LATVIJAS CILVĒKTIESĪBU CENTRS

LATVIAN CENTRE FOR HUMAN RIGHTS

Synthesis Report

Steps to Freedom. Monitoring detention and promoting alternatives to detention of asylum seekers in the Czech Republic, Estonia, Latvia, Lithuania, and Slovakia

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This report is prepared in the framework of the project "Steps to Freedom. Monitoring detention and promoting alternatives to detention in Latvia, Lithuania, Estonia, Slovakia and the Czech Republic" coordinated by the Latvian Centre for Human Rights and implemented in co-operation with the following partner organisations:

LIETUVOS RAUDONOJO KRYŽIAUS DRAUGIJA

Lithuanian Red Cross Society (Lithuania)

Jaan Tõnissoni Instituut (Estonia)

HUMAN RIGHTS LEAGUE
LIGA ZA ĽUDSKÉ PRÁVA

Human Rights League (Slovakia)

ORGANIZACE PRO POMOC UPRCHLÍKŮM

Organization for Aid to Refugees (Czech Republic)

UNHCR
The UN Refugee Agency

UNHCR Regional Office for the Baltic and Nordic Countries (Sweden).

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Riga, 2011

SYNTHESIS REPORT

Introduction

i. Background and aims

The Project "Steps to Freedom" has been initiated by the Latvian Centre for Human Rights[1] with an objective to assess the implementation of the Community legislation on the **detention practice vis-à-vis asylum seekers - including "failed" asylum seekers whose claims have been rejected by a final court decision** - in five EU Member States, namely the Czech Republic, Estonia, Latvia, Lithuania and Slovakia. In particular, the project aims at assessing whether States' legislation and practices fully comply with the European Union (EU) acquis and international standards.[2] Lastly, the report looks at the implementation of alternatives to detention and puts forward policy recommendations with regard to further strengthening the measures that are currently being developed. The research aims at supporting the UNHCR findings and policy recommendations adopted within the framework of the Global Roundtable on Alternatives to detention of Asylum-seekers, Migrants and Stateless Persons adopted in May 2011.[3] It also upholds the recommendations made by the EU Agency for Fundamental Rights and the policy guidelines developed by non-governmental organizations (NGOs), such as the Jesuit Refugee Service (JRS) and the International Coalition on Detention.[4]

The use of detention as migration-control and pre-expulsion mechanisms has blossomed across Europe over the past ten years. Lengthy detention of migrants has been a major facet of the phenomenon of criminalization of migration in Europe. Against this background, both the European Union and the Council of Europe have paid particular attention to this phenomenon and an important set of legal standards have been developed respectively by these two organizations over the recent period. Immigration detention has also been at the centre of intense political debates. Most noticeably, the Parliamentary

[1] The project has been co-funded by the European Refugee Fund (1 July 2010 – 31 December 2011) and implemented in cooperation with the following partners: the Organization for Aid to Refugees, the Czech Republic; the Jaan Tõnissoni Instituut, Estonia; the Lithuanian Red Cross Society, Lithuania; the Human Rights League, Slovakia; the UNHCR, Regional Office for the Baltic and Nordic Countries.

[2] See enclosed the list of instruments in the Annex I.

[3] UNHCR - OHCHR, Global Roundtable on Alternatives to detention of Asylum-seekers, Migrants and Stateless Persons, 11-12 May 2011 available at http://www.unhcr.org/refworld/docid/4e315b882.html

[4] European Union Agency for Fundamental Rights, Detention of Third Country Nationals in Return Procedures, November 2010; JRS, Alternatives to Detention, working paper, October 2008; IDC, There Are Alternatives – A Handbook for Preventing Unnecessary Immigration Detention, 2011.

Assembly of the Council of Europe has recently invited the member states to *"progressively proscribe administrative detention of irregular migrants and asylum seekers, drawing a clear distinction between the two groups, and in the meantime allow detention only if it is absolutely necessary to prevent unauthorized entry into the country or to ensure deportation or extradition, in accordance with the European Convention on Human Rights,[...] as well as to ensure that detention is authorized by the judiciary".*[5]

A first assumption for launching such a research in the selected States is that there are significant disparities among them with regards to the interpretation of the grounds of detention in law, rules regulating conditions of detention and the rights to lodge asylum applications in detention and to be released from detention and the availability of alternatives to detention.[6] When assessing the issue of detention in the five countries of concern, one should bear in mind the limited numbers of asylum applications in the countries of concern which by enlarge are still transit countries, although some of them have gradually evolved as countries of destination and register significant increase of asylum applications.[7] However, in light of the provisions of the Dublin II regulation, transit countries bear a primary responsibility in limiting secondary movements of asylum seekers in the common EU territory. The reluctance to implement alternative measures to detention is thus influenced by the fact that in some countries studied, detention is used as a tool to prevent onwards movement of the third-country nationals.[8]

Whilst pre-entry detention practice seems overall to be rather limited, pre-removal detention is widely used in the countries of concern. Despite recent improvements, most of the countries studied have fairly poor records when it comes to detention conditions. The maximum length of detention is also a critical issue in particular with regards to pre-removal detention procedures applied to rejected asylum seekers and irregular migrants. Monitoring detention

[5] Resolution 1637 (2008), Europe's boat people: mixed migration flows by sea into southern Europe, para 9.3 and 9.4; - see also Committee of Ministers, Twenty Guidelines on Forced Returns, 925th meeting, 4 May 2005.

[6] AUJESKA S. (ed.) Survey on Detention of Asylum Seekers in EU Member States, The Regional Coalition 2006; Hungarian Helsinki Committee, Creating and strengthening a sustainable network of civil society concerning administrative detention of asylum seekers and illegally staying third-country nationals across the 10 new EU Member States which acceded to the European Union on 1 May 2004, Final Report, 2008-2010 Research Project on the Detention of Vulnerable Asylum Seekers in the European Union implemented by the JRS-Europe.

[7] According to EUROSTAT, the following numbers of asylum applications were registered in 2010: Czech Republic: 780; Estonia: 35; Latvia: 65; Lithuania: 495; Slovakia: 540. As a matter of comparison, 51,595 asylum applications were lodged in France and 48,490 in Germany over the same period of time. Source EUROSTAT – Data in Focus, 5/2011.

[8] CHMELICKOVA N. (ed.) Survey on Alternatives to Detention of Asylum Seekers in EU Member States, The Regional Coalition 2006.

nearby the borders of the EU is of a particular importance given that returns may occur from EU to non-EU countries which may offer fewer guarantees with regards to human rights and the rule of law.[9] Whilst the present report will not enter into the details of the diplomatic relationship between the selected countries and non-EU neighbouring countries – such as the Ukraine, Russia and Belarus – this aspect should be born in mind when assessing the complexity of irregular migration management policy in the region. Although the overall assessment of the asylum policy in the selected states falls beyond the scope of the present research, it is to be noted that the recognition rates vary greatly from one country to another.[10]

Whilst national reports provide detailed description of legal framework and practice in the selected EU Member States,[11] the present report aims at highlighting the compatibility of States' practice with European and international standards, and more particularly with the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union. The synthesis report looks alternatively at the **legal framework** (Chapter I); the **procedural safeguards** (Chapter II) and the **detention conditions** (Chapter III). Throughout the report, good practices and issues of concerns are highlighted with an aim to feed into a constructive dialogue with policy makers and stakeholders.

Finally, the Chapter IV looks at the **alternatives to detention** available in the selected EU Member States. This chapter discusses opportunities to promote such alternatives as a pragmatic and protection-centred option for managing irregular migration. **Conclusions and policy recommendations** are set forth in the Chapter V.

[9] DUVELL F. The Common European Asylum System: Future Challenges and Opportunities. Joint Swedish Red Cross/UNHCR Conference, Stockholm, 3-4 November 2009.

[10] On the basis of figures provided by EUROSTAT, the recognition rate in 2010: Czech Republic: 35%; Estonia: 37.5%; - Latvia: 50%; - Lithuania: 7.9%; - Slovakia: 30.5%; EUROSTAT – Data in Focus, 5/2011.

[11] See Organization for Aid to Refugees, Detention of asylum-seekers and migrants and alternatives to detention in the Czech Republic, December 2011; Jaan Tõnissoni Instituut, Detention of asylum-seekers and alternatives to detention in Estonia, December 2011; Latvian Centre for Human Rights, Detention of asylum-seekers and alternatives to detention in Latvia, December 2011; Lithuanian Red Cross Society, Detention of asylum-seekers and alternatives to detention in Lithuania, December 2011; Human Rights League, Detention and alternatives to detention in Slovakia, December 2011.

ii. The use of terminology

Before moving to the specific issue of concern, it is important to take stock of the terminology used throughout the report. Whilst EU institutions and governments refer to "illegal migrants", the present report purposely refers to **"irregular migrants"** when addressing the question of non-nationals whose presence on the territory of a state has not been authorized or is no longer authorized by the State authorities. This is in line with the resolution of the Council of Europe Parliamentary Assembly which highlighted the importance of the language used in its Resolution 1509 (2006): "the Assembly prefers to use the term "irregular migrant" to other terms such as "illegal migrant" or "migrant without papers". This term is more neutral and does not carry, for example, the stigmatization of the term "illegal". It is also the term increasingly favoured by international organizations working on migration issues".[12]

This report uses the term **"immigration detention"** to refer to the detention of refugees, asylum-seekers, stateless persons and other migrants, either upon seeking entry to a territory or pending deportation, removal or return from a territory. It refers primarily to detention that is administratively authorized, but it also covers judicially sanctioned detention.

"Immigration detention" is to be distinguished from **"criminal detention"** and **"security detention"**, which refer respectively to detention or other restrictions on liberty of nationals or non-nationals on the grounds of having committed a criminal offence, or for national security or terrorism-related reasons.[13] Issues related to criminal and security detention *per se* are not covered in this report.

In the immigration context, there have emerged various definitions of **"detention"**. UNHCR has defined detention as "confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory.[14]" However, for the purpose of assessing the implementation of EC instruments into national legislation, the report shall refer to the definition laid down in EC instruments. Article 2 (k) of the Council Directive 2003/9/EC of 27 January 2003 (so-called the "Reception" Directive) defines "detention" as "confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement". Detention

[12] See GUILD E., Criminalization of migration in Europe: Human Rights' Implications, issue paper commissioned by the Council of Europe Commissioner for Human Rights, 2009.

[13] EDWARDS A., Back to Basics: the right to liberty and security of persons and "alternatives to detention" of refugees, asylum-seekers, stateless persons and other migrants, UNHCR Legal and Protection Policy research Series, PPLA/2011/01.Rev.1 April 2011.

[14] UNHCR, Guidelines on Detention of Asylum-Seekers and Refugees, 1999.

of persons caught when crossing the border or entering irregularly in a country will be alternatively referred to as **"detention to prevent irregular migration" or "up-front detention"**. Detention of irregular migrants for the purpose of expulsion or forced return to their country of origin or to a third country will be called **"pre-removal detention"**.

Finally, the term **"alternatives to detention"** is defined in light of the definition provided by the UNHCR i.e. "practical arrangements that minimize or avoid the need to deprive asylum seekers of their liberty while at the same time appropriately addressing concerns of States, including in particular, that of reducing the incidence of asylum seekers who abscond and ensuring their compliance with asylum procedures[15]." Whilst EC legislation does not provide *per se* a definition of such alternative, it should be noted that Article 15.1 of the Directive 2008/115/EC of 16 December 2008 stipulates that a deprivation of liberty may be ordered *"unless other sufficient but less coercive measures can be applied effectively in a specific case"*[16]. Article 7.3 provides a non-exhaustive list of measures that can be adopted by EU Member States such *"as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place for the period of the voluntary departure"*.

iii. Methodology

The research was conducted from 1 July 2010 through October 2011 in the Czech Republic, Estonia, Latvia, Lithuania and Slovakia. The selected states have a relatively short experience with regards to receiving asylum seekers, and they register a comparatively small number of asylum applications if compared to many other EU countries. However, a comparative analysis was deemed to be of interest in view of the wide range of situations, policies and context existing in these countries.

The relevant states were selected for the analysis due to consideration that monitoring detention and promoting alternatives to detention are particularly needed in Member States which are situated nearby the Eastern EU border, given the fact that rejected asylum seekers face a high risk of serious human rights violations if returned to a non-EU neighbouring country. Only few initiatives have been implemented at the European level aiming at addressing the specific situation of the detention of asylum seekers in this region. However,

[15] FIELD O., UNHCR, Alternatives to Detention of Asylum Seekers and Refugees, Legal and Protection Policy Research Studies, POLAS/2006/03, April 2006, available at: http://www.unhcr.org/refworld/pdfid/4472e8b84.pdf

[16] Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJEU L 348, 24 December 2008.

none of them included a comparative perspective and practice-oriented projects tackling excessive use of detention as well as promoting alternatives to detention.

The researchers studied national legislation implementing relevant EC instruments and carried out desk research in order to review case-law, parliamentary reports, government policy guidelines and legal commentaries. Most importantly, project partners also carried out monitoring visits in relevant reception and detention centres[17]. In subject areas where information was limited, interviews were sometimes the only available source of information. All interviewees were informed of the purpose and methodology of the research, and all agreed to participate. This research would not have been possible without the full commitment of the competent authorities of the Member States concerned and the project partners are extremely grateful for their cooperation and support.

A final note of caution shall be used in order to stress the complexity of legal landscape in the selected five countries that is due to recent and numerous changes in their respective legislation. Some of the observations made in the report are thus to be considered as provisional. Some disparities in the quantity of information should also be acknowledged. Compatibility assessment is further complicated by the constant evolution of the EU acquis and its increasing links with relevant developments at the level of the ECtHR and the Council of Europe.

Although this study cannot be considered as exhaustive, it provides a solid insight into detention practices across selected EU Member States.

[17] Please see national reports for details about monitoring visits. It is to be noted that nine detention centres were visited all together in the target countries. During the project, each selected detention centre was visited twice.

CHAPTER I - Application of detention measures, including permissible grounds of detention

The present chapter will look at the principle of the legality of detention within the context of the five countries of concern (1.1); it will also analyze the compatibility of detention practices with international standards with regards to pre-entry detention (1.2), pre-removal detention (1.3) and detention of vulnerable persons (1.4).

1.1. The principle of lawfulness and permissible grounds for detention

1.1.1. The grounds should be prescribed by law

According to international legal standards, immigration detention must be a measure of last resort and it must be only applied in exceptional circumstances. There is a solid international legal framework that sets out the permissible purposes and conditions of immigration detention. The international legal framework is guided by the principles of necessity, reasonableness in all the circumstances and proportionality. The starting point is that no one shall be subject to arbitrary or unlawful detention.[18] This position is based firmly in respect of each individual's right to liberty and to be free from arbitrary detention, as enshrined in a range of human rights instruments, such as the Universal Declaration of Human Rights, and Article 9 of the International Covenant on Civil and Political Rights (hereinafter ICCPR).[19]

Most importantly within the European context, the Article 5.1 (f) of the European Convention on Human Rights (hereinafter – ECHR)[20] defines the corner stone

[18] This right is to be found in various international and regional instruments: Art. 9 (1) of the ICCPR; Article 16 (4) of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families; Article 5 ECHR; Article 6 of the Charter of Fundamental Rights of the EU; Article 7 of the American Convention on Human Rights; Articles I and XXV of the American Declaration on the Rights and Duties of man; Article 6 of the African Charter on Human and People's Rights.

[19] Article 9 ICCPR: "1.Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. […]".

[20] UNHCR-OHCHR, Global Roundtable on Alternatives to Detention of Asylum-seekers, Migrants and Stateless Persons, 11-12 May 2011 available at http://www.unhcr.org/refworld/docid/4e315b882.html see also GABAUDAN M., The UNHCR Perspective on Detention, paper presented at the IARLJ 2002.

principles with regard to lawful detention.[21] Article 5.1 (f) permits detention in two immigration-related circumstances: (a) to prevent unauthorized entry into the country and (b) for the purposes of deportation or extradition. In other words, in a migratory context, a state has the right to detain a person for these express purposes only. According to the ECtHR, they are exhaustive in nature and must be interpreted restrictively (see *infra* at para 2.4).[22] The grounds for any deprivation of liberty must be set forth in law in a clear and exhaustive manner.[23] The principle of lawful detention is endorsed under the Charter of Fundamental Rights of the European Union and EC secondary legislation.[24]

This requirement is fulfilled by the all selected States where the deprivation of liberty of migrants is prescribed by legal instruments.[25] Whilst legal frameworks are in place in the countries of concern, it is to be noted that the material scope of such pieces of legislation must be analyzed carefully since several States are currently in a process of amending or have very recently amended their legislation in order to transpose EC Directives. The lack of information regarding the practical implementation of such recent pieces of legislation is acknowledged as a methodological caveat.

In a recent case dealing with the expulsion of a migrant, the Court has reiterated this interpretation stressing that the law prescribing grounds for detention must

[21] Article 5(1) (f) of the ECHR provides: (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: […]; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[22] ECtHR, *Vasileva vs Denmark*, application n° 52792/99, 25 September 2003, paras. 32-36. ECtHR, *Ciulla vs Italy*, application n° 11152/84, 22 February 1989, para. 41; ECtHR, *Wloch vs Poland*, application n° 27785/95, 19 October 2000, para. 108.

[23] ECtHR, *HL vs UK*, application n° 45508/99, 5 October 2004, para 114: *"the standard of "lawfulness" requires that all law be "sufficiently precise to allow the citizen [or other person subject to such measures] to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action might entail".*

[24] Article 6 EU Charter Fundamental Rights: "Everyone has the right to liberty and security of person". Article 18 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJEU L 326 13 December 2005; Recital 10, art. 6.2, 13.2 and 14.8 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJEU L 31, 6 February 2003.

[25] See Czech Republic: Article 124 of the Aliens' Act n° 325 /1999 Coll. – Estonia: Article 32 Act on Granting International Protection to Aliens and Asylum Act (AGIPA), 1 July 2006; - Latvia: Asylum Law, Article 9, para 1 and Immigration Law (adopted 31 October 2002 with amendments 26 May 2011), Article 51, para 1, 5.- Lithuania : Article VII (Articles 112-119) of the Legal Status of Aliens of the Republic of Lithuania, 29 April 2004, No IX-2206 (as last amended on 22 July 2009, No XI-392); Slovakia: Part VI para 62-74 of the Act on the Stay of Foreigners n°48/2002 Coll. As of January 2012, this will be replaced replaced by the Act no. 404/2011 of the 21. October 2011 on the Stay of the Foreigners and on the Changes and Amendments to the other Acts.

be publicly available.[26] Whilst most pieces of legislation do comply with such requirement, it is to be noted that in the Czech Republic regulations dealing with special categories of detainees (such as vulnerable groups) are sometimes to be found within internal regulations. This lack of transparency could attract criticisms in light of ECtHR requirements.[27]

1.1.2. The grounds should be exhaustively listed

The grounds must not only be prescribed by a law, they must fully comply with the exhaustive list included under Article 5.1 of the ECHR, in particular (f) on prevention of irregular entry and in view of deportation/extradition. In order to comply with the ECHR, it must be possible to subsume the grounds foreseen in national law and to justify pre-entry or pre-removal detention under one of the two limbs of Article 5.1 (f). Thus, the ECtHR proceeds with a control of both the legality and the regularity of the detention decision (see *infra* 2.4). A deprivation of liberty can appear to respect domestic law but being arbitrary and thus incompatible with Article 5.1 (f) ECHR. In its judgment in *Saadi v. U.K.*, the ECtHR clarified the notion of arbitrariness by highlighting that: *"*[...] *To avoid being branded as arbitrary, detention under Article 5.1 (f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued [...]."*[28]

In some of the countries of concern (such as the **Czech Republic, Latvia and Lithuania**), however, the respective aliens' legislation has a broader scope and the detention of asylum-seekers and third-country nationals is authorized as long as there is a "threat" for public health, public order or national security reasons. Assessing the legality of such provisions requires careful analysis as it should be mentioned that there are divergences between EC and ECHR standards with regards to this matter. Further EC standards also vary depending on whether the decision is taken within the context of pre-entry detention or pre-removal detention.

According to the ECtHR, the detention of third country nationals on other grounds, such as crime prevention, public health or vagrancy is not admissible under Article 5.1(f) ECHR. Stricter safeguards need to be fulfilled to justify the detention under criminal grounds[29] – whereas detention for reasons of public

[26] ECtHR, *Nolan and K. vs Russia*, application n° 2512/04, 12 February 2009.

[27] Czech Republic – special detention regime for vulnerable groups. Please see the website of the Refugee Facilities Administration of the MOI at www.suz.cz

[28] ECtHR, *Saadi vs UK*, application n° 13229/03, 29 January 2008.

[29] *ECtHR Fox, Campbell and Hartley vs the UK*, application n°1244/86, 12245/86 and 12383/86, 30 August 1990, para 32.

health is allowed as a measure of last resort for diseases, which spreading is dangerous for the public health or safety.[30] It should therefore be recalled that a detention measure based on one of the limbs of Art. 5.1(f) is necessarily of a short duration and aimed at either authorizing entry into the territory as quickly as possible or deporting a person as soon as possible. Should the authorities intend to justify a longer detention measure on the grounds of public order or national security, these grounds are *per se* not sufficient to justify detention under Art. 5.1 (f). Other Art 5.1 requirements will therefore have to be satisfied.

With regards to EC standards on pre-entry detention, immigration detention on grounds of public order is explicitly authorized with regards to detention of asylum seekers[31]. However, in our opinion, this should be read in light of UNHCR Revised Guidelines according to which detention may only take place in cases where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations likely to pose a risk to public order/national security.[32]

Within the context of pre-removal detention, Article 15.1 EU Return Directive only allows detention in order to prepare the return and/or in order to carry out the removal process. In a 2009 judgment, the CJEU further insisted that "the possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115/EC Return Directive."[33]

In the case of the **Czech Republic, Latvia and Lithuania,**[34] such considerations seem to be applied broadly. The concept of „threat to the public order" seems to be used as a blanket provision by the **Czech** authorities in order to allow pre-removal detention.[35] It is of serious concern that both the Constitutional Court and the Supreme Administrative Court of **Lithuania** have allowed a wide definition of the concept of threat to the national security and thus allowed for the detention of asylum-seekers on such grounds.[36]

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[30] *ECtHR, Enhorn vs Sweden*, application n°56529/00, 25 January 2005 - para 44.

[31] See Article 7.3 of the Directive 2003/99/EC.

[32] Guideline 3 - Exceptional Grounds for Detention - UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, February 1999.

[33] CJEU, *Saïd Shamilovich Kadzoev v. Direktsia "Migratsia" pri Ministerstvo na vatreshnite raboti* (C 357/09), 30 November 2009 – para 70.

