Törvénykönyvről*).
91 Lithuania, Lithuanian Red Cross, 11 February 2016.
92 Belgium, Law of 15 December 1980 on access to the territory, stay, settlement and removal of foreigners (*Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*), 15 December 1980, Article 74/9 (3).
93 Belgium, Article 74/9 (1) of the Immigration Act, as amended by the Law of 16 November 2011, (*Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*)

irregularly, the law also provides the possibility of detention "in adapted detention places" and "for as short as possible duration" (Article 74/9 (2)).[94] In April 2016 the Belgian Council of State stated that detention centres must be adapted to suit the needs of children, annulling provisions of a 2014 Royal Decree that did not clearly ban the detention of families with children in regular facilities and thus did not conform to the Belgian Immigration Act.[95]

The practice of not detaining children for asylum or return purposes also prevails in Italy, Portugal and Spain. In Italy and Portugal, the authorities have a policy not to detain families with children, partly because appropriate facilities are not available. In Spain, according to Article 62 (4) of the Immigration Law, the placing of children in detention centres is not allowed, except when requested by the parents, under exceptional circumstances (see Section 5.2).[96] In February 2015, the Spanish High Court declared Article 62-bis 1 i) of the Immigration Law inapplicable, dismissing the requirement that families can be detained only if adequate special areas are set up within the detention centres.[97]

Further four EU Member States have a general policy of not detaining asylum-seeking children, including when they are accompanied by their family members. In Germany, deprivation of liberty of applicants is only allowed in the context of the airport procedure – an accelerated asylum procedure applicable at Berlin-Schönefeld, Düsseldorf, Frankfurt am Main, Hamburg and Munich airports.[98] In the Netherlands, the State Secretary for Security and Justice addressed a letter to the House of Representatives in 2014 endorsing the principle that children do not belong in detention.[99] Subsequently, the Aliens Circular was revised: Part A, para. 7.3 now instructs border guards to refer families and unaccompanied children who apply for asylum to a special unit of the Aliens Police in the Ter Apel application centre.[100] In the Czech Republic, asylum-seeking children are exempt from detention whether they are accompanied or not.[101] Similarly, whereas Cypriot legislation prohibits the detention of any applicants for the sole reason that they are seeking asylum, in practice this results in families with children not being detained.[102]

Promising practice

Making child detention visible to promote alternatives

In **Cyprus** the situation has improved since 2014. The Ombudsperson, the Commissioner for the Rights of the Child, NGOs and the CPT persistently raised the issue of immigration detention of children. In Cyprus's 2015 response to the United Nations Committee against Torture (UNCAT) report of 2014, the authorities stated that, by means of a Ministerial Committee, they had decided not to detain parents of children irregularly residing in Cyprus. Detention has been replaced with alternatives, such as reporting regularly to a police station, submitting their travel documents and/or a financial guarantee. A 2016 NGO report confirms that in practice children are no longer detained.

Sources: Asylum Information Database (AIDA), Country report: Cyprus; Amnesty International (2014), 'Cyprus: Abusive detention of migrants and asylum seekers flouts EU law'; Amnesty International (2012), Punishment without a crime: Detention of migrants and asylum seekers in Cyprus; Cyprus, Commissioner for the Rights of the Child (2014), 'Position of the Commissioner for the Rights of the Child Leda Koursoumba regarding the first instance handling of unaccompanied minor: Findings from the investigation of complaints, from NGO consultations and from interviews with unaccompanied minors' (Θέση της Επιτρόπου Προστασίας των Δικαιωμάτων του Παιδιού Λήδας Κουρσουμπά αναφορικά με τον πρωταρχικό χειρισμό ασυνόδευτων παιδιών: Αποτέλεσμα διερεύνησης παραπόνων, διαβούλευσης με ΜΚΟ και συνετεύξεων με ασυνόδευτα παιδιά) File No. G.E.P. 11.11.44.01, November 2014; Cyprus, Office of the Law Commissioner, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Follow up to concluding observations on the Fourth Periodic Report of Cyprus adopted on 21 May 2014', Nicosia 18 May 2015; CPT, 'Report to the Government of Cyprus on the visit to Cyprus carried out by European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) the from 23 September to 1 October 2013', Ref CPT/Inf (2014) 31, Strasbourg, 9 December 2014, para. 32-36; 'Intervention of the National Independent Human Rights Authority regarding the treatment of unaccompanied minors until their care is taken over by the state' (Παρέμβαση Εθνικής Ανεξάρτητης Αρχής Ανθρωπίνων Δικαιωμάτων αναφορικά με τη μεταχείριση των ασυνόδευτων παιδιών μέχρι την ανάληψη της φροντίδας τους από το κράτος), Ref. 5/2013, 29 May 2014

94 Belgium Article 74/8(3) and 74/9 of the Immigration Act, as amended by the Law of 16 November 2011, (*Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.*)

95 Belgium, Council of State (*Conseil d'État*), Arrêt No. 234.577, 28 April 2016.

96 Spain, Immigration Law (*Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*), 11 January 2000.

97 Spain, High Court Ruling (*Tribunal Supremo*), *Sentencia de 10 de febrero de 2015, del Pleno de la Sala Tercera del Tribunal Supremo, por la que se declara inaplicable el inciso "y existan en el centro módulos que garanticen la unidad e intimidad familiar" del artículo 62 bis 1.i) de la Ley Orgánica 4/2000, de 11 de enero; y se anulan diversos incisos de los artículos 7.3, segundo párrafo, 16.2.k), 21.3 y el apartado 2 del artículo 55 del Real Decreto 162/2014, de 14 de marzo, por el que se aprueba el Reglamento de funcionamiento y régimen interior de los Centros de Internamiento de Extranjeros'*, 10 February 2015.

98 For a brief description of this procedure see the web page of the *Bundesamt für Migration und Flüchtlinge*.

99 Netherlands, State Secretary for Security and Justice (*Staatssecretaris van Veiligheid en Justitie*) (2014), 'Invoering screening en nieuwe locatie voor kinderen', letter to the House of House of Representatives (*Tweede Kamer der Staten Generaal),* 28 May 2014.

100 Netherlands, Aliens Circular A (*Vreemdelingencirculaire A*), Para. A1/7.3.

101 Czech Republic, Asylum Act *(Zákon o azylu)*, Article 46a(3).

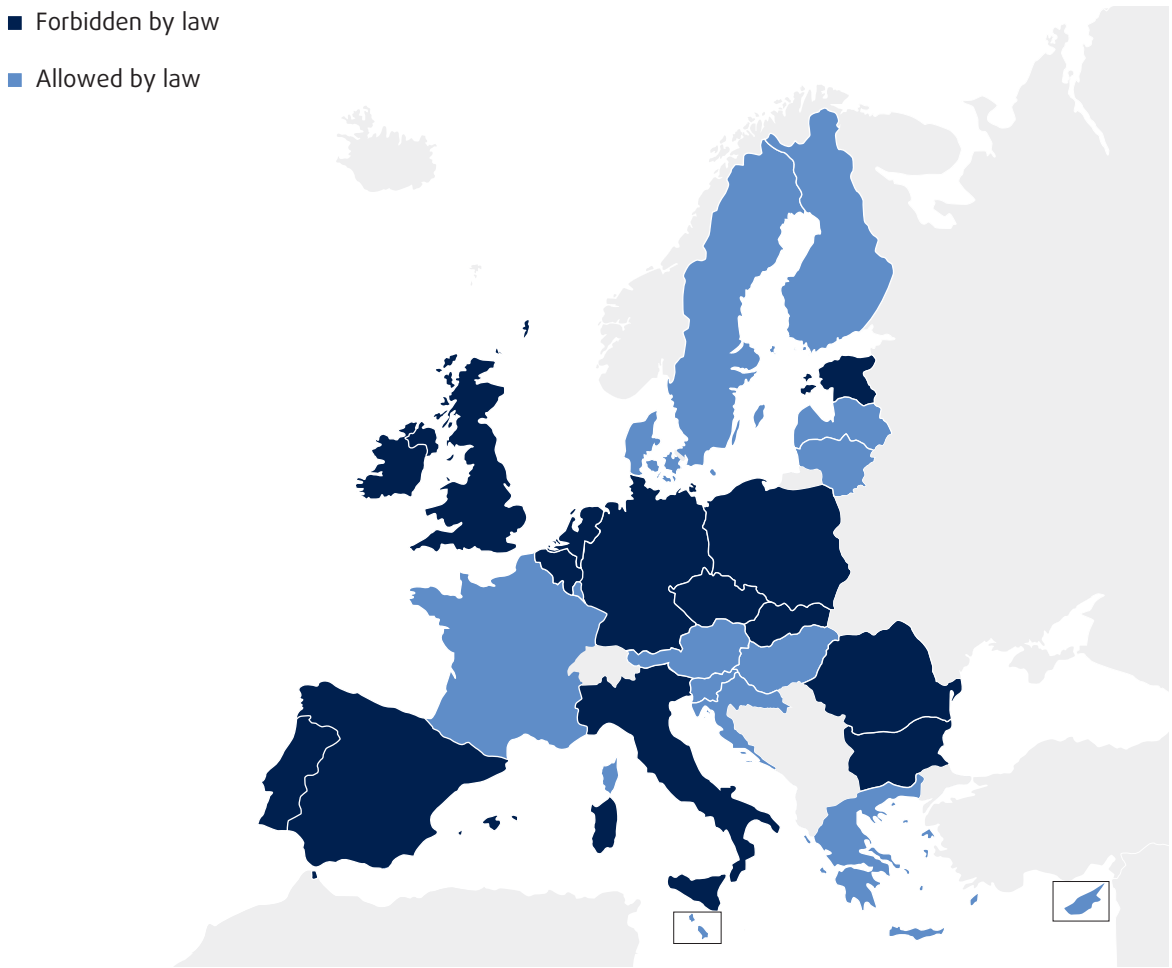
102 Cyprus, Article 9ΣΤ(1) Refugee Law; Future Worlds Center (2016), *Promoting and Establishing Alternatives to Immigration Detention in Cyprus*, October 2016.

3.1.2. Immigration detention of unaccompanied children under national law

Half of the EU Member States do not allow unaccompanied children to be detained for asylum and/or return purposes. Whereas some national laws ban their detention in both situations, others disallow it only in one, making it possible in the other. The significant number of EU Member States that prohibit immigration detention of unaccompanied children indicate that it is possible to implement sustainable asylum and return procedures without depriving unaccompanied children of their liberty. Such a ban on child detention is effective in preventing arbitrary detention of unaccompanied children. As such detention is only very exceptionally allowed under EU law, it is also a pragmatic way to avoid detailed assessments of whether or not deprivation of liberty is necessary and proportionate in each individual case (see Chapter 5).

A significant number of EU Member States do not provide the possibility of detaining unaccompanied children for **asylum purposes**, whereas in other countries it may be possible in certain, although often exceptional, cases. Fourteen Member States do not allow detention of unaccompanied children under one or more of the grounds set out in Article 8 (3) of the Reception Conditions Directive and Article 28 of the Dublin Regulation (Figure 5). In three Member States the prohibition on detaining unaccompanied asylum-seeking children appears to be based on general provisions that envisage

Figure 5: Detention of unaccompanied children in asylum procedures



Source: FRA, 2017 (based on sources listed in Annex 1)

accommodating them in reception facilities equipped to cater for their specific needs.[103]

These Member States may nevertheless deprive asylum-seeking unaccompanied children of liberty for an initial period when they are held at entry points until they are transferred to appropriate facilities or their disputed age is clarified. In some instances, unaccompanied children may continue to be deprived of liberty when they lodge an application for international protection while in detention.

In some Member States, in which detention of unaccompanied children is allowed, it rarely happens in practice, for example in Cyprus.[104] Others, such as Austria, Finland or Hungary, do not permit detention below a certain age.[105]

Hungary prohibits detention of unaccompanied children in return procedures,[106] but a reform introduced to the asylum law in March 2017 requires all undocumented persons who wish to lodge an application for international protection in Hungary, including unaccompanied children above 14 years of age, to be transferred to transit facilities at the border with Serbia to have their claim processed.[107] Persons hosted in such facilities are de facto deprived of liberty as the only exit is on the Serbian side of the border.

The **detention of unaccompanied children pending removal** is prohibited in nine EU Member States and allowed in 19 EU Member States, as illustrated in Figure 6.

Promising practice

Finding practical ways to avoid child detention

Some EU Member States may allow deprivation of liberty in theory in exceptional cases, but viable alternatives exist so it does not occur in practice.

- In **Lithuania**, the Order on Accommodation in the Foreigners Registration Centre (the only available facility) considers the centre unsuitable for unaccompanied children. Instead they are placed in the more suitable open refugee reception centre.
- In **Luxembourg**, no unaccompanied child has been detained at the centre in Findel since it opened in August 2011 as this has not been deemed necessary.
- **Denmark** permits detention of unaccompanied children in principle, although it should be avoided where possible according to a strategy issued by the Danish National Police. Pre-removal detention of unaccompanied children has been discontinued since September 2015, as the authorities considered the detention facility that would normally be used (Ellebaek) inadequate for detention of children, partly because the low number of potential child detainees would mean their de facto isolation. Other solutions are used instead, such as the placement of children in asylum centres, for example Gribskov. This not only avoids arbitrary deprivation of liberty of children, but also allows more efficient use of financial and human resources that would otherwise have to be invested in ensuring that the strict standards for the detention of children are met.

Sources: Denmark, the Danish National Police (Rigspolitiet), 'Strategi om varetægtsfængsling og frihedsberøvelse efter udlændingeloven', 25 August 2009 (updated 12 October 2012), J.no.: 2009-5200-23; Lithuania, Order on Accommodation in the Foreigners Registration Centre (Dėl Laikinojo užsieniečių apgyvendinimo Užsieniečių registracijos centre sąlygų ir tvarkos aprašo patvirtinimo), Article 3; Luxembourg, information provided to FRANET by the management of the Detention Centre (Centre de rétention), 1 March 2016. See also amended Act of 28 May 2009 establishing and organising the Detention Centre (Loi du 28 mai 2009 portant création et organisation du Centre de rétention), 29 May 2009

103 Germany, Asylum Act (*Asylgesetz*) Section 47 (provides for stay of applicants in reception centres); Portugal, Act on the conditions and procedures of asylum or subsidiary protection and the statuses of asylum, refugee and subsidary protection seekers (*Lei que estabelece as condições e procedimentos de concessão de asilo ou proteção subsidiária e os estatutos de requerente de asilo, de refugiado e de proteção subsidiária*), 30 June 2008, amended by Law 26/2014, 5 May 2014, Article 35B (6); Romania, Law No. 122/2006 regarding asylum in Romania, (*Legea nr. 122/2006 privind azilul în România*), 4 May 2006, Article. 195.

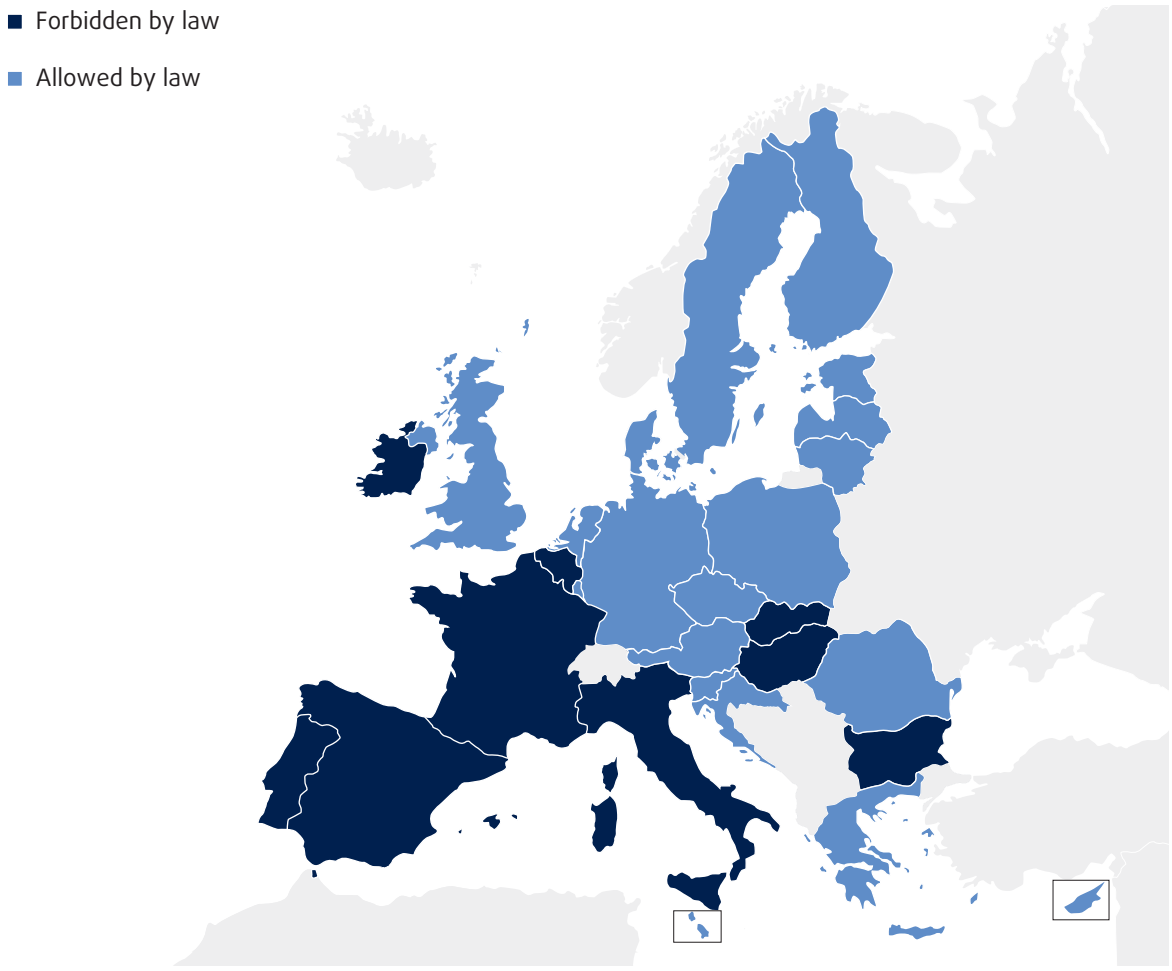
104 Asylum Information Database (AIDA), *Country Report: Cyprus*, March 2017, p. 75.

105 Austria, Aliens Police Act (*Fremdenpolizeigesetz*), 2005 as amended, Section 79(2) (for children below 16). Finland, Aliens Act (*Ulkamaalaislaki, Utlänningslag*), as amended on 26 June 2015, Article 122(3) (detention possible if there is an enforceable return decision). Hungary, Asylum Act (*2007. évi LXXX. törvény a menedékjogról*) as amended on 28 March 2017, Article 31 B (2)-(3), but Article 80/J (6) allows their deprivation of liberty in the transit zones (if they are older than 14 years) in case of mass migration state of emergency.

106 Hungary, Act No. 2 of 2007 on the Entry and Stay of Third-Country Nationals (*2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról*), Article 56 (2).

107 Hungary, Act No. 80 of 2007 on Asylum (*2007. évi LXXX. törvény a menedékjogról*), Article 80/J (6).

Figure 6: Detention of unaccompanied children in return procedures



Note: *In Germany, the situation differs from one Land (state) to another.*
Source: *FRA, 2017 (based on sources listed in Annex 1)*

The situation has remained relatively unchanged over the last seven years since FRA's publication *Detention of third-country nationals in return procedures*. In 2010, nine EU Member States directly or indirectly banned pre-removal detention of unaccompanied children.[108]

- Bulgaria abolished child detention in the pre-removal context in 2013.[109]
- In Slovenia, the Constitutional Court clarified that the restriction of liberty at the Aliens Centre (*Center za tujce*), where unaccompanied children are usually placed, is of such a degree that it amounts to deprivation of liberty.[110]
- In Portugal, provisions requiring child-specific standards continue to be interpreted as prohibiting the detention of unaccompanied children.[111]
- In Germany, the possibility of detaining unaccompanied children pending removal depends on the different regional provisions. For example, Lower

108 FRA (2010), *Detention of third-country nationals in return procedures*, Luxembourg, Publications Office, pp. 58–60.
109 Bulgaria, Law of Foreigners (*Закон за изменение и допълнение на Закона за чужденците в Република България*), 8 March 2013, Article 26 amending Article 44 (9) on the Law of Foreigners (*Закон за чужденците*).
110 Slovenia, Constitutional Court (*Ustavno sodišče*), Case Up-1116/09–22, 3 March 2011.
111 Portugal, Act on the legal regime of entry, permanence, exit and removal of foreigners from national territory (*Lei que aprova o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional*), Article 146 (1) read together with Article 146A (3).

Saxony,[112] North Rhine-Westphalia,[113] Rhineland-Palatinate[114] and Saxony-Anhalt[115] do not in principle detain unaccompanied children pending deportation; neither does Hamburg, unless they have committed a criminal offence.[116]

3.2. National laws banning detention below a certain age

Another approach that certain Member States use to reduce the risk of arbitrary detention of children is setting, by law or policy, a minimum age under which a child cannot be detained.

This is usually done for unaccompanied children, although Germany also has examples of policies concerning children accompanied by a parent. For example, in Schleswig-Holstein, mothers raising a child who is less than 10 years of age are not detained pending deportation; in Thuringia, single parents raising a child who is less than 7 years of age are not detained pending deportation.[117]

Setting a minimum detention age is more common for unaccompanied children. At least five EU Member States have legislation to this effect and some German Länder have similar policies (e.g. 16 years old in Schleswig-Holstein[118] and Thuringia[119]).

- In Austria[120] and Latvia,[121] unaccompanied children below the age of 14 years may not be taken into detention pending removal.
- In Austria, the law stipulates that children below 16 years old must be kept in alternatives to detention, unless unless certain facts justify the assumption that the purpose of migration detention may not be achieved by this alternative.[122]
- Unaccompanied children below the age of 15 years may not be taken into detention pending removal in Finland[123] and Poland.[124]
- In the Czech Republic, unaccompanied children can be detained only if they are 15 years old. Even then, this must be in exceptional circumstances – e.g. if there is a reasonable risk that they could threaten state security or could seriously disrupt public order.[125]
- Hungary does not in principle permit immigration detention of unaccompanied children. In practice, if they apply for asylum and are aged over 14, they are transferred to the closed transit facilities at the border with Serbia where they are deprived of liberty.[126]

This suggests a similar situation to the 2010 FRA report on detention of third-country nationals in return procedures, when at least six Member States had established age limitations.[127]

112 Germany, Lower-Saxony Ministry of the Interior and Sport (*Niedersächsisches Ministerium für Inneres und Sport*) ´Runderlass des Niedersächsischen Ministeriums für Inneres und Sport vom 23. September 2014 - Rechtliche Hinweise und verfahrensmäßige Vorgaben zur Organisation und Durchführung des Rückführungs- und Rücküberstellungsvollzugs (Abschiebung) und zur Beantragung von Abschiebungshaft´, September 2014, p.23..

113 Germany, Federal German Parliament (*Deutscher Bundestag*) (2012), ´Drucksache 17/10597´, question 36, p. 65, 5 September 2012;Richtlinien für die Abschiebungshaft im Land Nordrhein-Westfalen (Abschiebungshaftrichtlinien - AHaftRL) 5c).

114 Germany, Federal German Parliament (*Deutscher Bundestag*) (2016), ´Drucksache 18/7196´, question 16, p. 80, 6 January 2016.

115 *Ibid.*

116 *Ibid.*

117 Germany, Ministerium für Justiz, Gleichstellung und Integration des Landes Schleswig-Holstein, Erlass des Landesamt für Ausländerangelegenheiten, Regelungen zur Durchführung der Abschiebungshaft, 2 May 2012, at 4.3.1. Germany, Federal German Parliament (Deutscher Bundestag) (2016), ´Drucksache 18/7196´, question 16, p. 80, 6 January 2016.

118 Germany, Ministerium für Justiz, Gleichstellung und Integration des Landes Schleswig-Holstein, Erlass des Landesamt für Ausländerangelegenheiten, Regelungen zur Durchführung der Abschiebungshaft, 2 May 2012, at 4.3.1.

119 Germany, Federal German Parliament (Deutscher Bundestag) (2016), ´Drucksache 18/7196´, question 16, p. 80, 6 January 2016.

120 Austria, Aliens Police Act (*Fremdenpolizeigesetz*), Section 76(1) APA (*FPG*).

121 Latvia, Immigration Law (*Imigrācijas likums*), Section 51(1).

122 Austria, *Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetitel (Fremdenpolizeigesetz 2005 - FPG)*, Section 77 (1).

123 Finland, Aliens Act (*Ulkomaalaislaki/ Utlänningslag*) 301/2004, Section 122(3) prohibits the detention of UAC under the age of 15 (as amended1st of July 2015) Aliens Act (*Ulkomaalaislaki/ Utlänningslag*) 301/2004.

124 Poland, Act on foreigners (*Ustawa z dnia 13 grudnia 2013 r. o cudzoziemcach*), 13 December 2013, Article 397 (3).

125 Czech Republic, Section 74 (1) of the Asylum Act, (amended version); Section 124b of the Act on the Residence of Foreign Nationals (ARFN) (amended version).

126 Hungary, Act No. 80 of 2007 on Asylum (*2007. évi LXXX. törvény a menedékjogról*), Article 80/J (6).

127 FRA (2010), *Detention of third-country nationals in return procedures*, Luxembourg, Publications Office, p. 60.

Conclusion

For detention to be lawful, it is essential under EU law, the ECHR and international law that national law provides for the possibility to detain non-nationals for immigration or asylum purposes. In the absence of a clear domestic legal basis, no detention whatsoever can be deemed lawful.

Several EU Member States manage their asylum and return policies without resorting to deprivation of liberty. FRA welcomes the fact that the laws of several EU Member States currently prohibit the detention of unaccompanied children, and others, although formally permitting it, rarely use it in practice, if at all.

FRA opinion 3

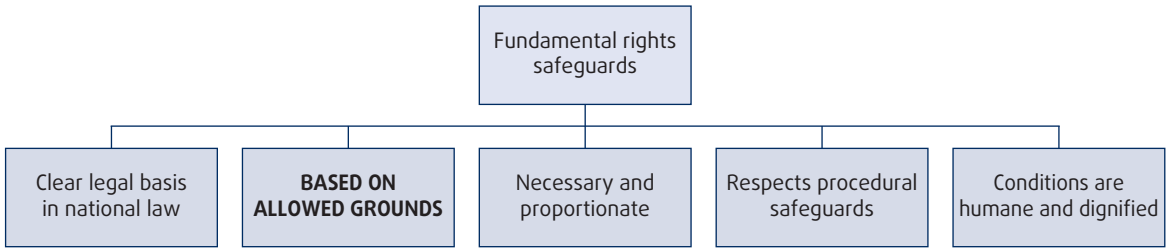
The European Commission should disseminate information about and promote EU Member States' positive experiences with managing their asylum and return policies without resorting to child detention or resorting to it in very exceptional cases only. The forthcoming 2017 European Forum on the Rights of the Child could be an ideal venue for taking the first step regarding this.

4 Exhaustive list of grounds for detention

This chapter analyses allowed grounds for detention, focusing on European law (Figure 7). The international (UN) instruments do not list grounds for detention, but require that deprivation of liberty be based on grounds established by law (see Table 3). European law, in contrast, contains an exhaustive list of grounds for detention. They make no distinction between adults and children.

Under the ECHR, no detention that is arbitrary can be compatible with Article 5 (1). To avoid being branded as arbitrary, detention under Article 5 (1) (f) must fulfil a number of conditions, one of which is that it must be closely connected to the ground of detention relied upon.[128]

Figure 7: Five conditions that deprivation of liberty must meet not to be unlawful and arbitrary



Source: FRA, 2017

128 ECtHR, *A. and Others v. United Kingdom* [GC], No. 3455/05, 19 February 2009, para. 164; *Thimothawes v. Belgium*, No. 39061/11, 4 April 2017, para. 64.

4.1. List of grounds under EU law

The EU asylum *acquis* prohibits the detention of a person for the sole reason that he or she has lodged an asylum application[129] or is subject to Dublin procedures,[130] but allows detention under certain conditions. Article 8 (3) of the Reception Conditions Directive establishes an exhaustive list of situations (six grounds) when the detention of an applicant for international protection is permissible after an individual assessment of each case and if other, less coercive alternative measures cannot be applied effectively. The exhaustive grounds for asylum-related detention are:

1. to verify the applicant's identity and nationality;
2. to determine an asylum claim where this would not otherwise be possible because of, in particular, a risk of absconding;
3. to decide on the applicant's right to enter the territory;
4. to prepare for or to carry out removal under the Return Directive where there are reasonable grounds to believe that the asylum application was made solely to delay or frustrate the return process;
5. when the protection of national security or public order so requires;
6. to secure Dublin transfer procedures.

