

Submission of the European Council on Refugees and Exiles to the United Nations Special Rapporteur for the human rights of migrants: Ending immigration detention of children and seeking adequate reception and care for them

Introduction

The European Council on Refugees and Exiles (ECRE) is an alliance of 106 NGOs across 40 European countries that aims to protect and advance the rights of refugees, asylum-seekers and other forcibly displaced persons in Europe and in Europe's external policies. ECRE's core activities include Legal Support and Litigation, Advocacy and Communications.

ECRE welcomes the decision of the UN Special Rapporteur on the human rights of migrants to focus his next thematic report on the issue of immigration detention of children, as well as the call for submissions by relevant stakeholders. This submission aims to provide general information on legislation regulating child detention across Europe and to identify important practices and challenges in Belgium, Poland, Cyprus and Austria in response to Questions 1, 2 and 4. The submission is based on the information provided by ECRE Members and the National Coordinators of the European Legal Network on Asylum (ELENA). Although the submission focuses on specific states and practices, ECRE notes multiple challenges in addressing child detention in Europe; in relation to Greece, some have been documented by the International Commission of Jurists and the Greek Council for Refugees in their joint submission to the Special Rapporteur.

In line with their particular vulnerability and inherent need for protection, children enjoy a special status under international human rights law. Art.3 of the UN Convention on the Rights of the Child (CRC) establishes the principle of best interests of the child, which must inform all actions taken regarding children and should be the primary consideration in all procedures involving them. At the European Union (EU) level, the Charter of Fundamental Rights of the EU (CFREU) has enshrined this principle in Art.24, along with a child's right to receive the care and protection that is necessary for their wellbeing. In all their actions implementing EU law, including during the implementation of EU asylum law, EU Member States are bound by the provisions of the CFREU and are required to provide conditions, procedures and information to children in order for them to effectively exercise their rights.

In the migration detention context, the [Joint General Comment](#) of the UN Committee on the Rights of the Child and the UN Committee on Migrant Workers stipulates that, due to the harm inherent in deprivation of liberty, detention is never in the best interests of the child. A general framework for the deprivation of liberty of children is laid down in Art.37(b) of the CRC, which provides that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, migration procedures cannot have consequences similar to those derived from the commission of a crime. The last resort principle, which applies in the context of juvenile criminal justice, is not applicable in immigration proceedings as it would be incompatible with the principle of the best interests of the child. Hence, children, whether unaccompanied (UAM) or travelling with their families, should be placed in non-

custodial community-based settings. UAM are entitled to special protection and assistance, including the assistance of a guardian, and the right to be heard.

Question 1: Legislation or policies that prohibit or restrict the use of immigration detention of children and their families

Under the EU legal regime, children may be placed in immigration detention pending asylum procedures, intra-European transfers and return procedures, as regulated in the [Common European Asylum System](#) (CEAS) and the [Return Directive](#). EU legislation does not prohibit child detention but provides that UAM and families with children may only be detained as a measure of last resort and for the shortest appropriate period of time. The best interests of the child should be primary consideration. In their transposition of EU legislation, European states have taken various approaches with some of them prohibiting child detention and others permitting it with restrictions.

The legislation of several EU member states prohibits detention of UAM. Legislation of **Belgium** ([Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers](#) (Aliens Act), Art.74/19), **Bulgaria** ([Law on Aliens](#), Art.44(6)), **Slovakia** ([Act on Residence of Aliens](#), Art.88(8)), and **Spain** ([Ley Orgánica sobre derechos y libertades de los extranjeros en España y su integración social](#)), Art.62(4)) explicitly prohibits detention of UAM. In **France** ([Code de l'entrée et du séjour des étrangers et du droit d'asile](#), Art.L511-4 and L521) and **Italy** ([Consolidated immigration law](#), Art.19(1-bis)), children cannot be subject to removal, hence neither to immigration detention. However, the practice in these countries shows that UAM may end up in immigration detention during age assessment procedures, following inaccurate age assessments, or, as is the case in Bulgaria, by being “attached” to unrelated adults with whom they were apprehended.

In **Belgium**, legislation prohibits child detention and UAM are instead placed in a federal reception centre, a Red Cross centre, or a local reception centre. An exception is foreseen for UAMs arriving at the border when there are doubts as to their age. In such circumstances, they can be detained at the border during an age assessment procedure for a maximum of 6 days. Afterwards, UAMs are transferred to an Observation and Orientation Centre (OOC) for UAMs, based on Art.40 and 41 of the [Reception Act](#). The OOC are managed by Fedasil, the Belgian Federal Reception Agency, and are legally considered a detention centre at the border, meaning that the child has not formally entered Belgian territory. Following the child’s placement in that centre, the Aliens Office has to find a durable solution in 15 days, which can include return in the event of a rejected asylum application. Otherwise, access to the territory has to be formally granted.