[34] Czech Republic - Article 124 (1) of the Aliens' Act n° 326/1999 Coll.; Latvia – Article 51 of the 2002 Immigration Law; Lithuania – Article 113.1 at (6) and (7) of the Aliens' Act.

[35] See Organization for Aid to Refugees, Detention of asylum-seekers and migrants and alternatives to detention in the Czech Republic, November 2011 – see e.g. the Supreme Administrative Court´s decision No. 3 As 4/2010-151 from 26 July 2011, or the Supreme Administrative Court´s decision No. 2 As 14/2008-50 14 May 2009.

[36] Constitutional Court of the Republic of Lithuania, decision of 15 May 2007, No 7/04-8/04; - Supreme Administrative Court of Lithuania, judgement of 27 May 2010, No N-63-4550/2010.

The risk of arbitrary detention seems to be increased in **Latvia** due to the fact that there is no legal definition of the threat to national security or public order and safety in the relevant asylum and immigration legislation. Therefore, there is no guarantee that the use of such provision is limited to cases when "there is evidence to show that the asylum seeker has criminal antecedents and/or affiliations"[37] or "a conviction for committing a serious crime".[38] The Latvian legislation foresees some procedural safeguards since any detention decision by the administration has to be reviewed by a judge who will need to assess different factors, including the threat to public order or national security and safety. The sample of cases reviewed highlight that judges usually take a protection-centred approach in their interpretation, although jurisprudence greatly varies from one court to another.[39] It should be noted that the national law does not provide for the grounds of release of asylum seekers from detention explicitly and in more detail given the specific circumstances of the asylum seekers' detention (e.g. established identity).

Detention of asylum-seekers and third-country nationals on grounds falling beyond the scope of Article 5.1(f) ECHR are deemed to be problematic. According to the Fundamental Rights Agency of the European Union, EU Member States should ensure that grounds for immigration detention do not extend beyond the exhaustive list of legitimate grounds foreseen in Article 5.1 (f) ECHR. *"Deprivation of liberty based on crime prevention, public health considerations or vagrancy should be governed by the same rules, regardless of the legal status the person concerned has in the host country. These grounds should therefore not be regulated by aliens or immigration laws, but in other pieces of legislation. Otherwise, there is a risk that this will lead to the application of different standards based on the legal status of the person in the country"*.[40]

1.1.3. Quality of the authorities entrusted to take detention measures

The standard of lawfulness also includes requirements regarding the quality of the authority entrusted with the power to detain. Article 15.2 of the Directive

[37] Guideline 3 - Exceptional Grounds for Detention - UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, February 1999.

[38] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Preamble, Section 12.

[39] Latvia – The LCHR analyzed 66 court decisions. See, for example, Decision of the Riga District Court of 29 April 2010; nº 6-3/30, Decision of the Riga District Court of 19 October 2010; nº 6-3/40; Decision of the Daugavpils District Court of 17 June 2011; nº KPL 12-049211; - Decision of the Daugavpils District Court of 15 June 2011; nº KPL 12-048711 and Decision of the Daugavpils District Court of 12 August 2011; nº KPL 12-048711; - Decision of the Latgale Regional Court (in Rezekne) of 14 July 2011; nº 12040311.

[40] European Union Agency for Fundamental Rights, Detention of Third Country Nationals in Return Procedures, *opus cit.*

2008/115/EC stipulates that "detention shall be ordered by administrative or judicial authorities". However, when ordered by administrative authorities, the detention order shall be subject to speedy judicial review. These requirements are in accordance with the ECtHR case law under Article 5.4 ECHR, which guarantees a right to speedy judicial review of the detention's lawfulness to any detained persons including persons deprived of liberty under Article 5.1 (f) ECHR.

Whilst this condition seems to be formally fulfilled in the selected EU States, it should be stressed that this remains an issue of concern in **the Czech Republic** where the initial power to detain foreigners, as well as follow-up decision to prolong the detention up to 120 days, lies with the Ministry of Interior. Review of the detention decision seems to be quite limited with regards to substantial grounds. Very lengthy judicial review is of serious concern in **Slovakia** and raises question with regards to access to an effective remedy within the context of immigration detention (see *infra* para 2.4)**.** This issue is further discussed below with regards to the issue of judicial review[41]. It shall be noted that proposals to transfer the competence for all asylum-related matters – including the detention - to border guards have been considered in **Lithuania**. These proposals have been heavily criticized by human rights monitoring bodies and eventually dismissed.[42]

1.2. Detention measures designed to prevent unauthorized entry

Whilst pre-entry detention shall always be regarded as a measure of last resort, additional safeguards apply with regards to the specific case of asylum seekers. Detention shall be a measure of last resort in light of the non-penalization clause embodied in the Article 31.2 of the 1951 Geneva Convention Relating to the Status of Refugees.[43] With regards to asylum-seekers, the principle of non-penalization of irregular entry shall be read together with the principle of

[41] ECtHR, *Singh vs Czech Republic*, application n° 60538/00, 25 January 2005.

[42] Official letter of the UNHCR Regional Office for the Baltic and Nordic Countries to the Prime Minister of Lithuania No 127/ROBNC/2010; - Official letter of the Secretary General of the Lithuanian Red Cross Society to the Commission for Governance Improvement No 377, 21 June 2010; European Commission against Racism and Intolerance, *ECRI Report on Lithuania (fourth monitoring cycle)*, adopted on 22 June 2011, published on 13 September 2011. Available online at <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Lithuania/LTU-CbC-IV-2011-038-ENG.pdf>

[43] Article 31.1 of the Geneva Convention: "1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

non-refoulement.[44] The *1999 UNHCR Revised Guidelines on Detention* set down a limited number of circumstances in which detention or other restrictions on movement may be considered necessary in an individual case.

> In a nutshell, detention can only be applied under the following circumstances:
>
> i) Cases in which identity is undetermined or in dispute;
>
> ii) Preliminary interview;
>
> iii) Cases where there is an intention to mislead the authorities;
>
> iv) Cases where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations likely to pose a risk to public order/ national security.[45]

The non-penalization clause and the principle of *non-refoulement* have been fully endorsed by the EU acquis and are legally binding over EU Member States[46]. In particular, legal provisions on unauthorized entry are to be found *inter alia* in the Articles 5 and 13 of the Schengen Borders Code that specify the categories of third country nationals who do not comply with the EC migration regime but who yet might exceptionally be granted the right to enter into the common EU territory under asylum and humanitarian grounds.[47] Finally, Article

[44] Article 33 of the Geneva Convention: "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.; 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[45] Guideline 3 - Exceptional Grounds for Detention - UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, February 1999; see also UNHCR ExCom conclusions n° 44 (XXXVII) – 1986 – Detention of Refugees and Asylum Seekers.

[46] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJEU L 326 13 December 2005.

[47] Article 5.4 (c) : "Third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorized by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations. Where the third-country national concerned is the subject of an alert as referred to in paragraph 1(d), the Member State authorizing him or her to enter its territory shall inform the other Member States accordingly".; - Article 13.1: "A third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas" - Regulation (EC) n°562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community code on the rules governing the movement of persons across the borders (Schengen Borders Code).

7.3 of the Directive 2003/9/EC also envisages detention of asylum seekers as an exceptional measure although this instrument does not explicitly require States authorities to apply a test of necessity before resorting to pre-entry detention (see *infra* under 2.4).[48]

The principle of not detaining asylum-seekers is generally reflected in the legislation and practice of **Estonia, Lithuania, and Slovakia,** although legislation allows for limited exceptions.

The legislation in **Slovakia** allows for the detention of asylum seekers in exceptional cases. First, persons can be detained if they erroneously lodged an application to the wrong authorities. In practice, this provision has never been applied and is considered as obsolete.[49] Second, detention of asylum seekers is limited to cases where the application has been introduced after the person was put in detention, Dublin II cases and cases rejected as inadmissible or manifestly unfounded[50]. In such cases, the appeal against the asylum decision does not have suspensive effect. The lack of suspensive effect creates the legal possibility to detain asylum seekers provided that other legal conditions are met. [51] Further, the legislation provides that the asylum procedure does not have an impact on the detention.[52] These provisions were heavily criticized by NGOs as a breach of the non-penalization clause.[53] On a positive note, however, the courts have clearly stated that the foreigner shall be released immediately after the ground for detention has disappeared.[54] As of 2012, the prolongation of the detention of asylum seekers will be strictly prohibited.[55]

In line with 1999 UNHCR Revised Guidelines and ECtHR jurisprudence,[56] the legislation applied in Estonia and Lithuania foresees that asylum-seekers might be detained for a very short period of time (maximum 48 hours) for the purpose

[48] The Recast directive includes a reference to the test of necessity – see Article 8 of the Amended Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers, COM (2011) 320 final, 2008/0244 (COD).

[49] Slovakia - Article 3.8 of the Asylum Act n° 480/2002 Coll.

[50] Slovakia - Article 62.1 of the Act on the Foreigners stay, n° 48/2002 Coll.; - see Article 62.2 of the Act on the Stay of Foreigners n° 48/2002 Coll. This is confirmed by the new legislation – see Article 88.4 of the Act n°404/2011 of the 21. October 2011 on the Stay of the Foreigners and on the Changes and Amendments to the other Acts.

[51] Slovakia – see Articles 21.2 in conjunction with Articles 11.1 and 12.1-2 of the Asylum Act n° 480/2002 Coll.

[52] Slovakia – Article 62.2 of the Act on the Stay of Foreigners, no 48/2002 Coll.

[53] Human Rights League, Detention and alternatives to detention in Slovakia, *opus cit*.

[54] The judgement of the Regional Court in Košice No. 4Sp/7/2011 dated on 06.07.2011. Copy in the file of the Human Rights League.

[55] Article 88 (4) of the Act on Border Control and Stay of the Foreigners as approved by the Parliament on 21 October 2011 on 24th session of the Parliament (decree of the Parliament no. 685, Parliament print n° 457).

[56] ECtHR, *Saadi vs UK*, application n° 13229/03, 29 January 2008.

of identity checks and registration procedures. However, UNHCR has strongly criticised that the list of detention grounds included in the **Estonian** legislation includes additional grounds for initial detention such as the violation of internal rules of the reception centre or suspicion that the asylum seeker has committed a criminal offence in a foreign country. UNHCR has requested to remove these far-reaching clauses and to stick to the principle of not detaining asylum-seekers.[57]

Lithuania offers an interesting case study as, in some cases, the detention practice stands in contrast with the legal framework. Indeed, the Lithuanian legislation fully complies with the principles defined by the ECtHR as well as with EC standards. Indeed, Article 113.2 of the Aliens' Law contains a generic provision prohibiting the detention of an alien for unlawful entry or stay in Lithuania when he has lodged an application for asylum[58]. Further, the prohibition of detention of asylum seekers is generally observed in practice both by administrative and judicial authorities. Overall, the main problem is not the excessive application of detention or lack of alternatives to detention – it is rather the conditions of detention and reception in the Foreigners' Registration Centre (hereinafter – FRC), which often fall short of complying with international standards (see *infra*). However, researchers have documented recent cases where asylum-seekers were detained on grounds that are not listed by the domestic legislation – such as the fact that the asylum-seeker had temporarily left the Lithuanian territory and acted in breach of the regulation of the reception centres.[59] There is yet to be a decision of the Supreme Administrative Court of Lithuania in this regard, so it is still unclear whether this unacceptable practice of district courts will be overruled.

Due to some confusion regarding the exact meaning of "final decision", few cases have been documented were courts ordered the detention of asylum seekers within the framework of the Dublin II procedure,[60] or while an appeal

[57] Submission by the UNHCR for the Office of the High Commissioner for Human Rights' Compilation Report, Universal Periodic Review, Estonia, July 2010.

[58] Law on the Legal Status of Aliens of the Republic of Lithuania, 29 April 2004, No IX-2206 (as last amended on 22 July 2009, No XI-392). See also Article 112. Law on the Legal Status of Aliens of the Republic of Lithuania, 29 April 2004, No IX-2206 (as last amended on 22 July 2009, No XI-392) according to which an asylum-seeker may exceptionally be detained for 48h where it is necessary to ensure national security and public policy, to protect public health or morals, to prevent crime or to safeguard the rights and freedoms of other persons (see details infra).

[59] Lithuanian Aliens Law, Article 84, para. 1, Order of Accommodation Conditions in the FRC, para. 18.3.; Svencionys District Court, judgement of 7 April 2011; Svencionys District Court, judgement of 12 July 2011.

[60] Lithuania - Svencionys District Court, judgement of 1 March 2010, Supreme Administrative Court of Lithuania, judgement of 5 February 2010, No N-444-3316-10.

procedure was still pending within the framework of accelerated procedure.[61] However, such practices were later found to be unlawful by the Supreme Administrative Court and national experts were informed that such problems no longer exist.[62] Whilst prohibition of detention seems to be broadly applied in Lithuania, it should be observed that the situation is likely to evolve in the short-term since the Parliament is currently debating possible amendments to the Aliens' Act that would further authorize detention of asylum seekers within the framework of the accelerated procedure.[63]

The **Czech Republic** and **Latvia** offer an interesting contrast with the other countries of concerns as their respective legislation allow for the detention of asylum-seekers.[64]

The 2009 **Latvian legislation** seems problematic as the detention grounds are broadly defined and fall short of UNHCR Guidelines[65] (see *supra* at Para 1.1.2.).[66] In practice, detention is not systematic and asylum-seekers that hold valid travel documents are usually directly transferred to an open reception centre (Mucenieki). Whilst global figures show a decrease of the overall number of persons detained and length of detention, information gathered during monitoring visits indicates that - following the opening of the new detention centre in Daugavpils - authorities systematically detain asylum-seekers crossing the Eastern border with Belarus.[67] Further, the courts' interpretation of the grounds of detention has been found to be broad and inconsistent, although

[61] Lithuania - Svencionys District Court, judgement of 22 April 2010, judgement of 20 May 2010, judgement of 16 June 2010.

[62] Lithuania - Dublin II - Supreme Administrative Court of Lithuania, judgement of 30 March 2010, No N-63-4397/2010; Accelerated procedure - Supreme Administrative Court of Lithuania, judgement of 30 June 2010, No N-63-5851/2010, judgement of 12 July 2010, No N-575-6127/2010, judgement of 12 August 2010, No N-438-6566/2010, judgement of 12 August 2010, No N-502-6567/2010. Svencionys District Court, judgement of 21 August 2011, judgement of 19 September 2011.

[63] Lithuania - Draft Law on the Amendment of the Law on the Legal Status of Aliens of the Republic of Lithuania, 21 June 2011, No XIP-2360(2).

[64] Czech Republic - Article 124 s Aliens' Act n° 325 /1999 Coll.

[65] Latvia - Article 9 para 1, Asylum Law – The State Border Guard (SBG) has the right to detain asylum seeker when at least one of the following grounds exists: i) the identity of the asylum-seeker has not been established; - ii) there is a reason to believe that the asylum seeker is attempting to use the asylum procedure in bad faith; iii) competent State authorities, including the SBG have a reason to believe that the asylum seeker represents a threat to national security or public order and safety. [non official translation].

[66] Latvia - United Nations, Committee Against Torture, Conclusions and Recommendations of the Committee against Torture, Latvia, CAT/C/LVA/CO/2, 19 February 2008; - UNHCR, Comments by the UNHCR Regional Office for the Baltic and Nordic Countries on the Draft Asylum Law of the Republic of Latvia, ROBNC/005/08, 21 January 2008, p. 2; - Latvian Centre for Human Rights, Detention of asylum-seekers and alternatives to detention in Latvia, December 2011.

[67] Latvia - Information obtained during the LCHR monitoring visit to the Daugavpils Detention centre on 7 September 2011.

some positive cases can be noted. Most worryingly, it seems that in some cases, courts have authorized the detention of asylum-seekers without referring to domestic legal grounds – as prescribed by the Asylum Law - or to international conventions.[68] The courts' practice reveal a tendency to extend automatically the maximum detention period (for two months), except for few cases where courts have individually assessed the particular circumstances of the case and indicated a specific date and time.[69]

Whilst the non-penalization clause of asylum-seekers has been duly incorporated into the **Czech legislation,**[70] the latter only applies under the strict conditions that the aliens i) comes directly from the country where he might suffer persecution, ii) immediately registers on his own initiative and iii) proves a good reason for illegitimate entry onto the territory. Information provided in the national report indicates that such an assessment is rarely applied. As a consequence, asylum-seekers are frequently detained in this country, although no statistics are publicly available with regard to the average length of such detention. The situation is particularly problematic with regard to the accelerated procedure applied at the international airport where pre-entry detention is routinely applied.[71] Further, it is to be noted that cells at the airport are not formally considered as detention places by the Czech authorities and access is currently denied to NGOs and international monitoring bodies such as UNHCR. This practice seems to fall short of the jurisprudence of the ECtHR. It shall be reminded that in the case of *Amuur vs France*, as well as in *Shamsa vs Poland,*[72] the Court held that the guarantees provided under the Convention fully apply to places of confinement located in airports or in international transit zones and thus, State parties to the Convention could not escape their legal obligation under Article 5 ECHR.

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[68] For examples where courts refer to legal grounds such as the lack of financial means as provided by the Immigration Law applicable to foreigners, but not to asylum seekers, see : Decision of the Riga District Court of 29 April 2010; no 6-3/30; Decision of the Riga District Court of 18 May 2010; no 6-3/33; Decision of the Riga District Court of 22 June 2010; no 6-3/40; Decision of the Riga District Court of 22 June 2010; no 6-3/30; Decision of the Riga District Court of 20 August 2010; no 6-3/40; Decision of the Riga District Court of 19 October 2010; no 6-3/65; Decision of the Riga District Court of 19 October 2010; no 6-3/40; Decision of the Riga District Court of 28 October 2010; no 6-3/55; Decision of the Riga District Court of 29 October 2010; no 6-3/68; Decision of the Riga District Court of 22 December 2010; no 6-3/78.

[69] Decision of the Daugavpils District Court of 30 May 2011; nº KPL 12-039911; Decision of the Daugavpils District Court of 31 May 2011; nº KPL 12-040311; Decision of the Daugavpils District Court of 31 May 2011; nº KPL 12-040011; Decision of the Daugavpils District Court of 6 June 2011; nº KPL 12-041511.

[70] Czech Republic - Art. 119a Part I, Aliens' Act n° 325 /1999 Coll.

[71] See Organization for Aid to Refugees, Detention of asylum-seekers and migrants and alternatives to detention in the Czech Republic, December 2011.

[72] ECtHR, *Amuur vs France*, application n° 19776/92, judgement of 25 June 1996; - ECtHR, *Shamsa vs Poland*, applications n° 45355/99 and 45357/99 of 27 November 2003.

Another worrying trend in the Czech practice is the frequent release of expulsion order and systematic registration in the Schengen Information System with regards to foreigners entering the Czech Republic via the airport without proper documentation.[73]

It is to be noted that the legal landscape has evolved very recently in the Czech Republic. Following the transposition of the relevant provisions of the Return Directive and the case law of the courts, the competent authorities are obliged to check first whether alternatives to detention are available.[74] National researchers were informed that the practice of the Alien's Police is not fully consistent with courts' decisions and there is still a reluctance to look at alternative measures to detention.

1.3. Detention measures designed to facilitate removal from national territory

International standards dealing with removal of aliens have considerably evolved over the recent years under the influence of an abundant case law of the ECtHR[75] and the adoption of the Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third country nationals (so-called Returns Directive).[76] Interestingly enough, the EC standards go beyond international law with regards to the *principle of necessity*, a test that is not directly required with regards to immigration detention according to an apparent restrictive interpretation of the ECtHR in the case of *Saadi vs the UK*.[77] As most recent ECtHR case law could however be interpreted as introducing a indirect necessity test of the immigration detention measure, the Court's case law would worth being clarified in this respect.

The principle according to which detention is a measure of last resort is duly reflected in the Directive. As *per* the Article 15.1, detention must only serve the

[73] Czech Republic - See Art. 120 (a) Part 1 of the Act n°326/1999 Coll.

[74] See e.g. decision of the City Court Prague No. 7 A 35/2011 from 24 February 2011

[75] See in particular ECtHR, *Chahal vs UK*, application n° 22414/93, 15 November 1996; - ECtHR, *Auad vs Bulgaria*, application n°46390/10, 11 October 2011; - ECtHR, *Abdolkhani and Karimnia vs Turkey*, application n° 50213/08, 27 July 2010; - ECtHR, *Raza vs Bulgaria*, application n° 31465/08, 11 February 2010; - See also RICUPERO I and FLYNN M., Migration and Detention: Mapping the International Legal Terrain, November 2009; ECRE Information Note on the 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, CO7/1/2009/Ext/MDM.

[76] 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, OJEU L 348, 24 December 2008.

[77] ECtHR, *Saadi vs UK*, application n° 13229/03, 29 January 2008. See also Laurence DEBAUCHE presentation made at UNHCR Conference on Alternatives to Detention, 16 November 2011.

purpose of facilitating removal; it must be for the shortest possible period while removal arrangements *"are in progress and executed with due diligence".* Article 15.1 (a) and (b) also provides that detention is justified in particular if there is a risk of absconding or where the person avoids or hampers the removal process. Whilst there is no common EU list of indicators to be considered in deciding whether or not to detain a person, it should be noted that the UK Border Agency has developed a fairly comprehensive list that could be used as a basis for developing similar lists in the respective countries of concerns (see Annex III).

Where there is no reasonable expectation that someone will be removed, detention ceases to be justified and the person concerned must be released immediately (Article 15.4). The dynamic jurisprudence of the CJEU has also developed the legal potential of the Directive beyond expectations.[78]

The adoption of the Directive has been severely criticized by experts and human rights monitoring bodies in particular with regards to the fact that the Directive allows Member States to derogate from substantial guarantees. Another area of concern relates to the adoption a maximum ceiling for detention of eighteen months, a duration that is superior to the practice of many EU Member States' practice at the time of adopting the Directive.[79] Despite these substantial shortcomings, it is to be acknowledged that the Directive codifies specific guarantees against arbitrary detention in accordance with well-established international case law (see *infra* paragraph 2.4).

With regards to the countries of concern, the transposition of the Directive has a positive impact by strengthening legal safeguards and ensuring the adoption of a maximum ceiling for the length of detention. However, several observations should be made with regards to the quality of such transposition.

A first observation can therefore be made about the complexity of the legal landscape of the countries of concerns with regards to pre-removal detention standards. Indeed, the **Czech Republic, Slovakia Estonia and Latvia**[80] have

[78] CJEU, *Saïd Shamilovich Kadzoev v. Direktsia "Migratsia" pri Ministerstvo na vatreshnite raboti* (C 357/09), 30 November 2009; - CJEU, Hassen El Driri, C-61/11.

