

MYKOLAS ROMERIS UNIVERSITY
FACULTY OF LAW
INSTITUTE OF INTERNATIONAL AND EUROPEAN UNION LAW

SOFIIA ZHEREBIUK
INTERNATIONAL LAW PROGRAMME

ALTERNATIVES TO DETENTION OF ASYLUM SEEKERS
Master thesis

Supervisor –
Prof. dr. Lyra Jakulevičienė

Vilnius, 2018

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LIST OF ABBREVIATIONS

EU - European Union

UN -United Nation

UNHCR - United Nations High Commissioner for Refugees

ATDs - Alternatives to Detention

ICCPR - International Covenant on Civil and Political Rights

ECHR - European Convention on Human Rights

ECtHR - European Court on Human Rights

HRC - Human Rights Committee

RCD - Reception conditions directive 2013

IDC - International Detention Coalition

ECRE - European Council on Refugees and Exiles

CJEU - Court of Justice of the European Union

FRA - European Union Agency for Fundamental Rights

INTRODUCTION

The right to liberty and security is one of the fundamental rights provided by European convention on human rights and fundamental freedoms and other legal instruments.¹ They apply to all persons in the territory or jurisdiction of the state, whatever their legal status. Also freedom of movement is guaranteed by the 1951 Geneva Convention.² States were forced to restrict these rights in order to control the flows of migrants including asylum seekers. Moreover, UN Working Group on Arbitrary Detention recognised “the sovereign right of States to regulate migration”.³ However, international human right law can limit this right and prescribe some limitation in order to protect human rights.

Now European countries more and more are using detention as an instrument for managing migration. And unfortunately, it has become a widespread practice. In 2013 622542 persons were detained for immigration-related purposes 77038 were asylum seekers.⁴ At least 123,987 applicants for international protection were detained in 2016 within the 16 AIDA countries.⁵ For instance, number of asylum seekers in detention in Hungary is 94% of the total number of asylum seekers in 2017.⁶ And, unfortunately, the asylum detention facilities are usually overcrowded.⁷ A huge number of asylum seekers were detained in United Kingdom in 2016– 13230.⁸ Moreover, detention practice often violates rights of asylum seekers. This clash with human rights provoked a criticism of using immigration detention, and not long ago has led to arising interest to limit the use of detention and to find and promote alternatives to detention.

For many years, the question of alternatives to detention of asylum seekers continues to be discussable and controversial. International community continues to remind state authority that immigration detention, concern persons who are seeking for international protection, should be a measure of last resort. Within the EU widespread violations of human rights in immigration

¹ European Convention on Human rights, ECHR, available at: <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>

² Convention relating to the Status of Refugees, 1951 (1951 Convention) as amended by the Protocol relating to the Status of Refugees, 1967 available at: <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>

³ UN Working Group on Arbitrary Detention, Report A/HRC/13/30 58 (10 January 2010).

⁴ UN High Commissioner for Refugees (UNHCR), *Progress Report mid-2016. Beyond Detention: A Global Strategy* available at: *to support governments to end the detention of asylum-seeker and refugees, 2014-2019*, August 2016, <http://www.refworld.org/docid/57b850dba.html> [accessed 18 October 2017]

⁵ AIDA Reports 16 countries available at <http://www.asylumineurope.org/reports>

⁶ Country Report: Hungary, ECRE, 2017 available at <http://www.asylumineurope.org/reports/country/hungary>

⁷ Country Report: Hungary, ECRE, 2016 available at: <http://www.asylumineurope.org/reports/country/hungary>

⁸ Country Report: United Kingdom, ECRE, 2016, available at http://www.asylumineurope.org/sites/default/files/report-download/aida_uk_2016update.pdf

detention centers are well-documented. International non-governmental organisations such as Human Rights Watch and Amnesty International, ECRE, international organisations such as the Council of Europe and UNHCR, prove these facts and make a pressure on governments to change their migration policies.

According to the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, detention of asylum seeker should be avoided or can only be used as a measure of last resort.⁹

According to the Article 8 of the recast Reception Conditions Directive 2013/33/EU¹⁰ and Article 15 of the Return Directive 2008/115/EC, detention can be used “... *if other less coercive alternative measures cannot be applied effectively*”. And “*when it proves necessary and on the basis of an individual assessment of each case...*”¹¹

Moreover, UNHCR worked out a Global Strategy 2014-2019, which aims to support governments to end the detention of asylum-seekers and refugees. This strategy has three main goals.

- “*to end the detention of children;*
- *to ensure that alternatives to detention (ATDs) are available in law and implemented in practice; and*
- *to ensure that conditions of detention, where detention is necessary and unavoidable, meet international standards by, inter alia, securing access to places of immigration detention for UNHCR and/or its partners and carrying out regular monitoring.*”¹²

⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017]

See also UN Sub-Commission on the Promotion and Protection of Human Rights, *Resolution 2000/21 on the Detention of Asylum-Seekers*, 18 August 2000, 2000/21, available at: <http://www.refworld.org/docid/3dda66394.html> [accessed 18 October 2017]

¹⁰ 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, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>

¹¹ 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 available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:en:PDF>

¹² UN High Commissioner for Refugees (UNHCR), *Progress Report mid-2016. Beyond Detention: A Global Strategy* available at: *to support governments to end the detention of asylum-seeker and refugees, 2014-2019*, August 2016, <http://www.refworld.org/docid/57b850dba.html> [accessed 18 October 2017]

In this context, due to the principle that detention is a measure of last resort ⁸, governments have to review their detention policies and practices in relation to alternatives to detention and maintain fundamental human rights. And nowadays, EU states recognized that widespread detention policy can undermine, rather than enhance, national security by encouraging people to live secretly.

It is not a secret that detention is physically and psychologically harmful to asylum-seekers and migrants.¹³ It became crucial point to change detention policy and adopt alternatives beyond detention. Alternatives to detention ensure adequate standard of living, support health and dignified life.

The problematic aspects raised in the research

- Automatic detention without considering ATDs is a violation of international human rights law .
- Wide application of the use of detention and connected to this rare use of alternatives.
- Implementation of alternatives to national legislation.

Aim of the research

The aim of this thesis is to evaluate the legal and practical aspects that minimise or avoid the need to deprive the liberty of asylum seekers.

The objectives of the research

- To examine problem of restriction on freedom of movement and its relationship to detention of asylum seekers and using alternatives to detention.
- To analyse the procedures to consider ATDs.
- To analyse the types of alternatives to detention and legal obligation to apply them.
- To determine problems of implementation of different types of alternatives.
- To identify best state practices on alternatives to detention.

Research methods

To achieve the aim of the thesis, the following methods were used:

Analytical method. Analytical method was used in analysis of relevant international, European legislation.

¹³ Executive Committee of the High Commissioner's Programme. Alternatives to detention, available at: <http://www.unhcr.org/excom/standcom/559643e59/alternativesdetention.html?query=alternative%20to%20detention>

Systematic method. Systematic method was used to determine the main point of legal documents, recommendation and publications of legal scholars.

It is also used to systematize different sources of information in order to make clear statistic information.

Description method. Description method was used to present EU and UNHCR policy on alternatives to detention.

Comparative method. Comparative method was applied to compare different types of alternatives to detention and states practice.

Originality of the thesis

Literature review has shown that this topic is highly discussible, especially in recent years and a lot international organizations and authors had expressed their opinion and recommendations. Also, this question is regulated by international and EU legal acts which established specific limitations on the use of detention for asylum seekers. The United Nation recommends careful consideration before detaining asylum seekers in situation to determine whether deprivation of liberty is necessary and proportionate. The United Nations have developed basic principles and recommendation to promote alternatives to detention. A Global Strategy to support governments to end the detention of asylum-seekers and refugees – 2014-2019 was developed by UNHCR.

Alice Edwards is an experienced international refugee and human rights lawyer and scholar has expressed her opinion about alternatives and pointed: ‘alternatives to detention, including no detention at all or release without conditions should become measures of first resort’.¹⁴ Philip Amaral, share this opinion and emphasise that “*endangering the health and well-being of people by detaining them is unnecessary; governments can instead use community-based alternatives that are more dignified for migrants and more cost-effective for states*”¹⁵. By analyzing a lot of scientific bibliography, we come to the conclusion that alternatives to detention enhance migration policy and guarantee fundamental rights and freedom. But the issue still remains to be very controversial as all international community support and encourage using ATDs, while political question for states remains whether they wish to follow the obligations prescribed by international and EU law and to regulate migration in a humane way, or otherwise.

¹⁴ A Edwards, ‘Measures of First Resort: Alternatives to Immigration Detention in Comparative Perspective’, *Equal Rights Review Special Feature on Detention and Discrimination*, (2011) 17-142 available at: http://www.equalrightstrust.org/ertdocumentbank/ERR7_alice.pdf

¹⁵ Ph. Amaral. Immigration detention: looking at the alternatives. 2013, 40-42 available at: <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/detention/amaral.pdf>

Despite the fact, that states have legal obligation to consider alternatives before using detention, there are many violation of human rights through arbitrary detention or automatic detention, which are confirmed by the European Court of Human Rights (ECtHR). That is why it is still actual to make complex analysis on alternatives to detention of asylum seekers through scientific literature, state practice and case law.

Moreover, this thesis will introduce the different practical approach to alternative measure, present the problem of implementation alternatives in national law and present possible solutions to the problem of their application in each case by analysing all circumstances. Nevertheless, we need to define good examples of state practice, which confirm that state authority can regulate migration policy effectively without violations of human rights and freedoms. By analysing this problem in a complex manner, including organizational and procedural aspects, the Master thesis is original in the context of other researches.

Structure of thesis

The thesis is divided into introduction, 3 main chapters, which are divided into subchapters, conclusion, recommendations and bibliography.

Chapter 1 provides an analysis of international refugee and human rights law, relating to the rights to liberty and security and freedom of movement. Also this part outlines the basis for alternatives to detention and examines detention as a measure of last resort of asylum seekers.

Chapter 2, the main part of this thesis, defines legal framework on alternatives to detention, provides an overview of main principles related to alternatives to detention. Also this part reviews international policy on alternatives and the main reason why alternatives are or should be resorted by states.

Chapter 3 defines the main types of alternative measures, including alternatives applicable to vulnerable person. Also, it presents a range of case law and state practice on alternatives to detention of asylum seekers, describes statistic of applying the alternatives in various countries.

Defence Statement

Alternatives to detentions are better legal solution in case of asylum seekers, which provide guarantees against arbitrary detention. ADTs are more human and less harmful from the perspective of human rights than detention.

1. BASIS OF ALTERNATIVES TO DETENTION IN INTERNATIONAL LAW.

1.1. Right to liberty and security, freedom of movement: main principles

As we know, the right to liberty and security is one of the fundamental rights. The interference with this right is allowed only in some exceptional circumstances. This right is prescribed in the ECHR¹⁶ and ICCPR¹⁷. Also this right is found in Universal Declaration of human rights. According to the UDHR *“Everyone has the right to life, liberty and security of person”* (Article 3) and *“No one shall be subjected to arbitrary arrest, detention or exile”* (Article 9).¹⁸ Afterward, these provisions were transferred into Article 9 ICCPR, which guarantees liberty and security of person and prohibits arbitrary deprivation of such liberty.¹⁹

The Article 9.1 of ICCPR says:

*“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.”*²⁰

Article 9 applies to all deprivations of liberty, whether in criminal cases or in other cases such as, immigration control²¹. Article 9 “does not prohibit immigration detention, nor is the right to liberty and security of person absolute”. It does prohibit unlawful as well as arbitrary detention.²²

¹⁶ European Convention on Human rights, ECHR, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf

¹⁷ International Covenant on Civil and Political Rights, ICCPR, available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

¹⁸ Universal Declaration of Human Rights, UDHR, available at: <http://www.un.org/en/universal-declaration-human-rights/>

¹⁹ A. Edwards, UNHCR, ‘Back to Basics: The Right to Liberty and Security of Persons and ‘Alternatives to Detention ‘of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants’, (April 2011), <http://www.refworld.org/docid/4dc935fd2>.

²⁰ Article 9 ICCPR

²¹ UN Human Rights Committee (HRC), *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, No. 8, available at: <http://www.refworld.org/docid/4538840110.html>

²² A. Edwards, UNHCR, ‘Back to Basics: The Right to Liberty and Security of Persons and ‘Alternatives to Detention ‘of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants’, (April 2011), <http://www.refworld.org/docid/4dc935fd2>.

Also see Article 4, ICCPR .Article 9 “may be derogated from ‘in time of public emergency subject to being ‘strictly required by the exigencies of the situation’ and ‘provided such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”(Article 4, ICCPR). Also See, Belmarsh Detainees case

Under international law, deprivations of liberty is formulated as '[...] any form of detention or imprisonment or the placement of a person in a public or private custodial setting in which that person is not permitted to leave at will by order of any judicial, administrative or other authority.'²³

The UN Special Rapporteur on the human rights of migrants pointed that detention for purposes of immigration control is included in the scope of deprivation of liberty and that '[...] different categories of migrants may be subjected to detention, including migrants who are undocumented or in an irregular situation, asylum-seekers awaiting the outcome of their asylum application and failed asylum-seekers awaiting removal.'²⁴

As mentioned before, the right of liberty and security is prescribed in the European Convention on Human Rights. Article 5 protects this right and provides an exhaustive list of exceptions when liberty can be deprived. The central aim of Article 5 is to ensure that no one should be deprived of his or her liberty in an arbitrary way²⁵ Besides, ECtHR designates, '[...] to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance.'²⁶

Also, there are some safeguards against arbitrary detention of asylum seekers in 1951 Convention relating to the status of refugee. Although, it does not contain explicit provision that prohibit arbitrary detention, but in Article 31 is underlined, '*[...] 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.*'²⁷ That means, the act of en-

²³ Article 4(2) United Nations ("UN"), Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>

²⁴ Human Rights Council ("HRC"), Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2 April 2012, p.4, § 8.

²⁵ *Amuur v. France*, ECtHR, 19776/92, Judgment 25 .06.1996; *Saadi v. the United Kingdom*, ECtHR, 13229/03 Judgment 29.01.2008; *Musa v. Malta*, ECtHR, 42337/12, Judgment 09.12. 2013.

²⁶ *Amuur v. France*, ECtHR, 19776/92, Judgment 25 .06.1996;

See also *Guzzardi v. Italy*, ECtHR, 7367/76, Judgment 06.11. 1980, Series A no. 39, p. 33, para. 92.

tering a country for the purposes of seeking asylum should not be considered an unlawful act. This confirms once again that automatic detention of asylum seekers for the reason of their status as such would be arbitrary deprivation of liberty.

The ECHR and the ICCPR prescribe the general principle of freedom of movement within a State. Article 12.1 of the ICCPR establishes:

*“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”*²⁸

Article 12 obliges States to ensure this right within the territory without restriction ‘[...] except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights...’.²⁹

It is necessary to examine who is to be considered ‘lawfully’ within the territory. HRC has held that ‘[...] “lawfully” within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State’s international obligations. In that connection, the Committee has held that an alien who entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12’.³⁰ As a consequence, this provision applies not only to refugees, but it may also apply to asylum seekers who are lawfully within the territory – those who have applied for international protection regardless of whether they entered the territory legally or without permission.

As it was pointed, article 12 para 3 provides exceptional circumstances in which this right may be restricted. HRC stated that ‘[...] the permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in article 12, paragraph 3’

²⁷ Article 31(1), Convention relating to the Status of Refugees, 1951 (1951 Convention) as amended by the Protocol relating to the Status of Refugees, 1967 available at: <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>

See also UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017]

²⁸ Article 12.1 ICCPR

²⁹ International Covenant on Civil and Political Rights, ICCPR, available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

³⁰ UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), para 4, 2 November 1999, CCPR/C/21/Rev.1/Add.9, available at: <http://www.refworld.org/docid/45139c394.html>

.Restrictions must be ‘provided by law, must be necessary in a democratic society for the protection of these purposes’.³¹

The other relevant provision is Article 26 of the Refugee Convention 1951.

