



Analysis of Norway's international obligations,  
domestic law and practice

# Detention of Asylum Seekers



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# Foreword

This report was written by Marek Linha<sup>1</sup> and André Møkkelgjerd<sup>2</sup> on behalf of the Norwegian Organisation for Asylum Seekers (NOAS).

The aim of the report is to provide a description of the international legal framework that regulates the detention of asylum seekers, and show to what extent current Norwegian laws and practice comply with these international obligations. It is a stated goal of the current Norwegian Government, which took office in October 2013, to use immigration detention more frequently. The report outlines how much room for manoeuvre the government actually has.

During the writing process several people have given valuable input and commented on earlier drafts of the report. In particular we would like to thank the Vice Chairman of the NOAS Board Dr. jur. Vigdis Vevstad; Professor of Law at the University of Oslo Mads Andenæs; Research Fellow at the University of Oxford Eirik Bjørge; and Ben Lewis and Jem Stevens from the International Detention Coalition. For valuable guidance on practical matters of criminal law we would like to thank lawyer and defence attorney Jørund Lægland.

Any errors or omissions in the text are the full and sole responsibility of the authors.

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Oslo, January 2014.

Marek Linha and André Møkkelgjerd

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# Abbreviations

CAT	Convention Against Torture
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
CSR	Convention Relating to the Status of Refugees
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
PU	National Police Immigration Service (Politiets utlendingsenhet)
TFEU	Treaty on the Functioning of the European Union
UDI	Norwegian Directorate of Immigration (Utlendingsdirektoratet)
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties
WGAD	UN Working Group on Arbitrary Detention

# I Introduction

Asylum seekers arriving to Norway today are more likely than ever before to end up in detention instead of receiving proper support and care. Partly as a result of policies adopted in 2008, immigrants arriving to Norway in an irregular manner are often mistakenly detained for illegal entry or presence under criminal law. Under immigration law, irregular immigrants may be detained under a wider range of circumstances for administrative purposes after a recent legislative amendment adopted in 2012.

Within the public discourse, the demand for immigration detention has persisted however. Arguments in favour of a more frequent use of detention to ensure better protection of Norway's borders were often raised during the parliamentary election campaign of 2013. A similar rhetoric has persisted afterwards, with the new government committing itself to increase the use of 'a locked reception centre' (lukket mottak) – a euphemism used to legitimate detention. Unfortunately, human costs of immigration detention have received far less attention.

Detention constitutes a serious exception from the right to liberty, and any resort to this measure must therefore be subject to adequate legal safeguards. States have collectively elevated several of such safeguards into the domain of international law, voluntarily restricting their own sovereign powers. These restrictions take a form of various requirements. In each individual case, detention must be necessary to achieve a legitimate aim, and be proportionate and reasonable, both initially and throughout the rest of the detention period. Importantly, less invasive means must be resorted to as an alternative to detention when these can achieve the same objective. To what extent does Norway comply with these and other requirements imposed by international law?

This report attempts to answer the above question by examining the current state of Norwegian law and practice in light of Norway's international obligations. Taken into account are primarily international human rights law, refugee law and EU law. Both strengths and weaknesses of Norwegian law and practice are identified in the report. The most important weaknesses are summarised below along with our recommendations on how these issues should be addressed.

## I.1 Summary of main findings and recommendations

Examined against international law, Norwegian domestic law on immigration detention displays both strengths and weaknesses. An important example of where Norway goes over and above the basic protections guaranteed under international law is automatic judicial review. Legality of detention is in each case examined by a court automatically (as opposed to upon request), normally within 24 hours. In a number of respects, however, Norwegian law and practice do not fully reflect international standards. This section gives a quick overview of the main weaknesses identified in the present report. Each finding is accompanied by a short commentary and a recommendation.

## 1) The current practice of penalising asylum seekers for irregular entry results in violations of the Refugee Convention Article 31 (1).<sup>3</sup>

The circumstances surrounding a refugee's flight from persecution may often compel the individual to rely on irregular documentation and smugglers to reach a country of refuge. The adopting states of the Refugee Convention have recognised this reality and pledged to exempt asylum seekers from penalisation for illegal entry or presence. Regrettably, asylum seekers who enter Norway in an irregular manner are often penalised with fines, imprisonment or both. This practice directly violates Article 31 (1) of the Refugee Convention, which, subject to certain requirements, exempts asylum seekers from such penalisation. The reasons behind this unfortunate practice are twofold. First, the relevant authorities are not sufficiently aware of the international obligation. Second, the existing guidelines on this subject do not interpret the provision in compliance with the customary rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties.

### NOAS recommends

Norway should implement the exemption from penalisation required by the Refugee Convention in good faith and with due regard to the rules of treaty interpretation.

In order to ensure sufficient accessibility of the law, the exemption should be directly incorporated both into the Immigration Act and the Penal Code.

## 2) It is unclear whether alternatives to detention are used in practice and in line with the legislative intent, as relevant statistics are incomplete.<sup>4</sup>

Since 2012, Norwegian legislation provides for two alternatives to detention: an obligation to report and an obligation to stay in a specific place. These may be combined with seizure of travel documents, tickets or other material items which may serve to clarify or prove identity. However, relevant statistics on the frequency of use of alternatives to detention are incomplete. Whether alternatives to detention are actually used in practice in line with the legislative intent is thus open to doubt.

### NOAS recommends

Statistics on the frequency of use of alternatives to detention should be completed and made available.

A study should be commissioned to assess the extent to which courts scrutinise the proportionality of detention in practice.

A working group consisting of representatives of the government and the civil society should be set up to further the use of alternatives to detention and to explore additional options.

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3 For analysis of the international obligation to exempt asylum seekers from penalization for illegal entry or presence see Section 2.4. For analysis of Norwegian law and practice see Section 3.4.

4 For further analysis see Section 3.2.



**3) It is unclear how often foreigners detained for the purposes of immigration control are held in prisons instead of the specialised detention centre at Trandum.<sup>5</sup>**

Irregular immigrants who are detained for administrative reasons under immigration law are normally held in the specialised detention centre at Trandum. Some may also be exceptionally held in regular prisons. The law is not entirely clear on when such exceptions are allowed and the actual practice is also unclear due to lack of statistics. The exception is never applied to families with children. When the exception is applied, irregular immigrants must be separated from ordinary prisoners.

**NOAS recommends**

Statistics should be made available on the frequency of use of regular prisons for holding foreigners whose detention is justified under Article 106 of the Immigration Act.

**4) Asylum seekers who are detained for immigration control purposes are not automatically informed about the asylum procedure.<sup>6</sup>**

Asylum seekers who end up detained in a specialised detention facility at Trandum must seek relevant information about asylum procedure on their own initiative. There are no leaflets available containing information about the asylum procedure. Nevertheless, seeking relevant information is facilitated in a number of ways: contact details for relevant organisations are stated in a brochure distributed within the facility, and phone calls to lawyers or civil society organisations are unrestricted and free of charge.

**NOAS recommends**

The brochure distributed within the detention centre should include basic information about the asylum procedure.

**5) The Immigration Act permits detention based on crime prevention, leading to the application of different standards depending on an individuals' legal status.**

In the context of immigration control, a foreigner may be administratively detained in a number of situations, including where there are doubts about his or her identity, for the purpose of deportation where there is a risk of absconding, in national security cases, and for crime prevention purposes. Inclusion of the last ground leads to the application of different standards based on the legal status of the person in the country. This goes against the recommendation of the European Union Agency for Fundamental Rights that domestic immigration laws should not regulate detention based on crime prevention.

**NOAS recommends**

Paragraph (d) in Article 106 of the Immigration Act should be repealed.

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<sup>5</sup> For further analysis see Section 3.3.1.

<sup>6</sup> For further analysis see Section 3.5.

## 6) The actual requirements of the new standard of proof are unclear and subjective.<sup>7</sup>

Relying on a new standard of proof, paragraphs (a) and (b) of Article 106 (1) of the Immigration Act permit detention, respectively, where there are ‘specific grounds for suspecting’ that an individual has provided a false identity, and where there are ‘specific grounds for suspecting’ that a foreigner will evade deportation. The law does not specify what may constitute ‘specific grounds for suspecting’ in such cases. The fact that this is largely left to the subjective evaluation of the police may in practice undermine the effectiveness of judicial review.

The process of establishing whether the risk of evasion exists in a particular case is regulated in the Immigration Act, Article 106 a, which lists a number of factors that may be taken into account. The provision does not strictly require that the risk of evasion be based on one or more of the listed factors. The list is non-exhaustive and “weight may also be given to general experience relating to evasion by foreign nationals.”

### NOAS recommends

Paragraph (a) of Article 106 (1) of the Immigration Act should refer to an exhaustive list of objective criteria whereby the ‘specific grounds for suspecting’ that an individual has provided a false identity would be set out transparently.

Article 106 a of the Immigration Act should be reformulated to permit detention only if one or more factors on the list are satisfied. The list should be exhaustive and only contain objective criteria.

## 7) Immigration detention is not subject to a clear set of procedural rules.<sup>8</sup>

Administrative detention of irregular immigrants justified under Article 106 of the Norwegian Immigration Act is subject to application of Articles 174-191 of the Criminal Procedure Act “insofar as appropriate”. Unfortunately, the wording of the provisions in the Criminal Procedure Act does not always make it clear whether certain safeguards apply to immigration detention, and if so to what extent. A study commissioned by the Ministry of Justice and Public Security was published in 2011, listing all necessary revisions.

### NOAS recommends

The relevant provisions of the Criminal Procedure Act should be revised to make the procedural rules related to immigration detention sufficiently clear and precise.

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7 For further analysis see Section 3.6.2.

8 For further analysis see Section 3.6.2.3.

## **8) The maximum allowed period of detention of foreigners for immigration control purposes is too long.<sup>9</sup>**

Article 106 of the Immigration Act sets the maximum period of detention to 18 months. This period is permitted if “the foreign national does not cooperate on implementing the removal or there are delays in procuring the necessary documents from the authorities of another country”. The maximum period corresponds to the maximum duration allowed under the EU Returns Directive. However, several other European countries have permitted considerably shorter periods, including Belgium, Austria, Poland and Slovenia.

### **NOAS recommends**

The maximum allowed period of detention of 18 months should be lowered.

## **9) The maximum allowed period of detention does not cover national security cases and cases where the foreign national has been expelled on account of a criminal conviction.<sup>10</sup>**

The exceptional limit of 18 months set out by the Norwegian Immigration Act does not cover all cases. Excluded are national security cases and cases where the foreign national has been expelled on account of a criminal conviction. In respect to the former type of cases, the Ministry of Justice and Public Security has argued that the EU Returns Directive is not applicable in serious national security cases, referring to Article 72 TFEU. In respect to the latter type of cases, application of the EU Returns Directive is excludable pursuant to Article 2 (2) (b) of the Directive.

### **NOAS recommends**

Article 106 of the Immigration Act should provide for a maximum allowed period of detention in all cases, including those concerning national security. This limit could be higher than in other types of cases but should not exceed 18 months.

## **10) Availability and competence of interpreters is not sufficiently ensured.<sup>11</sup>**

An arrested individual is often informed about the reasons for arrest by a legal counsel, who is automatically appointed by a court. Interpreters are used when needed, but there are cases when an interpreter may not be available.

Interpreters are also used at judicial hearings concerning the legality of detention. The responsibility to either appoint or approve an interpreter for this purpose rests with the court. However, in practice there are no special precautions to ensure competence of interpreters present at the hearings.

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<sup>9</sup> For further analysis see Section 3.6.4.

<sup>10</sup> For further analysis see Section 3.6.4.

<sup>11</sup> For further analysis see Section 3.6.5.

## NOAS recommends

Measures to ensure availability and competence of interpreters should be adopted.

### 11) The Immigration Act permits administrative detention of children for immigration control purposes.<sup>12</sup>

Children may be arrested only when it is ‘especially necessary’ and detained only when it is ‘absolutely necessary’. In practice, children are normally not detained for a longer period than 24 hours. Detention of unaccompanied minors for the purposes of immigration control has been rare.

## NOAS recommends

Article 106 of the Immigration Act should be amended to explicitly prohibit detention of unaccompanied minors.

### 12) The joint responsibility of the police for both administering the detention centre and carrying out deportations weakens prevention of *refoulement*.<sup>13</sup>

The National Police Immigration Service (PU) is responsible for both administering the detention centre at Trandum as well as carrying out deportations. As a result, much focus is placed on carrying out deportations successfully and efficiently, even though not all foreigners held in the detention centre are detained with a view to deportation. At least some of the detainees may be asylum seekers in need of specialised legal assistance. Unfortunately, prevention of deportation of asylum seekers contrary to the principle of *non-refoulement* does not seem to be a primary concern. This has been reflected in the unwillingness of the authorities responsible for administration of the detention centre to engage in a more regular form of cooperation with the civil society.

## NOAS recommends

A single institution should not be responsible for both administering detention centres and carrying out deportations.

Arrangements should be made so that civil society organisations can have a regular presence at the detention centre at Trandum.

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<sup>12</sup> For further analysis see Section 3.7.

<sup>13</sup> For further analysis see Section 3.5.

## 1.2 Background

European states have been increasingly relying on detention as a tool to manage challenges posed by irregular immigration. In 2010, the Parliamentary Assembly of the Council of Europe observed with concern that: “Whilst it is universally accepted that detention must be used only as a last resort, it is increasingly used as a first response and also as a deterrent.”<sup>14</sup> Over reliance on detention raises a host of difficult issues, including in regard to compliance with international human rights obligations, financing and administrative effectiveness. The human cost of detention should especially not be underestimated. A recent review of studies on impact of detention on asylum seekers from around the world shows that even short-term detention of adult asylum seekers leads to high levels of anxiety, depression and post-traumatic stress disorder.<sup>15</sup>

The human and material costs are difficult to justify from a pragmatic point of view. As noted in a recent UNHCR study, “pragmatically, there is no empirical evidence that the prospect of being detained deters irregular migration, or discourages people from seeking asylum.”<sup>16</sup> The same report also asserts that detention is unnecessary in most cases, since over 90 percent of asylum applicants and persons awaiting deportation comply with their respective legal obligations.<sup>17</sup>

The frequent use of immigration detention undermines the credibility of the institute of asylum in Europe. The Special Rapporteur on the human rights of migrants has recently observed “inconsistencies in the abilities of irregular migrants’ access to asylum procedures whilst in detention.”<sup>18</sup> Asylum seekers are often confused with ordinary aliens, frequently finding themselves detained before their asylum claim is examined. This obstructs their ability to obtain information about the asylum procedure, relevant legal assistance, and the necessary documentation to substantiate their asylum applications. Such practice also risks ignoring the individual circumstances surrounding the flight of asylum seekers, as well as their vulnerability and special needs.

European states still enjoy a wide margin of discretion within which they formulate their own domestic rules regarding detention of asylum seekers. The recent advances towards creating the Common European Asylum System (CEAS) still have a long way ahead to ensure a sufficiently uniform practice.<sup>19</sup> Similarly, international human rights law and refugee law only limit the power of states to detain asylum seekers, without imposing a single way of implementation. Uniformity of practice across different countries is difficult to achieve, as multilateral treaties must take into account a variety of institutional organizations and legal cultures of different states. Unfortunately, even the basic limits set by the international instruments are not always complied with. As a result of these realities, the practice in Europe varies from that in Sweden, where asylum seekers are detained only

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14 Council of Europe: Parliamentary Assembly, *Resolution 1707 (2010): The detention of asylum seekers and irregular migrants in Europe*, 28 January 2010, RES 1707 (2010).

15 Katy Robjant, Rita Hassan and Cornelius Katona, ‘Mental health implications of detaining asylum seekers: systematic review’, *British Journal of Psychiatry*, Vol. 194, 2009, pp. 306-312; See also: JRS Europe, *Becoming Vulnerable in Detention*, June 2010.

16 UN High Commissioner for Refugees (UNHCR), *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1, p. 1.

17 *Ibid*, p.1.

18 UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, 24 April 2013, A/HRC/23/46, para. 53.

19 European Council on Refugees and Exiles, *Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System*, September 2013, pp. 30-36.

exceptionally, to that in Malta, where the law in effect prescribes mandatory detention of all asylum seekers without a valid permission to reside in the country.

Increasing reliance on immigration detention can also be felt in Norway. The number of overnight stays in the Police Immigration Detention Centre at Trandum has increased from 7.431 in 2010 to 17.874 in 2011.<sup>20</sup> In late 2012, the Committee against Torture raised its concern in regard to overcrowding and sanitary conditions at the detention centre.<sup>21</sup> The conditions at the detention centre have since then improved,<sup>22</sup> but reliance on detention continues to be on the rise. During 2013, the Detention Centre held 3.243 inmates, who together spent in detention about 28.470 days.<sup>23</sup>

Because of the extra measures and a high number of personnel required to maintain a sufficient level of security, the cost of running the detention centre is almost nine times higher than running an open reception centre.<sup>24</sup> Trandum is currently the only officially designated immigration detention centre in the country.<sup>25</sup> However, there are indications that this may change within the next few years. The newly elected government has expressed that it intends to “make use of and enforce”<sup>26</sup> the current rules on detention of irregular immigrants more actively than what used to be the case. The government has proposed in this context to increase the capacity of Trandum if the need arises.<sup>27</sup> These developments call for an assessment of safeguards against arbitrary detention, particularly in regard to asylum seekers.

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20 The numbers can be derived from the annual reports published by the Supervisory Board at the web-site of the Ministry of Justice and Public Security at: <http://www.regjeringen.no/nb/dep/jd/dep/styre-rad-og-utval/permanente-rad-utvalg-og-arbeidsgrupper-/tilsynsradet-for-politiets-utlendingsint.html?id=547242>

21 UN Committee against Torture, *Concluding observations on the combined sixth and seventh periodic reports of Norway*, adopted by the Committee at its forty-ninth session, 29 October – 23 November 2012, para. 17; Cf. Council of Europe: Committee for the Prevention of Torture, *Report to the Norwegian Government on the visit to Norway carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18 to 27 May 2011*, 21 December 2011, CPT/Inf (2011) 33, paras.

22 A newly upgraded wing was put in use in March 2012. It contains 72 single rooms, each containing a bathroom with a sink, a shower and a toilet. All rooms also have a TV and shelves. Since March 2013, the detention centre includes a separate wing for women, asylum-seeking minors and families with children. The total capacity of the facility is 127 places plus 10 high security places.

23 E-mail communication with National Police Immigration Service (Politiets utlendingsenhet), 17.01.2014. The number includes a period of residence before 2013 for the people that were detained in 2012 (55 people).

24 In regard to an ordinary reception centre, UDI has given NOAS an estimate based on the budget for 2014. The cost per person for an ordinary place in a reception centre is NOK 95.000 per year. For an unaccompanied minor the cost is estimated at NOK 454.395. In addition the ‘cash regulation’ will normally provide the person with 32.544 per year. The host municipality will be compensated with NOK 15.610 per person (this sum also covers subsidy for day care of NOK 4.447 for 4 and 5 year olds, and NOK 155 to municipalities with care centres operated by the Child Welfare Service). UDI specified that this information is based on average calculations which include individual costs not associated with all spaces. E-mail from statistikk@udi.no, 12.12.2013. In regard to the detention centre at Trandum, the National Police Immigration Service (PU), has given NOAS the following numbers. The total budget for the detention centre is NOK 120 million per year. This covers overhead such as salaries and costs related to the detainees that will vary depending on the number of residents and period of residence. The costs associated with the detainees amount to about NOK 15 million. PU is unable to calculate the exact cost per detainee. The current capacity is given as approximately 105 spaces/rooms. Current capacity is the total amount of spaces/rooms adjusted for maintenance, security space, space reserved for families, etc. E-mail from PU, 13.12.2013.