[79] For a detailed analysis see LAMBERT H., The position of aliens in relation to the European Convention on Human Rights, Council of Europe, December 2008; BALDACCINI A., The EU Directive on return: Principles and Protests, *Refugee Survey Quarterly*, vol. 28 issue n° 4, 2010; - UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 16 June 2008 available at http://www.unhcr.org/4d948a1f9.pdf

[80] Czech Republic – see Act 427/2010 Collection of Acts on changing the Act. No. 326/1999 Coll. on Stay of Aliens on the territory of the Czech Republic – Slovakia: Act no. 404/2011 of the 21 October 2011 on the Stay of the Foreigners and on the Changes and Amendments to the other Acts; - Estonia: Article 24.1 Obligation to Leave and Prohibition on Entry Act (OLPEA), entered into force 1 April 1999, as amended 24 December 2010; - Latvia: Immigration Law (adopted 31 October 2002 with amendments 26 May 2011), Article 51, para 1, 5.

already officially transposed the EC Directive 2008/115/EC only very recently. In the case of Slovakia the legislation adopted in October 2011 will only enter into force in January 2012. Lithuania has so far only reached partial transposition.[81] In most countries, administrative regulations are still to be adopted in order to allow concrete implementation of the legislation. Against this background, no final conclusions can be reached about the final level of harmonization with EC standards.

A second observation is that the priority of voluntary return over forced returns, which is one of the key principles of the EC return policy,[82] is poorly reflected in the countries of concerns. With the exception of **Latvia,**[83] where voluntary return can occur up to one year after the order to leave the territory was issued, other countries studied seem to ignore such principle. Latest amendments introduced into the **Czech** legislation seem to have distorted the principle of voluntary return by allowing financial assistance for voluntary return only to individuals who were issued expulsion orders coupled with a re-entry ban.[84]

Third, different wordings are still used to define grounds for deprivation of liberty used in domestic law. It is to be noted that legislation in **Slovakia, Estonia** and in the **Czech Republic** suggests limited or no room of discretion is given to the administration when ordering detention within the context of an expulsion procedure.[85] These provisions are problematic in light of the provisions of the Article 15.1 of the Directive 2008/115/EC and the recent rulings of the ECtHR which provide that the legality of detention measures should be assessed against a test of proportionality and necessity (see further *infra* at 2.4). In **Slovakia**, such legal caveat will be sorted with the entry into force of the new legislation in January 2012.[86] It is to be noted that in the three countries, courts

[81] Lithuania - Draft amendment to the Law on the Legal Status of Aliens, 21 June 2011, No XIP-2360(2); - Slovakia: Act on Border Control and Stay of the Foreigners as approved by the Parliament on 21. October 2011 on 24th session of the Parliament (decree of the Parliament no. 685, Parliament print no. 457).

[82] See Article 7 of the Directive 2008/115/EC; see also Communication on a Common Policy on Illegal Immigration, COM (2001) 672, 15 November 2001; - Council doc. 12645/05, 12 October 2005.

[83] Latvia – Immigration Law (adopted 31 October 2002 with amendments 26 May 2011), Article 43 para 1-2.

[84] Czech Republic – Article 123 (a) of the Foreigners' Residence Act as amended by Act n° 427/2010 Coll.

[85] Estonia, Article 15.1 OLPEA as interpreted by the decision of the Supreme Court 3-3-1-45-06 of 13 November 2006; Slovakia – Article 62.1 (a) Act on the Stay of Foreigners Coll. 48/2002 Coll. ; Czech Republic- Article 124.1 Alien's Act n° 326/1999 Coll.

[86] Slovakia - Act Act no. 404/2011 of the 21 October 2011 on the Stay of the Foreigners and on the Changes and Amendments to the other Acts.

have introduced additional requirements with regards to the appreciation of the necessity of the detention measure.[87]

The recently amended **Latvian legislation** has been seriously criticized by some national human rights observers as it includes very broad grounds for detaining a person provided that there are reasons to believe that the foreigner will hamper or avoid return procedure or where there is a risk of absconding.[88] No detailed list of criteria for assessing the risk of absconding is available in Latvia. The current legislation seems to fall short of the necessity and proportionality test required by the provisions of the Directive 2008/115/EC (see *infra* paragraph 1.5).

In **Lithuania**, there is no adequate provision regarding the automatic release of a foreigner once all the grounds for detention have ceased to exist. This lacuna has been heavily criticized by the EU Fundamental Rights Agency since detention will only end if the foreigner initiates a legal procedure in order to challenge the legality of the detention.[89] Whilst the legislation does not fully comply with international standards, it should be noted that supreme courts have introduced important safeguards. In several cases, both the Constitutional Court and the Supreme Administrative Court of Lithuania have clearly stated that the possibility to challenge the legality of the detention order aims at ensuring that aliens' freedom of movement in Lithuania is restricted only in accordance with the law and only as long as it is necessary and unavoidable.[90] If it is established that an alien's detention is unlawful or unfounded, or when

[87] Estonia: Supreme Court, Riigihohus/3-3-1-45-06, 13 November 2006, para 10-12; Riigihohus/3-3-1-6-06, 9 May 2006, para 28; Riigihohus/3-3-1-53-06, 16 October 2006, para 13; - Czech Republic: Prague City Court, verdict n°7 A 35/2011, dated 24 February 2011; - Slovakia: decision of Constitutional Court of Slovakia no. II. US 264/09-81 dated on 19. October 2011, judgement of the Regional Court in Trnava 44Sp/3/2011 dated on 2. May 2011, judgement of the Regional Court in Trnava 44Sp/26/2011 dated on 9. May 2011; judgement of the Regional Court in Košice 6Sp/17/2011 dated on 11.8.2011.

[88] Latvia - Immigration Law (adopted 31 October 2002 with amendments 26 may 2011), Article 51, para 2. See LCHR's comments to the Draft Immigration Law amendments submitted to the Parliamentary Commission on Defence, Interior Affairs and Anti-Corruption Commission on 21 February 2011.

[89] European Union Agency for Fundamental Rights, Detention of Third Country Nationals in Return Procedures, *opus cit.*

[90] Constitutional Court of the Republic of Lithuania, decision of 5 February 1999, official gazette „Valstybes zinios", 10 February 1999, No 15-402.; - Supreme Administrative Court of Lithuania, judgement of 28 May 2009, No N-575-5928/2009, judgement of 30 March 2010, No 62-4397/2010, judgement of 30 March 2010, No N-62-4398/2010, judgement of 30 March 2010, No N-62-4399/2010, judgement of 23 April 2010, No N-62-4776-10, judgement of 23 April 2010, No N-62-4777-10, judgement of 30 June 2010, No N-63-5851/2010, judgement of 12 July 2010, No N-575-6127/2010, judgement of 12 August 2010, No N-438-6567/2010, judgement of 12 August 2010, No N-502-6566/2010, judgement of 14 October 2010, No N-444-7196/2010, judgement of 27 December 2010, No N-575-8481-10.

factual circumstances have changed, the detention is no longer justified and the alien's rights have to be effectively protected by releasing him from detention.[91]

Last, there are inconsistencies in the courts practice concerning pre-removal detention in particular with regards to the actual scope of the obligation for the authorities to check whether alternative measures to detention are available before resorting to detention as a measure of last resort.[92]

The safeguards with regards to the length of detention and the realistic prospects of removal will be further discussed (see *infra* Para 2.4).

1.4. Detention of vulnerable persons

The detention of vulnerable persons has been highly debated in Europe over the past years, in particular within the context of child detention.[93]

The UNHCR Guidelines provide a strong presumption against the administrative detention of children for immigration purposes. Guideline 5 asserts that "minors who are asylum seekers should not be detained" and, if they are, this detention should, in accordance with Article 37(b) of the CRC, be a measure of last resort and for the shortest appropriate period of time.[94] Within the context of the 60th anniversary of the Geneva Convention, the UNHCR has urged State parties to end child detention. The rule that vulnerable persons should, as a matter of principle, not be detained has been endorsed by the Committee of Ministers of the Council of Europe in at least three occasions.[95]

Although the ECtHR does not go as far as systematically prohibiting such detention, it has developed a solid jurisprudence with regards to the issue of detention of children and unaccompanied minors.[96] Detention of vulnerable

[91] Supreme Administrative Court of Lithuania, judgment of 28 December 2010, No N-575-8482-10, judgement of 16 May 2011, No N-575-4241-11.

[92] Lithuania - Svencionys District Court, judgement of 13 August 2010, No A-971-617/2010, judgement of 23 June 2011, No A-703-405/2011; example of good practice to be found at Svencionys District Court, judgement of 29 March 2010, No A-396-763/2010.

[93] See JRS, Detention of vulnerable asylum seekers and irregular migrants in the EU, conclusions of the conference, 8 June 2010.

[94] Guideline 5 of 1999 UNHCR Revised Guidelines: "If children who are asylum seekers are detained in airports, immigration-holding centres or prisons, they must not be held under prison-like conditions. Efforts must be made to have them released from detention and placed in other accommodation. If this proves impossible, special arrangements must be made for living quarters which are suitable for children and their families".

[95] Recommendation Rec (2003) 5 of the Committee of Ministers to Member States on measures of detention of asylum seekers; Committee of Ministers, Twenty Guidelines on Forced Return, guideline 6.1; Committee of Ministers, "Guidelines on human rights protection in the context of accelerated asylum procedures", July 2009.

[96] ECtHR, *Mubilanzila Mayeke and Kaniki Mitunga vs Belgium*, application n° 13178/03, 12 October 2006; - ECtHR, *Muskhadzhiyeva and others vs Belgium*, application n° 41442/07 19 January 2010.

persons can only occur where adequate infrastructures – including adequate detention regime - are available.

Whilst there is no prohibition of child detention or detention of vulnerable persons under EC law, some safeguards can also be found with regards to the use of detention measures. Whilst the Article 3.9 of the Directive 2008/115/EC provides a non-exhaustive list of vulnerable persons, special attention should be paid to their specific needs according to Article 16.3. Article 17 stipulates that detention of families with minor children should be a measure of last resort. In our opinion, a presumption against detention of children is also slowly emerging under EC law as these provisions should be read in connection with the EU Action Plan on Unaccompanied Minors, adopted in May 2010[97] which states that: *"unaccompanied minors should always be placed in appropriate accommodation and treated in a manner that is fully compatible with their best interests. Where detention is exceptionally justified, it is to be used only as a measure of last resort, for the shortest appropriate period of time and taking into account the best interests of the child as a primary consideration".*

Currently, there is no positive obligation imposed over EU Member States with regards to the need to set up effective identification mechanisms of vulnerable persons. However, such an obligation might materialize with regards to reception of asylum seekers as it features in the recast proposal for the reception directive.[98]

Legislation and practice in the countries of concern generally fall short of international standards with regards to adequate care vulnerable persons. In **Estonia**, there are no special provisions stated in the law for the protection of vulnerable persons in detention. The law only states that a minor shall be accommodated separately from adult persons to be returned except if this is evidently in conflict with the interests of the minor and the provision of food for minors shall be organized taking into consideration the needs resulting from their age.[99]

Whilst special provisions apply with regards to "vulnerable persons" in the **Czech Republic**, these measures are poorly implemented due to a lack of adequate identification mechanisms. Further, the legislation restricts the benefit of this special protection regime to unaccompanied minors under the age of 15. A similar problem can be found in **Latvia** which allows for the

[97] Communication from the Commission to the Council and the European parliament, Action Plan on Unaccompanied Minors, COM (2010) 213 final, 6 May 2010.

[98] Article 22 of the amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers, COM (2011) 320 final, 2008/0244 (COD).

[99] Estonia - Art. 26 (3) and (4) OLPEA.

detention of minors above the age of 14.[100] None of these countries seem to have adequate mechanisms available in order to appeal against decisions with regards to age assessment. In our opinion, the compatibility of such provisions with international and EC standards begs serious doubts. It should be reminded that the Articles 1 and 37 of the UN Convention on the Rights of the Child define the "child" as a person below the age of 18. Nowhere in the Convention are State parties allowed to define a different legal regime for categories of minors. We shall also stress that both under international and EC law, provisions related to minors must be interpreted according to the principle of the "best interest of the child". The legislation of such countries might also fall short of the presumption against child detention that is emerging from the provisions of the EC Directives read in conjunction with the May 2010 EU Action Plan on Unaccompanied Minors.[101]

In **Slovakia**, the Act on the Stay of Foreigners expressly prohibits the detention of unaccompanied minors[102] and prohibits the prolongation of the detention of vulnerable persons and families with children. The law states that vulnerable persons other than unaccompanied minors could be subjected to detention only as the last resort and for the shortest duration.[103] There is a clear prohibition with regards to detention of unaccompanied minors.[104] However**,** there have been cases where persons - that had been so far considered as unaccompanied minors[105] - have been immediately detained as the results of the medical checks revealed that they were above 18. The detention decision has been taken without waiting for the responsible courts to decide whether such medical statement shall be considered in order to change their legal status. This practice has been firmly condemned by regional courts and criticized by the NGOs arguing that the persons detained were *de jure* (at least) still considered

[100] Latvia – There are no provisions on the prohibition of detention of vulnerable groups in the legislation; provisions dealing with unaccompanied minors are to found under Immigration Law (adopted 31 October 2002 with amendments 26 May 2011), Section 508, para 1 and Article 595, para 1.

[101] See in particular Article 17.5 of the Directive 2008/115/EC (measure of last resort and best interest principle); see Guideline 11 of Council of Europe Twenty Guidelines on Forced Return, 925th meeting, 4 May 2005 ; see EU action plan on unaccompanied minors envisages that where detention is exceptionally justified, it is to be used as a measure of last resort, for the shortest appropriate period of time, and taking into account the best interest of the child as a primary consideration COM (2010) 213 final, 6 May 2010.

[102] Slovakia - See Article 62 (7) of the Act on the Stay of Foreigners.

[103] Slovakia - See Article 62 (7) of the Act on the Stay of Foreigners, second sentence.

[104] Slovakia - Article 62.7 of the Act on the Stay of Foreigners prohibits the detention of unaccompanied minors and prohibits the prolongation of detention of vulnerable persons and families with children.

[105] The official decision of the particular court on appointment of the legal guardian to the unaccompanied minor.

as unaccompanied minors.[106] As mentioned earlier, the ECtHR has on several occasions firmly condemned the detention of minors together with adults (both unaccompanied and with relatives). Such practice may amount to a breach of Article 5.1 (f) ECHR due to the extreme vulnerability of minors.[107] The newly adopted legislation does not include any improvements with regards to vulnerable persons, while the prolongation of the detention of asylum seekers will be strictly prohibited.[108]

By contrast, **Lithuania** offers example of good practice as courts have applied the benefit of the doubt when the age of the person has not been clearly established and ordered the immediate release.[109] The legislation provides that unaccompanied child asylum seekers can only be detained in exceptional cases.[110] Once an application for asylum has been made, an unaccompanied child must be accommodated at the Refugee Reception Centre, an open centre that provides care and education, unless the appointed guardian for the child requests otherwise.[111] If, however, an unaccompanied child does not seek asylum, he or she will be held in a closed detention centre, frequently a juvenile offender detention facility pending removal.[112]

Further efforts are needed with regards to the adequate reception and protection of children, as well as compliance with the principle of "best interest" of the child. It is to be noted that little information is available with regards to other groups defined under the Directive 2008/115/EC. Whilst the countries of concern might have little experience with **unaccompanied minors**, adequate definitions and specific provisions concerning these persons should be included in the legislation. Adequate training should be provided to the competent authorities and relevant stakeholders. With regards to age assessment, UNICEF has insisted that age assessment is, at best, an "inexact science" and the measures

[106] Until November 2011 there have been delivered ten decisions out of 15 cases. Judgements available in the case documentation of the Human Rights League. See Judgement of the Regional Court in Trnava 38Sp/7/2011 and 38Sp/8/2011 dated on 20.09.2011, pg. 10, 11, copy in the file of the Human Rights League.

[107] ECtHR, *Mubilanzila Mayeke and Kaniki Mitunga vs Belgium*, application n° 13178/03, 12 October 2006; - ECtHR, *Muskhadzhiyeva and others vs Belgium*, application n° 41442/07 19 January 2010; ECtHR, *Rahimi vs Greece*, application n° 8687/08, 5 April 2010.

[108] Human Rights League, Detention and alternatives to detention in Slovakia, December 2011.

[109] Lithuania - Svencionys District Court, judgement of 8 February 2010; - Svencionys District Court, judgement of 4 February 2010.

[110] Lithuania - Article 114 of the Law on Legal Status of Aliens, n° IX-2206, 29 April 2004.

[111] Lithuania - Article 79 of the Law on Legal Status of Aliens, n° IX-2206, 29 April 2004.

[112] International Organization for Migration, European migration network, Institute of Social Research, Audra Sipavičienė, A. et al., On the Road: Unaccompanied Minors in Lithuania, Vilnius, 2009: <www.iom.lt/ documents/Unaccompanied%20minors_EN.pdf> [accessed 29 January 2011].

used can only give an estimated rather than an actual age.[113] The Committee on the Rights of the Child has recommended that in undertaking age assessments, authorities "should not only take into account the physical appearance of the individual, but also his or her psychological maturity".[114] Where it is not clear following the assessment whether the child is in fact a child or an adult, the Committee has recommended that, "in the event of remaining uncertainty, (the assessment) should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such".[115] The United Nations High Commissioner for Refugees takes the same position.[116]

With regards to the broader issue of **"vulnerable groups"**, identification mechanisms should be set up without further delay. States should draw inspiration from identification tools and vulnerability indicators set up by the UNODC and the UNGIFT within the framework of the fight against trafficking in persons.[117] Whilst trafficking falls outside the scope of this study, it is worth reminding that there are numerous victims of trafficking amongst asylum seekers and irregular migrants. When developing identification tools with regards to vulnerable persons, State should make sure that adequate referral mechanisms are available with regards to victims of trafficking identified during the asylum or during the removal process.

[113] See UNICEF, Administrative Detention of Children – A Global report, Discussion paper, February 2011; - Royal College of Pediatrics and Child Health, "The Health of Refugee Children: Guidelines for Practitioners", 1999, p. 13.

[114] Committee on the Rights of the Child, General Comment No. 6 (2005), U.N. Doc. CRC/GC/2005/6, para.7.

[115] *Ibid.*

[116] See United Nations High Commissioner for Refugees, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, February 1997, para. 5.11.

[117] UNODC and UN.GIFT, *Anti-Human Trafficking Manual for Criminal Justice Practitioners*, 2009 available at www.unodc.org

CHAPTER II - PROCEDURAL SAFEGUARDS

The present chapter will look at the procedural safeguards available to persons in detention with regards to access to information on the reason for detention (2.1); access to legal assistance (2.2) and access to asylum procedure (2.3). Last, this chapter will review procedural safeguards available against arbitrary detention (2.4), such as the right to an effective remedy (2.4.1), the test of necessity and proportionality (2.4.2) and the length of detention (2.4.3).

2.1. Access to information on the reasons for detention

According to the Article 5.2 ECHR and 9 ICCPR, there is a right of detainee to be "promptly" informed of the reasons for detention.[118] Schematically, the ECtHR has interpreted this obligation to mean that the person must be told in simple, non-technical language that she or he can understand, the essential legal and factual grounds for the arrest, so that s/he can, if necessary, apply to a court to challenge its lawfulness.[119] According to experts, it is essential that this information should be communicated both *orally and in writing* with due care to the level of education of the persons.[120] According to the European Committee for the Prevention of Torture (CPT) and UN Working Group on Arbitrary Detention, the information provided shall also include the procedure to challenge the detention order.[121] These rules apply to cases of detention for the purpose of preventing irregular entry and with regards to pre-removal detention.[122] The right to be informed about the reasons for detention can also be found in the EU acquis both with regards to pre-entry and to pre-removal detention.[123] It shall be noted that Article 12.3 of the EU Return Directive undermines this procedural safeguards as Member States may choose not to provide such translation or information *"to persons who have illegally entered*

[118] Article 5.2 ECHR: "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

[119] ECtHR, *Fox, Campbell and Hartley vs UK*, applications n° 12244/86; 12245/86 and 12383/86, 30 August 1990; - Parliamentary Assembly, The detention of asylum seekers and irregular migrants in Europe, Committee on Migration, Returns and Population, 11 January 2010, document 12105 (Rapporteur Mrs. Ana Catarina MENDONÇA).

[120] Christophe RENDERS, JRS Belgium, "The social cost of detention", presentation made at UNHCR Conference on Alternatives to Detention, 16 November 2011.

[121] European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), Foreign nationals detained under aliens legislation – abstract from 7th General Report [CPT/Inf (97) 10]; CPT/Inf/E (2002) 1 – Rev. 2010 http://www.cpt.coe.int/en/hudoc-cpt.htm - Human Rights Council, 13th session, Report of the Working Group on Arbitrary Detention, para 64, UN General Assembly, A/HRC/13/30, 18 January 2010.

[122] ECtHR, *Saadi vs UK*, application n° 13229/03, 29 January 2008.

[123] See Articles 12-13 of the Directive 2008/115/EC and Article 5 of the Directive 2003/9/EC

the territory of a Member state and who have not subsequently obtained an authorization or a right to stay". These discrepancies with international standards are of concern and may lead to situations where EU States could be condemned by the Court of Strasbourg while complying with the EC standards.

Procedural safeguards with regards to access to information in detention seem to be implemented satisfactorily in the **Czech Republic** within the framework of the regular procedure. This right is however not properly implemented in the context of the accelerated procedure applied at the Prague international airport. In **Estonia**, the good quality of access to information has been welcomed by the CPT.[124] In particular the CPT has praised the fact that, upon admission, all foreign nationals receive written information on their rights (including the right to lodge complaints) and a copy of the internal rules (which were also available in English and Russian, the most frequently spoken languages at the time of the visit). According to the Article 26 OLPEA, such information is also provided orally in a language that the person understands (English, Russian, Arabic and French), whilst the detainee bears the cost of translation in his/her mother tongue if different. NGO monitors have confirmed that oral explanations are properly delivered and come be seen as a positive outcome of the procedure enhancing self-empowerment and trust in the authorities.