*“Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.”*³²

We need to determine whether the asylum seeker will be allowed to stay lawfully in the country. According to the Germany legislation, asylum seekers whose claim has been registered and is under examination are not yet “lawfully in” Germany, and requires them to stay within the administrative district where their claim will be assessed. They are not entitled to be in a particular part of country or place.³³

The word ‘lawful’ essentially refers to the domestic law of the State concerned.³⁴ According to J. C. Hathaway, presence is lawful in the case of ‘a person [...] not yet in possession of a residence permit but who had applied for it and had the receipt for that application’.³⁵ As a result, Article 26 applies to asylum seekers, who have filed an application for international protection. Moreover, article 31 of the Convention applies to asylum seekers and guarantees protection against arbitrary restriction of liberty. Articles 26 and 31 must be read together, as complementary provisions.³⁶ So, it would be incorrectly, that asylum seeker could not benefit from article 26.

³¹ UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), para 11, 2 November 1999, CCPR/C/21/Rev.1/Add.9, available at: <http://www.refworld.org/docid/45139c394.html>

³² Article 26, Convention relating to the Status of Refugees, 1951 (1951 Convention) as amended by the Protocol relating to the Status of Refugees, 1967 available at: <http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html>

³³ Asylverfahrensgesetz (AsylVfG), paras 55-60 available at: https://www.gesetze-im-internet.de/asylvfg_1992/BJNR111260992.html

³⁴ De Bruycker, P. (Ed.), Bloomfield, A., Tsourdi, E. & Pétin, J. Alternatives to immigration and asylum detention in the EU: Time for implementation. Odysseus Network and the European Union, (2015)

³⁵ J.C. Hathaway, The Rights of Refugees Under International Law (Cambridge University Press 2005) p.175

³⁶ De Bruycker, P. (Ed.), Bloomfield, A., Tsourdi, E. & Pétin, J. Alternatives to immigration and asylum detention in the EU: Time for implementation. Odysseus Network and the European Union, (2015)

Within the EU law, Recast Reception Condition Directive designates that asylum seekers benefit from freedom of movement, but authorises Member States to restrict applicants to a particular region.³⁷

Article 7 says:

*“Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State...”*³⁸

States also can decide on the residence of the applicant ‘for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection’.³⁹ It should be noted, that this provision do not concern to detention, and the asylum seeker should not be deprived of their liberty.

1.2. Detention as a last resort.

Detention of asylum-seekers should be a measure of last resort.⁴⁰ The right to seek asylum, the non-penalisation for irregular entrance or being, the rights to liberty and security and freedom of movement are guaranteed under international human right standards. All these rights confirm that statement. In order to achieve this aim states have to ensure these rights in proper way. As was mentioned, immigration detention is not prohibited. International and EU law provide guarantees against unlawful and arbitrary detention. There a lot of international documents, recommendations and paper that promote states resort to detention only in exceptional cases. Within the EU law it is clearly stated that detention should be a last resort.⁴¹ Also this statement is confirmed by European Convention of Human Rights.⁴² The United Nations have also developed a lot of rules and principles, which state that detention should be a measure of last resort and alternative measure should be available in law and practice.⁴³ The Committee of Ministers and the Parliamentary Assembly of the Council of Europe also expressed their opinion

³⁷ 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, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0033>

³⁸ Article 7 recast RCD

³⁹ Article 7.2 recast RCD

⁴⁰ UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012)

⁴¹ Article 8 recast RCD

⁴² Article 5 ECHR

⁴³ UN Human Rights Committee, General comment No. 35: Article 9, Liberty and security of person, 30 October 2014, CCPR/C/GC/35; UN Committee on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6; UN Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, 18 January 2010, A/HRC/13/30; Report of the Working Group on Arbitrary Detention, 10 January 2008, A/HRC/7/4

on this question and pointed that states have to consider non-custodial measures before resorting to detention.⁴⁴ Besides, ECtHR make a great contribution in this issue. In its judgment court prove that state have to establish less coercive measures in order to avoid arbitrary and unlawful detention. ECtHR pays attention that detention should be a measure of last resort.⁴⁵

The first important question is what are unlawfulness and arbitrariness in the context of detention. It is clear that any detention must be in accordance with and authorised by law. That means that any deprivation of liberty that is not in conformity with national law would be unlawful. It will be violation of article 9 ICCPR. Moreover, legislation which permits the use of detention but which violate international human rights standards would also be in breach with Article 9.⁴⁶ ECtHR stated that the lawfulness of detention, it is “*not always the decisive element in assessing the justification of deprivation of liberty*”.⁴⁷

The second point is that deprivation of liberty must not be arbitrary. The HRC pointed that arbitrariness should not be considered ‘against the law’, but should be understood more broadly with elements of “[...] *inappropriateness, injustice and lack of predictability*”. This means that such detention must not only be lawful but necessary and reasonable in all cases and circumstances.⁴⁸

ECtHR held: ‘*to avoid being branded as arbitrary, ... detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country ... and the length of the detention should not exceed that reasonably required for the purpose pursued*’.⁴⁹

⁴⁴ Committee of Ministers, Recommendation on measures of detention of asylum-seekers, 16 April 2003; Parliamentary Assembly of the Council of Europe, Resolution 2020 – The alternatives to immigration detention of children, 3 October 2014

⁴⁵ Popov v. France, Nos. 39472/07 and 39474/07, 19 January 2012; Rahimi v. Greece, No. 8687/08, 5 April 2011; A.B. and Others v. France Np 11593/12, 12 July 2016

⁴⁶ A. Edwards, UNHCR, ‘Back to Basics: The Right to Liberty and Security of Persons and ‘Alternatives to Detention ‘of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants’, (April 2011), <http://www.refworld.org/docid/4dc935fd2>.

⁴⁷ “The Court reiterates that the formal “lawfulness” of detention under domestic law is the primary but not always the decisive element in assessing the justification of deprivation of liberty. It must in addition be satisfied that detention during the period under consideration was compatible with the purpose of Article 5 § 1, which is – as mentioned before – to prevent persons from being deprived of their liberty in an arbitrary fashion. “

⁴⁸ *Hugo van Alphen versus The Netherlands* Communication no305/1998 (HRC), para 5.8.

⁴⁹ *Saadi v. the United Kingdom*, ECtHR, 13229/03 Judgment 29.01.2008.

Under Article 5(1) detention must be for a prescribed purpose. Article 5 allows detention in two immigration related circumstances: to prevent unauthorised entry into the country and for the purposes of deportation or extradition.⁵⁰

Due to UNHCR detention guidelines the legitimate purpose to detention is:

“1) To protect public order:

- To prevent absconding and/or in cases of likelihood of noncooperation;
- In connection with accelerated procedures for manifestly unfounded or clearly abusive claims;
- For initial identity and/or security verification;
- In order to record, within the context of a preliminary interview, the elements on which the application for international protection is based which could not be obtained in the absence of detention.

2) To protect public health;

3) To protect national security.

Detention that is not pursued for a legitimate purpose would be arbitrary”⁵¹.

The second question we should examine is when we can detain an asylum seeker. Within EU law, the recast Reception Conditions Directive⁵² provides detailed standards which limit the member states possibility to detain applicants for international protection. Due to recast RCD, Article 2 (h): “‘detention’: *means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.*”⁵³ Moreover, it does not matter how the area of detention is called, even international zone⁵⁴, the human rights apply everywhere. The EU law clearly state that a person shall not be held in detention because they have applied for international protection.⁵⁵ Detention must respond to the principles of ne-

⁵⁰ Article 5.1(f) ECHR

⁵¹ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/50348953b8.html> [accessed 18 October 2017]

⁵² 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, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0033>

⁵³ Article 2(h) recast RCD Directive

⁵⁴ See: *Amuur v. France*, ECtHR, 19776/92, Judgment 25 .06.1996

See also *Ilias and Ahmed v. Hungary* (no. 47287/15)

⁵⁵ Article 8 (1) recast RCD

cessity and can only be ordered on the basis of an individual assessment of each case.⁵⁶ Article 8 prescribes an exhaustive list of permissible ground for detention. They are:

- (a) “in order to determine or verify his or her identity or nationality;
- (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
- (c) in order to decide, in the context of a procedure, on the applicant’s right to enter the territory;
- (d) when he or she is detained subject to a return procedure under [the Return Directive], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;
- (e) when protection of national security or public order so requires;
- (f) in accordance with Article 28 of the recast Dublin Regulation”.⁵⁷

The duration of detention is not stated. Article 9 recast RCD establishes that detention is allowed for as short a period as possible and only for as long as the grounds are applicable.⁵⁸ Asylum procedures shall be executed with due diligence. Due to recital 16 recast RCD “With regard to administrative procedures relating to the grounds for detention, the notion of ‘due diligence’ at least requires that Member States take concrete and meaningful steps to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures.”⁵⁹

HRC held that: ‘[...] detention should not continue beyond the period for which the State can provide appropriate justification.’⁶⁰

Within the EU, duration of detention is different. In practice, the duration of detention is usually shorter than the legal maximum. For instance, the maximum detention period in Spain

⁵⁶ Article 8 (2) recast RCD

⁵⁷ Article 8(3) recast RCD

⁵⁸ Article 9(1) recast RCD

⁵⁹ Recital 16 recast RCD

⁶⁰ *A v. Australia*, Communication No. 560/1993 HRC, para. 9.4.

for third country national in Detention Centre for Foreigners (CIE) is 60 days, after which person must be released. The maximum detention duration for an asylum seeker who has applied for asylum from the CIE is 4 days. Persons issued with detention orders upon arrival are detained in police stations for a maximum period of 72 hours. Where return has not been carried out within that time limit, they have been transferred to a CIE. The maximum duration of persons ‘*de facto* detention’ is 8 days.⁶¹

In France, the maximum period of detention is 45 days. But the average term is 12.3 days.⁶² In Slovenia the maximum period of detention for asylum seekers is 3 months. It is possible to extend the period for an additional month. When there is a cessation of detention reason, asylum seekers have to be released. Also this procedure is used when the maximum period for detention has been attained or after cancelling the detention order due to procedure of judicial review.⁶³

In Netherlands border detention is 4 weeks. Territorial detention of asylum seekers under Article 59b of the Aliens Act may be imposed for 4 weeks. It is also possible to extend to another two weeks or another 3 months. Territorial detention of asylum seekers on grounds of public order may be ordered for a period of up to 6 months, with the possibility of an extension for 9 months. But the average period of detention is less than 3 months.⁶⁴

In Lithuania the maximum allowed period of detention is 18 months for both asylum seekers and returnees. But the average is 2-3 months. Lithuanian law authorizes the police or other law enforcement officer to detain non-nationals for maximum period of 48 hours. A court must then authorize detention beyond this period.⁶⁵ So, we can see that the law and the practice vary between member states.

A decision to detain ‘actuated by bad faith or an improper purpose’ may also render the detention arbitrary⁶⁶ ECtHR states: “detention will be “arbitrary” where, despite complying with

⁶¹ Country Report: Spain, ECRE, 2017 available at: <http://www.asylumineurope.org/reports/country/spain>

⁶² Country Report: France ECRE, 2018 available at: <http://www.asylumineurope.org/reports/country/france>

⁶³ Country Report: Slovenia ECRE, 2018 available at: <http://www.asylumineurope.org/reports/country/slovenia>

⁶⁴ Country Report: Netherlands ECRE, 2018 available at: <http://www.asylumineurope.org/reports/country/netherlands>

⁶⁵ Country Detention Reports, GPD, Lithuania, 2016 available at: <https://www.globaldetentionproject.org/immigration-detention-in-lithuania>

⁶⁶ *Bozano v. France; Shamsa v. Poland* ECtHR, Applic. Nos. 45355/99 and 45357/99, 27 November 2003;

the letter of national law, there has been an element of bad faith or deception the part of the authorities”.⁶⁷

Unfortunately, statistic data show that states choose detention as the best way of regulating migration policy. For instance, in Latvia, despite the small percentage of ordered detention decisions, some of the country’s immigration laws and practices have been criticised. In the past few years, international organizations paid attention that Latvian law fails to make detention a measure of last resort and for the shortest period possible.⁶⁸ In Estonia detention must comply with the principle of proportionality and necessity, individual circumstances of each case must be taken into account. Migrants may be detained if non-custodial measures cannot be applied effectively.⁶⁹

It is important that States observe the principle of minimum intervention and the least intrusive measure possible should be applied.⁷⁰ It is also needed to take into account the particular needs, vulnerabilities and circumstances of the person⁷¹ Special Rapporteur on the human rights of migrants François Crépeau, emphasize that any law should provide a list of measures from least to most restrictive. Of course, the principle of proportionality and necessity should be applied for every measure and in all cases.⁷²

In spite of the fact that a person shall not be held in detention because they have applied for international protection, Hungary’s parliament adopted a law on automatic detention of all asylum seekers in border transit zones.⁷³ This includes vulnerable persons as well as unaccompanied children above age 14. This provision stated that asylum seekers would be held in border “transit zones” for the duration of their asylum process, including any appeals.⁷⁴ All international

⁶⁷ *Saadi v. the United Kingdom*, ECtHR, 13229/03 Judgment 29.01.2008.

See also *Kolesin v. Russia*, ECtHR 72885/10, Judgment 28.11.2017.

⁶⁸ Country Detention Reports ,GPD, Latvia, 2017 available at: <https://www.globaldetentionproject.org/immigration-detention-in-latvia>

⁶⁹ Country Detention Reports ,GPD, Estonia, 2017 available at: <https://www.globaldetentionproject.org/immigration-detention-in-estonia>

⁷⁰ UNHCR, Options Paper 2: Options for governments on open reception and alternatives to detention, 2015

⁷¹ Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, A/65/222, 4 August 2010, paras 92, 95

⁷² Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2 April 2012, para 53.

⁷³ 2017/XX law on the severity of proceedings performed at the areas of border control and the amendments of related legislation, 17.03.2017 available at: https://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1700020.TV×hift=ffffff4&txtreferer=00000001.TXT

⁷⁴ Ibid.

organisations, NGO's criticised these provisions. The Council of Europe's Commissioner for Human Rights pointed that the new law "would be in clear violation of Hungary's obligations under the European Convention on Human Rights"⁷⁵, UNHCR held that Hungary would be in violation of both international and European law.⁷⁶ In addition, in case *Ilias and Ahmed v. Hungary*, ECtHR held, unanimously, "[...]that there had been a violation of Article 5 §§ 1 and 4 of the Convention, finding that the applicants' confinement in the Röszke border-zone had amounted to detention, meaning they had effectively been deprived of their liberty without any formal, reasoned decision and without appropriate judicial review."⁷⁷ The state authority responded by saying that the judgment was "unacceptable" and "unenforceable"⁷⁸ On 18 September 2017 the Grand Chamber Panel accepted the Hungarian Government's request that the case be referred to the Grand Chamber. The Grand Chamber will be holding a hearing on the case on 18 April 2018.⁷⁹ It is a clear evidence of arbitrary detention which violate all international standards.