The sixth situation is also mirrored in Article 28 of the Dublin Regulation, which repeats the obligation of the Member State to resort to detention only after an individual assessment of the case and if other, less coercive alternative measures cannot be applied effectively. There must be a significant risk of absconding, explicitly defined by national law, to make the Dublin transfer detention lawful. The CJEU has also emphasised that the drafting of the objective criteria defining the existence of a 'risk of absconding' is a matter of national law.[131]

In the context of detention pending return, Article 15 (1) of the Return Directive permits the detention of irregularly staying third-country nationals only if they are subject to return procedures. It is not permissible to detain an individual on the mere basis of irregular stay. The directive allows detention only to prepare the return or to carry out the removal process, in particular when there is a risk of absconding (based on objective criteria)[132] or the person concerned avoids or hampers the preparation of the return or the removal process.

The possibility of maintaining detention for public order reasons is not in the Return Directive. Therefore, Member States may not use detention for the purposes of removal as a form of 'light imprisonment'.[133]

Although Article 2 (2) of the Return Directive allows Member States not to apply the directive if the irregular migrants are apprehended at the border and have not obtained authorisation to stay, Member States are still bound by their obligations related to deprivation of liberty under the EU Charter, Article 4 (4) of the Return Directive, the ECHR and other instruments of international human rights law (e.g. the ICCPR and the CRC).

4.2. List of grounds under the ECHR

Article 5 (1) of the ECHR protects the right to liberty and security, with an exhaustive list of permissible exceptions. For deprivation of liberty not to be considered arbitrary, it must be in line with the permissible grounds for detention set out in Article 5 (1) (a)-(f). According to these, "no one shall be deprived of his liberty", except in any of the following cases and in accordance with a procedure prescribed by law. Deprivation of liberty is permitted:

- after conviction by a competent court;
- for failure to comply with a court order or a specific obligation prescribed by law;
- pending trial;
- in specific situations concerning minors;
- on public health grounds or because of vagrancy;
- to prevent an unauthorised entry or to facilitate removal of an alien.

If the detention cannot be based on any of these grounds, it is not permissible, the ECtHR held.[134] Likewise, failure to identify clearly the precise purpose of detention may mean that the detention is unlawful.

129 Reception Conditions Directive, Article 8 (1); Asylum Procedures Directive, Article 26.
130 Dublin Regulation, Article 28 (1).
131 CJEU, C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others*, 15 March 2017, para. 28.
132 See Article 3 (7) of the Return Directive defining the risk of absconding and setting out the precondition of laying down "objective criteria" in domestic law.
133 European Commission (2015), *Commission Recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks*, C(2015) 6250 final, Brussels, 1 October 2015, pp. 78–79.
134 ECtHR, *Al-Jedda v. the United Kingdom* [GC], No. 27021/08, 7 July 2011, para. 99.

Article 5 (1) (f) of the ECHR is most relevant in the context of migration, as it allows the detention of migrants in an irregular situation and asylum applicants in two situations:

1. to prevent unauthorised entry into the country;
2. to facilitate deportation or extradition of a person against whom such action is being taken (e.g. an order has been issued and there is a realistic prospect of removal).

Regarding the latter, the ECtHR considers detention arbitrary when no meaningful action with a view to deportation is under way or being actively pursued in accordance with the requirement of due diligence.[135] Like the other exceptions to the right to liberty and security, migration-related detention under Article 5 (1) (f) must be based on one of these two specific grounds, restrictively construed.[136] For instance, the pre-deportation ground for detention (second limb of Article 5 (1) (f)) may in principle not be applied to asylum applicants, the ECtHR stated, since Articles 31 and 33 of the 1951 Geneva Convention as well as the national law precluded their expulsion before a final decision has been taken on their claim,[137] unless there is "a true prospect" for executing the removal.[138]

In its 2010 report, FRA noted that for stateless persons the likelihood of successful removal is slim, as there is no country of nationality who is obliged to take the person back and the country of former habitual residence often denies admission to stateless persons who have left.[139]

With regard to detention to prevent unauthorised entry, according to the ECtHR, asylum applicants who have been granted formal authorisation to stay in a country (e.g. under EU law) cannot be held in detention under the second limb of Article 5 (1) (f) of the ECHR.[140]

Under the ECHR, in addition to the above typical grounds, detention of migrants in an irregular situation and asylum seekers might also be permissible for the purpose of securing the fulfilment of an obligation prescribed by law in accordance with Article 5 (1) (b) of the ECHR. For example, a discussion emerged in 2015 on resorting to detention to enforce compulsory fingerprinting for Eurodac.[141] In general, a balance must be struck between the right to liberty and the fulfilment of legal obligations under Article 5 (1) (b) of the ECHR.[142] Factors to consider when balancing such issues include the nature of the obligation arising from the relevant legislation, including its underlying object and purpose; the person being detained and the particular circumstances leading to detention; and the length of the detention.[143] In *O.M. v. Hungary*, the ECtHR reaffirmed its constant stance that, when detaining asylum applicants under Article 5 (1) (b), specific criteria must be met, namely there must be an unfulfilled obligation incumbent upon the applicant; the obligation has to be specific and concrete; and detention must be for the purpose of securing its fulfilment and not be punitive in character, and must cease the moment this obligation is fulfilled.[144]

4.3. Discrepancies between the EU and ECHR legal systems

The permissible grounds for detention under EU law must correspond to or fall under either of the migration-related grounds or any other relevant detention grounds exhaustively set forth in Article 5 (1) of the ECHR. Establishing such link is not always easy, particularly for asylum-related detention. Deprivation of liberty to verify the applicant's identity and nationality or to determine an asylum claim where this would not otherwise be possible because of, in particular, a risk of absconding can best be linked to the grounds in Article 5 (1) (b) of the ECHR.[145] Detention of asylum applicants to protect national security or public order, although found by the CJEU to be lawful under Article 6 of the Charter,[146] is difficult to subsume under any of the grounds set out in Article 5 (1) of the ECHR, except if detention is reasonably considered necessary under Article 5 (1) (c) to

135 ECtHR, *Mikolenko v. Estonia*, No. 10664/05, 8 October 2009; *M. and Others v. Bulgaria*, No. 41416/08, 26 July 2011, paras. 75–76.
136 See ECtHR, *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, 20 December 2011; *A. and Others v. the United Kingdom* [GC], No. 3455/05, 19 February 2009, para. 167.
137 ECtHR, *R.U. v. Greece*, No. 2237/08, 7 June 2011, para. 94. See also ECtHR, *S.D. v. Greece*, No. 53541/07, 11 June 2009, para. 62.
138 ECtHR, *Nabil and Others v. Hungary*, No. 62116/12, 22 September 2015, para. 38.
139 FRA (2010), *Detention of third country nationals in return procedures*, Luxembourg, Publications Office, pp. 25-26.
140 See, in this sense, ECtHR, *Suso Musa v. Malta*, No. 42337/12, 23 July 2013, para. 97. See, however, CJEU, *K. v. Staatssecretaris van Veiligheid en Justitie*, C-18/16, opinion of Advocate General Sharpston, 4 May 2017.
141 See FRA (2015), *Fundamental rights implications of the obligation to provide fingerprints for Eurodac*, Luxembourg, Publications Office.
142 ECtHR, *Göthlin v. Sweden*, No. 8307/11, 16 October 2014, para. 58.
143 ECtHR, *Petukhova v. Russia*, No. 28796/07, 2 May 2013, paras. 58–59; and *Vasileva v. Denmark*, No. 52792/99, 25 September 2003, paras. 36, 38.
144 ECtHR, *O.M. v. Hungary*, No. 9912/15, 5 July 2016, paras. 42–43, which follows earlier case law (*Göthlin v. Sweden*, No. 8307/11, 16 October 2014, para. 57; *Vasileva v. Denmark*, No. 52792/99, 25 September 2003, para. 36).
145 See also e.g. De Bruycker, Ph. (ed.) (2015), *Alternatives to Immigration and Asylum Detention in the EU. Time for Implementation*, Final report of the MADE REAL Project, pp. 50-51.
146 CJEU, C601/15 PPU, *J. N. v. Staatssecretaris voor Veiligheid en Justitie*, 15 February 2016.

Table 6: Grounds for detention of irregular migrants and asylum applicants in EU law and the ECHR

EU law	ECHR
To decide on the asylum applicant's right to enter the territory (Reception Conditions Directive, Article 8 (3) (c))	To prevent an unauthorised entry into the country (Article 5 (1) (f), first limb)
To prepare the return of a migrant in an irregular situation (Return Directive, Article 15 (1))	To facilitate the removal of an alien (Article 5 (1) (f), second limb)
To carry out the removal process of an irregular migrant (Return Directive, Article 15 (1))	
To prepare or carry out removal under the Return Directive where there are reasonable grounds to believe that the asylum application was made solely to delay or frustrate the return process (Reception Conditions Directive, Article 8 (3) (d))	
To secure Dublin transfer procedures (Reception Conditions Directive, Article 8 (3) (f), Dublin Regulation, Article 28 (2))	
To determine or verify the asylum applicant's identity or nationality (Reception Conditions Directive, Article 8 (3) (a))[147]	To secure the fulfilment of any obligation prescribed by law (Article 5 (1) (b)
To determine an asylum claim where this would not otherwise be possible because of, in particular, a risk of absconding (Reception Conditions Directive, Article 8 (3) (b))	
To protect national security or public order (Reception Conditions Directive, Article 8 (3) (e))	No grounds in the ECHR

Source: FRA, 2017

prevent the commitment of an offence. The relationship of immigration detention grounds under EU law and the ECHR is illustrated in Table 6.

- All grounds for detention in the Return Directive and five of the six grounds in the Reception Conditions Directive fall under Article 5 (1) (b) or Article 5 (1) (f) of the ECHR. Detention to protect national security or public order in Article 8 (3) (e) of the Reception Conditions Directive does not have a corresponding basis in the ECHR.[148] The lack of full harmony between the two legal regimes might lead to controversial situations when assessing individual Member States' laws and policies on detention.

For instance, in some Member States immigration detention of unaccompanied children who are seen as a serious threat to public order or national security is used as a punitive measure or to avoid the higher procedural safeguards applicable under juvenile justice in criminal law.[149]

In addition, in their national legislation on foreigners, some EU Member States provide other grounds not covered by Article 5 (1) (b) or Article 5 (1) (f) of the ECHR. For example, Lithuania has provisions to detain a person on the grounds of public health. According to the Aliens Act, a foreigner may be detained (1) "in order to stop the spread of dangerous and especially dangerous communicable diseases"; and (2) "when the alien's stay in the Republic of Lithuania constitutes a threat to public security, public policy or public health."[150]

147 Some commentators argue that it is highly questionable whether this detention ground falls under the ambit of Article 5 (1) b) of the ECHR, owing to the fact that national legislations only accidentally impose an obligation on asylum applicants to provide documentary evidence of their identity and nationality (Matevžič, G. (2016), *Detention of asylum-seekers under the scope of Article 5 (1) (f) of ECHR – some thoughts based on recent ECHR and CJEU jurisprudence*).

148 It is also noted by De Bruycker, Ph. (ed.), *(2015), Alternatives to Immigration and Asylum Detention in the EU. Time for Implementation, Final report of the MADE REAL Project,* pp. 51-52.

149 E.g. in Greece (on this practice, see https://www.lerosnews.gr/1/2/ta-nea-tis-lerou/8316-leros-sta-kraththria-katelhxan-oi-tarachopoioi-toy-hotspot.html; or http://www.efsyn.gr/arthro/ratsistiko-menos-apo-aganaktismenoys-katoikoys); see also the following domestic law provisions in the Czech Republic (Act on the Residence of Foreign Nationals, Article 124,); and in Germany (German Residence Act, Article 58a read in conjunction with Articles 62 (2) 1a and 62 (2)), stipulating that detention can be applied in case of well-founded suspicion of terrorism provided that deprivation of liberty is necessary to ensure the person's removal).

150 Lithuania, Aliens Act, Section 113.1 6) and 7).

4.4. Inappropriate use of detention to protect the child

A common argument to support migration detention of unaccompanied children is that it protects children from going missing or falling prey to people traffickers. For example, in Greece, unaccompanied children are regularly held in police cells as a discretionary protective measure pending transfer to a specialised accommodation facility. In the mainland as well as in the hotspots set up on the Greek islands to register and host new arrivals, unaccompanied children are in some cases deprived of their liberty, a measure imposed to prevent exploitation and avoid children going missing.[151] National law provides that unaccompanied children should not, as a rule, be detained, although it allows detention of asylum-seeking children in very exceptional cases, as a last resort, to ensure that they are safely referred to specialised accommodation facilities. The child could be detained for up to 25 days and exceptionally (e.g. in cases of mass influx) for 20 more days.[152] In practice, because accommodation for unaccompanied children is limited, children have been detained in hotspots or police cells, in inadequate conditions, often for a long time.[153]

EU Member States sometimes place child victims of human trafficking, or other children at imminent risk, in safe houses where freedom of movement is restricted. This aims to reduce the risk of disappearances or child abduction. In its handbook on guardianship,[154] FRA underlines that restrictions on the child's freedom of movement should be:

- proportionate;
- based on a risk assessment;
- always confirmed by judicial authorities.

When a victim is placed in a safe house where exit and entry is controlled, mitigating measures should ensure that the child is not in a detention-like regime. Such measures could include regular outings with the guardian, social workers or volunteers. The guardian should have unimpeded access to a child hosted in a closed facility and the child should have unimpeded access to the guardian and to other services. Judicial authorities should review measures restricting freedom of movements every month, to ensure that the placement is absolutely necessary for the safety of the child and is limited to the minimum time necessary.[155]

Conclusion

The ECHR and EU law list exhaustive but not identical permissible grounds for detention, which apply to everyone regardless of age.

The right to liberty and security in Article 6 of the Charter corresponds to the same right in Article 5 of the ECHR. The meaning and scope of Article 6 of the Charter must therefore not go below the standard of protection of the ECHR, as interpreted by the ECtHR. EU law may, however, provide more extensive protection (Article 52 of the Charter). The scope and content of the Charter's right to liberty and security, as shaped by the ECtHR, thus represents a minimum threshold of protection under EU law.

Most grounds for deprivation of liberty in secondary EU law correspond to those in the ECHR, but detention to protect public order under the Reception Conditions Directive seems difficult to subsume under Article 5 (1) of the ECHR. This can lead to diverging interpretations regarding the compatibility of national legislations with European law standards.

151 FRA (2016), *Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy*, Luxembourg, Publications Office.
152 Article 46 (10)(b) L 4375/2016.
153 See https://www.synigoros.gr/resources/dt-asynodeytoi-anilikoi-3032016.pdf.
154 FRA (2014), *Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, Luxembourg, Publications Office.
155 FRA (2014), *Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, Luxembourg, Publications Office, pp. 78-9.

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Domestic legislation regulating immigration or asylum should not be used to detain individuals on grounds of public order, thereby circumventing the safeguards established under human rights law for criminal detention. EU Member States should ensure that grounds for immigration detention established at national level do not extend beyond the exhaustive list of legitimate grounds listed in Article 5 (1) of the ECHR, as well as those permissible under the EU asylum and return acquis.

Detention to secure return is not lawful in the absence of realistic prospects for removal. EU Member States could consider introducing a presumption against pre-removal detention for de jure as well as de facto stateless persons, including children. This should be one in cases where it is evident from past experience that the country of former habitual residence will not readmit the person or, for de facto stateless persons, the country of nationality will refuse any cooperation in establishing the citizenship and issuing related travel documents.

Given its short- and long-term consequences on children's development, EU Member States should not use deprivation of liberty as a means to protect children from exploitation and to mitigate risks of them going missing. These risks should be countered by improving reception conditions (including by assigning specialised support staff on a 24/7 basis); strengthening guardianship systems; and gaining a better understanding of why children go missing and what can be done to prevent their disappearance. These efforts should be accompanied by effective mechanisms to record when a child goes missing and to follow up when the child is found again, as FRA points out in its Opinion on the impact on fundamental rights of the proposal for a revised Eurodac Regulation.

5 Assessing necessity and proportionality

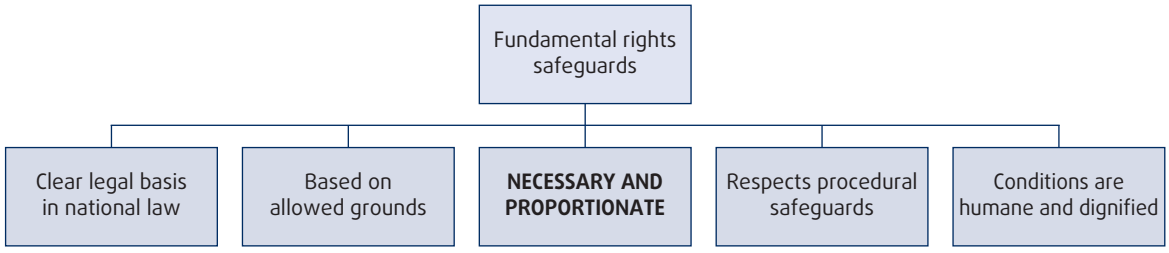
EU law prohibits mandatory detention. Therefore, an individual examination is needed when ordering detention. Such examination must assess if deprivation of liberty is necessary and proportionate in the individual case. This test applies to everyone, regardless of age. The difference for children is the parameters used when assessing if deprivation of liberty is arbitrary, in light of the particular vulnerability of children.

Protecting the rights of the child requires that the best interests of the child and the impact of detention on the right to respect for family life be carefully assessed before considering depriving a child or their parents of liberty. The assessment must consider the short- and long-term impact of deprivation of liberty on the child, including its possible detrimental effects. This chapter focuses on the third condition illustrated in Figure 8 that must be fulfilled to prevent arbitrary detention.

This chapter takes the general framework of assessing necessity and proportionality as a starting point. It first examines the requirement that detention must be a last resort, giving primary consideration to the best interests of the child. The second section is devoted to the right to family life, when children are together with their parents. The third section examines the requirement that detention last only as long as necessary, which is worded more strongly for children, requiring that deprivation of liberty be for the shortest appropriate time.

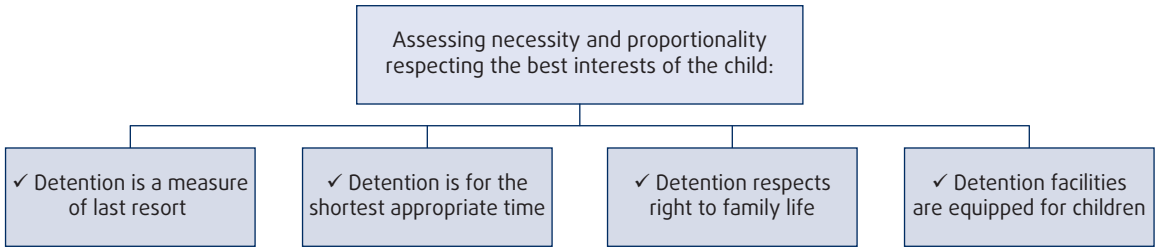
Vulnerable people include children. An additional factor in assessing the proportionality and necessity of detaining them is if the conditions in the detention facility are suitable for the specific needs of the individual and adequate to protect the child from abuse and violence, including from other detainees. Detention of children is arbitrary when conditions are not appropriate. This factor is analysed in more detail in Chapter 6. The best interests of the child play a central role in assessing necessity and proportionality, as illustrated in Figure 9.

Figure 8: Five conditions deprivation of liberty must meet to not be unlawful and arbitrary



Source: FRA, 2017

Figure 9: Conditions for necessity and proportionality



Source: FRA, 2017

This chapter builds on the standards developed by the ECtHR, many of which have been incorporated into secondary EU law. In spite of many parallels, however, the two legal systems differ in one important aspect: the requirement of a necessity test.

Under EU law, any return- or asylum-related detention is subject to the principles of proportionality and necessity, which require an individual assessment of each case in line with the requirements of Article 8 (2) of the Reception Conditions Directive and Article 15 (1) of the Return Directive. In *El Dridi*, the CJEU clarified that the Return Directive requires weighing if the deprivation of liberty is proportionate to the objective pursued, and if other, less coercive measures can be applied effectively (necessity).[156] The CJEU speaks of a gradation of measures "which goes from the measure which allows the person concerned the most liberty [...] to measures which restrict that liberty the most.[157]

In the light of the case law of the ECtHR, under Article 5 (1) (f) of the ECHR, there is no formal requirement for a necessity test to detain a person who tries to enter the country without authorisation or against whom action is being taken with a view to removal. States enjoy a broader margin of discretion when detaining a person under these two migration-related grounds than for other interferences with the right to liberty set out in Article 5 of the ECHR, such as preventing an individual from committing an offence or fleeing.[158] Notwithstanding this differentiation, the ECtHR has made it clear that, if a state's domestic law requires the necessity of detention to be demonstrated, then there must be compliance with those national laws.[159]

In practice most safeguards that under EU law derive from the necessity test, such as the requirement that detention be a last resort and last for the shortest appropriate time, also feature in the ECtHR case law as safeguards against arbitrary detention. However, the two systems differ to some extent. Unlike Article 15 (1) of the Return Directive, the ECtHR has so far refused to use the principles of proportionality and necessity in relation to the initial detention order.[160] In the leading case on detention to prevent unauthorised entry (*Saadi v. United Kingdom*), the ECtHR held that Article 5 imposes no requirement to examine that "the detention of a person to prevent his effecting an unauthorised entry into the country be reasonably considered necessary."[161] This followed the line taken in *Chalal* with regard to pre-removal detention, in which it was held that additional bases for detention are not required: all that is required is that the person is detained with a view to deportation.[162] However, subsequently, the ECtHR asserted that the duration of detention must not exceed the reasonable period required to achieve the aim.[163] In addition, when assessing if migration-related detention is legal and not arbitrary, the ECtHR now looks at whether or not a less intrusive measure could have been imposed instead of detention.[164]

156 CJEU, C-61/11, *El Dridi, alias Soufi Karim*, 28 April 2011, paras. 29–62. See also European Commission (2015), *Commission Recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks,* C(2015) 6250 final, Brussels, 1 October 2015, p. 78.

157 CJEU, C-61/11, *El Dridi, alias Soufi Karim*, 28 April 2011, para. 41.

158 ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, para. 72.

159 ECtHR, *Rusu v. Austria*, No. 34082/02, 2 October 2008, paras. 54–59.

160 Lutz, F. and Mananashvili, S., 'Return Directive 2008/115/EC' in: Hailbronner, K. and Thym, D. (eds.) (2016), *EU Immigration and Asylum Law: A Commentary*, Munich/Oxford/Baden-Baden: C.H.Beck/Hart/Nomos, second edition, p. 734.

161 ECtHR, *Saadi v. the United Kingdom* [GC], No. 13229/03, 29 January 2008, para. 45.

162 ECtHR, *Chahal v. United Kingdom* [GC], No. 22414/93, 15 November 1996, para. 112. See also ECtHR, *Rusu v. Austria*, No. 34082/02, 2 October 2008, para. 52.

163 ECtHR, *Louled Massoud v. Malta*, No. 24340/08, 27 July 2010, para. 68.

164 *Ibid*, and later in ECtHR, *Rahimi v. Greece,* No. 8687/08, 5 April 2011, para. 109; *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, 20 December 2011, paras. 124–125.

5.1. Last resort and alternatives to detention

The first requirement when assessing necessity and proportionality is that deprivation of liberty is resorted to only when no other, less intrusive measures are suitable. European and international law specifically establish that the detention of children in the migration context needs to be a last resort. As a result, EU Member States have a positive obligation to first explore and implement less coercive measures.

Essentially, this requires a three-step process, which is illustrated in Figure 10.

1. EU Member States should implement measures that fully respect the rights of the child to protection and care, such as unrestricted placement in a reception or other open arrangement, with the necessary support to guarantee the child's well-being.
2. If restrictions to fundamental rights – usually the right to liberty – are necessary, alternatives to detention, such as reporting requirements or designated residence possibly combined with tailored case management, should be applied, giving priority to alternatives that are most effective.
3. Only if the purpose cannot be achieved by imposing alternative measures should deprivation of liberty be considered.

The absence of alternatives to detention in national legislation or policy cannot be used as an excuse for resorting to detention in the individual case (see Chapter 1).

Alternatives to detention include a wide array of measures. Most of them restrict freedom of movement.[165] Minimum rules for the administration of juvenile justice[166] and non-custodial measures[167] have been developed in the context of the UN to promote the creation of adequate juvenile justice systems. The rules are largely also relevant to immigration detention.

Figure 10: Logical steps to assess if detention is a last resort

Source: FRA, 2017

165 For more information see FRA (2010), *Detention of third country nationals in return procedures*, Luxembourg, Publications Office. EMN (2014), *The use of detention and alternatives to detention in the context of immigration policies*.

166 UN, General Assembly, Resolution 40/33, *UN Standard Rules for the Administration of Juvenile Justice (The Beijing Rules)*, 29 November 1985, A/RES/40/33.

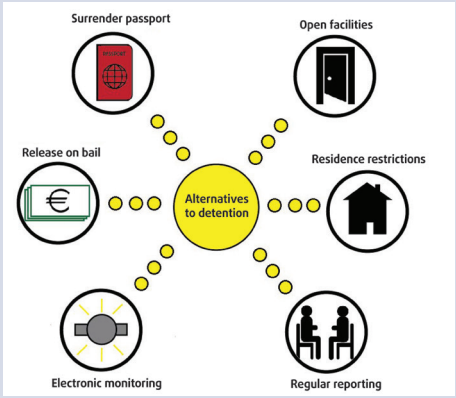
167 UN, General Assembly, Resolution 45/110, *UN Minimum Rules for Non-custodial Measures (The Tokyo Rules)*, 14 December 1990, A/RES/45/110.

Tools and guidance: Presenting legal sources and tools on alternatives to detention

FRA has compiled guidance to policymakers and practitioners on the use of non-custodial measures for asylum seekers and people in return procedures. Alternatives to detention can include the obligation to surrender passports, the duty to live in a particular address or region, or the obligation to report regularly to the police (see graphic).

Any restrictions on the rights concerned must conform with human rights law. A particularly useful tool in the FRA compilation is the 2015 handbook on *There are alternatives* by the International Detention Coalition. In 2015, UNHCR also issued a paper on Options for governments on open reception and alternatives to detention.

For more information, see FRA's paper on Alternatives to detention



- EU law, the Council of Europe and international human rights law require to provide for alternatives to detention. The ECtHR has been very firm in suggesting that respecting the best interests of the child requires states to adopt alternatives to detention. Where the authorities fail to examine all alternatives to detention, the detention of a child will be considered arbitrary and a violation of their rights to liberty and security.[168]

EU secondary law requires Member States to first examine the viability of alternatives to detention before resorting to deprivation of liberty for asylum or return purposes. This requirement concerns everyone, regardless of age. Recital (20) of the Reception Conditions Directive allows detention only "after all non-custodial alternative measures to detention have been duly examined" and underlines that any alternative measure to detention must respect the fundamental human rights of asylum applicants. In Article 8 (4) the directive provides some examples of possible alternatives to detention (regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place) and requires Member States to lay down alternatives to detention in national law. Article 28 of the Dublin Regulation and Article 15 (1) of the Return Directive require priority to be given to the use of "other sufficient but less coercive measures" than detention. The Return Directive establishes that deprivation of liberty is justified only if there are no less coercive measures that would be sufficient to achieve the same aim.[169] Article 15 (1) of the directive must be interpreted as requiring each Member State to provide alternatives to detention in its national legislation.[170] Furthermore, the Return Handbook reminds Member States that they should end detention on a case-by-case basis if alternatives to detention become an appropriate option.[171]

Respecting the best interests of the child requires the state to explore all alternatives to detention for migrant children, the ECtHR considers. As a result, if the authorities do not examine the situation of the child, and do not verify that the child's placement in administrative detention is a last resort and no alternative is available, then this amounts to a violation of the child's right to liberty.[172] The Court has also ruled that, if the authorities fail to examine all alternatives to detention, the detention of a child will be considered arbitrary and a violation of their rights to liberty and security as enshrined by Article 5 of the ECHR.[173] The CPT also considers that there should be meaningful alternatives to detention for certain vulnerable categories of person, including children and families with young children.[174]

At the UN level, in interpreting the prohibition of arbitrary detention contained in Article 9 (1) of the ICCPR, the Human Rights Committee observed that deprivation of liberty cannot be considered necessary if other, less invasive means to achieve the same ends could have been available and applied (e.g. by the

168 ECtHR, *Rahimi v. Greece,* No. 8687/08, 5 April 2011, para. 109.
169 Return Directive, Article 15 (1) read in conjunction with recital (16).
170 European Commission (2015), *Commission Recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks,* C(2015) 6250 final, Brussels, 1 October 2015, p. 79.
171 *Ibid*, p. 84.
172 ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012, para. 119.
173 ECtHR, *A.B. and Others v. France*, No. 11593/12, 12 July 2016; *R.M. and M.M. v. France*, No. 33201/11, 12 July 2016; *A.M. and Others v. France*, No. 24587/12, 12 July 2016; *R.K. v. France*, No. 68264/14, 12 July 2016.
174 Council of Europe, CPT, *Factsheet on Immigration detention*, CPT/Inf(2017)3, March 2017.

imposition of reporting obligations, sureties or other conditions).[175] Also, the Committee on the Rights of the Child and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have called on all states to establish alternatives to detention, in accordance with the best interests of the child and the right to liberty.[176] In this spirit the UN Working Group on Arbitrary Detention concluded that, given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied child would comply with the requirements stipulated in Article 37 (b) of the CRC, according to which detention can be used only as a last resort.[177]

In relation to using detention as a last resort, most Member States have not established alternatives to detention specially designed for children in law, although Finland introduced designated residence as an alternative to detention for children aged 15 – 17 years against whom the authorities have issued an enforceable expulsion order in 2017.[178] However, even if not limited to families and children, in practice, alternatives to detention are often provided to families and children. For example, in Spain children stay with their relatives in the community while their status is being determined.[179]

Concerning children with families, alternatives may be imposed on the family as a whole. For example, in Estonia the alternative to detention applied to the adult will also be applied to the child.[180] These alternative measures can include living in a specified place, appearing for registration at the Police and Border Guard Board, or surrendering a travel or identity document.[181]

Promising practice

Accommodating families with children in open facilities

Belgium has set up an option to accommodate families with children in open facilities with case-worker support, such as from a social worker, after several rulings from the ECtHR against the country. If a family receives a repatriation order because its application to stay in the territory has been rejected or is no longer valid, the family is transferred to a return house with support from a case worker or stays in its own residence, providing the dwelling meets the basic requirements of safety and human dignity. This alternative, introduced in practice in 2014, allows families with children to stay in their own houses when preparing to return to their country of origin. Whether they stay in their own dwellings or are placed in return houses, families must comply with certain conditions. The conditions imposed vary on the type of arrangement and may include the reimbursement of costs incurred for damage caused to the Belgian State or the need to pay a deposit, being able to support the family needs, permitting the case worker to access the house at the requested time, and reporting or other obligations.