See also the numbers published in a recent newspaper article: Martin Herman Wiedswang Zondag and Peter Svaar, ‘Venstre om lukkede mottak: – Meningsløse fengslinger’, NRK.no, 13.10.2013, available at: <http://www.nrk.no/valg2013/vil-ikke-prioritere-lukkede-mottak-1.11294867>

25 Irregular immigrants may also be temporarily detained in police cells or prisons around the country.

26 *Avtale mellom Venstre, Kristelig Folkeparti, Fremskrittspartiet og Høyre om utlendingsfeltet*, Stortinget, 30. September 2013, p. 2, [unofficial translation], available at: <http://www.hoyre.no/filestore/Filer/Politikkdokumenter/Samarbeidsavtale.pdf>

27 Skriftlig spørsmål fra Helga Pedersen (A) til justis- og beredskapsministeren, Dokument nr. 15:210 (2013-2014), available at: <http://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=58694>

### 1.3 The scope and structure of the study

How well does the Norwegian domestic legal system protect the right to liberty of asylum seekers? The right to liberty is a human right and must therefore be adequately protected in respect of everyone, including foreigners and asylum seekers. This report examines the law and practice related to detention of asylum seekers in Norway in light of its international obligations, primarily under international human rights law, refugee law and EU law. The report identifies strengths and weaknesses of safeguards against arbitrary detention provided by the Norwegian domestic legal framework and the actual practice. Where weaknesses are identified, the report proposes amendments to better reflect existing human rights obligations and best practices. In this respect the analysis also draws on lessons from legislation and practices in other European countries.

The first part of the report presents an up-to-date international legal framework, composed mainly of relevant norms of international refugee law, international human rights law, and European Union law. Among the main conventions considered are the 1951 Refugee Convention (CSR),<sup>28</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>29</sup> the European Convention on Human Rights (ECHR),<sup>30</sup> and the Convention on the Rights of the Child (CRC).<sup>31</sup> Norway has signed and ratified these conventions and is thus legally bound by them.

Relevant sources of EU law are also covered. Despite not being an EU member state, Norway is part of the European Economic Area and therefore participates in Schengen and Dublin cooperation. Countries within the Schengen area have abolished passport and immigration controls at their common borders. In order to prevent applicants from submitting applications for asylum in multiple states, the Dublin system provides for the transfer of an asylum seeker to the country responsible for the refugee status determination. The responsible state is usually the state through which the asylum seeker first entered the Schengen area. Since Norway participates in this system, it is bound by the EU Returns Directive<sup>32</sup> and the Dublin Regulation.<sup>33</sup> Relevant provisions of these two pieces of EU legislation are therefore covered by the report. However, since other EU instruments on asylum are not binding for Norway directly or in their entirety, this report does not address them comprehensively.<sup>34</sup>

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28 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137; UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267. Hereafter referred to as 'the Refugee Convention'.

29 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

30 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4, November 1950, ETS 5.

31 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

32 European Union: Council of the European Union, *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*, 16 December 2008, 2008/115/EC.

33 European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, L 180/31.

34 For a comprehensive analysis of reception conditions in Norway in light of the EU Reception Conditions Directive see: Jan-Paul Brekke and Vigdis Vevstad, *Reception conditions for asylum seekers in Norway and the EU*, Institute for Social Research, 2007. See also: Vigdis Vevstad and Charlotte Mysen, *Normative European Jurisprudence in a Refugee and Migration Context*, Institute for Social Research, 2011.

The EU Reception Conditions Directive<sup>35</sup> is covered only insofar as its application is demanded by the Dublin Regulation.<sup>36</sup> It should nevertheless be mentioned that the Norwegian legislature generally pays close attention even to non-ratified EU instruments and abides by selected rules on a voluntary basis.

Relevant international norms derived from the sources above are analysed in light of the latest case-law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Communications, Concluding Observations and General Comments reached by the United Nations Human Rights Committee (HRC) are also referred to extensively.<sup>37</sup>

Frequent reference is in addition made to instruments that are not directly binding, generally referred to as 'soft-law'. These include guidelines and recommendations issued by the Committee of Ministers of the Council of Europe,<sup>38</sup> the UN Working Group on Arbitrary Detention (WGAD),<sup>39</sup> and the United Nations High Commissioner for Refugees (UNHCR).<sup>40</sup>

Following the structure of the international framework, the second part of the report analyses relevant Norwegian domestic legislation and practice. The domestic rules and practices are analysed against international norms, and identified strengths and weaknesses are highlighted. Among the examined domestic legislation are the Immigration Act (*utlendingsloven*),<sup>41</sup> the Immigration Regulations (*utlendingsforskriften*),<sup>42</sup> the Directive on Trandum Detention Centre (*utlendingsinternatforskriften*),<sup>43</sup> the Penal Code (*straffeloven*),<sup>44</sup> and the Criminal Procedure Act (*straffeprosessloven*).<sup>45</sup> The actual practices are derived mainly from official 'white papers' presented to the parliament (*meldinger til Stortinget*, referenced as 'Meld. St.'), district court rulings, and from findings attained through field visits, interviews and correspondence with relevant public institutions.

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35 European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, L 180/96.

36 Specifically, Article 28 of the Dublin III Regulation refers to Articles 9, 10 and 11 of the EU Reception Conditions Directive that simply "shall apply". These provisions enter into force without a separate ratification process.

37 The UN Human Rights Committee is a body of independent experts established under the ICCPR. It is authorised to formulate concluding observations on state reports, develop General Comments, and, under the Optional Protocol, to adopt views on complaints submitted by individuals who allege breaches of any of the rights provided for by the Covenant. As a result of these functions, and in line with the general principles of international law, the Committee also has the power to interpret the Covenant, contributing thereby towards elaboration and concretization of the treaty's provisions.

38 The Committee is the Council of Europe's decision-making body. It comprises the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives. Under Article 15 (b) of the Statute of the Council of Europe, the Committee of Ministers may make recommendations to member states on matters for which the Committee has agreed "a common policy".

39 The Working Group against Arbitrary Detention is currently under the purview of the UN Human Rights Council. It is a special monitoring mechanism that investigates cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the relevant international legal instruments accepted by the states concerned.

40 The UNHCR is a multilateral, intergovernmental institution, established by the UN General Assembly as its subsidiary organ. In addition, its mandate is embedded in public international law. Among other responsibilities, the UNHCR is charged with the task of supervising international conventions providing for the protection of refugees.

41 *Lov av 15. mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her*. Official English translation of the text is available at: <http://www.regjeringen.no/en/doc/laws/Acts/immigration-act.html?id=585772>

42 *Forskrift om utlendingers adgang til riket og deres opphold her*. An official English translation of the text is available at: <http://www.udiregelverk.no/no/jrettskilder/sentrale/utlendingsforskriften-engelsk/>

43 *Forskrift om Politiets utlendingsinternat*. An English translation of the text is not available.

44 *Almindelig borgerlig Straffelov*. An official English translation of the text is available at: <http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf> (the translated text is out of date). A completely revised penal code was passed by the parliament in 2005 but has to this date not entered into force. The long delay has been explained by technical difficulties with the penal and police information register, also known as STRASAK, which needs to be replaced, see: Ot.prp. nr. 22 (2008-2009), p. 396.

45 *Lov om rettergangsmåten i straffesaker*. An official English translation is available at: <http://www.ub.uio.no/ujur/ulovdata/lov-19810522-025-eng.pdf> (the translated text is out of date).



It is important to note that Norwegian legal statutes tend to be less comprehensive compared to statutes in countries in continental Europe. Preparatory works often play an important role in determining the meaning of the applicable rules.<sup>46</sup> Where appropriate, the report therefore refers to preparatory works (*forarbeider*). Among others, these consist of Official Norwegian Reports (Norges offentlige utredninger, referenced as ‘NOU’) propositions to the parliament (proposisjon til Stortinget, referenced as ‘Ot.prp.’ or ‘prop.’) and Parliamentary bills (*innstillinger*, referenced as ‘Innst.’). Other sources of law are also mentioned, including circulars (*rundskriv*), instructions (*instruks*), and official guidelines (*retningslinjer*). Case-law by the Supreme Court of Norway setting out important precedents is also referred to.<sup>47</sup>

Each section within the second part of the report concludes with a brief summary of the main strengths and weaknesses of the respective laws and practices. Where appropriate, the analysis proposes legislative changes needed to align domestic laws with Norway’s international obligations and best practices.

Certain issues are covered by the report only to a limited extent. The report focuses primarily on administrative detention in the context of immigration control, not criminal detention. However, penal detention is covered to the extent the issues of immigration control and penal detention overlap. Detention conditions are covered only insofar as these are relevant in regard to protection against arbitrariness. Detention of stateless persons and situations of mass influx are not covered.

## 1.4 Methodology

The first part of the report sets out the international legal framework and was prepared entirely as a desk study. The primary focus of the framework is on binding rules of international treaties. However, non-binding soft-law instruments are also referred to. Binding legal obligations are formulated in the report by use of the terms ‘must’, ‘have to’ or ‘shall’. In contrast, obligations derived from soft-law instruments are referred to in the report by the term ‘should’.

Binding legal obligations are interpreted in light of relevant case-law. Decisions by the ECtHR and the CJEU are legally binding. In line with general principles of international law, the jurisdiction of the ECtHR extends to “all matters concerning the interpretation and application of the Convention.”<sup>48</sup> Similarly, the CJEU is tasked to “ensure that in the interpretation and application of the Treaties the law is observed.”<sup>49</sup> While neither of the two courts is formally bound by the doctrine of precedent, both courts strive to be consistent and depart from previous jurisprudence only for compelling reasons. Norway cannot be brought before the CJEU, but in practice Norwegian public institutions are nevertheless often influenced by its decisions.

Communications, Concluding Observations and General Comments submitted by the Human Rights Committee are not legally binding *per se*. Nevertheless, a state party cannot simply disregard Committee’s conclusions, since the Committee is a body formally vested with the authority to

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46 Regarding the sources of Norwegian law, see: Torstein Eckhoff, *Rettskildelære*, 5. Utgave ved Jan E. Helgesen, p. 22-26. Universitetsforlaget, 2001.

47 Regarding the Norwegian doctrine of sources of law, see: Torstein Eckhoff, *Rettskildelære*, 5. Utgave ved Jan E. Helgesen, Universitetsforlaget, 2001; See also: Erik Boe, *Innføring i juss; juridisk tenkning og rettskildelære*, 3. Utgave, Universitetsforlaget, 2010.

48 Art. 32 (1), ECHR.

49 Art 19 (1), European Union, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01.

interpret the ICCPR provisions. Blatant disregard of its conclusions and recommendations would call into question the sincerity of the state party's intention to abide by the obligations under the Covenant. Specifically, such disregard would involve the risk of a breach of the basic principle of international law that every treaty must be performed "in good faith", which is expressed in Article 26 of the Vienna Convention on the Law of Treaties (VCLT).<sup>50</sup>

Soft-law is not strictly legally binding per-se, but the weight that should be accorded to it may vary. First, a specific soft-law provision may constitute "subsequent practice" within the meaning of the general rule of treaty interpretation under the VCLT.<sup>51</sup> Where this is the case, the soft-law provision must be taken into account when interpreting a binding treaty rule. Second, a soft-law provision may reflect, or gradually attain, the status of customary international law. In such case the rule would have to be considered binding *per se*. Third, national law can refer to soft-law, hence giving it a special status. Preparatory works to the Norwegian Immigration Act explicitly mention that soft-law instruments may have relevance when interpreting domestic provisions in light of international law.<sup>52</sup>

Soft-law instruments issued by the UNHCR related to the application of the 1951 Refugee Convention deserve a separate mention. The adopting states of the Convention have undertaken to cooperate with the UNHCR and expressly recognised "its duty of supervising the application of the provisions of this Convention."<sup>53</sup> As noted by a UK court, related soft-law instruments such as the UNHCR Detention Guidelines<sup>54</sup> should therefore be accorded "considerable weight".<sup>55</sup>

The second part of the report, which primarily focuses on Norwegian domestic law and practice, consists of desk research combined with field visits and interviews. These were primarily conducted in Norway, with a visit to the Trandum detention centre and meetings with representatives of the National Police Directorate (Politidirektoratet), the National Police Immigration Service (Politiets utlendingsenhet, commonly referred to as PU), and the Romerike police district. Defence attorneys at the district court at Øvre Romerike, which is responsible for cases at the Gardemoen airport, were also consulted, as was the Office of the Director of Public Prosecutions (Riksadvokaten). Data were further collected through correspondence with the Directorate of Immigration (Utlendingsdirektoratet, commonly referred to as UDI), the Directorate of Norwegian Correctional Service (Kriminalomsorgsdirektoratet), and other relevant institutions. Several public institutions and civil society organisations in other countries were also consulted for limited comparative purposes, including in Denmark, Sweden, Malta and Greece.

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50 United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

51 Art. 31 (3) (b), VCLT.

52 Ot.prp. nr. 75 (2006–2007), p. 401.

53 Art. 35 (1), CSR. See also Walter Kälin, 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond', in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, edited by Erika Feller, Volker Türk and Frances Nicholson, Cambridge University Press, 2003, pp. 613-666.

54 UN High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012. Hereafter referred to as 'UNHCR Detention Guidelines'.

55 *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999.

Analysis in this report assumes that the position of Norwegian law in respect to international law can be characterised as qualified dualism.<sup>56</sup> A dualist system requires translation of international conventions into domestic law in order to render them legally effective within the domestic legal order. The dualist nature of the Norwegian system is well illustrated on the Norwegian Human Rights Act (*menneskerettsloven*).<sup>57</sup> In order to create the respective rights and obligations within the domestic legal order, the Act incorporates certain international human rights conventions into domestic legislation.<sup>58</sup>

It is important to note in this context that all Norwegian domestic legal rules must be interpreted with the presumption that they are not in conflict with international law.<sup>59</sup> In other words, where more than one interpretation of a domestic legal rule is possible, that interpretation must be preferred which avoids a conflict with a binding international rule. This principle of presumption must be applied when interpreting domestic provisions irrespectively of whether the given international rule has been directly translated into domestic law. In rare cases where such norm conflict cannot be resolved through interpretative accommodation, a legislative change by the parliament will be needed to align the domestic law with international law. The need for translation into domestic law and the principle of presumption are typical features of a dualist system.

The Norwegian system adopts features of monism within certain areas of law, including criminal law and immigration law. For this reason, the Norwegian system has been described as ‘sector monism.’<sup>60</sup> In respect to these specific areas of law, precedence must be given in favour of a rule of international law if that rule comes into conflict with a domestic rule. Such precedence must be given automatically when the domestic rule is being applied. A domestic rule must be automatically set aside in favour of a binding rule of international law even where the norm conflict cannot be resolved through interpretative accommodation. Specifically, the Norwegian Criminal Procedure Act requires that the criminal provisions must be applied “subject to such limitations as are recognized in international law”.<sup>61</sup> An identical provision is contained in the Norwegian Penal Code.<sup>62</sup> The Norwegian Immigration Act similarly obliges the authorities to apply the immigration rules “in accordance with international provisions by which Norway is bound when these are intended to strengthen the position of the individual.”<sup>63</sup>

As a result, when the report identifies practices where domestic criminal or immigration laws are applied inconsistently with international law, the practice will entail violation of both international law and domestic law.

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56 Vigdis Vevstad (ed.), *Utlendingsloven kommentarutgave*, Universitetsforlaget, 2010, pp. 41-52; and Øyvind Dybvik Øyen (ed.), *Lærebok i utlendingsrett*, Universitetsforlaget, 2013, 32-37.

57 Lov om styrking av menneskerettighetenes stilling i norsk rett (*menneskerettsloven*), and Ot.prp. nr. 3 (1998-99).

58 These include the ICCPR, ICESCR, ECHR and CRC.

59 Regarding the status of international law in the domestic Norwegian legal order and the principle of presumption see: Carl August Fleischer, *Folkerett*, 8. Utgave, Universitetsforlaget, 2005, pp. 358-367.

60 Sector monism has been discussed in detail by the Norwegian Supreme Court in HR-2000-30-B - Rt-2000-996 (224-2000) - UTV-2000-1029.

61 Art. 1 (2), Norwegian Penal Code (*straffeloven*).

62 Art. 4, Norwegian Criminal Procedure Act (*straffeprosessloven*).

63 Art. 3, Norwegian Immigration Act (*utlendingsloven*); see also: *Norges offentlige utredninger*, NOU 2004: 20, p. 373 and Ot.prp. nr. 75, p. 401.

## 1.5 Definition of terms

The terms ‘arrest’ and ‘detention’ have been subject to varying definitions both domestically and internationally.<sup>64</sup> Unless a person is recognised as being arrested or detained in the first place, he or she will not be afforded all the relevant human rights safeguards. The two concepts have been subject to a continuous refinement by human rights bodies vested with the authority to interpret and apply respective international human rights conventions. The subsections below discuss the latest developments, primarily focusing on aspects relevant to arrest and detention of asylum seekers. Before proceeding to analysis of the two concepts, the first subsection will briefly outline who is an ‘asylum seeker’.

### 1.5.1 Asylum seeker

Put simply, an asylum seeker is a person who seeks protection in another country. Asylum seekers who have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion may qualify for refugee status under the Refugee Convention.<sup>65</sup> An asylum seeker may also qualify for protection on other grounds, for example when fleeing from a violent conflict. In such case, the asylum seeker will not qualify for refugee status but may nevertheless qualify for complementary, subsidiary or temporary form of protection. In no case may a state send back a foreigner to his or her country of origin if the return would subject the foreigner to a real risk of serious harm such as torture. This principle, known as the principle of *non-refoulement*, has found an explicit expression in several international instruments, including the Refugee Convention<sup>66</sup> and the Convention Against Torture (CAT).<sup>67</sup> The principle can also be derived from general human rights norms, including the right to life<sup>68</sup> and the prohibition against torture.<sup>69</sup>

### 1.5.2 Arrest

At the outset it must be noted that the terms ‘arrest’ and ‘detention’ are two separate concepts. ‘Arrest’ refers to an act of apprehending which initiates ‘detention’. Arrest which is lawful under human rights law can give rise to detention which is not.<sup>70</sup>

In order for an act of apprehension to amount to ‘arrest’ within the meaning of international law, the act does not need to fulfil the formalities required under domestic legislation. For example, non-issuance of an arrest warrant may make apprehension unlawful under domestic law, but this will have no bearing on whether the act amounted to ‘arrest’ within the meaning of international human rights conventions.<sup>71</sup>

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64 See e.g., the definitions contained in the so called ‘UN Body of Principles’. UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment : resolution / adopted by the General Assembly*, 9 December 1988, A/RES/43/173.

65 Art. 1 (A) (2), CSR.

66 Art. 33, CSR.

67 Art. 3, UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

68 Art. 6, ICCPR; Art. 2, ECHR.

69 Art. 7, ICCPR; Art. 3, ECHR.

70 See, e.g., *Aage Spakmo v. Norway*, HRC, 1999, para. 6.3.

71 *Mr. Abduali Ismatovich Kurbanov v. Tajikistan*, Communication No. 1096/2002, U.N. Doc. CCPR/C/79/D/1096/2002, 2003, para. 7.2.