Also, after the Hungarian legislative reform, in March 2017 Polish authority made a proposal to lead in similar automatic detention in containers at the border. Civil society organisations have expressed their discontentment against the systematic and unjustified use of detention of asylum seekers.⁸⁰

That is why in such cases alternative to detention is the best solution of problem and it will protect asylum seekers from such unlawful and arbitrary decisions. It should be noted that alternatives to detention are used when there is one of the grounds for detention prescribed by law. So, national authorities must first prove there are grounds for resorting to detention of person. Given that detention is a measure of last resort, States have a legal obligation under interna-

⁷⁵ Commissioner on human rights 08 March 2017 available at: https://www.coe.int/en/web/commissioner/-/commissioner-concerned-about-hungary-s-new-law-allowing-automatic-detention-of-asylum-seekers?utm_source=ECRE+Press+Review&utm_campaign=6c0b9187fd-EMAIL_CAMPAIGN_2017_03_08&utm_medium=email&utm_term=0_1a5cfac4e4-6c0b9187fd-422306177

⁷⁶ The UN Refugee Agency .07 March 2017 available at: http://www.unhcr.org/news/briefing/2017/3/58be80454/unhcr-deeply-concerned-hungary-plans-detain-asylum-seekers.html?utm_source=ECRE+Press+Review&utm_campaign=384d3693d8-EMAIL_CAMPAIGN_2017_03_07&utm_medium=email&utm_term=0_1a5cfac4e4-384d3693d8-422295781

⁷⁷ *Ilias and Ahmed v. Hungary* (no. 47287/15)

⁷⁸ Hungarian Helsinki Committee, March 2017 <http://www.helsinki.hu/wp-content/uploads/HHC-Info-Update-rule39.pdf>

⁷⁹ Ibid.

⁸⁰ AIDA, The detention of asylum seekers in Europe Constructed on shaky ground?, ECRE, June 2017 available at: https://www.ecre.org/wp-content/uploads/2017/06/AIDA-Brief_Detention-1.pdf

Cited from Helsinki Foundation for Human Rights, 'Kontenery dla uchodźców – kolejny krok wstecz w ochronie praw cudzoziemców', 6 April 2017, available in Polish at: <http://www.hfhr.pl/kontenery-dla-uchodzcow-kolejny-krok-wstecz-w-ochronie-praw-uchodzcow/>

tional law, considering with principles of necessity and proportionality, first, to examine carefully alternative measures and, second, only then apply detention if it has been defined that alternatives are not sufficient to achieve the same ends.

However, In Malta alternatives to detention may apply in all cases where detention is not resorted to, including those cases where there are no grounds for the detention of the asylum seeker. As was noted, this goes against the letter and the spirit of the recast RCD where alternatives to detention should only be applied in those cases where there are grounds for detention.⁸¹

CJEU also expressed their opinion on alternatives to detention and pointer that:

“...that the ‘supervision’ that has to be undertaken by a judicial authority dealing with an application for extension of the detention of a third-country national must permit that authority to decide, on a case-by-case basis, on the merits of whether the detention of the third-country national concerned should be extended, whether detention may be replaced with a less coercive measure or whether the person concerned should be released, that authority thus having power to take into account the facts stated and evidence adduced by the administrative authority as well as any observations that the third-country national may submit.”⁸²

A huge disadvantage in question of the detention of asylum seekers in Europe is lack of explicit statistical data. Nevertheless, some statistics data is available and present us overview of detention practice. (see Annex 1)

1.3. Differences between alternatives to detention and other restriction on the freedom of movement.

It is very important to analyse the differences between alternatives to detention and other restriction on the freedom of movement. As was mentioned before, detention is a measure of last resort and States have a legal obligation, to explore and implement alternative measures before to going to detention. ATDs usually include some restrictions on the freedom of movement, but they do not amount to detention, which is a deprivation of liberty. Some restrictions on movement may be considered a deprivation of liberty.⁸³ The ECtHR pointed that the distinction be-

⁸¹ Country Report: Malta, ECRE,2017 available at: <http://www.asylumineurope.org/reports/country/malta>

⁸² Bashir Mohamed Ali Mahdi, CJEU, Case C-146/14 PPU, ECLI:EU:C:2014:1320 available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0146>

⁸³ *Celepli v Sweden*, HRC Case No. 456/1991, *Karker v France*, HRC Case No. 833/1998.

tween restrictions upon freedom of movement and arbitrary detention is ‘merely one of degree or intensity, and not one of nature or substance.’⁸⁴

There is a great example of restriction freedom of movement in *Celepli v Sweden* case held by HRC. Turkish citizen of Kurdish origin was not granted refugee status but had permission to stay in Sweden. He was afterward ordered to a deportation on the grounds of suspicion in terrorist activities. The expulsion order was not enforced as it was believed that he could be persecuted in Turkey. However, the Swedish authorities prescribed limitations and conditions concerning their place of residence. The HRC found that the person was considered to be lawfully in the territory of Sweden for the purposes of article 12 ICCPR. Sweden justified its restrictions on the ground of national security under article 12(3), which was accepted by the HRC.⁸⁵

As a consequence, legitimate purpose behind the restriction will differ from that of the legitimate purpose for restricting the movement of an asylum seeker. Standards relating to detention apply to all persons, including failed asylum seekers. In so far as other forms of restrictions on movement are concerned, it would appear from case law that the safeguards in article 12 of the ICCPR would not generally apply to failed asylum seekers, but would apply where an individual is allowed to remain in a country because the host State is unable to carry out an expulsion or deportation order. So, any restrictions must be justified according to one of the listed grounds in article 12(3).⁸⁶

Severe restrictions on freedom of movement which amount to a deprivation of liberty may come within the scope of article 9 ICCPR. In order for detention not to infringe this provision it must be authorised by law; be reasonable and necessary in all the circumstances; be subject to periodic review; be subject to judicial review.

UNHCR has emphasised that alternatives to detention should never become alternatives forms of detention nor alternatives to unconditional release.⁸⁷ It is important to understand whether it is a non custodial measure or deprivation of liberty. In Slovenia, individuals who apply for international protection at the border, airport or port are first processed by the Police in

⁸⁴ *Guzzardi v. Italy*, Application no. 7367/76, Council of Europe: European Court of Human Rights, 6 November 1980, available at: <http://www.refworld.org/cases,ECHR,502d42952.html>

⁸⁵ *Celepli v. Sweden*, CCPR/C/51/D/456/1991, UN Human Rights Committee (HRC), 2 August 1994, available at: <http://www.refworld.org/cases,HRC,51b6e7ad4.html>

⁸⁶ UN High Commissioner for Refugees (UNHCR), *Alternatives to Detention of Asylum Seekers and Refugees*, April 2006, POLAS/2006/03, available at: <http://www.refworld.org/docid/4472e8b84.html>

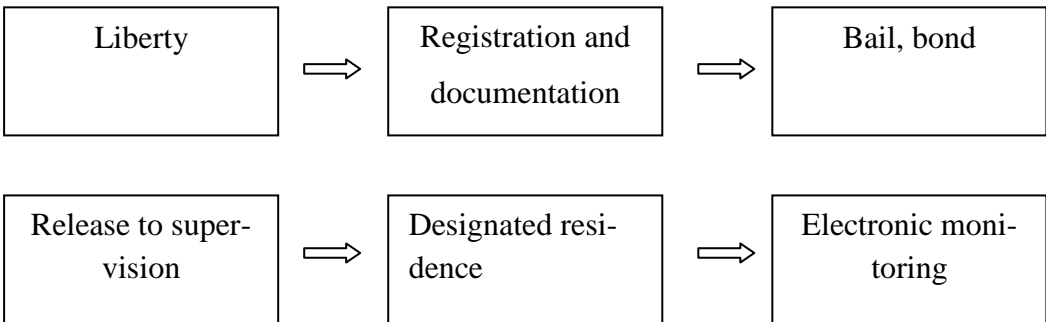
⁸⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, (2012), 26, available at: <http://www.refworld.org/docid/503489533b8.html>22

the preliminary procedure and then transferred to the Reception centre (Asylum Home). This restriction could be considered as ‘designated residence’, Majority of services for the asylum seekers are also provided there. In fact, this Asylum Home deprives them of their liberty because they do not have the right to leave that territory.⁸⁸ Even they are held in the reception centre, they are deprived of the liberty. In this case the regime of full day supervision and concomitance are enforced. As well as home curfew/arrest, it is considered as alternative measure and in some national legislation (France), it is a type of alternative to detention but in fact individuals have not right to leave their house and have to stay at home all the time. In such situation such measure cannot be considered as alternative but is rather detention.

In Belgium, families with minor children who claim asylum at the border are excluded from detention in a closed centre and are placed in facilities adapted to the needs of such families. In return procedure, the families with children currently are sheltered in “open return houses” organised by the Aliens Office. These houses are used as an alternative for detention as well. In contrast, the scheme applied in Belgium is an alternative to detention. This means that they are not deprived of their liberty but there is a restriction in freedom of movement.⁸⁹ In Spain the same situation, formally detention order imposed on asylum seeker but individuals cannot be physically prevented from leaving the Asylum Home⁹⁰

So, international standards provide a range of safeguards to detention and form of restriction of movement and many of the latter being used as alternatives to detention. All alternatives to detention of asylum seekers, whether or not they restrict freedom of movement, must comply with other human rights standards.

Table 1. Comparative table from less restrictive measure to more restrictive.⁹¹

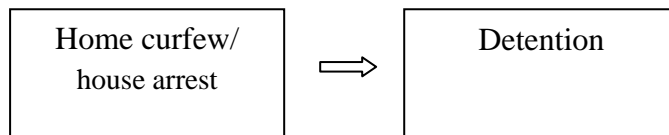


⁸⁸ Country Report: Slovenia, ECRE,2017 available at: <http://www.asylumineurope.org/reports/country/slovenia>

⁸⁹ Country Report: Belgium, ECRE,2017 available at: <http://www.asylumineurope.org/reports/country/belgium>

⁹⁰ Country Report: Spain, ECRE,2017 available at: <http://www.asylumineurope.org/reports/country/spain>

⁹¹ UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, (2012), available at: <http://www.refworld.org/docid/50348953b8.html>



Interim conclusion

In conclusion, as the right to liberty and security of a person is a fundamental human right, these rights could be restricted only in exceptional cases prescribed by law. Every decision should be examined as an individual case and only with compliance with the principle of necessity and proportionality. Sometimes some alternatives to detention include restriction freedom of movement but it is better solution than detention as it is a guarantee of basic rights of asylum seekers. As we see, the legal regulation of detention is well-established and it was pointed that detention should be a measure of last resort. Unfortunately, in many cases state resort to detention without clear legal ground and explanation and in this way there are a lot of violations of human rights confirmed by ECtHR. But in some countries positive steps are observed. For instance, they adopt a new legal regulation and provided procedural guarantees prescribed by EU and international law. But still EU and international organisation, NGOs, others bodies have to continue take measures in order to protect human right and prevent states' side from violation.

2. ALTERNATIVES TO DETENTION

2.1. Definition and legal framework

In spite of the fact that alternative to detention is very actual question, there is no single definition of it, and therefore there are different concepts of understanding. Different term are used such as “non-custodial measures,” “less restrictive measures,” “less invasive means”, “less coercive measures “ alternative measure” and others . Alternative to detention is also not a legal term, but refers to different practices which may be used to avoid detention.⁹² Recast Reception condition directive also does not provide for legal definition on alternatives. Various terms are used such as “non-custodial alternative measures”, “less coercive alternative measures”, “alternative measure to detention”.⁹³

Moreover, there is a concept that alternative to detention is considered in two various senses- in the narrow sense and broader. ⁹⁴ According to the narrow sense, ATDs refers to a practice used where detention has a legitimate basis, where a ground for detention is identified in the each individual case, but a less restrictive measure of control is at the State’s disposal which can be used. In the broader sense, alternatives to detention refer to policies and practices that States use to govern the migration process, which fall short of detention, but usually involve some restrictions.”⁹⁵

Moreover, these concepts make a legal confusion within the EU context. Under this broader sense open reception arrangements for asylum seekers could also be understood as an ATD, as they establish a way to control the migration process without detention, but involves some restrictions (for example a potential curfew at a reception centre).⁹⁶

UNHCR provide definition on alternatives to detention as “any legislation, policy or practice that allows asylum-seekers to reside in the community subject to a number of conditions

⁹²Steering committee for human rights. (CDDH) Drafting group on migration and human rights (CDDH-MIG). Draft analysis of the legal and practical aspects of effective alternatives to detention in the context of migration , 2017

⁹³ Article 8 ,11, recital 20 recast RCD

⁹⁴ C. Costello and E. Kaytaz, Building Empirical Research into Alternatives to Detention, (June 2013) 10

⁹⁵ Ibid.

⁹⁶ Philippe De Bruycker (Ed.)Alice Bloomfield Evangelia (Lilian) Tsourdi Joanna Pétin Alternatives to immigration and asylum detention in the EU, (2015) 60

or restrictions on their freedom of movement”.⁹⁷ The International Detention Coalition (IDC) has defined ‘alternative to detention’ as “any law, policy or practice by which persons are not detained for reasons relating to their migration status”.⁹⁸

Within the EU law recast Reception Conditions Directive (RCD)⁹⁹ regulates detention of asylum seekers and provides an exhaustive list of detention grounds. It also establishes an explicit obligation to examine less coercive measures before resorting to detention. Detention should be a measure of last resort and applicable only if a ground for detention exists.¹⁰⁰

Article 8.2 states :

“when it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively”.¹⁰¹

Recital 15 emphasizes:

“applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principles of necessity and proportionality with regard to both to the manner and the purpose of such detention”.¹⁰²

Another important step is implementation of alternative scheme. In this context, A. Edwards emphasize “many alternatives to detention involve some form of restriction on movement or deprive an individual of some of his or her liberty and must therefore be subject to human rights safeguards. [...] The greater the loss of or interference with liberty, the more human rights safeguards must be put in place to guard against executive excess, arbitrariness and unfair punishment”.¹⁰³

Also Recital 20 recast RCD gives us understanding of alternative to detention and says:

⁹⁷ UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>

⁹⁸ International detention coalition (IDC) ‘There are alternatives, a handbook for preventing unnecessary detention (revised edition) (2015) , 2

⁹⁹ 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, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0033>

¹⁰⁰ Ibid.

¹⁰¹ Article 8.2 recast RCD

¹⁰² Recital 15 recast RCD

¹⁰³ A. Edwards, UNHCR, ‘Back to Basics: The Right to Liberty and Security of Persons and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants’ (April 2011), 8-9.

*“In order to better ensure the physical and psychological integrity of the applicants, detention should be a measure of last resort and may only be applied after all non-custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants”.*¹⁰⁴

This means that, not only alternatives to detention should be non-custodial but they should also respect the fundamental rights of asylum seekers as established in international legal acts. Every alternative scheme must be conform to the rights the prohibition of torture, inhuman or degrading treatment, the right to human dignity, the right to private and family life and the right to an effective remedy.¹⁰⁵ When all these provisions are fulfilled, Member states can set up various schemes of alternatives to detention. In 2012 UNHCR published the Guidelines which provide detailed guidance on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention.¹⁰⁶ The guidelines include an annex with a range of alternatives to detention. This list of alternatives is not-exhaustive.¹⁰⁷

According to the recast Reception Conditions Directive, Member States must not only put in practice alternative measures, but must also put in practice such measures through their national laws transposing the Directive. Recast RCD prescribe not exhaustive list of possible alternative “such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place...”¹⁰⁸ Therefore, alternatives to detention come into play when there is one of the grounds for detention prescribed in the recast RCD.¹⁰⁹ Where there is no legal basis to detain an asylum seeker, there is also no legal ground to apply ATDs. The asylum seeker should be simply acquitted. Also HRC has held: states are required to show that ‘in light of the author’s particular circumstances, there were not less invasive means of achieving the

¹⁰⁴ Recital 20 recast RCD

¹⁰⁵ Philippe De Bruycker (Ed.)Alice Bloomfield Evangelia (Lilian) Tsourdi Joanna Pétin Alternatives to immigration and asylum detention in the EU,(2015), 63

¹⁰⁶ UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ 2012

¹⁰⁷ Ibid . 41-43

¹⁰⁸ Article 8.4 recast RCD

¹⁰⁹ Article 8.3 recast RCD

same ends ...’¹¹⁰ Working Group on Arbitrary Detention also has stated that “alternative and non-custodial measures should always be considered before resorting to detention”.¹¹¹

In the framework of the Common European Asylum System alternative to detention is defined:

“Alternatives to detention come into play when an individual is exceptionally liable to detention on the basis of one of the six grounds enumerated exhaustively in the recast Reception Conditions Directive. They should therefore not be conflated with permissible restrictions on the freedom of movement which are sometimes applicable to asylum seekers. They are non-custodial measures which respect the fundamental rights of asylum seekers. The principles of necessity and proportionality call for the examination of the individual profile in order to decide on the type of alternative to be applied as well as the level of coerciveness within each scheme.”¹¹²

Looking at the legislation of EU member state, we can see different regulation of alternatives to detention. We can say that alternatives are well-established. But the main problem and question “are they used in practice?” For this purpose, we need to analyse legislation on alternatives and how they are interpreted.