By contrast, it is to be noted that the **Lithuanian** Aliens' Law does not contain any provisions related to the right of an alien to receive information on detention and therefore falls short of international standards. However, interviews carried out within the course of the research seem to indicate that prompt and detailed information are provided in practice. However, the researchers were informed that no information is provided with regards to legal remedies.[125]

Whilst the **Latvian** legislation includes adequate provisions with regards to access to information,[126] such right seems to be poorly implemented in practice. In breach of international standards, the written information is provided in Latvian regardless of the fact that the detainee might not understand this language. Oral interpretation should be provided by the State Border Guards and by the courts. Asylum-seekers interviewed in the course of the project complained about the poor quality of the information and lack of adequate

[124] Estonia – see Art. 26 (7) OLPEA; CPT monitoring visit to Harku Repatriation Centre of the Citizenship and Migration Board on 9-18.05.2007. Report was adopted by the CPT at its 64th meeting held from 5-9.11.2007.

[125] Interview held with the inspector of the Foreigners Registration Centre, 27 January 2011; Interview held with an asylum seeker detained in the Foreigners Reception Centre, 30 November 2010.

[126] See Asylum Law, Article 9; Immigration Law (adopted 31.10.2002 with amendments 26.05.2011), Article 52; - Immigration Law (adopted 31.10.2002 with amendments 26.05.2011), Article 56.

interpreting services despite efforts made by the competent authorities to sort out this issue.[127]

In **Slovakia**, the legislation clearly includes a duty to inform the person about the reasons for detention in a language that s/he understands and access to information and interpreting services seem to be generally adequate in practice.[128] However, a lack of adequate interpreters is of particular concerns with regards to Somalis. There has been a recent increase of the number of Somali nationals that are caught while irregularly crossing the Slovak-Ukraine borders.[129] In several *cases, ad hoc* interpreters have been used providing poor quality of the translation. It is to be noted that courts have developed a protection-centred approach and imposed the strict observation of the right to be informed in a language that the person understands.[130] As of January 2012, the law will strengthen the obligation to inform the foreigner on the grounds of the detention, possibility to inform the embassy of the country of citizenship on the detention, and the possibility for judicial review of the detention decision in the language s/he understands.[131] Additionally, as per Article 90 (1) (e), the detainee will have the right to be informed on the possibility to apply for assisted voluntary return, to contact NGOs or to contact the UNHCR in the language s/he understands or *"may reasonably be presumed to understand"*.[132] However, the newly adopted legislation still opens the door for poor translation as the wording used in the Article 90 (1) (e) is identical to the one used in the EC Return Directive, a provision that has been criticized for its lack of clarity.[133]

[127] Information obtained from the LCHR monitoring visit to the Olaine detention centre on 29 March 2011 and to the Daugavpils detention centre on 7 September 2011.

[128] Slovakia - Article 63 of the Act on the Stay of Foreigners; for more information on this issue see the "Report on Practices in Interviewing Immigrants: Legal Implications" prepared by Zuzana Števulová within the project "Practices in interviewing immigrants: legal implications" funded by the Visegrad Fund. The report is available at www.hrl.sk.

[129] Slovakia - According to the statistics provided by the Alien and Border Police, in the first 6 months of 2011, the Somalis were the major nationality among the foreigners who crossed the border illegally (72 detected cases out of 184). In the same time in 2010, Somalis were only the 5th most detected nationality regarding the illegal border crossing (15 cases out of 213 in total). Source: Ministry of Interior of Slovakia, Bureau of Alien and Border Police. Statistic overview of the legal and illegal migration in first half of 2011: http://www.minv.sk/swift_data/source/policia/hranicna_a_cudzinecka_policia/rocenky/rok_2011/2011_I_polrok_UHCP-SK.pdf>

[130] Slovakia - Judgements of the Regional Court in Trnava 38Sp/7/2011 and 38Sp/8/2011 dated on 20.09.2011, enclosed in the files of the Human Rights League; Judgement of the Regional Court in Košice 6Sp/17/2011 dated on 11.08.2011; Judgement of the Regional Court in Trnava no. 44Sp/59/2011 dated on 18.07.2011, enclosed to the file of the Human Rights League.

[131] See Article 90 (1) (a) of the Act n° 404/2011 of 21 October 2011 on the Stay of the Foreigners and on the Changes and Amendments to the other Acts.

[132] See Article 90 (1) (e) of the Act n° 404/2011 of 21 October 2011 on the Stay of the Foreigners and on the Changes and Amendments to the other Acts.

[133] ECRE, Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, October 2006.

Effective access to information remains an issue in some of the countries. Against this background competent stakeholders should pay particular attention to relevant recommendations put forwards by the EU Fundamental Rights Agency. Given practical challenges to implement the procedural safeguards included under Article 5.2 ECHR in practice, the EU Fundamental Rights Agency has advised *"to specify expressly in national legislation that the reason for detention as contained in the detention order and the procedure to access judicial review be translated in a language the detainee understands. The reasons should also be given to him/her in written form as well as read out with the help of an interpreter, if necessary"*.[134] Beyond legal improvements, practical steps shall be taken in order to implement this right adequately. Further, interpreting system should be substantially improved through adequate trainings. Whilst such measures might be costly, States should seek assistance from the European Commission and relevant EC agencies (such as the EASO, FRONTEX and the Fundamental Rights Agency) in order to pull out common interpreting systems – in particular for rare languages - and to further develop technical assistance.

2.2. Access to legal assistance

Although access to legal assistance is a key procedural safeguard, it is to be noted that the EtCHR has adopted a cautious approach with regards to States' obligations in this field.[135] Under EC law, provisions on access to legal assistance can be found both with regards to asylum seekers and with regards to persons subject to a removal order.[136] However given financial implications of free legal assistance, both instruments contain severe limitation with regards to the right to free legal assistance. There is a critical lack of adequate harmonization under the provisions of the EC Return Directive since Member States have the obligation to ensure the provision upon request of free legal assistance and/ or representation in accordance with national law. Further, this safeguard may also be subject to the conditions set out in Article 15(3) to (6) of the Asylum Procedures Directive. According to human rights monitoring bodies, this provision severely circumscribes the ability of asylum claimants – and thus detainees - to access free legal assistance by allowing Member States to introduce a series of limitations, such as excluding legal aid for judicial review of administrative decisions, limiting the granting of assistance to where the

[134] European Union Agency for Fundamental Rights, Detention of Third Country Nationals in Return Procedures, *opus cit*.

[135] ECtHR, *Čonka vs Belgium*, application n°511564/99, 5 May 2002.

[136] See Articles 15 and 16 of the Directive 2005/85/EC and Article 13.4 of the Directive 2008/115/EC.

appeal or review is likely to succeed, and introducing monetary and temporal restrictions to the provision of legal aid.[137]

Access to legal assistance – as well as the quality of such assistance - seems to be an area of concern in the five selected countries. In its 2010 report, the EU Fundamental Rights Agency has highlighted practical obstacles in **Estonia** since applications for free legal assistance have to be submitted in Estonian language. This condition proves to be difficult to fulfil in practice given above-mentioned problems with adequate interpreting service.[138] In **Latvia**, there are no legal provisions concerning legal assistance for asylum seekers and foreigners within the framework of an appeal procedure against the decisions on detention or extending detention. Further, information gathered during the monitoring visits revealed that asylum seekers do not have adequate information about legal counselling in Latvia.[139] In August 2011, the Parliament adopted amendments providing for free legal assistance to foreigners in case of appeal of the decisions on return order and forced return.[140] The amendments will enter into force on 23 December 2011.

Whilst the scope of legal assistance is limited to courts hearings[141] in **Lithuania** (see *infra* under Para 2.4)**,** a draft amendment to the Aliens' Law foresees that legal aid will be provided only upon request of the alien.[142] If adopted, the amendment could breach of the principle of equality of arms.[143] Last, in several cases, researchers have documented cases where the quality of legal assistance raised serious concerns.[144]

Quality of legal assistance is also deemed to be an issue both in the **Czech Republic and in Slovakia**, where legal assistance is provided by NGOs which have limited capacities. The sustainability of such service is also a matter of concern in both countries provided that these organizations are funded for a

[137] See Immigration Law Practitioners' Association (ILPA) Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, June 2004, p. 20; ECRE, Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *opus cit*.

[138] Estonia - Article 12.5 of the State Legal Aid Act available RT I 2004, 56, 403 entered into force 01.03.2005 also available https://www.riigiteataja.ee/akt/114032011017

[139] Information obtained from the LCHR monitoring visit to the Olaine detention centre on 29 March 2011 and to the Daugavpils detention centre on 7 September 2011. See also the results of the project "Legal assistance to asylum seekers in Latvia" co-funded under the ERF at http://www.humanrights.org.lv/html/30456.html (accessed 19 September 2011).

[140] Latvia - Amendments to the State Ensured Legal Aid Law (adopted on 4 August 2011).

[141] Lithuania - Aliens' Law, Article 116, para. 1.

[142] Lithuania - Draft amendment to the Aliens'Law, Article 122, para 1.

[143] ECtHR, *Nikolova vs Bulgaria*, application n° 31195/96, 25 March 1999 - para 58.

[144] Lithuania - Svencionys District Court, judgement of 23 June 2011; - Svencionys District Court, judgement of 21 May 2009.

limited period of time through the European Refugee Fund and the European Return Fund. While access to legal assistance seems to be secured in both countries, their respective legislation still contains legal caveats.

With regards to the **Czech Republic**, cells at the Prague airport are not formally considered as detention places by the Czech authorities and access is currently denied to NGOs and international monitoring bodies such as UNHCR.

Free legal assistance is available for asylum seekers in **Slovakia**. However, with regards to the removal procedure, a major shortcoming in the Slovak legislation is that free access to legal assistance is not granted during the hearing at the police department. Such service is only available once the detention decision is issued and the migrant is placed into a detention facility.[145] This provision has been amended with the new legislation passed in October 2011. As of 2012, the foreigners who would be issued decision on administrative expulsion will have the right to free legal assistance provided by the Legal Aid Centre of the Ministry of Justice during the appeal procedure.[146] According to the initial statement of the Legal Aid Centre, the legal aid would be primarily secured by assigned advocates.[147] This provision aims at implementing the provision of the Article 13 (3) of the Return Directive on free legal assistance with regard to the decision on return. However, it does not include the right to free legal assistance provided with respect to decision on detention. Therefore, the free legal aid to detainees would be provided through EC funded projects which raises concerns with regards to its sustainability.

Access to legal assistance is poorly implemented throughout the countries of concern. If needed, national legislation should be revised in order to fully comply with EU standards. It is to be reminded that the CJEU held that rights guaranteed by Community Law require *"a procedural system which is easily accessible*.[148] Substantial efforts are also needed with regards to the quality of the legal

[145] Human Rights League, Detention and alternatives to detention in Slovakia, December 2011, 3.3. Safeguards against arbitrary detention, p.13.

[146] See Article 77 (8) of the Act n°404/2011 of the 21 October 2011 on the Stay of the Foreigners and on the Changes and Amendments to the other Acts: "The third country national is entitled to be awarded by legal representation to the extent and based on conditions stated in special act." The special act in this provision is the Article 3 of the Act. N° 327/2005 Coll. On Legal Aid to People in Poverty and on Amendment and Change of the Act No. 586/2003 on Advocacy and on Amendment and Change of the Act No. 455/1991 Coll. On Self – Employment as in the wording of the Act No. 8/2005 Coll.

[147] The information provided by Mr. E. Hebeň from the Legal Aid Centre during the National Seminar on Detention held on October 5, 2011 in Bratislava, Slovakia.

[148] Even though it did not involve a person in need of international protection, see for instance *Panayotova and others v. Minister voor Vreemdelingenzaken en Integratie*, C-327/02, European Union: European Court of Justice, 16 November 2004, paragraph 27 (Rights guaranteed by Community Law requires *"a procedural system which is easily accessible"*), at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0327:EN:HTML.

assistance available in the countries of concern. Whilst practical issues and cost associated with effective legal assistance is a critical problem, recommendations of the EU Fundamental Rights Agency might provide some useful benchmarks. In light of the variety of practical and legal obstacles preventing the effective access to legal assistance, the competent authorities were advised to enter into a dialogue with civil society organizations as well as bar associations in order to find legal as well as pragmatic solutions to these problems.[149] Countries should also seek assistance from the European Commission and relevant EC agencies in order to develop further training programmes and improve existing systems.

2.3. Access to asylum procedure

2.3.1. General overview

Whilst the right to seek asylum is firmly enshrined in international conventions, access to asylum procedure has been harmonized under EC legislation.[150] The right to seek asylum is formally acknowledged in all the selected countries. However, in practice, this right might be hampered by two practical obstacles: i) limited access to information about the asylum procedure; ii) the obligation to lodge an application within a short dead-line.

Limited access to information seems to be critical in two countries, namely Latvia and Lithuania. **In Latvia**, information leaflets on asylum issued by the Office of Citizenship and Migration Affairs are not freely available, but distributed only on an *ad hoc* basis or upon request. In **Lithuania**, the Aliens' Law does not contain any specific provision related to the distribution of information on the asylum procedure in detention facilities. Whereas a variety of informational material related to asylum and assistance in the asylum procedure is available in the open reception centre, there is currently no such information in the detention premises. This situation has been heavily criticized by the UNHCR and civil society organizations. The competent authority objects to the distribution of information material on asylum in the detention facilities because it fears that this could encourage abuse of the asylum procedure by detainees. It is to be noted that significant improvement occurred with regards to access to asylum at the borders. Since June 2010, there is a tripartite memorandum of understanding, signed between the UNHCR, Lithuanian Red Cross and the border guard authorities, the purpose of which is to improve the reception of

[149] European Union Agency for Fundamental Rights, Detention of Third Country Nationals in Return Procedures, *opus cit*.

[150] See Article 14 of the Universal Declaration of Human rights; - see Article 18 of the EU Charter on Fundamental Rights; see Article 6 of the Council Directive EC 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, JOCE L 326 13 December 2005.

asylum seekers at the Lithuanian border.[151] On the basis of this memorandum of understanding, the Red Cross prepared informational leaflets on the asylum procedure in Lithuania, in five languages (English, Russian, Georgian, French and Farsi), to be distributed at all border crossing points and at the Vilnius International Airport. The leaflets provide a detailed presentation of the asylum procedure, as well as the rights and duties of the applicant. Whilst these leaflets are systematically distributed in the reception centres, the authorities have refused to distribute them in the detention places.

It is to be noted that the access to information regarding the asylum procedure is deemed to be generally satisfactorily in the **Czech Republic, Slovakia and Estonia**. However, some concerns were raised in Slovakia with regards to access to interpretation for specific groups of asylum-seekers such as Somalis (see *supra* para 2.1).

Access to asylum procedure might be hampered by the short timeframe for submitting an asylum application. The legislation appears to be particularly restrictive in **Estonia**, where applications can be rejected as manifestly unfounded if they are not submitted immediately after crossing the border.[152] Whilst asylum seekers in detention have only seven days to apply for asylum in the **Czech Republic**,[153] this is not an issue in practice given that NGOs have regular access to detention places, except for cells located at the Prague international airport. At the request of the Ombudsman, UNHCR and NGOs, information leaflets have been placed in the cells although access is still denied to NGOs and human rights monitors. Such derogatory regime is deemed to be problematic as – in light of the jurisprudence of the ECtHR – transit zones and detention centres located at border crossing points are fully part of States' jurisdiction and rights included in the ECHR shall fully apply therein. From the perspective of the detainees, it has to be reminded that oral explanations are often decisive to allow the person to have a full grasp of his legal status.

Access to Ombudsman, NGOs and UNHCR is granted by the legislation in all the countries of concern and in practice, this does not seem to be an issue of concern in the five countries (see *infra* details under 3.3).[154]

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[151] Tripartite memorandum of understanding on modalities of mutual cooperation to support the access of asylum seekers to the territory and the asylum procedures of the Republic of Lithuania, 2 June 2010.

[152] Estonia: Article 20.16 AGIPA.

[153] Czech Republic: Article 3(b) of the Asylum Act 325/1999 Coll.

[154] Czech Republic: Articles 21 and 36 of the Asylum Act; - Estonia: Article 26.4 OLPEA; - Latvia: Asylum Law, Article 4, para 1; Article 10 para 7; Immigration Law, Article 59.2, para 2 (4)); Lithuania: Article 71 para 1(8) Law on the Legal Status of Aliens, as last amended on 22 July 2009, n° XI-392, official gazette „Valstybes zinios", 4 August 2009, No 93-3984 ; and Slovakia: Article 17.1 of the Asylum Act n° 480/2002 Coll.

2.3.2. Legal assistance with regards to negative decision

It shall be reminded that EC legislation clearly imposes an obligation upon EU Member States to provide legal assistance in case of a negative decision.[155] This obligation seems to be duly fulfilled in **Slovakia** and in the **Czech Republic.**[156] Yet, this obligation seems to be poorly implemented in the other countries of concern.

The scope of legal assistance in the context of a negative asylum decision is a matter of concern in **Lithuania.** Indeed, the legal aid guaranteed by the state is limited to preparing appeals against negative decisions and representation in court, however, it does not cover legal consultations related to any other questions in relation with the immigration status of the applicant. Although this restrictive interpretation raises serious criticisms with regards to the effectiveness of legal assistance, some local experts take the view that this limitation is in line with the provisions of Article 15 (3) to (6) of the Asylum Procedure Directive.[157]

In **Estonia**, there was no regular access to legal assistance for asylum seekers rejected at first instance until September 2011 where a memorandum of understanding allows the Estonian Human Rights Centre to grant such assistance.[158] Lack of legal assistance was all the more worrying that the legislation provides that the appeal should be lodged within ten days.[159]

In **Latvia**, access to state-funded legal assistance for asylum seekers is available only for lodging an appeal against negative decisions. However, in practice, only a very limited number of persons have enjoyed state-funded legal assistance; most of them have received legal assistance provided by NGOs. Access to such assistance is more difficult for asylum seekers in the detention centre located 230 km from the capital city.[160]

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[155] Article 15, para. 1 of the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJEU L 326 13 December 2005.

[156] See Human Rights League, Detention and alternatives to detention in Slovakia, *opus cit*; see Organisation for Aid to Refugees, Detention of asylum-seekers and alternatives to detention in the Czech Republic, *opus cit.*

[157] Interview with the senior specialist of the Migration Department, 5 October 2011.

[158] Information available at: http://humanrights.ee/en/activities/refugees/

[159] Estonia: Article 41.3 AGIPA

[160] See the results of the project "Legal assistance to asylum seekers in Latvia" co-funded under the ERF at http://www.humanrights.org.lv/html/30456.html

2.4. Access to judicial review and safeguards against arbitrary detention

2.4.1. The right to an effective remedy

The right to challenge the lawfulness of detention must include a right of access to a court.[161] Even if the initial decision to detain is taken by an administrative body, Article 5 ECHR guarantees the right of judicial review.

Moreover, such review must be effective which includes a realistic possibility of accessing the remedy.[162] The court must be empowered to order release (which might necessitate alternative arrangements that impose lesser restrictions on liberty and movement), and the court must have the power to examine the lawfulness of any detention in light of the requirements of international or regional human rights treaty standards.[163]

As mentioned above, while the initial period of detention may be lawful, extended periods may not be. In order to ensure lawful detention does not become unlawful or arbitrary, any period of detention must be subject to periodic review. There is little guidance as to what constitutes acceptable periodic review.[164] Whilst the Article 15.3 EU Returns Directive imposes an obligation to involve judicial review in case of "prolonged detention periods", the Directive leaves some flexibility to states to define the exact timelines for regular reviews and to determine when detention periods can be considered as prolonged. It should be noted that both in **Estonia** and in **Latvia**[165] – the legislation requires a periodic review after two months. Whilst the extension is not systematically granted in Estonia, the judicial review seems to be merely formal in Latvia and courts' practice reveals a tendency to authorize the extension of the detention period automatically for two months, with the exception of some cases examined by the Daugavpils court indicating a specific date and time (see *supra* at para 1.2.). Such practice is in breach of the case law of the ECtHR which has clearly stated that mere formal review will not discharge State's obligations under the provisions of Article 5.4.[166] In light of these requirements, the system applied in the **Czech Republic** also seems to

[161] ECtHR, S.D. *vs Greece*, application n° 53541/07, 11 June 2009, p. 76; for a detailed analysis see EDWARDS A., Back to Basics: the right to liberty and security of persons and "alternatives to detention" of refugees, asylum-seekers, stateless persons and other migrants, *opus cit*.

[162] ECtHR, *Čonka vs Belgium*, application n°511564/99, 5 May 2002.

[163] ECtHR, *Louled Massoud vs Malta*, application n° 24340/08, 27 July 2010.

[164] Parliamentary Assembly of the Council of Europe, Resolution1707 (2010) on detention of asylum-seekers and irregular migrants in Europe, 28 January 2010.

[165] Estonia: Article 25 OLPEA; - Latvia: Article 54, para 2-4 of the Immigration Law.

[166] ECtHR, *Louled Massoud vs Malta*, application n° 24340/08, 27 July 2010.

be legally flawed.[167] Indeed, the administration has a duty to confirm *ex officio* the continuing existence of grounds for detention throughout the entire period – according to the EU Fundamental Rights Agency, this guarantee cannot however be considered as effective periodic review. Similarly, the Lithuanian legislation does not include any specific provision related to a periodic judicial review. According to the Article 118.1 of the Alien's Law, the detention decision is reviewed when the grounds for detention have disappeared, upon request by the alien or the institution which initiated the detention.

According to a constant case law of the ECtHR, the review must be speedy or prompt. Constitutional or other legal challenges that are lengthy or cumbersome, for example, would not be sufficient to meet this requirement. Delays in providing judicial review can also lead to violations of rights to liberty and security of person. The ECtHR has found, for example, a delay of 32 to 46 days in a court's review of the lawfulness of detention to be excessive.[168] According to information gathered by the national researchers, judicial review tends to be lengthy in **Slovakia**. In several cases, the judicial review occurred at the end of the initial detention period (six months) or even after the person had been released from detention.[169] In an important case,[170] the Constitutional Court ruled that the right of the applicant for immediate review of the legality of the deprivation of liberty had been violated. In any case, administrative and procedural routine could not interfere and be in contradiction with the basic rights of the applicants. In Slovakia, the specification of the explicit period for judicial review of the detention decision is one of the major procedural changes envisaged by the new Aliens' Law which will enter into force in January 2012.[171] However, in order to be effective, similar amendments should be mirrored in the Civil Procedure Code, which regulates general rules for the civil procedure applicable for the procedure on judicial review of the detention decision. Such procedural changes shall include *inter alia* providing for the special shorter periods with regard to the delivery of the case – file and written opinion of the respected police department (now 15 days since delivery of the Court's request), special shorter period for the preparation for the hearing (five days

[167] Czech Republic – Article 126 Foreigners' Residence Act.

[168] ECtHR, *Sanchez-Reisse vs Switzerland*, application n° 986/82, 21 October 1986.

[169] See Human Rights League, Detention and alternatives to detention in Slovakia, December 2011, section 3.5.2 Barriers and Concerns, footnote 46, p.16.