Other EU member states, including **Cyprus** and **Poland**, also prohibit the detention of asylum-seeking children. In **Cyprus**, the [Refugee Law of 2000](#) prohibits the detention of asylum-seeking children, whether unaccompanied or with their families (Art.9ΣΤ(1)). The [Aliens and Immigration Law](#) provides that children can be detained as a last resort and for the least possible time (Art.18ΠΓ(1)). In practice, children are generally not detained, including in cases where there may be doubts regarding their age. Currently, they are often released when they state that they are in fact under 18, especially if an NGO intervenes. UAMs are accommodated in youth hostels, which are run either by the state or NGOs. Families with

children are never detained in practice; in fact, there are no available detention facilities for families with children.

In **Poland**, UAMs in asylum procedures should not be detained ([Law on Protection](#), Art.88a(3)) but, in practice, they are detained during age assessment procedures when there are doubts regarding their age. Those qualified as minors are eligible for a foster care scheme which is run by Polish regional government units. Under this scheme, UAMs who have applied for asylum may reside in a foster family or a care institution until a decision on their guardianship is reached. Under Art.61(7) of the Law on protection, courts are obliged to consider the application for a minor's placement in foster care immediately and, in any event, no later than within 10 days. Medical and psychological care for minors residing in care institutions is provided on site.

UAMs who are not in the asylum procedure may be detained if they are over 15 while a court decides whether they are to be placed in a care shelter or a detention centre ([Law of 12 December 2013 on foreigners](#), Art.397(1)-(3) and 414(4)). When detained, UAM are placed in a detention centre in Ketrzyn, where adequate rooms (with 15 beds in total) are separated from the remaining part of the centre. In 2019, 24 UAMs were placed in the Kętrzyn detention centre. Families with children may currently be placed in guarded centres in Ketrzyn, Biala Podlaska and Przemysl, with a new centre under construction in Lesznowola.

Besides Poland, several other European countries prohibit detention of UAM below a certain age. As in **Poland**, children below the age of 15 cannot be detained in the **Czech Republic** ([Act on Foreign Nationals](#), Art.124(1)), **Finland** ([Aliens Act](#), Art.222), and **Switzerland** ([Loi fédérale sur les étrangers et l'intégration](#), Art.79(2)), and those below the age of 14 cannot be placed in immigration detention in **Austria** ([Aliens Police Act](#) (FPG), Art.76(1)) and **Latvia** ([Immigration Law](#), Art.51(1)).

In **Austria**, children under the age of 14 cannot be detained. In practice, they are first accommodated in special centres for UAM managed by federal authorities and are later placed under the authority of the provinces, which involve NGOs in accommodation and care provision. However, children below the age of 14 who are not UAM can be detained with their families for brief periods prior to removal providing that a detention facility can ensure child-appropriate accommodation (FPG, Art.79(5)). In practice they tend to be detained for 2-3 days prior to removal in the Zinnergasse facility. This facility has 12 family apartments, is specifically equipped for families and children, and staff is not uniformed. Austrian legislation provides further rules restricting detention of children, depending on their age group. Children aged between 14-16 should be placed in alternatives to detention (ATD) unless facts justify the assumption that the objective of detention cannot be achieved with alternatives (FPG, Art.77(1)). Children older than 16 may be detained if the centre is age-appropriate and promotes their development (FPG, Art.79(2)). Between 2016-2019, on average, 26 children from this age group were detained annually.

Some other countries allow detention of children only on specific grounds (**Netherlands** ([Aliens Decree](#) and [Aliens Circular](#)) and **Sweden** ([Aliens Act](#), Ch.10, §2)) or for a limited time (**Sweden** 6 days ([Aliens Act](#), Ch.10, §5); **Finland** 6 days ([Aliens Act](#), Art.122)).

Question 2: Existing non-custodial alternatives to immigration detention (ATD) of children

In order to qualify as an ATD, restrictive measures should be a genuine alternative to deprivation of liberty and not an alternative to liberty. In other words, measures applied in circumstances where detention does not have a legal basis and would not normally be imposed cannot be considered ATD. In countries which allow child detention, in line with the principle of last resort, ATD should be applied wherever possible.