There are some countries where alternatives to detention are not provided by law. In Spain there is no provision on alternatives to detention. The state authorities usually consider the detention in the reception centre as an alternative to detention.¹¹³

Only last year Belgium transposed into national legislation norms of Reception Condition Directive. Aliens Act establishes that less coercive alternative measures need to be considered before resorting to detention. But there is no detailed provision on alternatives. These alternatives are to be defined by Royal Decree, which has not yet been adopted.¹¹⁴ In Lithuanian legislation alternatives to detention are well established, but there is no legal obligation to examine ATD.¹¹⁵ Alternatives to detention have been laid down in national law in Italy. It is regulated by

¹¹⁰ *C. v. Australia*, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 13 November 2002, available at: <http://www.refworld.org/cases,HRC,3f588ef00.html>

¹¹¹ Report of the Working Group on Arbitrary Detention: addendum: report on the visit of the Working Group to the United Kingdom on the issue of immigrants and asylum seekers, E/CN.4/1999/63/Add.3, 18 December 1998, § 33.

¹¹² Philippe De Bruycker (Ed.) Alice Bloomfield Evangelia (Lilian) Tsourdi Joanna Pétin Alternatives to immigration and asylum detention in the EU, (2015) , 65

¹¹³ Country Report: Spain, ECRE, 2017 available at: <http://www.asylumineurope.org/reports/country/spain>

¹¹⁴ Country Report: Belgium, ECRE, 2017 available at: <http://www.asylumineurope.org/reports/country/belgium>

¹¹⁵ Country Detention Reports ,GPD, Lithuania , 2016 available at: <https://www.globaldetentionproject.org/immigration-detention-in-lithuania>

Consolidated Act on Immigration. But in practice, state authority does not use them.¹¹⁶ In Romania the Asylum Act provides for the possibility to impose alternatives detention, defined as “restrictive measures”. But in practice they do not use them as well.¹¹⁷ Until Recently, Malta had a practice to detain asylum seekers that have entered the state irregularly automatically. In 2016 state authority introduced a new migration strategy which end automatic detention and provide six grounds for detention which set out in the recast Reception Conditions Directive.¹¹⁸ Under national legislation in Portugal the detention of asylum seeker cannot be based on the application for international protection, and can only apply on the following grounds: national security, public order, public health; risk of absconding; applying for asylum at the border; following a decision of removal from national territory; during Dublin procedures The Asylum Act lays down alternatives to detention (less coercive alternative measures) but in practice court rarely resort to alternatives.¹¹⁹

We can see that situation of implementation of alternatives to detention in national law is different. Nevertheless, comparing statistics for the past year, the tendency of using the alternative to detention has grown.

2.2. Advantages of effective alternatives to detention

It is well-documented that alternatives to detention are better solution that can bring advantages for state, in terms of compliance with immigration procedures, cost-effectiveness and respect for human rights, health, and wellbeing. International Detention Coalition emphasize that alternative to detention in all cases ‘improve compliance with immigration and case resolution processes, cost less than detention, reduce wrongful detention and litigation, reduce overcrowding and long-term detention, increase voluntary or independent departure rates, respect, protect and fulfill human rights, can help stabilize vulnerable individuals in transit, improve individual health and wellbeing’.¹²⁰

¹¹⁶ Country Report: Italy, ECRE,2018 available at: <http://www.asylumineurope.org/reports/country/italy>

¹¹⁷ Country Report: Romania , ECRE,2018 available at: <http://www.asylumineurope.org/reports/country/romania>

¹¹⁸ Country Report: Malta, ECRE,2018 available at: <http://www.asylumineurope.org/reports/country/malta>

¹¹⁹ Country Report: Portugal, ECRE,2018 available at: <http://www.asylumineurope.org/reports/country/portugal>

¹²⁰ R. Sampson, G. Mitchell and L. Bowring, There are Alternatives: Handbook for Preventing Unnecessary Immigration Detention, IDC, 2015, p 9

The use of alternatives should be in accordance with international human rights standards including European and international law and the relevant jurisprudence of the Court, the CJEU and the CCPR¹²¹

Alternatives to detention can improve migration policy by supporting compliance with immigration procedures across a range of populations. But they should be implemented effectively. Due to IDC research compliance rates among asylum seekers awaiting a final outcome ranged between 80-99.9%. This result based on thirteen programs.¹²² Within the EU member states such as Belgium, Sweden compliance rates were ranging from 68% to 80%.¹²³

Alternatives can prevent the serious harm on the physical and psychological health of asylum seekers. For example, in *Aden Ahmed v. Malta* case, ECtHR found that there was violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention. In this case applicants complained about the overcrowded detention centre, the absence of female staff in the centre and lack of access to fresh air. The Court held that her situation was vulnerable because of her irregular migrant status, her past and her personal emotional circumstances in combination with her fragile health.¹²⁴ Moreover, in 2010 Jesuit Refugee Service published report “Becoming Vulnerable in Detention”. The aim of this report was to investigate and analyse vulnerability in detained asylum seekers and irregular migrants. The research shows that the study revealed that detention itself influenced the detainees’ level of vulnerability. It was noted that ‘the negative consequences of detention and its harmful effects on individual persons are disproportionate to their actual situations, in that they have committed no crime and are only subject to administrative procedures, and; It is unnecessary to detain persons and thus make them vulnerable to the harmful effects of detention because non-custodial alternatives to detention do exist’.¹²⁵

Also, important question is impact of detention on children health. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment noted: “even very short periods of detention can undermine a child’s well-being and compromise cognitive development,

¹²¹ Steering committee for human rights. (CDDH) Drafting group on migration and human rights (CDDH-MIG). Draft analysis of the legal and practical aspects of effective alternatives to detention in the context of migration, 2017 p 71

¹²² R. Sampson, G. Mitchell and L. Bowring, *There are Alternatives: Handbook for Preventing Unnecessary Immigration Detention*, IDC, 2015, p 10

¹²³ Ibid.

¹²⁴ *Aden Ahmed v. Malta*, ECtHR, 55352/12, Judgment 09 .12 2013

¹²⁵ JRS Europe, DEVAS project, ‘Becoming vulnerable in detention’ 2010 available at : <http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29338/20111014ATT29338EN.pdf>

increasing risk of depression, anxiety, post-traumatic stress disorder, suicide and self-harm, mental disorder and developmental problems.”¹²⁶

Another advantage is cost effectiveness. Immigration detention is expensive policy. Unnecessary cases of detention, including unlawful and arbitrary detention reduce the costs of detention. Accessible information pointed that alternatives to detention cost less.¹²⁷ It is difficult to find proper data on this question because states hide this information, but nevertheless some research shows that alternatives are more affordable.

In Austria, the estimated cost of detention is €207 per day.¹²⁸ While alternatives to detention costs €17 to €24.¹²⁹ In Lithuania costs of detention is approximately €18 while daily costs of accommodation in the non-secure section of the centre is around €14,5¹³⁰ In Belgium the estimated cost is €180-€190 per day per individual, while alternatives to detention costs €90 to €120.¹³¹ In Slovenian, detention in the Aliens Centre costs €15.10 per person per day versus €7.20 in the Asylum Home.¹³²

In 2015 the cost of detention of the Menogia centre in Cyprus was near €725,000 according to data provided by the authorities. As was state by organization it was possible to avoid these costs through the use of alternatives.¹³³

It is interesting situation in Czech Republic. Persons who are detained have to pay for their detention. They have to pay 10 Euros per day. Many of them cannot pay and are issued with a debt note upon release. The UN High Commissioner for Human Rights has expressed his

¹²⁶ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/69, 5 9(March 2015), para 16.

¹²⁷ R. Sampson, G. Mitchell and L. Bowring, *There are Alternatives: Handbook for Preventing Unnecessary Immigration Detention*, IDC,(2015)

¹²⁸ Country Report: Austria, ECRE,2017 available at: <http://www.asylumineurope.org/reports/country/austria>

¹²⁹ R. Sampson, G. Mitchell and L. Bowring, *There are Alternatives: Handbook for Preventing Unnecessary Immigration Detention*, IDC, (2015), 11

¹³⁰ Country Detention Reports ,GPD, Lithuania , 2016 available at: <https://www.globaldetentionproject.org/immigration-detention-in-lithuania>

¹³¹ R. Sampson, G. Mitchell and L. Bowring, *There are Alternatives: Handbook for Preventing Unnecessary Immigration Detention*, IDC, (2015) ,11

¹³² De Bruycker (Ed.), A.Bloomfield, E. Tsourdi Joanna Pétin, *Alternatives to immigration and asylum detention in the EU: Time for implementation*. Odysseus Network and the European Union, (2015),23

¹³³ AIDA, *The detention of asylum seekers in Europe Constructed on shaky ground?*, ECRE, June 2017 available at: <https://www.ecre.org/wp-content/uploads/2017/06/AIDA-Brief-Detention-1.pdf>

opinion and said that “the fact that people are being forced to pay for their own detention is particularly reprehensible.”¹³⁴

It should be noted that the advantages of alternatives to detention will only be accessible if alternatives are used instead of detention, and as a consequence, help to reduce the total number of detention. Actually, many of the abovementioned benefits are inseparable linked to a reduction in the overall use of unnecessary detention.

According to the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, alternatives are most effective when asylum seekers are:

“treated with dignity, humanity and respect throughout the asylum procedure; informed clearly and concisely at an early stage about their rights and duties associated with the alternative to detention as well as the consequences of non-compliance; given access to legal advice throughout the asylum procedure; provided with adequate material support, accommodation and other reception conditions, or access to means of self-sufficiency ; able to benefit from individualised case management services in relation to their asylum claim”.¹³⁵

It should be noted that alternatives to detention are the human way to achieve effective migration policy. It is a balance between protection of human rights of asylum seeker and state interest to control migration flows.

2.3. Principles of proportionality and necessity

International human rights law underline that immigration detention should be used only as a measure of last resort only in exceptional cases where it is necessary, reasonable, and proportionate to a legitimate government objective. “*Detention must be necessary in all the circumstances assessed against the facts of the individual case at hand.*”¹³⁶ The principles of necessity and proportionality are the fundamental point of transparency detention decisions.

As we know any deprivation of liberty must not be arbitrary. In this context, this notion necessarily indicates on concepts of reasonableness, necessity and proportionality.

¹³⁴ Czech Republic, Joint Global Detention Project, Organization for Aid to Refugees and Forum for Human Rights Submission to the Universal Periodic Review 28th session of the UPR Working Group, (October-November 2017)

¹³⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>

¹³⁶ A. Edwards, UNHCR, ‘Back to Basics: The Right to Liberty and Security of Persons and ‘Alternatives to Detention ‘of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants’, (April 2011), <http://www.refworld.org/docid/4dc935fd2>.

HRC:

“Arbitrariness” is not to be equated only with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.¹³⁷ ... The element of proportionality becomes relevant in this context.¹³⁸

In the context of the detention of asylum-seekers, UNHCR pointed that there are three purposes for which detention may be necessary in an individual case:

- public order; public health ; national security.¹³⁹

To understand the principle of proportionality ECtHR pointed:

“The general principle of proportionality requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights.”¹⁴⁰

Within the EU law, recast RCD requires that detention should be applied with accordance ‘to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention.’¹⁴¹

“The necessity and proportionality tests further require an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case.”¹⁴²

Moreover, mandatory and systematic detention is not in conformity with the necessity and proportionality requirements. Mandatory detention is unlawful.

¹³⁷ *van Alphen v. the Netherlands* (Communication No. 305/1988), CCPR/C/39/D/305/1988, UN Human Rights Committee (HRC), 23 July 1990, available at: <http://www.refworld.org/cases,HRC,525414304.html>

¹³⁸ *A v. Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 30 April 1997, available at: <http://hrlibrary.umn.edu/undocs/html/vws560.html>

¹³⁹ Ibid. 16

¹⁴⁰ UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) 21

See also *Vasileva v. Denmark*, Application no. 52792/99, Council of Europe: European Court of Human Rights, 25 September 2003

¹⁴¹ Recital 15 recast RCD

¹⁴² UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) ,21

European Union Agency for Fundamental Rights (FRA) in their research has found that in almost half of EU Member States, proportionality is a factor that must be considered by administrative and judicial bodies to balance the interests of the state with the individual's right to liberty and security of person.¹⁴³ In some countries, this is displayed in legislation either in the form of a general proportionality test or with a list of criteria to consider detention and deprivation of liberty. In some countries, courts have established a proportionality test.

National legislation

It is interesting to analyze national legislation. For instance, in Austria principle of proportionality is established in the Constitution and applies in all administrative procedures including asylum and return proceedings.¹⁴⁴ According to national legislation, the principle of necessity is to be taken into account. Detention has to be necessary to reach one of the stated objectives.¹⁴⁵

In Slovenia there is no provision that detention can be applied only as a measure of last resort. And, moreover Slovenian law does not contain provisions that require proof that the alternatives cannot be effectively applied. Unfortunately, in practice, individual circumstances are often not properly founded and the necessity and proportionality test is not implemented enough.¹⁴⁶

Unfortunately, Hungarian asylum system is not effective as well. As mentioned before, Hungary authority adopts a law which allow detain all asylum seekers at the boarder automatically. Under the legislation, detention of asylum seeker may only be ordered on the basis of assessment of the individual's circumstances. Less coercive alternatives to detention should be applied. But in fact, HHC stated that the necessity and proportionality tests are not used.¹⁴⁷

Belgium law contains grounds for detention of asylum seekers during the asylum procedure as set out by Article 8(3) of the recast RCD. But there is different regulation of detention at the border and on the territory. Under new law asylum seekers arriving without travel documents are automatically detained. Detention at the border does not contain any guarantees such as the

¹⁴³ FRA, *Detention of Third-Country Nationals in Return Procedures*, 2011 , p. 22

¹⁴⁴ Constitutional Court (Austria), 20 September 2011 case Vfslg.19472.

See also VwGH, Decision Ra 2013/21/0008, 2 August 2013.

