



CHILD IMMIGRATION DETENTION IN THE EU

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INTRODUCTION

Immigration detention of children, both of children who are alone or with their families, is a widespread practice in EU member states. Although numbers of children in detention are not adequately collected and published on national level, the statistics collected in 2016, 2017 and 2018 by the Fundamental Rights Agency and the Quaker Council for European Affairs¹ show that the practice is prevalent and underreported.

On a given date in 2016, 180 children were detained in the 14 EU countries that provided data². The longest detention period of unaccompanied children was 195 days (of a 15-year old boy in Latvia, whose nationality was not reported) and 151 days (of a 16-year old Syrian boy in Poland)³. There is significant divergence between member states in the methodology of collecting data; in some countries, children who are detained with their parents are not counted separately as they may not always have been subject to a detention order but deprived of liberty to keep them together with their parents⁴.

Detention of irregular migrants or asylum seekers under EU law arises in the context of enforcing decisions to return to their country of origin⁵, to enforce Dublin transfers⁶ or as part of the reception procedure for those seeking international protection⁷.



In addition, de facto detention of asylum seekers, such as in hotspots⁸, regularly occurs and is therefore included in the scope of this paper.

This paper aims to provide an informative description of the developments regarding child immigration detention at the global level, with a focus on European law and conduct, and suggests next steps towards ending child immigration detention and implementing alternatives. Hereby, immigration detention of children and families is considered in the asylum context as well as the return procedure.

IMPACT OF CHILD DETENTION ON A CHILD'S WELL-BEING AND DEVELOPMENT

Immigration detention is an extreme measure with long lasting harmful impacts on children. Medical professionals report⁹ that 85% of parents and children who are detained experience negative mental health consequences. For children, the impact on health, psychosocial and academic development is even more profound. Detained children exhibit symptoms of depression and anxiety, sleep problems including nightmares, eating difficulties and somatic complaints as well as emotional and behavioural problems¹⁰. Detention can have long-lasting negative impacts on development and life outcomes even if detention is for short periods and carried out in so-called child specific facilities.

In addition to the distress associated with deprivation of liberty, compounded by the lack of understanding of the reasons for this form of punishment, in many EU member states, children in immigration detention lack access to formal education, child specific care and support, and appropriate health services, and face restrictions on their enjoyment of family life and play, among other child rights, which are hugely important to child development.¹¹ Confirming the gravity of the impact of child detention, the European Court of Human Rights has repeatedly found that child immigration detention amounted to torture and degrading treatment, arguing that the vulnerability of children and the best interests of the child principle must prevail.¹²

MOUNTING INTERNATIONAL CONSENSUS TOWARDS ENDING CHILD DETENTION

All EU governments committed to ending detention of children for migration-related reasons and implementing community-based alternatives at the UN General Assembly on 19 September 2016 by signing the New York Declaration for Refugees and Migrants. Governments committed to limit child detention to “.../ a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we will work towards the ending of this practice.” Albeit a political commitment on global level, the declaration is an indication of the direction of the global consensus.

On 10 December 2018, 164 countries adopted the Global Compact on Migration (GCM) during the UN intergovernmental conference in Marrakech, Morocco.¹³ The document renews and strengthens a worldwide commitment to work towards ending child detention and increasingly make use of alternatives to detention. Under Objective 13 of the GCM, it is stated

that the undersigned will “commit to prioritize non-custodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only”.¹⁴ Furthermore, the text affirms the unconditional importance of the best interest of the child “by ensuring /.../ alternatives to detention in non-custodial contexts, favouring community-based care arrangements, that ensure access to education and health care, and respect the right to family life and family unity /.../ and by working to end the practice of child detention in the context of international migration”.¹⁵

In December 2017, the UN Committee on the Rights of the Child and the Migrant Workers Committee published joint General Comments (GC no. 22¹⁶ and GC no. 23¹⁷) which include authoritative guidance on the interpretation of the UN Convention on the Rights of the Child in respect of immigration detention of children. The Committee asserts that “the detention of any child because of their or their parents’ migration

The European Court of Human Rights

In January 2018, the European Court of Human Rights in Strasbourg published two factsheets on their key judgments concerning detention of unaccompanied¹⁸ and accompanied children¹⁹. They include key case law summaries between 2006-2017. Whilst the court considers the circumstances of each individual case separately, factors such as the age of the child, the material conditions of detention and the duration of detention are the main constant factors considered by the court in all cases. In addition to procedural rights, the court has most often examined violations against Article 3 (prohibition of inhuman or degrading treatment), Article 5.1 (right to liberty and security) as well as Article 8 (right to respect for private and family life).