Under international human rights law, ‘arrest’ refers to apprehension of a person, irrespective of whether this happens in a criminal or administrative context.<sup>72</sup> Human rights treaties grant a number of elementary procedural safeguards against arbitrary detention, including the right to be informed of the reasons for arrest. This and other procedural safeguards must be granted also to those apprehended for administrative purposes, including in the context of immigration control.

### 1.5.3 Detention

Classification of a facility under domestic legislation as a ‘holding centre’, ‘reception centre’ or ‘accommodation’ has no bearing on the question whether the confinement constitutes ‘detention’ within the meaning of international law.<sup>73</sup> Indeed, as explained further below, the measure does not necessarily have to involve confinement in a specialised facility (sometimes referred to as ‘custodial detention’) in order to constitute detention. The issue must always be analysed individually in light of the relevant rules of international human rights law.

Human rights conventions afford the right to liberty<sup>74</sup> and a separate right to freedom of movement.<sup>75</sup> In the words of the ECtHR, the difference between deprivation of liberty (i.e., detention) and restriction of freedom of movement is “merely one of degree or intensity, and not one of nature or substance.”<sup>76</sup> There is a range of factors that cumulatively affect the determination of whether a specific measure amounts to detention. These include the type, duration, effects, and the manner of implementation of the measure.<sup>77</sup> A short period of confinement for a few hours may amount to detention, especially where there is an element of coercion, such as use of forceful means<sup>78</sup> or when the place is locked and guarded.<sup>79</sup> Presence of continuous supervision and control can also be important.<sup>80</sup>

In *Amuur v. France*, the ECtHR dealt with a case of Somali refugees who were refused entry to France on the ground of using falsified passports. Although the refugees were held by the police at the airport for 20 days, they were nevertheless permitted during that time to take a plane, if they so wished, to leave to another country. The refugees were held under strict and constant surveillance by the police within the international zone of the airport, and they were not enabled to seek asylum. After 20 days they were sent to Syria. The Court stressed above all that “confinement must not deprive asylum seekers of the right to gain effective access to the procedure for determining refugee status.”<sup>81</sup> Giving special weight to the fact that such access was not provided and the fact of the constant surveillance by the police, as well as other factors,<sup>82</sup> the Court held that the measure was severe enough to amount to detention.

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72 *Van der Leer v. Netherlands*, 1990, ECtHR, para. 27.

73 It is an established principle of international law that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. See Art. 27 of the Vienna Convention on the Law of Treaties. United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. Hereafter referred to as ‘VCLT’.

74 Art. 9 (1), ICCPR; Art. 5, (1) ECHR.

75 Art. 12, ICCPR; Art. 2, Protocol No. 4 to ECHR.

76 *Guzzardi v. Italy*, ECtHR, 1980, para. 93.

77 *Guzzardi v. Italy*, ECtHR, 1980, para. 95.

78 *Foka v. Turkey*, ECtHR, 2008, para. 78.

79 *Nolan and K v. Russia*, ECtHR, 2009, para. 96.

80 *H.L. v. United Kingdom*, ECtHR, 2004, para 91.

81 *Amuur v. France*, ECtHR, 1996, para. 43.

82 *Ibid*, para. 45.

In so doing it also dismissed the argument that the measure did not constitute detention because the refugees were free to leave France.<sup>83</sup>

The case above can be compared to *Raimondo v. Italy*, where the circumstances were less restrictive.<sup>84</sup> Mr Raimondo was not allowed to leave his house without notifying the police but it was not required of him to obtain permission to do so. He was obliged to return to his house by 9 p.m. and not to leave it before 7 a.m., unless there was a valid reason and he had given prior notification. Lastly, he was obliged to report to the police on specific days. Considering cumulatively all relevant factors, the ECtHR did not consider the situation to be severe enough to amount to detention. Instead, it was assessed as merely constituting a restriction on the freedom of movement.<sup>85</sup>

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83 *Ibid*, para. 48.

84 *Raimondo v. Italy*, ECtHR, 1994, para. 13.

85 *Raimondo v. Italy*, ECtHR, 1994, para. 39.

## 2 International legal framework

This Section provides an overview of international law related to detention of irregular immigrants, particularly asylum seekers. The primary purpose is to provide a framework under which Norwegian domestic law and practice could be analysed. The subsequent analysis is contained in the next part of the report. The overview presents primarily the relevant norms of international human rights law, refugee law and EU law. These norms are interpreted in light of the latest case-law of the ECtHR and the CJEU, as well as conclusions reached by the HRC. Important soft-law instruments are also frequently referred to. The present Section can thus also serve as a resource, providing a quick access to relevant international norms.<sup>86</sup>

### 2.1 Reception conditions and the freedom of movement

At the outset it is important to emphasise that states should provide asylum seekers with an open reception arrangement that does not involve any restrictions on their freedom of movement. In many cases neither detention nor any other less invasive restrictions, the so-called ‘alternatives to detention’, will actually be necessary. Asylum seekers must be granted the freedom of movement pursuant to Article 26 of the Refugee Convention, which reads as follows:<sup>87</sup>

#### **Convention relating to the Status of Refugees, Article 26**

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

Similarly as under the provision above, both ICCPR<sup>88</sup> and ECHR Protocol No. 4<sup>89</sup> grant the freedom of movement to those who are “lawfully within the territory of a State”. The phrase “lawfully within” has been subject to debate and differing interpretations. The position of the Human Rights Committee and UNHCR differ from the position of the ECtHR.<sup>90</sup> An unfortunate consequence of this has been a different level of protection under the global human rights regime and the European human rights regime, the latter being lower.

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86 This Section has greatly benefited from other resource materials, see especially: European Union: European Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration*, June 2013; International Commission of Jurists, *Migration and International Human Rights Law*, 14 April 2011, Practitioners Guide No. 6; The International Detention Coalition, *Legal framework and standards relating to the detention of refugees, asylum seekers and migrants*, 2011.

87 Corresponding wording is also contained in Article 26 of the Statelessness Convention, see: UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117.

88 Art. 12 (1), ICCPR.

89 Art. 2 (1), ECHR Protocol No. 4.

90 The positions of the HRC and the ECtHR are considered further below. For the UNHCR position see: UN High Commissioner for Refugees (UNHCR), *Saadi v. United Kingdom*. Written Submissions on Behalf of the United Nations High Commissioner for Refugees, 30 March 2007, paras. 11-20.

The Human Rights Committee has interpreted Article 12 (1) ICCPR as granting the right to the freedom of movement to “an alien who entered the State illegally, but whose status has been regularized”.<sup>91</sup> Clearly, the status of a recognized refugee is regularized, and hence he or she must be considered as ‘lawfully within’ the country.<sup>92</sup> A number of Concluding Observations by the Committee show that it considers that Article 12 (1) also applies to registered asylum seekers, who must likewise be considered as ‘lawfully within’.<sup>93</sup>

In a Concluding Observation on Denmark, the Human Rights Committee noted that asylum seekers are often restricted or discouraged from choosing a residence in specific municipalities or from moving from one municipality to another. The Committee then stated that Denmark should ensure that any such measures are applied “in strict compliance with Article 12 of the Covenant.”<sup>94</sup> Similarly, in a Concluding Observation on Lithuania the Committee expressed its “concern that restrictions are imposed on the freedom of movement of asylum seekers with temporary refugee status and that failure to observe those restrictions may result in the rejection of the claim for asylum.”<sup>95</sup>

The position of the ECtHR in regard to the meaning of the phrase “lawfully within” contained in Article 2 (1) ECHR Protocol No. 4 has been that it simply refers back to domestic law. According to the Court, “It is for the domestic law and organs to lay down the conditions which must be fulfilled for a person’s presence in the territory to be considered ‘lawful.’”<sup>96</sup> Consequently, under ECHR, an act of applying for asylum will not in itself render the stay of an asylum seeker lawful, unless this follows from the domestic legislation.<sup>97</sup>

The right to freedom of movement contains an important safeguard, which requires that any restrictions on the freedom must be necessary to protect a permissible purpose. Under ECHR Protocol No. 4<sup>98</sup> any restriction must be “necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.<sup>99</sup> The safeguard is worded similarly under the ICCPR.<sup>100</sup>

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91 N Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 4.

92 For example in *Salah Karker v. France*, Article 12 (1) was automatically considered to apply, see: *Salah Karker v. France*, HRC, 2000, para. 9.2.

93 Hathaway has similarly opined that “it cannot sensibly be argued that persons who avail themselves of domestic laws which authorize entry into refugee status determination or comparable procedure are not lawfully present.” James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p. 179.

94 UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Denmark*, 15 November 2000, CCPR/CO/70/DNK, para. 16.

95 UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations, Lithuania*, 19 November 1997, CCPR/C/79/Add.87, para. 15.

96 *E. Omwenyike v. Germany*, ECtHR, 2007, The Law, para. 1.

97 The ECtHR has confirmed this position in regard to the term ‘unauthorized entry’ in Article 5 (1) (f) in the *Saadi* case discussed further in Section 2.6.3.2.1 below.

98 Art. 2 (1), Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46. Hereafter referred to as ‘ECHR Protocol No. 4’.

99 Art. 2 (3), ECHR Protocol No. 4.

100 See: Art. 12 (3), ICCPR.



The Human Rights Committee has emphasised that restrictive measures must conform to the principle of proportionality: “they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”<sup>101</sup> The Committee also emphasised that states should ensure that reasons for the application of restrictive measures are provided.<sup>102</sup>

## 2.2 Alternatives to detention

Several international legal instruments point at the exceptional nature of detention, establishing the presumption against the use of detention in the context of immigration control. Article 31 (2) of the Refugee Convention prohibits states from imposing on refugees movement restrictions “other than those which are necessary”, further requiring that “such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country.” Furthermore, international human rights law allows detention only as an exception from the right to liberty, which can be employed only when it is necessary, proportionate and reasonable.<sup>103</sup> In addition, the EU Returns Directive expressly requires that detention must be subject to consideration of “other sufficient but less coercive measures [that] can be applied effectively in a specific case”.<sup>104</sup>

The Committee of Ministers of the Council of Europe has recommended that states should consider alternative and non-custodial measures before resorting to detention both in the context of detention for the purpose of return,<sup>105</sup> as well as in the context of detention of asylum seekers generally.<sup>106</sup> On the UN level, WGAD and OHCHR have gone even further, recommending that governments should consider the possibility of progressively abolishing immigration detention altogether.<sup>107</sup>

There is a variety of alternatives to detention. Some alternatives may be more appropriate than others, depending on the specific circumstances of each individual case.<sup>108</sup> The UNHCR Detention Guidelines mention several alternatives to detention, including surrender of documents, sureties, reporting requirements, community supervision, designated residence, electronic monitoring and home curfew.<sup>109</sup> While phone reporting or use of other modern technologies can be considered a

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<sup>101</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 14.

<sup>102</sup> *Ibid.*, para. 15.

<sup>103</sup> See Section 2.6.3 below.

<sup>104</sup> Art. 15 (1), EU Returns Directive. See also Recital 16, EU Returns Directive.

<sup>105</sup> Council of Europe: Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005, Guideline 6.1.

<sup>106</sup> Council of Europe: Committee of Ministers, *Recommendation Rec(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum seekers*, 16 April 2003, (2003) 5, para. 6.

<sup>107</sup> UN General Assembly, *Report of the Working Group on Arbitrary Detention*, 18 January 2010, A/HRC/13/30, para. 58; Office of the United Nations High Commissioner for Human Rights, *Administrative detention of migrants*, Migration Discussion Papers, Geneva, undated, p. 13, available at: [http://www2.ohchr.org/english/issues/migration/taskforce/docs/administrative\\_detentionrev5.pdf](http://www2.ohchr.org/english/issues/migration/taskforce/docs/administrative_detentionrev5.pdf)

<sup>108</sup> International Detention Coalition, *There are Alternatives: A handbook for preventing unnecessary immigration detention*, 13 May 2011; Jesuit Refugee Service, *From Deprivation to Liberty: Alternatives to detention in Belgium, Germany and the United Kingdom*, December 2011; UN High Commissioner for Refugees (UNHCR), *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum seekers, Stateless Persons and Other Migrants*, April 2011; For a quick review of the latest topical issues see: Refugee Studies Centre, *Detention, alternatives to detention, and deportation*, Forced Migration Review, No. 44, September 2013.

<sup>109</sup> UNHCR Detention Guidelines, Guideline 4.3, para. 40.

good practice, the use of electronic monitoring such as wrist or ankle bracelets should be avoided because of the associated criminal stigma.<sup>110</sup>

It is important to emphasize that in many cases neither detention nor any alternative measure will be necessary. Both UNHCR and WGAD have warned that alternatives to detention should not become an alternative to unconditional release.<sup>111</sup>

## 2.3 Immigration detention as a non-penal measure

In recent years, commentators have noticed that criminal law has slowly entered into the domain of immigration law. This has been referred to by some as ‘cimmigration’.<sup>112</sup> This phenomenon raises a number of legal challenges that are yet to be sufficiently well addressed. Chief among them is the question of how to prevent administrative detention related to immigration control from becoming *de facto* punitive while maintaining adequate legal safeguards.

The Section starts by presenting international norms that emphasise the need to avoid criminalising illegal entry or presence under domestic law. It then proceeds to discuss norms that require separating criminal cases from administrative cases related to immigration control. The following Section then discusses in detail international prohibition of penalisation of asylum seekers for illegal entry or presence.

As noted by the ECtHR, states “enjoy an undeniable sovereign right to control aliens’ entry into and residence in their territory.”<sup>113</sup> For some states, for example the countries within the Schengen Area, preventing irregular entry is also a matter of international obligation.<sup>114</sup> Immigration detention is a tool that states employ to maintain control over their borders. It is often justified as an administrative measure of a preventive character that a state may resort to under exceptional circumstances. A state may arrest or detain foreigners only to the extent allowed by international law, including the human rights treaties and other relevant international conventions that the state has voluntarily committed itself to respect.<sup>115</sup>

It must be noted at the outset that, above all, seeking asylum cannot be regarded by states as an unlawful act. The Universal Declaration of Human Rights has recognized the right to seek and enjoy asylum as a human right,<sup>116</sup> as have other human rights instruments, such as the Charter of

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110 Ibid; European Union: European Agency for Fundamental Rights, *Detention of third country nationals in return procedures*, 30 November 2010, p. 51.

111 UNHCR Detention Guidelines, Guideline 4.3, para. 38; UN General Assembly, *Report of the Working Group on Arbitrary Detention*, 18 January 2010, A/HRC/13/30, para. 65.

112 See, e.g., Izabella Majcher, “Cimmigration” in the European Union through the Lens of Immigration Detention, Global Detention Project Working Paper No. 6, September 2013; Juliet Stumpf, ‘The Cimmigration Crisis: Immigrants, Crime and Sovereign Power’, *American University Law Review*, Vol. 56, No. 2, 2006, pp. 367-419; Katja Franko Aas, Nicolay B. Johansen, Thomas Ugelvik (eds.), *Krimigrasjon? Den nye kontrollen av de fremmede*, Universitetsforlaget, 2013.

113 *Saadi v. United Kingdom*, ECtHR, 2008, para. 64. Held previously in *Chahal v. United Kingdom*, ECtHR, 1996, para. 73.

114 European Union: Council of the European Union, *Regulation (EC) No. 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 borders*, 15 March 2006, No. 562/2006. Hereafter referred to as ‘Schengen Borders Code’.

115 The Schengen Borders Code is itself without prejudice to “the rights of refugees and persons requesting international protection, in particular as regards non-refoulement”, see Art. 3 (b), Schengen Borders Code.

116 Art. 14, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). Hereafter referred to as ‘UDHR’.

Fundamental Rights of the European Union.<sup>117</sup> Domestic laws subjecting illegal entry to fines or imprisonment may in practice adversely affect the right to seek asylum and unnecessarily complicate subsequent integration of asylum seekers into society.

Criminalization of illegal entry can lead to penalisation of asylum seekers and other vulnerable groups in direct contravention of a number of binding international legal instruments. Penalising an asylum seeker for illegal entry will breach the Refugee Convention Article 31 (1), provided he presents himself to the authorities without delay and shows good cause for his illegal entry or presence. In case of a migrant who travels illegally through the use of smugglers, penalisation for illegal entry will result in a breach of Article 5 of the Anti-Smuggling Protocol.<sup>118</sup> Similarly, in case of a victim of human trafficking, penalisation for illegal entry will result in a breach of Article 26 of the Anti-Trafficking Convention.<sup>119</sup>

Penal detention can also raise issues under Articles 15 and 16 of the EU Returns Directive, where irregular immigrants are subjected to return proceedings.<sup>120</sup> The CJEU examined this issue in *El Dridi*. The Court held that penal detention of a person who disregarded the order to leave the country would jeopardise the effectiveness of the directive, delay the return, and disregard the principle that enforcement of the return procedure must be gradual and proportionate.<sup>121</sup> Nevertheless, the Court has left the option of penal detention open for cases where other measures were tried but failed.<sup>122</sup>

The use of penal detention as a tool of general immigration control has also been criticized at the UN level. As noted by the WGAD, “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention.”<sup>123</sup> Similarly, the Office of the United Nations High Commissioner for Human Rights (OHCHR) expressed the view that “infractions of immigration laws and regulations should not be considered as criminal offences” and that “detention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature.”<sup>124</sup> Observing with concern that European legislation and policy documents at times incorrectly refer to irregular immigrants as ‘illegal’, the Special Rapporteur on the human rights of migrants has recently noted that, “[u]sing incorrect terminology that negatively depicts individuals as ‘illegal’ contributes to the negative discourses on migration, and further reinforces negative stereotypes of irregular migrants as criminals.”<sup>125</sup>

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117 Art. 18, European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (OJ C 364/01). Hereafter referred to as ‘CFREU’.

118 UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000. Hereafter referred to as ‘Anti-Smuggling Protocol’.

119 Council of Europe, *Council of Europe Convention on Action against Trafficking in Human Beings*, 16 May 2005, CETS 197. Hereafter referred to as ‘Anti-Trafficking Convention’.

120 The CJEU clarified that the EU returns Directive is not relevant in cases concerning illegal entry or presence. Consequently the Directive does not preclude the states from classifying an illegal entry or presence as an offence and laying down penal sanctions to deter and prevent such an infringement of the national rules on residence. *Achughbabian v Préfet du Val-de-Marne*, CJEU, 2011, para. 28.

121 *El Dridi*, CJEU, 2011, paras. 59-60.

122 *Achughbabian v. Préfet du Val-de-Marne*, CJEU, 2011, para. 46.

123 UN General Assembly, *Report to the Seventh Session of the Human Rights Council - Report of the Working Group on Arbitrary Detention*, 10 January 2008, A/HRC/7/4, para. 53; UN General Assembly, *Report of the Working Group on Arbitrary Detention*, 18 January 2010, A/HRC/13/30, para. 58.

124 Office of the United Nations High Commissioner for Human Rights, *Administrative detention of migrants*, Migration Discussion Papers, Geneva, undated, p. 13, available at: <http://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf>

125 N Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants, Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, 24 April 2013, para. 35.