[170] See the Decision of the Constitutional Court of Slovakia no. II. ÚS 264/09-81 dated on 19.10.2010, where the Constitutional Court decided that the right of the applicant granted by the art. 5 (4) of the Convention has been violated by both the Regional Court in Trnava (there was period of 62 days that could be influenced and shortened by the Court) and the Supreme Court of Slovakia (the period of 50 days that could be influenced and shortened by the respected court).

[171] Act n° 404/2011 of 21 October 2011 on the Stay of the Foreigners and on the Changes and Amendments to the other Acts. The regional courts will have 7 days for deciding about the appeal (article 88.7 of the new Act) and the Supreme Court will be obliged to decide the case within 7 days since delivery of the file from the regional court (article 88.8 of the new Act).

since delivery of the Court's announcement on the date of the hearing), special shorter period for issuing the judgment (30 days since the public announcement) etc. These procedural changes would enable the courts to immediately release the detainee – without waiting for written notification – in the case where the initial decision on detention is deemed to be illegal.

2.4.2. The test of proportionality and necessity

As already mentioned (see *supra* para 1.2 and 1.3), there are great variations with regards to the obligation to apply a test of necessity between the ECHR and EC law. This area seems currently to be ruled by a double paradox. First, it should stressed that EC standards go beyond current ECtHR jurisprudence since the Court has stated the test of necessity does not apply to immigration detention.[172] Second, differences are still to be deplored between the detention regime applied within the context of the reception conditions for asylum seekers and pre-removal procedures for irregular migrants. Paradoxically, the necessity test only applies to the later procedure, although this imbalance could be fixed with the adoption of the recast Directive on reception conditions.[173]

As *per* the Article 15.1, detention must only serve the purpose of facilitating removal; it must be for the shortest possible period while removal arrangements "are in progress and executed with due diligence". Where there is no reasonable expectation that someone will be removed, detention ceases to be justified and the person concerned must be released immediately (Article 15.4). According to the provisions of the Recital 16, the use of detention should be limited and subject to the principle of *proportionality* with regards to the means and the objective pursued (see *infra* paragraph 1.5). Moreover, the Article 15.1 outlines a *necessity* test by subjecting a decision to detain to "other sufficient but less coercive measures [which] can be applied effectively in the specific case". The need for a necessity test has been further strengthened by latest rulings of the Court of Justice of the EU.[174] Further, the preamble of the EC Return Directive asserts that it is legitimate for Member States to return irregularly staying third

[172] ECtHR, *Saadi vs UK*, application n° 13229/03, 29 January 2008.

[173] Article 18 of the Amended Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers, COM (2011) 320 final, 2008/0244 (COD).

[174] See CJEU, *Hassen El Driri*, C-61/11, para 63: "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, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period".

country nationals, *„provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement".*[175]

The concept of *"realistic prospect of imminent departure"* was recently interpreted by the ECJ judgment Shamilovich Kadzoev[176]. According to this decision, such a reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country.[177] Practical and personal obstacles can seriously obstruct or delay the prospects of removal. Reasons can fall within the sphere of responsibility of the migrant (destruction of travel documents) or due to external circumstances (statelessness, absence of means of transportation, consular issues). It is to be added that the ECtHR has also clearly established that the legality of the detention is linked to the *"realistic prospect of imminent departure"* i.e. all domestic remedies have been exhausted and procedures for obtaining adequate travel documents have been arranged.[178]

It is to be noted that there are great disparities in the practice and legislation of the selected countries. In **Latvia**, the legislation does not include a clear requirement for the administration and/or the courts ordering or prolonging detention to balance the interest of the state and those of the individual when filling the margin of discretion given to them by the law. However, since 2011, the judge shall take into consideration the individual circumstances of the case when extending or refusing to extend an order for deprivation of liberty.[179] Analysis of court's practice reveals that the necessity test seems to barely apply in practice as there is a widespread practice of automatic extension of detention for two months (see *supra* at para 1.2).[180] In **Estonia**, the wording of the legislation suggests that detaining a person is an automatic standard procedure provided that the preconditions listed in the act are met. Whilst, the principle according to which detention is a measure of last resort is not mentioned in the legislation, courts have in practice taken the opportunity to fill the legislative gap. The necessity and proportionality of the detention measures are routinely assessed by competent judicial authorities.[181] According to the

[175] Paragraph 8 of the Preamble.

[176] CJEU, *Saïd Shamilovich Kadzoev v. Direktsia "Migratsia" pri Ministerstvo na vatreshnite raboti* (C 357/09), 30 November 2009.

[177] See Human Rights Council, 13th session, Report of the Working Group on Arbitrary Detention, para 64, UN General assembly, A/HRC/13/30, 18 January 2010.

[178] ECtHR, *Auad vs Bulgaria*, application n°46390/10, 11 October 2011.

[179] Latvia Immigration Law, Section 54[1], para 1.

[180] Decision of the Daugavpils District Court of 30 May 2011; nº KPL 12-039911; Decision of the Daugavpils District Court of 31 May 2011; nº KPL 12-040311; Decision of the Daugavpils District Court of 31 May 2011; nº KPL 12-040011; Decision of the Daugavpils District Court of 6 June 2011; nº KPL 12-041511.

[181] Thematic National Legal Study on the rights of irregular migrants in voluntary and involuntary return procedures, 30 June 2009.

Supreme Administrative Court of Estonia, the concept of a "real prospect" must be analyzed pragmatically. While in most cases, the existence of reasonable prospects of removal will arise in the context of extending the period of detention, in some cases it will be clear from the outset that the likelihood of successful removal is slim.[182]

The concept of "realistic prospect of removal" is not reflected in the legislation of **Lithuania**. Neither the Aliens' Law, nor the draft amendment includes an explicit obligation for the authorities to act diligently and to take active steps in order to remove the detained person. Further the interpretation by the Supreme Administrative Court of Lithuania seems to have evolved restrictively. In 2006, the Supreme Administrative Court of Lithuania established that the grounds for detention are inseparable from the purposes of detention. Unless the existence of at least one of these circumstances is proven by facts, the detention of an alien in the context of Article 113 will not be justified.[183] However, in May 2011 judgment, the Supreme Administrative Court of Lithuania stated that an alien's detention cannot be dependent on the decision to remove him, i.e. if no decision to remove the alien has been adopted or if such a decision has been annulled, there does not arise an unconditional obligation to release the alien from detention and accommodate him in the foreigners reception centre.[184] Thus, neither the current Lithuanian legislation, nor latest court practice are in compliance with international and European standards.

Similarly, in **Slovakia**, there is no express reference to the necessity to balance the interest of the state with those of the individual – the only safeguards can be found in the legislation are the prohibition to extend the detention in case of families with children or persons otherwise vulnerable, as well as the obligation of the police to assess regularly the duration and the purpose of the detention.[185] The need to test the proportionality and the necessity of the detention measure has been continuously stressed by the courts.[186]

Last, with regards to the **Czech Republic**, the administration has a duty to confirm *ex officio* the continuing existence of grounds for detention throughout the entire period. This guarantee cannot be considered as effective review despite the fact that international law leaves flexibility for States to define the

[182] Estonian Supreme Court – case of a stateless person; absence of receiving state- Estonia/ Riigihohus/3-3-1-45-06, 13 November 2006, para 10-12; Estonia/Riigihohus/3-3-1-6-06, 9 May 2006, para 28; Estonia/Riigihohus/3-3-1-53-06, 16 October 2006, para 13.

[183] Supreme Administrative Court of Lithuania, judgement of 14 December 2006, No N-17-2752/2006.

[184] Supreme Administrative Court of Lithuania, judgement of 16 May 2011, No N-575-4241-11.

[185] Slovakia - Article 62.3 and 63 of the Asylum Act n°480/2002 Coll.

[186] Article 63 (e) of the Act on the Stay of Foreigners in conj. with the article 63 (f) (1) of the Act on the Stay of Foreigners.

modus operandi of the periodic review. The immediate expulsion procedure available at the international airport in Prague raises concerns with regards to the test of necessity and proportionality.[187] According to this procedure, foreigners can voluntarily consent to their immediate expulsion within 48 hours. This procedure has been severely criticized as it does not offer the procedural safeguards available under the regular expulsion procedure – including judicial review - and allows for short-term detention.[188]

Whilst both EC standards and the jurisprudence of the ECtHR leaves the definition of the parameters used to assess the "realistic prospects for removal" at the discretion of the administration and the courts, the legislators could consider adding further safeguards. According to the Fundamental Rights Agency, in order to prevent prolonged detention, legislators may consider introducing presumptions against pre-removal detention for *de facto* stateless persons, where it is evident from past experience that the country of nationality will refuse any cooperation in establishing the citizenship and issuing related travel documents.[189]

2.4.3. Maximum length of detention

Whilst the maximum duration of detention is not regulated under the EC Reception Directive, the Returns Directive has imposed a maximum ceiling of 18 months. Such disparity between the two detention regimes is of particular concern. It should also be reminded that the CJEU considers that the 18 months limit only applied to pre-removal detention and therefore the respective duration of pre-entry and pre-removal detention can be cumulated.[190]

Lengthy detention practices have been reported to be an issue of concern in all the selected countries over the past decade. In **Lithuania**, an individual was detained in 2002 for more than four years (1 523 days). In **Estonia**, before the new legislation adopted in December 2010, the maximum length of detention has been close to four years (1 436 days)[191]. In **Latvia**, before the adoption of the 2011 Immigration Law, the maximum length of detention was 20 months. There have been a few cases when the overall term of detention has extended

[187] Czech Republic - Article 150 para 5 Act n° 326/1999 of the Aliens' Act.

[188] Czech Republic - Article 27 Act n° 273/2008 of the Aliens' Act.

[189] European Union Agency for Fundamental Rights, Detention of Third Country Nationals in Return Procedures, *opus cit*.

[190] CJEU, *Saïd Shamilovich Kadzoev v. Direktsia "Migratsia" pri Ministerstvo na vatreshnite raboti* (C-357/09), 30 November 2009.

[191] European Union Agency for Fundamental Rights, Detention of Third Country Nationals in Return Procedures, November 2010.

beyond that limit when the deportation could not be possible due to the failure of authorities to establish a person's identity.[192]

Except for the case of **Lithuania** where a maximum period of detention is yet to be introduced into the legislation, States have amended their legislation in order to comply with the provisions of the Directive 2008/115/EC. It shall be reminded that this Directive is the only instrument which stipulates a maximum detention period. The Directive provides for a possibility to detain illegally staying third country nationals for a maximum period of six months, provided that "any detention shall be for as short a period as possible […]."[193] It is to be noted that this provision has established an implicit obligation for States to introduce mechanisms or procedures to ensure that detention is not unduly prolonged. Under any circumstances, the six months ceiling shall not be applied automatically since the principle of proportionality requires the authorities ordering detention to examine that the deprivation of liberty does not exceed the time strictly required to carry out the removal. States are permitted to extend this six months period for an additional twelve months under exceptional circumstances, namely in the event of un-cooperative behaviour on the part of the individual or in case of delays in obtaining the necessary documents from third countries.[194]

The eighteen months ceiling has been heavily criticized by human rights monitoring bodies, such as UNHCR and ECRE, which have highlighted the danger that the maximum period of detention extends even further the current lengthy practices of detention for a potentially large class of persons. Furthermore, there is a risk that those states which applied higher standards before the adoption of the Directive may now use this legislation as a pretext to lower them.[195] The eighteen-months ceiling has also been criticized given the detrimental impact of long-term detention on the mental health of detainees.[196]

In the very recent case of *Auad vs Bulgaria* case, the ECtHR has clearly stated that the eighteen months ceiling could not be automatically applied and that detention would deem to be arbitrary in case there are no realistic prospects

[192] Information obtained from the LCHR's case work in December 2008 - June 2010.

[193] See Article 15.5 of the Directive 2008/115/EC.

[194] See Article 15.6 of the Directive 2008/115/EC.

[195] See UN press release, UN experts express concern about proposed EU Return Directive, 18 July 2008, UNHCR, UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, 16 June 2008, p. 2. See also joint press release by ECRE and Amnesty International, "Returns" Directive: European Parliament and Member States risk compromising respect for migrants "rights", 20 May 2008 as well as the attached letter to European Parliament Members, available at: http://www.ecre.org/files/ECRE%20AI%20Joint%20PR%20Returns%20Directive.pdf.

[196] See in particular, Jesuit Refugee Service (JRS), Becoming Vulnerable in Detention – civil society report on the detention of vulnerable asylum seekers and irregular migrants in the EU, July 2010.

of removal. In this case, the Bulgarian government had based its defence on its detention legislation alleged conformity with EU law in order to justify the applicant's detention for eighteen months pending his removal to Lebanon. The ECtHR did not give much attention to this element and focused its assessment on the actual initiatives taken by the Government to remove the applicant and concluded that they were manifestly insufficient: *"(…) Contrary to what has been suggested by the Government, compliance with that time-limit, which is in any event exceptional (…), cannot automatically be regarded as bringing the applicant's detention into line with Article 5 § 1 (f) of the Convention. As noted above, the relevant test under that provision is rather whether the deportation proceedings have been prosecuted with due diligence, which can only be established on the basis of the particular facts of the case."*[197]

Given that the selected countries have modified their legislation only recently, information compiled within the course of this research should be handled carefully. Indeed, preliminary information leans towards the conclusion that the duration of detention has overall decreased in the countries of concern with the introduction of a maximum ceiling – with the exception of Lithuania. However, even after the introduction of new sets of legislation, cases of repeated detention were documented in the **Czech Republic**; such cases were also reported in **Latvia** in the recent years.[198] Repeated detention contravenes both EC standards and well-established jurisprudence of the ECtHR.[199] Further, practice in these two countries is also of concern with regards to the length of detention, although the average length of detention for asylum seeker has decreased in Latvia over the recent years.[200] In the Czech Republic, it is problematic that the aliens' police tend to require the detention for 180 days straight away and the sample of decisions analysed reveals significant disparities amongst regional courts with regards to the appreciation of the necessity and proportionality of the detention measures.[201]

In **Slovakia**, it is to be noted that no issues were reported with regards to the length of detention *per se*. Although the duration for both the initial detention (six months) and its prolongation (12 months) formally comply with the EC

[197] ECtHR, *Auad v. Bulgaria*, Appl. No. 46390/10, Judgement of 11 October 2011, para 134; see also ECtHR, *Raza vs Bulgaria*, application n° 31465/08, 11 February 2010.

[198] Latvia - Information obtained from the LCHR's case work in October 2009 - August 2010; - Czech Republic: see Organization for Aid to Refugees, Detention of asylum-seekers and alternatives to detention in the Czech Republic, December 2011.

[199] ECtHR, *John vs Greece*, application n° 199/05, 10 August 2007.

[200] Latvian Centre for Human Rights, Detention of asylum-seekers and alternatives to detention in Latvia, December 2011.

[201] Substantial differences exist with regards to the quality of the courts' decisions e.g. discrepancies were documented between the District Court in Mladá Boleslav near the detention centre in Bela Jezova (e.g. decision No. 11 C 12/2010 from 2 March 2011) and the City Court in Prague (e.g. decision No. 7 A 35/2011 from 24 February 2011).

standards, detention decisions do not include details about measures planned for the expulsion of the individual.[202] As already mentioned, the sample of cases studied in **Latvia** show a significant tendency to authorize the extension of the detention period automatically for two months (see *supra* at para 1.2). Whilst these cases are worrying, it is too early to put forward final conclusions with regards to the transposition of the Directive 2008/115/EC as courts' practice might however evolve positively under the influence of the ECtHR case *Auad vs Bulgaria*.

In conclusion, it shall be reminded that, given the interference that detention has on personal dignity, the EU Fundamental Rights Agency has insisted on the utmost importance to regulate in national legislation that detention shall be ordered or maintained only for as long as it is strictly be drafted in a manner so as to ensure that the individual circumstances of the person concerned are evaluated in each case, thus making the systematic application of the maximum time limit for detention necessary to ensure successful removal.[203]

[202] The Human Rights League, Detention and alternatives to detention in Slovakia, *opus cit*.

[203] European Union Agency for Fundamental Rights, Detention of Third Country Nationals in Return Procedures, *opus cit*.

CHAPTER III - Conditions of Detention[204]

Conditions of detention are deemed to be essential with regards to the assessment of the fairness and the legality of the detention. The current chapter will look at the material conditions available in detention as well as reception centres across the countries of concern (3.1). It will then look at the detention regime (3.2) and at the contact with the outside world (3.3). Lastly, the report will assess complaint procedures and monitoring mechanisms currently applied (3.4).

3.1. Material conditions

3.1.1. Physical dignity and integrity

Adequate living conditions, as well full respect of the physical integrity and dignity of the detainees feature highly in the legal standards of the Council of Europe and the ECtHR jurisprudence.[205] Positive obligations have also been inserted under EC law. Following the transposition of the Directive 2003/9/EC, Member States have the legal obligation to offer adequate standards of living in reception centres for asylum seekers.[206] States' obligation with regards to living conditions of vulnerable persons is further strengthened under the provisions of the Recast directive.[207] Although the Directive 2008/115/EC provides limited obligations with regards to the conditions of detention within the context of expulsion procedures, it is to be noted that reference to human dignity features under Recital 17. Article 16 requires Member States to provide accommodation in a specialized detention facility. In the case where Member States have to resort to prison accommodation, the third country nationals shall be kept separated from ordinary prisoners. Further, Article 17 lies down the obligation to accommodate families separately and with adequate privacy.

According to the information gathered through field visits, the conditions of detention are of concern in all the selected countries, except for **Estonia**

[204] This chapter builds on the guidelines developed in the Resolution of the Parliamentary Assembly of the Council of Europe, Resolution on the detention of asylum seekers and irregular migrants in Europe, document 12105; as well as the nationals reports included in JRS, Becoming Vulnerable in Detention – civil society report on the detention of vulnerable asylum seekers and irregular migrants in the EU, *opus cit*.

[205] See in particular Parliamentary Assembly, Resolution on the detention of asylum seekers and irregular migrants in Europe, *opus cit*; European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), Foreign nationals detained under aliens legislation, *opus cit*.

[206] Article 14.1 of the Directive 2003/9/EC.

[207] Articles 17 and 18 of the amended proposal Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers, *opus cit*.

where detention conditions were favourably assessed by the CPT and national monitors.[208] Of particular concern until recently in **Latvia (May 2011)**[209] and in the **Czech Republic**[210] is the prison-like atmosphere although detainees are accommodated in centres specifically designed for the purpose of immigration detention. Whilst detention conditions were particularly critical in Latvia in the old centre of Olaine, this centre was closed in May 2011 and should get refurbished.[211] To our knowledge, none of the countries of concern are using prisons for detaining asylum seekers and migrants. Locations such as police stations, centres located at the borders are also used in countries but only for such time until the persons concerned can be transferred to more appropriate facilities. In **Lithuania**[212] issues were reported with regards to the lack of separate accommodation for men, women and families at reception centres located at the borders, a requirement that is not specified in the legislation. Reception conditions at the borders are generally of concern since the centres have very limited capacity and adequate accommodation is not ensured in case of large groups of asylum seekers. As already mentioned, in **Slovakia,** there were cases reported very recently where unaccompanied minors were detained due to serious procedural mistakes, despite express legal prohibition[213] (see *supra* para 1.4**)**. Prison-like atmosphere and lack of adequate facilities fall short of international standards as persons deprived of their liberty shall be treated with dignity and respect for their rights. According to a well-established jurisprudence of the ECtHR, detention conditions may be so bad that they give rise to a finding of ill-treatment contrary to Article 3 of the ECHR.[214]

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[208] Estonia – Ministry of Justice Monitoring visit report available http://www.oiguskantsler.ee/index.php?menuID=362; CPT monitoring visit to Harku Repatriation Centre of the Citizenship and Migration Board on 9-18.05.2007. Report was adopted by the CPT at its 64th meeting held from 5-9.11.2007.

[209] Latvia - Report to the Latvian Government on the visit to Latvia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 September to 4 October 2002, CPT/Inf (2005) 8; I.Pūce un L.Grāvere (2006) "Detention Facility for Illegal Immigrants Olaine", p. 94-95.

[210] Czech Republic - Information gained from the visit made in frame of the Steps to Freedom project and information provided by lawyers and social workers from the Organization for Aid to Refugees weekly present in the detention centre.

[211] Latvia, CPT Latvia Report, *opus cit* – see the website of the SBG at http://www.rs.gov.lv/index.php?id=1031&sa=&top=1031&rel=1677

[212] Lithuania - Interview with the LRC lawyer A. Dumbryte of 19 July 2011. Rules of Border Control Points, approved by the Government of the Republic of Lithuania, 2 February 2001, No 126, official gazette "Valstybes zinios", 7 February 2001, No 12-346. As last amended on 12 January 2011, No 12, official gazette "Valstybes zinios", 15 January 2011, No 6-222. Para. 48.

[213] Human Rights League, Detention and alternatives to detention in Slovakia, December 2011, Section 3.5.2. Barriers and Concerns: Age Assessment.

[214] ECtHR, *Ribitsch vs Austria*, application n° 18896/91, 4 December 1995; EtCHR, *Dougoz vs Greece* application n° *Dougoz vs Greece*, application n° 40907/98, 6 March 2001.

According to information gathered from national researchers, security arrangements are in place (isolation cell) in case detainees breach internal regulations in the **Czech Republic Latvia, Slovakia,** and **Lithuania**. No information is available with regards to cases of ill-treatment.

Whilst the living conditions seem to be comfortable in **Estonia**, material conditions seem to be particularly poor in **Lithuania** where buildings are poorly maintained offering little privacy and hygiene conditions. **In the Czech Republic**, the conditions of detention seem to be particularly poor in the reception centre located in the Prague international airport, where the facility is small, depressive and has only artificial lightening. It is to be noted that asylum seekers detained under the regular procedure are hosted in a closed reception centre under conditions that have been criticized by UNHCR. Living conditions in the Foreigners' Registration Centre in **Lithuania** are deemed to fall short of CPT standards which state that centres should be properly maintained and kept clean at all times, in particular in order that all facilities are usable (for example, toilets, showers, water heaters, etc.).[215] Sheeting is not available at the Vilnius international airport. Detention facility in Daugavpils are described as simple but acceptable in **Latvia,** where overall detention conditions have improved with the refurbishment of premises through EU funded projects.[216]

Last, some worrying developments were reported in **Estonia, in the Czech Republic and in Slovakia** with regards to the obligation imposed on detainees to pay for their accommodation and costs of removal. Despite severe criticisms from UNHCR and competent NGOs, this practice seems to be widely developed in Central and Eastern European countries.[217]

3.2. Detention regime

3.2.1. Food

According to the guidelines of the CPT, *"food supplied to detainees should be adequate for their needs. Food should be sufficient and nutritious, including three meals a day with regular intervals. Food should cater to the needs of detainees according to their age, health, physical condition, religion, culture and the nature of their work. Particular account has to be taken of the needs of detained families*

[215] CPT, Foreign nationals detained under aliens legislation – abstract from 7th General Report [CPT/Inf (97) 10]; CPT/Inf/E (2002) 1 – Rev. 2010 http://www.cpt.coe.int/en/hudoc-cpt.htm

[216] Latvia - Valsts Robežsardzes 2010.gada publiskais pārskats, p.21; - Information obtained from the LCHR monitoring visit to the Daugavpils detention centre on 07.09.2011.