Sources: Legal source for the return houses: Belgium, Royal Decree fixing the regime and the determining rules applying to the accommodation provided under Article 74/8, (1) of the Law of 15 December 1980 on access to the territory, stay, settlement and removal of foreigners 14 May 2009. Legal source for the stay at the own residence with return support: Belgium, Law of 15 December 1980 on access to the territory, stay, settlement and removal of foreigners (Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers/Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen), 15 December 1980, Article 74/9, (3); Belgium, Royal Decree of 17 September 2014 determining the content of the agreement and the sanctions which may be taken pursuant to Article 74/9 (3) of the Law of 15 December 1980 on access to the territory, stay, settlement and removal of foreigners 17 September 2014 (also legal source on the condition to fulfil)

Judgments by the ECtHR can make a difference in promoting the application of alternatives to detention, as shown by initiatives taken in France following the *Popov* ruling.[182] After a recommendation by the General Controller of Prisons, the Ministry of the Interior issued a circular stressing that alternatives to detention, namely designated residence, should be the norm for families,[183] although civil society reports that this

175 UN, Human Rights Committee, Communication No. 900/1999, *C. v. Australia*, 13 November 2002, para. 8.2; *Saed Shams and Others v. Australia,* Communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, 11 September 2007, para. 7.2.

176 UN, Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration*, paras. 79 and 84; UN, Human Rights Council, *Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment*, 5 March 2015, A/HRC/28/68, para. 85.

177 UN, *Report of the Working Group on Arbitrary Detention*, 15 January 2010, A/HRC/13/30, para. 60. See also *Report of the Working Group on Arbitrary Detention,* 10 January 2008, A/HRC/7/4, para. 80.

178 Finland, Aliens Act (*ulkomaalaislaki/utlänningslag*) (301/2004), Chapter 7, Section 120(b).

179 International Detention Coalition, NGO monitoring of immigration detention: Tips, examples and positive practices.

180 Estonia, Section 12(1) Obligation to Leave and Prohibition on Entry Act (*Väljasõidukohustuse ja issesõidukeelu seadus*), January 2016.

181 *Ibid.*

182 ECtHR, *Popov v. France*, No. 39472/07 and 39474/07, 19 January 2012.

183 France, Ministry of Interior (*Ministère de l'Intérieur*), Circular (*Circulaire*), 6 July 2012.

policy is not systematically implemented in practice.[184] The designated residence decision should determine the perimeter of permitted movement and the periodic obligation to report to the nearest police station or gendarmerie unit. Guarantees are required from the people concerned, including proof of stable address and possession of valid travel documents (which the administrative authority can hold in exchange for an official receipt). When third-country nationals in an irregular situation, who are the subject of a removal order and are accompanied by their children, do not have a stable address, the circular suggests considering designated residence in an establishment such as a hotel (France is now also creating open centres). For families whose guarantees to report are poor and whose overall behaviour strongly indicates that they will refuse to meet their obligations, the circular recommends choosing the solution best adapted to the characteristics of each situation, such as designated residence with particular vigilance, or house arrest in another place that facilitates monitoring by the police or gendarmerie. If this measure fails, the family could be put in administrative detention, according to law.

Another alternative to detention comes from the Netherlands. Families are placed in 'family locations', where their freedom of movement is restricted on the basis of the Aliens Act 2000.[185] People staying at a family location may not leave a certain region of the Netherlands, often the municipality where the family location is.[186] The Central Agency for the Reception of Asylum Seekers maintains a daily reporting duty at the family location.[187] This means that residents, all family members including children, must report each day (except Sundays and holidays) to officials of the Central Agency for the Reception of Asylum Seekers. If they fail to do so, financial penalties may be imposed.

5.2. Family life

When authorities decide on the necessity and proportionality of detaining families with children, they also need to consider the right to respect for private and family life, set forth in Article 7 of the Charter and Article 8 of the ECHR. This right encompasses not only the right of a child to be with their parents but also protection from interference with the family's private life. The ECtHR is of the opinion that, while mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life,[188] it cannot be inferred from this that the sole fact that the family unit is maintained necessarily guarantees respect for the right to a family life, particularly where the family is detained. Confining children with parents to a detention centre, thereby subjecting the family to custodial living conditions typical of that kind of institution, can be regarded as an interference with the effective exercise of their family life. This interference needs to be examined, giving primary consideration to the best interests of the child.[189] In *Popov v. France*, the ECtHR clarified "that the child's best interests cannot be confined to keeping the family together and that the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life. In the absence of any indication to suggest that the family was going to abscond, the measure of detention for fifteen days in a secure centre appears disproportionate to the aim pursued."[190]

Article 9 of the CRC requires States Parties to ensure that a child is not "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". Furthermore, under Article 2 (2) of the CRC, children should not be discriminated against on the basis of the status or activities of their parents.

Secondary EU law on asylum and return also reflects the principle of family unity. Article 12 of the Reception Conditions Directive establishes that Member States should take measures to ensure family unity when providing housing. When a family is detained, it should be provided with separate accommodation guaranteeing adequate privacy (Article 11 (2)). Article 14 (1) (a) of the Return Directive establishes family unity as one of the safeguards of persons pending return, while Article 16 (2) requires that families in detention pending removal be provided with separate accommodation guaranteeing adequate privacy. The right of children not to be separated from their parents[191] and to be

184 France, CIMADE (2014), Centres and establishments of administrative detention (*Centres et locaux de rétention administrative*).
185 Netherlands, Aliens Act 2000, Article 56.
186 Netherlands, Aliens Decree (Vreemdelingenbesluit 2000), Article 5.1.
187 Boersema, E., Sportel, I., Smit, M. and Leerkes, A. (2015), 'Als ik bezig ben, denk ik niet zo veel'. *Evaluatie van de pilot Activeren bewoners gezinslocaties*, The Hague, Ministry of Security and Justice – WODC.
188 See e.g. ECtHR, *Olsson v. Sweden (No. 1)*, No. 10465/83, 24 March 1988, para. 59.
189 ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012, para. 103. ECtHR, *A.B. and Others v. France*, No. 11593/12, 12 July 2016, para. 145 and 151.
190 ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012.
191 PACE, Recommendation 1985 (2011), Undocumented migrant children in an irregular situation: a real cause for concern, para. 9.4.4; Committee of Ministers, Recommendation Rec (2003)5 on measures of detention of asylum seekers, para. 21.

separated from non-related adults[192] is also covered in several recommendations by the Parliamentary Assembly of the Council of Europe (PACE).

In some Member States – for example Latvia,[193] Lithuania,[194] or Poland[195] – when a child is detained together with their parents, detention is ordered only for the parents. No detention decision is issued to the child, who is considered to be "hosted" in the detention facilities (and not detained) to preserve the family unity. This poses challenges to appealing against the decision to place a child in a closed facility. The ECtHR highlighted that in these cases the child is in a legal vacuum that does not allow them to challenge the detention; only their parents can.[196]

- Immigration detention of children with their families should not entail lower child protection standards than when the parents are detained under criminal law. In both cases, the best interests of the child and the right of the child not to be separated from its parents require that states carefully examine the possibility of applying less coercive measures, such as house arrest, to avoid separating the child from the parents, for example when a mother is breastfeeding.

In the field of criminal detention, under certain conditions, younger children are allowed to stay with the imprisoned parent, particularly with the mother. The European Prison Rules, designed for children in conflict with the law, recommend 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.[197] A decision to keep a child with their parents in prison must be always based on the best interests of the child.[198] The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that "the need to keep the family together is a not sufficient reason to legitimize or justify the deprivation of liberty of a child, given the prejudicial effects that such measures have on the emotional development and physical well-being of children. The Special Rapporteur shares the view of the Inter-American Court of Human Rights that, when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family".[199]

Many EU Member States also require that national authorities seek alternatives to detention and apply less coercive measures when deciding on the imprisonment of parents for criminal purposes, especially mothers. In Italy, for example, national law provides that, unless condemned for violent crimes, mothers whose children are aged under six years may have their imprisonment suspended and may be held under alternative forms of detention, such as in correctional institutions or home detention. The possibility of accessing alternative detention measures is extended to the father if the mother has died or is unable to take care of the child.[200] Similarly, in Romania, national law provides that a mother may ask for the postponement or suspension of the prison sentence.[201]

Only when alternatives to imprisonment are not possible, for example because the crime is so serious or for national security reasons, may states allow the child to stay with their mother (or, in some Member States, father) in prison. This is based on the consideration that developing an emotional relationship with the mother and/or father is essential for development and, therefore, in the child's best interests. Under criminal detention, the option to stay in prison with the mother is mainly limited to babies and infants (Table 7).

192 PACE, Resolution 1810 (2011), Unaccompanied children in Europe: issues of arrival, stay and return, para. 5.9; PACE, Recommendation 1985 (2011), Undocumented migrant children in an irregular situation: a real cause for concern, para. 9.4.4.
193 Latvia, Immigration Law (Imigrācijas likums), Article 59(5) adopted on 31 October 2010, in force from 1 May 2003.
194 Lithuania, State Border Guard Service, 19 February 2016.
195 Poland, Headquarters of Border Guard (*Komenda Główna Straży Granicznej*), 17 February 2016.
196 ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012, para. 124. ECtHR, *A.B. and Others v. France*, No. 11593/12, 12 July 2016, para. 134.
197 Council of Europe, Committee of Ministers, European Prison Rules, Recommendation Rec(2006)2, adopted by the Committee of Ministers on 11 January 2006 at 36.1.
198 UN, General Assembly, Resolution 70/175, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules),* 8 January 2016, A/RES/70/175, Rule 29.
199 UN, Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 March 2015, A/HRC/28/68, para. 80.
200 Italy, Law No. 354 of 26 July 1975, Norms governing the prison system and the enforcement of measures involving deprivation of, and limitation to liberty (*Legge 26 luglio 1975, n. 354, Norme sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà*), as reformed by Law No. 62 of 21 April 2011, Modifications to the Criminal Procedure Code and to Law No. 354 of 26 July 1975 (*Legge 21 aprile 2011, n. 62, Modifiche al codice di procedura penale e alla legge 26 luglio 1975, n. 354, e altre disposizioni a tutela del rapporto tra detenute madri e figli minori*, Article 1(1), 3.
201 Romania, Law 286/2009 regarding the Criminal Code (*Legea nr.286 din 24 iulie 2009 privind Codul penal*), Articles 83 and 91.

Table 7: Ages from and up to which a child can stay in prison with the parent, when the latter is imprisoned under criminal law, 28 EU Member States

EU Member State	Upper age limit[a]	Applies to	Source
AT	2 (3)	M	Austria, *Bundesgesetz vom 26. März 1969 über den Vollzug der Freiheitsstrafen und der mit Freiheitsentziehung verbundenen vorbeugenden Maßnahmen* (*Strafvollzugsgesetz* – StVG), § 74 StVG Schwangerschaft
BE	3	M	Belgium, Royal Decree containing the general prison regulation (*Arrêté royal portant règlementation des établissements pénitentiaires*), 21 May 1965, Article 111–112
BG	1	M	Bulgaria, Execution of Penalties and Detention in Custody Act (*Закон за изпълнение на наказанията и задържането под стража*), 3 April 2009, Article 85 (2)
CY	1 (2)	M	Cyprus, Prison General Regulations (*Οι περί φυλακών Γενικοί Κανονισμοί*) N. 121/97, Regulation 46 (1)
CZ	3	M	Czech Republic, Law on Serving of Imprisonment (*Zákon o výkonu trestu odnětí svobody*), No. 196/1999, 30 June 1999, § 67
DE	school age	M	Germany, Act concerning the execution of prison sentences and measures of rehabilitation and prevention involving deprivation of liberty (Strafvollzugsgesetz), Section 80
DK	1 (3)	M+F	Denmark, Act on Enforcement of Sentences (*Bekendtgørelse af lov om fuldbyrdelse af straf m.v.*), Section 54
EE	3	M	Estonia, Imprisonment Act (*Vangistusseadus*), 1 July 2015, Article 54 (1)
EL	3	M	Greece, Law 2776/1999, Correctional Code (*Σωφρονιστικός Κώδικας*), (O.G. A' 291/24–12–1999), Article 13 (3)
ES	3	M	Spanish Ministry of the Presidency (*Ministerio de la Presidencia*) (1979). *Ley Orgánica 1/1979, de 26 de septiembre, General Penitenciaria*, 5 November 1979, Article 31
FI	2 (3)	M+F	Finland, the Child Welfare Act (*Lastensuojelulaki/ Barnskyddslag*) (417/2007), Section 37, Chapter 7
FR	1.5	M	France, Code de procédure pénale, Article D401
HR	3	M	Croatia, Execution of Prison Sentence Act *(Zakon o izvršavanju kazne zatvora)* (1999), Official Gazette *(Narodne novine)*, Article 111
HU	1	M	Hungary, Act CCXL of 2013 about the execution of the penalties, the measures, certain coercive measures and the confinement for petty offences (*2013. évi CCXL törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról*), Section 128 (3)
IE	1	M	Ireland, Prison Rules, S.I. No. 252/2007, Article 17(1)
IT	6	M (F)	Italy, Law No. 354 of 26 July 1975, Norms governing the prison system and the enforcement of measures involving deprivation of, and limitation to liberty (*Legge 26 luglio 1975, n. 354, Norme sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà*), as reformed by Law No. 62 of 21 April 2011, Modifications to the Criminal Procedure Code and to Law No. 354 of 26 July 1975 (*Legge 21 aprile 2011, n. 62, Modifiche al codice di procedura penale e alla legge 26 luglio 1975, n. 354, e altre disposizioni a tutela del rapporto tra detenute madri e figli minori*, Articles 1(1) and Article 3
LT	3–4	M	Lithuania, Penal Code *(Bausmių vykdymo kodeksas)*, 27 June 2002, No. IX-994 (with amendments), Article 151–153

EU Member State	Upper age limit[a]	Applies to	Source
LU	Children who are too young to be separated from their mother	M	Grand-Ducal Regulation of March 24, 1989, Regarding the Administration and the Internal Regulations of Penitentiary Establishments (*Règlement grand-ducal du 24 mars 1989 concernant l'administration et le régime interne des établissements pénitentiaires*) Article 142
LV	4	M	Latvia, The Sentence Execution Code of Latvia (*Latvijas Sodu izpildes kodekss*), 23 December 1970 (with amendments until 12 September 2013), Section 77, para. 5
MT	1	M	Malta, Prisons Regulations, S.L. 260.03 of the Laws of Malta, Regulation 38(2)
NL	9 months (4)	M+F	The Netherlands, Penitentiary Principles Act (*Penitentiaire beginselenwet*), Article 12, Section 2
PL	3	M	Poland, Executive criminal code (Ustawa z dnia 6 czerwca 1997 r. Kodeks karny wykonawczy) 6 June 1997, Article 87
PT	3 (5)	M+F	Portugal, Law 115/2009 on the Code for Executing Punishments and Measures to Deprive Freedom (*Lei nº 115/2009 sobre o código de execução de penas e medidas privativas de liberdade*), 12 October 2009, Article 7 (1) (g)
RO	x	–	Not relevant
SE	infant	M+F	Sweden, Act on Imprisonment *(Fängelselag [2010:610])*, 10 June 2010, Chapter 2, Section 3
SI	1 (2)	M	Enforcement of Criminal Sanctions Act (*Zakon o izvrševanju kazenskih sankcij, ZIKS-1*), adopted on 23 February 2000, with subsequent amendments, Article 62
SK	3 (5)	M+F	Slovakia, Act No. 475/2005, Act on Prison Sentence as amended (*Zákon č. 475/2005 Z. z. Zákon o výkone trestu odňatia slobody a o zmene a doplnení niektorých zákonov*), 26 October 2005, Articles 74 (4) and 62 (2)
UK	1.5	M	United Kingdom, HM Government (1999), The Prison Rules *1999*, 10 March 1999, rule 12; UK, HM Ministry of Justice (2014), Prison Instruction 49/2014: Mother & Baby Units, December 2014, p. 3; UK, HM Government (1995), The Prison and Young Offenders Centre Rules (Northern Ireland) 1995, 10 January 1995, rule 92; UK, HM Government (2011), The Prisons and Young Offenders Institutions (Scotland) Rules 2011, 12 September 2011, rule 128

Notes: *M = mothers; M+F = both parents.*

[a] Older age limit in brackets when applicable in exceptional cases. Further exceptions are not captured in the table – for example, when the parents are under 18 or specific rules set up by German Länder.

Source: *FRA, 2017 (based on sources listed in table)*

The situation is different for immigration detention. Justified by the principle of family unity, most EU Member States do not exclude the possibility that children may accompany the parents in detention, regardless of the age of the child. For example, in Austria, foreigners who are detained pending removal may be accompanied by the minors under their guardianship, although only if the accommodation is child-friendly.[202]

Deprivation of liberty for migration-related purposes is not necessarily based on a careful assessment of the best interests of the child, as in some cases the decision depends on the will of the parents. In Latvia, although national law prohibits migration detention of children below the age of 14, detained parents can request that the children stay with them.[203] In Spain, migrants in an irregular situation who are detained in detention have the right to have their underage children accommodated with them, but only if the prosecutor's

202 Austria, Article 79 (5) Alien Police Act (*Fremdenpolizeigesetz*), Section 4 (4) of the Detention Order (*Anhalteordnung*).

203 Latvia, Section 59[1](2), (3),(5), Immigration Law.

office agrees and if the accommodation guarantees family unity and privacy,[204] as required by Article 11 (2) of the Reception Conditions Directive.[205] In Italy, children are not detained with their parents, but it is possible when at least one of the parents submits a request or if the juvenile court decides that it is in the best interests of the child.[206] In Slovakia, the Supreme Court has ordered release from detention and annulled the judgement of the regional court in Kosice that confirmed the decision of the police ordering detention of a female Afghan asylum seeker and her three minor children who claimed asylum in Slovakia. The family was placed in a detention facility of a closed type, regardless of the fact that the applicant was able to provide cash bail. The Supreme Court in its judgement said that due to the fact that detention poses serious restriction of liberty, it needs to be assessed in each individual case and the measure chosen must be the least intrusive and restrictive one, whereby the options for alternatives to detention need to be considered first as well as the best interests of the child. The Supreme Court has in its ruling made several references to the judgements of the European Court of Human Rights.

When authorities decide on a possible detention of the child with their family, or separation of family members as a matter of law or practice, FRA has found no evidence that a best-interests assessment is conducted in each individual case or that the competent child protection authorities are involved (see also Section 7.2), as would normally be the case under criminal detention. Without such an assessment, depriving children of liberty to keep the family together would not respect the requirements deriving from Article 24 of the Charter (rights of the child).

Promising practice

Seeking the advice of specialised bodies

At least two EU Member States have established special committees to advise authorities on the child's best interests, when detention of parents is considered. These bodies have helped reduce instances of arbitrary child detention.

In **Cyprus**, families with children are not detained. When the authorities consider the necessity to detain parents, they seek the views of a special committee. The special committee convenes to decide whether the mother of a child can be detained, while the child is placed in alternative care, or not.

In 2012, the **United Kingdom** appointed 11 child welfare experts as full members of a panel advising the government on the removal of families. The Independent Family Returns Panel makes recommendations to Home Office workers on the best method of returning individual families to their home country, ensuring that the specific welfare needs of children are met. The panel recommends avoiding the separation of families for removal purposes unless as a last resort. Overall, the process is effective in avoiding unnecessary detention, according to statistics in its 2014–16 report. In 2014–16, of the 1,470 families who left the country, 1,323 did so voluntarily, 89 families left with assisted voluntary return and 14 families left with other support. Thus 97 % of families who left the country did so without the need for an ensured return, which can include detention. This compares favourably with previous reporting periods, when the figures were 51 % (2011–12) and 76 % (2012–14). The data also reflect a positive trend of smaller numbers of families being arrested as part of the returns process, as well as a significantly greater proportion of families returning voluntarily or with assistance.

Sources: UK Visas and Immigration, Report on the family returns process by the Independent Family Returns Panel for 2014 to 2016, 19 January 2017; Home Office (2012), UK government webpage on the issue; Independent Families Return Panel (2012), Annual Report 2011/2012

204 Spain, Article 62.bis (1) of the Organic Law 4/2000 (Aliens Act).
205 Reception Conditions Directive, Article 11(2).
206 Italy, The Ministry of the Interior's General Directive on Detention Centres and assistance pursuant to Article 22 (Ministero dell'Interno - Direzione generale dei servizi civili Circolare del 30 agosto 2000), para. 1 of Decree of the President of the Republic No. 394 of 31 August 1999, adopted on 30 August 2000, Article 2 (f).

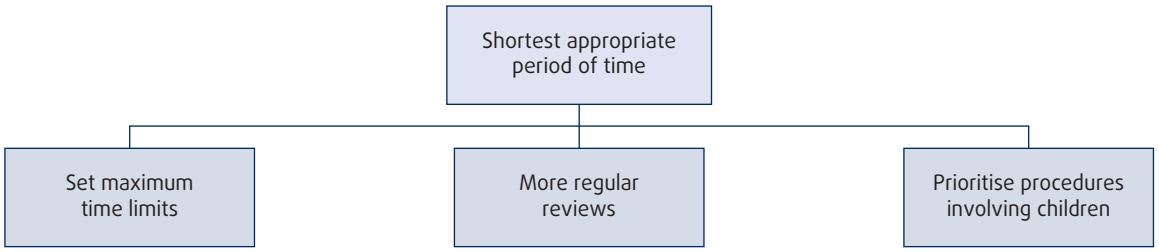
- In some cases alternative measures to detention are not sufficient and effective, e.g. to prevent absconding. As a result, the authorities deem it absolutely necessary to detain families with children. In this case they have only two options: separating the child from the parent or detaining the whole family together. This creates conflict between the right to respect of family life (and avoiding separation from the parents) and the best interests of the child, which requires that the child be detained only as a last resort.

Sometimes, authorities detain only one of the parents, usually the father, keeping the child in a reception facility with the other parent. A number of EU Member States use this as a practical solution to prevent detention of children, keep children in the education system and, at the same time, prevent absconding. For example, in Denmark, children aged between 7 and 14 are rarely detained with their parents in the Ellebaek facility, which is used for pre-removal detention of families.

If detention is considered necessary, only one of the parents will be detained. If both parents are detained or there is only one parent, the child is referred to child protection authorities, that is, social services at the municipal level. However, children fully dependent on their parents (below the age of six years) can be kept in a detention centre with the parents.[207] In 2016, the Belgian Council of State prohibited the detention of a parent even if a family hosted in the return housing units did not fulfil the agreement it had concluded with the state, arguing that this measure constitutes a disproportionate interference with the right to respect for family life.[208]

The option of detaining one parent only is, in some EU Member States, regulated by law. For example, in Finland, Government Bill No. 172/2014 allows the possibility of placing one of the parents in a detention unit and the other one in an open facility, such as a reception centre, with the child.[209] In Germany, the possible separation from the family differs by region: for example, in Brandenburg, usually only "the head of the family" is detained pending the family's removal.[210]

Figure 12: Shortest appropriate period of time



Source: FRA, 2017

207 Denmark, the Ministry of Immigration, Integration and Housing.

208 Belgium, Council of State (Conseil d'État), *Arrêt No. 234.577*, 28 April 2016. See also Caritas international, CIRÉ, Ligue des droits de l'Homme, MRAX, Centres fermés pour étrangers - état des lieux, December 2016, pp. 70-71.

209 Finland, Government Bill No. 172/2014 (*hallituksen esitys/regeringens proposition 172/2014*), Article 122.

210 Germany, Ministry of the Interior of the State Brandenburg (*Innenministerium Brandenburg*) (1997) *´Organisationserlass ´des Ministeriums des Innern zur Durchführung des Asylverfahrensgesetzes´*, 6 March 1997, Article 6.7.2.

5.3. Shortest appropriate period of time

European and international law requires that immigration detention be only as long as necessary. This means that, for example, detention in view of implementing a removal becomes arbitrary where reasonable prospect of removal no longer exists and the person must be immediately released.[211] There must be clear and cogent evidence, not just bare assertion, of the necessity in each individual case.[212] This safeguard concerns anyone, not only children.

For children, this safeguard is even stronger. At the EU level, Article 11 (2) of the Reception Conditions Directive and Article 17 (1) of the Return Directive provide that detention of children must be for the shortest appropriate period of time. It is in this spirit that the Dublin Regulation contains reduced time limits for submitting and responding to transfer requests when asylum applicants are detained.[213]

Sometimes a more stringent approach is taken, by requiring detention to be for not only the shortest appropriate time, but the shortest possible time. This is the approach that, for example, the Dublin Regulation takes. Its preamble mentions that detention "should be as short a period as possible".[214] Similarly, the CPT recommends that when, exceptionally, children are held with their parents in a detention centre, the deprivation of liberty should detention of children be for "the shortest possible period of time".[215]

EU Member States can take different measures to ensure that children are kept in detention for the shortest possible period. This report reviews three options, as illustrated in Figure 12, namely (1) the establishment of maximum time limits for detention of children, (2) ensuring more regular reviews and (3) speeding up the main procedure (e.g. asylum or return procedure) during which a child is detained.

5.3.1. Setting maximum time limits for detaining children

Neither international nor European human rights law establishes a maximum time for detention of adults or children. Only in 2012, the UNHCR underlined the need to set a maximum detention period in national legislation to guard against arbitrariness.[216]

> ➢ The Return Directive is the first binding supranational document providing a maximum length of immigration detention, albeit only for pre-removal detention. No equivalent provision is in the Reception Conditions Directive. The rationale for an upper limit is the desire to prevent instances of indefinite detention. It is based on the consideration that, after a certain time has elapsed and the removal has not been implemented, however exceptional the circumstances are, the deprivation of liberty loses its initial purpose and becomes arbitrary.

The Return Directive has established the upper limit at 18 months. It received strong criticism internationally and from civil society at the time of its adoption.[217] The Return Directive provides two ceilings. The first ceiling is set at six months (Article 15 (5)). Pre-removal detention should normally not be extended beyond such a period. In exceptional cases, Article 15 (6) of the directive provides two exceptions in which detention can be extended for a further 12 months (up to 18 months in total), provided that the possibility is set forth in national law and the authorities make all reasonable efforts to carry out the removal. The first exception is when the removal procedure is likely to last longer because the person does not cooperate. The second exception is beyond the person's influence; it is if the country of return delays issuing the necessary documentation. Further extension is not possible beyond these reasons and these deadlines.[218]

211 Return Directive, Article 15 (4); CJEU, C-357/09, *Said Shamilovich Kadzoev (Huchbarov)*, 30 November 2009, para. 63; ECtHR, *Mikolenko v. Estonia*, No. 10664/05, 8 October 2009, para. 68; UN, *Report of the Working Group on Arbitrary Detention*, 18 January 2010, A/HRC/13/30, para. 64. See also the Opinion by the Working Group in *Mustafa Abdi v. United Kingdom of Great Britain and Northern Ireland*, Opinion No. 45/2006, A/HRC/7/4/Add.1 at 40.

212 FRA and the ECtHR (2014), Handbook on European law relating to asylum, borders and immigration, Luxembourg, Publications Office, p. 156.