To maintain the administrative nature of immigration detention, states must adhere to the principle of separation. The principle is expressed in Article 16 (1) of the EU Returns Directive, which states that “[d]etention shall take place as a rule in specialised detention facilities.” The same principle is repeated in Article 10 (1) of the recast EU Reception Conditions Directive. The term ‘as a rule’ allows the use of prison accommodation where the state “cannot provide accommodation in a specialised facility”, but even then, third-country nationals “shall be kept separately from ordinary prisoners.” In recent guidelines on accelerated procedures, the Committee of Ministers of the Council of Europe has recommended that detained asylum seekers should be accommodated “in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal and factual situation and staffed by suitably qualified personnel.”<sup>126</sup>

## 2.4 Non-penalisation for illegal entry or presence

Asylum seekers are often compelled to rely on irregular documentation and smugglers to gain access to asylum procedures in a country of refuge.<sup>127</sup> Only few countries are willing to issue a visa to an asylum seeker, and an application for asylum must usually be lodged at the border.<sup>128</sup> These realities have been acknowledged for example by a UK High Court, which recognised that, “visa requirements and carrier’s liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents”.<sup>129</sup>

Recognising the circumstances surrounding the flight of refugees from persecution, the adopting states of the Refugee Convention have decided that refugees must be exempted from penalisation for illegal entry or presence. Article 31 (1) of the Convention imposes the following obligation (emphasis added):

### Convention relating to the Status of Refugees

#### Article 31 (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.

The provision applies to all refugees, irrespective of whether or not the refugee status determination procedure has been completed. Recognition of refugee status is declaratory – it does not create a person a refugee, it only declares the person to be one.<sup>130</sup> A person becomes a refugee as soon as he or she fulfils the criteria contained in Article 1 of the Convention, as amended by the 1967 Protocol.

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126 Council of Europe: Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, 1 July 2009, Guideline XI (7).

127 Guy S. Goodwin-Gill ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalisation, Detention, and Protection’, in UN High Commissioner for Refugees (UNHCR), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003, p. 196.

128 Torunn Skard, in Øyvind Dybvik Øyen (ed.), *Lærebok i utlendingsrett*, Universitetsforlaget, 2013, p. 52.

129 *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999. The case led to an amendment of English immigration law and the incorporation of Article 31 in UK legislation. See Vladislava Stoyanova, *Smuggling of Asylum seekers and Criminal Justice*, Working paper no. 5, Refugee Law Initiative, June 2012, p. 9.

130 UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, para. 28.

Presenting a falsified passport to the authorities does not create a presumption that the asylum seeker is not a refugee, since “[i]rregular or no documentation does not reveal anything about the credibility of a protection claim.”<sup>131</sup>

So far there has not been a uniform practice among European states in interpretation and application of the terms of Article 31 (1) of the Refugee Convention. However, the CJEU might express its view on the correct interpretation of the provision in a near future.<sup>132</sup> The Court has competence to rule on this matter on the basis of Article 18 of the Charter of Fundamental Rights of the European Union.<sup>133</sup>

The starting point for interpreting the provision’s terms is the general rule of treaty interpretation contained in the Vienna Convention of the Laws of Treaties (VCLT). According to the Convention, the terms of a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.<sup>134</sup>

Applying the general rule of treaty interpretation may not always lead to a satisfactory result. To further clarify the meaning of ambiguous terms, the VCLT allows recourse to the supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.<sup>135</sup>

The following Subsections summarise the leading literature on interpretation of the key terms of Article 31 (1) of the Refugee Convention (emphasised above). Much of the literature on the correct interpretation of the provision relies on analysis of the preparatory works leading up to the adoption of the Convention. Such analyses have been prepared by eminent international lawyers, including Guy Goodwin-Gill<sup>136</sup> and James C Hathaway.<sup>137</sup> Interpretation of Article 31 was also discussed in 2001 at the UNHCR Global Consultations, which were attended by prominent experts on refugee and asylum law.<sup>138</sup> Other important sources referred to are commentaries to the convention written by Atle Grahl-Madsen,<sup>139</sup> Paul Weis<sup>140</sup> and Gregor Noll.<sup>141</sup>

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131 Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd edition, Oxford University Press, 2007, p. 384.

132 See the request for a preliminary ruling on the correct interpretation of the terms of Article 31 (1) of the Refugee Convention submitted to the CJEU by a German court: case C-481/13, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=144517&pageIndex=o&doclang=en&mode=req&dir=&occ=first&part=1&cid=861153>

133 The provision requires that the right to asylum must be guaranteed “with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees”.

134 Article 31 (1), VCLT.

135 Article 32, VCLT.

136 Guy S. Goodwin-Gill ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, in UN High Commissioner for Refugees (UNHCR), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003.

137 James C. Hathaway, *The rights of Refugees under International Law*. Cambridge University Press, 2005, pp. 385-413; James C Hathaway, *Why Refugee Law Still Matters*, *Melbourne Journal of International Law*, May 2007.

138 Cambridge University Press, *Summary Conclusions: Article 31 of the 1951 Convention*, June 2003.

139 Atle Grahl-Madsen, UN High Commissioner for Refugees (UNHCR), *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997.

140 Paul Weis, *The Refugee Convention, 1951: The Travaux préparatoires Analyzed with a Commentary by Dr. Paul Weis*, Cambridge University Press, 1995.

141 Gregor Noll in Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, pp. 1243-1276.

### 2.4.1 Penalties

The term ‘penalties’ covers measures such as prosecution, fine and imprisonment, if imposed with a punitive intent. Detention for administrative purposes is permitted if it meets the necessity test of Article 31 (2)<sup>142</sup> and is in compliance with other human rights obligations. Expulsion does not in itself constitute a penalty under article 31.<sup>143</sup>

### 2.4.2 Illegal entry or presence

The term ‘illegal entry or presence’ has generally not raised any difficult issues of interpretation. As succinctly put by Goodwin-Gil, the term includes “arriving or securing entry through the use of false or falsified documents, the use of other deception, clandestine entry, for example, as a stowaway, and entry into State territory with the assistance of smugglers or traffickers”.<sup>144</sup>

### 2.4.3 Coming directly

As noted by Noll, the ordinary meaning of the terms ‘coming directly’ is not sufficiently precise.<sup>145</sup> The dictionary meaning of the word ‘directly’ implies movement in a direct line of motion and urgency in sense of time, and does not exclude traveling through several countries on the way to a country of refuge.<sup>146</sup>

Some countries have incorrectly interpreted the term restrictively, with the result that an asylum seeker is exempted from penalisation only if the individual is seeking refuge in the first safe country. Such restrictive interpretation cannot be based on the ordinary meaning of the term ‘directly’. It is also difficult to arrive at such strict understanding when interpreting the terms of the treaty in their context and in the light of its object and purpose.

Context to interpretation of the term ‘coming directly’ is added by the relationship with Article 31 (2), which guarantees freedom of movement, and Article 33, which prohibits *refoulement*. Regardless of how an asylum seeker reached a country of refuge, he is entitled to benefit from the protection of these provisions.<sup>147</sup>

Furthermore, the preamble of the Refugee Convention refers to the heavy burden the granting of asylum may place on some countries, and recognises that the only solution is international co-operation.<sup>148</sup> Contracting states should not disrupt passage – by penalisation – to a state willing to accept an asylum seeker, as this would contravene the idea of burden sharing.

It is important to realise that the quality of status determination in Europe still varies from country

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142 Article 31 (2) reads as follows: The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

143 Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, pp. 1262-1264.

144 Guy S. Goodwin-Gill ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, in UN High Commissioner for Refugees (UNHCR), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003, p. 196.

145 Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, p. 1256.

146 *Ibid.*, p. 1254.

147 *Ibid.*, p. 1256.

148 Preamble recital 5, CSR.

to country.<sup>149</sup> An example is the different recognition rates for asylum claims in Greece and Sweden. According to data from 2013, zero percent of Syrian asylum seekers were given protection in Greece, while the number in Sweden was 91.5 per cent.<sup>150</sup>

Obstructing the passage of asylum seekers to a state with proper asylum procedures would also be contrary to the object and purpose of the Convention. The preamble of the Convention refers to the “profound concern for refugees” and its purpose is to “assure refugees the widest possible exercise of [...] fundamental rights and freedoms”.<sup>151</sup> The object and purpose of the Convention is further implied in its first Article, which extends protection to asylum seekers with a genuine fear of persecution.

The initial analysis of the meaning of the term ‘coming directly’ shows that the restrictive interpretation is not easily reconcilable with the context and the object and purpose of the Convention. To further clarify the meaning, recourse will be made to supplementary means of interpretation, in line with Article 32 of the VCLT.

The drafters of the Refugee Convention could not have predicted the European refugee situation in 2013, but the president of the 1951 Conference of Plenipotentiaries did make an interesting remark, relevant for the current situation in Europe:

The PRESIDENT, speaking as representative of Denmark, and referring to the French amendment to paragraph 1, said that the Conference should bear in mind the importance of the words “shows good cause” in the last line of that paragraph. A refugee in a particular country of asylum, for example, a Hungarian refugee living in Germany, might, without actually being persecuted, feel obliged to seek refuge in another country; if he then entered Denmark illegally, it was reasonable to expect that the Danish authorities would not inflict penalties on him for such illegal entry, provided he could show good cause for it. The Danish delegation therefore felt that reliance should be placed on the phrase “show good cause”. Even if the French amendment were adopted, it would be necessary to replace the words “coming direct from his country of origin”, which the French delegation proposed should be added to paragraph 1, by the phrase “coming direct from a territory where his life or freedom was threatened”.<sup>152</sup>

The issue of travelling through several European countries was also raised by the High Commissioner for Refugees, Dr. Van Heuven:

He recalled that he himself had fled the Netherlands in 1944 on account of persecution, had hidden for five days in Belgium and then, because he was also at risk there, had been helped by the Resistance to France, thence to Spain and finally to safety in Gibraltar. It would be unfortunate, he said, if refugees in similar circumstances were penalized for not having proceeded directly to the final country of asylum.<sup>153</sup>

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149 According to the European Council on Refugees and Exiles, “the Dublin system locks asylum seekers into a dangerous ‘asylum lottery,’ where the outcomes of their claims, and therefore their lives, depend on the route of their flight.” See: European Council on Refugees and Exiles, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Dublin Regulation*, 29 April 2009, p. 3.

150 European Council on Refugees and Exiles, *Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System*, September 2013, p. 19

151 Preamble recital 2, CSR.

152 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirteenth Meeting*, 22 November 1951, A/CONF.2/SR.13.

153 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Fourteenth Meeting*, 22 November 1951, A/CONF.2/SR.14; see also Guy S. Goodwin-Gill ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, in UN High Commissioner for Refugees (UNHCR), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003, p. 192.

Hathaway and Goodwin-Gill agree that ‘coming directly’ should not be interpreted narrowly.<sup>154</sup> The latter author points out that “[t]he criterion of ‘good cause’ for illegal entry is clearly flexible enough to allow the elements of individual cases to be taken into account.”<sup>155</sup>

The Summary Conclusions of the Expert Roundtable organized by the United Nations High Commissioner for Refugees in 2001 state that “[r]efugees are not required to have come directly from territories where their life or freedom was threatened.”<sup>156</sup> The Conclusions furthermore clarify that Article 31 (1) of the Refugee Convention applies to “persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee. The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country.”<sup>157</sup>

Central to European immigration control and policy today is the Schengen *acquis* and Dublin Regulation. The recast Dublin III Regulation gives any member state the right to “send an applicant to a safe third country”.<sup>158</sup> However, this term in the Regulation should not influence the interpretation of Article 31.<sup>159</sup> The preamble of the Regulation requires that detention of asylum seekers covered by the Directive must be “in accordance with” Article 31 of the Refugee Convention.<sup>160</sup> It is clear that the Dublin Regulation was not meant to modify the meaning or exclude the application of Article 31 of the Refugee Convention.

#### 2.4.4 Without delay

Another requirement under Article 31 of the Refugee Convention requires that asylum seekers “present themselves without delay to the authorities”. The terms indicate that presenting oneself to the authorities must be done within an acceptable period and be voluntary.

Whether a specific duration will fall within the meaning of ‘without delay’ will depend on “the circumstances of the case, including the availability of advice, and whether the State asserting jurisdiction over the refugee or asylum seeker is in effect a transit country”.<sup>161</sup>

An asylum seeker should not be denied the benefit of Article 31 if the individual is arrested or detained before he or she could be reasonably have been expected to seek asylum. At least as long as there is no evidence of bad faith, the asylum seeker should be exempted from penalisation.<sup>162</sup>

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154 James C Hathaway, *Why Refugee Law Still Matters*, Melbourne Journal of International Law, May 2007 p. 90. See also James C. Hathaway, *The rights of Refugees under International Law*. Cambridge University Press, 2005, pp. 393-400.

155 Guy S. Goodwin-Gill ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, in UN High Commissioner for Refugees (UNHCR), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003, p. 194.

156 Cambridge University Press, *Summary Conclusions: Article 31 of the 1951 Convention*, June 2003, para. 10 (b).

157 *Ibid*, para. 10 (c).

158 Article 3 (3), Dublin III Regulation.

159 Arguments to the contrary could potentially be based on a reference to Article 31 (3) (c), VCLT.

160 Preamble recital 20, Dublin III Regulation. The Receptions Conditions Directive likewise requires that detention be applied “in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention”, see: Preamble recital 15, Reception Conditions Directive.

161 Guy S. Goodwin-Gill ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, in UN High Commissioner for Refugees (UNHCR), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003, p. 202.

162 James C. Hathaway, *The rights of Refugees under International Law*. Cambridge University Press, 2005, pp. 390-391.



There may be good reasons for not contacting the nearest frontier control point, and head instead for a larger city to apply for asylum.<sup>163</sup> A regional court in Germany found that an asylum seeker who had entered illegally and presented himself to the authorities after one week was not to be penalised, since his reason for not presenting himself immediately was due to seeking advice on the asylum procedure.<sup>164</sup> In the *Adimi* case, a UK court considered sufficient that the claimant had intended to claim asylum “within a short time of arrival”.<sup>165</sup> In a case concerning illegal entry with a false passport, the Swiss Federal Court has accepted that fearing for one’s life and *refoulement* at the border may constitute good cause.<sup>166</sup>

Furthermore, it cannot sensibly be required that an asylum seeker be aware of the exact wording of article 31 (1). A certain amount of leeway should therefore be accorded, as long as the individual can show good cause for his behaviour.<sup>167</sup>

#### 2.4.5 Good cause

The term ‘good cause’ is closely connected to the term ‘without delay’ and other terms in Article 31 (1).<sup>168</sup> Good cause is a matter of fact and “may be constituted by apprehension on the part of the refugee or asylum seeker, lack of knowledge of procedures, or by actions undertaken on the instructions or advice of a third party”.<sup>169</sup> Fleeing persecution will constitute good cause, provided an authorised entry is impossible to attain due to visa policies, or because the processing of such an authorised entry would aggravate the danger of persecution.<sup>170</sup> Family links in the country of refuge may also constitute ‘good cause’.<sup>171</sup>

### 2.5 Access to asylum procedure from detention

The international obligation of states to enable detained asylum seekers access to asylum procedures is uncontested. State parties to the 1951 Refugee Convention are obliged to grant the respective rights guaranteed in the Convention to those who fulfil the criteria of being a refugee. Within the European context, Article 3 (1) of the Dublin III Regulation contains an explicit obligation to “examine any application for international protection by a third-country national or a stateless person who applies

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163 Atle Grahl-Madsen, UN High Commissioner for Refugees (UNHCR), *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997, Article 31, Comments, para. 7.

164 Guy S. Goodwin-Gill ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, in UN High Commissioner for Refugees (UNHCR), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003, p. 201.

165 *Ibid*, p. 204.

166 *Ibid*, pp. 202-203.

167 Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, p. 1259.

168 Atle Grahl-Madsen, UN High Commissioner for Refugees (UNHCR), *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997, para 8.

169 Guy S. Goodwin-Gill ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, in UN High Commissioner for Refugees (UNHCR), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003, p. 217.

170 Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, p. 1261.

171 Guy S. Goodwin-Gill ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection’, in UN High Commissioner for Refugees (UNHCR), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003, p. 218; See also: Cambridge University Press, *Summary Conclusions: Article 31 of the 1951 Convention*, June 2003, para. 10 (d).

on the territory of any one of them, including at the border or in the transit zones.” These obligations do not contain any exception by which their application would cease in respect to an individual who happens to be detained. As explicitly stressed by the ECtHR, “confinement must not deprive asylum seekers of the right to gain effective access to the procedure for determining refugee status.”<sup>172</sup>

States must refrain from acts that would make it impossible or unnecessarily difficult for an asylum seeker to submit an application for asylum from detention. Such acts would undermine the obligation to examine asylum applications, in contravention of the general principle of international law that treaties must be performed in good faith.<sup>173</sup>

Detention can pose a number of potential obstacles to effective access to asylum procedures. The European Union Agency for Fundamental Rights<sup>174</sup> has warned against restrictions in the communication with the outside world; short time frames for submitting an asylum application; lower standard of processing of asylum applications submitted from detention; or non-distribution of leaflets on asylum.<sup>175</sup> The last obstacle has also been warned against by the UNHCR, which has emphasised that, it is “important that asylum seekers in detention are provided with accurate legal information about the asylum process and their rights”.<sup>176</sup>

Relevant and competent national, international and non-governmental organisations and bodies must have “the possibility to visit” the specialised detention facilities pursuant to Article 16 (4) of the EU Returns Directive. Such visits may be subject to authorisation.

## 2.6 Safeguards against arbitrary detention

This Section discusses a number of important safeguards against arbitrary detention under international law, including procedural safeguards. The first Subsection starts by emphasizing that detention is only permitted if it is aimed at achieving a legitimate purpose. The second Subsection then turns to the principle of legal certainty, which requires that any domestic law under which detention may be justified must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness. The third Subsection explains the principles of necessity, proportionality and reasonableness. The fourth Subsection discusses the maximum permissible duration of detention. Lastly, the fifth Subsection looks at procedural safeguards, specifically, the right to be informed of the reasons for arrest, the right to legal assistance, and the right to challenge the legality of detention before a court.

### 2.6.1 Permissible grounds

The ICCPR, unlike the ECHR (see further below), does not provide a list of grounds based on which persons may be detained. During the drafting of the Covenant there were doubts whether any such

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172 *Amuur v. France*, ECtHR, 1996, para. 43. Furthermore, the Court ruled that a state must not transfer an individual to a third country without examining his or her asylum claim when the state knows or ought to have known that the third country in question does not in practice properly examine asylum applications, see: *M.S.S. v. Belgium and Greece*, ECtHR, 2011, paras. 358-359.

173 Art. 26, VCLT; See further: Guy S. Goodwin-Gill, ‘State Responsibility and the ‘Good Faith’ Obligation in International Law’ in Malgosia Fitzmaurice & Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions*, Hart Publishing, 2004.

174 The Agency is an EU body tasked with collecting and analysing data on fundamental rights with reference to, in principle, all rights listed in the Charter. The Agency does not intervene in individual cases but rather investigates broad issues and trends.

175 European Union: European Agency for Fundamental Rights, *Detention of third country nationals in return procedures*, 30 November 2010, pp. 47-48.