[217] Statements made by UNHCR Regional Representative, Bureau for Central Europe Budapest, at the conference organized by the Latvian Centre for Human Rights, Detention of asylum seekers and alternatives to detention: experiences from the Central, Eastern and Northern European countries, Riga, 15-16 December 2011.

with children. Food shall be prepared and served hygienically. Clean drinking water shall be available at all times. The authorities should, where possible, allow the opportunity for detainees to prepare their own food".[218]

All the countries of concern generally meet the requirement with regards to basic access to nutrition except for **Lithuania** where nutrition is reported to be an issue concerning persons detained at borders and in Vilnius international airport. Whilst there are no provisions requiring national authorities to provide food with regards to those detainees, food is currently provided by NGOs through an EC funded project that will end in June 2012. Concerns were raised with regards to the sustainability of the nutrition program since solutions are yet to be found once the EU project ends; the quantity and quality of the nutrition is not adequate, in particular for small children.[219]

Although food is provided in the **Czech Republic**, JRS has reported that the inability to cook their own food and the strict meal times foster a prison-like environment among detainees.[220] Food is reportedly poor and monotonous in **Latvia** reception centre for asylum seekers due to limited financial assistance (2.13 euro per day).[221]

3.2.2. Healthcare and medical issues

According to the CPT standards, health care facilities must be sufficient, including enough doctors, dentists and nurses attending the centre during the week.[222] By contrast, current EC standards are quite weak with regards to access to health care and they may not systematically be free of charge according to the reception directive. However, the recast proposal for a directive on reception conditions of asylum seekers further strengthen States' obligations to grant access to adequate medical care. Appropriate mental health care also features in the recast proposal.[223]

These standards seemed to be met satisfactorily in most countries, except for the **Czech Republic** where several cases have been recorded, where the doctor refused to release the medical records to the detainee. Medical records

[218] CPT, Report to the Government of Denmark on the visit to Denmark carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 20 September 2008, CPT/Inf (2008) 26.

[219] Lithuania - Interview with the LRC lawyer A. Dumbryte of 19 July 2011.

[220] Czech Republic - JRS, Becoming Vulnerable in Detention – civil society report on the detention of vulnerable asylum seekers and irregular migrants in the EU, *opus cit.*

[221] Latvia - Information obtained from the LCHR monitoring visit to the Reception centre for asylum seekers "Mucenieki" on 31 March 2011.

[222] CPT, Denmark Report 2008, *opus cit*.

[223] Articles 14 and 15 of the Directive 2003/9/EC; - Article 19 of the recast proposal for a Appropriate mental health care features in the recast proposal of the reception directive, *opus cit*.

release was subject to prior authorization of NGO lawyer. Such a practice is contrary to the Act on Health Care according to which each patient has the right to information contained in his medical record.[224] Some good practices have been identified with regards to **Lithuania** where all persons detained or accommodated in the reception centre are ensured the primary healthcare services and essential medical help. These services are provided by the general practitioner or other medical staff of the reception centre subject to their qualification, according to the needs of the persons detained or accommodated in the reception centre. The costs of medical services provided are covered from the State budget.[225] However, asylum seekers detained at the border face many problems with regards to health care since the legislation does not clearly foresee which institution is responsible for funding their health insurance.

The legislation foresees that detainees and persons accommodated in the reception centres in Lithuania receive health education with regards to drug addiction, sexually transmitted infectio and other infectious diseases.[226] This is however poorly implemented in practice. Issues were raised however with regards to access to health care services that cannot be provided in the reception centre since the legislation is unclear with regards to health insurance regulation. Although this problem has been temporarily solved by an EC-funded project, a sustainable solution is yet to be adopted. Whilst access to health care services outside the reception centre is provided in **Estonia,** concerns were raised by the CPT with regards to the presence of a police officer during the medical examinations and the practice of handcuffing detainees whenever they were transported to and from a hospital.[227] The Chancellor of Justice has pointed out the same concerns during their recent monitoring visits.[228]

Another issue at stake lies with persons with mental trauma. Identification and special care of persons with special needs currently available in the countries of concerns seems to be limited (see *supra* para 1.4), although some positive developments can be mentioned with regards to **Latvia** and **Lithuania** where professional psychologists have been appointed in the reception centres.[229] In both countries, language barrier was reported to be an important obstacle

[224] See Organization for Aid to Refugees, Detention of asylum-seekers and migrants and alternatives to detention in the Czech Republic, *opus cit*.

[225] Para. 31, 33, 39 in Order of Conditions of Temporary Accommodation of Aliens in the Foreigners' Registration Centre, approved by the Minister of the Interior Affairs, 4 October 2007, *opus cit*.

[226] Para 37 in in Order of Conditions of Temporary Accommodation of Aliens in the Foreigners' Registration Centre, approved by the Minister of the Interior Affairs, 4 October 2007, *opus cit*.

[227] CPT monitoring visit to Harku Repatriation Centre of the Citizenship and Migration Board on 9-18 May 2007. The report was adopted by the CPT at its 64th meeting held from 5-9 November 2007.

[228] Reports available http://www.oiguskantsler.ee/index.php?menuID=362

[229] Lithuania: Interview with the social worker of the FRC I. Petrovskiene of 27 January 2011; - Latvia: Information obtained from the LCHR monitoring visit to the Daugavpils detention centre on 7 September 2011

for psychological assistance. Further, it seems that in Lithuania such service is currently not available due to job vacancy and maternity leave.

The CPT has frequently been concerned by the lack of arrangements for persons in need of psychiatric care and it has repeatedly stressed that it should be the primary responsibility of the state to provide such care (although assistance from civil society should also be sought, the matter should not be left in civil society's hands).[230]

3.2.3. Recreational regime

Access to recreational activities is crucial to maintain the psychological and physical conditions of immigration detainees. Within this context, adequate treatment of children is an issue of major concern.[231] It is to be noted that Article 17 of the Directive 2008/115/EC imposes an obligation on EU Member states to organize leisure activities for minors in pre-removal detention, as well as access to education. As per EC standards on reception conditions, access to education should also be provided to minor asylum seekers.[232] Limited obligation exists under EC law with regards to adults. Yet, the recast proposal for a reception conditions directive further strengthens obligations with regards to the recreational and vocational activities including for adults. The proposal also insists on the due care of vulnerable persons.[233] The adoption of such standards would considerably enrich the existing EU acquis. For the time being, the Council of Europe has developed comprehensive standards for all detainees and it is to be noted that the five States of concern have developed recreational regimes.[234]

Recreational regime developed in **Slovakia** and in **Lithuania** can be seen as good practices since persons are offered a balanced program of meaningful activities, such as sports, vocational training and other educational or skills training.[235] Unfortunately, in Lithuania, such regime is only available for persons accommodated in reception centres, whilst no leisure activities is offered to

[230] CPT, Denmark Report 2008, *opus cit*., para 89.

[231] ECtHR, *Mubilanzila Mayeke and Kaniki Mitunga vs Belgium*, 13178/03, 12 October 2006; - ECtHR, *Muskhadzhiyeva and others vs Belgium*, application n° 41442/07 19 January 2010.

[232] See Article 10 of the Directive 2003/9/EC and Article 14 of the recast proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers, *opus cit*.

[233] See Articles 10, 15 and 16 of the recast proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers, *opus cit*.

[234] Parliamentary Assembly, Resolution on the detention of asylum seekers and irregular migrants in Europe, *opus cit*.

[235] Details are provided in the national reports of JRS, Becoming Vulnerable in Detention – civil society report on the detention of vulnerable asylum seekers and irregular migrants in the EU, *opus cit*.

persons held in detention in centres, border crossing points or at the airport. Existing recreational regimes in **Estonia** and in **Latvia** are reportedly to be rather poor.[236]

Concerns are to be noted with regard to access to education for minors in **Estonia** and **Lithuania**. Whilst most legislation explicitly regulate the access to such right, access to education and recreational activities is *de facto* not available in **Estonia,**[237] due to lack of qualified staff and language barriers. In Lithuania, access to education is available under the regular regime in reception centres. Both **Latvia**[238] and **Slovakia**[239] offer adaptation classes for minors – although in Slovakia this right is limited to persons whose detention is longer than three months.

Some recreational activities have also been developed in the **Czech Republic,** although to a lesser extent. As per the recommendations of the CPT, both in **Estonia** and in the **Czech Republic,** immigration detainees are able to get visits of priests, rabbis or imams and to practice their religion.

3.3. Contact with outside world

Given the harmful consequences of detention, it is a well-established requirement that centres shall ensure detainees' contact with the outside world. In the five countries, immigration detainees are entitled, as from the outset of their detention, to inform a person of their choice of their situation which complies with the obligations set forth both under Article 5 of the Directive 2003/9/EC and Articles 12 and 13.3 of the Directive 2008/115/EC. It is of concern that in **Estonia** and in **Lithuania**, a two-tier system is applied at the borders where access to phone might not be free of charge. Derogatory regimes applied at the borders are of particular concerns to human rights monitors given that of access to adequate legal counseling could further increase the risks of a breach of international standards including the Article 33 of the Geneva Convention and Article 3 ECHR.

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[236] Latvia - Information obtained from the LCHR monitoring visit on 29 March 2011; - Estonia Information obtained by the JTI representative during the monitoring visit to the Harku Expulsion Centre in November 10th 2010 and Chancellor of Justice's monitoring visit (22 November 2010) Report available at http://www.oiguskantsler.ee/index.php?menuID=362

[237] Information obtained by the JTI representative during the monitoring visit to the Harku Expulsion Centre in November 10th 2010 and Chancellor of Justice's monitoring visit (22 November 2010) Report available at http://www.oiguskantsler.ee/index.php?menuID=362

[238] See the results of a study on access to education: Latvian Centre for Human Rights, Pētījums par patvēruma meklētāju, bēgļu un personu, kurām piešķirts alternatīvais statuss, piekļuvi izglītībai Latvijā, 2011, available, at http://www.humanrights.org.lv/upload_file/Gala_zinojums_ped.pdf

[239] Slovakia – Article 70.2 of the Act on the Stay of Foreigners.

National reports indicate that detainees have access to a lawyer, doctor, families, and representatives of organizations (including the UNHCR or the IOM, the competent diplomatic representation of their country, or NGOs including by letter, and telephone). However, in practice, there are some restrictions. Except for **Estonia** and **Slovakia**, detainees have to bear the cost of communication. It should be stressed that in Slovakia phone cards are provided by the Slovak Humanitarian Council. In some cases, free access to communication was allowed by the detention centres in order to sort critical individual situations (access to ID, special humanitarian cases etc.). However without such humanitarian assistance, detainees would have to bear the cost of communication themselves. When available, Internet access is often restricted. Mobile phone may be used under strict conditions. Further, in **Estonia,** in the **Czech Republic**, in **Latvia**, and in **Lithuania**, reception or detention centres may be located far away and distance may *de facto* limit the ability of NGOs to visit detention places regularly. Limitations in the capacity and/or expertise of NGOs are of particular concern in all the countries under review.

3.4 Complaints procedures and inspection

3.4.1. Complaint procedures

According to CPT standards, there should be satisfactory procedures for dealing with complaints submitted by detainees of ill-treatment by staff and allegations of misconduct must be taken seriously. In particular, detainees should be guaranteed confidentiality when filing a complaint. Reporting of relevant events by staff to the management concerned (or to headquarters, in particular where the running of centres is out-sourced to private firms) is important. Furthermore, detainees shall not be punished for having made a request or lodged a complaint.[240]

National reports indicate that satisfactorily complaint mechanisms are available in the **Czech Republic,**[241] **Estonia**[242] **and in Slovakia.**[243] There were reports with regards to **Latvia** that no adequate police assistance was provided in cases of violent incidents amongst residents of the reception centre.[244] Structural problems were reported in **Lithuania** as there are no complaint

[240] CPT, Foreign nationals detained under aliens' legislation – abstract from 7th General Report, *opus cit.*

[241] See Organization for Aid to Refugees, Detention of asylum-seekers and migrants and alternatives to detention in the Czech Republic, December 2011.

[242] Estonia - Chapter 18 of the Internal Rules of the expulsion centre (available RTL 2004, 104, 1687 entered into force 6 August 2004 also available https://www.riigiteataja.ee/akt/13255970)

[243] Human Rights League, Detention and alternatives to detention in the Slovakia, December 2011.

[244] Latvia - Information obtained from the LCHR monitoring visit to the Reception centre for asylum seekers "Mucenieki" on 31 March 2011.

mechanisms available at the border crossing points and at the airport. Whilst such mechanism is available in the reception centre and is in used according to information provide by social workers,[245] asylum seekers complained that they had no access to the complaint mechanisms. They also stated that there is no inspection or monitoring mechanism available therein.[246]

3.4.2. Independent monitoring mechanisms

Independent monitoring mechanisms play a central role in improving the conditions of detention by regularly informing the competent authorities and civil society of the existence of structural problems. Such monitoring mechanisms are required under EC law, although provisions set forth under the Directive 2003/9/EC and Directive 2008/115/EC leave some margin of appreciation to the States with regards to the implementation details.[247] According to the CPT, detention centres shall be inspected regularly by an agency in order to assess whether they are administered in accordance with the requirements of national and international law. The conditions of detention and the treatment of detainees shall be monitored by an independent body or bodies whose findings shall be made public. National parliamentarians should also have a role in monitoring such places of detention. Monitoring should also be carried out by the national preventive mechanisms under the Optional Protocol to the Convention Against Torture (OPCAT). Civil society and the media have a right to know what is happening in detention centres and should have reasonable access to them and to individual detainees.

According to the information available Lithuania and Estonia offer examples of good practices with regards to independent inspection bodies.

In **Estonia**, monitoring of the Harku Expulsion Centre is carried out regularly by the Chancellor of Justice. The scope of the monitoring covers material detention, as well as legal rights of detainees. The Chancellor of Justice is an independent body empowered with the competence to review the conformity of the acts of the local authorities with the Constitution and the laws.

In **Lithuania**, independent monitoring is provided by the Lithuanian Red Cross Society, in accordance with the tripartite memorandum of understanding between the UNHCR, Red Cross and the SBGS. The LRC representative makes at least two monitoring visits to different border crossing points, including Vilnius International Airport and the Foreigners' Registration Centre, every month. The monitor reports her observations to the UNHCR and SBG, and a working group, consisting of representatives from all the three parties to the agreement, meets

[245] Lithuania - Interview with the social worker of the FRC I. Petrovskiene of 27 January 2011.
[246] Lithuania - Interview with an asylum seeker detained in the FRC of 30 November 2010.
[247] See Article 16 of Directive 2008/115/EC and Articles 14.7 and 23 of the Directive 2003/9/EC.

regularly to discuss the occurring problems. In case the LRC monitor detects problems that require urgent solutions, she reports them to the UNHCR and SBGS immediately. However, the LRC only acts as a monitor and does not have the power to make any decisions independently.[248]

A similar arrangement exists on an informal basis since 2009 in **Slovakia** and negotiations are currently taking place in order to adopt a memorandum of understanding. Detention centres are also monitored by public prosecutors on a regular basis.

In the **Czech Republic**, the independent monitoring body is the Ombudsman office[249] releasing reports from his visits[250] in addition to receiving complaints from individuals.

A similar system is in place in **Latvia.**[251] No official statistics are available on the legal assistance provided to asylum seekers and irregular migrants by the Ombudsman's Office. Yet, according to the information provided by the Ombudsman's Office, this institution received a total of 20 written complaints from various categories of foreigners and ten from refugees and asylum seekers between January 2008 and October 2011; 79 oral consultations were held with foreigners and 51 consultations were provided to refugees and asylum seekers during the relevant period.[252] According to the amendments to the 2011 Immigration Law, the Ombudsman's Office was designated as the independent body monitoring forced return according to the provisions of the Return Directive.[253] Although the Ombudsman's Office conducted a few visits to the Daugavpils centre in 2011, the project on monitoring of forced return is at the initial stage of its elaboration. [254]

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[248] Tripartite memorandum of understanding on modalities of mutual cooperation to support the access of asylum seekers to the territory and the asylum procedures of the Republic of Lithuania, 2 June 2010.

[249] Act. No. 349/1999 on Public Defender of Rights, Art. 1, para 4b) as amended by Act No. 303/2011 on changing the administrative court procedural code, part. 3)

[250] Available at www.ochrance.cz

[251] There was one visit of the Ombudsman's Office to the Olaine detention facility in 2008; three monitoring visits were conducted in 2009, one – in 2010. There were also seven Ombudsman's Office's visits to the Reception centre "Mucenieki" during the period from 2008 till October 2011. There was one visit of the Ombudsman's Office to the Daugavpils detention centre during the period from January till the end of September 2011. Information obtained from the Ombudsman's Office on 29 September 2011; The Ombudsman's Office did not found serious violations in the detention centre "Olaine" except language barriers of the staff. Tiesībsarga 2010.gada ziņojums, 2011, Section 52.

[252] Information obtained from the Ombudsman's Office on 29 September 2011.

[253] Immigration Law (adopted 31.10.2002 with amendments 26 May 2011), Section 50[7].

[254] Information obtained by e-mail correspondence from a representative of the Ombudsman's Office on 28 September 2011.

CHAPTER IV - Alternatives to detention

As mentioned in the introduction, the overall aim of the report is to promote the use of alternatives to detention across the countries of concern. The present chapter starts thus by introducing international standards (4.1). The second paragraph includes a brief description of the practice in the States of concern (4.2) whilst an overview of best practices available elsewhere is provided in the third paragraph (4.3). The final part of the chapter includes detailed recommendations based on policy guidelines developed by international organizations and NGOs (4.4).

4.1. International legal standards

There has been a significant evolution of the legal international framework with regards to alternatives to detention. As already mentioned, alternatives to detention are defined by UNHCR as *"practical arrangements that minimize or avoid the need to deprive asylum seekers of their liberty while at the same time appropriately addressing concerns of States, including in particular, that of reducing the incidence of asylum seekers who abscond and ensuring their compliance with asylum procedures".*[255] In practice, alternatives to detention may take various forms, including registration and/or deposit of documents, bond/bail, reporting conditions, community release and supervision, designated residence, electronic monitoring or home curfew. Ideally, alternatives to detention are provided for by laws and regulations. The development of legal standards promoting the use of alternatives to detention has been greatly influenced by the consistent research and advocacy work carried on by international actors, such as UNHCR, Amnesty International, JRS and the International Detention Coalition.[256] The work of the Council of Europe and the EU Fundamental Rights Agency has also greatly influenced the debate and enhanced the credibility of alternatives to detention.[257]

[255] FIELD O., UNHCR, Alternatives to Detention of Asylum Seekers and Refugees, Legal and Protection Policy Research Studies, POLAS/2006/03, April 2006, available at: http://www.unhcr.org/refworld/pdfid/4472e8b84.pdf

[256] FIELD O., UNHCR, Alternatives to Detention of Asylum Seekers and Refugees, Legal and Protection Policy Research Studies, *opus cit.*; - Amnesty International, Irregular Migrants and Asylum Seekers: Alternatives to Immigration Detention, POL 33/001/2009; - IDC, There are alternatives – a handbook for preventing unnecessary immigration detention, 2011; - JRS, Alternatives to Detention, working paper, October 2008.

[257] European Union Agency for Fundamental Rights, Detention of Third Country Nationals in Return Procedures, *opus cit.*; - Parliamentary Assembly, The detention of asylum seekers and irregular migrants in Europe, Committee on Migration, Returns and Population, 11 January 2010, document 12105 (Rapporteur Mrs Ana Catarina MENDONÇA).

Advocacy work has consistently highlighted the feasibility of alternatives to detention and their positive outcome from a migration management perspective. According to UNHCR, *"research across various alternatives to detention has found that over 90 per cent compliance or cooperation rates can be achieved when persons are released to proper supervision and facilities. A correlation has also been found between some alternatives to detention and voluntary return rates. Moreover, alternatives to detention are considerably less expensive than detention. Costs of detention increase also when one takes into account the negative long-term of depriving individuals of their liberty"*.[258] Several studies point to the damaging effects of the immigration detention on the mental health of the detainees.[259] The survey of detainees in 23 EU member states concludes that the situation in detention, including inability to get sufficient information on their case, aggravates vulnerability of asylum seekers.[260] Such evidence provides an additional argument why safeguarding the fundamental right to liberty is crucial in a democratic society. However, experience shows that the implementation of alternatives to detention requires intensive case management and the measures should be individually tailored to the specific need of the individuals. According to UNHCR, States should take a cautious approach when resorting to alternatives to detention. Indeed, some alternatives to detention may themselves impact upon a person's human rights, be it on their liberty or other rights. *"As a consequence, such measures also need to be in line with principles of necessity, proportionality, legitimacy and other key human rights principles. Each alternative to detention must be assessed on its merits and individuals released subject to conditions that restrict their liberty should enjoy the right to periodical review"*.[261]

The use of alternatives to detention has been codified only very recently and overall, the international law framework remains limited. Ten years after the adoption of the 1999 UNHCR's Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, one could speak of a **presumption against detention** emerging in international law.[262] In the famous case *C vs Australia*, the UN Human Rights Committee held that in order to fulfil their

[258] UNHCR - OHCHR, Global Roundtable on Alternatives to detention of Asylum-seekers, Migrants and Stateless Persons, 11-12 May 2011 available at http://www.unhcr.org/refworld/docid/4e315b882.html

[259] International Detention Coalition (IDC), La Trobe Refugee Research Centre, There are Alternatives. A handbook for preventing unnecessary immigration detention, 2011, pp.11-12.

[260] Jesuit Refugee Service-Europe (JRS-E), Becoming Vulnerable in Detention, Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union (The DEVAS Project), June 2010.