¹⁴⁵ Country Report: Austria, ECRE,2017 available at: <http://www.asylumineurope.org/reports/country/austria>

See also Article 76(2) FPG. Available at: <https://www.jusline.at/gesetz/fpg/paragraf/76>

¹⁴⁶ Country Report: Slovenia, ECRE,2017 available at: <http://www.asylumineurope.org/reports/country/slovenia>

¹⁴⁷ Country Report: Hungary, ECRE,2017 available at <http://www.asylumineurope.org/reports/country/hungary>

test of necessity and proportionality, the obligation to consider alternatives, the need for an individual assessment. But on the territory all these guarantees are provided.¹⁴⁸

The principles of reasonableness, necessity and proportionality require that states have to prove that there were no other possibilities to achieve their objectives without interfering with the right to liberty and security of person. The Human Right Committee has held that Article 9 of the ICCPR requires states to show that ‘in light of the author’s particular circumstances, there were not less invasive means of achieving the same ends ...’¹⁴⁹

The fact that many states do not resort to detention in some cases also confirms that it is generally unnecessary for individuals with pending asylum claims. Besides, states cannot detain asylum seekers simply by stating that there is no alternative measure available. States have legal obligation to establish less coercive measure in their national legislation under international and EU law and to ensure that alternative measures are available in law and practice. States have to comply with their international obligation.¹⁵⁰ All human rights, including the right to liberty and security impose negative and positive obligations on the state.

2.4. Procedural aspects of detention and alternatives to detention

International and regional human rights instruments set down a range of procedural guarantees relating to detention and ATDs. Under recast RCD ‘[...] an applicant should have effective access to the necessary procedural guarantees...’¹⁵¹ *contravention of the provisions of this article shall have an enforceable right to compensation.*¹⁵² Article 9 of the recast RCD provides guarantees for detained applicants. It should be noted that procedural safeguards ‘apply irrespective of one’s status as an asylum-seeker or other migrant, and whether one is entering or being removed from the territory.’¹⁵³

¹⁴⁸ Country Report: Belgium, ECRE, 2017 available at: <http://www.asylumineurope.org/reports/country/belgium>

See also Aliens Act available in French and Dutch: <https://emnbelgium.be/news/law-reform-belgiums-immigration-act-published>

¹⁴⁹ *C. v. Australia*, CCPR/C/76/D/900/1999, UN Human Rights Committee (HRC), 3 November 2002, available at: <http://www.refworld.org/cases,HRC,3f588ef00.html>

¹⁵⁰ Treaty obligation must be performed by states in good faith. Article 26, Vienna Convention on the Law of Treaties 1969.

¹⁵¹ Recital 15 recast RCD

¹⁵² Article 5 ECHR, available at: <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>

See also Article 9 ICCPR

¹⁵³ A. Edwards, UNHCR, ‘Back to Basics: The Right to Liberty and Security of Persons and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants’ (April 2011) 38

Article 5 of the ECHR provides: ‘*Everyone who is arrested shall be informed promptly, in a language he understands, of the reasons for his arrest and of any charge against him; [...] Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful; Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.*’¹⁵⁴

Firstly, asylum seeker must be informed of grounds for detention, which must be communicated promptly and in a language the person understands and not merely a language he or she is expected to understand. ECtHR found “that a delay of seventy-six hours in providing reasons for detention was not compatible with the requirement of the provision that such reasons should be given “promptly”¹⁵⁵

Secondly, any period of detention must be subject to periodic review before a judicial or other independent authority. The reviewing body must be independent and possess the power to order release or to change any conditions of release.¹⁵⁶ Non-reviewable detention should be considered as arbitrary.¹⁵⁷ Delays in providing judicial review can also lead to violations of rights to liberty and security of person.

Article 9.5 RCD says:

*“Detention shall be reviewed by a judicial authority at reasonable intervals of time, ex officio and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention.”*¹⁵⁸

For example, in case *Sanchez-Reisse v. Switzerland* ECtHR held that 46 days delay in a court’s review of the lawfulness of detention was excessive.¹⁵⁹

¹⁵⁴ Article 5 ECHR, available at: <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>

See also Article 9 ICCPR

¹⁵⁵ *Saadi v. the United Kingdom*, ECtHR, 13229/03 Judgment 29.01.2008 para 84

¹⁵⁶ UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>

¹⁵⁷ *A v. Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993, ,UN Human Rights Committee (HRC),30 April 1997, available at: <http://hrlibrary.umn.edu/undocs/html/vws560.html>

¹⁵⁸ Article 9.5 recast RCD

¹⁵⁹ Case of *Sanchez-Reisse v. Switzerland* – Judgment, ECtHR 9862/82 paras 59-60

Moreover states have to ensure that applicants have a free legal assistance and representation. Procedures for access to legal assistance and representation must be prescribed by national law.¹⁶⁰ “Either personally or through a representative, the right to challenge the lawfulness of detention before a court of law at any time needs to be respected.”¹⁶¹ “Member States may also provide that free legal assistance and representation are granted: only to those who lack sufficient resources; only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.”¹⁶² ECtHR held “that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy.”¹⁶³

Also, there is a specific guarantee in cases of unlawful or arbitrary detention. Recast RCD emphasize that asylum seeker should be released immediately where detention decision is ordered is unlawful or arbitrary way.¹⁶⁴ Individuals have the right to compensation in cases of unlawful or arbitrary detention. For example, In July 2015, the Supreme Court of Lithuania forced the country to pay more than 6,000 Euros in compensation to victims in a case involving breaches of their rights. “*Supreme Court reminded the state of its duty to observe its international commitments and to respect human rights.*”¹⁶⁵ The complaint concerned Afghan children who had been crossing national boarder. They were placed in a prison with adult men for three months, where they faced abuse and humiliation.¹⁶⁶

Also EU law proves special condition for detainees: specialised detention facilities; separate accommodation of detained applicants and other third-country national; access to open-air spaces; UNHCR access to detained applicants; NGO/lawyers’ access to detained applicants; systematically provision of information on the rules applied in the facility. State has to ensure “*that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access to the*

¹⁶⁰ Article 9.6 recast RCD

¹⁶¹ UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, (2012), 29 available at: <http://www.refworld.org/docid/503489533b8.html>

¹⁶² Article 9.7 recast RCD

¹⁶³ *Čonka v Belgium ECtHR*, 51564/99, Judgment 05 .02.2002, para 46.

¹⁶⁴ Article 9.3 recast RCD

¹⁶⁵ Human Rights Monitoring Institute, “Lithuania to Pay Over 6,000 Euros for Violating Refugee Rights,” *European Liberties Platform*, 30 July 2015 available at: <https://www.liberties.eu/en/news/refugee-rights-lithuania-6000-euros/4618>

¹⁶⁶ Ibid.

detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible.”¹⁶⁷

Alternatives to detention must comply with some procedural rules and provide some safeguards for asylum seeker. UNHCR clearly stated that ‘...consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken’.

So, firstly, like a detention, alternatives to detention need to be properly governed by laws and regulations in order to avoid the arbitrary imposition of restrictions on liberty or freedom of movement¹⁶⁸ Special Rapporteur on the human rights of migrants emphasize that ‘alternatives to detention should have a human rights-based approach, be established by law, be non-discriminatory and be subject to judicial review and independent monitoring and evaluation’.¹⁶⁹

In that regard the CJEU also pointed:

*“... when a directive allows the Member States discretion to define transposition measures adapted to the various situations possible, they must, when implementing those measures, not only interpret their national law in a manner consistent with the directive in question but also ensure that they do not rely on an interpretation of the directive that would be in conflict with fundamental rights or with the other general principles of EU law”*¹⁷⁰

Furthermore, the principle of legal certainty is used here. This means that the law and its legal consequences must be ‘foreseeable and predictable’.¹⁷¹ Clearly identifying various alternatives to detention in national legislation would meet the requirement of legal certainty. And also the authority responsible for implementation and application must be specified.¹⁷² Under recast

¹⁶⁷ Article 10.4 recast RCD

¹⁶⁸ UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ 2012 p 22

¹⁶⁹ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2 April 2012, § 73

¹⁷⁰ J. N. v Staatssecretaris van Veiligheid en Justitie. CJEU , Case C-601/15 PPU, ECLI:EU:C:2016:84 available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=ecli:ECLI:EU:C:2016:84>

¹⁷¹ UNHCR, ‘UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) .22

¹⁷² Ibid.22

RCD, States have to ensure that the rules on alternatives to detention for asylum seekers are established in national law.¹⁷³

For instance, alternatives to detention are well-established in Greece. Less coercive measures should be applied. Greece law provide that detention should be exceptional and its necessity be based on individual assessment.¹⁷⁴ National legislation provide alternatives to detention such as reporting to the authorities, the obligation to stay at a certain place, the deposit of an adequate financial guarantee, the submission of documents.¹⁷⁵ However, in practice there is another situation. According to the Report of Special Rapporteur on the human rights of migrants ‘alternatives to detention are often not considered by the Government, and an individual assessment mechanism to determine the necessity, proportionality and reasonableness of detention in each individual case in accordance with Law 3907/2011 is not consistently applied. The absence of an automatic periodic judicial review makes it difficult to determine the lawfulness of detention.’¹⁷⁶ This proves again that alternatives should be applied not only by law, but in practice also.

A completely different situation is in Spain. It is very controversial, but there are no provisions on alternatives for asylum seeker. Only cautionary alternative is used under removal procedure. But also they are not used in practice.¹⁷⁷

Also, it is important to analyse migration policy of small countries, where the rate of migrants is low. For example, the Latvian immigration law provides some alternatives but does not contain clear obligation for authorities to consider alternatives to detention. There are no detailed rules governing the application of the alternatives or criteria for their use. But in practice they are used by state authority.¹⁷⁸

Secondly, States have to maintain that alternatives to detention which impose restrictions on liberty or freedom of movement should be reviewed regularly in individual cases by an inde-

¹⁷³ 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 (recast) available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>

¹⁷⁴ Country Detention Reports, GPD, Greece, 2018 available at <https://www.globaldetentionproject.org/immigration-detention-in-greece-2>

¹⁷⁵ Ibid.

See also Law 3907/2011, article 22(3)

¹⁷⁶ Special Rapporteur on the human rights of migrants, “Report of the Special Rapporteur on the human rights of migrants on his mission to Greece,” A/HRC/35/25/Add.2, 24 April 2017, para 48

¹⁷⁷ Country Report: Spain, ECRE, 2017 available at: <http://www.asylumineurope.org/reports/country/spain>

¹⁷⁸ Country Detention Reports, GPD, Latvia, 2017 available at: <https://www.globaldetentionproject.org/immigration-detention-in-latvia>

pendent body due to the principle of necessity and proportionality. Additionally, individuals should have the access to effective complaint mechanisms and remedies as well as independent monitoring and evaluation.¹⁷⁹ It is very important that alternatives to detention need to be established not only on paper, but they need to be used in practice. Regular reviews also give authorities a chance to revalue a person's willingness to be interesting with authorities on the progress of their migration case and to comply with any conditions imposed. It is also a possibility to identify changes in the case such as vulnerability or others risk factors, and identify any new barriers to case resolution.¹⁸⁰

In Poland there is no systematic detention of asylum seeker. Despite the fact that alternatives to detention and procedural guarantees are well established in law, asylum seekers are placed in detention, and alternatives to detentions are not considered, properly justified and explained.¹⁸¹

Luxemburg laws prescribe that decisions ordering less coercive measures must be duly reasoned and indicate the available remedies for asylum seeker. Individuals receive a copy of the decision, the main elements of the decision are informed in a language person understand. The decisions can be appealed in the same manner as detention decisions. In this case asylum seeker has rights to appeal within three months from the notification of detention. Court performs its decision within 10 days. Individuals are able to submit a complaint to authority regarding the conditions of detention and restrictive measures.¹⁸² In spite of the good implementation, alternatives to detention are rarely used.

All persons subject to non-custodial measures should receive clear information about their rights and duties in relation to the measures in place, and on the consequences of non-compliance. All their rights should be respected throughout the immigration procedure. Migrants

¹⁷⁹ UNHCR, 'UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' 2012 p 22

See also UN General Assembly, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, 2 April 2012, A/HRC/20/24, available at: <http://www.refworld.org/docid/502e0bb62.html> UN General

UNHCR, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons*, 2011 available at: <http://www.unhcr.org/protection/expert/536a00576/global-roundtable-alternatives-detention-asylum-seekers-refugees-migrants.html>

¹⁸⁰ R. Sampson, G. Mitchell and L. Bowring, *There are Alternatives: Handbook for Preventing Unnecessary Immigration Detention*, IDC, 2011, p 33.

¹⁸¹ Country Report: Poland, ECRE, 2017 available at: <http://www.asylumineurope.org/reports/country/poland>

¹⁸² Country Detention Reports ,GPD, Luxembourg , 2018 available at: <https://www.globaldetentionproject.org/countries/europe/luxembourg>

subject to non-custodial measures should have access to legal counsel.¹⁸³ Asylum seekers are in a better position to comply with migration authorities if they understand their legal position, rights and duties. It is clearly, that available information provisions reduce the rate of absconding.

In Czech Republic the specific needs of individuals need to be taken into account. Specific needs of vulnerable persons, unaccompanied children and families with children must be taken into account in the detention arrangements. It is very important to use these rules in practice. And in Czech Republic vulnerable asylum seekers are hardly ever detained.¹⁸⁴

In addition, alternatives must ensure human dignity and respect for other fundamental rights. It is crucial point that States have to ensure that all persons, regardless of their status, are able to exercise their fundamental human rights and freedoms. Alternatives to detention are the core point in reducing the risk of individual's rights being violated. These fundamental rights include economic, social and cultural rights such as access to health, livelihood and education.¹⁸⁵ *“Ensuring fundamental rights are respected can support migrants to stay engaged with authorities, minimise secondary movement and improve the safety and security of both migrant and local population”*.¹⁸⁶

Committee on Economic, Social and Cultural Rights pay attention that State have legal obligation to ensure adequate standard of living, access to water and basic needs, access to drugs and access to education, and this obligation should not be restricted on the ground of nationality or legal status.¹⁸⁷

Within the EU law , Member State have to inform the asylum seeker of any established benefits and of the obligations with which they must comply relating to reception conditions, ensure that applicants are provided with information on organisations that provide legal counsel and organisations might inform them about reception conditions, including health care.¹⁸⁸

Interim conclusion

¹⁸³ Ibid para 66

¹⁸⁴ Country Detention Reports ,GPD, Czech Republic , 2018 available at: <https://www.globaldetentionproject.org/countries/europe/czech-republic>

¹⁸⁵ R. Sampson, G. Mitchell and L. Bowring, There are Alternatives: Handbook for Preventing Unnecessary Immigration Detention, IDC, (2011), 28

¹⁸⁶ Ibid.

¹⁸⁷ Committee on Economic, Social and Cultural Rights (“CESCR”), Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights, E/C.12/2017/1, 13 (March 2017), para 9

¹⁸⁸ Article 5 recast RCD

In conclusion, the question of alternatives to detention of asylum seekers is regulated within the EU. It is stated that state have to consider ATDs before resorting to detention. In the recast RCD there is no legal definition of it and there is no comprehensive analysis of alternatives. The flows of migrants reaching the EU borders are very high. So, there is a danger that states resort to detention of asylum seekers immensely and in a case where it is not necessary. That is why less coercive measure should be considered as a matter of priority in international community. Concerning national legislation, almost all countries established alternatives in their law, but not all provide the obligation to consider ATDs. Also there is no legal definition of alternatives in national law. The problem is that ATDs are not frequently used in practice and detention is ordered in arbitrary and unlawful way with violation of principle of proportionality and necessity. Within the EU, procedural aspects of ATD are well-established. Asylum seekers have guarantees from arbitrary and unlawful detention decision. However, there is a lack of legal regulation of this issue in national legislation. State authority has to take appropriate steps in order to protect asylum rights and provide all procedural guarantees in practice.

