



Preventing and Addressing Vulnerabilities in Immigration Enforcement Policies

Acknowledgements

The overall drafting and preparation of this report was led by Marta Gionco, Advocacy Officer and Michele LeVoy, Director of PICUM, the Platform for International Cooperation on Undocumented Migrants.

Information and input provided by PICUM members and other organisations working with people affected by migration detention was of immense value in writing this briefing. In particular, each country profile has been written in close collaboration with organisations from that country. We would like to thank them for their inestimable support and extend our special thanks to:

- Belgium: [Vluchtelingenwerk Vlaanderen](#), [Myria](#), [JRS Belgium](#) & [Plate-forme Mineurs en exil](#)
- Greece: [AITIMA](#) & [Human Rights 360°](#)
- The Netherlands: [Stichting LOS](#)
- Spain: [Andalucía Acoge](#) & [Fundación Cepaim](#)
- United Kingdom: [FLEX - Focus on Labour Exploitation](#) & [Bail for Immigration Detainees](#)

We would also like to thank White & Case for their pro bono research on migration enforcement and individuals' vulnerability, which constituted the basis of the legal analysis of the ECtHR jurisprudence in this report, Josexto Ordoñez for his legal insights on immigration detention in Spain and the European Network on Statelessness for their research and feedback on stateless persons in detention. This briefing was made possible thanks to the efforts of PICUM trainees Karin Åberg, who conducted initial interviews with members, and Saskia Basa, who assisted in finalising the report.

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This report has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2014-2020). For further information please consult: <http://ec.europa.eu/social/easi>. The information contained in this publication does not necessarily reflect the official position of the European Commission

Executive Summary

Every year, more than 100,000 people are detained for migration control purposes in the European Union.¹

Immigration detention places individuals' lives on hold, as people do not know when, or if, they will ever be released.² It has a severe impact on mental health, with studies indicating higher incidence of anxiety, depression and post-traumatic stress disorder than among the rest of the population,³ and an average of very high levels of depression in four out of every five detainees.⁴ Moreover, detention is often characterised by insufficient or inadequate access to information and interpreters, violation of procedural safeguards, lack of access to medical care, and isolation, which further place individuals in a situation of vulnerability.⁵ Therefore, detention is always a harmful practice, whose negative impact broadly exceeds its purposed objectives.

The harmful impact of immigration detention is further exacerbated when it adds to pre-existing factors that already put detainees in a situation of vulnerability, including poor physical or mental health conditions, disabilities, past experiences of trauma, or age.

This report analyses states' legal obligations in relation to immigration detention and vulnerability, and draws concrete recommendations on how to ensure that migration policies refrain from creating or exacerbating situations of vulnerability. It is based on the analysis of the international and European legal framework and a comparative analysis of the law and practice in five European countries: Belgium, Greece, the Netherlands, Spain and the United Kingdom.

1 Global Detention Project, Country profiles - Europe, available [here](#).

2 PICUM (2020), "Removed. Stories of hardship and resilience in facing deportation and its aftermath", available [here](#).

3 M. von Werthern, K. Robjant, Z. Chui, R. Schon, L. Ottisova, C. Mason and C. (2018) "The impact of immigration detention on mental health: a systematic review" in BMC Psychiatry, available [here](#).

4 M. Bosworth and B. Kellezi, (2012) "Quality of Life in Detention: Result from the Questionnaire Data Collected in IRC Yarl's Wood, IRC Tinsley House, and IRC Brook House, August 2010 – June 2011" Centre for Criminology University of Oxford, available [here](#).

5 Special Rapporteur on the human rights of migrants (2 April 2012) "Report of the Special Rapporteur on the human rights of migrants, François Crépeau", A/HRC/20/24, para. 15, available [here](#).