[261] UNHCR - OHCHR, Global Roundtable on Alternatives to detention of Asylum-seekers, Migrants and Stateless Persons, 11-12 May 2011 available at http://www.unhcr.org/refworld/docid/4e315b882.html

[262] UNHCR, Expert meeting on Alternatives to Detention, 30 September 2009.

obligation under Article 9.1 ICCPR, State parties shall always check whether there are less invasive means available in order to achieve the same ends.[263] According to the guidelines of Council of Europe, *"a person may only be deprived of his/her liberty, […] if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems"*.[264]

Such presumption against detention is also slowly emerging under EC law. As already mentioned, Article 15.1 of the EC Return Directive stipulates that a deprivation of liberty may be ordered *"unless other sufficient but less coercive measures can be applied effectively in a specific case"*. Further, Recital 16 of the Directive held that *"detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient"*. Article 7.3 provides a non-exhaustive list of measures that can be adopted by EU Member States such *"as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place for the period of the voluntary departure"*. According to the EU Fundamental Rights Agency, the standards set forth in the Directive are higher to what takes place currently in practice. *"Except for those countries which require an individualized test to verify if the deprivation of liberty is proportional to the removal objective, the requirement to review alternatives first, before resorting to detention, is not that common and mainly concerns categories of persons deemed to be particularly vulnerable, such as for instance, children."*[265] However, Member States might be compelled to upgrade their practice in the forthcoming period since the latest case law of the CJEU suggests that the individualized test is a key element under EC detention policy.[266]

4.2. Alternatives to detention in the five selected countries

As already mentioned in the introduction, alternatives to detention are a very recent topic in the selected countries and policies are only slowly shaping up.

Alternatives to detention do not currently exist in **Slovakia,** although such measures have been introduced in the late October 2011 law amendment and will enter into force in January 2012.[267] Alternatives to detention have

[263] UN Human Rights Committee, Communication n°900/1999, C vs Australia, para 82.

[264] Guideline 6.1. Committee of Ministers, Twenty Guidelines on Forced Returns, 925th meeting, 4 May 2005.

[265] European Union Agency for Fundamental Rights, Detention of Third Country Nationals in Return Procedures, *opus cit.*

[266] CJEU, *Hassen El Driri alias Karim Soufi vs Italy*, affaire C-61/11 PPU, 28 April 2011 – para 63.

[267] See § 89 of the Act no. 404/2011 of the 21 October 2011 on the Stay of the Foreigners and on the Changes and Amendments to the other Acts.

been introduced only very recently into the legislation of the **Czech Republic, Estonia, Latvia** and **Lithuania.** Although it would be premature to draw final conclusions, the paragraph below aims at providing a provisional assessment of the systems recently introduced in each country.

Although the legislation in **Estonia** broadly covers the same list of alternatives as the one listed under the Directive 2008/115/EC, in practice the here has been a very limited use of such alternatives.[268]

The possibility to use alternatives to detention for "humanitarian reasons" was inserted in the **Latvian legislation** in May 2011 (entered into force in June 2011).[269] The legislation foresees the obligation of regular reporting and obligation to surrender identification documents. These provisions raise concerns with regards to several points. First, the clause "due to reasons of humanitarian nature" suggests that the alternatives may be applied mainly to vulnerable persons, not to potentially all persons concerned as required by the Directive 2008/115/EC. Secondly, the provision on regular reporting neither includes the maximum frequency of registration, nor the obligation of the authorities to indicate the consequences for the applicant of not fulfilling the duties in the decisions on the alternatives to detention. Thirdly, the law does not provide any detailed provisions with regards to the application of the alternatives.[270] Although appeal mechanisms are available under general provisions of administrative law, they are not clearly stipulated in the Immigration Law.[271] Such shortcomings suggest that the legislation should be amended in the near future. However, an overall assessment of the system is yet to be done and so far alternative measures to detention have only been implemented in very few cases in respect to irregular migrants. So far alternatives have not been applied with regards to asylum seekers, and some officials believe that the provisions on alternatives to detention for asylum seekers should be separately elaborated in the Asylum Law.[272]

Lithuania is the country that has the most sophisticated system of alternative measures to detention amongst the selected countries – including regular reporting, guardianship system and accommodation in special reception

[268] Estonia - see Art. 10.1-2 OLPEA.

[269] Latvia - Immigration Law (adopted 31 October 2002 with amendments 26 May 2011), Article 51, para 3-4.

[270] Latvia - Conclusions from the national seminar "Detention of asylum seekers and alternatives to detention" organized by the LCHR in cooperation with the UNHCR on 21.10.2011.

[271] Latvia - Administrative Procedure Law (adopted 25 October 2001), Article 76-79.

[272] Latvia - According to the SBG, the obligation of regular reporting was applied in few cases. See conclusions from the national seminar "Detention of asylum seekers and alternatives to detention" organized by the LCHR in cooperation with the UNHCR on 21 October 2011.

units.[273] According to Article 115.1 of the Aliens' Law, alternative measures to detention may be applied only when three conditions are met. These conditions are cumulative according to a consistent jurisprudence of the Supreme Administrative Court of Lithuania:[274] 1) the alien's identity has been established; 2) the applicant does not constitute a threat to national security or to the public order; 3) the applicant provides assistance to the court in determining his/her legal status in the Republic of Lithuania.

Whilst the actual decision to apply alternative measures to detention is left at the discretion of the courts, the court may take into account other circumstances as well.[275] The difficulties to establish the alien's identity is a ground frequently used by the courts for refusing to apply alternative measures to detention. In practice, courts have also refused to grant alternative measures to detention when the applicant did not have a place of residence and regular sources of income.[276] It should be noted that social benefits are limited to aliens hosted in a reception centre.[277] These cases were heavily debated since these additional requirements may jeopardize the implementation of alternative measures to detention in Lithuania. Measures are currently debated in order to expand the accommodation capacities in reception centres for beneficiaries of alternative measures to detention. When taking a decision to grant an alternative measure to detention, the courts must indicate the time frame within which the measure will apply.[278] If alternative measures to detention are not respected by the applicant, the police authorities shall request the detention of the alien to the competent court.[279] In several cases, district courts ordered the detention of rejected asylum seekers who breached the conditions of alternatives to detention by leaving Lithuania and going to other EU countries, from where

[273] Lithuania – As per Article 115, para. 2 -5 of the Aliens' Law, five measures might be applied: 1) the alien is required to regularly at the fixed time appear at the appropriate territorial police agency; 2) the alien is required to, by means of communication, at the fixed time inform the appropriate territorial police agency about his whereabouts; 3) entrusting the guardianship of an unaccompanied minor alien to a relevant social agency; 4) entrusting the guardianship of an alien, pending the resolution of the issue of his detention, to a citizen of the Republic of Lithuania or an alien lawfully residing in the Republic of Lithuania who is related to the alien, provided that the person undertakes to take care of and support the alien; 5) accommodating the alien at the Foreigners' Registration Centre without restricting his freedom of movement (this alternative measure is only applicable to asylum seekers).

[274] Supreme Administrative Court of Lithuania, judgement of 28 May 2009, No N-575-5928/2009.

[275] Supreme Administrative Court of Lithuania, judgement of 28 May 2009, No N-575-5928/2009.

[276] Lithuania - Svencionys District Court, judgement of 20 May 2010, judgement of 27 May 2010; - Svencionys District Court, judgement of 14 December 2009, judgement of 13 August 2010, judgement of 29 July 2011.

[277] Lithuania - Aliens' Law, Article 71 para 1(6).

[278] Lithuania - Aliens' Law, Article 115, para. 4.

[279] Lithuania - Aliens' Law, Article 115, para. 3.

they were later returned in accordance with the Dublin II Regulation.[280] These rulings have been upheld by the Supreme Administrative Court of Lithuania.[281]

In the **Czech Republic**, the latest amendment to the Aliens' Act, which came into force in January 2011, has introduced two forms of alternatives to detention in the legislation (i.e. regular reporting obligation and bail system[282]). According to national experts, so far the regular reporting obligation has received a limited implementation whilst the bail system has not yet been applied.[283] However, the Alien's police retains the power to restrict the applicant's liberty in case there is a *"serious probability"* that the applicant will abscond or try to hamper the removal procedure. Further, the police retains the power to immediately re-detain third country nationals in case there is a *"suspicion"* that they might not respect their duties under the alternatives to detention regime provided that the breach of procedure falls within the foreigners' sphere of responsibility. The notion of "serious probability" and "suspicion" are quite vague and such ill-defined provisions could potentially limit the adequate use of alternatives to detention.

An additional problem in implementing alternatives to detention in practice seems to come from the reluctance of the administration to follow courts practice. Whilst the courts have recently issued judgements stating the obligation to consider alternatives to detention, the practice of the aliens' police is yet to be changed, and, so far, alternatives to detention have rarely been considered as a viable option.[284] Most worryingly, current court practice does not guarantee the uniform application of the newly amended legislation since researchers have found great disparities in court interpretation.[285]

It is to be noted that the alternative measures that have recently been introduced in **Slovakia** are very similar to those existing in the Czech legislation (i.e. regular reporting obligation and bail system). The system thus raises similar concerns. Although the legislation is yet to be implemented, the rather cautious approach taken by the authorities in the course of the negotiations of the amendment

[280] Lithuania - Svencionys District Court, judgement of 14 December 2009, judgement of 13 August 2010, judgement of 29 July 2011.

[281] Lithuania - Supreme Administrative Court of Lithuania, judgement of 16 May 2011, No N-575-4241-11.

[282] Czech Republic - Article 123 (b) and 123 (c) of the Aliens Act.

[283] The Organization for Aid to Refugees was informed that the obligation to report was applied in only 24 cases as of 15 June 2011 - See Organization for Aid to Refugees, Detention of asylum-seekers and migrants and alternatives to detention in the Czech Republic, December 2011.

[284] Czech Republic - Prague city court, verdict n° 7 A 35/2011, 24 February 2011; see also Prague city Court, verdict n° 5A, 30/2011-17, 21 February 2011.

[285] See Organization for Aid to Refugees, Detention of asylum-seekers and migrants and alternatives to detention in the Czech Republic, December 2011.

shows a certain level of mistrust and concern that such alternatives might be abused.[286]

The overview of the existing practice in the selected countries highlights a number of practical issues with regards to the effective implementation of the legislation, such as the lack of adequate housing system and access to social benefits. Lack of adequate individual case management seems also to be a matter of great concern. Further, competent authorities seem to be reluctant to implement such measures as there is a presumption that the applicant will abscond or try to hamper the removal procedure. Experience and good practice in other EU Member States should be taken into consideration in order to overcome existing shortcomings and ensure adequate use of alternatives to detention. Experiences highlighted below show that alternatives to detention can be effective even in countries with a far greater migration pressure than the countries included in the research.

4.3. Best practice from other EU Member States

4.3.1. Overview

The April 2011 UNHCR report provides a detailed analysis of 12 types of alternatives to detention with a particular focus on asylum-seekers, whilst the study of the EU Agency for Fundamental Rights grasps the issue with regards to detention for the purpose of forced return.[287] Against the background in the countries studied, it appears that experiences developed in countries such as **Belgium and the UK** seem to be the most relevant as they would allow to develop small-scale and flexible reception programmes that would fit with the migration profile of the countries of concern. The development of reception centres in the countries of concern would allow applying alternatives to detention more systematically without requiring foreigners to prove adequate sources of income and housing.

[286] Slovakia – Human Rights League, "The original proposal on alternative measures to detention into Slovak legislation" prepared by the Human Rights League in Slovakia in "The administrative expulsion and detention. The principal comments of the Human Rights League to the proposal of the Act on Border Control and Stay of the Foreigners", dated on 8th May 2011, discussed on the meeting with the MoI (Bureau of the Alien and Border Police of the Police Forces) on 10th May 2011 (available in the file of the Human Rights League)

[287] EDWARDS A., Back to Basics: the right to liberty and security of persons and "alternatives to detention" of refugees, asylum-seekers, stateless persons and other migrants, *opus cit.*; - European Union Agency for Fundamental Rights, Detention of Third Country Nationals in Return Procedures, *opus cit.*

Further, the Czech Republic, Estonia, and Slovakia should closely study the bail system available in **Canada and in the UK**, since this option has so far remained unused in their respective system.

Countries like Lithuania - whose legislation foresees a guardianship or bond system - should also look at community-based alternatives – such as the Community Assessment and Placement Model (**CAP**) – which is strongly encouraged by civil society organizations. However, this kind of alternatives may only be viable on the longer-term given the fact that foreign communities are still very limited in the countries of concern, if not almost inexistent.[288]

Irrespective of the alternative model used, competent stakeholders should look at developing a comprehensive and co-ordinated service delivery approach. **Individual case management** is critical in order to ensure that adequate support is provided to persons with complex needs. Case managers may promote informed decision making by both the government and the individual in question by ensuring timely access to all relevant information, options, rights and responsibilities. Case managers ensure that individual have a proper understanding of their immigration status and administrative process. Case managers are generally social workers, psychologists or other human services professionals. Adequate transparency throughout the entire process enables individuals to comply with requirements placed on them. Further, with reliable information, authorities can make informed decisions related to the actual flight risk or vulnerabilities and lead to avoid unnecessary and wrongful detention.[289] Interesting practice of case management can be found *inter alia* in Belgium and in the UK.

4.3.2. Good practices

Existing pilot-projects apply mainly within the context of returns procedure, although some initiatives also include asylum border cases. In Europe, due to awareness raising campaigns with regards to the harmful impact of detention on young children and vulnerable persons,[290] as well as under the influence of the ECtHR rulings, it is to be noted that many States have primarily focused on avoiding detention of families with minor children. Although initiatives are

[288] IDC, There Are Alternatives – A Handbook for Preventing Unnecessary Immigration Detention, 2011.

[289] IDC, There Are Alternatives – A Handbook for Preventing Unnecessary Immigration Detention, *opus cit.*; See also UNHCR - OHCHR, Global Roundtable on Alternatives to detention of Asylum-seekers, Migrants and Stateless Persons, *opus cit.*

[290] IDC, There Are Alternatives – A Handbook for Preventing Unnecessary Immigration Detention, *opus cit.*; JRS, Becoming Vulnerable in Detention, *opus cit*. ; HICKS M., The mental health consequences of detention, presentation made at UNHCR Conference on Alternatives to Detention, 16 November 2011.

very diverse, the common feature of such programmes is to develop a policy of engagement based on individual case management and move away from enforced returns. The programmes presented therein are government-run models but it should be noted that hybrid NGO-government partnerships as well as community based models are also available.[291]

- ***Case management models***

Alternative measures to detention for families with minor children were introduced in Belgium in 2008 following repeated condemnations by the ECtHR.[292] It is to be noted that such measures were adopted under mere administrative regulations and still lack adequate legal framework, although new legislation is to be adopted at the end of 2011.[293] Although these persons are still considered to be "detained" from a legal point of view, in practice they enjoy a relative freedom of movement in a defined area and under the supervision of the coach. Two "return houses" were established in October 2008 - as an alternative to detention - for accommodating families with minor children who had no right to remain in Belgium and were waiting for expulsion.[294]

The principal objective of the return houses is to prepare families for all possible immigration outcomes, whether return or legal stay. In October 2009, the program was expanded to include asylum seeker families with children arriving at the border.[295] Ordinarily, and almost without exceptions, asylum applicants at the border would be detained in a transit centre during the entire asylum procedure. The third category of persons housed in the return houses is Dublin II cases. Unfortunately, families are often transferred to the return houses without adequate information about the process and this may lead to negative, if not violent, reactions. This shortcoming is acknowledged by the Immigration

[291] Projects description provided therein builds on the study of EDWARDS A., Back to Basics: the right to liberty and security of persons and "alternatives to detention" of refugees, asylum-seekers, stateless persons and other migrants, *opus cit*. Information have been updated based on the presentations made at UNHCR Conference on Alternatives to Detention, 16 November 2011.

[292] ECtHR, *Mubilanzila Mayeke and Kaniki Mitunga vs Belgium*, application n° 13178/03, 12 October 2006; - ECtHR, *Muskhadzhiyeva and others vs Belgium*, application n° 41442/07 19 January 2010.

[293] Arrêté royal du 14 mai 2009 fixant le régime et les règles de fonctionnement applicable aux lieux d'hébergement au sens de l'article 74/8, paragraphe 1er de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

[294] Directorate General of the Immigration Office, section identification and removal, Alternatives to detention for families with minor children, the Belgian approach, working paper, 10 November 2011; - Vluchtelingenwerk Vlaanderen, JRS, CIRE, Briefing to the European Committee for the Prevention of Torture: Alternatives to Immigration detention of families with minor children in Belgium, May 2009.

[295] There are three return houses in Belgium: in Zulte (six units in an apartment block), Tubize (three houses) and Sint-Gillis-Waas (five houses). Currently the capacity is limited, but there are plans of expansion. The houses are located in the community, in apartments provided by and serviced by the state.

Office.[296] The basic needs for applicants are covered, including access to legal assistance, health care and education. Applicants' individual needs are assessed by a case manager who will assist the person to take informed decisions throughout the administrative and legal process. Most and foremost, case manager gets acquainted with the individual's personal history and build a relationship based on trust and transparency. Screening procedure also allows for the identification of vulnerabilities and special medical needs. The case workers also assist competent authorities in making well-informed decisions regarding the return or the regularization of the foreigner. This engagement strategy resulted in increasing the number of families returning voluntarily and lowering the number of families absconding – about 20-30 per cent of the cases.[297] Belgian authorities also confirmed that the system has lead to an increase of the recognition rate for families seeking asylum.[298] Another positive outcome is that the authorities have the duty to ensure that families that were granted a refugee status have access to another type of accommodation once they leave the "return houses". Although an exhaustive assessment of the pilot program is yet to be done, the overall outcome seems quite positive. However, interviewees stressed a lack of adequate human resources. The coaches have to work under high pressure and to respond to persons with different needs and perspectives. In order to improve the situation, one option would be to avoid mixing border cases and return cases together in the same place. Training of coaches should also be strengthened. Steps should also be taken in order to improve the quality of the legal assistance through trainings of lawyers and NGOs. Whilst, NGOs access remains quite limited, it should be increased under the new legislation. Involvement of community based NGOs does not feature in the programme but might be developed at a later stage. Adequate statistical tools are yet to be developed in order to provide adequate quantitative and qualitative information.

According to the UK Border Agency's (UKBA) *Operational Enforcement Manual* (OEM), there are three alternatives to detention in the UK: temporary admission, release on restrictions, or bail. The distinction between these three options is that temporary admission and release on restrictions may be ordered

[296] Interview with the coach of a "return house" in Zulte on 7 November 2011. Similar information were provided by M. Geert Verbauwhede, Coordinator for Identification and Removals, Immigration Office Belgium, Belgian practice in not detaining families with children, UNHCR Conference on Alternatives to Detention, 16 November 2011.

[297] Belgium: According to information provided by the Immigration Office, the absconding rate is about 20%. Source interview with representatives of the immigration office in Zulte held on 7/11/2011; Directorate General of the Immigration Office, section identification and removal, Alternatives to detention for families with minor children, the Belgian approach, *opus cit*; - Sweden: Information provided by the Swedish authorities during the study visit to Sweden in January 2011.

[298] Interview with representatives of the immigration office in Zulte held on 7 November 2011.

prior to any detention being imposed, whereas bail is granted only after one has already been detained. The OEM provides that alternatives to detention should be used wherever possible so that detention is used only as a measure of last resort and, further, that there should be a presumption in favour of temporary release. Despite these provisions, the UN Human Rights Committee has observed that, in practice, alternative measures are applied only when detention space is unavailable, and that detention is frequently used for mere administrative convenience. Moreover, there is no statutory limit on periods in detention, leading to regular judicial and costly review of detention. However, there have been a number of projects piloted in the UK, for example, a family return project in Glasgow.[299] The UKBA's Glasgow pilot is similar to the Belgian return houses: its goal is to reduce the need for enforced removal and detention in Scotland. It aims to encourage refused asylum seekers to return voluntarily to their countries of origin by providing intensive family support focused on helping families make sense of their stay in Scotland, confronting issues delaying a return and building up skills and preparedness for a voluntary return. The project is for families only and makes provision for four – five families to be accommodated at any one time in self-contained, open flats. The project notes that many more families will be eligible than can be accommodated within the project. The central feature of the pilot is described as intervention.

Whilst the "Family Return project" in Glasgow (2009-2011) has encountered limited success, the UK Border Agency set up a new programme for families – Children's Champion - effectively running as of March 2011 and aiming at adopting a renewed approach to family returns based on engagement policy rather than enforcement.[300] There is currently a limited involvement of NGOs through the advisory return panel but this component could be further developed in the future.

- ***Bail system***

Whilst existing legislation in the **Czech Republic, Estonia**, and **Slovakia** include provisions on the bail system, information gathered throughout this research indicates that the bail system has so far remained unused. According to UNHCR, traditional bail systems can work in favour of asylum-seekers and

[299] See for instance, Children's Society and Bail for Immigration Detainees, "An evaluative report on the Millbank Alternative to Detention Pilot", May 2009; details available in UNICEF, Administrative Detention of Children – A Global report, Discussion paper, *opus cit.*

[300] Memorandum of Understanding – Family Return Project, Glasgow City Council, UK Border Agency and Scottish Government, final version May 2009; see also the Millbank project in Kent (2007-2008) and the Liverpool Key Worker Pilot (April 2009- March 2010). Information provided by Jerome Phelps, head of the UK Detention Action, *The pilot projects on alternatives to detention in Liverpool and Glasgow*; - and Mrs. Caroline Rowe, Head of the office of the Children's Champion, UKBA – *Ending the detention of Children of children : a fresh approach to managing family returns*; oral presentations made at UNHCR Conference on Alternatives to Detention, 16 November 2011.

irregular migrants. Best practice suggests that bail hearings be automatic, rather than upon request. In both systems, the provision of legal advice and language assistance can be essential to effective access to bail. Nonetheless, many asylum-seekers and irregular migrants lack the financial means to be released on bail. Release on conditions without money deposit, or other options, can avoid the discrimination on the basis of financial resources inherent in normal bail systems.[301] A number of alternative programmes were identified as good practice in this regard. The system currently applied in Canada was singled out as particularly effective given that it combines relief from bail payments with reporting obligations, supervision, counselling and individual coaching on all relevant matters.[302]

According to the IDC, Canada uses the negative financial consequences through a bail mechanism, as one possible condition of release from detention and is automatically considered at hearings to review the decision to detain. These hearings are undertaken by a member of the Immigration and Refugee Board within 48 hours of detention, then within another seven days and then every 30 days thereafter, as required. Release may be ordered with or without conditions (such as providing a nominated address, or handover of travel documents) and the application for release could be supported by a "bondsperson". A bondsperson agrees to pay a monetary bond which is paid upfront, held in trust and then returned if the individual complies with the conditions of their release. In some situations, the money does not need to be paid unless the person does not comply with the conditions of their release.[303] The IDC report further explains that the government founded special program called Toronto bail program, which has been operating since 1996 and identifies eligible detainees and then supports their application for release. The program costs CA$10-12 per person per day compared with CA$179 for detention. In 2009-2010 financial years it maintained a 96.35 per cent compliance rate.[304]

The bail system has been successfully applied in the UK, and a study of bailed asylum detainees showed that 90 per cent complied with their bail conditions.[305] According to the EU Fundamental Rights Agency, the Scottish authorities are

[301] UNHCR - OHCHR, Global Roundtable on Alternatives to detention of Asylum-seekers, Migrants and Stateless Persons, *opus cit.*

[302] EDWARDS A., Back to Basics: the right to liberty and security of persons and "alternatives to detention" of refugees, asylum-seekers, stateless persons and other migrants, *opus cit.*

[303] IDC, There Are Alternatives – A Handbook for Preventing Unnecessary Immigration Detention, *opus cit.*

[304] IDC, There Are Alternatives – A Handbook for Preventing Unnecessary Immigration Detention, *opus cit.*

[305] BRUEGEL and NATAMBA E., Maintaining contact: what happens after detained asylum seekers get bail? Social Science Research Paper n° 16, London South Bank, University, 2003 quoted footnote 519 in UNICEF, Administrative Detention of Children – A Global report, Discussion paper, *opus cit.*

allowed to accept a symbolic amount as well, for instance of £5. This is for the reason that it is assumed that many foreigners in removal proceedings would not be in possession of significant financial resources. The law also foresees that the sureties by third parties could be accepted, but they can only be requested "if that will have the consequence that a person who might not otherwise be granted his liberty will be granted it".[306]

4.4. Recommendations for further developing alternative measures to detention[307]

As highlighted in this chapter, there is not one alternative measure that fits, from the ethical and efficiency point of view, all situations and all States. In line with UNHCR recommendations,[308] it is up to competent stakeholders to analyze the local realities and appreciate what *alternative measures can be more suitable and effective in that particular country,* having in mind the legitimate aims pursued and the justifications presented by the State authorities, as well as the social environment, the legislation and the administrative structure of the country.