176 UNHCR Detention Guidelines, Guideline 7 (vi.).

enumeration could be complete or acceptable to all countries.<sup>177</sup> For this reason Article 9 (1) of the ICCPR only prohibits arrest and detention if it is ‘arbitrary’. The provision reads as follows:

#### **International Covenant on Civil and Political Rights**

##### **Article 9 (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.

As clarified by the Human Rights Committee, the provision “is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control etc.”<sup>178</sup> The Committee has also expressly accepted the possibility of detention for “reasons of public security”.<sup>179</sup>

In contrast, Article 5 (1) ECHR avoids any explicit reference to the notion of ‘arbitrariness’ and relies instead on an exhaustive list of six grounds under which detention or arrest is permitted. The detention of a person on a ground that does not appear on the list will automatically violate this provision.<sup>180</sup> The burden of proof to establish the lawfulness of detention rests on the state,<sup>181</sup> which must justify detention by relying on one of the six grounds below:

#### **European Convention on Human Rights**

##### **Art. 5 (1)**

No one shall be deprived of his liberty save in the following cases [...]:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

The ECtHR has insisted on several occasions that each ground on the list has to be read restrictively.<sup>182</sup> The principle of strict interpretation can be illustrated on the case of *Lawless v. Ireland*. Referring to the

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<sup>177</sup> Bossuyt, M.J., *Guide to the travaux préparatoires of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, 1987, p. 199, para. 44

<sup>178</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, 30 June 1982, No. 8, para. 1. Hereafter referred to as ‘HRC General Comment No. 8.’

<sup>179</sup> HRC General Comment No. 8, para. 4.

<sup>180</sup> See, e.g., *Engel and others v. Netherlands*, ECtHR, 1976, para. 69. The case involved use of detention as a disciplinary measure within the military. Provisional arrest of Mr Engel was found to be in violation of Article 5 (1) because ‘disciplinary punishment’ does not appear on the list.

<sup>181</sup> *Hutchison Reid v. United Kingdom*, ECtHR, 2003, para. 71.

<sup>182</sup> *Ciulla v. Italy*, ECtHR, 2002, para. 41; *Wloch v. Poland*, ECtHR, 2000, para. 108.

paragraph (c), the Irish government argued before the Court that it could detain Mr. Lawless one day before a parade was to be held in Northern Ireland, as he was notorious for his frequent violent acts. His detention would thus prevent him from potentially committing crimes. The Court dismissed the argument by first establishing that anyone detained under this provision must be brought before a judge with a view to a trial for a criminal offence, as implied by paragraph 3 of the same Article.<sup>183</sup> The Court then explained that the interpretation offered by the Irish government would open up the possibility of arresting and detaining anyone suspected of harbouring intent to commit an offence merely on the strength of an executive decision. In words of the Court, this would “lead to conclusions repugnant to the fundamental principles of the Convention.”<sup>184</sup>

The Court has been less strict when interpreting paragraph (f), which contains the most relevant ground in regard to detention of asylum seekers. The provision allows detention of a person to prevent an ‘unauthorized entry’ or of a person against whom ‘action’ is being taken with a view to deportation or extradition. In regard to the term ‘unauthorised entry’, the ECtHR has maintained that lodging an asylum application does not in itself authorize the entry. This was the approach taken in the *Saadi* case, where the Court did not recognize temporary admission to enter a country after lodging an asylum application as authorizing the entry within the meaning of the Convention.<sup>185</sup> In regard to the term ‘action’, the Court has determined that enquiries by the domestic police into the possibility of extradition with the police of the respective third country are enough to amount to ‘action’. Formal request or an order for extradition was held to be unnecessary.<sup>186</sup>

The grounds allowing pre-entry and pre-removal detention contained in domestic legislation may be more specific than the wording of Article 5 (1) (f), but they must be closely connected to one of the two purposes. The European Union Agency for Fundamental Rights has recommended that domestic immigration laws should not regulate detention based on crime prevention, public health considerations or vagrancy, as 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.<sup>187</sup>

The Committee of Ministers of the Council of Europe has recommended that detention of asylum seekers should be resorted to only in the following circumstances:<sup>188</sup> (i.) when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state; (ii.) when elements on which the asylum claim is based have to be determined which, in the absence of detention, could not be obtained; (iii.) when a decision needs to be taken on their right to enter the territory of the state concerned, or (iv.) when protection of national security and

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183 The relevant part of Art. 5(3) reads as follows: “Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.”

184 *Lawless v Ireland*, ECtHR, 1961, para. 14 of ‘The Law’.

185 *Saadi v. United Kingdom*, ECtHR, 2008, para. 65. However, see the dissenting opinion by Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä, on page 31 and the views submitted to the Court by UNHCR in para. 56 and the views by Liberty, ECRE and AIRE Centre in para. 59; see also: UN High Commissioner for Refugees (UNHCR), *Saadi v. United Kingdom. Written Submissions on Behalf of the United Nations High Commissioner for Refugees*, 30 March 2007, paras. 11-20.

186 *X v. Switzerland*, ECommHR, App No 9012/80, 1980, p. 220.

187 European Union: European Agency for Fundamental Rights, *Detention of third country nationals in return procedures*, 30 November 2010, p. 20.

188 Council of Europe: Committee of Ministers, *Recommendation Rec(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum seekers*, 16 April 2003, (2003) 5, para. 3. The recommendation does not concern measures of detention of asylum seekers on criminal charges or rejected asylum seekers detained pending their removal from the host country (see para. 2); Cf. UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum seekers*, No. 44 (XXXVII), 1986, para. (b).

public order so requires.

A similar list of grounds is also contained in Article 8 (3) of the recast EU Reception Conditions Directive, which is a binding legal instrument.<sup>189</sup> The list is exhaustive, but the wording of some of the grounds contained in the provision has been criticised for leaving too much room for manoeuvre to states as regards the detention of asylum seekers.<sup>190</sup> Particularly problematic are paragraph (a), which allows detention of a foreigner “in order to determine or verify his or her identity or nationality”, and paragraph (c), which allows detention “in order to decide in the context of a procedure, on the applicant’s right to enter territory”. These provisions should be interpreted narrowly to avoid potential breaches of Article 5 (1) (f) of the ECHR.

### 2.6.2 The principle of legal certainty

Both the ICCPR and ECHR require that any detention must be in accordance with a procedure “prescribed by law”.<sup>191</sup> Any detention which does not result from proper application of domestic legislation will be unlawful under both conventions.

In addition, the ECtHR has interpreted the requirement in light of the purpose of the European Convention, namely the rule of law. Hence, under ECHR the expression ‘prescribed by law’ does not “merely refer back to domestic law” but also to the quality of law, requiring it to be “sufficiently accessible and precise, in order to avoid all risk of arbitrariness.”<sup>192</sup>

Especially where deprivation of liberty is concerned, legislation must “allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail.”<sup>193</sup> Such legislation must include a procedure for ordering and extending detention, time limits and adequate safeguards against arbitrariness.<sup>194</sup>

### 2.6.3 The principles of necessity, proportionality and reasonableness

In their considerations of individual cases, both the HRC and the ECtHR have derived numerous principles from the respective human rights conventions. Among the most important principles are those that relate to conditions under which human rights may be restricted. Here, the principles of necessity, proportionality and reasonableness are among the most important. With increasing amount of case-law, the two human rights bodies have clarified the meaning of the principles and how they relate to a wide range of specific situations. As will be shown further below, the two bodies have sometimes adopted different approaches. Furthermore, they have tended to apply the principles without drawing explicit conceptual boundaries between them. For the sake of conceptual clarity, the paragraphs below briefly describe the function of each principle individually, although this is just one among many possible ways to conceptualize them. Subsections below then present the ways the principles have been applied in practice.

The principle of necessity requires, first of all, that detention be aimed at achieving its stated purpose.

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<sup>189</sup> Norway is bound by Article 8 (3) of the Directive in a complicated way. Article 28 (4) of the Dublin III Regulation, which is binding for Norway, refers to, among others, Article 9 of the Directive. This Article in turn refers to Article 8 (3).

<sup>190</sup> European Council on Refugees and Exiles, *Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System*, September 2013, pp. 31-33.

<sup>191</sup> Art. 9 (1) ICCPR; Art 5 (1) ECHR.

<sup>192</sup> *Amuur v. France*, ECtHR, 1996, para. 50; *Dougoz v. Greece*, ECtHR, 2001, para 55; *Conka v. Belgium*, ECtHR, 2002, para. 39.

<sup>193</sup> *Medvedyev and Others v. France*, ECtHR, 2010, para. 80.

<sup>194</sup> *Abdolkhani and Karimnia v. Turkey*, ECtHR, 2009, para. 135.

Second, the principle requires weighing the individual's right to liberty and freedom of movement against relevant state interests, such as the need to maintain the effectiveness and integrity of the asylum procedure. This weighing must be further informed by the principles of proportionality and reasonableness.

The principle of proportionality requires considering whether the same purpose could be effectively achieved by less invasive means, given the individual circumstances of each specific case. This may result in imposing no restrictions at all, shorter detention than initially proposed, or alternatives to detention, such as residence restrictions or reporting requirements (see Section 2.2 above).

The principle of reasonableness requires considering potential vulnerabilities<sup>195</sup> of the individual before the decision to detain the individual is made. In addition to the results mentioned in connection to the principle of proportionality, application of the principle of reasonableness may result in the detention of the individual in a facility which is specially equipped to meet the specific needs in question.

The assessment of necessity, proportionality and reasonableness in individual cases implies application of some set of relevant criteria. However, none of the instruments below explicitly provide for such a list.<sup>196</sup> It is also important to bear in mind that different international bodies apply the three principles in slightly different ways. In general, it is possible to differentiate between three different international legal regimes under which the three principles are applied: (i.) the global human rights regime; (ii.) the European human rights regime; and finally, (iii.) the EU law regime.

#### 2.6.3.1 Global human rights regime

As already mentioned, Article 9 of the ICCPR simply prohibits 'arbitrary' arrest and detention. During the process of the drafting of the provision there were concerns that the term 'arbitrary' was too vague.<sup>197</sup> While some countries thought the term simply meant without legal grounds or contrary to law, others considered that 'arbitrary' meant not only illegal but also unjust, and incompatible with the principles of justice or with the dignity of human person. According to this latter view, an arbitrary act was any act which violated "justice, reason or legislation, or was done according to someone's will or discretion; or which was capricious, despotic, imperious, tyrannical, or uncontrolled."<sup>198</sup> This latter view has also influenced the HRC.

In *Hugo van Alphen v. The Netherlands* the Committee held that "arbitrariness is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability." Hence remand in custody pursuant to lawful arrest "must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime."<sup>199</sup>

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<sup>195</sup> For example Art 3 (9) of the EU Returns Directive includes as vulnerable persons minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

<sup>196</sup> In respect to detention with a view to deportation, the European Union Agency for Fundamental Rights has referred to a "useful checklist" developed by the UK Border Agency, see: European Union: European Agency for Fundamental Rights, *Detention of third country nationals in return procedures*, 30 November 2010, p. 22.

<sup>197</sup> Bossuyt, M.J., *Guide to the travaux préparatoires of the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, 1987, p. 200, para. 46.

<sup>198</sup> *Ibid.*, p. 201, para 49.

<sup>199</sup> *Hugo van Alphen v. Netherlands*, HRC, 1990, para. 5.8; *A v. Australia*, HRC, 1997, para. 9.2.

In *A v. Australia*, the Committee considered a case of a Cambodian asylum seeker who entered Australia illegally and was subsequently kept detained for a period of four years. The Committee explained that, “detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.”<sup>200</sup>

In *C. v. Australia*, the Committee considered a similar case of an asylum seeker without an entry permit whose two year detention led to a serious deterioration of the individual’s mental health. The Committee took special notice of the fact that the State had failed to consider less invasive means of achieving the same ends, for example imposition of reporting obligations, sureties or other conditions which would take account of the author’s deteriorating condition.<sup>201</sup>

In sum, any detention, including administrative detention for the purposes of immigration control, must be necessary initially as well as over time. This entails the consideration of whether the same purpose could not be achieved by less invasive means in light of the particular circumstances of each individual case. The same view is expressed in the UNHCR Detention Guidelines.<sup>202</sup> The necessity criterion is also contained in Article 31 (2) of the Refugee Convention (see Section 2.2 above).

### 2.6.3.2 European human rights regime

The ECtHR has attached different requirements to the separate permissible grounds for detention listed under Article 5 (1) ECHR (see Section 2.6.1 above). When determining whether deprivation of liberty is in keeping with the object and purpose of the provision, the ECtHR makes use of the notion of arbitrariness. However, the application of the principle has varied to some extent, depending on the type of detention involved.

#### 2.6.3.2.1 Immigration detention

In immigration detention cases falling under Article 5 (1) (f), the ECtHR has applied a lower protective standard than in detention cases based on other grounds. In regard to immigration detention, both pre-entry and pre-removal, the Court held there is “no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing.”<sup>203</sup>

Pre-entry detention was first considered in the *Saadi* case.<sup>204</sup> Mr Saadi was initially not detained and granted ‘temporary admission’ by the UK authorities. He consistently complied with the reporting requirements prior to his detention, dutifully arriving each day for the processing of the asylum claim. After a few days he was detained when a bed became available in a special detention facility, where he was subsequently held for seven days. The purpose of his detention was to make him easily accessible during a fast-track asylum procedure. Despite lack of any indication that he might try to evade entry restrictions, the Court held that arrest of Mr Saadi was not in breach of Article 5 (1), since

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<sup>200</sup> *A v. Australia*, HRC, 1997, para. 9.4.

<sup>201</sup> *C v. Australia*, HRC, 2002, para. 8.2.

<sup>202</sup> UNHCR Detention Guidelines, Guideline 4.2.

<sup>203</sup> *Chahal v. United Kingdom*, ECtHR, 1996, para. 112; *Conka v Belgium*, ECtHR, 2002, para. 38; *Saadi v. United Kingdom*, ECtHR, 2008, paras. 72-73.

<sup>204</sup> *Saadi v. United Kingdom*, ECtHR, 2008.

the arrest was “closely connected to” the purpose of preventing unauthorised entry.<sup>205</sup> According to the Court, a narrow construction permitting detention only of a person who is shown to be trying to evade entry restrictions would interfere with the power of states to exercise their undeniable right to control an alien’s entry into and residence in their country.<sup>206</sup> The decision has been criticized on several grounds, including for setting a lower standard than the ICCPR.<sup>207</sup> Nevertheless, the Court has so far maintained its position.

Despite avoiding any explicit resort to the principle of necessity, the ECtHR examines whether immigration detention is in keeping with the purpose of protecting the individual from arbitrariness. To avoid being branded arbitrary, detention must be: (i.) closely connected to the stated purpose, which must be pursued with due diligence; (ii.) be carried out in good faith; (iii.) the place and conditions of detention should be appropriate; and (iv.) the length of the detention should not exceed that reasonably required for the purpose pursued.<sup>208</sup> The four requirements are considered below.

The first requirement of ‘close connection’ has enabled the Court to ease states’ concerns over their sovereignty. The vagueness of the term provides the Court with considerable room for manoeuvre. Most importantly, the Court has refrained from setting out the conditions necessary to objectively determine whether a measure is connected to its stated purpose closely enough.

In relation to pre-entry detention, the Court simply held in *Saadi* that the connection was close enough, “since the purpose of the deprivation of liberty was to enable the authorities quickly and efficiently to determine the applicant’s claim to asylum”<sup>209</sup>

In contrast, the Court has arguably been stricter in cases concerning pre-removal detention. This has been especially true in cases where states attempted to justify detention of asylum seekers on the basis of deportation proceedings while the asylum applications were still pending.<sup>210</sup> Deportation cannot be executed until after the assessment of an asylum claim, since this would entail a risk of breaching the principle of *non-refoulement*. The fact that the assessment of asylum claims was not completed has provided a strong indication to the Court that detention had no connection to the alleged purpose of deportation.

A related requirement in regard to both pre-entry and pre-removal detention has been that the stated purpose must be actively pursued with due diligence.<sup>211</sup> In regard to pre-removal detention, deportation proceedings must be in progress, otherwise detention will cease to be justifiable. In other words, the authorities must be able to show that they have been taking concrete steps towards effectuating deportation. This principle tends to be often applied together with the requirement of good faith.

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205 *Ibid*, para. 77.

206 *Ibid*, para. 65.

207 Joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä to *Saadi v. United Kingdom*, ECtHR, 2008, pp. 34-36.

208 *Saadi v. United Kingdom*, ECtHR, 2008, para. 74.

209 *Ibid*, para. 77.

210 *R.U. v. Greece*, ECtHR, 2011, paras. 88-96; *Ahmade v. Greece*, ECtHR, 2012, paras. 142-144; See also the string of Hungarian cases: *Lokpo and Touré v. Hungary*, ECtHR, 2011; *Al-Tayyar Abdelhakim v. Hungary*, ECtHR, 2012; *Hendrin Ali Said and Aras Ali Said v. Hungary*, ECtHR, 2012.

211 *Chahal v. United Kingdom*, ECtHR, 1996, para. 113; *Saadi v. United Kingdom*, ECtHR, 2008, para. 77



The second requirement of good faith was independently considered in *Conka v. Belgium*. The case involved a group of asylum seekers who were purposefully misled by the police to make it easier to arrest them. The Court first noted that deception can generally be a legitimate police tactic for certain purposes. Nevertheless, according to the Court, acts whereby the authorities seek to gain the trust of asylum seekers with a view to arresting and subsequently deporting them may render the arrest arbitrary even where the arrest would be otherwise legal.<sup>212</sup>

The third requirement of appropriate place and conditions has been considered in a range of different cases, mostly involving vulnerable groups. In *Muskhadzhiyeva and others v. Belgium* the Court considered detention of a mother with her five minor children in a closed reception centre for adults. The Court found that the detention breached Article 5 (1).<sup>213</sup> This was in addition to the finding that the detention constituted a violation of Article 3.<sup>214</sup>

Similarly, the Court considered the detention of an adult woman infected with HIV, whose health deteriorated while detained, as arbitrary and thus in breach of Article 5 (1). One of the important reasons for this conclusion was the fact that the Belgian authorities failed to consider less invasive means, (i.e., alternatives to detention).<sup>215</sup>

In some cases, detention conditions may breach Article 3 without breaching Article 5 (1). This was the case in *Horshill v. Greece*, where the Court held that police cells are not appropriate premises for the detention of persons who are awaiting the application of an administrative measure.<sup>216</sup>

The fourth requirement concerns a reasonable length of detention. The Court has been willing to apply the principle of proportionality “to the extent that the detention should not continue for an unreasonable length of time”.<sup>217</sup> In that respect “account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.”<sup>218</sup> Hence, as soon as the length of detention becomes ‘unreasonable’, asylum seekers must be released. What this actually means in practice is discussed further in Section 2.6.4 below.

To summarise, the approach of the ECtHR largely overlaps with the approach by the HRC, with the exception of the application of the principle of necessity. It needs to be emphasised that the fact that a state practice does not violate ECHR does not automatically mean that it cannot be found in violation of other international legal obligations.<sup>219</sup>

The Human Rights Committee has never made a distinction between immigration detention and other types of detention, consistently maintaining in its case-law that detention must be based on the principle of necessity in each case. Furthermore, the Committee has dismissed justification of

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212 *Conka v. Belgium*, ECtHR, 2002, para. 41.

213 *Muskhadzhiyeva and others v. Belgium*, ECtHR, 2010, paras. 69-75.

214 Article 3 ECHR prohibits subjection of anyone to “torture or to inhuman or degrading treatment or punishment”.

215 *Yoh-Ekale Mwanje v. Belgium*, ECtHR, 2011, para. 124.

216 *Horshill v. Greece*, ECtHR, 2013.

217 *Saadi v. United Kingdom*, ECtHR, 2008, para. 72.

218 *Amuur v. France*, ECtHR, para. 43.