Key findings:

International and European legal framework

- States have a positive obligation to protect individuals in situations of vulnerability. Under international law, individuals in situations of vulnerability should not be detained.⁶ Specific safeguards also apply to the following individuals in situations of vulnerability: children,⁷ victims of torture,⁸ victims of trafficking in human beings,⁹ women in detention,¹⁰ pregnant women,¹¹ lesbian, gay, bisexual, transgender and gender-diverse persons,¹² people living with a mental illness,¹³ people with disabilities¹⁴ and stateless people.¹⁵
- Under EU law, the 2008 Return Directive¹⁶ establishes an obligation to pay “particular attention” to individuals in situation of vulnerability. While the standards it sets are lower than in the Reception Condition Directive,¹⁷ it can be argued that, under EU law, the level of protection granted to people in a vulnerable situation and detained for immigration purposes should be the same whatever the reasons for their detention. Therefore, the standards set by the Reception Condition Directive should also apply to detainees under the Return Directive.¹⁸

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- 6 Working Group on Arbitrary Detention (7 February 2018) “Revised Deliberation No. 5 on deprivation of liberty of migrants”, para. 41, available [here](#).
- 7 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, available [here](#).
- 8 Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, available [here](#).
- 9 Office of the High Commissioner for Human Rights (2003) “Recommended Principles and Guidelines on Human Rights and Human Trafficking”, guideline 2.6 and 6.1, available [here](#).
- 10 Committee on the Elimination of Discrimination against Women (5 December 2008) “General Recommendation No. 26 on women migrant workers” CEDAW/C/2009/WP.1/R, available [here](#); Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, available [here](#).
- 11 United Nations Higher Commission for Refugees (1999) “UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers”, available [here](#).
- 12 Special Rapporteur on the human rights of migrants (15 April 2019) “The impact of migration on migrant women and girls: a gender perspective”, A/HRC/41/38, available [here](#).
- 13 Human Rights Committee (13 November 2002) “C. v. Australia” CCPR/C/76/D/900/1999, available [here](#).
- 14 Working Group on Arbitrary Detention (7 February 2018) “Revised Deliberation No. 5 on deprivation of liberty of migrants”, para. 41, available [here](#); United Nations Human Rights Office of the High Commissioner, Global Migration Group (2017) “Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations”, principle 8(3), available [here](#).
- 15 Special Rapporteur on the human rights of migrants (2 April 2012) “Report of the Special Rapporteur on the human rights of migrants, François Crépeau”, A/HRC/20/24, available [here](#).
- 16 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 L 348, 24.12.2008, Article 15, available [here](#). The same provision is maintained in Article 18 of the proposed Recast EU Returns Directive, available [here](#).
- 17 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down the standards for the reception of applicants for international protection (recast), Article 11(1), available [here](#).
- 18 I. Majcher (2019) “The European Union Returns Directive and its Compatibility with International Human Rights Law”, Leiden, The Netherlands: Brill, p. 518, available [here](#).

Definition of vulnerability

- Despite the increasing references to the term “vulnerability” in migration and refugee law,¹⁹ there is no commonly agreed definition of vulnerability in international and EU law.²⁰ Most legal frameworks, including the EU Return Directive and the member states analysed in this report, adopt a “group-based” approach to vulnerability, which only looks at pre-existing personal factors of vulnerability. In most cases, this list is exhaustive, therefore factors which are not explicitly mentioned by the legal framework are not considered.
- A group-based approach to vulnerability is fundamentally incomplete because it ignores the impact of external factors which can create

a situation of vulnerability even in absence of pre-existing personal factors of vulnerability. To strike a balance between the risks of a check-list approach and a more comprehensive, but more difficult to operationalise, definition of vulnerability, it is key to ensure that the decision is taken at the individual level, and that the list is non-exhaustive and allows to take into consideration different factors on a case-by-case basis.²¹ Furthermore, the process is key: the right to be heard, as well as the involvement of a multidisciplinary team at least in the assessment phase, are important safeguards that contribute to the adequate identification of different factors of vulnerability.

Vulnerability screening and assessment procedures

- In the **Netherlands**, **Spain** and **Greece**, there are no standard vulnerability screenings or assessment practices. In practice, vulnerabilities can be raised by migrants, their lawyers or medical professionals, but there is no official procedure prior or during detention. In **Belgium** and in the **United Kingdom**, where some forms of screening procedures exist, people who are identified as vulnerable are frequently still detained as the outcome of the screening is balanced against migration control purposes. As a consequence, individuals who are identified as vulnerable are still frequently detained.
- Factors of vulnerability frequently need to be raised by lawyers, NGOs and medical personnel.