213 Dublin Regulation, Article 28 (3).

214 Recast Dublin Regulation, recital (20).

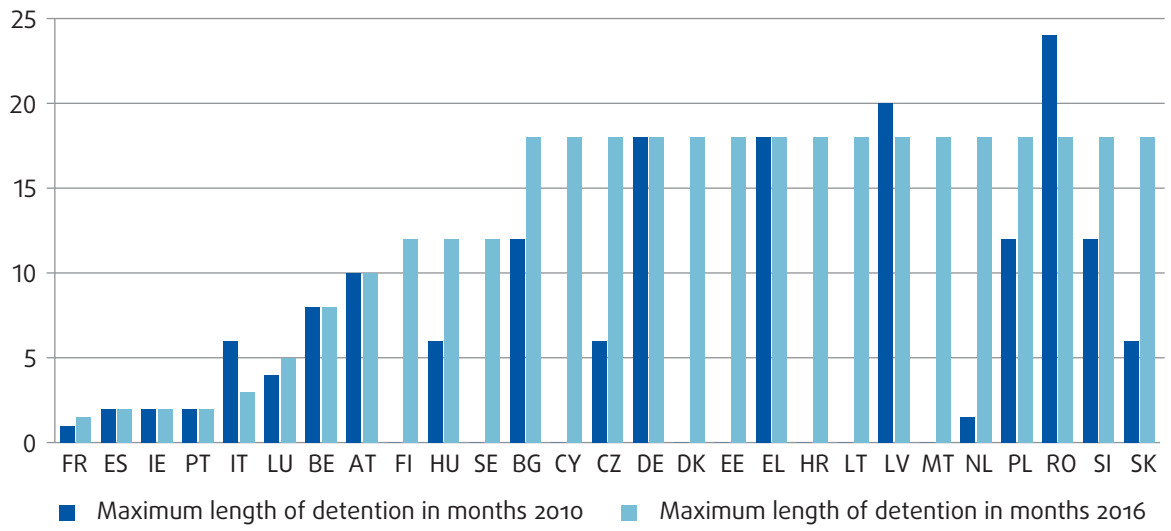
215 CPT, Factsheet on Immigration detention, CPT/Inf (2017)3, March 2017.

216 UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, Guideline 6. See also UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, 28 August 2013, CMW/C/GC/2, para. 27.

217 See press release of the UN, 'UN experts express concern about proposed EU Return Directive', Geneva, 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 ECRE and Amnesty International (2008), 'Returns' Directive: European Parliament and Member States risk compromising respect for migrants' rights', Joint press release, 20 May 2008 as well as the attached letter to European Parliament Members.,

218 See CJEU, C-357/09, *Said Shamilovich Kadzoev (Huchbarov)*, 30 November 2009, para. 60.

Figure 13: Maximum length of pre-removal detention, comparison 2010-2017, 27 EU Member States



Notes: *Croatia, Cyprus, Denmark, Estonia, Finland, Lithuania, Malta, Sweden and the United Kingdom had no maximum length of detention in 2010.*

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

In Cyprus 'prohibited immigrants' can be detained for up to three years under the Aliens and Immigration Law, Ο περί Αλλοδαπών και Μεταναστεύσεως Νόμος (ΚΕΦ.105), Article 19 (2).

Source: *FRA, 2017 (based on national legislation)*

The national laws of all EU Member States bound by the Return Directive, as well as Ireland (that is not bound by it),[219] give maximum time limits for detention pending removal. The United Kingdom – which does not apply the Return Directive – is the only Member State that does not have a maximum time limit (Figure 13).[220] Some Member States also have upper time limits for asylum detention, which are usually, but not always, shorter than for persons in return procedures. For example, in Italy, asylum detention can last for a maximum of 12 months (compared with 18 months for detention pending return), in Luxembourg for 12 months (compared with five months for pre-removal detention) and in Slovenia for three months, extendable to a maximum of four months (compared with 18 months for pre-removal detention).[221]

Figure 13 shows that 9 EU Member States have extended the maximum length of detention. Two Member States have reduced it to be compatible with the 18 months limit set in the Return Directive. Nine EU Member States did not have any limit in 2010 and all but one (the United Kingdom) have subsequently set a maximum length of detention pending return. As of April 2017, eight Member States use a lower ceiling than EU law allows, although Austria plans to increase it.[222] Sixteen EU Member States apply the maximum limit of pre-removal detention of 18 months set out in the Return Directive and three (Hungary, Finland and Sweden) apply the 12-month ceiling set by Article 15 (5) of the Return Directive.

219 Ireland, Section 5 of the Immigration Act 1999 (as amended) provides that if persons fail to comply with any aspect of the deportation order, they may be arrested and detained pending removal. This provision does not apply to children. The period for such detention is 8 weeks in total. Section 78 of the International Protection Act 2015 amends section 5 of the Immigration Act 1999 to permit the detention period of 8 weeks to be extended beyond then by a District Court judge (Section 5 (9) (b)). Section 78 of the International Protection Act 2015 was commenced by the International Protection Act 2015 (Commencement) (No. 2) Order 2016 (S.I. No. 133 of 2016) in March 2016.

220 For instance, see The Report of the Inquiry into the Use of Immigration detention in the United Kingdom: A Joint Inquiry by the All Party Parliamentary Group on Refugees and the All Party Parliamentary Group on Migration, in which it is suggested that a maximum time limit of 28 days should be set for immigration-related detention.

221 Italy, *Decreto Legislativo 142/2015*, Legislative Decree 142/2015 "Implementation of Directive 2013/33/EU on standards for the reception of asylum applicants and the Directive 2013/32/EU on common procedures for the recognition and revocation of the status of international protection," 18 August 2015, Article 6 (8); Luxembourg, *Loi du 18 décembre 2015 relative à la protection internationale et à la protection temporaire; Recueil de Législation, A –– N° 255, 28 décembre 2015*, Article 22 (4); Slovenia, International Protection Act, (*Zakon o mednarodni zaščiti*), Article 51 (3).

222 Austria, Government Programm, Arbeitsprogramm der Bundesregierung 2017/2018, January 2017, p. 29.

Time limits are usually the same for adults and children. Most EU Member States do not have any maximum time limits in place specifically for children who are held together with their families. There are, however, a few exceptions. In Luxembourg and in Sweden, children cannot be detained for longer than 72 hours.[223] In exceptional circumstances, Swedish law allows the prolongation of detention by an additional 72 hours.[224] In Bulgaria, children in families can be detained in special homes in exceptional circumstances for a maximum of three months,[225] although reports suggest that this limit has not always been respected in practice.[226] The Dutch Aliens Circular 2000 states that the maximum stay in the closed family facility pending removal is two weeks, but can be extended if they resist physically or if the parents start extra procedures.[227] In Hungary, children with families can be detained for up to 30 days under the Asylum Act, whereas the maximum time for detention for other cases (adults) is six months.[228]

At least four EU Member States have shorter detention ceilings for unaccompanied children. In Austria, unaccompanied children aged 14–18 can be detained pending return for a maximum of two months.[229] In the Czech Republic, unaccompanied children aged 15–18 awaiting removal and parents held with their children can be detained for up to 90 days under the Act on Residence of Foreign Nationals instead of the 180 days that is the maximum time for adults.[230] In Finland, according to the 2015 amendment of the Aliens Act, unaccompanied children under the age of 15 can no longer be detained under any circumstances; unaccompanied children aged between 15 and 17 years may be detained for up to 72 hours once there is an enforceable decision on their removal from Finland. The period of detention can be extended by a further 72 hours for extraordinary reasons.[231] In the United Kingdom, unaccompanied children may be detained only in a short-term holding facility for a maximum period of 24 hours (except where a child is being transferred to or from a short-term holding facility).[232]

5.3.2. Establishing more regular reviews

The right to a judicial review of the detention order is an essential procedural safeguard against arbitrary detention (Chapter 5). In addition, automatic periodic reviews by the administration or by courts reduce the risk of keeping migrants in detention for longer than necessary. Such automatic reviews are particularly important for children, as their mental or physical health can deteriorate when they are detained, requiring a reassessment of the necessity and proportionality of the deprivation of liberty.

There are essentially two ways of implementing automatic periodic reviews. The first option is to impose detention for the time envisaged, for instance to implement a removal decision or effect a Dublin transfer, but provide regular periodic reviews. The second option is to allow detention only for a short time and extend it only if it is still warranted. This second is the approach of those EU Member States that set strict time lines, typically a month or less, for the first detention order, which can then be extended for additional short periods until the maximum length of detention is reached.[233] For example, in Denmark, if the court finds the detention lawful, it will set a time limit that the court can extend later, but by no more than four weeks at a time.[234]

Article 15 (3) of the Return Directive and Article 9 (5) of the Reception Conditions Directive oblige EU Member States to review the validity of detention at reasonable intervals, either on application by the detained individual or *ex officio*. The directives do not define "reasonable intervals". As good practice, the UNHCR Detention Guidelines recommend reviewing the necessity of continuing detention "every seven days until the one month mark and thereafter every month until the maximum period set by law is reached".[235] The European Commission Return Handbook indicates the time frame after which a judge should be involved: "a three monthly ex-officio judicial review may be considered at the limit of what might still be compatible with 15 (3)".[236]

EU Member States have implemented different time limits to review immigration detention orders. In Austria,

223 Luxembourg, amended Act of 28 May 2009 establishing and organising the Detention Centre (*Loi du 28 mai 2009 portant création et organisation du Centre de rétention*), Article 6(3), 29 May 2009; Sweden, Aliens Act, Chapter 10, Section 5.
224 Sweden, Aliens Act, Chapter 10, Section 5.
225 Bulgaria, Foreigners in the Republic of Bulgaria Act (*Закон за чужденците в Република България*), 23 December 1998, Article 44(9).
226 Vankova, Z. (Ванкова, З.) (2012), *Специалните домове за временно настаняване на чужденци – quo vadis?* (*The special homes for temporary accommodation of foreigners – quo vadis?*), Sofia, Bulgarian Helsinki Committee.
227 Netherlands, Aliens Circular 2000 A (*Vreemdelingencirculaire 2000 A*), Para. A5/2.4.
228 Hungary, Act No. 80 of 2007 on Asylum (*2007. évi LXXX. törvény a menedékjogról*), Article 31/A (7).
229 Austria, Aliens Police Act (*Fremdenpolizeigesetz*), 2005 as amended, Section 80 (2).
230 Czech Republic, Act on Residence of Foreign Nationals, Section 125(1).
231 Finland, Aliens Act, as amended on 26 June 2015 (*Ulkamaalaislaki, Utlänningslag*), Section 122.
232 United Kingdom, Immigration Act 2014, Section 5 (4).
233 See for example, France, Article L.552–1, L552–7 *Code de l'entrée et du séjour des étrangers et du droit d'asile* or Luxembourg, Immigration Law Article 120 (3).
234 Finland, Aliens Act, Section 37.3.
235 UNHCR (2012), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, para. 47 (iv).
236 European Commission, Return Handbook, 14.3. Regular review of detention, p. 83.

for example, in the context of asylum procedures, the Federal Office for Immigration and Asylum reviews a detention order every four weeks.[237] In Malta, the Immigration Appeals Board automatically reviews the detention order imposed upon an asylum applicant after seven working days, although this period can be extended by additional seven working days for duly justified reasons. If the applicant remains in detention, further reviews are conducted every two months.[238]

These two examples concern all detention orders. In some cases, there are specific provisions for children. For example, in Finland, a District Court must confirm the detention order within four days, or 24 hours for unaccompanied children.[239] If the detained person is not released, the District Court must review the matter on its own initiative no later than two weeks after its previous decision.[240] Similarly, in Romania, when children are detained with one or both parents or a legal guardian, the General Inspectorate for Immigration reviews the detention decision within one month, instead of three months as for adults.[241]

Promising practice

Involving specialised child protection staff when ordering or extending detention

Regular assessments and reviews involving competent child protection authorities and other specialised staff serve to safeguard the best interests of the child. They can determine whether or not the child's health has deteriorated as a result of the deprivation of liberty.

This is the case in Finland. Section 125 (a) of the Finnish Aliens Act requires the municipal child welfare authority to provide a written assessment by a professionally qualified social worker to a District Court that is hearing a child detention case.' The qualified expert has an opportunity to be heard by the court.

Source: Finland, Finnish Aliens Act, Section 122 read in conjunction with Section 117a and Section 121

237 Austria, Aliens Police Act Act (*Fremdenpolizeigesetz*), Article 80 (6).
238 Malta, Reception of Asylum-seekers Regulations, Subsidiary Legislation 420.06, as amended by Legal Notice 417 of 2015 Reg.6.3–4.
239 Finland, Aliens Act, Section 124 (2) .
240 Finland, Aliens Act, Section 128.
241 Romania, Aliens Act, Emergency Ordinance No. 194/2002 on the legal regime of aliens in Romania, Article 101(13) and 106(3).

5.3.3. Prioritise procedures involving children

Another factor affecting the length of potential detention is the overall duration of the procedure based on which the detention is imposed. In this context, the vulnerability of children and their perception of the passing of time mean that prolonged decision-making in asylum or return-related proceedings have particularly adverse effects on children. The UN Committee on the Rights of the Child, therefore, called in its *General Comment No. 14* (2013) for procedures or processes regarding or impacting children to be prioritised and completed in the shortest time possible.[242] In *A.B. and Others v. France*, the ECtHR criticised the absence of effective steps by the authorities to execute the expulsion order swiftly, noting that the applicants had been detained for 18 days without any flight being organised or documents being obtained.[243]

Prioritising procedures involving children requires that children are immediately identified, particularly when they travel unaccompanied or are at risk. At borders, the Frontex Vega Handbook, initially designed for airports but now being adapted for use at land and sea borders, is a handy tool for Frontex as well as national border guards to swiftly refer children at risk to appropriate child protection services thus reducing the risk of arbitrary detention.

In the field of asylum, one way to complete procedures swiftly without reducing the quality of the examination is to assess the claims of children first. Article 31 (7) of the Asylum Procedures Directive explicitly gives EU Member States the option to prioritise examination of an application for international protection in the case of applicants who are vulnerable or in need of special procedural guarantees. It refers in particular to unaccompanied children. In the exceptional cases where detention of asylum-seeking children is deemed absolutely necessary as a last resort, such an approach could help reduce the length of detention to the minimum possible time.

Some EU Member States address the need to conduct procedures related to children swiftly in national law. Article 6 of the Finnish Aliens Act, for example, stipulates that matters concerning children are to be processed urgently. In Romania, the relevant legislation explicitly stipulates that the asylum application of an unaccompanied child must be "analysed as a matter of

242 UN, Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para. 1)*, 29 May 2013, CRC/C/GC/14, para. 93.
243 ECtHR, *A.B. and Others v. France*, No. 11593/12, 12 July 2016, para. 155.

priority".[244] In the Netherlands, unaccompanied children will be detained only under exceptional circumstances, and only based on limited grounds, one being that the deportation of the child can happen within 14 days.[245]

In addition, the Dublin Regulation contains reduced time limits for submitting and responding to transfer requests when asylum applicants are detained. Although not specifically directed at children, this mechanism contributes to reducing the periods of detention for all persons subject to a Dublin transfer.[246]

Conclusion

Mandatory detention is prohibited under EU and human rights law; an individual examination is therefore always needed before ordering detention. Research findings indicate that detention decisions involving children are not necessarily based on a careful, individual assessment of necessity and proportionality, as required by Articles 6 and 52 (1) of the Charter. In addition, they do not always give primary consideration to the best interests of the child. At the same time, experience shows that protracted cases of child detention are rare and often linked to reasons of public order or national security, which should be regulated by criminal law rather than immigration law.

The requirement to provide alternatives to detention is present in EU law, Council of Europe law and international human rights law. With respect to children, the ECtHR has been very firm in suggesting that respecting the best interests of the child requires states to adopt alternatives to detention. Where authorities fail to examine all alternatives to detention, the detention of a child will be considered arbitrary and a violation of their right to liberty and security. EU secondary law also requires Member States to examine first the viability of alternatives to detention before resorting to deprivation of liberty for asylum or return purposes. This requirement concerns everyone, including children.

The right to respect for private and family life (Article 7 of the Charter and Article 8 of the ECHR) is an additional factor when national authorities decide on the necessity and proportionality of detaining families with children. In practice, when national authorities decide to detain the child with the parents or separate family members, they rarely assess the best interests and seldom involve the competent child protection authorities. Such an approach is contrary to Article 24 of the Charter (rights of the child). Conflict between the right to respect for family life (non-separation from the parents, thus detaining the child together with the parents) and the best interests of the child (not detaining the child unless as a last resort) requires careful balancing.

Regarding the length of detention, European and international law require that immigration detention be only as long as necessary and for the shortest appropriate period. EU Member States can use various measures to ensure that children are kept in detention for the shortest period. They include setting maximum time limits for the detention of children; establishing more regular reviews; and speeding up the asylum or return proceedings by giving priority to children.

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Where they have not yet done so, EU Member States should issue simple and practicable instructions to support officers responsible for preparing or issuing detention decisions. These instructions should advise officers on the steps to take to ensure that necessity and proportionality are adequately assessed in each individual case, giving primary consideration to the best interests of the child.

EU Member States must take adequate legislative and policy measures to ensure that alternatives to detention are not only available on paper but also used in practice for families and children. In the absence of such measures, national authorities cannot justify the use of detention as a last resort.

When deciding whether or not to detain a family with children, EU Member States should always thoroughly assess the best interests of the child, which means being with the parents in open facilities that enable the family to live with dignity. If they are detained, detention has to take place in facilities adequately equipped to host families, also duly taking into account the length of the deprivation of liberty.

EU Member States that allow immigration detention of children should consider fixing a maximum length of child detention. This should be coupled with regular judicial reviews of the necessity and proportionality of detention, which should be based on an individual assessment of the child's situation by the competent national child protection authorities.

244 Romania, Asylum Act, Article 16 (1).
245 The Netherlands, Aliens Act, Articles 59 and 59a.
246 Dublin Regulation, Article 28 (3).

6 Child-specific procedural safeguards

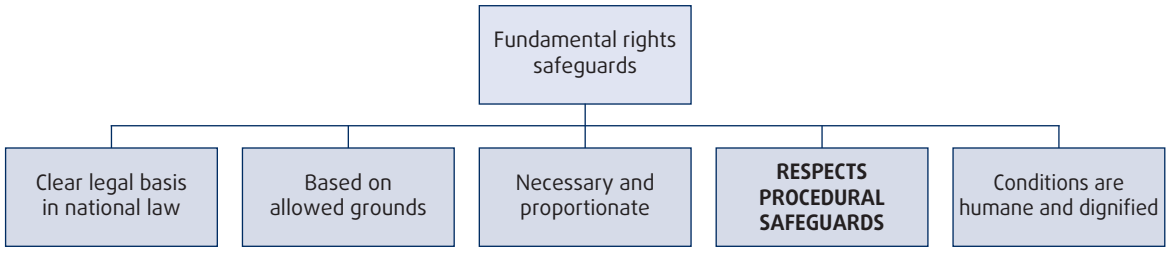
To ensure that detention is not unlawful or arbitrary and, when imposed, does not limit fundamental rights unduly, European and international law contain a set of procedural safeguards (see Figure 14).

➢ The most important procedural safeguards that apply regardless of age are the rights to:

- judicial review, which is enshrined at all three levels – the EU Charter, the ECHR and international human rights law[247] – and expressly guaranteed by secondary EU law;[248]
- free legal aid as a precondition to exercise the right to an effective remedy, as the procedures are complex, so one needs to be familiar with domestic law to access them effectively;[249]
- linguistic assistance.[250]

Alongside these general safeguards are child-specific safeguards, which are the focus of this report.

Figure 14: Five conditions deprivation of liberty must meet to not be unlawful and arbitrary



Source: FRA, 2017

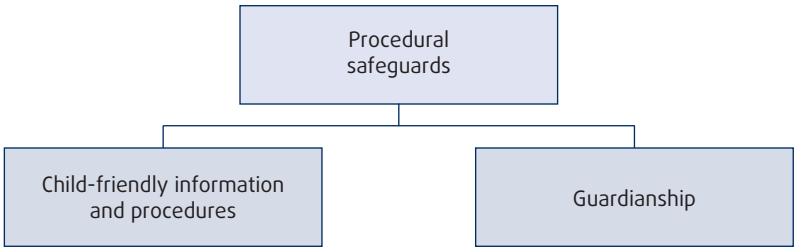
247 EU Charter, Article 47 (right to an effective remedy); ECHR, Article 5 (4); ICCPR, Article 9 (4); Reception Conditions Directive, Article 9 (3); Return Directive, Article 15 (2) (a).

248 Reception Conditions Directive, Article 9 (3); Return Directive, Article 15 (2).

249 European Commission of Human Rights, *Mohammed Zamir v. the United Kingdom*, No. 9174/80, 11 October 1983, para. 113. See also ECtHR, *Chahal v. United Kingdom* [GC], No. 22414/93, 15 November 1996, para. 130; and ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002, paras. 44–45 where the Court gave considerable importance to the lack of legal representation when determining whether an existing remedy was to be considered effective. Council of Europe Twenty Guidelines on Forced Return, Guideline 9; Reception Conditions Directive, Article 9 (6); Return Directive, Article 13 (4).

250 ECHR, Article 5 (2); Reception Conditions Directive, Article 9 (4); Return Directive, Article 12.

Figure 15: Procedural safeguards for children



Source: FRA, 2017

Specific procedural safeguards for children exist, because it is necessary to ensure that the best interests of the child is a primary consideration in all procedures concerning children. This chapter focuses on two key safeguards for children: (1) the importance of child-friendly procedures and provision of information in a child-friendly manner; and (2) the role of guardianship for unaccompanied children (Figure 15).

6.1. Child-friendly information and procedures

Procedural steps that may result in placing children in detention as well as those affecting a child already in detention need to be based on a child-friendly approach that respects the child as a human being and allows them to fully exercise their rights. Organising the relevant procedures in a child-friendly and child-sensitive manner is crucial to avoid intimidating the child and to be able to assess the best interests of the child based on their actual views. It requires proactive provision of information to the child on the procedure and their rights. Staff interacting with children in the context of the procedures need adequate training and awareness of the specific needs of children who are or may be subject to immigration detention., When children are involved with justice systems (including when they seek asylum) that are not child-friendly, they can face obstacles with regard to legal representation or being heard, receive inadequate information or be treated as adults without safeguards adequate to their vulnerability, the 2011 European Commission Communication *An EU Agenda for the Rights of the Child* acknowledges.

Guidance and tools: Council of Europe guidance on child-friendly justice

The Committee of Ministers of the Council of Europe adopted guidelines on child-friendly justice in 2010. Their general elements are intended to apply also outside the justice system, including to children in contact with police or immigration authorities. Among other principles, they emphasise the importance of prompt and adequate information, including on children's rights and applicable procedures, possible remedies and review mechanisms, or availability of support mechanisms and services. The information should be appropriate to the age and maturity of the child, in a language that the child can understand and sensitive to gender and culture. The guidelines also underline the role of training of professionals working with children. They should receive interdisciplinary training on the rights and needs of children of different age groups, and on communicating with them at all ages and stages of development, including when children are particularly vulnerable (see also Chapter 6 in relation to the child-specific training of detention staff).

Source: Council of Europe, Committee of Ministers (2010), Guidelines on child-friendly justice, 17 November 2010, in particular pp. 20-21 and 23

6.1.1. Child-friendly procedures and the right to be heard

EU law does not comprehensively prescribe how to ensure that procedures involving children are child-friendly. It emphasises, however, the best interests of the child as a primary consideration when deciding on detention in asylum and return procedures. The Reception Conditions Directive highlights the importance assessing the best interests of the child based on the views of the child in accordance with their age and maturity.[251] As a horizontal obligation, it also applies

251 Reception Conditions Directive, Article 23 (2) (d).

to decisions related to detention of child applicants for international protection. Similarly, the Return Directive stipulates that Member States must take due account of the best interests of the child.[252] This applies to the implementation of the Return Directive as a whole, including any decisions related to detention. The European Commission clarified that the child's right to be heard is an integral part of any best interests assessment and must include respecting the child's rights to express their own views freely and have these views taken duly into account in all matters affecting the child.[253]

In general terms, Member States have incorporated the provisions of relevant EU law (particularly the Return Directive and the Reception Conditions Directive) into national law without expressly requiring that the child be heard. The 2015 amendments to the Finnish Aliens Act indicate that stronger national law provisions are possible: the Act now expressly stipulates that a child can be placed in detention only after they and the responsible municipal social worker have had the opportunity to be heard by the judge.[254]

6.1.2. Child-friendly information

Relevant EU law requires that persons subject to asylum or return procedures be informed of their rights and the decisions concerning them in a language that they understand or are reasonably supposed to understand. The Reception Conditions Directive specifically stipulates that detained applicants be immediately informed of the reasons for their detention, procedures to challenge the detention order and the option to request free legal assistance and interpretation.[255] The primacy of the best interests of the child implies that this information must also be communicated in a manner appropriate to the age and maturity of the child. The Asylum Procedures Directive obliges Member States to ensure that personnel of detention facilities have sufficient information and training to be able to inform applicants where and how applications for international protection may be lodged; Member States should interpret it in a similar way.[256]

The Dublin Regulation also recognises the need for child-specific information.[257] It does not, however, include a duty to provide information in a child-friendly manner. Such a safeguard would be particularly important for unaccompanied children, as they typically face significant difficulties in understanding the purpose and requirements of legal procedures and what their duty to cooperate with the authorities entails, as FRA emphasises in its opinion on the proposal for a revised Dublin Regulation.[258]

In international law, Article 12 of the CRC underlines the right of the child to be heard in any judicial and administrative proceedings, and have their views given due weight in accordance with their age and maturity.[259] This requires that any communication with the child be appropriate to the child, also taking into account the requirement that information must be in a language that the detained person understands, under Article 5 (2) of the ECHR.

- According to Article 5 (2) of the ECHR, Member States must promptly inform everyone who is arrested of the reasons for their arrest and of any charge against them. 'Everyone' includes children. However, only some Member States specify in legislation the duty to communicate immigration-related decisions, including detention decisions, in a child-friendly manner.

When accompanied children are detained with their parents and/or legal guardians, it is assumed that the parents/guardians will inform their children. Therefore, no specific provisions or practices are in place for communicating such decisions in a child-friendly manner. Sometimes, the appointed legal advisers or other counsellors who support all individuals involved in a given procedure inform them. Legal-aid providers and civil society organisations that provide services in detention facilities also play key roles in providing information, such as Save the Children in the migration hotspots in Italy.[260] Children can benefit from these general measures, but it remains unclear how child-friendly they are.

252 Return Directive, Article 5 (a).
253 European Commission, Commission Recommendation (EU) 2017/432 on making returns more effective when implementing the Directive 2008/115/EC, C/2017/1600, Brussels, 7 March 2017, at recital 19 and para. 13 (d). European Commission, The protection of children in migration, COM/2017/0211 final, 12 April 2014 at point 5. See also European Commision (2015), *Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks*, C/2017/1600, Brussels, 1 October 2015, p. 51.
254 Finland, Finnish Aliens Act, Section 122 in conjunction with Sections 117a and 121.
255 Reception Conditions Directive, Article 9 (4).
256 Asylum Procedures Directive, Article 6 (1).
257 Dublin Regulation, Recital (34) and Article 4 (3).
258 FRA (2016), Opinion on the impact of children, of the proposal for a revised Dublin Regulation (COM(2016)270 final; 2016/0133 COD), Luxembourg, Publications Office, p. 37.
259 See also Committee on the Rights of the Child (2009), *General Comment No. 12*, paras. 21, 123-124.
260 FRA (2016), Opinion on fundamental rights in the 'hotspots' set up in Italy and Greece, Luxembourg, Publications Office, p. 21.

For example, in Austria, a legal adviser must advise and support a detained person, who may be a child.[261] The adviser is entitled to participate at all stages of proceedings. In Belgium, all persons placed in detention, including children, should meet with a social worker upon arrival, who provides information on the detention facility and the person's rights and obligations, including the right to appeal. Similarly in Poland, dedicated staff, namely a return assistant (*opiekun powrotowy*) and a social assistant (*opiekun socjalny*), must inform all detainees, including children, of the detention decision including the right to appeal.[262] The social assistant is a Border Guard officer or staff member trained in intercultural communication whose task is to inform detained foreigners individually about their rights and to identify persons in need of special treatment.[263] The return assistant is a Border Guard officer or worker responsible for individually informing detained foreigners about the detention decisions and the administrative procedures in place.[264] Nevertheless, there is no evidence that these persons receive child-specific training.

Unaccompanied children's legal guardian or representative should inform them about their rights and obligations. In principle, the guardian should also inform the child about complaints procedure and support him or her to submit complaints about the detention conditions and/or other violations of their rights when detained. However, often guardians are not appointed swiftly upon deprivation of liberty, FRA has found. When appointed, often guardians have no or limited personal contact with the child: they do not meet the child in person or visit the detention facility.[265]

Some Member States include specific measures and/or practices for informing children in their return procedures.