219 Art. 53 ECHR accordingly states: “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.”

detention based on administrative convenience of quick accessibility to an individual.<sup>220</sup>

Non-application of the principle of necessity is also inconsistent with Article 31 (2) of the Refugee Convention, which prohibits restrictions on the freedom of movement “other than those which are necessary”. The Executive Committee of the UNHCR has emphasised that, in view of the hardships which it involves, an asylum procedure should not involve detention beyond a limited initial period necessary “to determine the elements on which the claim to refugee status or asylum is based.”<sup>221</sup> As further clarified in the UNHCR Detention Guidelines, this determination should only involve “recording, within the context of a preliminary interview, the elements of their claim to international protection.”<sup>222</sup>

#### 2.6.3.2.2 Detention based on other grounds

Detention on criminal grounds requires stricter safeguards. Detention based on ground (a) requires a conviction by a competent court.<sup>223</sup> Detention based on ground (c) necessitates a reasonableness test requiring “the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence”<sup>224</sup>

Detention pursuant to grounds (b), (d) and (e) must involve “an assessment whether detention was necessary to achieve the stated aim”. In these cases, detention is “justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest”.<sup>225</sup>

In regard to the ground (b), the Court has further stated that “where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty”, and that “duration of the detention is a relevant factor in striking such a balance”.<sup>226</sup>

Detention to establish identity may be justified under Article 5 (1) (b), but in such a case the duration of detention must be very short. In *Vasileva v. Denmark*, the duration of 13 and a half hours was deemed to be disproportionate.<sup>227</sup> The case concerned a lady in her late sixties, who was caught in public transportation without a travel ticket and subsequently refused to state her identity.

#### 2.6.3.3 EU law regime

The EU Returns Directive belongs to EU law, setting common standards and procedures for returning illegally staying third-country nationals. It includes provisions on detention, which may be resorted to under specifically defined circumstances and subject to the necessity test. It must be noted that the Directive allows states to exclude from its scope those who are “subject to return as a criminal

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220 *Hugo van Alphen v. Netherlands*, HRC, 1990, para. 5.8

221 UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum seekers*, No. 44 (XXXVII), 1986, para. (b).

222 UNHCR Detention Guidelines, Guideline 4.1, para. 28.

223 However, the decision to impose a sentence of detention and the length of the sentence are matters for the national authorities, see: *Saadi v. United Kingdom*, ECtHR 2008, para. 71.

224 *Fox, Campbell and Hartley v. United Kingdom*, ECtHR, 1990, para. 32.

225 *Saadi v. United Kingdom*, ECtHR, 2008, para. 70.

226 *Ibid.*

227 *Vasileva v. Denmark*, 2003, ECtHR, para. 41.

law sanction or as a consequence of a criminal law sanction”.<sup>228</sup> Furthermore, it is open to question whether the scope of the Directive covers serious national security cases, given the exception clause in Article 72 of the Treaty on the Functioning of the European Union (TFEU).<sup>229</sup>

According to the Directive, detention must always be subject to case-by-case assessment<sup>230</sup> of whether it is “necessary to ensure successful removal.”<sup>231</sup> The Directive contemplates “in particular” two scenarios where this may potentially be the case: (i.) where there is “a risk of absconding” or (ii.) where the concerned individual “avoids or hampers the preparation of return or the removal process.”<sup>232</sup> The phrase ‘in particular’ makes the list non-exhaustive.

The risk of absconding is defined as “the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that [the person] may abscond”.<sup>233</sup> Most importantly, each decision to detain must be subject to the principle of proportionality<sup>234</sup> and the consideration of “other sufficient but less coercive measures [that] can be applied effectively in a specific case”.<sup>235</sup>

Detention will cease to be justified under the Directive “when it appears that a reasonable prospect of removal no longer exists”.<sup>236</sup> The CJEU has clarified that there must be “a real prospect” that the removal can be carried out successfully.<sup>237</sup> According to the Court, this will not be the case “where it appears unlikely” that the person concerned will be admitted to a third country within the limited period of detention permitted by the Directive (see further below).<sup>238</sup>

In *Arslan*, the CJEU further clarified that an asylum seeker may be kept in detention, on the basis of national law, where the application for asylum was made solely to delay or jeopardise the enforcement of the return decision. However, the national authorities must examine on a case-by-case basis whether that is the case and whether it is objectively necessary and proportionate to keep the asylum seeker in detention in order to prevent him or her from definitively evading return.<sup>239</sup>

The Dublin III Regulation<sup>240</sup> has a similar protective standard regarding the assessment of the risk of absconding as the EU Returns Directive. The Regulation determines which state is responsible for examining a given asylum application. For this purpose the Regulation allows detaining and transporting asylum seekers to the country responsible for their assessment. The Regulation permits

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228 Art. 2 (b), EU Returns Directive.

229 European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.

230 Recital 6, EU Returns Directive.

231 Art. 15 (5), EU Returns Directive.

232 Art. 15 (1) (a) and (b), EU Returns Directive.

233 Art. 3 (7), EU Returns Directive.

234 Recital 16, EU Returns Directive.

235 Art. 15 (1), EU Returns Directive.

236 Art. 15 (4), EU Returns Directive.

237 *Kadzoev*, CJEU, 2009, para. 65

238 *Ibid.*, para. 66.

239 *Arslan*, CJEU, 2013, para. 63.

240 European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, L 180/31. Hereafter referred to as ‘Dublin III Regulation’.

detention for the purpose of a transfer only where there is “a significant risk of absconding”.<sup>241</sup> This arguably constitutes a higher threshold than ‘a risk of absconding’<sup>242</sup> under the EU Returns Directive. Unfortunately the Regulation does not elaborate on the meaning of the new threshold.<sup>243</sup> Further, detention must be based on “an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.”<sup>244</sup>

#### 2.6.4 Permissible duration

Under ECHR it is required that legislation on detention must provide for clear time limits for detention in accordance with the principle of legal certainty. However, the ECHR itself does not set such limits, and the ECtHR has maintained that the maximum allowed length of detention depends on the particular circumstances of each case,<sup>245</sup> holding that “detention should not continue for an unreasonable length of time”.<sup>246</sup>

In *Louled Massoud v. Malta*, the Court considered the duration of detention of 18 months and 9 days with a view to deportation to be excessively long, given the fact that it must have become clear quite early on that the deportation was bound to fail.<sup>247</sup> The detained individual refused to cooperate and the authorities of his home country were not prepared to issue any travel documents. The Court also noted that the delay was not due to the need to wait for the domestic courts to determine a legal challenge.<sup>248</sup> Furthermore, the Court also found it hard to conceive that the domestic authorities could not have resorted to “measures other than the applicant’s protracted detention to secure an eventual removal”.<sup>249</sup>

In rare cases involving issues of national security the Court has accepted relatively long periods of detention. In *Chahal*, the Court considered a case of a Sikh separatist who was detained with a view to deportation to India for the period of more than three and a half years. The Court accepted the length of detention, observing that the case involved “considerations of an extremely serious and weighty nature.” In such cases, the Court explained, “[i]t is neither in the interests of the individual applicant nor in the general public interest in the administration of justice that such decisions be taken hastily, without due regard to all the relevant issues and evidence.”<sup>250</sup>

In the case of a mother detained with her three children pending determination of an asylum claim, the Court considered a period of three months’ to be unreasonably lengthy, when coupled with inappropriate conditions.<sup>251</sup>

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241 Art. 28 (2), Dublin III Regulation.

242 Art. 15 (1) (a), EU Returns Directive.

243 Article 2 (n) of the Regulation only contains the definition of ‘risk of absconding’, which is identical to the wording in EU Returns Directive.

244 Art. 28 (2), Dublin III Regulation.

245 *Auad v. Bulgaria*, ECtHR, 2011, para. 128.

246 *Saadi v. United Kingdom*, ECtHR, 2008, para. 72.

247 *Louled Massoud v. Malta*, ECtHR, 2010, para. 67.

248 *Ibid.*, para. 66.

249 *Ibid.*, para. 68.

250 *Chahal v. United Kingdom*, ECtHR, 1996, para. 117.

251 *Kanagaratnam and Others v. Belgium*, ECtHR, 2011, paras. 94-95.

Under the EU Returns Directive detention must be “for as short a period as possible”.<sup>252</sup> The upper time limits are 6 months and further 12 months in exceptional circumstances where the detained individual does not cooperate or where there are delays in obtaining the necessary documentation from third countries.<sup>253</sup> An important tool to ensure that detention is kept as short as possible is to allow extending detention only for a short period at a time, as recommended by the European Union Agency for Fundamental Rights.<sup>254</sup>

Stricter time limits must be adhered to in regard to persons subjected to the Dublin procedure. Article 28 (3) of the Dublin III Regulation requires that detention must be “for as short a period as possible” and for “no longer than the time reasonably necessary” to carry out the administrative procedures for the Dublin transfer. The transfer procedures are subject to a specific time frame. A state must communicate the request for a transfer of an asylum seeker to the state responsible for determination of the asylum claim within a period that “shall not exceed one month from the lodging of the application”. The responsible state must respond “within two weeks of receipt of the request”. Failure to respond will amount to an implicit acceptance. The transfer must then be carried out “as soon as practically possible, and at the latest within six weeks of the implicit or explicit acceptance of the request”. Where the transfer does not take place within this period, “the person shall no longer be detained”. In sum, the time frame set out by the Regulation does not allow holding a person in detention for more than approximately three months.

## 2.6.5 Procedural safeguards

Detained asylum seekers or other irregular immigrants must be informed of the reasons for arrest, be provided access to legal assistance, and enabled to challenge the lawfulness of their arrest at a court. The last procedural safeguard is crucial, as it provides for a mechanism whereby executive decisions may be subjected to judicial scrutiny. These safeguards are intertwined however. Challenging the lawfulness of the arrest would be very difficult, if not impossible, without knowing the reasons for one’s arrest, or without access to legal assistance. The three procedural safeguards are discussed in detail below.

### 2.6.5.1 Reasons for arrest

According to Article 5 (2) of the ECHR, everyone who is arrested enjoys the right to “be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”<sup>255</sup> This right applies both to those apprehended under criminal law and those apprehended for administrative reasons under non-criminal provisions,<sup>256</sup> including in the context of immigration control.<sup>257</sup>

In *Van der Leer v Netherlands*, the government of Netherlands argued before the ECtHR that the right only applies to criminal cases. The argument was that the term ‘arrest’ in Article 5 (2) ECHR is followed by the term ‘charge’, the conjunction ‘and’ connecting the two terms. The Court rejected this interpretation by referring to paragraph 4 of the same Article, which entitles any detained person to take proceedings to have lawfulness of his or her detention speedily decided. The Court pointed out

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252 Art. 15 (1), EU Returns Directive.

253 Arts. 15 (5), 15 (6) (a) and (b), EU Returns Directive.

254 European Union: European Agency for Fundamental Rights, *Detention of third country nationals in return procedures*, 30 November 2010, p. 36.

255 See also Art. 9 (2), ICCPR.

256 *Van der Leer v. Netherlands*, ECtHR, 1990, para.27.

257 *Abdolkhani and Karimnia v. Turkey*, ECtHR, 2009, paras. 136-137; *Shamayev and Others v. Georgia and Russia*, ECtHR, 2005, paras. 413-414.

that unless promptly and adequately informed of the reasons for arrest, the detained person could not make an effective use of that right.<sup>258</sup>

Furthermore under ECHR, everyone arrested must be told “the essential legal and factual grounds for his arrest”.<sup>259</sup> Hence both legal basis and factual basis are required. Providing only a legal basis will not suffice, unless it can be inferred from the interrogation.<sup>260</sup> Although the reasons do not have to be given in writing<sup>261</sup> or in any other specific way,<sup>262</sup> public statements such as parliamentary announcements were found by the Court to be insufficient.<sup>263</sup>

The provided reasons do not have to be particularly detailed.<sup>264</sup> In this regard, Article 5 (2) can be compared to Article 6 (3) (a), which requires that the accused must be informed about the nature and cause of the accusation “in detail”. The reason is that the latter provision is designed to enable the accused to prepare a defence against criminal charge, not to challenge the lawfulness of his or her arrest. Nevertheless, the level of information under Article 5 (2) must be sufficient to allow the detainee to challenge the lawfulness of his or her detention at a court.<sup>265</sup>

The ECtHR has held that notification about the reasons for arrest may not be necessary at all when the reasons are sufficiently clear from the circumstances surrounding the arrest. In *Dikme v Turkey*, the Court considered the case of Mr Dikme, who produced falsified documents during an identity check by the police and was subsequently arrested and interrogated. The court considered “the criminal and intentional nature of that act” and held that under such circumstances Mr Dikme “cannot maintain that he did not understand why he was arrested and taken to the local police station”.<sup>266</sup>

However, not providing reasons for arrest in an explicit way risks creating a misunderstanding. The arresting officer’s opinion that the arrested person is aware of the reasons for his or her arrest may not be sufficient and does not in itself mean the right has been respected.<sup>267</sup> Particular regard must in this context be given to asylum seekers, who are often faced with an unfamiliar legal system. The WGAD has recommended that asylum seekers or immigrants be provided notification of the custodial measure in writing, stating the grounds for the measure, and setting out the conditions under which the asylum seeker or immigrant must be able to apply for a remedy to a judicial authority.<sup>268</sup> Pre-removal detention falling under the scope of the EU Returns Directive must always be ordered in writing with reasons being given in fact and law.<sup>269</sup>

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258 *Van der Leer v. Netherlands*, ECtHR, 1990, para. 28.

259 *Fox, Campbell and Hartley v. United Kingdom*, ECtHR, 1990, para. 40.

260 *Ibid.* 41.

261 *X v. Netherlands*, ECommHR, 5 YB 224 at 228, 1962; nevertheless, pre-removal detention falling under the EU Returns Directive must always be ordered in writing, see further below.

262 *X v. Netherlands*, ECommHR, 9 YB 474 at 480, 1966.

263 *Saadi v. United Kingdom*, ECtHR, 2008, paras. 84-85.

264 *Nielsen v. Denmark*, ECommHR, 2 YB 412 at 426, 1959.

265 *Shamayev and Others v. Georgia and Russia*, ECtHR, 2005, para 413; *Abdolkhani and Karimnia v. Turkey*, ECtHR, 2009, para. 136.

266 *Dikme v. Turkey*, ECtHR, 2000, para. 54.

267 *Peter Grant v. Jamaica*, HRC, 1996, para. 8.1.

268 UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention*, 28 December 1999, E/CN.4/2000/4, Annex II, Deliberation No. 5, Principle 8; UN General Assembly, *Report of the Working Group on Arbitrary Detention*, 18 January 2010, A/HRC/13/30, para. 61.

269 Art. 15 (2), EU Returns Directive.

The ECtHR has also held that reasons for arrest must be explained to the detained individual, “in simple, non-technical language that he can understand”.<sup>270</sup> This implies not only a right to an interpreter when necessary but also that the information must be given in simple terms.

Asylum seekers must be informed about the right to legal counsel (see further below), as they may not be aware of this right in case they come from a country where the right is systematically denied. They must also be informed about the asylum process (see Section 2.5 above). Those detained for the purpose of deportation falling under the scope of the EU Returns Directive must be provided with information which explains the rules applied in the facility and sets out their rights and obligations, including the right to contact competent national, international and non-governmental organizations.<sup>271</sup>

The time required to provide reasons for arrest may vary somewhat according to the circumstances of the case. In *Saadi*, the ECtHR considered 76 hours too long.<sup>272</sup> The Human Rights Committee has accepted that a delay of eight hours may be required before an interpreter can be present, especially if it is an official interpreter chosen according to procedures that ensure competence.<sup>273</sup>

#### 2.6.5.2 Legal Assistance

Both ECHR and ICCPR provide for the right of detainees to have access to a lawyer during criminal trial proceedings,<sup>274</sup> but the same right must also be granted generally to ensure the possibility of challenging the lawfulness of detention.<sup>275</sup> The right to establish contact with legal representatives while in detention is expressly provided for under the EU Returns Directive.<sup>276</sup>

In *Öcalan v Turkey*, the ECtHR considered the case of a detained individual who possessed no legal training and had no possibility of consulting a lawyer while in police custody. The Court considered that the proceedings referred to in Article 5 (4) must be judicial in nature and held that, “the applicant could not reasonably be expected under such conditions to be able to challenge the lawfulness and length of his detention without the assistance of his lawyer.”<sup>277</sup>

The ECtHR also ruled that the principle of confidentiality between clients and lawyers must be protected, as otherwise the assistance would lose much of its usefulness. According to the Court, interference with the lawyer-client privilege does not necessarily require an actual interception or eavesdropping to have taken place. A genuine belief held on reasonable grounds that their discussion was being listened to is sufficient for a violation to occur.<sup>278</sup>

In addition, legal advice and assistance must be available in the context of review of decisions related to return under the EU Returns Directive<sup>279</sup> and should also be available in the context of accelerated

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270 *Fox, Campbell and Hartley v. United Kingdom*, ECtHR, 1990, para. 40.

271 Art. 16 (5) EU Returns Directive.

272 *Saadi v. United Kingdom*, ECtHR, 2008, paras. 84-85.

273 *Michael and Brian Hill v. Spain*, HRC, 1999, para. 12.2.

274 Art 14 (3) (b), ICCPR; Art. 6 (3) (c), ECHR.

275 *Berry v. Jamaica*, HRC, 1994, para. 11.1; *Bouamar v. Belgium*, ECtHR, 1988, para. 60.

276 Art. 16 (2), EU Returns Directive.

277 *Öcalan v. Turkey*, ECtHR, 2005, para. 70.

278 *Istratii and Others v. Moldova*, ECtHR, 2007, paras. 88-92.

279 Art. 13 (3), EU Returns Directive.

asylum procedures.<sup>280</sup> In the context of review of decisions related to return, legal assistance and representation must be provided free of charge.<sup>281</sup> Nevertheless, free legal assistance may be limited in certain respects, including on the basis of financial need (which may imply the so called ‘means testing’); in respect to designated counsel; and there may be monetary limits and time limits. Most critically, free legal assistance may be wholly denied where the appeal or review is not likely to succeed.<sup>282</sup>

Pursuant to Article 16 (2) of the Refugee Convention, legal assistance free of charge must be provided to refugees with “habitual residence” in a country where such assistance is provided to nationals.<sup>283</sup> Habitual residence does not require recognition of refugee status, a permanent stay, or even a plan to make one’s stay permanent. It contains no reference to legality or status, but implies a factual element, in particular “more than a mere presence, namely some form of ‘willed connection’ between refugee and State.”<sup>284</sup> Hence in practice the provision allows states to raise certain requirements for asylum seekers to access free legal assistance. However, such requirements must contain elements related to the factual situation of a refugee, not to the legality or acceptance of his or her status.

### 2.6.5.3 Review of detention

Both ICCPR and ECHR contain the fundamental right of everyone to challenge the lawfulness of detention before a court.<sup>285</sup> Individuals facing criminal charges are in addition covered by safeguards requiring prompt judicial control and a trial within a reasonable time.<sup>286</sup>

Under ECHR the right to challenge the lawfulness of detention is contained in Article 5 (4), which reads as follows:

#### **European Convention on Human Rights**

##### **Art. 5 (4)**

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The reviewing court must be independent of the executive and of the parties to the case and ensure guarantees of a judicial procedure appropriate to the kind of deprivation of liberty in question.<sup>287</sup> Furthermore, the court and the whole judicial system must be organized in a way that would enable speedy examination of detention matters,<sup>288</sup> including during vacation periods.<sup>289</sup>

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280 Council of Europe: Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, 1 July 2009, Guideline IV (1) (f).