3. TYPES OF ALTERNATIVES IN LEGISLATION AND PRACTICE

Despite the growing interest on alternative to detention, there are no defined and exhaustive lists of alternatives to detention. There is a wide range of alternatives to detention proposed by a range of bodies. Within the EU, recast Reception Condition Directive provide the following alternative measure ‘regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place’¹⁸⁹ The EU Fundamental Rights Agency proposed ATDs such as the obligation to surrender passports or travel documents; residence restrictions ; release on bail and provision of sureties by third parties; regular reporting to the authorities; placement in open facilities with caseworker support; electronic monitoring.¹⁹⁰ Special Rapporteur on the human rights of migrants in his report also pointed the non- exhaustive list of alternatives: registration requirements, deposit of documents, bond/bail or surety/guarantor, reporting requirements, case management/supervised release, designated residence, electronic monitoring, home curfew/house arrest and voluntary return.¹⁹¹ UNHCR in their Detention Guidelines list very similar non-exhaustive less coercive measure such as deposit or surrender of documentation, reporting conditions, directed residence, residence at open or semi-open reception or asylum centres, provision of a guarantor/surety, release on bail/bond, community supervision arrangements. It was also pointed that some alternatives are used in combination, depending on the individual case. Alternatives to detention may also involve greater or lesser restrictions on liberty or freedom of movement.¹⁹²

States can choose one of these scheme and they are free to create measures which are better for their migration policy. It should be noted there is a need to analyse the advantages and disadvantages of each alternatives in order to have understanding each of them. Of course, the im-

¹⁸⁹ Article 8 recast RCD

¹⁹⁰ European Union Agency for Fundamental Rights (FRA) Alternatives to detention for asylum seekers and people in return procedures,(2015). Available at: <http://fra.europa.eu/en/publication/2015/alternatives-detention-asylum-seekers-and-people-return-procedures>

¹⁹¹ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2 April 2012 para 56

¹⁹² UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017]

portant thing is implementation of these alternatives which should be based on the particular national or regional context.¹⁹³

Table 2. Comparative analysis of ATD within the EU¹⁹⁴

Countries	Registration and documentation	Regular reporting	Bail, bond	Designated residence	Home curfew/ house arrest, Electronic monitoring	Others	Are they used in practice
Austria	–	+	+	+	–	–	yes
Belgium	–	–	–	–	–	+	yes
Bulgaria	–	+	–	–	–	–	Rarely
Croatie	+	+	–	+	–	–	Rarely
Cyprus	–	+	+	+	–	–	no
Czech Republic	–	+	+	–	–	–	yes
Denmark	+	+	+	+	–	+	yes
Estonia	+	+		+	–	–	yes
Finland	+	+	+	+	-	–	yes
France		–	–	+	+	–	no
Germany	+	+	+	+	–	+	yes
Greece	+	+	+	+	–	–	no
Hungary	–	+	+	+	–	–	no
Italy	+	+	–	+	–	–	no
Latvia	+	+	–	–	–	–	yes
Lithuania	–	+	–	+	–	–	yes
Luxembourg	–	–	–	+	–	–	no
Malta	–	+	+	–	–	–	no
Netherlands	–	+	+	+	–	–	no
Poland	–	+	+	+	–	–	yes

¹⁹³ Steering committee for human rights. (CDDH) Drafting group on migration and human rights (CDDH-MIG). Draft analysis of the legal and practical aspects of effective alternatives to detention in the context of migration , (2017)

¹⁹⁴ Based on AIDA country reports 2017-2018 available at: <http://www.asylumineurope.org/>

Global Detention Project , Country Profile , available at: <https://www.globaldetentionproject.org/>

European Migration Network (EMN), The use of detention and alternatives to detention in the context of immigration policies: Synthesis Report for the EMN Focussed Study 2014, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf

Portugal	–	+	+	+	+	+	no
Ireland	–	+	–	+	–	–	no
Romania	–	+	–	+	–	–	no
Slovenia	–	+	–	+	–	–	no
Slovakia	–	+	+	–	–	–	no
Spain	+	+	–	+	–	–	yes
Sweden	+	+	–	–	–	–	yes
United Kingdom	–	+	+	+	+	+	no

3.1. Registration and documentation

The practice of using the alternative measure such as registration and documentation are observed in some EU countries. However, this alternative is not regulating by recast RCD. UNHCR and European Agency for fundamental rights proposed such alternative in their guidelines and handbooks.¹⁹⁵ This alternative is constituted the registration with state authorities and providing them with official registration documents such as “alien registration card”. This card may contain a person’s photograph and a reason of staying in the territory of the State. Such measure may be used upon arrival, or later.¹⁹⁶ Sometimes migrants have to renew these documents and these as may constitute a kind of de facto reporting requirement. According to the principle of non-discrimination, this alternative should be available to migrants who do not have a permanent address.¹⁹⁷

The benefit from this measure:

- Respect the right to liberty and security;
- Freedom of movement;
- Good chance for persons arriving without documentation to have some identification document;

¹⁹⁵ European Union Agency for Fundamental Rights (FRA) Alternatives to detention for asylum seekers and people in return procedures, (2015). available at: <http://fra.europa.eu/en/publication/2015/alternatives-detention-asylum-seekers-and-people-return-procedures>

See also UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, (2012), available at: <http://www.refworld.org/docid/50348953b8.html> [accessed 18 October 2017]

¹⁹⁶ Steering committee for human rights. (CDDH) Drafting group on migration and human rights (CDDH-MIG). Draft analysis of the legal and practical aspects of effective alternatives to detention in the context of migration, (2017), 63

¹⁹⁷ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2 April 2012 para 57

- Effective measure to prevent absconding;
- Allows authorities to establish a database with the information of the registered persons;

Nevertheless, there are some disadvantages of such alternative measure. Sometimes, asylum seekers can abuse their right and resort to forgery of documents. From state's side, it is very important that all sectors of state authority recognized such documents and provide to asylum seekers all services, including education, medicine, etc.¹⁹⁸

If it is necessary, asylum seekers may be asked to surrender travel or identification documents with the registration authorities. However, as was noted by Special Rapporteur on human rights the individuals must be provided with substitute documentations, which they may need in order to have adequate housing, access education, health-care services or for others needs.¹⁹⁹ Also this alternative to detention can minimize a risk of absconding.²⁰⁰ It is one of the simple and cost effective alternative measures. Within the EU only 10 countries use this ATD.²⁰¹

3.2. Regular reporting

In the EU law recast RCD establish such alternative as regular reporting to the authorities.²⁰² But the main problem is that there are no clear procedural standards of using such alternative. Only some guidelines and research provide some instruction and rules in implementation such measure. Regular reporting is one of the most frequently applied alternatives to detention. But very often such alternative is used in return procedure.²⁰³ This alternative consists of an obligation to report to immigration or other authorities (for example, to the police authority) at specified times, to provide information on his place of residence, to come to extend visa, receive assistance . Regular reporting is used on particular asylum seekers during the status determination procedure. Such reporting could be periodic, or scheduled by other official immigration appointments. Reporting conditions could also be to an NGO or private contractor within commu-

¹⁹⁸ Steering committee for human rights. (CDDH) Drafting group on migration and human rights (CDDH-MIG). Draft analysis of the legal and practical aspects of effective alternatives to detention in the context of migration , (2017) ,63

¹⁹⁹ Ibid. para 58

²⁰⁰ Executive Committee of the High Commissioner's Programme. Alternatives to detention ,June 2015, available at: <http://www.unhcr.org/excom/standcom/559643e59/alternativesdetention.html?query=alternative%20to%20detention>

²⁰¹ AIDA Reports 16 countries available at <http://www.asylumineurope.org/reports>

See also EMN study on alternatives to detention

²⁰² Article 8 recast RCD

²⁰³ AIDA Reports 16 countries available at <http://www.asylumineurope.org/reports>

nity arrangements.²⁰⁴ Regular reporting can vary from once a day to once or a month. This alternative is often used with designated residence or surrender of documents.

In the UNHCR research was mentioned that in some countries such as Slovenia, Lithuania, Sweden and Austria, the state authorities or the courts deciding on the alternative measure have a large margin of appreciation to decide the periodicity of reporting.²⁰⁵

It is interesting that regular reporting can be undertaken via telephone to avoid lengthy or expensive travel. For instance, such practice is used in the UK and is also mentioned in Lithuanian law.²⁰⁶ But, this alternative not currently applied in practice.

In Austria, asylum seekers have reporting duties if one of the alternatives is ordered. Applicants have to report to the police offices of the Federal Police Directorates every day or every second day. If reporting obligations are violated, the asylum seeker is detained.²⁰⁷ In Poland reporting order was used 2094 times for asylum seekers and returnees in 2017.²⁰⁸

Using reporting alternative, states have to ensure that all conditions imposed continue to meet the necessity, reasonableness and proportionality tests. It should be based on individual assessment and be proportionate to the objective pursued.²⁰⁹

If reporting obligation is used frequently, for example, every day, it could potentially infringe rights as the right to family life. In line with the principle of proportionality, high frequency reporting should only be applied exceptionally, where there is a risk of non-compliance. And, of course the vulnerability should be considered.²¹⁰

²⁰⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017]

²⁰⁵ De Bruycker, P. (Ed.), Bloomfield, A., Tsourdi, E. & Pétin, J. Alternatives to immigration and asylum detention in the EU: Time for implementation. Odysseus Network and the European Union, (2015) , 91

²⁰⁶ Art.115 of the Lithuanian Alien's law : *possibility to "report by means of communication at certain time to the territorial police Office his/her place of stay"*.

Cited from De Bruycker, P. (Ed.), Bloomfield, A., Tsourdi, E. & Pétin, J. Alternatives to immigration and asylum detention in the EU: Time for implementation. Odysseus Network and the European Union, (2015) , 89

²⁰⁷ Country Report: Austria, ECRE, 2017 available at: <http://www.asylumineurope.org/reports/country/austria>

²⁰⁸ Country Report: Poland, ECRE, 2017 available at: <http://www.asylumineurope.org/reports/country/poland>

²⁰⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017]

²¹⁰ De Bruycker, P. (Ed.), Bloomfield, A., Tsourdi, E. & Pétin, J. Alternatives to immigration and asylum detention in the EU: Time for implementation. Odysseus Network and the European Union, 2015 , 91

Advantages of this alternative measure:

- Ensures the freedom of movement within the state where the applicant is located;
- It is simple to implement for state, that is why it is frequently used;
- There is a regular contact between the authorities and the asylum seeker;
- Ensures availability of the person to asylum procedures.

There are some disadvantages of such alternative to detention:

- Long travel distances, without reimbursement of expenses for transportation – it can discourage compliance and can unfairly discriminate on the basis of economic position.²¹¹ And as result of it, asylum seeker can be detained.
- May increase fear of detention, especially when reporting is provided at police department. As a consequences, the risk of absconding raises.

3.3. Bail, bond

Recast RCD also established such alternative measure but does not provide explanation of it.²¹² This alternative is also pointed by UNHCR and FRA and other NGOs. Many countries use alternative such as release on bail, bond In this context, “*bail*” is a deposit of a sum of money to guarantee the individuals future compliance with immigration procedures. “*Bond*” is a written agreement with the authorities where the individual promises to fulfill his or her duties, sometimes requiring the deposit of a sum of money by the individual or a third person. A “*surety*” is the guarantee given by a third person that the individual will comply with the immigration procedures; to this end, the third person, the “*guarantor*”, agrees to pay a set amount of money if the individual absconds”.²¹³ Requests for surety are often included as part of bail or bond conditions. All these provisions allow persons to be released from detention. Asylum seekers must be informed of their ability to be released on bail. This requirement needs to be accessible and effective. As was emphasized by UNHCR, the bond amount must be reasonable.

The amount of bond should not be so high in order to make this alternative practical.²¹⁴ However, it is one of the main problems in practical aspects. Because, state authority sometimes

²¹¹ *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Annex A

²¹² Article 8.4 recast RCD

²¹³ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2 April 2012 para 59

²¹⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017]

establishes a high amount of money and in this case almost all asylum seeker have not such opportunity to pay.

As was noted before, states are obliged to ensure equal treatment of all non-nationals. Amnesty International pointed that *“States must ensure access to bail, bond and surety without discrimination against particular groups of non-nationals, for example on the basis of their nationality, ethnic or other origin, economic situation, or immigration or other status. In particular, states should not deny bail, bond or surety solely on the basis that a person has entered or remains on the territory irregularly. Conditions attaching to the grant of bail or release on bond or surety must be reasonable, and must not create an excessive or unrealistic burden on the individual.”*²¹⁵

In Austria the deposit and amount of the financial guarantee are regulated by the Ordinance Implementing the Aliens Police Act .This sum must be determined in each individual case and must be proportionate. The maximum is €1,717.46 for financial guarantees. But in practice, this alternative measure is not applied.²¹⁶ In Hungary, the amount of the bail can vary between €500 and 5,000. But the application of such alternative is not clearly defined by law. According to the law, the amount of bail should depend on the personal conditions and situation of the applicants as determined by the authority. But in practice, state authority does not consider such conditions. Only twice the release on bail was issued in 2017.²¹⁷ In Netherlands, such alternative as financial guarantee is used rarely.²¹⁸ There is some difficulty in using some alternative. For example, in Luxemburg, non-citizens need to have a fixed address, reception centers do not taken into account, in order to be granted alternatives to detention. But many applicants do not have a fixed address in Luxembourg, nor sufficient resources to pay bail. As consequences, there is no others options, except detention, for them.²¹⁹

Advantages:

- It is easier to apply in countries with huge flows of migrants, or for individuals who have lived long periods in the country and have sufficient financial resources;

²¹⁵ Amnesty international ,Irregular Migrants and Asylum-seekers: Alternatives to immigration Detention, 2009 , 13

²¹⁶ Country Report: Austria, ECRE,2017 available at: <http://www.asylumineurope.org/reports/country/austria>

²¹⁷ Country Report: Hungary, ECRE,2017 available at <http://www.asylumineurope.org/reports/country/hungary>

²¹⁸ Country Report: Netherlands ECRE,2018 available at:
<http://www.asylumineurope.org/reports/country/netherlands>

²¹⁹ Country Detention Reports ,GPD, Luxemburg , 2018 available at:
<https://www.globaldetentionproject.org/countries/europe/luxembourg>

- Cost effective for States because asylum seeker usually have the obligation to cover the costs for the individual concerned.²²⁰

Disadvantages:

- It is discriminatory against persons with limited funds, or those who do not have previous connections in the community.²²¹
- State has to ensure that the amount of bail is reasonable in all the circumstances otherwise high amount can result in detention or place other release conditions at risk of non-compliance.²²²
- Lack of legal assistance.

3.4. Release to supervision

Release to supervision is not regulated by EU law. Also, there is no provision in the RCD. However, there are some handbooks which provide the definition of this measure and some legal and practical aspects. Release to supervision is a guarantee provided by a third person, nongovernmental organisation or other religious organisations ensuring that the individual will comply with the asylum procedure.²²³ State also could ensure supervision. This measure support applicants while their status is being resolved. The supervision may take place by periodic home visits or registration by the public authorities or their designated representative, and may also include providing support for access to work, finding local accommodation, education, social security payments legal assistance, and other services.²²⁴ The problematic aspect of this alternative measure is a lack of legal regulation. There is no legal norm on application of such measure and it is rarely discussed in practice. That is why such measure is rarely used and there is no provision in national legislation of states. There is an only theoretical aspect of such alternative to detention.