- In the Netherlands, the Repatriation and Departure Service (*Dienst Terugkeer en Vertrek*) has officials trained in communicating with unaccompanied children. In the case of families, parents are supposed to communicate the decision to the children.[266]
- The United Kingdom sets up a Family Departure Meeting in cases of forced return.[267] This takes place in the family home. Children are encouraged to attend. With the permission of the parents, the Home Office official (Family Engagement Manager) must speak to the children directly to ensure that they understand the potential impact of arrest on the family.[268] These officers have specialised training from the Home Office.[269]

6.2. Guardianship and legal representation

Article 20 of the CRC enshrines states' obligation to protect children who are temporarily or permanently deprived of their family environment, entitling these children to special protection and assistance. Every child deprived of parental care, including unaccompanied children, should have a guardian appointed.[270] The guardian exercises three core functions: (1) they ensure the child's overall well-being, (2) they safeguard the child's best interests and (3) they exercise legal representation, complementing the limited legal capacity of the child, when necessary, in the same way that parents do.[271]

In practice, responsibility for representing the child in particular administrative proceedings might be separate from the other two functions of guardianship. Legal representatives, unlike guardians, have a restricted mandate in national law: to represent the child in particular proceedings.

261 Austria, *Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden (BFA-Verfahrensgesetz – BFA-VG)*, BGBl. I Nr. 87/2012, Article 51.

262 Poland, Headquaters of Border Guard (*Komenda Główna Straży Granicznej*), Reply to Helsinki Foundation for Human Rights to the request for disclosure of public records, 11 March 2016, KG-OI-III.0180.19.2016.JB-I.

263 Poland, The Border Guard (*Straż Graniczna*), 17 September 2015, Rules of conduct of Border Guard with foreigners in need of special treatment (*Zasady postępowania Straży Granicznej z cudzoziemcami wymagającymi szczególnego traktowania*).

264 Poland, Headquaters of Border Guard (*Komenda Główna Straży Granicznej*), Reply to Helsinki Foundation for Human Rights to the request for disclosure of public records, 11 March 2016, KG-OI-III.0180.19.2016.JB-I.

265 FRA (2014), Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, Luxembourg, Publications Office, p. 69.

266 The Netherlands, Ministry for Security and Justice (*Ministerie van Veiligheid en justitie*).

267 United Kingdom, UK Visas and Immigration (2013) Enforcement instructions and guidance, 10 December 2013, Chapter 45 (b), para. 2.5.1.

268 *Ibid*, para. 3.

269 United Kingdom, Home Office, Evaluation of the New Family Returns Process research report 78, December 2013, p. 33 Footnote 65.

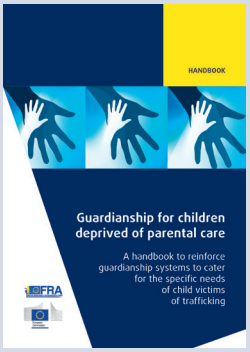
270 UN, Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 21.

271 FRA (2014), Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, Luxembourg, Publications Office, pp. 15 and 37.

Tools and guidance: *Guardianship for children deprived of parental care* – a FRA handbook

The guardian, being the independent person who safeguards the best interests and general well-being of the child, should be involved and consulted in issues related to the detention and detention conditions of unaccompanied children. FRA published a handbook in 2014 to promote a shared understanding of the main features of guardianship and to help standardise guardianship practice in the Member States.

The handbook provides guidance and recommendations to EU Member States on strengthening guardianship systems, setting forth the core principles, and the fundamental design and management of such systems. It aims to improve conditions for children under guardianship and promotes respect for their fundamental rights. The handbook has a specific focus on child victims of trafficking, but it generally covers guardianship systems for all children who are deprived of parental care, including unaccompanied migrant or asylum-seeking children.



The guardian differs from a qualified lawyer, who provides legal aid to a child deprived of liberty. Article 37 (d) of the CRC enshrines that right, stating that "[e]very child deprived of his or her liberty shall have the right to prompt access to legal [...] assistance" to challenge the detention decision.

EU law recognises the importance of legal guardianship, but does not define its functions. Proposed legislative changes clarify that the guardian is "a person or organisation appointed to assist and represent an unaccompanied child with a view to safeguarding the best interests of the child and his or her general well-being in [asylum] procedures and exercising legal capacity for the minor where necessary."[272] The current versions of the Reception Conditions Directive and Asylum Procedures Directive both provide for the right of unaccompanied children to be provided a legal representative only.[273]

The majority of EU Member States have entrusted guardianship functions to municipal or local social services, and only a few Member States have a central guardianship authority at the national level, as FRA reported in a comparative study on guardianship. When a Member State implements guardianship at regional or local level, it sometimes applies different approaches in different parts of the country. Most of the EU Member States assign guardianship duties to natural or legal persons. A few Member States have set up a separate guardianship system for unaccompanied children who have only a temporary right to stay in the Member State or no right to stay at all. However, in practice, differentiated arrangements are in place in many more Member States depending on the specific status of the child.[274]

Guardians have a key role in safeguarding the best interests of unaccompanied children in the various proceedings. They could support the child during age assessment procedure and ensure that special procedural safeguards are in place, such as access to information and free legal aid. In cooperation with other competent authorities, guardians could contribute to effective monitoring of the facilities used to hold children and facilitate access to complaint mechanisms. Finally, they could contribute significantly to the individual assessment required to order or review a detention decision for an unaccompanied child. However, often guardians are assigned late or not at all.

According to CPT standards, 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 legal representative or guardian who keeps them informed of their legal situation and effectively protects their interests. Review mechanisms should also be introduced to monitor the ongoing quality of the guardianship.[275]

In the majority of the Member States, national law contains a duty to notify the guardianship authority whenever an unaccompanied child is identified and/or detained. For example, in the Czech Republic, the police will appoint a guardian when initiating an administrative

272 European Commission, *Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, Article 4 (f) and European Commission, *Proposal for a Directive laying down standards for the reception of applicants for international protection (recast)*, Article 2 (12).

273 Reception Conditions Directive, Articles 2(n) 24 and Asylum Procedures Directive, Articles 2 (j) and 25.

274 FRA (2015), Guardianship systems for children deprived of parental care: With a particular focus on their role in responding to child trafficking, Luxembourg, Publications Office, pp. 7–8.

275 CPT, Factsheet on Immigration detention, CPT/Inf(2017)3, March 2017.

detention procedure.[276] A representative of the guardianship authority (the local branch of the Office of Social and Legal Protection of Children, *Orgán sociálně-právní ochrany děti*) will be present during the interview with the child at the police station where they are initially held.

Research shows that often the authorities do not assign an individual guardian to the child before ordering detention. When there is a guardian, the amount and frequency of personal contact with the child differs in individual Member States.[277] Often, only a legal representative is assigned to the child and not a guardian. The legal representative is tasked with representing the child in the legal proceedings, for example lodging an appeal. In Sweden for example, if the child does not have a guardian *ad litem*, a public counsel (*offentligt biträde*) is appointed to represent the child. Such a public counsel must always be appointed for unaccompanied children in migration-related detention and acts as a representative of the child in court.[278]

Conclusion

The right to be heard, which is a general principle of EU law, and Article 24 of the Charter mean that children must have effective opportunities to express their views. These are to be considered in accordance with the child's age and maturity.

To ensure that the best interests of the child are a primary consideration in all procedures concerning children, general procedural safeguards applicable to immigration detention, such as judicial review, and access to free legal aid and linguistic assistance, are complemented by child-specific safeguards. These include guardians for unaccompanied children, and conducting procedures and providing information in a child-friendly manner.

Although the current provisions of EU law do not expressly define its functions, the role of a guardian for unaccompanied children is indispensable in ensuring the child's overall well-being, safeguarding the child's best interests and exercising legal representation, complementing the limited legal capacity of the child. The guardianship systems of individual Member States vary in scope and capacity, and do not always ensure that guardians are appointed soon enough after a child is identified as unaccompanied. As a result, the children may not benefit from the presence of a guardian when, for example, a decision on detention is made.

Conducting immigration-related procedures involving children in a child-friendly manner is a precondition for involving them meaningfully in the procedures, as it enables the authorities to take the views of the child into account. Only some EU Member States have legislation specifically stipulating the child's right to be heard before the authorities decide on detention, as required by the Convention on the Rights of the Child. Similarly, the availability of child-specific information in asylum and return-related procedures varies for both unaccompanied and accompanied children; their parents are generally expected to provide them with information. Even where information targeted specifically at children is available, it is not always delivered in a child-appropriate manner or in a form that is adapted to the specific situation and needs of children. This, together with not enough child-specific training and expertise among some staff conducting proceedings with children, may not only contribute to the feeling of insecurity and intimidation, but also effectively prevent children from fully exercising their rights.

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To ensure children's right to be heard, which is a general principle of EU law, EU Member States should develop and use child-friendly information and materials, and train officers and other relevant staff to conduct procedures in a child-appropriate manner and facilitate children's involvement.

In light of Article 24 of the Charter (rights of the child), EU Member States should appoint a guardian as soon as an unaccompanied child is identified and before they decide on deprivation of liberty.

276 Czech Republic, Act on the Residence of Foreign Nationals No. 326/1999 Coll. (*Zákon o pobytu cizinců na území České republiky a o změně některých zákonů*), 30 November 1999, Section 124 (5). Amended version available at: http://www.zakonyprolidi.cz/cs/1999-326. See also Czech Republic, Ministry of Labour and Social Affairs (*Ministerstvo práce a sociálních věcí*), 2009, Nezletilý cizinec bez doprovodu (manual).

277 FRA (2014), Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, Luxembourg, Publications Office, pp. 54–55.

278 Sweden, Aliens Act (*Utlänningslag (2005:716)*), chapter 18, sections 1 and 3, 29 September 2005.

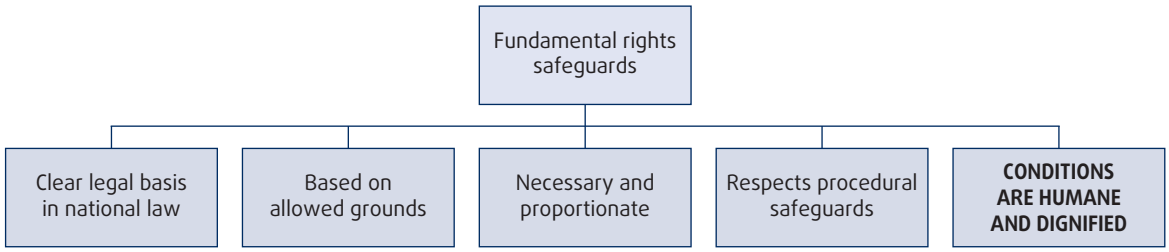
7 Humane and dignified conditions in detention

This section examines the conditions in closed facilities where children, either with their families or unaccompanied, are held for the purpose of removal or as asylum seekers. The facility must ensure dignified detention conditions. Corresponding standards have been developed at the EU, Council of Europe and international levels. Even if detention in the migration context is on valid grounds prescribed by law and fulfils the formal criteria of legality, the conditions of detention themselves may breach EU law, the ECHR or other international human rights norms.

This chapter analyses such detention condition requirements. This is the final set of safeguards described in this report against unlawful and arbitrary detention (Figure 16). This chapter deals with the type of facility used, examines child-specific training and analyses two specific aspects, namely access to education and healthcare.

Both EU law and the ECHR require that conditions of deprivation of liberty must be humane and dignified, and that families should not be separated.

Figure 16: Five conditions deprivation of liberty must meet to not be unlawful and arbitrary



Source: FRA, 2017

Under EU law, conditions of detention in the migration context must fully comply with the Charter, in particular with the right to human dignity (Article 1)[279] and the prohibition of inhuman or degrading treatment (Article 4).[280] Articles 16–17 of the Return Directive regulate detention conditions for persons in return procedures, while Articles 10–11 of the Reception Conditions Directive govern the detention conditions of applicants for international protection. Both the Reception Conditions Directive and the Return Directive require that non-nationals who are in detention must be treated with full respect for their human dignity.[281] When detention of children cannot be avoided, they must be held in conditions suitable to their needs. Facilities must be specialised, taking into account children's needs and ensuring specific rights, such as healthcare, access to education and leisure activities, family unity and privacy for families (Return Directive Article 17 (2) and Reception Conditions Directive Article 11 (4)). Both directives require that in detention the needs of children be taken into account.[282]

The ECtHR case law directly links detention conditions to the lawfulness of detention.[283] The ECtHR has stated that detention facilities must be suited to the age of the child and equipped to deal with their specific needs, and that, when facilities are inadequate to cater for the specific needs of children, detention is arbitrary.[284] The ECtHR has found the detention of a parent with children in a place not suitable for children to be unlawful and a contravention of Article 5 of the ECHR.[285] Nonetheless, even when families are detained in a special wing that is appropriate for families, the detention can be unlawful, if, given the extreme vulnerability of children, it exposes them to feelings of anxiety and inferiority.[286] Under the ECHR, conditions of detention can be assessed under different articles: the prohibition of torture or inhuman or degrading treatment or punishment (Article 3), the right to liberty and security (Article 5) and the right to respect for private and family life (Article 8). The ECtHR has been very strong in ruling that certain deprivations of liberty are arbitrary, based on the detention conditions. Table 8 shows examples of what the ECtHR found inadequate.

In its judgments, the ECtHR has notably been guided by findings of the CPT, the monitoring body established under the Council of Europe to prevent torture, inhuman or degrading treatment or punishment.

Tools and guidance: The CPT standards

The CPT standards collect the findings of three decades of work by the CPT. The standards apply to all persons deprived of liberty, including those held for migration-related purposes. The CPT has carried out hundreds of visits to immigration detention facilities. In March 2017, the CPT has prepared a Factsheet on immigration detention (March 2017). The factsheet compiles all the relevant CPT standards and present these in an accessible manner. The Factsheet presents the CPT's requirements related to detention conditions in the immigration context, such as suitable premises, adequate material conditions and an open regime.

As regards the deprivation of liberty of children, the CPT standards specify that children should only be held in centres designed to cater for their specific needs and staffed with properly trained men and women. In order to limit the risk of exploitation, special arrangements should be made for living quarters that are suitable for children, for example, by separating them from adults, unless it is considered in the child's best interest not to do so. Children deprived of their liberty should be offered a range of constructive activities (with particular emphasis on enabling a child to continue his/her education).

Source: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)(2017), Factsheet on Immigration detention, CPT/Inf(2017)3, Council of Europe

279 CJEU, C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others,* 27 February 2014, para. 35.
280 See in this sense CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Judgement of 21 December 2011, paras. 94, 106.
281 Reception Conditions Directive, recital (18); Return Directive, recital (17).
282 Reception Conditions Directive, recital (18); Return Directive, Article 14 (1) (d).
283 Lutz, F. and Mananashvili, S., 'Return Directive 2008/115/EC' (2016) in: Hailbronner, K. and Thym, D. (eds.), *EU Immigration and Asylum Law. A Commentary*, Munich/Oxford/Baden-Baden: C.H.Beck/Hart/Nomos, second edition, p. 756.
284 ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012, paras. 118–120; *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, paras. 74–75; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, paras. 100–102.
285 ECtHR, *Kanagaratnam and Others v. Belgium*, No. 15297/09, 13 December 2011, paras. 94–95.
286 ECtHR, *Kanagaratnam and Others v. Belgium*, No. 15297/09, 13 December 2011; ECtHR, *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, paras. 74–75.

Table 8: Examples of detention conditions scrutinised by the ECtHR

Example	Case reference	Article
Even when accompanied by a parent, the detention of children in a closed centre can expose them to feelings of anxiety and inferiority, risking their development.	ECtHR, *Kanagaratnam and Others v. Belgium*, No. 15297/09 (2011)	Article 3 Article 5 (1)
Families shall not be separated, and the authorities are required to do everything in their power to limit the detention of families with children.	ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07 (2012)	Article 8
Detention facilities that present a danger to children, such as those that contain iron-framed beds and automatic doors to rooms, as well as stress, insecurity and a hostile atmosphere, are ill suited for children.	ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07 (2012)	Article 3
Even in cases where the material conditions of detention are appropriate, the conditions inherent to detention establishments cause anxiety for young children.	ECtHR, *A.B. and Others v. France*, No. 11593/12 (2016)	Article 3
In the case of unaccompanied children, authorities must ensure that the child receives proper counselling and educational assistance from a qualified person specially assigned to them.	ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03 (2006)	Article 3
Unaccompanied children cannot be held in adult detention centres or in a youth hostel, which are unsuited to their extremely vulnerable situation (especially very young children).	ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03 (2006); ECtHR, *Housein v. Greece*, No. 71825/11 (2013)	Article 5 (1)
When the detention conditions, particularly accommodation, hygiene and infrastructure, are so poor that they undermine human dignity, especially given the vulnerability of unaccompanied children, the detention is unlawful, even if it lasts only as long as two days.	ECtHR, *Rahimi v. Greece*, No. 8687/08, (2011)	Article 3

Source: FRA, 2017

Article 37 of the CRC requires States Parties to ensure that children in detention are treated with humanity and respect for their inherent dignity and in an age-appropriate manner.[287] When detained, children should have the opportunity for regular contact with and visits from friends, relatives, religious, social and legal counsel, and their guardian.[288] Children also continue to have the right to education and recreation, and to medical treatment and psychological counselling where necessary.[289]

Table 9 summarises some of the main standards stemming from EU law, the ECHR and other international human rights law instruments in relation to various detention conditions applicable to children.

287 UN, Convention on the Rights of the Child, 20 November 1989, Article 37 (c).

288 Convention on the Rights of the Child, Article 37 (c); UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, Article 17 (5).

289 UN, Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 63; UN, *Rules for the protection of juveniles deprived of their liberty*, A/RES/45/113, 14 December 1990 *(Havana Rules)*, para. 38, which apply to any deprivation of liberty, on the right to education in detention.

Table 9: Selected standards on detention conditions under EU, CoE and UN instruments

Conditions	European Union	Council of Europe	United Nations
Detention conditions take into consideration needs of the child	• Reception Conditions Directive, Article 11 (2) • Return Directive, Article 17 (4)	• ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, paras. 100–102. • ECtHR, *Muskhadzhieyeva v. Belgium*, paras. 74–75 • ECtHR, *Popov v. France*, paras. 118–120 • CPT Standards, Factsheet on immigration detention, at point 10	• CRC, Article 37 (c)
Right to education	• Reception Conditions Directive, Article 11 • Return Directive, Article 17 (3)	• ECHR, Protocol No. 1, Article 2 • Committee of Ministers, Twenty Guidelines on Forced Return, guideline 11.3	• CRC, Article 28 • CRC General Comment No. 6, para. 63 • UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), para. 38
Right to healthcare	• Reception Conditions Directive, Article 11 (1) • Return Directive, Article 16 (3)	• PACE Resolution 1810 (2011), para 5.13 • CPT Standards, Factsheet on immigration detention, at point 10	• CRC, Article 24 • CRC General Comment No. 6, para. 63
Right to recreation/ leisure	• Reception Conditions Directive, Articles 11 and 12 • Return Directive, Article 17 (3)	• Committee of Ministers, Twenty Guidelines on Forced Return, guideline 11.3 • CPT Standards, Factsheet on immigration detention, at point 10	• CRC, Article 31 • CRC General Comment No. 6, para. 63
Right not to be separated from parents/ family unity	• Reception Conditions Directive, Article 11 (4) (as far as possible) and Article 2 • Return Directive, Article 14 (1) (a)	• ECtHR, *Popov v. France*, para. 134. • PACE Recommendation 1985 (2011), para. 9.4.4 • Committee of Ministers, Recommendation (2003) 5, para. 21 • CPT Standards, Factsheet on immigration detention, at point 10	• CRC, Article 9 (1)
Separation from non-related adults	• Reception Conditions Directive, Article 11 (3) • Return Directive, Article 17 (2)	• Committee of Ministers, Twenty Guidelines on Forced Return, guideline 11.2 • PACE Resolution 1810 (2011), para. 5.9 • PACE Recommendation 1985 (2011), para. 9.4.4 • CPT Standards, Factsheet on immigration detention, at point 10	• CRC, Article 37 (c) • CRC General Comment No. 6, para. 63
Separation between men and women	• Reception Conditions Directive, Article 11 (5)		
Contact with family members	• Reception Conditions Directive, Article 10 (4) • Return Directive, Article 16 (2)	• ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, paras. 75–87 • Committee of Ministers, Twenty Guidelines on Forced Return, guideline 10.5 • Committee of Ministers, Guidelines on child-friendly justice (17 November 2010), Chapter IV, para. 21 a	• CRC, Articles 9 (4) and 37 (c) • CRC General Comment No. 6, para. 63

Source: FRA, 2017

Tools and guidance: Developing European minimum standards for immigration detention

A Council of Europe committee of experts, set up under the authority of the European Committee on Legal Co-operation (CDCJ), is codifying the existing international standards regulating the conditions in which migrants are to be held in detention centres. The committee's work will result in European Rules on the Administrative Detention of Migrants. The work of the Committee of Experts on Administrative Detention of Migrants (CJ-DAM), in which FRA participates as an observer, started in May 2016 and is expected to be completed by the end of 2017. This codification exercise implements one of the recommendations in the first report of the Secretary General of the Council of Europe on the state of democracy, human rights and the rule of law in Europe (2014), which itself followed on from similar calls made by the Parliamentary Assembly and CPT. This work has also been encouraged by the European Commission in its communication on EU Return Policy (COM(2014) 199 final, published on 28 March 2014).

The draft codifying instrument also covers standards relating to children. The Committee of Ministers plans to adopt it as a non-binding recommendation to Member States in 2018. It deals with:

- basic principles related to immigration detention
- legal remedies
- detention procedures
- material conditions (accommodation, food, sanitation and hygiene, clothing, cash, etc.)
- activities, welfare and assistance
- healthcare
- order, discipline and safety
- personnel.

Source: Terms of Reference *of CJ-DAM (adopted by the Committee of Ministers at the 1241st meeting (Budget) of Ministers' Deputies, 24–26 November 2015, CJ-DAM(2016)1)*

7.1. Facilities

7.1.1. Specialised facilities

Returnees and asylum seekers are not criminals and deserve different treatment from individuals falling within the criminal justice system. The use of specialised facilities is, therefore, the general rule envisaged by the EU migration and asylum *acquis*. In practice, however, deprivation of liberty can occur in different types of facilities, including dedicated centres, prison establishments, police cells and facilities in transit zones or at borders.

Article 10 of the Reception Conditions Directive and Article 16 (1) of the Return Directive require that, as a rule, detention should take place in specialised detention facilities. However, where no alternatives are available, neither of the two directives excludes the possibility of prison accommodation,[290] except for the accommodation of unaccompanied children who, under Article 11 (3) of the Reception Conditions Directive, must never be detained in prisons. Unaccompanied children detained under the Return Directive must, as far as possible, be placed in institutions with personnel and facilities appropriate to the needs of persons of their age (Article 17 (4)).

- Most EU Member States that allow the possibility of detaining children have established specialised child-friendly facilities, either separately or as distinct parts of existing detention facilities. EU Member States that, although they do not formally prohibit detention of children, have non-detention policies or practices in place, such as Cyprus, Italy or Lithuania, have not created specialised facilities for detention of children. Bulgaria and Romania changed their laws to allow the detention of asylum applicants, including children.[291] The new provisions entered into force in early 2016, but as of April 2017 closed facilities to host asylum-seeking children have yet to be established.

Table 10 summarises the information FRA could collect on the existence and use of facilities that Member State authorities consider to fulfil the requirements of specialised facilities for children under EU law and whether or not these were used in 2015 or 2016.

290 Reception Conditions Directive, Article 11 (2); Return Directive, Article 16 (1).

291 Bulgaria, Amendments to the Asylum and Refugee Act (*Закон за изменение и допълнение на Закона за убежището и бежанците*), 2 October 2015, Article 40, Article 45e (1); Romania, Parliament, Law 331 of 16 December 2015 for changing and completion of certain legislative acts in the field of aliens, (*Legea nr. 331/2015 pentru modificarea si completarea unor acte normative in domeniul strainilor*), 16 December 2015, Article III (1)

Table 10: Specialised detention facilities for families with children and unaccompanied children

EU Member State	Children in families		Unaccompanied children	
	Facility	Children detained in 2015–16	Facility	Children detained in 2015–16
AT	Zinnergasse	Yes	Vordernberg	–
BE	–	–	–	–
BG	Busmantsi	Yes	–	–
	Lyubimets	Yes		
CY	*planned*	–	–	–
CZ	Bela-Jezova	Yes	Bela-Jezova	Yes
DE	–	–	–	–
DK	Ellebaek	No	Ellebaek	No
EE	Harku	No	–	–
EL	Elleniko	–	Amygdaleza	Yes
ES	–	No	–	–
FI	Joutseno	Yes	Joutseno	No
	(Metsälä)	Yes	(Metsälä)	No
FR	Lyon	Yes	–	–
	Oissel	Yes		
	Marseilles	Yes		
	Metz-Queuleu	Yes		
	Cornebarrieu	Yes		
	Nimes	Yes		
	Saint-Jacques-de-la-Lande	Yes		
	Hendaye	Yes		
	Mesnil-Amelot 2	Yes		
	Lesquin (site 2)	Yes		
HR	Jezevo	Yes	Jezevo	No
HU	Kiskunhalas (return)	Yes	–	–
	Békéscsaba (asylum)	No		
IE	–	–	–	–
IT	–	–	–	–
LT	–	–	–	–
LU	Findel	Yes	–	–
LV	Daugavpils	Yes	Daugavpils	Yes
MT	Lyster Barracks	No	Lyster Barracks	No
NL	Zeist	Yes	Zeist	No
PL	Biala Podlaska	Yes	Ketrzyn	Yes
	Ketrzyn	Yes		
	Przemysl	Yes		
PT	St. Anthony Housing Unit (Oporto)	Yes	–	–

RO	–	–	Bucharest (District 1)	Yes
			Giurgiu	Yes
			Galati	Yes
			Radauti	Yes
			Somcuta Mare	Yes
			Timisoara	Yes
SE	Åstorp	No	Åstorp	No
	Kållered	No	Kållered	No
	Flen	No	Flen	No
	Märsta	No	Märsta	No
	Gävle	No	Gävle	No
SI	Aliens Centre in Postojna	No	Aliens Centre in Postojna	No (but common practice)
SK	Sečovce	Yes	–	–
UK	Tinsley House	Yes	Tinsley House	Yes
	Cedars (closed down in October 2016)	Yes	Cedars (closed down in October 2016)	Yes

Source: FRA, 2017

At the end of 2016, there were some 40 facilities that the authorities considered adequate to host families with children. They were in 19 EU Member States. In contrast, nine EU Member States did not have specialised facilities for families with children according to the information collected by FRA. In the United Kingdom, a 2016 report noted that the Cedars facility was underused and, on the two occasions when the reporter had visited, no families were present. Accordingly he recommended that the Home Office, as a matter of urgency, should either close the facility or change its use.[292] In October 2016, Cedars closed down.[293]

For unaccompanied children, only 14 EU Member States had centres considered suitable. Altogether there were 25 detention facilities that authorities considered to meet the EU legal requirements for hosting unaccompanied children.

➢ Conditions in these facilities vary significantly and change over time. One of the characteristics of detention facilities adapted to host children is the presence of child-friendly spaces. However, many facilities are like prisons: officers wear fatigues, there barbed wire and people use handcuffs for transport. This undermines any attempt to create an appropriate environment for children.

Conditions in facilities may differ even within the same country. In France, internal rules and available child-friendly equipment differ among the administrative detention centres where families can be held. Whereas in Sète, for example, detained individuals can move freely in the communal areas and have access to a TV room and table football, in Coquelles people had to ask for permission from the detention authorities to access the telephone or the coffee machine, and often had to wait for several hours or even days.[294] Childcare equipment, such as a game room, is reportedly available in some facilities, for example in Hendaye, but is reduced to a TV room in others, for example in Paris.[295]

292 United Kingdom, Home Office (2016) Shaw, Stephen, 'Review into the Welfare in Detention of Vulnerable Persons: A report to the Home Office by Stephen Shaw', January 2016, p. 67.
293 United Kingdom, Home Office (2017) 'National Statistics on Detention' 23 February 2017.
294 France, Assfam, Forum Réfugiés, France terre d'asile, La Cimade et l'Ordre de Malte (2016), Centres and establishments of administrative detention 2015 Report (*Centres et locaux de rétention administrative*).
295 *Ibid.*

In Mayotte, a French overseas department in the Indian Ocean, the standards used for other French administrative detention facilities did not apply until May 2017. The law required only separate accommodation and special equipment to accommodate families.[296] For a number of years, conditions in the administrative detention facility in Mayotte were significantly below standard. Facilities were criticised for the lack of facilities adapted to children, including very young children.[297] The detention centre in Mayotte hosts far more children every year than any other in an EU Member State. In 2015, it held some 4,378 children (compared with 116 on the French mainland) and in 2014 some 5,582 (compared with 110 on the mainland). At the end of 2015 a new detention facility was created, replacing the highly criticised sub-standard facility.[298]

One characteristic of detention facilities adapted to host children is child-friendly spaces. The information that the Slovenian police provided to FRA illustrates what child-friendly spaces could entail. In the Slovenian Aliens Centre, child-friendly spaces include a common area with TV and table tennis, an area for leisure games and for organised educational and creative activities, and a playroom with toys for small children.