281 Art 13 (4), EU Returns Directive.

282 The EU Returns Directive refers in this regard to Article 15 of the so called ‘EU Procedures Directive’. European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326; 13 December 2005, pp. 13-34.

283 Article 16 (2), CSR reads as follows: “A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.” See also UNHCR Detention Guidelines, Guideline 7 (ii).

284 Andreas Zimmermann (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, pp. 940-941; Cf. James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, pp. 908-912.

285 Art 9 (4); Art. 5 (4) ECHR.

286 Art 9 (3); Art 5(3) ECHR.

287 *Weeks v. United Kingdom*, ECtHR, 1987, para. 61.

288 *R.M.D. v. Switzerland*, ECtHR, 1997, para. 54

289 *E. v. Norway*, ECtHR, 1990, para. 66.



The right to have one's detention speedily reviewed by a court is a more detailed elaboration (or *lex specialis*) of the right of everyone to a remedy which must be effective, not merely formal.<sup>290</sup> Hence, first and foremost, the detained individual must have a "realistic possibility" of accessing a court to challenge the lawfulness of his or her arrest.<sup>291</sup> Systems providing for mandatory detention of asylum seekers where the only option to challenge the lawfulness of detention is to pursue cumbersome constitutional proceedings will fail to satisfy this requirement.<sup>292</sup>

Where the decision to detain an individual is taken by a court, as opposed to a police officer for example, the judicial decision on the legality of the detention is already incorporated into the initial decision to detain.<sup>293</sup> The individual so detained will nevertheless still enjoy the right to periodic review of his or her detention (see further below).

The ECtHR requires that the reviewing court (i.) must consider both procedural and substantive conditions which are essential for the lawfulness of his or her deprivation of liberty; (ii.) such assessment must be made in the light not only of the requirements of domestic law but also of the ECHR; and (iii.) the reviewing judicial body must have the competence to decide the lawfulness of the detention and to order release if the detention is unlawful.<sup>294</sup>

In addition, the review must further meet standards of due process, although these do not necessarily have to be the same as those required for criminal or civil litigation.<sup>295</sup> What the appropriate standards are may vary according to the particular nature of the circumstances in which the proceedings take place.<sup>296</sup> The detained person must have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation.<sup>297</sup> The lack of effective assistance of a lawyer during the proceeding may result in failure of affording the necessary safeguards. The proceedings must be adversarial and must always ensure equality of arms between the parties.<sup>298</sup> Furthermore, domestic courts cannot disregard concrete facts invoked by the detainee when these are capable of putting the lawfulness of the detention in doubt.<sup>299</sup> The proceedings do not need to be held in public, as this could have negative effects on speediness.<sup>300</sup> The principle of self-incrimination is guaranteed under international human rights law only in respect to criminal cases.<sup>301</sup>

The time required to decide the lawfulness of detention may vary according to the circumstances and complexity of the case.<sup>302</sup> The ECtHR found time-periods of 21, 17 and 23 days to be excessive.<sup>303</sup>

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290 Art 2 (3) (a) ICCPR; Art 13 ECHR; on the *lex specialis* relationship see *Chahal v. The United Kingdom*, ECtHR, 1996, para. 126.

291 *Conka v. Belgium*, ECtHR, 2002, para. 46.

292 *Louled Massoud v. Malta*, ECtHR, 2010, para 45; *Suso Musa v. Malta*, ECtHR, 2013, para. 52.

293 *De Wilde, Ooms and Versyp v. Belgium*, ECtHR, 1971, para. 76.

294 *A and Others v. United Kingdom*, ECtHR, 2009, para. 202.

295 *A and Others v. United Kingdom*, ECtHR, 2009, para. 203.

296 *Bouamar v. Belgium*, ECtHR, 1988, para. 57.

297 *Winterwerp v. Netherlands*, ECtHR, 1979, para. 60.

298 *Reinprecht v. Austria*, ECtHR, 2005, para. 31.

299 *Nikolova v. Bulgaria*, ECtHR, 1999, para. 61.

300 *Reinprecht v. Austria*, ECtHR, paras. 39-40.

301 Art. 14 (3) (g) ICCPR; the right against self-incrimination is also an inherent part of the right to a fair hearing under Article 6 of the ECHR, see *John Murray v. United Kingdom*, ECtHR, 1996, para. 45.

302 *Baranowski v. Poland*, ECtHR, 2000, para. 72.

303 *M.A. v. Cyprus*, ECtHR, 2013, para. 162; see also *Khodorkovskiy and Lebedev v. Russia*, ECtHR, 2013, paras. 521-524.

The UNHCR Detention Guidelines recommend that the review should ideally be automatic, and take place in the first instance within 24-48 hours of the initial decision to hold the asylum seeker.<sup>304</sup>

Provision must always be made for a subsequent review by a competent court to be available at reasonable intervals, in as much as the reasons initially warranting confinement may cease to exist.<sup>305</sup> The UNHCR Detention Guidelines refer to good practice which indicates that following an initial judicial confirmation of the right to detain, review would take place every seven days until the one month mark and thereafter every month until the maximum period prescribed by law is reached.<sup>306</sup>

## 2.7 Detention of children

Although international human rights law does not prohibit detention of children, it demands that it be resorted to only as a last resort. This principle is most clearly expressed in Article 37 (b) the Convention on the Rights of the Child (CRC),<sup>307</sup> which reads as follows:

### Convention on the Rights of the Child

#### Art. 37 (b)

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

The Committee on the Rights of the Child has stated that unaccompanied minors “should not, as a general rule, be detained.”<sup>308</sup> The Committee of Ministers of the Council of Europe has reiterated in a number of recommendations and guidelines the same principle also in regard to asylum-seeking children generally, not just unaccompanied minors.<sup>309</sup>

In a recent report, the Committee on the Rights of the Child has emphasised that, “States should adopt alternatives to detention that fulfil the best interests of the child, along with their rights to liberty and family life”.<sup>310</sup> In particular, states should allow children to remain with their family members and/or guardians and “be accommodated as a family in non-custodial, community-based contexts while their immigration status is being resolved.”<sup>311</sup> As noted by the WGAD, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirement of last resort, given the availability of alternatives to detention.<sup>312</sup>

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304 UNHCR Detention Guidelines, Guideline 7 (iii).

305 *Luberti v. Italy*, ECtHR, 1984, para 31; *Bezicheri v. Italy*, ECtHR, 1989, para. 20; *Oldham v. United Kingdom*, ECtHR, 2000, para. 30.

306 UNHCR Detention Guidelines, Guideline 7 (iv).

307 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. Hereafter referred to as ‘CRC’.

308 UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 61.

309 Council of Europe: Committee of Ministers, *Recommendation Rec(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum seekers*, 16 April 2003, (2003) 5, para. 20; Council of Europe: Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005, Guideline 11.1; Council of Europe: Committee of Ministers, *Guidelines on human rights protection in the context of accelerated asylum procedures*, 1 July 2009, Guideline XI (2).

310 UN Committee on the Rights of the Child, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 28 September 2012, para. 79.

311 *Ibid.*

312 UN General Assembly, *Report of the Working Group on Arbitrary Detention*, 18 January 2010, A/HRC/13/30, para. 60.

In *Popov v. France* the ECtHR considered the case of a Kazakhstani family with a baby and a young child whose asylum application had been rejected. The family was detained for 15 days with a view to deportation. Assessing the lawfulness of their detention under Article 5 (1), the Court held in regard to children that, “in spite of the fact that they were accompanied by their parents, and even though the detention centre had a special wing for the accommodation of families, the children’s particular situation was not examined and the authorities did not verify that the placement in administrative detention was a measure of last resort for which no alternative was available.”<sup>313</sup> The Court consequently found that the French system did not sufficiently protect the right to liberty of the children, although it immediately reiterated that detention does not need to be reasonably considered necessary under Article 5 (1) (f) as far as parents are concerned.<sup>314</sup> Nevertheless, the Court examined whether the necessity of detention and potential alternatives were appropriately considered by the domestic authorities in connection to its assessment under Article 8, which contains the right to respect for family life. Largely based on the ground that the authorities did not consider any alternatives to detention, the Court’s conclusion was that the detention violated Article 8 in regard to the whole family.<sup>315</sup>

In exceptional circumstances when a child is detained, the place of detention must be adapted to the needs of the child. The ECtHR has held in a number of cases that detention of children in inappropriate facilities was arbitrary and inconsistent with Article 5 (1) ECHR.<sup>316</sup> The lack of proper facilities for children may in addition constitute inhuman treatment under Article 3. An example of the latter is a case concerning detention of a five year old unaccompanied girl for a period of two months in a detention centre which was not adapted to children’s needs.<sup>317</sup> The Court noted that no one had been assigned to look after her and that no measures were taken to ensure that she received proper counselling and educational assistance from qualified personnel specially mandated for such a purpose. Consequently the Court held that her detention “demonstrated a lack of humanity to such a degree that it amounted to inhuman treatment.”<sup>318</sup>

Detention of asylum-seeking adults responsible for children must be subject to a careful analysis of the necessity, proportionality and reasonableness of the measure. The analysis must take into account the specific vulnerabilities and pay “a primary consideration” to the best interest of the child.<sup>319</sup> Any decision to separate a child from his or her parents against their will must be subject to judicial review.<sup>320</sup>

Unaccompanied or separated children in detention must have the right to prompt access to legal and other appropriate assistance.<sup>321</sup> The Committee on the Rights of the Child has clarified that such assistance must include the assignment of a legal representative free of charge.<sup>322</sup> In addition, the

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313 *Popov v. France*, ECtHR, 2012, para. 91.

314 In regard to the latter issue see Section 2.6.3.2.1 above.

315 *Ibid*, para. 115.

316 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, 2006, paras. 103-105; *Muskhadzhiyeva and others v. Belgium*, ECtHR, 2010, paras. 69-75.

317 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR, 2006, paras. 50-59.

318 *Ibid*, para. 58. See also: *Muskhadzhiyeva and others v. Belgium*, ECtHR, 2010, paras. 55-63; *Popov v. France*, ECtHR, 2012, paras. 75-76.

319 Art. 3 (1), CRC.

320 Art. 9 (1), CRC.

321 Art. 37 (d), CRC.

322 UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 63.

EU Returns Directive explicitly obliges states to provide, at minimum, “emergency health care and essential treatment of illness”.<sup>323</sup>

The Committee on the Rights of the Child has emphasised that all relevant procedures must be accelerated to minimize the time spent in detention.<sup>324</sup> Any judicial and administrative proceedings affecting the child must nevertheless afford the child the opportunity to be heard either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.<sup>325</sup>

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<sup>323</sup> Art. 16 (3), EU Returns Directive.

<sup>324</sup> UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 61.

<sup>325</sup> Art. 12 (2), CRC.

## 3 Norwegian law and practice

To what extent does Norway comply with requirements imposed by international law in regard to detention of Asylum seekers? As described in the previous part of the report, detention constitutes a serious exception from the right to liberty, and any resort to this measure must therefore be subject to adequate legal safeguards. Closely following the international legal framework set out above, this part identifies both strengths and weaknesses of Norwegian domestic law and practice. For comparative purposes, some lessons are also drawn from laws and practices in other European countries. Each respective Section ends with a brief summary, describing both strengths and weaknesses.

### 3.1 Reception conditions and the freedom of movement

This Section starts by briefly describing the main features of the reception arrangement for asylum seekers in Norway. How these conditions affect the freedom of movement of asylum seekers is discussed in the second Subsection.

#### 3.1.1 Reception conditions generally

The Norwegian Immigration Act provides for an open reception arrangement whereby asylum seekers who “without undue delay”<sup>326</sup> lodge an application for asylum with the police “shall be offered accommodation.”<sup>327</sup> The Directorate of Immigration is responsible for all accommodation centres, but does not run any of them itself. Instead, the centres are run by commercial companies, municipalities and NGOs.<sup>328</sup> The centres differ in regard to their specialisation, the range of offered services and standard. Asylum seekers spend their initial time in the centres until their asylum application is assessed. Thereafter they are either recognized as refugees (and hence leave the centres and start integrating in one of the municipalities)<sup>329</sup> or, in case their asylum application is rejected, they will need to leave the country.

Upon arrival, asylum seekers spend an initial period of 2-10 days in a transit centre for screening and are then assigned to different types of reception centres, depending on their needs.<sup>330</sup> The transit centres, as other reception centres, are open and do not impose any limits on freedom of movement. Asylum seekers subject to Dublin proceedings remain in the transit centres, where the standard of living is considerably lower in comparison to other centres.<sup>331</sup> Most asylum seekers are offered accommodation in ordinary reception centres that are spread around the country. Asylum seekers

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326 Art. 93 (1), Norwegian Immigration Act (utlendingsloven).

327 Art. 95 (1), Norwegian Immigration Act (utlendingsloven).

328 Norges offentlige utredninger, NOU 2011: 10, p. 27.

329 In practice asylum seekers sometimes remain in reception centres for months after receiving a positive decision due to lack of cooperation from the municipalities.

330 Jan-Paul Brekke and Vigdis Vevstad, *Reception conditions for asylum seekers in Norway and the EU*, Institute for Social Research, 2007, p. 19.

331 However, families with children and other vulnerable asylum seekers are accommodated in ordinary reception centres.

with special physical or psychological needs are assigned to specialized units.<sup>332</sup> In addition, there are specialized centres for asylum-seeking unaccompanied minors aged between 15 and 18. These centres are also open, and the minors are normally allowed to leave the centres during the day if they so wish. Those under 15 years of age are placed in care centres operated by the Child Welfare Service.

Rejection of an asylum application is normally followed by an order to leave the realm.<sup>333</sup> According to the Immigration Act, even under such circumstances the foreign national “may be offered accommodation” until he or she leaves the country.<sup>334</sup> Asylum-seekers will normally be allowed to continue to stay at reception centres. No accommodation is offered to rejected asylum seekers from countries that are considered safe, as these people are subjected to an accelerated procedure that only takes 48 hours.<sup>335</sup>

Until the summer of 2010, rejected asylum seekers who obstructed deportation proceedings used to be accommodated in separate ‘waiting centres’ (ventemottak).<sup>336</sup> These asylum seekers would not be detained in a holding centre for different reasons, for example because the deportation could not be practically carried out. Accommodation in these centres was not subject to restrictions on the freedom of movement, as the centres were also open, but their operation was premised on the assumption that a drastic reduction in the standard and other forms of passive force would promote return.<sup>337</sup> This arrangement was discontinued in 2011, when the level of conflict within the centres rendered their operation unsustainable. A number of studies have evaluated the system of separate waiting centres and concluded they were ineffective.<sup>338</sup> The current government has nevertheless proposed to establish a new system of departure centres but the precise details of the scheme remain unclear.<sup>339</sup>

### 3.1.2 The freedom of movement

Norwegian law exempts asylum seekers from the requirement to apply for a residence permit.<sup>340</sup> The exemption covers both initial entry and the subsequent period until the first-instance decision on the asylum application.<sup>341</sup> Norwegian legislation does not impose any automatic restrictions on the right to freedom of movement of arriving asylum seekers who do not possess residence permits. The same holds in regard to the accelerated asylum procedure, which is used to screen out manifestly unfounded applications.<sup>342</sup>

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332 However, there is no standardized and automatically applied psychological screening that would reveal, e.g., previous trauma related to torture. A recent tragedy involving hijacking a bus and killing three people by an asylum seeker has provoked a discussion on the need to implement an automatic screening system.

333 Art. 90 (1), Norwegian Immigration Act (utlendingsloven).

334 Art. 95 (1), Norwegian Immigration Act (utlendingsloven).

335 Accommodation will only be provided if necessary until a decision has been made, see: The Directorate of Immigration, *Case processing of applications for protection*, last updated 30.12.2009, available at: <http://www.udi.no/Norwegian-Directorate-of-Immigration/Central-topics/Protection/Procedure-in-asylum-cases/What-is-the-procedure-in-asylum-cases/>

336 Exception were families with children, unaccompanied minors, persons suffering from a serious sickness, those returning voluntarily with the assistance of the IOM, and those cooperating with the police, see the circular (no longer in force): Rundskriv A-3/2006, *Retningslinjer for hvem som skal gis midlertidig botilbud i asylmottak etter endelig avslag på søknad om asyl*, 01.02.2006.

337 NTNU Samfunnsforskning, *Avviste asylsøkere og ventemottaksordningen: Mellom passiv tvang og aktiv returassistanse*, 2010, p. 3.

338 Ibid; Norges offentlige utredninger, NOU 2011: 10.

339 *Avtale mellom Venstre, Kristelig Folkeparti, Fremskrittspartiet og Høyre om utlendingsfeltet*, Stortinget, 30. September 2013, p. 2, available at: <http://www.hoyre.no/filestore/Filer/Politikkdokumenter/Samarbeidsavtale.pdf>

340 Art. 56 (2), Norwegian Immigration Act (utlendingsloven).

341 Where an application for protection has been rejected at first instance, the exemption will continue to apply provided the administrative decision has been appealed and implementation has been deferred.

342 Accelerated procedure is used in cases where the application is submitted by persons coming from countries that are considered safe. Asylum seekers are provided accommodation in an open reception centre until their application is processed, which happens within 48 hours. For details on the procedure see the relevant internal instructions by the Directorate of Immigration, IM 2012-015.

When an asylum seeker wants to move to an accommodation centre located elsewhere in the country, he or she must apply for permission. This is not always granted, as the immigration authorities have a policy of spreading the centres throughout the country.<sup>343</sup> Nevertheless, the Directorate of Immigration “tries its utmost” to accommodate asylum seekers close to their relatives or others if they make such a request during the initial screening.<sup>344</sup>

Registered asylum seekers may choose to live outside reception centres in a self-financed private accommodation. However, if they choose to live outside their allotted centre, they will lose certain entitlements, such as compensation for clothes and housing.<sup>345</sup>

Living privately remains only a theoretical option for many asylum seekers, since the associated costs are high, and the conditions required to receive a work permit are quite strict. Asylum seekers may receive a work permit without having to apply for a residence permit pursuant to Article 94 (1) of the Immigration Act.<sup>346</sup> An asylum seeker may receive a work permit after an asylum interview if there is no question of rejecting the applicant or of requesting another country to take the applicant back. In addition, there must be “no doubt as to the applicant’s identity”. As further specified in the Immigration Regulations, an approved travel document or national identity card is required to prove the identity, unless the asylum seeker comes from a country that does not issue such documents.<sup>347</sup> A UDI circular further specifies that the exception does not cover applicants that come from countries where such documents are issued, regardless of the reasons for why the applicant could not submit the documents.<sup>348</sup> Furthermore, there is a condition that the travel document or national identity card must be valid at the time when the applicant first submits the document to the immigration authorities.<sup>349</sup> Since the circumstances surrounding the flight from state persecution often make it impossible to obtain official documents, many asylum seekers are not able to receive a work permit.

Reception conditions vary from country to country. Reception centres in Sweden do not impose any restrictions on the freedom of movement. The choice to opt out for private accommodation is not discouraged, as it does not lead to any loss of entitlements.<sup>350</sup> In Denmark, asylum seekers must be present in reception centres during night-time, when the centres are locked. In practice this places a serious restriction on their freedom of movement. They may apply for a permission to live in a self-financed private accommodation, but this is subject to a number of formal requirements.<sup>351</sup>

### 3.1.3 Summary

Although asylum seekers arriving to Norway are not subjected to automatic restrictions on their freedom of movement, the exercise of the right is discouraged in certain ways. In particular, the

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343 Jan-Paul Brekke and Vigdis Vevstad, *Reception conditions for asylum seekers in Norway and the EU*, Institute for Social Research, 2007, p. 39.