Any alternative measure to detention could become *intrusive and stigmatizing* when not all aspects of the country's reality are taken into account; particular care has to be taken to avoid that a theoretically satisfying measure become *de facto* restrictive or excluding because of its modalities or environmental situation.[309]

A constructive dialogue with civil society organizations and international organizations is key in developing successful measures. Further, a concrete and practical way to alert governments to alternative measures to detention could consist in proposing pilot projects aimed to test, in the specific national context, the viability of a measure, its effectiveness in reducing the rate of absconding or flight and its economic interest in terms of saving human and financial costs. Such **pilot-project** should duly respect the following principles.

Alternative measures to detention have to meet the test of *due regard to individual factors, necessity and proportionality*. This entails that

[306] See chapter 5 *in* European Union Agency for Fundamental Rights, Detention of Third Country Nationals in Return Procedures, *opus cit.*

[307] This paragraph is based on JRS policy recommendations – JRS Europe, Alternatives to Detention, working paper, October 2008; it also includes recommendations from the International Detention Coalition, see IDC, There Are Alternatives – A Handbook for Preventing Unnecessary Immigration Detention, *opus cit.*

[308] See in particular recommendations of the working group n° 2, UNHCR, Border Management and Protection of Refugees, Conference report, 24-26 November 2010, Budapest, Hungary

[309] D'AUCHAMP P., OHCR, Introduction to the human rights consequences of detention, presentation made at UNHCR Conference on Alternatives to Detention, 16 November 2011.

- *Among different possible effective measures, in any individual case the less intrusive has to be chosen*[310] and;

- *Any measure applied to an individual person has to be constantly monitored and;*

- *Subject to a periodic review* because "ongoing or indefinite restrictions on one's freedom of movement or restrictions that become onerous over an extended period of time (e.g. excessive reporting requirements over many years) may also become unlawful".[311]

In any case, **special legal protections for vulnerable people, in particular for children** should be imposed.[312] The UN Convention on the Rights of the Child (1989) establishes that in taking any kind of decision, especially on detention or freedom of movements, *the basic principle is the child's best interest*. According to the IDC, "as a rule, minors should not be detained unless as a measure of last resort and for the shortest possible time. *They should not be separated from their parents against their will* nor from other adults responsible for them whether by law or custom. If minors are detained, they must not be held under prison-like conditions. Every effort must be made to release them from detention as quickly as possible and place them in other accommodation. If this proves impossible, *special arrangements must be made which are suitable for children and their families.* For unaccompanied minor asylum seekers, alternative and non-custodial care arrangements, such as residential homes or foster placements, should be arranged and, where provided for by national legislation, legal guardians should be appointed, within the shortest possible time"[313]

Pilot-programmes should always include adequate **individual case management**. Competent stakeholders may want to draw inspiration from the five-step model developed by the IDC, which is considered as highly authoritative by most experts and inter-governmental organizations:[314]

[310] Arguing from analogy to the UN Standard Minimum Rules for Non-Custodial Measures, GA resolution 45/110, 14 December 1990 http://www2.ohchr.org/english/law/tokyorules.htm

[311] FIELD O., UNHCR, Alternatives to Detention of Asylum Seekers and Refugees, Legal and Protection Policy Research Studies, *opus cit.*

[312] The UNHCR Guidelines (*opus cit.*) list as vulnerable persons single women, children, unaccompanied minors, persons with special medical or psychological needs. EU Directive 2003/9 on minimum standards for reception of asylum seekers lists unaccompanied minors, dependent elderly persons, persons with disabilities, pregnant women, unaccompanied parents with minor children, and victims of torture, rape or any other serious form of psychological, physical or sexual violence. See also European Parliament, The conditions in centres for third country national, 2007.

[313] See also IDC, Children in Immigration Detention. Position paper, 21 November 2007, available at: http://idcoalition.org/portal/component/option,com_remository/Itemid,105/func,select/id,6/

[314] IDC, There Are Alternatives – A Handbook for Preventing Unnecessary Immigration Detention, *opus cit.*

- *Screening:* Screening should take place as early as at the time of irregular arrival, detection in the community with irregular status, or lodging of an asylum or protection claim. Where an indication of vulnerability or risk is present, the individual should be referred for comprehensive assessment;

- *Comprehensive assessment:* Comprehensive assessment follows an indication of risk or vulnerability during screening, and provides a basis for further decision making. Through consideration of all systems and factors impacting on the individual, a case manager can identify and address issues regarding basic needs and protection, whilst also reconsidering systemic and policy issues including the governments' need to manage a person's immigration status. The case manager will engage with the client and all key stakeholders to understand risks, vulnerabilities, strengths and what kind of support the client may need to ensure wellbeing and timely case resolution. This may lead to a recommendation about appropriate management responses.

- *Case planning:* Understanding the needs and priorities of the individual - and the individual's understanding of the situation - may demonstrate what action is needed to assist an expeditious case resolution, for example legal counselling to deal with experiences of torture or trauma. Information gathered throughout the assessment process is therefore considered and analysed with the client, goals set, prioritized and action plans put in place, outlining necessary steps to reach goals and responsible persons. Consideration and planning for practical necessities, such as housing, health care, livelihood, social support needs, reporting requirements and logistics is critical.

- *Intervention:* The agreed case plan is implemented, and should ensure communication, education, advocacy and facilitation of appropriate service involvement, assisting individuals to maintain a link to immigration authorities. Full engagement with the individual and all key stakeholders is critical in resolving immigration cases and supporting vulnerable individuals. Using the ongoing relationship between case manager and client, individuals are supported to explore all possible immigration outcomes from the time of their case being opened.

- *Regular and ongoing review:* As work and relationship develop, the case manager will continuously monitor the situation so any emerging needs or change in situation is identified and responded to accordingly, working towards a case outcome.

- *Case closure:* the case is closed when the individual departs the country or is granted the right to remain in the country. In both instances, referral to another service provider for ongoing assistance should be considered if required.

Lastly, pilot-programmes should always include **adequate training** programmes for all the stakeholders and independent assessment mechanisms – involving a dialogue with all competent actors and the civil society - in order to spot problems and to build upon good practices. Adequate statistical tools should be developed in order to collect both qualitative and quantitative information.

Chapter V - Conclusions and Recommendations

The overall objective of this research was to assess the extent to which immigration detention legislation and practice of the selected EU Member States are in line with international standards and the EU acquis. Besides its legal focus, the research also looks at the conditions of detention available for asylum seekers - including failed asylum seekers whose claims have been rejected by a final court decision - both upon arrival on the territory of a country or within the context of a removal procedure. The research also assessed whether alternative measures to detention have been developed and the extent to which such measures are adequately implemented in the countries of concern.

Despite its limited scope, the study clearly reveals serious shortcomings in the legal detention regime and the practice of the States of concern. Whilst a presumption against detention has slowly emerged under international law and in the EU acquis, States still frequently resort to detention as a migration management tool. Whilst it is to be deplored that asylum seekers are routinely detained in the Czech Republic and in Latvia, the practice in the other countries where detention of asylum seekers is strictly limited by legislation may not always comply with the *1999 UNHCR Revised Guidelines on Detention*. Further, pre-removal detention is used extensively and often for lengthy period of times in all the countries of concerns. In contrast with strict requirements of the ECtHR, most States allow immigration detention on grounds falling outside the Article 5.1 (f) ECHR, such as threat to the national security or the public order, or for health purpose. Last, the study reveals that the States' practice does not fully comply with ECtHR jurisprudence with regards to families with children and unaccompanied minors. Identification of vulnerable persons remains a key issue whilst no adequate identification mechanisms are in place.

The study takes note of the improvements with regards to procedural safeguards against arbitrary detention in the recent period. Improvements are linked to the transposition of the EU acquis, but also to the active scrutiny of the judiciary and international and domestic human rights monitoring bodies such as the CPT, the UNHCR, the Ombudsman's Office and NGOs. Due to recent changes in the national legislation, the study acknowledges that the state of play should be analysed with great caution and bearing in mind forthcoming legal reforms. Yet, under the current situation, improvements are required with regards to access to adequate information, sustainability and availability of legal assistance as well as adequate judicial review of detention decisions. Where countries have taken steps to improve the legal assistance offered by the NGOs within the context of immigration detention, the sustainability of such improvement is of particular concern since NGOs activities are often funded by

short-term EC funded projects. Derogatory standards applied to reception and detention centres located at the borders are of particular concern. The study reveals a trend to apply derogatory legal standards to these places, despite very clear jurisprudence from the ECtHR.

Like in many countries across the EU, material conditions of detention remain generally poor with the exception of Estonia and Latvia. Despite improvements over the recent period of time with regards to regular reception and detention centres, no significant progress has been registered with regards to the situation in detention areas located in international airport and at border crossing points.

Whilst alternative measures to detention are fairly new in most EU Member States, the transposition of the EC Return Directive imposes a positive obligation to look at less coercive measures before resorting to detention. Such obligation is less clear with regards to the asylum seekers although the proposal for a recast reception directive seeks to impose similar requirements. Not surprisingly, the development of alternatives to detention is still embryonic in the countries of concern. Although legal frameworks are now into place, many steps should be taken for their actual implementation. Information gathered throughout the research highlights that by far, alternatives to detention remain unused, and there is also a lack of adequate quantitative qualitative data. A great reluctance of competent authorities, as well as the judiciary, can be observed as there is a presumption that people will abscond. Although absconding cases can never be totally avoided, experience in other countries show that these mechanisms can be effective even in countries with a great migratory pressure – such as Canada and Australia. In our opinion, alternatives to detention are a viable option in the selected countries but a sustainable implementation of such mechanisms require steps. A profound change in the legal culture of these countries should take place in order to allow for the regular use of alternative measures to detention and to apply a presumption against detention. In order to help these countries to achieve such changes the study offers illustration of good practices that could inspire the States of concern with regard to implementing pilot-programmes in the forthcoming period.

The seven recommendations set out below could help to address the inconsistencies documented throughout the research.

1. Strengthen the legal presumption against detention

With regards to pre-entry detention, States shall always ensure that both their legislation and practice fully comply with the principle that asylum seekers shall in principle not be detained in line with the requirement of the Article 31.2 of the Geneva Convention. Exceptions for detention of asylum seekers should be

strictly limited to the cases identified under the 1999 UNHCR Revised Guidelines on Detention.

With regards to pre-removal detention, States shall fully transpose the requirements of the Directive 208/115/EC with regards to the use of detention as a measure of last resort and only where when other alternative measures are not available.

Bearing in mind that the latest international and EU developments now impose an obligation on States to measure the necessity and proportionality of detention measures, the competent authorities should draft a detailed list of factors that officials should take into account in deciding whether or not to detain. Competent authorities should draw inspiration from the good practices available elsewhere in the EU (see UKBA list of indicators – annex III of the report). Lists of indicators should be developed with regards to both pre-entry and to pre-removal detention.

2. Grounds for immigration detention shall be strictly limited to cases falling under the Article 5.1 (f) ECHR

States should ensure that grounds for immigration detention do not extend beyond the exhaustive list of legitimate grounds foreseen in Article 5.1 (f) ECHR. Deprivation of liberty based on crime prevention, public health considerations or vagrancy should be governed by the same rules, regardless of the legal status the person concerned has in the host country. These grounds should therefore not be regulated by aliens or immigration laws, but in other pieces of legislation in order to avoid any discrimination based on the legal status of the person in the country.

Given the increasing complexity of the legal standards dealing with detention, both at ECHR and EC level, States should seek assistance from the Council of Europe and the Commission in order to strengthen the training of competent law enforcement authorities, as well as lawyers and the judiciary.

3. Detention of vulnerable persons shall be avoided

States shall review their legislation in order to ensure that detention of vulnerable persons – in particular children - occurs only in very exceptional circumstances. If unavoidable, such detention could only occur in appropriate separate infrastructures and with adequate detention regime. With regards to minors, States shall align their legislation with the 1989 UN Convention on the Rights of the Child and apply specific safeguards to all persons under the age of 18.

Identification mechanisms should be put in place in order to implement legal provisions adequately. Identification tools and indicators developed by UNODC and the UNGIFT within the context of trafficking in persons could provide a useful methodology and could easily be adjusted to a different asylum/migration context.[315] Training programmes should be implemented in order to increase the sensitivity of competent stakeholders. States should rely on the expertise of civil society organizations such as JRS in developing tools and policies. When developing identification tools with regards to vulnerable persons, Sate should make sure that adequate referral mechanisms are available with regards to victims of trafficking identified during the asylum or the removal procedures.

4. Further strengthen procedural safeguards against arbitrary detention

As highlighted in the UNHCR guidelines and other documents, alternatives to detention must be considered in each and every case. If – for individual reasons – alternatives are found not to be feasible, the following non exhaustive list of procedural guarantee, at a minimum must be put in place.[316] National legislation should always foresee that the reason for detention as contained in the detention order and that the procedure to access judicial review is translated in a language the detainee understands. The reasons for holding a person in detention should also be given to him/her in written form as well as read out with the help of an interpreter, if necessary. Beyond legal improvements, practical steps shall be taken in order to implement this right adequately. Further, interpreting system should be substantially improved through adequate trainings.

In light of the variety of practical and legal obstacles preventing the effective access to legal assistance, the competent authorities are advised to enter into a dialogue with civil society organizations as well as bar associations in order to find legal as well as pragmatic solutions to these problems. The quality of legal assistance needs to be improved through adequate trainings. Whilst such improvements might be costly, States should look at options for regional co-operation with regards to training programmes and interpretation services. States should also seek assistance from the European Commission and relevant EC agencies (such as the EASO, FRONTEX and the Fundamental Rights Agency) in order to pull out resources for strengthening interpreting systems and to further develop training programmes. Exchange of expertise and peer review could be developed in order to overcome the challenge of providing adequate translation and interpretation of rare languages.

[315] UNODC and UNGIFT, Anti-Human Trafficking Manual for Criminal Justice Practitioners, 2009 available at www.unodc.org

[316] UNHCR, Conclusions of the working group n° 2, "Border Management and Protection of Refugees", Conference report, 24-26 November 2010, Budapest, Hungary

Lastly, States should ensure that judicial review available to persons held in detention is prompt and effective. The court shall be empowered to order the immediate release of the person if the detention is deemed to be unlawful or if the legal grounds allowing detention no longer exist. The court must have the power to examine the lawfulness – including the proportionality and necessity - of any detention in light of the requirements of international or regional human rights treaty standards.

5. Strictly limit the duration of detention

Lengthy detention is acknowledged as a key issue in most countries of concern. No maximum duration is currently provided under international and EC law with regards to pre-entry detention but ECtHR jurisprudence and UNHCR Guidelines have clearly stated that the duration should be **"as short as possible"**. Within the context of removal procedures, the adoption of a maximum (18 months) ceiling under EC legislation is a significant progress and countries that have not yet done so should transpose this provision as soon as possible. However, it is to be noted that 18 months ceiling remains a very long period with potential harmful consequences for detainees. States should handle detention duration with great care and in light of the jurisprudence of the ECtHR and the CJEU.

In particular, the six months ceiling should never be applied automatically and the 12 months prolongation shall only occur under exceptional circumstances and when there are **reasonable prospects of removal**. Both reasons and duration of detention shall be reviewed periodically by fully qualified courts. In case the grounds for detention have disappeared or in case there is no real prospect of removal, detainees shall be immediately released.

6. Improve conditions of detention, in particular for the most vulnerable detainees

Increasing attention should be paid with regards to the **social and human costs** of detention. States should commission independent assessment of conditions of detentions prevailing in *all* detention and reception centres on their territory and at their borders. In line with the UNHCR recommendations, persons should be accommodated in **open reception centres** and accommodation should always be **free of charge**. Irregular migrants and failed asylum seekers shall never have to bear the cost of their removal from the States' territory.

UNHCR and NGOs must have accelerated access to the person in custody. Detention must not be an obstacle to **asylum**. Applications for protection

made in by asylum seekers in detention should be prioritized and processed with adequate procedural guarantees.

Adequate **refurbishment** programmes should be designed and detention regime should be improved. Two tier systems prevailing in reception and detention centres at the borders should be abolished.

Adequate mechanisms should be put in place in order to **identify vulnerabilities** at an early stage. Psychological and medical assistance should be further developed and adequately implemented.

Persons with specific needs and children should not be detained. When detention of **children** is unavoidable, adequate detention regime should be tailored to the child's needs, including effective access to education. Children should not be separated from their parents or guardians. In any case, appropriate accommodation for families should always be available in *all* detention and reception centres on their territory and at their borders. The effectiveness of the existing monitoring and the complaint mechanisms should be thoroughly assessed and improved accordingly.

7. Strengthen the implementation of alternatives to detention through pilot-projects

In order to allow for adequate implementation of alternatives to detention, competent authorities should adopt a **step-by-step approach** starting with a detailed analysis of existing measures. States should conduct study visits to countries where alternatives to detention work satisfactorily. Whilst existing legislation mainly foresees the use of alternatives to detention within the context of pre-removal detention, States shall also consider developing those mechanisms with regards to asylum seekers and pre-entry detention. Study visits should also involve relevant civil society organizations.

On the basis of this assessment, **pilot-programmes** – in particular for families with children - should be designed in order to allow for a gradual implementation of alternative measures to detention. In accordance with the international legal framework and the EU acquis, and following UNHCR recommendations,[317] alternatives to detention should be developed through one or more of the following means:

- Reporting mechanisms
- Sureties by third parties (gurantors) including by associations/organizations

[317] UNHCR, Conclusions of the working group n° 2, "Border Management and Protection of Refugees", Conference report, 24-26 November 2010, Budapest, Hungary.

- Bail
- Surrender of passport

Electronic monitoring (with the provision that the electronic monitoring be conducted in a manner in full compliance with fundamental rights)

Training of all competent stakeholders involved is of crucial importance in order to ensure that key actors have an adequate understanding of the objectives and means of the alternative measures to detention. Bearing in mind that there is no one single option valid for all the countries, each country should design alternatives according to their specific environment and legal framework. Options could include both alternatives within the context of pre-entry detention and pre-removal detention. In both instances, programmes should always allow access to asylum procedures. Pilot-programmes should always include adequate **individual case management**. Alternative measures to detention should always meet the test of due regard to individual factors, necessity and proportionality. Under no circumstances should alternative measure to detention become intrusive and stigmatizing. Alternatives to detention shall never be so overly restrictive that they would amount to alternative forms of detention.

Independent and transparent assessment of the pilot should be made after two years in order to analyse shortcomings and the added value of the project. On the basis of the project outcome, the feasibility of extending the project should be explored.

Adequate **statistical tools** should be developed in order to collect both qualitative and quantitative information.

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Annex II – List of Acronyms

AGIPA	Act on Granting International Protection to Aliens and Asylum Act
CJEU	Court of Justice of the European Union
CPT	European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment
EC	European Community
ECtHR	European Court on Human Rights
ECHR	European Convention on Human Rights
ECRE	European Council for Refugees and Exiles
EU	European Union
UNGA	United Nations General Assembly
IDC	International Detention Coalition
JRS	Jesuit Refugee Service
NGO	Non Governmental Organizations
OHCHR	Office of the High Commissioner on Human Rights
OLPEA	Obligation to Leave and Prohibition on Entry Act
SBG	State Border Guards
UNHCR	United Nations High Commissioner for Refugees
UNGIFT	UN Global Initiative to Fight Trafficking
UNODC	United Nations Agency against Organized Crimes and Drugs

Annex III – Non-exhaustive list of indicators developed by the United Kingdom Border Agency

The United Kingdom Border Agency Enforcement Instructions and Guidance contain a non-exhaustive list of factors that Agency officials are supposed to take into account in deciding whether or not to detain. These include[318]:

- What is the likelihood of the person being removed and, if they are likely to be removed, after what timescale?
- Is there any evidence of previous absconding?
- Is there any evidence of a previous failure to comply with conditions of temporary release or bail?
- Has the subject taken part in a determined attempt to breach the immigration laws? (i.e. entry in breach of a deportation order, attempted or actual clandestine entry)
- Is there a previous history of complying with the requirements of immigration control? (i.e. by applying for a visa, further leave, etc.)
- What are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? If the dependant is a child or vulnerable adult, do they depend heavily on public welfare services for their daily care needs in lieu of support from the detainee? Does the person have a settled address/employment?
- What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?
- Is there a risk of offending or harm to the public (this requires consideration of the likelihood of harm and the seriousness of the harm if the person does offend)?
- Is the subject under 18?
- Does the subject have a history of torture?
- Does the subject have a history of physical or mental ill health?

[318] UKBA - Enforcement Instructions and Guidance, Chapter 55.3.1, Abstract reproduced p. 218 *in* UNICEF, Administrative Detention of Children – A Global report, Discussion paper, February 2011