²²⁰ Steering committee for human rights. (CDDH) Drafting group on migration and human rights (CDDH-MIG). Draft analysis of the legal and practical aspects of effective alternatives to detention in the context of migration , 2017 p 70

²²¹ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017]

²²² Steering committee for human rights. (CDDH) Drafting group on migration and human rights (CDDH-MIG). Draft analysis of the legal and practical aspects of effective alternatives to detention in the context of migration , 2017 p 70

²²³ Ibid, 68

²²⁴ Executive Committee of the High Commissioner's Programme. Alternatives to detention, 2015 available at: <http://www.unhcr.org/excom/standcom/559643e59/alternativesdetention.html?query=alternative%20to%20detention>

This alternative may take place within open or semi open reception or asylum facilities, and also in some offices of the relevant service provider. It is an opportunity for the asylum seeker lives freely in the community. Release to supervision may be a condition of the asylum seekers release and may involve direct reporting to the relevant authorities.²²⁵ But, frequently this alternative is considered as ‘unconditional release’. FRA in their report stressed that alternative to detention must be distinguished from unconditional release.²²⁶ That means that asylum seeker can be released without condition. Some authors consider that is “a starting point” to alternatives.²²⁷ In this situation asylum seeker must be aware of asylum procedure, consequences of non-compliance of such rules, and comply with all procedural standards.

Advantages of this alternative measure:

- Allows asylum seekers and their families to reside in the community;
- There is a regular contact between the authorities and the asylum seeker; (if supervision are taken by State)
- Access to medical services, education, accommodation, etc,

Disadvantages:

- Implementation of such alternative measure and mechanism of providing supervision
- Rarely used, because it is a resource-intensive measure for State.

3.5. Designated residence

Designated residence is also one of the frequently used alternative measures. This alternative is prescribed by recast RCD. States ‘[...] shall ensure that the rules concerning alternatives to detention, an obligation to stay at an assigned place, are laid down in national law.’²²⁸ That’s why within the EU near 20 countries resort to this alternative.²²⁹ Under this ATD, asylum-seekers have to reside at a specific address or within a particular region, or within special centre

²²⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017]

²²⁶ European Union Agency for Fundamental Rights (FRA) *Alternatives to detention for asylum seekers and people in return procedures*, (2015). available at: <http://fra.europa.eu/en/publication/2015/alternatives-detention-asylum-seekers-and-people-return-procedures>

²²⁷ A. Edwards, UNHCR, ‘Back to Basics: The Right to Liberty and Security of Persons and ‘Alternatives to Detention ‘of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants’, (April 2011), <http://www.refworld.org/docid/4dc935fd2>.

²²⁸ Article 8.4 recast RCD

²²⁹ AIDA Reports 16 countries available at <http://www.asylumineurope.org/reports>

See also EMN study on alternatives to detention

until their status has been determined. This ATD is frequently used with a duty to regularly report to the police department or to another competent authority. It should be noted that person does not have a choice to leave such residence and live in another place. But in some countries, asylum seeker has to report regularly but could leave such centers. In cases where designated residence is isolated, it is important to ensure that in the location of the designated residence there is the access to medical services, education and legal assistance.²³⁰ In Germany, asylum seeker authorities have to notify state authorities if he wants to leave the district for more than 3 days. In Luxembourg, applicants have to present themselves to the Directorate of Immigration when summoned by the Minister.²³¹

In Germany, asylum seeker has no right to choose place of residence. According to the Asylum act, asylum seekers have to live on the territory of the Federal state. Also, their place of residence may be restricted within some region, districts. Usually, individuals have to live in initial reception centre. This ATD are usually used for period of 3 month. In some exceptional cases, asylum seeker can apply to the state authority to be allowed to reside in some area. But in practice such decisions are rarely ordered and only in special circumstances (for example, medical services, which are available in some region). In most federal initial centers, asylum seeker have the right to move freely within the town, district but have to report to secure personal before leaving and reentering.²³²

One of the forms of designated residence is open or semi-open reception or asylum centers. Semi-open centres may include some rules and regulations. For example, reporting before leaving and entering or curfew. Asylum seekers may be required to remain in these facilities until their claims are processed. Reception centres have to ensure basic need of applicants such as housing, food, and health care. The quality of these services is different and often varies from one center to another.²³³ Such centre is available in Netherlands .It is called Centre for Asylum Seekers (AZC). AZC is considered as open centres. Asylum seekers are free to go outside. But,

²³⁰ Amnesty international ,Irregular Migrants and Asylum-seekers: Alternatives to immigration Detention, 2009 , 14

²³¹ European Migration Network (EMN), The use of detention and alternatives to detention in the context of immigration policies: Synthesis Report for the EMN Focussed Study 2014,available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf

²³² Country Report: Hungary, ECRE,2018 available at: <http://www.asylumineurope.org/reports/country/germany>

²³³ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017]

in fact, they have to report weekly and if asylum seekers fail to report twice the reception conditions will be withdrawn.²³⁴

Advantages

- Allow to place a large numbers of asylum seekers;
- Allows to control movement of applicants;
- Provides support and registration, housing, food, education and health care.

Disadvantages:

- Restriction on right to liberty and freedom of movement;
- Reception centres may become alternative forms of detention and amount to de facto detention;²³⁵
- Sometimes the conditions of such centres are very poor and asylum seeker do not have access to normal living condition.
- More expensive ATD than others alternatives.

3.6. Electronic monitoring

The most intrusive alternative to detention is electronic monitoring, or tagging. This alternative is rarely used in Europe. There is a lack of legal regulation within the EU. Only in some national legislation there is some provision on this but in fact it is rarely used.²³⁶ Electronic monitoring is primarily used in the context of criminal law and rarely in migration purpose. Electronic ‘tagging’ is a system whereby an electromagnetic device (called a ‘Personal Identification Device’ or ‘PID’) is attached to a person’s ankle or wrist keeping track of a person’s movements.²³⁷

Special Rapporteur on the human rights of migrants emphasised that electronic monitoring “*may violate the right to freedom of movement provided by article 12 of the International*

²³⁴ Country Report: Netherlands ECRE, 2018 available at: <http://www.asylumineurope.org/reports/country/netherlands>

²³⁵ Steering committee for human rights. (CDDH) Drafting group on migration and human rights (CDDH-MIG). Draft analysis of the legal and practical aspects of effective alternatives to detention in the context of migration, 2017 p 70

²³⁶ European Migration Network (EMN), The use of detention and alternatives to detention in the context of immigration policies: Synthesis Report for the EMN Focussed Study 2014, 33 available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf

²³⁷ Field O., Alternatives to Detention of Asylum Seekers and Refugees, Legal and Protection Policy Research Series. Geneva: UNHCR, 2006, 36

Covenant on Civil and Political Rights. Furthermore, the stigmatizing and negative psychological effects of the electronic monitoring are likely to be disproportionate to the benefits of such monitoring.”²³⁸ Also, such alternative as electronic tagging must be evaluated individually. If asylum seeker cannot comply with electronic tagging and in the end was detained, such measure could be discriminatory. If state authority combine electronic monitoring with other restrictions, such as a requirement to stay at home during the whole day, such restrictions might amount to house arrest, which could be seen as detention.²³⁹

Within the Europe this alternative is used rarely and only in some countries. In the United Kingdom, electronic monitoring to asylum seekers can, in theory, take 2 forms: voice recognition and electronic tagging. Only the latter is used. In most cases, a receiver of information is placed in the individual’s home and an electronic bracelet is fitted around the individual’s ankle to report whether he/she is at home at specific times. In practice, electronic tagging is used rarely and only for ex-criminals. The statistics of such case is not available.²⁴⁰

House arrest with electronic monitoring for parents of minor children residing may be used in France. Such measure is used for 45 days.²⁴¹ In Portugal the Asylum Act provides residential detention with electronic surveillance. Persons have no opportunity to leave the house. In this context such restriction is an alternative form of detention and not an alternative to detention.²⁴²

Amnesty international highlighted that *“it must only be used to achieve a legitimate objective, and applied in accordance with relevant principles of international law. Electronic monitoring should be used only after a careful assessment of the extent to which the specific measure will restrict the human rights of the individual, as well as its proportionality and necessity to fulfil a legitimate objective, and used only if, and for so long as, there is no less restrictive measure likely to achieve the same objective.”*²⁴³

Advantages:

²³⁸ Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2 April 2012 para 63

²³⁹ Ibid.

²⁴⁰ Country Report: United Kingdom ECRE,2017 available at: <http://www.asylumineurope.org/reports/country/united-kingdom>

²⁴¹ Country Report: France ECRE,2018 available at: <http://www.asylumineurope.org/reports/country/france>

²⁴² European Migration Network (EMN), The use of detention and alternatives to detention in the context of immigration policies: Synthesis Report for the EMN Focussed Study 2014,available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf

²⁴³ Amnesty international ,Irregular Migrants and Asylum-seekers: Alternatives to immigration Detention, 2009 , 15

- To increase contact with asylum seeker,
- Can monitor compliance with reporting restrictions

But, in fact there is no huge advantage of this measure, as this alternative influence negatively on human right. And may used only in very exceptional cases.

Disadvantages:

- Severe restriction freedom of movement;
- interference in people's private and family lives,
- expensive alternative measure.²⁴⁴

3.7. Home curfew/ house arrest

Home curfew/house arrest is also a extreme form of alternative to detention. Within the EU law there is no legal regulation on this question. Recast RCD does not provide such alternative to detention. Only in some national law there is a legal provision on such measure and it is considered as alternative to detention. This measure will amount to deprivation on liberty and become an alternative form of detention rather than an alternative to detention.²⁴⁵ That is a problem of implementation of such measure. As generally, it is deprived a liberty of asylum seeker and should be considered as detention. But in fact, state prescribes this measure as alternative to detention and never minded that this could breach the asylum rights.²⁴⁶ Also, state does not provide all procedural rules concerning this alternative. The lack of national legislation is also one of the important problems.

Home curfew must be proportional and necessary in each individual case. House arrest also should only be applied in exceptional cases. Working Group on Arbitrary Detention stated that 'house arrest may be compared to deprivation of liberty provided that it is carried out in closed premises which the person is not allowed to leave.'²⁴⁷

According to the French legislation house arrest is used as alternative to administrative detention. The period of home arrest is 6 months and can be renewed once for the same period. The state authority is also allowed to keep the passport or identity document of the asylum seeker. Unfortunately, there is no legal norm that does not foresee any obligation to prove the impos-

²⁴⁴ Field O., Alternatives to Detention of Asylum Seekers and Refugees, Legal and Protection Policy Research Series.: UNHCR, (Geneva ,2006) , 222

²⁴⁵ Human Rights Council ("HRC"), Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2 (April 2012),.16

²⁴⁶ Country Report: France ECRE,2018 available at: <http://www.asylumineurope.org/reports/country/france>

²⁴⁷ Human Rights Council ("HRC"), Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/20/24, 2 (April 2012),.para 64

sibility to set up alternative measures before deciding to detain asylum seekers. The test of necessity and proportionality is not implemented in such case. French state authority have systematically imposed house arrest as soon as asylum seekers are placed in the Dublin procedure.²⁴⁸

It is really hard to point some advantages of this ATD. Definitely, house arrest and home curfew restrict right to liberty, freedom of movement. Asylum seekers are deprived their right to education, to healthcare, adequate living.

3.8. Alternatives for children and other vulnerable individuals

The question of asylum seeker vulnerability is very important. Within the EU asylum law there are provisions to ensure that the detention of vulnerable persons takes into account the potentially serious impact on their health, including mental health. Mental Health Europe (MHE) issued a position paper on the need to support mental health for migrants and refugees. MHE claimed that many migrants and refugees still face barriers to accessing mental healthcare and support services, and asked to “invest in the development of culturally appropriate and accessible mental health support in a manner that respects the principle of non-discrimination and with specific attention to the needs of migrant and refugee women and child”.²⁴⁹

Under Article 21 RCD “*Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.*”²⁵⁰ These groups can be considered as *de jure* vulnerable.²⁵¹ But this list is not exhaustive.

Detention of children is frequently practice within the EU. Twenty-one member states still detain minors in practice. Unaccompanied minors are frequently detained if there is a doubt as to their age.²⁵² The UN Convention on the Rights of the Child provides a guarantee relating to

²⁴⁸ Country Report: France ECRE, 2018 available at: <http://www.asylumineurope.org/reports/country/france>

²⁴⁹ Position paper on mental health and migration, MHE, October 2016, available at: <https://mhe-sme.org/position-paper-on-mental-health-and-migration/>

²⁵⁰ Article 21 recast RCD

²⁵¹ Philippe De Bruycker (Ed.) Alice Bloomfield Evangelia (Lilian) Tsourdi Joanna Pétin Alternatives to immigration and asylum detention in the EU, 2015 p 56

²⁵² Marie Walter-Franke, Asylum detention in Europe: State of play and ways forward, Affiliate research fellow, Jacques Delors Institut – Berlin, 18 May 2017

the protection of the rights of children including asylum-seeking children. Article 37 b says “No child shall be deprived of his or her liberty unlawfully or arbitrarily. 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”²⁵³

In asylum context, one of the aims UNHCR Global Strategy 2014-2019, was to support governments to end the end the detention of children.²⁵⁴ UNHCR stressed that children, should not be detained at all. “The best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children”.²⁵⁵

Nowadays, children are the most vulnerable group in the Europe. The principle of the best interests of the child is too often ignored in asylum and immigration procedures. Uncombined children as well as children with parents often suffer from violation of their rights.²⁵⁶ It is very important that children should not be detained only for reason that they are separated or uncombined or on the basis of his or her migration or residence status. If it is possible minors have to be released in to the care family members. If this possibility is not available, state authority has to ensure that children are placed in special centre and are provided with appropriate care and supervision.²⁵⁷ It should be noted that ‘whether they are migrants, refugees or internally displaced, they are always children: entitled to protection, support and all the rights enshrined in the CRC’.²⁵⁸

ECtHR emphasize that “It is important to bear in mind that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant. Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The Court has also observed that the Convention on the Rights of the Child encourages States to take appropriate measures to ensure that

²⁵³ Convention on the Rights of the Child available at:
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

²⁵⁴ Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019, 2014, available at: <http://www.unhcr.org/detention.html>

²⁵⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017]

²⁵⁶ Council of Europe Strategy for the Rights of the Child 2016–2021 available at :
<https://www.coe.int/en/web/children/children-s-strategy>

²⁵⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017] para 54-57

²⁵⁸ Vulnerability of unaccompanied and separated child migrants ,European Parliament, December 2016, available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/595853/EPRS_BRI\(2016\)595853_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/595853/EPRS_BRI(2016)595853_EN.pdf)

a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents”.²⁵⁹

It is well- documented that deprivation of their freedom can have a harmful impact on children, and lead to the beginning of psychological disorders in the short or long term. Minors held in detention are at risk of post-traumatic stress disorder.²⁶⁰

UNHCR provide various options for governments on care arrangements and alternatives to detention for children and families and also pointed that children should not be detained at all and the best interests of the child must be a primary consideration.²⁶¹

UN Special Rapporteur on Torture, also held that “within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children”,²⁶²

In the UNHCR progress report was highlight that in some research countries have been made significant progress towards the goal of the Global Strategy to end the detention of children. Positive steps were made, such as adoption of protective laws and practices against the detention of children, improved implementation of the best interests of the child principle. As statistics shows the number of detained children decrease.²⁶³

²⁵⁹ *Abdullahi Elmi and Aweys Abubakar v. Malta*, ECtHR, final Judgment 22.02.2017 available at: <http://hudoc.echr.coe.int/eng?i=001-168780>

In this case two unaccompanied minors 16 and 17 years old were detained in 2012 in Safi Barracks Detention Centre, Malta. They were claimed that the context of detained decision was not explained them in language which they understand. They were detained with adult men. Physical conditions were basic and detainee often lacked the most basic necessities, including clothing, particularly shoes. Detention center was overcrowded. One of the applicant have medical problem with health. He argued that there were no access to medical care and the quality of medical provided. They received very little about stages of the asylum procedure. In this case court found a violation of Article 3 of the Convention; Article 5 § 4 of the Convention; Article 5 § 1 of the Convention;