In one of the more recent deliberations²⁰, the Court held that the presence in administrative detention of a child who was accompanying his or her parents was only compatible with the European Convention on Human Rights if the domestic authorities established that they had taken this measure of last resort **only after having verified**, in the specific circumstances, that **no other less restrictive measure could be applied**. The Court also observed that “the authorities had not taken all the necessary steps to enforce the removal measure as quickly as possible and thus limit the time spend in detention. In the absence of a particular risk of absconding, the administrative detention of eighteen days’ duration seemed disproportionate to the aim pursued”²¹. The court reiterated that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of an irregular immigrant. In addition, asylum seeking children have specific needs that are related in particular to their age, lack of independence, and status. The court also noted that, although the material conditions in certain centres were appropriate, the conditions inherent in establishments of this type are a source of anxiety for young children.²²

status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents' migration status and states should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice".²³

Other UN bodies, regional and international organisations have also extended their support to

campaigning for the end of child detention globally. In 2014, the Inter-Agency Working Group on Ending Child Detention was established and includes, in addition to the abovementioned UN Committees, UNICEF, UNHCR, OHCHR, IOM, a number of relevant UN Special Rapporteurs and the Council of Europe Human Rights Commissioner. In recent years these bodies have issued relevant public positions²⁴ against child detention. Most recently UNHCR urged states to end detention of children in the migration context²⁵ making it the number one goal of their 'Global Strategy - Beyond Detention 2014-2019'²⁶.

ALTERNATIVES FOR FAMILIES EXIST BUT ARE UNDERUSED

The EU Returns Directive establishes a legal obligation for member states to take due account of the best interests of the child principle (Article 5), to use immigration detention of children and families only as a measure of last resort and for the shortest appropriate period of time (Article 18) and only unless other sufficient but less coercive measures can be applied effectively in a specific case (Article 15). Despite the limitations in the Returns Directive, and according to the European Commission's own evaluation, child detention is widely used across the EU²⁷ and alternatives to detention are underused and applied for only a small number of individuals or families.²⁸ In order to ensure adequate implementation of the Returns Directive, appropriate care arrangements and community-based programmes need to be urgently put in place across member states.

Community and case management alternatives are more effective and cheaper²⁹, as well as a legal necessity according to EU law and international human rights obligations. The assumption that more and longer detention will assist returns is unfounded and in fact, evidence points to the opposite.³⁰ The EU Return Handbook itself acknowledges that an "overly repressive system with systematic detention may also be inefficient, since the returnee has little incentive or encouragement to co-operate in the return procedure."³¹ Research also finds that detention discourages cooperation and decreases individuals' motivation and ability to contribute towards case resolution, including return.³²

On the other hand, there is strong evidence that alternatives to detention that use case management to support and engage migrants in immigration processes achieve high rates of compliance and case resolution and better ensure the rights and well-

being of migrants. International Detention Coalition's analysis of alternatives to detention from around the world found that alternatives see compliance rates of between 70% and 99%.³³ UNHCR places compliance rates equally between 80-95%.³⁴ Models for effective alternatives to detention in line with child rights obligations, based on engagement with migrants and led by civil society organisations within the community setting do exist but have received very little attention and support from governments. NGOs in four countries (Cyprus, Poland, Bulgaria and the UK) are currently playing an active role in testing these approaches through a series of philanthropically funded pilots, which are coordinated by the European ATD Network.³⁵

From the NGOs in the above mentioned countries, the pilot project in Poland also includes families, with a total of 21 children that partook already during the first months of the project.³⁶ The pilot uses an engagement-based case management model, using the Revised Community Assessment and Placement (CAP) model developed by the International Detention Coalition to promote the use of alternatives to detention nationally.³⁷ In Norway, alternatives to detention are considered following an individual assessment conducted by both the court as well as the police. There is the possibility to regularly report, reside at a fixed address or surrender travel documents. Additionally, various EU member states have made recent legislative changes that enable the use of alternatives to detention. Croatia has legally allowed the possibility to reside at a fixed address and report to authorities, surrender documents or use financial guarantees³⁸. Similarly, Slovakia has also introduced fixed residency as well as the possibility of financial guarantees in their national legislation.³⁹

Lastly, while some member states may not allow for child immigration detention by national law, de facto detention of children remains a reality, for example in hotspots in Greece. Alternative accommodation arrangements were provided for unaccompanied

minors in the age of 14-18, to avoid them having to reside at police stations under 'protective custody'. These alternative care arrangements ensured access to education, healthcare, leisure activities as well as legal aid and family reunification.⁴⁰

A practice not in line with EU legal obligations

The EU Returns Directive allows for child detention only “unless other sufficient but less coercive measures can be applied effectively in a specific case.” The European Court of Human Rights has further clarified that a verification procedure has to be undertaken to demonstrate that no other less restrictive measure could be applied in a particular case. The EU Returns Directive also makes the assessment of the best interests of the child paramount in any decision and the Joint General Comments of the UN Committee of the Rights of the Child and the Migrant Workers’ Committee affirm that immigration detention can never be in the best interests of the child.