The existence of dedicated spaces for children does not necessarily mean that facilities are child-friendly, as they are often like prisons. For example, in 2015, the Hungarian Commissioner for Human Rights noted that children at the Békéscsaba asylum detention facility could use the playroom only under the supervision of armed guards and social workers;[299] of the 155 armed security staff and 24 police officers guarding the facility, only eight were women.[300]

In Slovakia, the Sečovce facility created child-friendly rooms or living rooms but the number of detained families increased and overcrowded the facility, so the living rooms were used to accommodate families instead. No indoor playrooms were available during the peak period of summer 2015.[301] The facility also applies a strict prison regime:[302] it is surrounded by barbed wire, all windows are barred, staff wear uniforms and carry arms and truncheons.[303] Handcuffs or special belts are systematically used on parents during transportation, including if very small children accompany their parents.[304] Like other detainees, children are allowed out of doors for one hour twice a day.[305] Children may go to the small playground with their mothers under police supervision.[306]

Monitoring bodies have visited detention facilities that host children, and they have raised a number of other issues, for example overcrowding at the Daugavpils facility in Latvia which also affect the situation of children.[307] Limited space per child is also an issue. For instance, Polish rules on guarded centres assign a minimum space of four square metres per child.[308]

7.1.2. Non-specialised facilities

Most Member States apply the safeguards of the Return Directive and the Reception Conditions Directive to avoid detaining children in non-specialised facilities. However, these standards have a relatively low threshold.

Detention in non-specialised facilities may be allowed by law and/or occur in practice because people wrongly identify children as adults. In Lithuania, two Afghan minors were detained in a regular prison together with unrelated adults for over four months, in spite of their asylum-seeking status, on the mistaken premise that they were adults. The Supreme Court of Lithuania found

296 France, Code of Entry and Residence of Foreigners and of the Right to Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile*), Article R 553-3.
297 France, Assfam, Forum Réfugiés, France terre d'asile, La Cimade et l'Ordre de Malte (2015), Centres and establishments of administrative detention 2014 report (*Centres et locaux de rétention administrative*).
298 *Ibid*, p. 60.
299 Hungary, Commissioner for Fundamental Rights (2015), *Report of the Commissioner for Fundamental Rights in case* AJB-366/2015 *(Alapvető Jogok Biztosának jelentése az AJB-366/2015. számú ügyben),* pp. 12–15.
300 *Ibid,* pp. 5–8.
301 Slovakia, Human Rights League, February 2016.
302 European Parliament, Committee on Civil Liberties, Justice and Home Affairs (2007), The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states, Luxembourg, Brussels, European Parliament, p. 183.
303 Human Rights League, Forum for Human Rights (2016) The Immigration Detention of Families with Minor Children and the Situation of Unaccompanied Minors in Slovakia, Alternative Report to the United Nations Committee on the Rights Of The Child for Consideration of the Combined Third to Fifth Periodic Reports of Slovakia under the Convention on the Rights of the Child, p. 4.
304 *Ibid*, p. 6.
305 Police Detention Centre Sečovce, Internal rules of detention centre for foreigners Sečovce (*Vnútorný poriadok útvaru policajného zaistenia pre cudzincov Sečovce*), Article 1 (not public, obtained by a request for information).
306 *Ibid,* Article6/3.
307 Latvia, Ombudsman (*Tiesībsargs*) (2016) Ombudsman of the Republic of Latvia Annual Report 2015 (*Latvijas Republikas tiesībsarga 2015.gada ziņojums*).
308 Poland, Ministry of Internal Affairs, 'Appendix to the Regulation of the Ministry of Internal Affairs on guarded centres and arrests for foreigners' (*Załącznik do Rozporządzenia Ministra Spraw Wewnętrznych z dnia 24 kwietnia 2015 r. w sprawie strzeżonych ośrodków i aresztów dla cudzoziemców*), 24 April 2015, Article 11 (1) (b).

that they were unlawfully detained and awarded them appropriate compensation.[309]

Another reason for detaining children in non-specialised facilities can be that the authorities consider unrelated adults their 'family'. This can lead to violations of these children's special rights as unaccompanied children. For instance, in Bulgaria, despite the prohibition of detention of unaccompanied children,[310] the Ombudsman[311] and civil society organisations[312] have found several cases of detention of unaccompanied children who were 'attached' to adults who were not related or, in some cases, even known to them.

➢ Other examples of situations in which children may be held in non-specialised facilities include the Metsälä Detention Unit in Finland, a non-specialised facility where children may be held if the child-friendly facility at Joutseno is full. Although unaccompanied children and families always go into the women's section, they share the common areas with adult men.[313] Children have also been detained at Vestre prison in Denmark, in accordance with Section 36 of the Danish Aliens Act, one of them for six days.[314] The cells there are locked and there are no special facilities for children.

7.1.3. Short-term holding facilities

Whether alone or with their families, children may be held briefly at the border to determine their right to entry, or within the country if they are suspected of violating immigration law. During this time they can be held in rooms at border-crossing points, police stations, first registration centres or other facilities. Time frames are usually rather short, although a proposal has been tabled in Germany to extend deprivation of liberty in transit zones from four to ten days.[315] Where non-admitted persons are not kept in the transit zone of an airport,[316] police cells or border guards' facilities are typically used for short-term holding. In some

- Estonia uses the general facilities of the Police and Border Guard Board (*Politsei- ja Piirivalveamet*) for short-term detention. None of these facilities are specially designed to cater for the needs of children.[317]
- If a person is taken to a police station for identification in Germany, the conditions depend on the police station and the police staff involved.[318]
- In the United Kingdom, 23 out of the 43 police forces in England and Wales had some separate custody facilities for children and young people.[319]

An NGO report from 2014 illustrated the challenges in Bulgarian short-term holding facilities at that time. There was no alarm button to call the guards; hygiene standards were low; there were no windows; there was no fresh air; and people were spending more time there than allowed by law. A mother and her three children from Afghanistan were held for over a week in one of five cages dividing an indoor basketball field that had been adapted to accommodate the huge wave of asylum seekers and migrants. They were offered hardly any food. Other migrants complained that they stopped receiving rations after the legal 24-hour detention period had elapsed, were forced to sleep on the floor and sometimes had to wait outside in the cold until late at night before the police allowed them into a building.[320]

➢ Short-term holding facilities are often not equipped for holding children and are usually not subject to the same level of independent monitoring as immigration detention facilities. The quality of services and treatment is particularly difficult to uphold when arrivals increase and authorities sometimes have to use facilities not intended for detention.

309 Lithuania, Supreme Court of the Republic of Lithuania, Civil Case No. e3K-3-412-690/2015, 14 July 2015.
310 Bulgaria, Foreigners in the Republic of Bulgaria Act (*Закон за чужденците в Република България*), 23 December 1998, Article 44(9).
311 Bulgaria, Ombudsman of the Republic of Bulgaria (Омбудсман на Република България) (2016), Annual Report of the Ombudsman of the Republic of Bulgaria as a National Preventive Mechanism 2015 (*Годишен доклад на Омбудсмана на Република България като Национален превантивен механизъм 2015*), 15 February 2016, p. 22.
312 Centre for Legal Aid- Voice in Bulgaria (2016), Who gets detained? Increasing the transparency and accountability of Bulgaria's detention practices of asylum seekers and migrants, Sofia, Bulgaria, European Programme for Integration and Migration, Network of European Foundations.
313 Finland, Metsälä Detention Unit.
314 Denmark, Danish Ministry of Immigration, Integration and Housing.
315 Germany, Bundesrat, 'draft for legislation to better ensure obligation to depart the country is followed' (*Entwurf eines Gesetzes zur besseren Durchsetzung der Ausreisepflicht*), 23 February 2017.
316 FRA (2014), Fundamental rights at airports: border checks at five international airports in the European Union, Luxembourg, Publications Office, Section 1.1.2.
317 Estonia, Police and Border Guard Board (*Politsei- ja Piirivalveamet*).
318 Germany, Jesuit Refugee Service, February 2016.
319 United Kingdom, All Party Parliamentary Group on Children (2014) "It's all about trust": Building good relationships between children and the police, October 2014.
320 Human Rights Watch (2014), 'Containment Plan: Bulgaria's Pushbacks and Detention of Syrian and Other Asylum Seekers and Migrants', pp. 31–37.

In the autumn of 2015 in Denmark, for example, short-term detention took place in sports centres near the borders (Roedbyhavn and southern Jutland). These facilities have now been closed as numbers of arrivals dropped. In the United Kingdom, Longport freight shed, a facility previously used to search vehicles, was used as a short-term holding facility, including for the detention of children, despite not having been adapted for this purpose. HMIP considered the conditions "wholly unacceptable". Detainees were held for several hours or even overnight in the unsegregated freight shed, which could not separate women and children from men. They received no clean or dry clothes, food or hot drinks, and had nowhere to sleep other than on a concrete floor. During the inspection, HMIP observed immigration staff wearing police-style fatigues and stab-vests, and carrying batons. A second facility at Dover Seaport, which had been used to detain 370 unaccompanied children between July and September 2015, was considered too small for the number held there and not fit for purpose. The facility had one main holding room and a separate small family room with no natural light. The family room was not fit for purpose.[321]

- The time in short-term holding facilities is normally limited to a few hours or days. However, delays in transferring children to specialised facilities may occur, particularly if specialised holding or reception facilities are crowded or not available, as is the case in hotspots in Greece and Italy.

In Greece and Italy, new arrivals by sea, including children, are confined to the hotspots until they are registered and fingerprinted. In Italy, deprivation of liberty by the police can last for a maximum of 96 hours, after which detention can be continued only if confirmed by a judge, except for unaccompanied children, who must be released.[322] In Greece, unaccompanied children who have applied for asylum while in detention may remain in detention only in "very exceptional cases" and "as a last resort" for the time required to refer them safely to appropriate accommodation facilities. Such detention cannot exceed 25 days. It can, nevertheless, be prolonged by an additional 20 days when, on account of "exceptional circumstances" and "despite reasonable efforts by competent authorities", it is not possible to refer them safely to appropriate accommodation facilities.[323] There is insufficient capacity in dedicated, specialised facilities, so unaccompanied children remain in the hotspots pending further transfer.[324] For the same reasons, delays in transfer also occur when children are held in police stations in Greece. Such facilities are generally inappropriate for children, lacking the necessary support and assistance they require, space for outdoor exercise, proper hygiene conditions, items of personal hygiene and leisure activities, and are not always able to separate children from unrelated adults, the CPT has noted.[325]

7.2. Child-specific training

Staff working in reception facilities must have adequate training, according to Article 18 (7) of the Reception Conditions Directive. Under Article 24 (4), EU Member States have a duty to provide specific training to those working with unaccompanied children. Article 17 (4) of the Return Directive requires that, as far as possible, personnel take into account unaccompanied children's needs; this requirement presupposes that personnel are aware of the rights, needs, and risks of unaccompanied children.

- Very few of the specialised facilities employ staff who have received specific training on child protection, according to the information that FRA has collected. This particularly applies to guards as well as private staff employed to run facilities in some EU Member States.

321 United Kingdom , Her Majesty's Inspectorate of Prisons (2016) 'Report on an unannounced inspection of the short-term holding facilities at Longport freight shed, Dover Seaport and Frontier House', London, p. 5, 10, 11 and 17.

322 Italy, Immigration code (*Testo unico sull'immigrazione*), legislative decree No. 286, 25 July 1998 (as amended), Article 14 (3) and 14 (4); Constitution of the Italian Republic, Article 13. Italy, Legislative decree (decreto legislative) No. 142/2015, 18 August 2015, Article 19 (4) as amended in March 2017.

323 Greece, Law No. 4375 of 2016 on the organisation and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EU, 3 April 2016, Article 46 (10) (b).

324 FRA (2016), Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy, Luxembourg, Publications Office, pp. 28–31.

325 The CPT visited Amygdaleza Special Holding Facility for Unaccompanied Minors, Petrou Ralli Special Holding Facility for Irregular Migrants, Attica Police Headquarters. See: CPT (2016), *Report to the Greek Government on the visit to Greece carried out from 14 to 23 April 2015*, CPT/Inf (2016) 4, paras. 105–108.; Greece, Greek Ombudsman (Συνήγορος του Πολίτη), Annual Report 2015, Athens, March 2016, pp. 127–129, 139–139; Greek Council for Refugees (Ελληνικό Συμβούλιο για τους Πρόσφυγες) (2015), 'Complementary Submission to the Committee of Ministers of the Council of Europe in the case of M.S.S. v. Belgium and Greece (Application No 30696/09): the issue of unaccompanied minors', press release, 29 May 2015.

Whereas psychologists, civil society workers, social workers, teachers or doctors may have the knowledge and skills to work with children, guards rarely have training in child protection and child welfare issues. For example, in Croatia, most police staff have acquired basic knowledge during their general training, but not the necessary skills to work with children from different cultures and with language barriers.[326] In some Member States, such as Sweden, there is no regulatory framework for the qualifications of staff at all.[327]

Facilities in only four EU Member States reported regular training or awareness raising on issues related to child protection.

1. In Luxembourg, the security guards working in the Findel facility receive regular training in sensitivity for working with detained foreigners.[328]
2. In Latvia, staff of ACDF Daugavpils regularly attend seminars and training events, which directly or indirectly address child protection issues.[329]
3. In Finland, instructors working in the detention unit of Joutseno are trained in child protection. In addition, several members of the staff have an educational background in social work and have experience of social work with children.[330]
4. In the United Kingdom, before its closure, all staff at Cedars were provided with a detailed induction and training in safeguarding, which was updated with annual refresher courses. Training in identifying child sexual exploitation and trafficking was also available.[331]

Additional challenges emerge when EU Member States employ private security companies in the facilities that they consider specialised. In Austria, the Ministry of the Interior has contracted the private security company G4S to provide services in the Vordernberg detention facility. The Austrian Ombudsman Board has criticised the move.[332] In the United Kingdom, the Home Office Immigration Enforcement entrusted G4S with the security aspects of Cedars and Tinsley House, the two facilities that accommodated children.

In some cases, privately employed staff determine everyday processes and have considerable personal contact with the detainees, including children. For example, based on her visits conducted in 2015, the Czech Ombudsperson reported that, in the Bělá-Jezová facility, uniformed private security guards escorted the migrants to the telephone booths, accompanied them to the doctor and supplied them with articles of personal hygiene.[333] They also accompanied migrants to all meals.[334] Although their tasks were limited to ensuring security, in practice, the private security guards spent 100 % of their time among the detainees and were the ones who decided how to respond to their everyday needs, including requests for medical care.[335] According to the authorities, this was a temporary situation resulting from the increase of arrivals in 2015 and the fact that Bělá-Jezová was the only detention facility in the country, having to host both adults and children as a result. Since then, two new facilities have opened, allowing the facility at Bělá-Jezová to dedicate itself to housing vulnerable groups including families with children, and it is adapted to this purpose.[336] Although the presence of private security has been reduced since, the Ombudsman still describes it as disproportionate, including their patrolling in the corridors and escorting of detainees between the individual buildings of the facility.[337]

326 Korač Graovac A. (ed.) (2014), *Legal protection of unaccompanied children (Pravna zaštita djece bez pratnje)*, Zagreb, University of Zagreb, Faculty of Law (*Pravni fakultet Sveučilišta u Zagrebu*).
327 Sweden, Swedish Migration Agency (*Migrationsverket*), 9 February 2016.
328 Luxembourg, Caritas Luxembourg, Integration and Solidarity Unit (*Caritas Luxembourg, Service Solidarité et Intégration*).
329 Latvia, State Border Guard (*Valsts robežsardze*), Latvian Centre for Human Rights (*Latvijas Cilvēktiesību centrs*), 24 February 2016, Letter No. 23.1–1/585.
330 Finland, Joutseno Detention Unit.
331 Barnardo's (2014) Cedars: two years on, April 2014, Essex, United Kingdom, Barnardo's, p. 4.
332 See Volksanwaltschaft (2014) , '*Zwischenergebnis zur Vordernberg-Prüfung*', 12 March 2014; Volksanwaltschaft (2016) ‚Bericht des Volkanwaltschaftsausschusses ueber den Sonderbericht der Volksanwaltschaft ueber die Wahrnehmungen des Pruefungsverfahrens zum Anhaltezentrum Vordernberg (III-188 der Beilagen)' ‚9 June 2016.
333 Czech Republic, The Public Defender of Rights, (2015) 'Facility for the Detention of Foreign Nationals in Bělá-Jezová: Evaluation Report of Systematic Visits' (*Zařízení pro zajištění cizincu Bělá-Jezová: Vyhodnocení systematické návštěvy*), p. 6.
334 Communication with the Methodology Department of the Refugees Facilities Administration of the Ministry of the Interior (*oddělení metodiky, Správa uprchlických zařízení* MV).
335 Czech Republic, The Public Defender of Rights (2015), 'Facility for the Detention of Foreign Nationals in Bělá-Jezová: Evaluation Report of Systematic Visit' (*Zařízení pro zajištění cizincu Bělá-Jezová: Vyhodnocení systematické návštěvy*), p. 30.
336 Czech Republic, Refugees Facilities Administration of the Ministry of the Interior (2016), Detention Facility for Foreigners Bělá-Jezová, p. 2.
337 Czech Republic, The Public Defender of Rights (2016), 'Facility for the Detention of Foreign Nationals in Bělá-Jezová: Visit Report' (*Zařízení pro zajištění cizincu Bělá-Jezová: Zpráva z návštěvy zařízení*), pp. 9 and 15.

Promising practice

Requiring obligatory regular training of staff working in child detention facilities

In the **United Kingdom**, staff in facilities that detain children and families must "be appropriately trained in the duty to have regard to the need to safeguard and promote the welfare of children", according to Section 55 of the Borders and Citizenship and Immigration Act 2009 and the Detention Services Order 19/2012. All staff working with children must receive training in child protection; there must also be a staff training strategy, which should set priorities for training in safeguarding and provide access to internal training programmes. The order also states that it may be beneficial for staff in detention facilities to access local authority child protection training. At Cedars, which formerly accommodated most of the detained migrant children in the United Kingdom, the children's charity Barnardo's provided all staff with a detailed induction and annual refresher courses in safeguarding. They also covered child sexual exploitation and trafficking.

Sources: Barnardo's (2014), Cedars: Two years on, April 2014, p 4; HM Government Home Office (2012), Detention Services Order 19/2012 Detention and Escorting Safeguarding Children Policy; UK, HM Government (2009), Borders and Citizenship and Immigration Act 2009, Section 55, 21 July 2009

7.3. Right to education

Under human rights and refugee law, the right to education applies to all children, regardless of legal status.[338] It therefore applies to children in immigration detention. Protocol No. 1 to the ECHR addresses the right to education: "No person shall be denied the right to education". Pursuant to Article 22 of the 1951 Refugee Convention, the right to education applies to all, regardless of legal residence or stay. In *Ponomaryovi v. Bulgaria*,[339] the ECtHR found that a requirement to pay secondary school fees based on the immigration status and nationality of the applicants was not justified.

The right to education for children seeking asylum is uncontroversial, but people in some EU Member States have asked if it also extends to migrant children in an irregular situation.

EU law comprehensively regulates the right to education for children applying for international protection. Within asylum procedures, children must have access to the education system under similar conditions to national children, and preparatory classes if necessary, and not later than three months after applying.[340] For those in return proceedings, EU law expressly regulates only the right to education for children who are granted a voluntary period of departure or whose removal has been postponed as well as for children in immigration detention. When detained, children in return procedures must have access to education "depending on the length of their stay" and to leisure activities, according to Article 17 (3) of the Return Directive.[341] For children whose removal has been postponed or who have been granted a voluntary departure period, the Return Handbook underlines that the length of stay requirement should be interpreted restrictively, but considers that national practice, which normally establishes access to the education system only if the length of the stay is more than 14 days, may be acceptable.[342]

In 2011, FRA mapped the legal situation concerning the right to education for children in an irregular situation in the then EU-27. In the majority of EU Member States, the right to education is provided to all children physically staying in the country, hence also to children staying irregularly or detained, although this was only explicitly set in law in four Member States. Only five EU Member States (Bulgaria, Hungary, Latvia, Lithuania and Sweden) did not provide for access to education for children in an irregular situation.[343] Sweden has changed its approach since 2011, extending the right to education to all children.[344] In Hungary, Latvia and Lithuania, when detained, all children regardless of status are entitled to education, although Lithuania sets forth this right only in the order regulating the stay in the detention

338 For an overview, see FRA (2011), Fundamental rights of migrants in an irregular situation in the European Union, Luxembourg, Publications Office, Chapter 7.
339 ECtHR, *Ponomaryovi v. Bulgaria*, No. 5335/05, 21 June 2011, paras. 59–63.
340 Reception Conditions Directive, Article 14 (1) and (2).
341 Return Directive, Article 17 (3).
342 European Commission (2015), *Commission Recommendation of 1.10.2015 establishing a common " Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks (Return Handbook)* , C(2015) 6250 final, Brussels, 1 October 2015, p. 75.
343 FRA (2011), Fundamental rights of migrants in an irregular situation in the European Union, Luxembourg, Publications Office, Table 10, p. 89.
344 Sweden, Proposition 2012/13:58 on education for children staying in the country without permission (*Utbildning för barn som vistas i landet utan tillstånd*) amending the Education Act (Skollag) 2010:800, as approved by Parliament.

facility.[345] Bulgaria lays down the right to education only for asylum-seeking children.[346]

In practice, many Member States do not provide schooling at first reception or pre-removal facilities because the stay is normally short. However, children may stay much longer than planned at these facilities because there is insufficient capacity at specialised facilities. For example, when visiting hotspots in Italy and Greece, FRA observed unaccompanied children staying there for a long time without access to education.[347] Teenagers also stay at return houses in Belgium for months without attending school, reports say.[348]

- Preferably, schooling should be provided "outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country".[349] Only a few Member States allow children to attend schools outside the detention facilities, although this does not always happen in practice. In the Czech Republic, for example, children may attend catch-up classes at the local elementary school in Bělá-Jezová for the 6–15 age group;[350] however, at present, the staff of the school provide classes directly at the facility.[351] A few other EU Member States offer compulsory education within the detention facility. In Poland, for example, teachers from local schools teach one or more school groups depending on the facility.

Where basic education takes place in detention, its quality is frequently inadequate because, for example: teaching material is lacking (as a volunteer who regularly visits detention facilities in the Czech Republic told FRA in February 2017); there are no adequately qualified teaching staff (as the Police and Border Guard Board in Estonia noted in March 2016); language assistants are unavailable (e.g. in Poland[352]); education is limited to certain subjects;[353] and school hours are restricted (e.g. 18 hours a week in Poland[354]).

Other obstacles delay or limit children's access to compulsory education in immigration detention. For instance, in Cyprus children can enrol only at the beginning of the school year and must otherwise wait until the following September,[355] and in Latvia access to education is hampered by language barriers and the lack of documentation detailing past level of education received.[356] Another issue is the insufficient preparation of traumatised children. For example, some children refuse to return to school after attending for one day in Cyprus,[357] or refuse to receive education altogether in Latvia.[358]

Leisure and recreational activities very between countries and facilities. Usually NGOs or social workers offer such activities, except in Poland, where mainly border guards organise them.[359] Leisure and recreational activities are available to children to a different degree, but are often considered insufficient. For example,

345 Hungary, Ministerial Decree No. 27 of 2007 (V.31) IRM on the implementing rules of immigration detention (*27/2007. (V. 31.) IRM rendelet az idegenrendészeti eljárásban elrendelt őrizet végrehajtásának szabályairól*), Article 17; Latvia, Section 3(3) Education Law (*Izglītības likums*), adopted on 29 October 1998; Latvia, Order on Accommodation in the FRC (Laikinojo užsieniečių apgyvendinimo Užsieniečių registracijos centre sąlygų ir tvarkos aprašas), 4 October 2007, 18.16.

346 Bulgaria, Asylum and Refugee Act (*Закон за убежището и бежанците*), 31 May 2002, Article 45e(2).

347 FRA (2016), Opinion on fundamental rights in the 'hotspots' in Greece and Italy, Luxembourg, Publications Office.

348 Belgium, Plate-forme Mineurs en exil – Platform Kinderen op de vlucht; Jesuit Refugee Service.

349 UN, Havana Rules, para. 38, this inspired: Council of Europe, Committee of Ministers (2005), Twenty Guidelines on Forced Return, adopted 4 May 2005, Guideline 11; European Commission, Return Handbook, pp. 101–102.

350 Czech Republic, Ministry of the Interior *(Ministerstvo vnitra)*.

351 Czech Republic, Department of Work with Clients of the Refugee Facilities Administration of the Ministry of the Interior *(odbor práce s Klienty, Správa uprchlických Zařízení MV)*.

352 Poland, Association for Legal Intervention, Helsinki Foundation for Human Rights (2014), Still behind bars. *Report on the Monitoring of Guarded Centres for Foreigners by the Helsinki Foundation for Human Rights and the Association for Legal Intervention*, Warsaw, Association for Legal Intervention, pp. 37–38.

353 Denmark, Danish Prison and Probation Service, 2016; Finland, Joutseno Detention Unit.

354 Poland, Border Guards, 12 February 2016, WM-SO/270/16.

355 Cyprus, Anti-discrimination Authority (2015), Report regarding the system of protection and representation of unaccompanied minors (Έκθεση της Αρχής κατά των Διακρίσεων αναφορικά με το σύστημα προστασίας και εκπροσώπησης των ασυνόδευτων ανήλικων), Ref. AKR 41/2015, 24 August 2015.

356 Latvia, State Border Guard (*Valsts robežsardze*), Latvian Centre for Human Rights (*Latvijas Cilvēktiesību centrs*), 24 February 2016, Letter No. 23.1–1/585.

357 Cyprus, Anti-discrimination Authority (2015), Report regarding the system of protection and representation of unaccompanied minors (Έκθεση της Αρχής κατά των Διακρίσεων αναφορικά με το σύστημα προστασίας και εκπροσώπησης των ασυνόδευτων ανήλικων), Ref. AKR 41/2015, 24 August 2015.

358 Latvia, State Border Guard (*Valsts robežsardze*), Latvian Centre for Human Rights (*Latvijas Cilvēktiesību centrs*), 24 February 2016, Letter No. 23.1–1/585; State Border Guard (*Valsts robežsardze*), Latvian Centre for Human Rights (*Latvijas Cilvēktiesību centrs*), 6 May 2016, Letter No.23.1–1/1372.

359 Poland, Chief of Warmińsko-Mazurski Border Guard Division (*Komendant Warmińsko-Mazurskiego Oddziału Straży Granicznej*), Reply to Helsinki Foundation for Human Rights to the request for disclosure of public records, 12 February 2016WM-SO/270/16.

children detained in Lithuania may participate in outside events but this usually depends on initiatives by NGOs. Leisure activities are often considered insufficient.

Promising practice

Access to e-learning and special language training at school

In the **Netherlands**, if children aged below 13 years are detained at the Closed Family Facility (*gesloten gezinsvoorziening*) Zeist for longer than two weeks, they attend a primary school by using e-learning in a special building at the facility. Children accommodated at family locations (*gezinslocaties*) participate in regular education. In some cases, the primary school is located on the premises of the family location as an annex of a regular primary school. In Goes and Amersfoort, the children attend nearby primary schools. All schools offer a special programme for children who have insufficient command of Dutch. Children who know Dutch well enough follow the regular curriculum offered at Dutch primary schools. Children older than 12 years participate in secondary education outside the family location.

Sources: AZS Papilio (2016), Home, page; Basisschool Villa Kakelbont (2016), Meerwerf basisschool Villa Kakelbont staat op het asielzoekerscentrum (AZC); Netherlands, Central Agency for the Reception of Asylum Seekers (Centraal Orgaan opvang Asielzoekers) (2016), Amersfoort; Obs de Brink (2016), Locaties; OBS De verrekijker (2016), Home; Tangent (2015). Hartelijk welkom op Prinsenbos, 3 November 2015; De Tweemaster (2016), Taal Expertise Centrum Goes (TEC Goes)

7.4. Healthcare

Being able to access certain basic forms of healthcare is a core right. It does not depend on a person's legal status or whether or not the person is deprived of liberty. However, there is no overall consensus on the minimum level of entitlement. In emergency situations denial of treatment would clearly not be compatible with the right to life and the prohibition of degrading and inhuman treatment set forth in Articles 2 and 3 of the ECHR. Similarly, denying care to children and of necessary antenatal, delivery and post-natal care would be difficult to justify in light of Article 24 of the CRC, Article 12 of the ECESCR and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

In 2011, FRA mapped the standard of healthcare that EU Member States offered to migrants in an irregular situation. Most Member States provided only emergency healthcare to migrants in an irregular situation but some also gave primary and secondary healthcare.[360] Entitlements were broader for children, particularly if they were unaccompanied, were formally tolerated or attended school. Greece, Portugal, Romania and Spain provided the same healthcare services to migrants in an irregular situation as to national children in 2011, according to this mapping.[361]

EU law regulates access to healthcare for asylum applicants and persons in return procedures who are detained. According to Article 11 (1) of the Reception Conditions Directive, which regulates the detention of vulnerable persons, the health and mental health of applicants for international protection must be of primary concern to national authorities and their health situation must be regularly monitored. More generally, under Article 19 of the directive, Member States must ensure necessary healthcare, including at least emergency care and essential treatment of illness and serious mental disorders, to all applicants. The Return Directive is more limited in its scope. It requires particular attention to vulnerable persons in detention pending return. Article 16 (3) of the directive requires that emergency care and essential treatment of illness be provided to detained persons.