²⁶⁰ Arbitrary detention of women and children for immigration-related purposes, European Parliament, March 2016 available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577991/EPRS_BRI\(2016\)577991_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577991/EPRS_BRI(2016)577991_EN.pdf)

²⁶¹ UN High Commissioner for Refugees (UNHCR), Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families, 2015 available at: <http://www.unhcr.org/detention.html>

²⁶² UN Special Rapporteur on Torture, *Thematic Report on torture and ill-treatment of children deprived of their liberty*, 5 March 2015 (A/HRC/28/68) para 80

²⁶³ Progress Report mid-2016 UNHCR Global Strategy to support governments to end the detention of asylum-seekers and refugees – 2014-2019, 2016 <http://www.unhcr.org/protection/detention/57b579e47/unhcr-global-strategy-beyond-detention-progress-report.html?query=alternative%20to%20detention>

UNHCR will continue to support the ending of child detention and to support Governments in developing alternative detention for children and families in the context of asylum context.²⁶⁴

ECtHR also pointed that state have to examine whether less restrictive measures would be available and sufficient:

*“...In spite of the fact that they were accompanied by their parents, and even though the detention centre had a special wing for the accommodation of families, the children’s particular situation was not examined and the authorities did not verify that the placement in administrative detention was a measure of last resort for which no alternative was available. The Court thus finds that the French system did not sufficiently protect their right to liberty.”*²⁶⁵

Moreover, there has been an increase in detained families with children in 2015 and 2016. In 2016, 182 children have been placed in administrative detention with their parents. Despite the ruling of ECtHR the detention of minors must be used as a last resort, 4,285 children have been placed in detention in 2016. in Mayotte. Children are often detained with adults who are not their parents.²⁶⁶

It should be noted that detained children must have the same minimum procedural guarantees as adults, but they must be adapted to their specific needs. An independent and qualified curator should be appointed for such children. During detention, the right to education must be respected. Provision should be made for their rest and play, with other children, which is essential to a child’s mental health and will prevent stress and injury.²⁶⁷

Within the EU legal regulation is different. In Austria Children under the age of 14 cannot be detained. Families with young children are detained only for 24 hours prior to forced return.²⁶⁸ In Belgium families with minor children who claim asylum at the border are placed in facilities adapted to the needs of such families. The detention of unaccompanied children is prohibited by law. Under new legislation, unaccompanied children cannot be placed in detention

²⁶⁴ UNHCR’s position regarding the detention of refugee and migrant children in the migration context, January 2017 available at: <http://www.unhcr.org/protection/detention/58a458eb4/unhcrs-position-regarding-detention-refugee-migrant-children-migration.html>

²⁶⁵ *Ccase of Popov v. France*, ECtHR, 39472/07 and 39474/07, Judgment 19.01.2012 available at: <http://hudoc.echr.coe.int/eng?i=001-108710>

²⁶⁶ Country Report: France ECRE, 2018 available at: <http://www.asylumineurope.org/reports/country/france>

²⁶⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017]

²⁶⁸ Country Report: Austria, ECRE, 2017 available at: <http://www.asylumineurope.org/reports/country/austria>

centres. When they arrive at the border, they are transferred to the Observation and Orientation Centre for unaccompanied children.²⁶⁹

National authority of Romania stated that children are not detained in public custody but in fact 80 children were detained public custody centres in 2017. In 2017 a mother and her 2-year-old child, who arrived in Romania by boat, were detained in the detention centre as they did not make an asylum claim from the very beginning.²⁷⁰

In Italy, the law clearly provides that unaccompanied children can never be detained. Unfortunately, there is a practice to detain children. In 2017 Association for Legal Studies on Immigration found that 80 unaccompanied children were detained with adults, without any written detention order or information on the possibility to seek asylum. They have not possibility to communicate with the outside world.²⁷¹ In Ireland, detention of unaccompanied children is prohibited and is not used in practice.²⁷²

It should be noted that state have to ensure the right of child not only in law but in practice also. They have to comply with principle of the best interests of the child, avoid violation of child's rights, implement alternatives to detention and ensure that such implementation is fully respected in practice.

Vulnerability has to be considered before resorting to detention. Except children, there are other groups of vulnerable persons such as persons with serious illnesses, persons with mental disorders, asylum-seekers with disabilities, older persons. In this context, state authority has to ensure assess the special reception needs.

Within the EU only some member states have specific procedures and vulnerable individuals. A good procedures aspect is established in Netherlands. Special rules are used for persons who are in need of special procedural guarantees on account of torture, rape or other serious forms of psychological, physical and sexual violence, for whom adequate support cannot be ensured ; persons for whose individual circumstances border detention is disproportionately burdensome. Detention decision is based on the individual and special circumstances produced by the asylum seeker. In Sweden vulnerable persons are not excluded from detention. In Germany some federal states have special regulation for special group such as elderly person, nursing mother, person with disability, single parents. In Poland asylum seekers whose is considered that

²⁶⁹ Country Report: Belgium, ECRE,2017 available at: <http://www.asylumineurope.org/reports/country/belgium>

²⁷⁰ Country Report: Romania , ECRE,2018 available at: <http://www.asylumineurope.org/reports/country/romania>

²⁷¹ Country Report: Italy, ECRE,2018 available at: <http://www.asylumineurope.org/reports/country/italy>

²⁷² Country Report: Ireland, ECRE,2018 available at: <http://www.asylumineurope.org/reports/country/republic-ireland>

they are victims of violence or have a disability or are unaccompanied minors are not placed in detention centres. This is also applicable to asylum seekers whose detention causes a serious threat to their life or health. In practice such groups are detained. For example, the mother with two minor children unlawfully placed in detention centre. They were victims of violence in the country of origin. But during the asylum procedure they were not recognized as such without examining all circumstance and were detained by local authority. The Supreme Court pointed that the court is obliged to call an expert witness when assessing the influence of detention on the mental state of a asylum seeker.²⁷³

Also, UNHCR stressed that pregnant and nursing woman should not be detained .State have to provide safeguards against sexual and gender-based violence.²⁷⁴ In all EU members woman are accommodated separately.²⁷⁵

Interim conclusion

In conclusion, it should be noted that international organization and NGOs are still working on alternatives' question. The problem is still relevant as there is a problem of implementation of alternatives to detention in law and practice. As we see there are a lot of possible schemes of alternative and the most suitable one states can choose to the national policy. Moreover, there is a problem of legal regulation of such alternative measures in the EU level. Of course, there are a lot of handbooks and guidelines for states but still it is not enough. Moreover, statistics show that a lot of states implement some alternative ways to national legislation but in practice they are rarely used. Recast RCD defines only few alternatives to detention and encourages states to implement them to national legislation. Unfortunately, there is no provision about procedural aspects of such less coercive measure, how they should be applied, criteria of alternative, etc. There is necessity to adopt such regulation and it will probably achieve better result of applying this alternative to detention. Moreover, as research shows the question of detention of vulnerable group is still actual and discussable. The UNHCR provides a strategy in order to end detention of children. And it should be noted that in some states there are a positive steps in such directions. Special centers for children exist and other possible alternatives. In reality, we can see that deten-

²⁷³ AIDA Reports 16 countries available at <http://www.asylumineurope.org/reports>

²⁷⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html> [accessed 18 October 2017]

²⁷⁵ European Migration Network (EMN), *The use of detention and alternatives to detention in the context of immigration policies: Synthesis Report for the EMN Focussed Study 2014* , 46-47, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf

tion of vulnerable group is varying state by state. Due to international obligation, state has to ensure the rights and freedom of every person regardless their legal status. States have to provide procedure guarantee for such group not only in papers but in practice too. Administrative detention should be only a measure of last resort and used in exceptional cases.

CONCLUSIONS

1. Detention of asylum seekers should be a measure of last resort and when there is no more suitable restrictive measure. The purpose of government in migration policy can be succeeded with using ATDs instead of detention. Nevertheless, the main purpose is that asylum seekers cannot be detained at all.
2. The obligation of considering alternatives before resorting to detention is well-established at international and European level. Nowadays, many states adopted legislative on alternatives and provide a range of policy and legislative reforms to limit the use of detention of asylum seekers. Alternative to detention allow asylum seekers to have access to medical services, education, good condition of living and reside in the community with freedom of movement while their migration status is being resolved. Moreover, some states provide guarantee s for vulnerable persons. But it is still clear that it needs further development. There is a serious gap in implementation alternatives in law and implementation existing rules in practice. Sometimes, states unable to cope with the high influx of refugees in a proper way and order arbitrary and unlawful detention as they are not able to analyse alternative measure.
3. There is a range of available alternatives to detention. The EU, some international organisation, NGOs and ECtHR, have been working on this question for many years and proposing a variety of alternatives. States can choose some of them and implement them effectively. Some alternatives are more restrictive, some less, but as a result they are better solution and are more suitable to upholding human rights. Moreover, there is a range of benefits from alternatives. Alternatives are less harmful than detention, guarantee human rights and support health and dignified life. Available statistic shows that alternative to detention is cheaper than detention, better and more effective asylum systems.
4. There are a lot of official documents, recommendation, papers and specific research which promote to use alternative measures and established clear obligation to consider alternatives before resorting to detention. In spite of this fact, some states still have not established this obligation in national law. As a consequence, this gap creates an obstacle for using alternative measure. Constantly, ECtHR in many cases found violation of ECHR through arbitraty detention and stress that state have to consider less coercive measures. But still this approach does not solve the problem of alternatives' application.

5. One of the problems is incomplete regulation of alternatives to detention within European level. Only recast Reception Condition Directive establishes some alternatives measure but does not provide specific rules on regulation and implementation of it. There is no legal regulation on providing procedural aspects on alternatives and with clear and comprehensive analysis which would be obligatory for states.

RECOMMENDATION

- States have to review their migration and asylum policies concerning detention of asylum seekers which violate their human rights and fundamental freedom and have to follow the obligation prescribed by international and EU law. EU member states have to provide detailed grounds for detention in national legislation, and resort to detention in exceptional cases. Before resorting to detention, it is important to determine possible alternative measure.
- All states should focus on alternative measure and provide proper legal mechanism of implementation and procedure guarantee for asylum seeker, including automatic review. For instance, publishing national guidelines on applicable criteria on alternatives with clear ground of detention, mechanism of using alternatives, legal safeguards, recommendation for judges and instruction for border guards etc, supported by EU, NGOs, local legal organisations etc.
- Take into consideration the vulnerability of person, state authority has to establish rules of application procedure of such individuals and provide special centres for them. States have to provide special verification mechanism with medical assistance of such individuals. It is possible to create special centres where a health of such persons will be examined.
- States should focus on international cooperation between each other. Providing information on alternatives to detention, sharing experience on implementation and providing statistics on the relevant issue.

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ABSTRACT

The issue relating to alternatives to detention of asylum seekers highlighted in a lot of international as well in regional documents. The main purpose of the thesis is to analyse the issue of detention of asylum seekers and alternatives to detention. According to the international legislation state have the right to detain asylum seekers but no one shall be subjected to arbitrary or unlawful detention. Moreover, state have legal obligation to examine alternative measure in order to protect human rights. The special attention is given to analyse the implementation such alternatives in law and practice by states. Consequently, this paper comes to conclusion that state use detention of asylum seeker in arbitrary way and there is a problem of implementation practical aspects of alternative. Legislations of some countries are not fully harmonised with international standards and do not provide guarantee for asylum seeker.

Keywords: human rights, detention, alternative measure, asylum seeker, deprivation of liberty, freedom of movement.

SUMMARY

ALTERNATIVES TO DETENTION OF ASYLUM SEEKERS

The aim of the master thesis is to evaluate the legal and practical aspects that minimise or avoid the need to deprive the liberty of asylum seekers.

The thesis consists of introduction and three parts which are divided into chapters. The first part of the thesis is devoted to the general overview of international refugee and human rights law, relating to the rights to liberty and security and freedom of movement of asylum seekers. Also this part outlines the detention as a measure of last resort of asylum seekers. This part is supplied by asylum detention statistic provided by European Council on Refugees and Exiles and Eurostat.

The second part of the thesis is concerned with the legal framework of alternatives to detention. This part provides the overview of EU national legislation on alternatives to detention and comparative analysis on it. Also the procedure aspects is defined in this chapter such as where the issue of ATDs arises, guarantees for asylum seekers. This part devoted to states law regarding to the principle of necessity and proportionality. Detention should be used only as a measure of last resort only in exceptional cases with the principle of necessity and proportionality. Moreover, I conclude that state do not follow this principle in all cases and frequently resort to detention without examination all circumstances of case.

The third part of the thesis analyses the possible range of alternative measure. I conclude that there is no exhaustive list of alternatives measure and state can choose appropriate scheme of alternative. Also this part is concerned with the analysis of states practice of using different types of alternatives with advantages and disadvantages for states and asylum seekers. The question of vulnerability is defined in this part. I found out that only few states have mechanism to identify vulnerable individuals and groups.

ANNEX 1

Comparative analysis of detained asylum seekers within the EU ²⁷⁶

Countries	Number of asylum seeker 2015	Asylum seekers detained in 2015	Number of asylum seeker 2016	Asylum seekers detained in 2016	Number of asylum seeker In 2017	Asylum seekers detained in 2017
Austria	68,589	Not available	42,073	first half of 2016 14,661	24,296	4,962
Belgium	27,076	January-September 1,492	18,710	6,311	19,688	Not available
Bulgaria	12,738	12,256	19,418	11,314	3,700	2,194
Croatia	162	20	2,234	50	880	134
Cyprus	1560	January-September 100	3055	187	4582	238
Czech Republic	Not available	8,500	1475	Not available	1445	Not available
Denmark	20,935	Not available	8,789	Not available	3220	Not available
Estonia	230	Not available	175	Not available	190	Not available
Finland	32346	Not available	5,519	Not available	4990	Not available
France	50,840	1,293	85,244	Not available	100,412	Not available
Germany	362,153	Not available	745,545	Not available	222683	Not available
Greece	8,519	January-September 2,164	51,091	4,072	58,661	9,534

²⁷⁶ Based on AIDA country reports from 2015-2017 available at: <http://www.asylumineurope.org/>

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Hungary	175,960	2393	29,432	2,621	3,397	2498
Italy	59,165	Not available	123,370	2,984	130,119	Not available
Latvia	330	Not available	350	Not available	355	Not available
Lithuania	315	262	430	Not available	495	Not available
Luxembourg	2,505	Not available	2,160	Not available	2430	Not available
Malta	990	Not available	1,745	20	1,619	43
Netherlands	34,958	Not available	20,700	1,780	16,785	1,540
Poland	8,340	first half of 2015 547	12321	603	5,053	246
Portugal	Not available	2,071	1,469	2,444	1,750	Not available
Ireland	1770	Not available	2245	Not available	2,910	Not available
Romania	1260	Not available	1880	Not available	4,820	690
Slovenia	275	Not available	1310	Not available	1,476	48
Slovakia	330	Not available	145	Not available	160	Not available
Spain	14,780	Not available	16,544	769	31,738	1,380
Sweden	149,028	3,524	28,939	3,714	25,666	4,379
United Kingdom	22,314	11,146	30,603	13,230	33,512	12,916

HONESTY DECLARATION

DD/MM/YYYY

Vilnius

I, _____ Sofiia Zherebiuk _____, student of
(name, surname)

Mykolas Romeris University (hereinafter referred to University),
International Law programme

(Faculty /Institute, Programme title)

confirm that the Bachelor / Master thesis titled

“___Alternatives to detention of asylum seekers” _____
_____:

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

(signature)

(name, surname)