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from: Austrian delegation  
to: Asylum Working Party  
on: 18 October 2011

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Subject: Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers

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Delegation will find attached a proposal of the Austrian delegation concerning the above proposal. Changes are indicated in **bold/underlined**; deletions are indicated in **bold**.

**Proposals of the Austrian delegation on the amendment of the Directive of the European Parliament and the Council laying down standards for the reception of asylum seekers**

*Article 8*

**Detention**

1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for international protection in accordance with Directive [.../.../EU] [the Asylum Procedures Directive].
2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.
3. Without prejudice to Article 11 and to detention in the framework of criminal proceedings **and administrative criminal proceedings**, an applicant may only be detained:
  - (a) in order to determine or verify his/her identity or nationality;
  - (b) in order to determine, within the context of a preliminary interview, the elements on which the application for international protection is based which could not be obtained in the absence of detention;
  - (c) in the context of a procedure, to decide on the right to enter the territory;

- (d) when he/she is detained in order to prepare the return and/or carry on the removal process and it can reasonably be considered that he/she makes an application for international protection merely in order to delay or frustrate the enforcement of that return or removal process;
- (e) when protection of national security or public order so requires.
- (f) in accordance with Regulation (EC) No [.../...] [Dublin Regulation], **in order to secure the transfer procedures** where a risk exists that the applicant may abscond in order to delay or frustrate his/her transfer, ~~once the take back or take charge request has been sent to the Member State considered to be responsible for examining the application.~~
- (g) when this is necessary to safeguard an effective procedure on the application for international protection**

These grounds shall be laid down in national law.

4. Member States shall ensure that any rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.

#### *Article 9*

#### **Guarantees for detained asylum seekers**

1. Detention shall be for as short a period as possible and shall only be maintained for as long as the grounds set out in Article 8(3) are applicable.

Administrative procedures relevant to the grounds set out in Article 8(3) shall be executed with due diligence. Delays in the administrative procedures **not permitted by national law** that cannot be attributed to the asylum seeker shall not justify a continuation of detention.

2. Detention shall be ordered by judicial or administrative authorities. **When detention has been ordered by administrative authorities, Member States shall grant the applicant concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such case Member States shall immediately inform the asylum seeker concerned about the possibility of taking such proceedings.** ~~Where detention is ordered by administrative authorities, it shall be confirmed by judicial authorities within  3 working days  72 hours from the beginning of the detention. Where the judicial authority finds detention to be unlawful, or there is no decision within  3 working days  72 hours, the asylum seeker concerned shall be released immediately.~~

3. Detention shall be ordered in writing. The detention order shall state the reasons in fact and in law on which it is based.

Detained asylum seekers shall immediately be informed of the reasons for detention and the procedures laid down in national law for challenging the detention order, in a language they understand or are reasonably supposed to understand.

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

5. As regards access to free legal assistance and representation in cases of an appeal or review of the detention order the rules set out in Article 26 (2) shall apply.

Article 10

Conditions of detention

1. Detention shall take place as a rule in specialized detention facilities. **Where a Member State cannot provide accommodation in a specialized detention facility and is obliged to resort to prison accommodation, the asylum seekers shall be kept separately from ordinary prisoners.** ~~In the specialised detention facilities asylum seekers in detention shall be kept separately from other third country nationals who have not lodged an application for international protection unless it is permitted under national law and necessary to ensure family unity and the applicant consents thereto.~~
2. Detained asylum seekers shall have **appropriate** access to open-air spaces.
3. Member States shall ensure that persons representing the United Nations High Commissioner for Refugees have the possibility to communicate with applicants and to have access to detention facilities. This also applies to an organisation which is working in the territory of the Member State concerned on behalf of the United Nations High Commissioner for Refugees pursuant to an agreement with that Member State.
4. **Applicants in detention shall be allowed – on request – to establish in due time contact and maintain communication with legal representatives and family members.** ~~Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned, have the possibility to communicate with applicants and have access to detention facilities. Limits to access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely limited or rendered impossible.~~

5. Member States shall ensure that asylum seekers in detention are systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations in a language they understand or are reasonably supposed to understand.
6. In duly justified cases and for a reasonable period which shall be as short as possible Member States may derogate from paragraph 5 when the asylum seeker is detained at a border post or in a transit zone with the exception of cases referred to in Article 43 of Directive [.../.../EU] [the Asylum Procedures Directive].

~~(a) from the first subparagraph of paragraph 1 where accommodation in specialised detention facilities is temporarily not available and, as a consequence, Member States are obliged to resort to prison accommodation, provided that asylum seekers in detention are kept separately from ordinary prisoners; unaccompanied minors shall not, however, be kept in prison accommodation;~~

~~(b) from paragraph 5 when the asylum seeker is detained at a border post or in a transit zone with the exception of cases referred to in Article 43 of Directive [.../.../EU] [the Asylum Procedures Directive].~~

#### *Article 11*

#### **Detention of vulnerable persons and persons with special reception needs**

1. ~~In all cases, vulnerable  Vulnerable  persons shall not be detained unless it is established that their health, including their mental health, and well-being, will not significantly deteriorate as a result of the detention.~~

Where vulnerable persons are detained, Member States shall ensure regular monitoring and adequate support taking into account their particular situation including their health.

2. ~~Minors shall not be detained unless it is established in an individual case that it is in the minor's best interests, as prescribed in Article 23(2).~~

Detention of minors shall only be ordered of last resort, after having established that other less coercive alternative measures cannot be applied effectively. It shall be for as short a period as possible and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.

Detention of unaccompanied minors shall be allowed only in ~~resorted to only in~~ particularly exceptional cases permitted under national law.

Where minors are detained, they shall have the possibility to engage in leisure-activities, including play and recreational activities appropriate to their age.

~~Minors shall have access to open-air spaces.~~

Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

3. Detained families shall be provided with separate accommodation guaranteeing adequate privacy.
4. Where female asylum seekers are detained, Member States shall ensure that they are accommodated separately from male asylum seekers, unless these are family members and all concerned individuals consent thereto.

Exceptions may also apply for the use of common spaces designed for recreational or social activities including the provision of meals.

5. In duly justified cases and for a reasonable period that shall be as short as possible Member States may derogate from the fourth subparagraph of paragraph 2, paragraph 3 and the first subparagraph of paragraph 4, when the asylum seeker is detained at a border post or in a transit zone, with the exception of cases referred to in Article 43 of Directive [...]/.../EU] [the Asylum Procedures Directive].
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