The CPT has emphasised the important contribution which healthcare services in places of deprivation of liberty should make to combating ill-treatment of detained persons, through the methodical recording of injuries and the provision of information to the relevant authorities. A comprehensive medical screening of all newly-arrived detainees enables identifying those at risk of self-harm, screening for transmissible diseases and the timely recording of injuries. This is in the interest of both detainees and staff.[362] The CPT also underlined the need to put in place procedures and training to prevent acts of self-harm and suicides.[363]

360 FRA (2011), Fundamental rights of migrants in an irregular situation in the European Union, Luxembourg, Publications Office, Chapter 6.1. See also, FRA (2011), Migrants in an irregular situation: access to healthcare in 10 European Union Member States, Luxembourg, Publications Office, as well as FRA (2015), Cost of exclusion from healthcare – The case of migrants in an irregular situation, Luxembourg, Publications Office, which in the introduction refers to the expansion of healthcare services in Sweden in July 2013.

361 FRA (2011), Fundamental rights of migrants in an irregular situation in the European Union, Luxembourg, Publications Office, Chapter 6.2 and Table 8.

362 Council of Europe, CPT (2017), *Factsheet on Immigration Detention*, CPT/Inf(2017)3, Strasbourg, p. 7; Council of Europe ,CPT (2013), *Documenting and reporting medical evidence of ill-treatment, extract from the 23rd General Report of the CPT*, CPT/Inf(2013) 29-part, Strasbourg, paras. 71-73.

363 Council of Europe, CPT (2013), *Documenting and reporting medical evidence of ill-treatment, extract from the 23rd General Report of the CPT*, CPT/Inf(2013) 29-part, para. 82.

- Challenges to offering child healthcare in detention facilities include the need for children's consent if they are unaccompanied. Recurrent obstacles to adequate child healthcare include the lack of specialised doctors, access to medicines, and lack of trust if medical staff are closely affiliated with the authorities in charge of the facility, confidentiality is compromised and/or interpretation is not available.

In Cyprus, criminal sanctions are possible if the detainee is deemed to have abused the right to medical examination and treatment. The sentence can be imprisonment for up to three years and/or a fine corresponding to a maximum of approximately €5,124).[364] The CPT and UNCAT have criticised the provision for deterring people from effectively exercising their right to be examined routinely and free of charge by an independent doctor.[365]

Several Member States differentiate children's capacity to consent to medical treatment according to age and maturity (e.g. Finland, the Netherlands, Slovenia and Spain). Where consent is required, the child's legal guardian should normally give it. If no guardian is present, Croatia allows the police or medical staff to consent to the treatment.[366] Where the guardian is also the director of the detention facility, as in Romania, this may affect the impartiality of decisions on access to outside specialised healthcare, particularly when unaccompanied migrant children have serious conditions.[367]

A recurrent obstacle to adequate child healthcare is the lack of specialised doctors. Medical services at detention facilities rarely include staff specialised in working with children or visiting paediatricians. Even where paediatricians visit detention facilities, such as in Poland, visits are not regular except at the detention centre in Biała Podlaska.[368] Access to psychological treatment is generally limited by restricted availability, but also by language barriers. In the majority of Member States, children are therefore referred to hospital for child-specific healthcare. In Slovenia, for example, upon request for psychotherapeutic help by a legal representative or Asylum Home, the Ministry of the Interior appoints a commission to approve of the request and define the appropriate treatment.[369]

Access to pharmacy services may be limited by shortage of stock. NGOs in Bulgaria collected donated medicines for persons detained at special homes until the demand dropped because numbers of detainees decreased.[370] Excessive restrictions on keeping medicines may also directly affect detainees' health. For example, at the Bělá-Jezová facility, the administration confiscates all personal medicine, including vitamins for pregnant women. Only medical staff may hand them out, and may not always be present when needed.[371] A child with acute asthma did not receive proper medication because no medical staff were present, NGOs reported.[372] Lack of trust is another recurrent obstacle to effective healthcare provision. This is often the case when medical staff are closely affiliated with the authorities in charge of the facility, when confidentiality is compromised and/or when interpretation is not available. In Poland, for example, psychologists are also Border Guard officers (except in the detention centre in Biała Podlaska),

364 Cyprus, Law on the rights of persons arrested and detained (*Ο περί των Δικαιωμάτων Προσώπων που Συλλαμβάνονται και Τελούν υπό Κράτηση Νόμος*) N.163(I)/2005 as amended, Article 30.

365 Council of Europe CPT (2014), *Report to the Government of Cyprus on the visit to Cyprus carried out from 23 September to 1 October 2013*, 9 December 2014, CPT/Inf (2014) 31, Strasbourg, para. 20; UN, United Nations Committee against Torture, Concluding observations *on the fourth report of Cyprus*, 21 May 2014.

366 Croatia, Ministry of Social Policy and Youth (*Ministarstvo socijalne politike i mladih*), 13 April 2016.

367 Romania, JRS Romania.

368 Poland, Bieszczadzki Border Guard Division *(Bieszczadzkiego Oddziału Straży Granicznej*), Reply to Helsinki Foundation for Human Rights to the request for disclosure of public records, 11 February 2016, OA/XIV/182/16;
Poland, Nadbużański Border Guard Division (*Nadbużańskiego Oddziału Straży Granicznej*), Reply to Helsinki Foundation for Human Rights to the request for disclosure of public records, February 2016, concerning the response to the letter No. 201/2016/FRA/JS/MJ;
Poland, Warmińsko-Mazurski Border Guard Division (*Warmińsko-Mazurskiego Oddziału Straży Granicznej*), Reply to Helsinki Foundation for Human Rights to the request for disclosure of public records, 12 February 2016, WM-SO/270/16;
The detention center in Przemyśl.

369 Slovenia, International Protection Act *(Zakon o mednarodni zaščiti)*, 2007, Article 84 (2); and Article 19 (3) of the Rules on rights of applicants for international protection.

370 For more information, see the website of the Bulgarian Red Cross (Български червен кръст), and the Facebook pages of the Refugee Support Group, and of the Council of Refugee Women in Bulgaria (Съвет на жените бежанки в България).

371 Czech Republic, The Public Defender of Rights (2015) 'Facility for the Detention of Foreign Nationals in Bělá-Jezová: Evaluation Report of Systematic Visit' *(Zařízení pro zajištění cizincu Bělá-Jezová: Vyhodnocení systematické návštěvy)*, p. 25.

372 Muller, Robert (2015) Czechs under fire for harsh, lengthy migrant detentions, Reuters, 18 October 2015.

which has hampered access to psychological help.[373] In Austria, public health officers (*Amtsärzte*) providing healthcare in detention facilities;[374] if detainees choose to also consult a doctor of their own choice, they must cover the costs and the consultation must take place in the detention room.[375]

If police officers are present during the consultation, they directly compromise medical confidentiality, as reported in Medveďov, Slovakia, in 2010.[376] If police escort and handcuff accompanying parents, as reported in Slovakia[377] and Estonia,[378] children trust the consultation less. At the centre for administrative detention in Metz, France, detainees wishing to see a doctor or nurse during their stay must ask the police to help them submit a request, in French, to a box in the dining room.[379]

Language barriers and lack of interpretation are another common obstacle, slowing down examination and treatment.

- In Bulgaria[380] and Poland, the lack of local knowledge of the individual's language restricts access to psychological care.[381]
- In Slovakia, medical staff have very limited opportunity to request the presence of an interpreter. Some nurses and doctors do not speak English, which makes establishing a diagnosis difficult. They have had to use gestures to explain intended medical interventions/procedures to patients. In particular, children have not been able to understand the state of their health and treatment.[382]

Promising practice

Full-time psychologists at facility

When children with families need to be detained for short periods of time in **Portugal**, they are placed in the Saint Anthony Housing Unit (*Unidade Habitacional de Santo António)* in Oporto. A full-time clinical psychologist works there, who is responsible for accompanying all persons and helping them deal with problems that are common at the facility, such as anxiety, stress, depression or sleep disorders, as well as problems in any other area of life. Whenever necessary, transport to the hospital or to psychiatric services is provided. These services and procedures have been described and assessed as adequate in the study conducted by the Jesuit Refugee Service – Portugal, except that some detained persons interviewed said they needed additional medical services, such as HIV testing, appointments with medical specialists or support from dentists and ophthalmologists.

Sources: Gonçalves, N., Jorge, A., Cabral, H., Bronzin, M., Varela, A., Alves, S., Silva, G., Fernandes, P., Almeida, I., Gil, A., Duarte, F. (2010), Muros que nos separam: Detenção de requerentes de asilo e migrantes irregulares na UE, Prior Velho and Águeda, Paulinas, pp. 30, 48, 70

373 Białas, Jacek; Cegiełka, Dawid; Chmura, Adam; Górczyńska, Marta; Ostaszewska-Żuk, Ewa; Rusiłowicz, Karolina; Słubik, Katarzyna; Trylińska, Anna; Witko, Daniel (2014), Still behind bars-*Report on the Monitoring of Guarded Centres for Foreigners by the Helsinki Foundation for Human Rights and the Association for Legal Intervention*, Warsaw, Association for Legal Intervention, Helsinki Foundation for Human Rights, pp. 31–34.

374 Austria, Decree of the Ministry of the Interior on checks on persons by authorities and institutions of public safety (*Verordnung der Bundesministerin für Inneres über die Anhaltung von Menschen durch die Sicherheitsbehörden und Organe des öffentlichen Sicherheitsdienstes (Anhalteordnung - AnhO)*), BGBl. II Nr. 128/1999, 19 May 2017, Section 10.

375 *Ibid*, Section 10 (5).

376 CPT, Report *to the Government of the Slovak Republic on the visit to Slovakia carried out from 24 March to 2 April 2009,* Council of Europe, 11 February 2010, para. 41.

377 Human Rights League, Forum for Human Rights (2016), *The Immigration Detention of Families with Minor Children and the Situation of Unaccompanied Minors in Slovakia.* Alternative Report *to the United Nations Committee on the Rights Of The Child for Consideration of the Combined Third to Fifth Periodic Reports of Slovakia under the Convention on the Rights,* p. 6.

378 Estonia, Chancellor of Justice (Õiguskantsler), OPCAT control visit to Harku detention centre (OPCAT kontrollkäik Harku kinnipidamiskeskusesse), 12 March 2013.

379 France, CIMADE (2014), Centres and establishments of administrative detention (*Centres et locaux de rétention administrative*). See also CIMADE (2015), *Rapport 2015 sur les centres et locaux de retention administraive*.

380 Kanev, Kr., *et al.* (2014), 'Country report: Bulgaria' in: Baeva, S. (ed.), Children Deprived of Liberty in Central and Eastern Europe*: Between Legacy and Reform*, Sofia, Bulgarian Helsinki Committee, p. 277.

381 The Halina Nieć Legal Aid Center (2013), Vulnerable Foreigners in Poland*: Identification, Detention and Judicial Practice*, Krakow, The Halina Nieć Legal Aid Center, pp. 21.

382 Human Rights League, Forum for Human Rights (2016), *The Immigration Detention of Families with Minor Children and the Situation of Unaccompanied Minors in Slovakia:* Alternative Report *to the United Nations Committee on the Rights Of The Child for Consideration of the Combined Third to Fifth Periodic Reports of Slovakia under the Convention on the Rights,* p. 5.

Conclusion

Most EU Member States that allow detention of children in law have specialised facilities, either separately or as distinct parts of existing holding facilities. One characteristic of detention facilities adapted to host children is child-friendly spaces. Many facilities, however, are like prisons. This makes it difficult, if not impossible, to create an appropriate environment for children.

Some Member States are short of space in specialised facilities, so they hold children in unsuitable holding facilities. Conditions are typically inappropriate for children in short-term facilities, such as police cells or holding rooms near the border, where children are held, either alone or together with their families, until a decision to release or transfer them to appropriate facilities. Minimum standards are particularly difficult to implement when numbers of arrivals are large and people are placed in infrastructure not originally intended to hold migrants. When transfer, release or removal is not immediate, short-term facilities may become congested and detention conditions deteriorate further. There is a shortage of training in child protection and child welfare for staff working in or guarding facilities where migrants are deprived of liberty.

In practice, many Member States do not plan for education at first reception or pre-removal facilities, as the intended duration of stay is short. Recurrent obstacles to the provision of adequate child healthcare are the lack of specialised doctors, access to medicines, limited interpretation, lack of confidentiality and lack of trust if medical staff are seen as closely affiliated to the immigration authorities.

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Asylum-seeking children and children in return procedures must not be deprived of liberty if available facilities do not guarantee minimum standards for the child's well-being. To achieve this, EU Member States must create child-friendly spaces and take effective measures to prevent holding facilities from being like prisons. This affects infrastructure (such as removing barbed wire or bars on windows), the use of force (e.g. avoiding systematic handcuffing of children or their parents during transport), reducing the number of uniformed and armed staff, and adopting flexible house rules (e.g. free access to the yard).

To guarantee the right to education set out in Article 14 of the Charter, EU Member States must provide children with access to education. Where detention lasts longer than a very short period, education must be provided. Children should have access to a formal education system, taught by qualified teachers through programmes integrated in the country's education system. Priority should be given to providing education outside of detention facilities.

EU Member States should take proactive measures to guarantee detained children the right to healthcare enshrined in Article 35 of the Charter. To that end, they should ensure regular visits by paediatricians from outside the facilities, provide effective interpretation services and ensure accessibility of medicines. Medical consultations and medical information must be confidential and child-appropriate.

8 Oversight mechanisms

Persons deprived of liberty are confined to locations outside public scrutiny, so they are at higher risk of human rights violations than other people. Effective oversight systems are, therefore, necessary to prevent abuse and essential to ensure accountability for human rights violations. This chapter describes the preventive role of monitoring bodies and explains the role of child protection authorities and Schengen evaluations. Monitoring or oversight bodies often act only after someone complains. This chapter ends by illustrating the importance of complaint mechanisms for children deprived of liberty.

8.1. Independent monitoring bodies

The protection of fundamental rights would be incomplete without a mechanism to prevent violations from occurring. Therefore, mechanisms to ensure preventive action are essential, in particular when it comes to the detention of vulnerable persons, such as children.

One of the most common and widespread methods of preventing violations is preventive monitoring. This happens at both the international and European levels.

Secondary EU law also recognises the important role of monitoring bodies. UNHCR and entities working on its behalf must have the opportunity to communicate with and visit detained applicants, according to Article 10 (3) of the Reception Conditions Directive. Relevant and competent national, international and non-governmental organisations and bodies must have the opportunity to visit detention facilities under Article 16 (4) of the Return Directive.

The UN has several mechanisms for monitoring detention facilities. The Working Group on Arbitrary Detention conducts country-level field missions. Since January 2015 it has visited only one immigration detention facility in the EU, in Malta.[383]

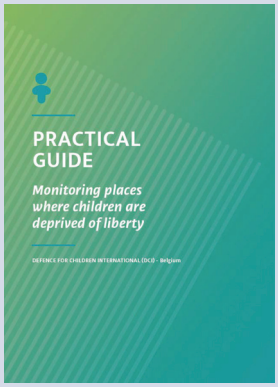
383 UN, OHCHR (2017), Country visits-*Working Group on Arbitrary Detention.*

Tools and guidance: Practical guide to monitoring child detention places

Defence for Children International has published a practical guide to monitoring places where children are deprived of liberty. The guide applies to all types of deprivation of liberty. It takes into account the practical experience of a number of national and international bodies, and draws on the experience of experts working in the field. It aims to assist and strengthen the capability of monitoring bodies to effectively carry out a visit to facilities where children are detained.

The guide was released on 15 February 2016 and is available through the Defence for Children's website.

It complements the 2014 guidance by the Association for the Prevention of Torture, the International Detention Coalition and UNHRC "Monitoring Immigration Detention, Practical Guide", which is specific to immigration detention.



The Subcommittee on Prevention of Torture (SPT), established under the Optional Protocol to the Convention Against Torture (OPCAT),[384] is allowed to visit "any place [...] where persons are or may be deprived of their liberty [...] with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment".[385] Since January 2015, the subcommittee has visited detention facilities in Cyprus,[386] Italy,[387] the Netherlands[388] and Romania.[389] Except in the Netherlands, all visits were to immigration detention facilities.

The mandates of the UN Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, and the UN Special Rapporteur on the Human Rights of Migrants also include visits to detention facilities. However, neither visited any EU Member States between January 2015 and April 2017.

In Europe, the monitoring body that most frequently visits places where persons are deprived of liberty is the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), established under the Council of Europe. It frequently visits immigration detention facilities that hold asylum seekers and persons in return procedures. It has developed standards for conditions in immigration detention facilities, including specific standards for children (see Chapter 6).[390] In some of its most recent missions to immigration detention facilities, the CPT drew special attention to the situation of children in detention.

For instance, it recommended that "Greek authorities take the necessary steps to ensure that unaccompanied minors [...] are only held in centres designed to cater to their specific needs, staffed with properly trained men and women and offering a range of age-appropriate purposeful activities". More specifically, the committee recommended that Greek authorities no longer use the Amygdaleza special holding facility or the Petrou Ralli special holding facility to detain unaccompanied children; instead, they should find more suitable premises, preferably open.[391] Similarly, on a visit to Hungary, the committee recommended that the detention of families with children in detention centres should be only a last resort and last as short as possible. It stressed that "immediate steps should be taken at Békéscsaba Asylum Reception Centre and Unit Kárpát 2 of the Kiskunhalas Guarded Shelter to provide young children with appropriate care and activities suitable for their age".[392] In another report following a visit to the Czech Republic, the CPT stated "that the accommodation of children accompanying their parent(s) together with other adults in a detention centre can have a negative psychological effect on the child's development and well-being, particularly when the child is young". With reference to their particular vulnerability, the CPT also recommended that the necessary measures be taken to ensure that unaccompanied or separated children "are always provided with special care and accommodated in an open (or semi-open) establishment specialised for juveniles (e.g. a social welfare/educational institution for juveniles)".[393]

National monitoring bodies complement such supranational bodies. The OPCAT requires States Parties to set up National Preventive Mechanisms. By the end of April 2017, 24 EU Member States had established such bodies, most of which deal with immigration detention of children. Belgium, Latvia and Slovakia have not ratified the Optional Protocol and Ireland has not yet set up a National Preventive Mechanism.[394] Table 12 provides example of reports that cover immigration detention of children.

384 UN, Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), 18 December 2002.
385 OPCAT, Article 4(1).
386 UN, OHCHR, 'UN experts urge Cyprus to address migrant detention conditions, improve overall monitoring', 1 February 2016. Official visit report not published yet.
387 UN, Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) (2016), *Report on the visit made by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Punishment to Italy, Report to the State Party*, 23 September 2016, CAT/OP/ITA/1.
388 UN, SPT, *Visit to the Netherlands for the purpose of providing advisory assistance to the national preventive mechanism: recommendations and observations addressed to the State party, Report of the Subcommittee*, 3 November 2016, CAT/OP/NLD/1.
389 UN, OHCHR, 'UN torture prevention experts urge Romania to tackle prison overcrowding' 12 May 2016.
390 CPT, Factsheet on Immigration detention, CPT/Inf(2017)3, March 2017..
391 Council of Europe, CPT (2016) *Report to the Greek Government on the visit to Greece from 14 to 23 April 2015*, CPT/Inf (2016) 4, 1 March 2016, paras. 105–108.
392 Council of Europe, CPT (2016), *Report to the Hungarian Government on the visit to Hungary from 21 to 27 October 2015*, CPT/Inf (2016) 27, 3 November 2016, para. 44.
393 Council of Europe, CPT (2015), Report to the Czech Government *on the visit to the Czech Republic carried out from 1 to 10 April 2014*, CPT/Inf (2015) 18, 31 March 2015, paras. 32-33.
394 Ireland, Department of Justice and Equality, Parliamentary Question 21723/16 on the 14 July 2016.

Table 12: National Preventive Mechanisms set up under Article 17 of OPCAT, examples of immigration detention reports, 21 EU Member States

EU Member State	National Preventive Mechanism	Reports between January 2015 and April 2017 including immigration detention of children (examples)
AT	Austrian Ombudsman Board (*Volksanwaltschaft*)	Annual Report 2015 on the Activities of the Austrian National Preventive Mechanism (NPM), June 2016, pp. 67-71.
BG	The Ombudsman of the Republic of Bulgaria (*Омбудсман на Република България - ORB*)	Годишен доклад на Омбудсмана като Национален превантивен механизъм за 2016 (*Annual Report of the Ombudsman as a National Preventive Mechanism 2016*), 15 February 2017, pp. 11-18.
CY	Commissioner for Administration and Human Rights (Ombudsman) (*Επίτροπος Διοικήσεως και Ανθρωπίνων Δικαιωμάτων*)	Έκθεση αναφορικά με την επίσκεψη που διενεργήθηκε στα αστυνομικά κρατητήρια Πάφου στις 3 Οκτωβρίου 2014 (Report on the visit implemented in the Paphos Police Cells on 3 October 2014), 2 March 2015, No. EMP 2.15.
CZ	Public Defender of Rights (*Veřejný ochránce práv*)	Report on Visit to the Detention of Foreigners Bělá-Jezová, 22 December 2016. Report on Visit to the Facility for Detention of Foreigners Bělá-Jezová, 9 September 2015.
DE	National Agency for the Prevention of Torture *(Nationale Stelle zur Verhütung von Folter*)	Annual Report 2015 of the Federal Agency and of the Joint Commission, 2016, p. 33 f.
DK	Danish Parliamentary Ombudsman (*Folketingets Ombudsmand*)	Tilsynsbesøg i Børnecenter Hundstrup (Visit to Children's Centre Hundstrup), Closing letter, 31 January 2017.
EE	Chancellor of Justice (*Õiguskantsler*)	2015-2016 Overview of the Chancellor of Justice Activities, pp. 26-27.
EL	Greek Ombudsman *(Συνήγορος του πολίτη)*	Πρόληψη βασανιστηρίων και κακομεταχείρισης- Ειδική Έκθεση 2016 (*Prevention of torture and ill-treatment – Special report 2016*), 31 December 2016, pp. 143-145.
ES	Ombudsman (*Defensor del Pueblo*)	Spain's National Preventive Mechanism against Torture Annual Report 2015, p. 100.
FI	Parliamentary Ombudsman (*Eduskunnan Oikeusasiamies/ Riksdagens Justitieombdusman*)	Eduskunnan Oikeusasiamiehen Kertomus Vuodelta 2015 (*Parliamentary Ombudsman's Report for 2015*), 2016, p. 237.
FR	General Controller of Places of Deprivation of Liberty (*Contrôleur général des lieux de privation de liberté*)	Annual report 2015, pp. 95-96; Enquêtes sur les placements de familles en centre de rétention administrative (*Investigations on the placements of families in administrative detention centres*), July and September 2015.
HR	Ombudswoman of the Republic of Croatia (*Republika Hrvatska / Pučki Pravobranitelj*)	Izvješće pučke Pravobraniteljice za 2016 (*Report of the Ombudsperson for 2016*), 31 March 2017, p. 189.
HU	Commissioner for Fundamental Rights (*Alapvető Jogok Biztosának Hivatala*)	Report on monitoring the Debrecen Guarded Refugee Reception Centre, case AJB-366/2015, April 2015.

IT	National Guarantor for the Rights of Persons Detained and Deprived of their Liberty (*Garante Nazionale dei diritti del delle persone detenute o private della libertà personale*)	Report to the Parliament 2017, 21 March 2017, p. 88 and p. 107.
LT	Seimas Ombudsmen`s Office of the Republic of Lithuania (*Seimo kontrolierių įstaiga*)	2014-2015 Report on National Prevention of Torture, pp. 31-35; Užsieniečių laisvės apribojimo vietose seimo kontrolierių vykdytos nacionalinės kankinimų prevencijos rezultatų apžvalga, 30 March 2015.
PL	Commissioner for Human Rights *(Rzecznik Praw Obywatelskich*)	Raport Krajowego Mechanizmu Prewencji Tortur z wizytacji Strzeżonego Ośrodka dla Cudzoziemców w Kętrzynie (*Report of the National Preventive Mechanism on the visit to the Guarded Centre for Foreigners in Kętrzyn*), 30 January 2017.
PT	Portuguese Ombudsman (*Provedor de Justiça*)	Report to the Parliament 2015, 2016, pp.72-74.
RO	Advocate of the People (*Instituția Avocatul Poporului*)	Raport privind vizita desfășurată la Centrul Regional de Cazare și Proceduri pentru Solicitanții de Azil Șomcuta Mare (*Report on the visit to the Regional Centre for Accommodation and Procedures for Asylum Seekers Şomcuta Mare*), 5 December 2016, pp. 3, 5-6. Raport privind vizita efectuată la Centrul Regional de Proceduri și Cazare pentru Solicitanții de Azil Rădăuți, județul Suveceava (*Report on the visit to the Regional Centre for Accommodation and Procedures Rădăuți*), 6 December 2016, pp. 3, 5-7, 9-10.
SE	Parliamentary Ombudsmen (*Riksdagens ombudsmän*)	Opcat-inspektion av Migrationsverkets förvarsenhet i Flen den 7–8 mars 2016 (*OPCAT inspection of the Migration Agency detention unit in Flen on 7-8 March 2016*), Dnr 843-2016, p. 3. Opcat-inspektion av Migrationsverkets förvarsenhet i Gävle den 6–7 september 2016 (*OPCAT inspection of the Migration Agency's detention unit in Gävle on 6-7 September 2016*) Dnr 4831-2016, pp. 3 and 10.
SI	Human Rights Ombudsman (*Varuh človekovih pravic*)	Državni preventivni mehanizem – poročilo o opravljenem obisku na lokaciji Center za tujce (*'National Preventive Mechanism – report of on-site visit of the Centre for foreigners'*), 24 November 2015, Report of the Human Rights Ombudsman of the Republic of Slovenia on the Implementation of Duties and Powers of the National Preventive Mechanism for the year 2014, p. 131-133
UK	UK HM Inspectorate for Prisons	UK HM Inspectorate for Prisons (2016), Report on an unannounced inspection of Cedars pre-departure accommodation (4 – 26 April 2016), 11 August 2016, pp. 23-25.

Note: *N/A = Not applicable or not available.*

Source: *FRA, 2017*

These bodies have drawn attention to many different issues, ranging from access to education for children in detention[395] to access to fresh air.[396] In Lithuania, the Ombudsmen noted that in the section dedicated to unaccompanied children, the few available information stands only offered information in Lithuanian.[397] In Poland, the Commissioner for Human Rights recently expressed its worry about the fact that the Guarded Centre for Foreigners in Kętrzyn did not have a permanently employed paediatrician, considering that the centre is mostly for families with children and unaccompanied children.[398] In France, the General Controller of Places of Deprivation of Liberty conducted an on-site assessment of the facilities in which an Albanian family, a mother and her two young children, were held. It noted that the treatment of the mother and children was satisfactory – but recommended, for example, placing young children in car seats during transfers due to safety reasons.[399] Finally, in the Czech Republic, the Public Defender of Rights recommended the termination of permanent surveillance of the living quarters by the security agency in the Detention Centre for Foreigners Bělá-Jezová.[400]

In addition to the National Preventive Mechanisms under OPCAT, other independent human rights bodies can also oversee children in immigration detention. In Cyprus, for example, the Commissioner for the Rights of the Child documented the systematic detention of unaccompanied children before 2014. The report helped change policy and reduce instances of child detention.[401]

Finally, civil society organisations, charities and volunteers working in detention facilities also play an important role in ensuring some scrutiny of detention conditions, often alleviating the suffering of the most vulnerable.

8.2. Child protection authorities

The principle of the best interests of the child requires Member States to take proactive measures, ensuring that legislation, policies and practices at all levels of government give it primary consideration (Section 1.3). In addition, it requires Member States to carefully assess the impact of detention on the right to respect for family life before depriving a child or their parents of liberty. The assessment must consider the short- and long-term impacts on the child, including possible detrimental effects. Assessing this requires child protection expertise.

Although staff in direct contact with children should have specialised training and skills (Section 6.2), in practice, child protection capacity in migration detention facilities is limited, research shows. Only a few Member States have social workers in the detention facilities (usually those that host families), for example Belgium, the Czech Republic, Denmark, Hungary and the Netherlands.