For this reason, access to legal and medical aid, NGOs services and interpretation is key to ensure their timely identification. In practice, however, these rights are not always effective, due to lack of funding, the remote locations of the detention centres, and/or insufficient staffing. Services are particularly lacking in the context of de facto detention centres, such as in police stations in **Greece**.

- The frequent lack of interpretation while accessing services (including legal aid and health care) and in the decision-making processes further hinders the identification of vulnerabilities.
- In the five countries analysed by this report, civil society organisations have access to detention

19 I. Atak, D. Nakache, E. Guild, F. Crépeau (2018). “Migrants in vulnerable situations and the Global Compact for Safe Orderly and Regular Migration.” Legal Studies Research Paper No. 273/2018, Queen Mary University of London.

20 C. Hruschka, and L. Leboeuf (2019) “Vulnerability: A Buzzword or a Standard for Migration Governance?” Population & Policy Compact 20, available [here](#).

21 Amnesty International the Netherlands, Médecins du Monde the Netherlands and LOS Foundation – Immigration Detention Hotline (2016) “To confine or to protect? Vulnerable people in immigration detention”, available [here](#).

centres, but often face difficulties or administrative burdens to exercise this right. Access is often granted only based on a bilateral agreement between the CSO and the authorities. Moreover,

access to detention centres does not equate with the right to set up official structured monitoring systems, which are often lacking in practice.

Specific groups

- In the EU Return Directive, as well as the national legislation of **Belgium, Spain** and **the Netherlands**, mental health issues are not included in the definition of vulnerability, despite broad evidence of the high incidence of mental health issues in immigration detention,²² and the lack of adequate support in the countries analysed. In **Belgium** and **Spain**, individuals living with mental health issues are sometimes placed in solitary confinement within the immigration detention system, which is also used as a punitive measure. Furthermore, mental health issues are often too easily dismissed, leading to further deterioration of individuals' conditions while in detention. In 2020, 51% of the immigration detainees in the Brook House centre in the **United Kingdom** were considered at risk of suicide.²³
- Stateless people are particularly at risk of prolonged and arbitrary detention. In the five

countries analysed by this report, statelessness is not considered as a factor of vulnerability in detention decisions. Furthermore, all of these countries fail to impose an obligation to identify a country of removal prior to the decision to detain. This can lead to an imposition of a detention order despite the lack of reasonable prospect of removal, thus making their detention arbitrary under European²⁴ and international²⁵ law.

- Despite the broad evidence of the negative impact of immigration detention on children,²⁶ and consensus at the UN level that detaining children based on the children's or their parents' migration status is always a human rights violation and is never in the best interests of a child,²⁷ child detention remains widely used across the EU.²⁸ Alternatives to detention are underused and applied for only a small number of individuals or families.²⁹

22 S. Shaw (2016) "Review into the Welfare in Detention of Vulnerable Persons A report to the Home Office", p. 175, available [here](#); Jesuit Refugee Service - Europe (2010), "Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union", p. 92, available [here](#).

23 The Guardian (13 November 2020) "Asylum seekers crossing Channel face 'inhuman treatment', observers say", available [here](#).

24 EU Return Directive, Article 15(4), available [here](#).

25 UN Working Group on Arbitrary Detention (7 February 2018) "Revised Deliberation No. 5 on deprivation of liberty of migrants", para. 27, available [here](#).

26 Australian Human Rights Commission (2014) "The forgotten children: National Inquiry into Children in Immigration Detention", available [here](#); M. Cohen, K. Hui, C. Jimenez on behalf of 2002 individual and 34 organisational signatories (12 July 2018) "End immigration detention: an open letter", the Lancet, available [here](#); A. Lorek, K. Ehntholt et al (2009) "The mental and physical health difficulties of children held within a British immigration detention center: a pilot study", available [here](#).

27 Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, available [here](#).

28 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, Child Immigration Detention in the EU, available [here](#).

29 A. Bloomfield, E. Tsourdi, J. Pétin, P. de Bruycker (ed.), Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation, January 2015, available [here](#); c.f. PICUM, Child Immigration Detention in the EU, available [here](#).