KEY STEPS:

› Need for improved data collection

In many EU Member States, the number of children being detained remains unclear. Data is not adequately collected: it is often not comprehensive, disaggregated, constant nor comparable at regional or international level. Member states should improve data collection and make it publicly available. The European Commission should integrate data on child detention in Eurostat figures as well as into the reporting mechanism on the implementation of the Return Directive.

› Need to invest in alternatives

Governments often present child detention as a measure to increase returns, discourage further migration, or protect children from going missing and/or from human traffickers. As discussed above, detention does not necessarily lead to increased returns and there is no evidence indicating that detention deters people from coming to Europe.

Given the harmful impact of detention on children, and children’s fear of detention which causes them to distrust and disengage with public authorities, the only adequate and effective way to protect them from going missing and/or being taken by traffickers is to create appropriate placement options in the community. Any measure designed to protect a child should be implemented within the child protection system, with a view to provide appropriate care arrangements for the individual child. Community-

based alternatives to detention are practical, more effective and cheaper, while upholding human rights obligations and safeguarding children. Such placement options, with proper case management support that focus on engagement and case resolution can further strengthen compliance with migration processes and are equally effective in terms of mitigating the risk of absconding.

Furthermore, investing in alternatives would ensure that EU member states would comply with EU law, notably the EU Returns Directive.

› Funding through the next MFF (2021-2027)

Availability of funds is crucial for the successful implementation of case management based alternatives to detention. The Migration and Asylum Fund under the next Multi-annual Funding Framework of the EU presents opportunities to this end. Annex III to the EU Commission’s proposal includes “establishing, developing and improving effective alternatives to detention, in particular in relation to unaccompanied minors and families” under the list of priority actions eligible for higher co-financing⁴¹. The European Commission should further encourage governments to prioritise this in their national programming for the next financing period for migration and asylum and to include a wide range of experts, civil society and other stakeholders in the consultation, implementation and evaluation phases of the national programming.

Endnotes

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- 2 Fundamental Rights Agency, *European legal and policy framework on immigration detention of children*, 2017, p. 13, available [here](#).
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- 5 Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, available [here](#) (hereafter EU Returns Directive).
- 6 ‘Dublin transfers’ refer to the transfer of migrants from one European member state to another European member state that is considered responsible for the examination of the asylum application as prescribed by: Council Regulation 604/2013 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 (recast), available [here](#).
- 7 Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), available [here](#).
- 8 ‘Hotspots’ are located in areas along EU borders with a relatively high influx of migrants and where temporary facilities have been established to provide for first basic needs and process the registration of asylum requests.
- 9 Open letter from health professionals against immigration detention, *The Lancet*, vol. 388, 19 November 2016, p.2473-2474, available [here](#).
- 10 International Detention Coalition, *Captured Childhood*, 2012, p.50, available [here](#).
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- 12 See *Popov v. France* App no 39472/07 and 39474/07 (ECtHR, 19 January 2012); *Muskhadzhiyeva and Others v. Belgium* App no 41442/07 (ECtHR 19 January 2010); *Kanagaratnam and Others v. Belgium* App no 15297/09 (ECtHR 13 December 2011).
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- 21 European Court of Human Rights, *Press release – Judgements and decisions of 12 July 2016*, available [here](#), ECHR 248 (2016), 12 July 2016, p. 4, available [here](#).
- 22 See also *R.C. and V.C. v. France* (no. 76491/14).
- 23 Ibid, para.5, p.3.
- 24 See UNICEF, *Advocacy brief – A home away from home*, August 2016, available [here](#); UNHCR, *UNHCR’s position regarding the detention of refugee and migrant children in the migration context*, January 2017, available [here](#); OHCHR, *Children and families should never be in immigration detention – UN experts*, December 2016, available [here](#); IOM, *Global Compact Thematic Paper – Immigration detention and alternatives to detention*, available [here](#).
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- 26 UNHCR, 2014-2019 Beyond Detention, A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014, available [here](#).

- 27 The EU-funded evaluation of the implementation of the Returns' Directive found that 17 EU countries reportedly detain unaccompanied children (15 member states, and 2 Schengen Associated Countries) and 19 countries detain families with children. The evaluation notes that some of these countries detain unaccompanied children only occasionally in practice (Austria, Czech Republic, Lithuania, Luxembourg, Malta, Slovenia and Sweden). 11 countries reported that they do not detain unaccompanied children in practice and 8 reported that they do not detain families with children. Matrix & ICMPD, *Evaluation on the application of the Return Directive (2008/115/EC)*, Final Report, European Commission – DG Home Affairs, Luxembourg: Publications Office of the European Union, 22 October 2013, available [here](#); c.f. PICUM, *Protecting undocumented children: Promising policies and practices from governments at all levels*, 2015, available [here](#).
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- 29 International Detention Coalition, *There Are Alternatives – A handbook for preventing unnecessary immigration detention (revised edition)*, 2015, p.4, available [here](#).
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