- In the Belgian detention centre La Caricole, each family has a reference person who is a social worker.[402]
- The social workers in detention facilities in the Czech Republic work directly for the Refugee Facilities Administration of the Ministry of the Interior and are responsible for, inter alia, identifying victims of human trafficking.[403]
- In Hungary, social workers call in the child protection authority if they observe child abuse, serious neglect or any other serious threats to the child or serious danger.[404]

395 Poland, Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*) (2013), *Realizacja prawa małoletnich cudzoziemców do edukacji,* Warsaw, Office of the Commissioner for Human Rights, pp. 45.

396 Šelih, I., and Kalčina, L. (eds) Report *of the Human Rights Ombudsman of the Republic of Slovenia on the Implementation of Duties and Powers of the National Preventive Mechanism for the year 2014 (Poročilo Varuha človekovih pravic Republike Slovenije o izvajanju nalog in pooblastil Državnega preventivnega mehanizma za leto 2014)* Lubljana, The Human Rights Ombudsman of the Republic of Slovenia, p. 133.

397 The Seimas Ombudsmen's Office of the Republic of Lithuania (2016) 2014-2015 Report on National Prevention of Torture, Vilnius, The Seimas Ombudsmen's Office of the Republic of Lithuania, p. 32.

398 Poland, National Preventive Mechanism (2016) *Report of the National Preventive Mechanism on the visit to the Guarded Centre for Foreigners in Kętrzyn (Raport Krajowego Mechanizmu Prewencji Tortur z wizytacji Strzeżonego Ośrodka dla Cudzoziemców w Kętrzynie)* Warsaw, National Preventive Mechanism, 30 January 2017, p. 12.

399 France, Hazan, Adeline (*Contrôleure générale des lieux de privation de liberté*) (2015), *Report of the investigation on the placement of families in administrative detention centres (Rapport d' enquête sur les placements de familles en centre de rétention administrative)*, Contrôleur Général des Lieux de Privation de Liberté, July 2015, p.7.
See also*: Contrôleur Général des Lieux de Privation de Liberté* (2016), Annual report 2015. , p. 95.

400 Czech Republic, Public Defender of Rights, Report on Visit to the Detention of Foreigners Bělá-Jezová, 22 December 2016, p. 9.

401 Cyprus, Commissioner for the Rights of the Child (2014), Position *of the Commissioner for the Rights of the Child Leda Koursoumba regarding the first instance handling of unaccompanied minor- Findings from the investigation of complaints, from NGO consultations and from interviews with unaccompanied minors*, File No. G.E.P. 11.11.44.01, November 2014.

402 Belgium, Jesuit Refugee Service.

403 Czech Republic, Communication with the Methodology Department of the Refugees Facilities Administration of the Ministry of the Interior *(Oddělení metodiky, Správa uprchlických zařízení MV)*.

404 Hungary, Ministry of the Interior (2013) 'Ministry of the Interior Decree 29/2013 (VI 28) on Rules Implementing Asylum Detention and Asylum Bail', Section 19.

- National child protection authorities could play an important role in safeguarding the best interests of the child and promoting the well-being of detained children. They could help assess the best interests of the child (e.g. when authorities consider detaining children together with their parents), oversee child detention standards and in run complaint mechanisms smoothly. Nevertheless, in many Member States, child protection authorities do not take an active part in deciding whether or not a child should be detained, or in monitoring detention facilities, according to information that FRA has gathered.

A typical example of the involvement of child protection authorities is when such agencies act as guardians for individual children, although in this case the contribution differs significantly. When social workers work in the detention facility, as they are in Hungary, the national child protection authority is usually involved only when the social workers contact it about cases of child abuse, domestic violence or other situations requiring formal involvement.[405]

Child protection authorities visit detained children regularly in only a few EU Member States. For example, in Estonia, when children are held in a detention facility, a social worker and a child protection specialist from the local municipality visit the centre to monitor the children's well-being.[406] The social worker or the child protection specialist decides the frequency of the visits, depending on the specific case.[407] Similarly, in Finland, when a child is held in detention with a parent in the Joutseno Detention Unit, social workers from child welfare services of the municipality visit the detention facility regularly and meet each child and their parents every two weeks.[408] Social workers assess the child's condition and deliver their statement to the District Court, which rehears the matter every two weeks and decides whether or not the requirements for continuation of detention still exist.[409]

The involvement of national child protection authorities is possible only if they are informed that a child is detained. In Estonia, an informal arrangement between the Police and Border Guard Board and the Estonian Union for Child Welfare (*Lastekaitseliit*) ensures that child protection authorities are informed every time a child is placed in the detention centre.[410]

8.3. Schengen evaluations

The Schengen evaluation and monitoring mechanism,[411] as revised in October 2013, provides for the verification of the application of the Schengen *acquis*. Teams of experts from other Member States, led by the European Commission, visit sites in a given Member State with the support of EU agencies, such as the European Border and Coast Guard Agency (Frontex) and FRA, as observers. Since 2015, the strengthened Schengen evaluation mechanism covers all aspects of the Schengen *acquis*, including return and readmission. On-site evaluation visits can be announced or unannounced. They follow multiannual programmes (currently for 2015–19) and annual evaluation programmes. After each visit, the team draws up an evaluation report, identifying any shortcomings, recommending remedial action and setting a deadline for implementation. The European Commission submits the recommendations to the Council of the EU for adoption. As part of follow-up, the Member State in question must submit an action plan on how it intends to remedy the weaknesses and gaps.

- Regular reviews in the field of return and readmission focus in particular on the correct application of the Return Directive at the national level. They also include monitoring the treatment of children in return procedures and assessing the best interests of the child. The evaluation assesses compliance with standards explicitly included in Articles 10 and 15–17 of the Return Directive. In particular when reviewing detention conditions, the standards drafted by the CPT are used as a guiding document.[412]

405 *Ibid.*, Section 19 f)-g).
406 Estonia, Police and Border Guard Board Estonia (*Politsei- ja Piirivalveamet*): Harku detention centre (*Harku kinnipidamiskeskus*).
407 *Ibid.*
408 The term 'child welfare' is as well used in Finland to refer to child protection. For instance, the English translation of the central act on child protection is called the Child Welfare Act.
409 Finland, Joutseno Detention Unit, 26 February 2016.
410 Estonia, Police and Border Guard Board Estonia (*Politsei- ja Piirivalveamet*): Harku detention centre (*Harku kinnipidamiskeskus*). Estonia, Estonian Union for Child Welfare (*Lastekaitseliit*).
411 Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ 2013 L 295/27, pp. 27–37
412 According to the Commission's Return Handbook (p. 93 et seq.), other implicit standards are the following: Council of Europe, Committee of Ministers (2005), Twenty Guidelines on Forced Return, adopted 4 May 2005; Council of Europe, CPT (2017), Factsheet on Immigration Detention, CPT/Inf(2017)3, Strasbourg; or the Council of Europe, Committee of Ministers (2006), Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, 11 January 2006.

The standard questionnaire for evaluating the implementation of the Schengen *acquis* in a given Member State contains questions relating to children in detention. They address how to promote the best interests of the child throughout the entire return procedure, including when considering detention; how to address the special needs of vulnerable persons when providing detention conditions inside the territory and at the border; if specialised detention or reception facilities for unaccompanied children are in place; and if alternatives to detention are available.[413]

The regular announced reviews have covered 12 EU Member States between 2015 and May 2017. Although the results are restricted, several findings and recommendations relate to the situation of children in detention pending removal.

8.4. Complaint mechanisms

Another important tool for protecting human rights is the opportunity to lodge an individual complaint against alleged violations. Effective complaints procedures are a basic safeguard against ill-treatment in detention, the CPT noted.[414] Complaint mechanisms exist at the national as well as at the supra-national level. Broadly speaking, there are two different types of mechanisms: (1) appeals to a court or tribunal entitled to make a binding decision and (2) complaints to other bodies that can issue recommendations. This section deals with the second type of complaint mechanism.

At the supra-national level, most of the UN human rights instruments include individual complaint mechanisms but immigration detention cases in Europe seldom use them. The Human Rights Committee has dealt with immigration detention cases from Australia,[415] and the UN Committee Against Torture reviewed the case of migrants intercepted by Spain off the coast of Mauritania.[416] An individual complaint mechanism also exists under the CRC. Optional Protocol No. 3 allows individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols. Only 12 EU Member States have ratified Optional Protocol No. 3 and seven EU countries have signed but not ratified it as of April 2017.

The need for effective complaint mechanisms derives from Article 2 of the ICCPR which states that every person has the right to an effective remedy. The UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)[417] provide that every child "should have the opportunity of making requests or complaints to the director of the detention facility and to his or her authorized representative."[418] They also state that every child should have the right to lodge a complaint with "the central administration, the judicial authority or other proper authorities through approved channels."[419] Independent mechanisms, such as the Ombudsman, should be able to receive and examine children's complaints.[420] Such preventive measures are relevant to prevent all children from violence, abuse of neglect as required by Article 19 of the CRC.[421]

Most Member States provide internal or external mechanisms, or both. Internal complaint mechanisms take various forms.

- In Finland, Hungary and Malta, complaints can be addressed to the Director or Head of the detention facility.[422]
- Some senior officials can also receive and review complaints, for example the Chancellor of Justice in Estonia.[423]
- Portugal has a more formal complaint mechanism with a permanent monitoring committee.[424]
- While important, taken alone, internal complaint mechanisms are not necessarily viewed as effective.

413 European Commission (2014), *Annex to the Commission Implementing Decision establishing a standard questionnaire in accordance with Article 9 of Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis*, C(2014) 4657 final, Brussels, 11 July 2014, Chapter 2 (Return and readmission).

414 Council of Europe, CPT (2015), Juveniles deprived of their liberty under criminal legislation, Extract from the 24th General Report of the CPT, published in 2015, CPT/Inf(2015)1-part, para. 131.

415 UN, Human Rights Committee, A. v. Australia, 3 April 1997, CCPR/C/59/D/560/1993; C. v. Australia, 28 October 2002, CCPR/C/76/D/900/1999; Saed Shams and Others v. Australia, 20 July 2007, CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 and 1288/2004; F.K.A.G. v. Australia, 26 July 2013, CCPR/C/108/D/2094/2011.

416 UN, Committee Against Torture (CAT), *J.H.A. v. Spain* [Marine I case], 21 November 2008, CAT/C/41/D/323/2007.

417 UN, General Assembly, Resolution 45/113, *United Nations Rules for the protection of juveniles deprived of their liberty*, 14 December 1990, A/RES/45/113 *(Havana Rules)*.

418 *Ibid.*, para. 75.

419 *Ibid.*, para. 76.

420 *Ibid.*, para. 77.

421 See UN, Committee on the Rights of the Child (CRC) (2011) General comment No. 13 (2011), *the right of the child to freedom from all forms of violence*, 18 April 2011, paras. 45ff.

422 Hungary, Act LXXX of 2007 on Asylum (2016) *(2007. évi LXXX Törvény a menedékjogról)* 1 January 2008, Article 31/G; Finland, Joutseno Detention Unit, 26 February 2016; Malta, Subsidiary Legislation 260.06, Detention Service Regulations, 15 January 2016, Regulation 42.

423 Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), 1 April 2013, Article 16; Estonia, Chancellor of Justice Act (Õiguskantsleri seadus), 1 January 2016, Article 1 and Article 19.

424 Gonçalves, N., Jorge, A., Cabral, H, Bronzin, M., Varela, A., Alves, S., Silva, G., Fernandes, P., Almeida, I., Gil, A., Duarte, F. (2010), *Muros que nos separam: Detenção de requerentes de asilo e migrantes irregulares na UE*, Prior Velho and Águeda, Paulinas, pp. 79-81.

> Belgium's permanent Complaint Commission dealing with individual complaints has declared only 60.6 % of lodged complaints admissible, and only nine of them well founded, Myria reports.[425]

Most EU Member States have set up National Preventive Mechanisms under OPCAT, often represented by Ombudsmen (Section 7.3). A number of them can also review individual complaints.

Complaint mechanisms are ineffective if people do not know of them. For example, in Greece, children are not made aware of their right to make a complaint to the Greek Ombudsman.[426] Therefore, it is important to ensure that children become aware of the available complaint mechanisms in a way suitable to their age, maturity and language skills. Providing information in a child-friendly way is a precondition to ensure children know their rights. This can be done, for instance, by informing them of their right to make a complaint upon their arrival at the detention centre, as happens in Latvia and Sweden.[427] In many cases, NGOs who work in detention facilities, providing social or legal counselling, may provide information on how to lodge a complaint.

Another way to help people make complaints is by providing complaint boxes in accessible places within the facility. FRA observed this in the hotspot in Leros (Greece), for example. However, together with the boxes there must be a transparent procedure to follow up complaints systematically.

One obstacle to providing information is language. This can be overcome by supplying information in a language that the child or their guardian understands. For example, Poland makes information regarding the complaints mechanism available in 16 foreign languages.[428] Similarly, in the United Kingdom, a child-friendly complaint form is available in 14 languages.[429]

For unaccompanied children, some EU Member States, for example Latvia or Slovenia, require that the complaint be formally lodged by the guardian.[430] Where the guardian does not regularly visit the child or there is no regular contact, this can constitute an additional practical barrier.

Conclusion

National Human Rights Institutions, particularly National Preventive Mechanisms that EU Member States set up under the OPCAT, are important in preventing unlawful or arbitrary detention. They complement the work done by international monitoring bodies, principally the CPT.

National child protection authorities could play an important role in safeguarding the best interests of the child and in promoting the well-being of detained children. Child protection authorities could be involved in assessing the best interests of the child, in the oversight of child detention standards and in the smooth running of complaint mechanisms. Nevertheless, in many Member States child protection authorities are not actively involved in the process of child detention.

The Schengen evaluation mechanism regularly reviews the correct application of the EU return *acquis* by EU Member States. It assesses compliance with standards explicitly included in Articles 10 and 15 to 17 of the Return Directive, which also includes the treatment of children in return procedures and assessing the best interests of the child, in the context of pre-removal detention.

425 *Le Centre interfédéral pour l'égalité des chances et la Lutte contre le Racisme, Myria, Le Service de lutte contre la pauvreté, la précarité et l'exclusion sociale, Kinderrechtencommissariaat, Le Délégué général aux droits de l'enfant de la Fédération Wallonie Bruxelles, Le Médiateur fédéral, La Commission de la protection de la vie privée, Ombudsmann der Deutschsprachigen Gemeinschaft, le Médiateur de la Wallonie et de la Fédération Wallonie, Comité permanent de contrôle des services de renseignement et de sécurité, Conseil supérieur de la Justice, Institut pour l'égalité des femmes et des hommes* (2015), Examen Périodique Universel *de la Belgique auprès du Conseil des Droits de l'Homme des Nations Unies Second cycle – 24e Session en Janvier 2016 Compilation de contributions,* Brussels, pp. 64-65.

426 Greece, UNHCR Detention Office.

427 Latvia, State Border Guard (*Valsts robežsardze*), Latvian Centre for Human Rights (*Latvijas Cilvēktiesību centrs*), 14 March 2016, Letter No. 23.1–1/739; Sweden, Swedish Migration Agency *(Migrationsverket*), 9 February 2016.

428 Poland, Headquarters of Border Guard (*Komenda Główna Straży Granicznej*), reply to Helsinki Foundation for Human Rights to the request for disclosure of public records, 17 February 2016, KG-OI-III.0180.8.2016.KT.

429 United Kingdom, Her Majesty's Inspectorate of Prisons (2014*)* Report *on an unannounced inspection of Cedars pre-departure accommodation and overseas family escort*, para. 2.19.

430 Latvia, State Border Guard (*Valsts robežsardze*), Latvian Centre for Human Rights (*Latvijas Cilvēktiesību centrs*), 14 March 2016, Letter No. 23.1–1/739. Slovenia, Ministry of Interior.

Effective complaints procedures are a basic safeguard against ill-treatment in detention but complaint mechanisms are useless if the persons concerned do not know about them.

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When designing approaches to immigration detention of children, EU Member State authorities should make full use of the advice and engage the participation of ombuds institutions and National Human Rights Institutions, especially those with child-specific mandates.

Child protection authorities in EU Member States should devote primary attention to children deprived of liberty for immigration purposes. Responsible authorities should consult child protection agencies, at least when assessing whether or not to detain a child together with their parents. Child protection authorities should also regularly visit children held in immigration detention.

The European Commission could consider undertaking unannounced Schengen evaluation visits if there is evidence of arbitrary use of child detention pending removal in a given EU Member State.

EU Member States should ensure that each detention or other holding facility offers child-accessible ways to submit complaints, for example through a complaint box, and that they inform children in a child-friendly manner about their right to lodge a complaint. Responsible authorities should follow up on each individual complaint.

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Annex: Legal provisions

Detention of unaccompanied children in asylum procedures

EU Member State	Detention allowed?	Legal source
AT	yes	Police Act (*Fremdenpolizeigesetz*), 2005 as amended, Article Sections 76 (1) and 79.2 (for children below 16) read together with Article 1
BE	no	Belgium, Immigration Act (*Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*), 15 December 1980, last amended on 13 September 2016, Article 74/19
BG	no	Asylum and Refugees Act (*Закон за убежището и бежанците*), Article 45e (1)
CY	yes	Refugee Law (*Ο περί Προσφύγων Νόμος του 2000*), Article 9ΣΤ(1) (provision inserted by Law 105(I)/(2016))
CZ	no	Asylum Act (*Zákon č. 325/1999 Sb. o azylu*), Section 46a (3) in combination with Section 2 (1) (i)
DE	no	Asylum Act, *Asylgesetz*, Section 47 (provides for stay of applicants in reception centres)
DK	yes	Aliens Act (*Udlændingeloven, lovbekendtgørelse nr. 1021*), Sections 36–37
EE	no	Obligation to Leave and Prohibition on Entry Act (*Väljasõidukohustuse ja sissesõidukeelu seadus*), 1 January 2016, Article 23 read together with Article 12 (9)
EL	yes	Law 4375/2016, Article 46 (10) (b)
ES	no	Organic Law 4/2000 (Aliens Act), *Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social*, as amended on 30 October 2015, Articles 35 and 62.
FI	yes	Aliens Act, as amended on 26 June 2015 *Ulkamaalaislaki, Utlänningslag*, Article 122 (3) (detention possible if there is an enforceable return decision)
FR	yes	*Code de l'entrée et du séjour des étrangers et du droit d'asile*, Article L221–1
HR	yes	Act on International and Temporary Protection (*Zakon o međunarodnoj i privremenoj zaštiti*), Article 54 (8)
HU	yes	Act No. 80 of 2007 on Asylum (*2007. évi LXXX. törvény a menedékjogról*), as amended on 28 March 2017, Article 31/B, but Article 80/J (6) allows their detention in the transit zones (if aged above 14 years) in case of mass migration state of emergency
IE	no	International Protection Act 2015, Article 20 (6)
IT	no	Legislative decree (*decreto legislative*) No. 142/2015, 18 August 2015, Article 19 (4) Article 7 seems to allow detention of families as Article 7 (1) lists preservation of family unity among the conditions of detention
LT	yes	Law on the Legal Status of Aliens (*įstatymo dėl užsieniečių teisinės padėties*), Article 114 (4)
LU	yes	*Loi du relative à l'accueil des demandeurs de protection internationale et de protection temporaire*, Article 22 (1)
LV	yes	Asylum Law (*Patvēruma likums*), Article 13, Article 22 (3) (6)
MT	yes	Reception of Asylum-Seekers Regulations, Article 14 (1)
NL	no	Aliens Circular A (*Vreemdelingencirculaire A*), Para. A1/7.3
PL	no	Act on granting protection to foreigners within the territory of the Republic of Poland (*Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej*), Articles 62 and 67 in combination with provisions of Chapter 6
PT	no	Law 27/2008 (*Lei No. 27/2008*), as amended in 2014, Article 35B (6)

EU Member State	Detention allowed?	Legal source
RO	no	Law No. 122/2006 regarding asylum in Romania, 4 May 2006 (*Legea nr. 122/2006 privind azilul în România*), Article 19[5] (2)
SE	yes	Swedish Aliens Act (*Utlänningslag 2005:716*), as amended, Chapter 10 (3)
SI	yes	International Protection Act (*Zakon o mednarodni zaščiti, ZMZ-1*), 25 March 2016, Article 84 (2) Restriction of movement to the premises of the Asylum Home (retention) possible as per Article 84 (1)
SK	no	Law No. 04/2011 Coll. on Residence of Aliens (*Zákon o pobyte cudzincov*), Articles 1 (2) and 88a (1) and 88a (3)
UK	no	Immigration Act 2014, 14 May 2014, Section 5

Detention of unaccompanied children in return procedures

EU Member State	Detention allowed?	Legal source
AT	yes	Police Act (*Fremdenpolizeigesetz*), 2005 as amended, Article Sections 76 (1) and 79 (2) (for children below 16)
BE	no	Immigration Act (*Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*), 15 December 1980, last amended on 13 September 2016, Article 74/19
BG	no	Law on Foreigners (*Закон за чужденците*), last amended 27 December 2016 Article 44 (6) and (9)
CY	yes	Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μεταναστεύσεως Νόμος*), Cap 105, Article 18PH (1)
CZ	yes	Act on the Residence of Foreign Nationals (*Zákon č. 326/1999 Sb. o pobytu cizinců na území České republiky*), Section 124 (6)
DE	yes	Residence Act (*Aufenthaltsgesetz*), last amended on 22 December 2016 (BGBl. I S. 3155), Section 62 read together with the General Administrative Regulations relating to the Residence (*Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz*), 26 October 2009 at 62.0.5 Some *Länder* forbid detention of unaccompanied children
DK	yes	Danish Aliens Act (*Udlændingeloven, lovbekendtgørelse nr. 1021*), Sections 35 and 37
EE	yes	Obligation to Leave and Prohibition on Entry Act (*Väljasõidukohustuse ja sissesõidukeelu seadus*), 1 January 2016, Section 26[5] (4), which states that minors must be accommodated separately from unrelated adults
EL	yes	Law 3907/2011, Article 32
ES	no	Organic Law 4/2000 (Aliens Act), *Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social*, as amended on 30 October 2015, Articles 35 and 62.
FI	yes	Aliens Act, as amended on 26 June 2015 *Ulkamaalaislaki, Utlänningslag*, Article 122
FR	no	*Code de l'entrée et du séjour des étrangers et du droit d'asile*, Article L511-4, which bans return of unaccompanied children and consequently also detention
HR	yes	Law on Foreigners (*Zakon o strancima*), Article 132
HU	no	Act No. 2 of 2007 on the entry or stay of third-country nationals (*2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról*), Article 56 (2)
IE	no	Immigration Act 1999, Section 5 (4) (a)

EU Member State	Detention allowed?	Legal source
IT	no	Legislative decree No. 286/1998 (*Testo unico sull'immigrazione*) as amended in March 2017, Article 19 (1-bis), which prohibits expulsion and consequently also detention of unaccompanied children
LT	yes	Law on the Legal Status of Aliens (*Įstatymo dėl užsieniečių teisinės padėties*), Article 114 (4)
LU	yes	Act on free movement of persons and immigration (*Loi du 29 août 2008 sur la libre circulation des personnes et l'immigration*), 10 September 2008, Article 120
LV	yes	Immigration Law (*Imigrācijas likums*), Article 51 (1)
MT	yes	Return Regulation, Article 10
NL	yes	Netherlands, Aliens Circular 2000 A (*Vreemdelingencirculaire 2000 A*), Para. A5/2.4
PL	yes	Act on Foreigners (*Ustawa o cudzoziemcach*), Article 397
PT	no	Act on the legal regime of entry, permanence, exit and removal of foreigners from national territory (*Lei que aprova o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional*), Article 146 (1), read together with Article 146A (3)
RO	yes	Law 272/2004 on the protection and promotion of children's rights (*Legea 272/2004 privind protectia si promovarea drepturilor copilului*), Article 68, read together with of Emergency Ordinance No. 194/2002 on the legal regime of aliens in Romania (*Ordonanța de urgenta privind regimul străinilor în România*), Article 131 (b)
SE	yes	Aliens Act (*Utlänningslag 2005:716*), as amended, Chapter 10 (3)
SI	yes	Aliens Act (*Zakon o tujcih, ZTuj-2*), Articles 76 and 82 (6), as interpreted by Constitutional Court (*Ustavno sodišče*) case Up-1116/09-22 of 3 March 2011
SK	no	Law No. 404/2011 Coll. on Residence of Aliens (*Zákon o pobyte cudzincov*), Article 88 (8)
UK	yes	Immigration Act 2014, 14 May 2014, Section 5

Length of detention pending removal

EU Member State	National legislation
AT	Police Act, *Fremdenpolizeigesetz 2005, Fassung vom 18.04.2017*, Section 80 (2) 2
BE	Aliens Act, *Loi du 15 Décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*, Article 74/6
BG	Law on Foreigners, (*Закон за чужденците*), last amended 27 December 2016 Article 44 (8)
CY	Cyprus, Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μεταναστεύσεως Νόμος*), Cap 105, Article 18ΠΣΤ (7) and (8)
CZ	Act on the Residence of Foreign Nationals (*Zákon č. 326/1999 Sb. o pobytu cizinců na území České republiky*), Section 125 (1)
DE	Residence Act (*Aufenthaltsgesetz*), last amended on 22 December 2016 (BGBl. I S. 3155), Section 62 (4)
DK	Aliens Act, Consolidation Act No. 863 of 25 June 2013, Section 37 (8)
EE	Obligation to Leave and Prohibition on Entry Act (OLPEA), *Väljasõidukohustuse ja sissesõidukeelu Seadus*, Section 23(1), 25(1) Obligation to Leave and Prohibition on Entry Act (OLPEA), *Väljasõidukohustuse ja sissesõidukeelu Seadus,* section 23(1), 25(1); The 2005 Act on Granting International Protection to Aliens (AGIPA), *Välismaalasele rahvusvahelise kaitse andmise Seadus,* Section 36 (2)
EL	Law 3907/2011, Article 30 (5) and (6)

ES	Organic Law 4/2000 of 11 January 2000 on rights and liberties of aliens in Spain and their social integration (Aliens Law), *Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social* (LOEX), Article 62 (2)
FI	Aliens Act, *Ulkamaalaislaki, Utlänningslag*; Article 127
FR	Code of Entry and Residence of Foreigners and of the Right to Asylum, as amended by Law no. 2016-274 of 7 March 2016, *Code de l'entrée et du séjour des étrangers et du droit d'asile* (Ceseda) Article L.552-1, L.552-7
HR	Law on Foreigners, *Zakon o izmjenama i dopunama Zakona o strancima*, 1475, Articles 124–126
HU	Act No. 2 of 2007 on the Entry and Stay of Third-Country Nationals, *2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról*, Articles 54 (4)-(5), 55 (3) and 58 (1)-(2) Act No. 80 of 2007 on Asylum, *2007. évi LXXX. törvény a menedékjogról*, Article 31/A (6)-(7)
IE	Immigration Act 1999, Section 5(6)
IT	Legislative decree No. 286/1998 (*Testo unico sull'immigrazione*), as amended, Article 14 (5)
LT	Law on the Legal Status of Aliens, *įstatymas dėl užsieniečių teisinės padėties*, Article 114 (4)
LU	Immigration Law, *Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration*, Article 120 (3)
LV	Immigration Law 2003, *Imigrācijas likums*, Section 54 (7)
MT	Sub-legislation 217.12 common standards and procedures for returning illegally staying third-country nationals regulations, 11 (12), 11 (13)
NL	Netherlands, Aliens Circular 2000 A (*Vreemdelingencirculaire 2000 A*), Article 59 (5) and (6)
PL	Law on Foreigners *Ustawa o cudzoziemcach*, Article 404 (5)
PT	Act 23/7 of July 4 on the entry, stay, exit and removal of foreign citizens from Portuguese territory, *Lei No. 23/2007, de 4 Julho entrada, permanencia, saida e afastanebti de estrageuris di territorio nacional*, Article 146 (3)
RO	Act on the Regime of Aliens in Romania, Official Gazette No. 421 of 5 June 2008, Article 97 (3)
SE	Aliens Act, *Utlänningslag (2005:716)*, Chapter 10, Section 4
SI	Aliens Act, *Zakon o tujcih*, Article 76 (4) Article 79 (1); International Protection Act, *Zakon o mednarodni zaščiti*, Article 51 (3)
SK	Act No. 404/2011 of 21 October 2011, on Residence of Aliens and Amendment and Supplementation of Certain Acts, Article 88 (4)
UK	Not applicable

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Up to one third of migrants arriving in the European Union since the summer of 2015 have been children. The current emphasis on speedier asylum processing and making returns more effective may trigger increased use of immigration detention, possibly also affecting children. The detention of children implicates various fundamental rights and will only be in line with EU law if limited to exceptional cases. This report aims to support practitioners in implementing relevant polices in line with applicable law by outlining available safeguards against unlawful and arbitrary detention and highlighting promising practices.

FRA - EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS
Schwarzenbergplatz 11 – 1040 Vienna – Austria
Tel. +43 158030-0 – Fax +43 158030-699
fra.europa.eu – info@fra.europa.eu
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