- Children are detained in all five countries analysed in the report. This includes:
 - » Unaccompanied children whose ages are contested (**Belgium, Greece, Spain**);
 - » Children who are suspected of a crime or failed to comply with reporting duties (**Netherlands**);
 - » Children detained in police stations under the Greek “protective custody” system³⁰ – a practice deemed unlawful by the European Court of Human Rights.³¹
- Gender-specific needs and vulnerabilities are often overlooked in detention centres. Women face particular obstacles which can exacerbate vulnerabilities in detention.
 - » In **Greece**, women can be held for long periods in police stations and deprived of access to basic hygiene products.
 - » In the **United Kingdom**, many women denounced pervasive sexual harassment. Insufficient female staff in detention centres has also been reported, meaning that health screenings and searches are often done by male medical professionals or guards, in some cases causing further delays until female staff is available.
 - » In **Belgium**, some women are held in mixed centres where they are outnumbered by the male population, thus creating discomfort among some.
- Often excluded from group-based definitions of vulnerability, men in detention also face specific vulnerabilities, often linked to their young age, experiences of trauma and abuses, and their migratory journey. In some countries, detention centres for men are more densely populated, leading to higher risks of conflict with the staff and poorer conditions.
- Transgender, intersex and gender non-conforming persons in detention regularly experience discrimination and are vulnerable to a number of harms including physical and sexual violence, solitary confinement as well as verbal and psychological abuse. In the absence of gender recognition and gender responsive policies, transgender, intersex and gender non-conforming persons are often misclassified and detained in facilities according to their sex assigned at birth rather than their self-determined gender identity.³²

³⁰ Human Rights Watch (14 April 2020) “Greece: Free Unaccompanied Migrant Children”, available [here](#).

³¹ H.A. and others v. Greece- App no 19951/16 (28 February 2019, ECtHR), available [here](#).

³² International Detention Coalition (2016) “LGBTI Persons in Immigration Detention”, available [here](#).

Recommendations

Defining vulnerability:

- Definitions of vulnerability should be based on an open-ended list, which takes into consideration the intersectional nature of vulnerability as well as vulnerabilities caused by detention itself.
- Mental health issues should be explicitly included in the definition of vulnerability, alongside physical health, age, gender, sexual orientation and gender identity, past experiences of trauma, torture or human trafficking, disability, statelessness, and any other protection needs.
- Vulnerability should always be determined and assessed on an individual basis.

Screening and assessment procedures:

- There should be a clear legal obligation to screen and assess individuals' vulnerability before a decision to detain is taken and before individuals are placed into situations of deprivation or restriction of liberty, to prevent the harmful effect that even short periods of detention can have on individuals in pre-existing situations of vulnerability.
- States should develop clear vulnerability screening and assessment procedures in close cooperation with civil society organisations and other stakeholders.
- Vulnerability screening and assessment procedures should be transparent. Each decision should be motivated in writing and made accessible to detainees and their lawyers.
- In the vulnerability screening phase, individuals should always be heard.
- Vulnerability assessments should be conducted by an independent and multidisciplinary panel.
- In some cases, factors of vulnerability can only be identified with time, and after a relationship of trust is established. Furthermore, detention itself might affect individuals' vulnerability, exacerbating existing vulnerabilities or creating new ones. For these reasons, vulnerability should be reassessed at regular time intervals.
- Alternatives to detention should be available and considered for each case, independent of individuals' vulnerability.
- States should collect data on vulnerability screening procedures and their outcomes, including how many individuals in a situation of vulnerability are released or detained.
- Individuals involved in the vulnerability screening and assessment procedures, as well as other individuals who come into contact with detainees, including detention officials, or who take decisions on detention, should be adequately and regularly trained on the identification and assessment of vulnerabilities and on the impact of detention on individuals' health.
- The screening and assessment procedures should take into consideration gender-specific needs, including by making available sufficient female staff to attend to the particular needs of the female detainee population, including cis and transgender women.

Access to legal aid and services:

- All communication, including with lawyers and medical staff, should be made through an interpreter whenever needed. Documents regarding the decision to detain should be translated in a language that is understood.
- Free access to legal aid should be available to challenge the detention order.
- Everyone should have access to medical screening before detention. Medical health care, including psychological support, should always be available.





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