Under **Belgium's** Aliens Act (Art.74/6 and 51/5), less coercive alternative measures should be considered before imposing detention. There are three ATD: open housing units, personal accommodation upon agreement and measures to prevent absconding. Foreseen in the [Arrêté royal de 14 mai 2009](#), open housing facilities ("return homes") accommodate families with children pending their return and following the assignment of an accommodation supervisor. Family members are allowed to enter and exit without requesting permission, provided that one family member is always present in the house. Access to education is secured for children, although not all children under this scheme go to school. Second, families can stay in their own homes (Aliens Act, Art.74/9(3)), based on agreement with the Aliens Office ([Arrêté royal de 17 Septembre 2014](#)). Third, measures to prevent absconding (Aliens Act, Art.74/14(2), [Arrêté royal de 8 Octobre 1981](#)) include reporting obligations, financial guarantees or surrender of copies of identity documentation.

In **Austria**, the above-mentioned Zinnergasse facility also has a section functioning as ATD for families. This section has 17 housing units and people placed there can leave the centre during the day. Reportedly, personnel is not uniformed and the conditions are child-friendly.

According to information provided by the **Polish** authorities, ATD under Art.88 of the Law on Protection are widely used in cases of families of asylum applicants. In the first half of 2019, 71 minors (including 13 UAMs) were placed in detention centres in comparison with 327 minors for whom alternative measures were imposed.

Question 4: Challenges and/or obstacles in the development and/or implementation of non-custodial ATD of children and their families

In **Belgium**, the detention of families with children has resumed since mid-2018, due to supposedly large number of absconding cases from return homes. Under the Aliens Act (Art.74/9(3)(4)), families can be detained if they do not cooperate with the procedure (i.e. do not comply with conditions agreed upon with the Aliens Office) or have absconded. Detention can also take place upon arrival, when the arriving family does not meet the requirements for entry. Detention may last up to two weeks and can be extended for another two. Families are detained in specific facilities near the airport ("family units"), which are equipped with outdoor playgrounds. In April 2019, the initial act establishing the rules of closed family units near the airport ([Arrêté royal du 22 juillet 2018](#)) was suspended by the Council of State and no families have been detained since then. The Council of State has not yet delivered a decision on the annulment of this act.

In **Austria**, a number of practical challenges have been identified as regards the access to socio-economic rights of people placed in ATD in the Zinnergasse facility. There is a problem of access to healthcare, as individuals do not receive basic care, nor can they benefit from insurance. Children are allowed to go to school but must return for the night. This is often a problem as some children may not be able to go to school and return to the facility on time due to where they previously lived. Education is not provided in the Zinnergasse facility.

In **Poland**, the use of detention is prevalent for families who are transferred back to the country under [the Dublin Regulation](#), after having left during the asylum procedure. Moreover, the best interests of the child are not properly assessed in detention proceedings, which is exacerbated by lack of specific guidelines on best interest assessments. Courts reportedly find that placing the whole family in detention complies with the child's best interests as it prevents the separation of families. Children are not involved in the proceedings and cannot exercise their right to be heard. Courts disregard psychosocial expert opinions regarding the negative impact of detention measures on a child's well-being. The use of ATD is also affected by the courts' findings that an asylum-seeking family may not have a regular place of residence or money to secure a bail option, despite the applicants' right to reside in reception centres and receive reception benefits. Despite the use of ATD mentioned above, the total number of 156 detained children in 2019 remains concerning. Detention is not always imposed for the shortest time-period, even in the case of children. In 2018, the stay of children in detention centres averaged 115 days, exceeding even that of adult detainees in some cases. Lastly, the system for the appointment of guardians for UAM is not effective. In 2019, none of the appointed guardians appealed against the placement of a child in detention or extension of detention period.

Recommendations

- Detention can never serve the child's best interests. ECRE recommends that the Special Rapporteur confirm **the incompatibility of child detention with the best interests of the child by inviting states to explicitly prohibit child detention for migration purposes and to introduce clear non-detention policies for minors.**
- In line with the child's inherent need for protection, ECRE recommends that the Special Rapporteur promote **a care-centred approach to receive and safely accommodate unaccompanied children in facilities that ensure child-friendly supervision and non-carceral institutional support, including by creating robust guardianship systems.** Families with children should also be placed in appropriate facilities that adequately ensure their dignity and well-being.
- Where states permit detention of children under specific circumstances, ECRE recommends that the Special Rapporteur endorse **a strict and narrow rationale for child detention measures, whose sole aim should be to protect the child's well-being from an exceptional and imminent danger and only for the shortest duration possible.** Under no circumstances should detention replace obligations of reception, care and accommodation of unaccompanied children or families.

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