344 Ibid.

345 See the so called ‘cash regulation’ (pengereglementet). See also: Jan-Paul Brekke and Vigdis Vevstad, *Reception conditions for asylum seekers in Norway and the EU*, Institute for Social Research, 2007, p. 39.

346 The work permit does not grant any rights beyond the right to work and implies no residency rights, see: Ot.prp. nr. 75 (2006-2007), p. 444.

347 Art. 17-24, Norwegian Immigration Regulations (utlendingsforskriften).

348 Art. 3.1.5., UDI rundskriv, RS 2010-180.

349 Art. 3.1.4. (2), UDI rundskriv, RS 2010-180.

350 Asylum Information Database, *National Country Report: Sweden*, May 2013, p. 33

351 The Danish Immigration Service, *Self-financed residence*, [http://www.nyidanmark.dk/en-us/coming\\_to\\_dk/asylum/where\\_can\\_asylum\\_seekers\\_live/self\\_financed\\_residence.htm](http://www.nyidanmark.dk/en-us/coming_to_dk/asylum/where_can_asylum_seekers_live/self_financed_residence.htm) [last visited 10.11.2013]

right to choose one's place of residence is illusory for many asylum seekers. This is partly due to the policy of the immigration authorities to disperse asylum seekers among reception centres located throughout the country. Asylum seekers cannot freely choose a specific reception centre based on availability alone. At the same time, living outside reception centres is unaffordable for many, as this choice is tied to loss of entitlements. Asylum seekers may often find it impossible to compensate the associated costs by themselves due to legal obstacles in obtaining a work permit.

### 3.2 Alternatives to detention

Alternatives to detention are set out in Article 105 of the Immigration Act, which contains two options: an obligation to report and an obligation to stay in a specific place. Application of these measures under the defined circumstances is left to the discretion of the chief of police or the person authorised by the chief of police.

The possibility of applying less invasive measures instead of detention must always be considered. This obligation is expressed in Article 106 (2), which demands that, “[n]o decision to arrest or remand in custody shall be made if an obligation to report or an order to stay in a specified place will be sufficient”.

The obligation to stay in a specific place is further regulated in the Immigration Regulations, which contains an important principle that it “shall not restrict freedom of movement more than is necessitated by the considerations justifying the order.”<sup>352</sup>

Both alternatives to detention may be combined with seizure of travel documents, tickets or other material items which may serve to clarify or prove identity.<sup>353</sup> Failure to comply with the restrictions may lead to a fine, imprisonment not exceeding six months, or both.<sup>354</sup> These two alternatives to detention were introduced only recently in 2012. The extent to which the alternatives are used in practice is not clear, as complete statistics are not yet available.<sup>355</sup>

The alternatives to detention described above are subject to a number of procedural safeguards. Article 105 of the Immigration Act imposes an obligation on the police to make the person affected by the order imposing the obligation to report or to stay at a specific place aware of the right to demand to have his or her case examined by a court. The provision further calls for application “insofar as appropriate” of a limited number of provisions from the Criminal Procedure Act.<sup>356</sup> Among others, these include the requirement to issue the order in writing and that the order shall be lifted when the stated ground no longer justifies the measure.<sup>357</sup> Seizure is also subject to procedural safeguards, including the right to be provided reasons for the seizure and the right to challenge the decision at a court.

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352 Art. 18-2 (3), Norwegian Immigration Regulations (utlendingsforskriften).

353 Art. 104, Norwegian Immigration Act (utlendingsloven); see also Art. 18-12 (2), Norwegian Immigration Regulations (utlendingsforskriften).

354 Art. 108 (1), Norwegian Immigration Act (utlendingsloven).

355 The Minister of Justice has recently been questioned within the parliament whether alternatives to detention are used in practice in line with the legislative intent. According to the Minister, the statistics on the frequency of use of alternatives to detention are not yet complete. See: Stortinget, *Skriftlig spørsmål fra Eirik Sivertsen (A) til justis- og beredskapsministeren*, Dokument nr. 15:150 (2013-2014), available at: <http://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=58580>

356 Specifically, Article 175 (1) second sentence, Article 184 and Article 187.

357 See also: Ot.prp. nr. 75 (2006-2007), p. 447.



### 3.2.1 Summary

Since 2012, Norwegian legislation provides for two alternatives to detention: an obligation to report and an obligation to stay in a specific place. These may be combined with seizure of travel documents, tickets or other material items which may serve to clarify or prove identity. However, it is unclear whether the alternatives are used in practice in line with the legislative intent, as relevant statistics are incomplete.

## 3.3 Immigration detention as a non-penal measure

In the context of general immigration control, the Norwegian police has the power to stop an individual and request proof of his or her identity.<sup>358</sup> The individual is obliged to “show proof of identity and if necessary provide information in order to clarify his or her identity and the lawfulness of his or her stay”.<sup>359</sup> If the individual “is not cooperating on clarifying his or her identity” or where “there are specific grounds for suspecting that the foreign national has given a false identity”, he or she “may be arrested and remanded in custody” under Article 106 of the Norwegian Immigration Act.<sup>360</sup> The same Article allows arrest and detention of foreigners on other grounds (see Section 3.6.1 below), including where this is necessary for the purpose of deportation.<sup>361</sup> Where a foreign national is detained under one of the grounds listed in Article 106 of the Immigration Act, he or she will “as a general rule” be detained in “a holding centre for foreign nationals”.<sup>362</sup> Detention in the holding centre does not formally constitute penalisation.

Currently, the only officially designated immigration detention centre in Norway is the Police Immigration Detention Centre at Trandum. The current capacity of the detention centre is 127 places plus 10 security cells. The holding centre does not belong under the Norwegian correctional services but is administered by the police.<sup>363</sup> The regime within the detention centre is similar to ordinary prisons. For example, during the night the detainees are locked inside their rooms and not allowed to walk around within the detention centre.

In 2013, a committee commissioned by the Ministry of Justice and Public Security has prepared an analysis on reorganisation of the police (politianalysen), proposing to transfer the competencies related to the immigration administration from the National Police Immigration Service (PU) to the Directorate of Immigration (UDI).<sup>364</sup> Whether these suggestions will actually lead to a different arrangement in regard to the management of the detention centre at Trandum remains to be seen. In this context it is useful to consider implications of alternative arrangements in other Nordic countries.

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358 Art. 21 (1), Norwegian Immigration Act (utlendingsloven).

359 Art. 21 (1), Norwegian Immigration Act (utlendingsloven); see also Art. 83 (2), Norwegian Immigration Act (utlendingsloven).

360 Art. 106 (1) (a), Norwegian Immigration Act (utlendingsloven).

361 Art. 106 (1) (b), Norwegian Immigration Act (utlendingsloven).

362 Art. 107 (1), Norwegian Immigration Act (utlendingsloven).

363 Art. 107 (2), Norwegian Immigration Act (utlendingsloven).

364 NOU 2013: 9, p. 139. Interestingly, the analysis suggests that deportations should be the responsibility of the Directorate of Immigration, see: pp. 222-223.

In Denmark, there is only one detention centre specifically intended for asylum seekers and irregular immigrants, with a capacity of 118 places. It is officially referred to as prison,<sup>365</sup> as it is run by the correctional services. The arrangement is unfortunate since it needlessly portrays asylum seekers and irregular immigrants to the public as criminals. Furthermore, the regime inside the detention centre has been criticized for being largely based on the regime in ordinary Danish prisons.<sup>366</sup>

In Sweden, there are nine detention centres, with a total capacity of around 235 places.<sup>367</sup> The detention centres are run by the Migration Board, which is not authorized to use force. The detainees are free to walk around within the detention centre and use all the available facilities whenever they please, including during the night. An unfortunate side effect of this arrangement has been an increased reliance on the ordinary prison system in cases where individuals display threatening behaviour, or with persons with self-harm behaviour.<sup>368</sup>

In Finland, there is only one detention centre, Metsälä, with the capacity of 40 places. Due to lack of places, the majority of detained irregular immigrants are placed in police cells.<sup>369</sup> The situation has prompted international criticism, including from the UNHCR<sup>370</sup> and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>371</sup> The detention centre is run by the City of Helsinki's Department of Social Services and Health Care. Staff of the detention centre consists of social workers. Other services are contracted, including security, which is ensured by a for-profit company owned by the city of Helsinki.<sup>372</sup>

### 3.3.1 The principle of separation

To maintain the administrative nature of immigration detention, it is important to adhere to the principle of keeping asylum seekers and other irregular immigrants separated from ordinary criminals.

According to Article 107 of the Norwegian Immigration Act, those detained for immigration control purposes (i.e. under Article 106 of the Act), "shall as a general rule be placed in a holding centre for foreign nationals". The phrase 'as a general rule' implies that exceptional placement of asylum seekers and other irregular immigrants in police cells or prisons is permitted. The provision does

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365 In full name the prison has been referred to as 'Ellebæk (formerly Sandholm) Prison and Probation Service Established for Asylum seekers and others deprived of their liberty'.

366 Council of Europe: Committee for the Prevention of Torture, *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 February 2008*, 25 September 2008, CPT/Inf (2008) 26, para. 88.

367 Asylum Information Database, *National Country Report: Sweden*, May 2013, pp. 42-45.

368 Svenska Röda Korset, *Förvar under lupp: En studie av rättssäkerheten för asylsökande i förvar*, 2012, pp. 52-55; See English translation of the summary of the findings: Swedish Red Cross, *Detention Under Scrutiny: A study of the due process for detained asylum seekers*, 2012, pp. 4-5, available at: [http://www.redcross.se/PageFiles/5738/Forvar\\_under\\_lupp\\_enligshFINAL%5B1%5D.pdf](http://www.redcross.se/PageFiles/5738/Forvar_under_lupp_enligshFINAL%5B1%5D.pdf)

369 Amnesty International, *Finland: Submission to the United Nations Human Rights Committee for the 108th Session of the Human Rights Committee (8-26 July 2013)*, p. 15, available at: <http://www.amnesty.org/en/library/asset/EUR20/002/2013/en/b3912ado-601a-4fef-a0d4-803466cd6ca7/eur200022013en.pdf>

370 UN High Commissioner for Refugees (UNHCR), *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: Finland*, November 2011, p. 4.

371 Council of Europe: Committee for the Prevention of Torture, *Report to the Finnish Government on the visit to Finland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 30 April 2008*, 20 January 2009, CPT/Inf (2009) 5, p. 12

372 Global Detention Project, *Finland Detention Profile*, September 2009, available at: <http://www.globaldetentionproject.org/countries/europe/finland/introduction.html>

not specify when such exceptions are allowed, and the actual practice is unclear.<sup>373</sup> However, some guidance is offered in preparatory works.

The preparatory works state that a foreigner may be held in a regular prison “in cases where it can be assumed that detention will be prolonged, for example due to obvious problems with clarifying the identity and similar.”<sup>374</sup> This statement undermines the principle that irregular immigrants who are administratively detained should be held in specialised facilities, not in regular prisons. Absent additional compelling reasons, placement of an irregular immigrant in a regular prison seems to be unjustified. The preparatory works further state that exceptions may also be decided in the “interests of peace, order and security”, for example when the individual poses a danger to himself or others. This is less problematic, although it should be noted that the detention centre at Trandum does have a high security wing. Nevertheless, the conditions at the wing are not suitable for long term detention.

Families with children are in practice not placed in police cells or prisons.<sup>375</sup> Older unaccompanied minors have in individual instances been temporarily held in police arrest before being transferred to the holding centre. This has happened mainly in cases where they were arrested on the suspicion of committing a criminal offence.<sup>376</sup>

The Immigration Regulations further specify that foreigners who are administratively detained under Article 106 of the Immigration Act and are not placed in the holding centre “shall as a general rule be separated from other prisoners.”<sup>377</sup> Interestingly, this provision expressly excludes foreign nationals who are expelled as a result of being sentenced to a penalty. This affects foreigners who are expelled and remain detained in prison after serving their sentence, with the continuing detention being justified under the Immigration Act.

### 3.3.2 Crimmigration

A pressing issue concerns a recent increase in the use of penal law for prosecuting transgressions against immigration law that had not previously been regarded as criminal. The guidelines issued in 2008 by the Director of Public Prosecutions explicitly link immigration matters to crime.<sup>378</sup> According to the guidelines, offences committed in connection with immigration proceedings “impede immigration authorities’ work, entail considerable use of resources, and may undermine the institute of asylum”. The guidelines further vaguely refer to a general “rise of organized crime across borders and the threat of terrorism”. Finally, the guidelines make a tenuous link between transgressions against immigration laws and crime by emphasizing that “foreigners residing in the country of unknown origin and identity, or those who do not leave the country in spite of being ordered to do so, *can* pose a significant security risk and a crime-related problem [emphasis original].”<sup>379</sup>

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373 NOAS has asked the Police Directorate and the Directorate of Norwegian Correctional Service (Kriminalomsorgsdirektoratet) for statistics on where foreigners detained on the basis of violations of the Immigration Act are being held. Unfortunately, none of the two institutions could provide us with a comprehensive statistics. Interestingly, the institutions could only provide information about foreigners detained on a specific date. On December 3, ten foreigners were administratively detained in ordinary prisons. We do not have numbers for the same day, but this can be contrasted to the number of detainees at Trandum during our visit on October 25, which was 69.

374 Ot.prp. nr. 75 (2006–2007), p. 448 (unofficial translation).

375 Meld. St. 27 (2011-2012), p. 89.

376 Ibid.

377 Article 18-12a, Norwegian Immigration Regulations (Utlendingsforskriften).

378 Riksadvokaten, *Retningslinjer for påtalebehandling av straffbare handlinger som avdekkes i utlendingssaker*, Ra 05-370 KHK, 01.12.2008.

379 Ibid, p. 2, [unofficial translation].

The guidelines instruct the police to initiate criminal proceedings in cases where a foreign national uses a wrong identity or false documents, breaches a previously issued prohibition on entry, repeatedly enters illegally, stays illegally for a prolonged period, or works illegally.<sup>380</sup> The police and prosecutors enjoy a margin of discretion in such cases, and may decide accordingly whether to initiate criminal proceedings or not.<sup>381</sup> For example, it is possible to withhold initiation of criminal proceedings in cases where the foreign national is about to be deported.<sup>382</sup> Most problematic from the perspective of international law is penalisation of foreigners entering Norway in an irregular manner. This issue is addressed in a separate section below.

### 3.3.3 Summary

Irregular immigrants who are detained for administrative reasons under immigration law are normally held in the specialised detention centre at Trandum. Some may also be exceptionally held in regular prisons. The law is not very clear on when such exceptions are allowed and the actual practice is also unclear due to lack of statistics. The exception is never applied to families with children. When the exception is applied, irregular immigrants must be separated from ordinary prisoners. As a result of policy changes in 2008, certain immigration matters have been linked to crime, and irregular immigrants are increasingly being detained under penal law.

## 3.4 Non-penalisation for illegal entry or presence

This Section examines the implementation of Article 31 (1) of the Refugee convention under Norwegian domestic law. The first Subsection presents applicable domestic law, revealing that there are no express domestic provisions, neither in immigration law nor in criminal law, that exclude asylum seekers from penalisation for illegal entry or presence. Nevertheless, arguments are made that correct application of the domestic law, especially the defence of necessity, should in principle exclude asylum seekers from such penalisation. The second Subsection then proceeds to discuss the current practice, showing that asylum seekers are often penalised in violation of the Refugee Convention. The third Subsection lists some of the most serious implications, both for the penalised individual and the public interest. The fourth Subsection concludes by presenting solutions that prevent penalisation of asylum seekers in the UK, Denmark and Finland.

### 3.4.1 Applicable domestic law

Norwegian domestic law does not contain any express rule that exempts asylum seekers from penalisation for illegal entry or presence in line with Article 31 (1) of the Refugee Convention. In contrast to other specific provisions of the Refugee Convention,<sup>383</sup> Article 31 (1) has so far not found its way into Norwegian domestic law.<sup>384</sup> Both the Norwegian Immigration Act and the Penal Code penalise illegal entry or presence without expressly exempting asylum seekers. Nevertheless, both of these pieces of

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380 Ibid. p. 1.

381 Arts. 224 (1) and 69 (1) of the Norwegian Criminal Procedure Act (*straffeprosessloven*) respectively.

382 Erling Johannes Husabø and Annika Elisabet Suominen, *Forholdet mellom straffeprosesslovens og utlendingslovens regler om fengsling og andre tvangsmidler*, En utredning avgitt til Justisdepartementet, 02.03.2011, p. 18.

383 For example Article 1 (a) (2) of the Refugee Convention is incorporated in Article 28(1) (a) of the Norwegian Immigration Act.

384 The provision is briefly mentioned in the preparatory works to the new and old Immigration Act. However, the provision is never discussed in detail. In particular, there is lack of guidance about the circumstances that may exempt asylum seekers from penalisation. See: NOU 1983:47, p. 145; Ot. Prp. Nr. 46 (1986-1987), p. 102 and 185; NOU 2004: 20 p. 165; Prop. 138 L (2010–2011), p. 16.

legislation formally require their provisions to be applied in line with binding rules of international law. Failure to do so would imply a breach under international law as well as domestic law.<sup>385</sup>

Arriving in Norway without a valid travel document is punishable under immigration law, including where this is a result of negligence. Such conduct is punishable under Article 108 (2) (a) of the Immigration Act with a fine or imprisonment for a term not exceeding six months or both. In the context of immigration control, a foreigner is obliged to produce a valid travel document.<sup>386</sup> The foreigner may be arrested by the police in accordance with Article 171 (1) of the Norwegian Criminal Procedure Act if he fails to do so.<sup>387</sup>

Several provisions in the Immigration Act indicate that asylum seekers should be exempted from penalisation. According to the last paragraph of Article 108, contravention of penal provisions “shall only lead to prosecution when required in the public interest.”<sup>388</sup> According to Article 8 (3) of the Immigration Act, the Directorate of Immigration has the discretion to “exempt a foreign national from the passport requirement or accept a document other than that which follows from the general provisions”. Furthermore, Article 9 (1) of the Act exempts asylum seekers from normal visa requirements.<sup>389</sup>

Arriving to Norway with a falsified travel document is punishable under criminal law. Article 182 of the Penal Code subjects to a penalty “[a]ny person who with unlawful intent uses as genuine or unfalsified any document that is forged or falsified”. This includes both the use of a wholly falsified document, but also the modification of an otherwise originally issued document. Where an asylum seeker uses another person’s original document and passes himself off as that person, the legal basis for penalisation will be Article 166 of the Penal Code.<sup>390</sup> The power of the police to arrest a person in these situations follows from Article 171 (1) of the Norwegian Criminal Procedure Act.

The Penal Code does provide for the possibility to exempt asylum seekers from penalisation for presenting a falsified travel document, at least in theory. Article 182 of the Penal Code requires ‘unlawful intent’ (*retsstrid*). This requirement allows for exempting certain acts from penalisation in situations where the penalisation would seem unreasonable.<sup>391</sup> Arguably, the intent should not be considered unlawful in case of an asylum seeker who uses a falsified passport in order to reach a country of refuge.

As is the case under many other legal systems, Norwegian criminal law recognizes that under exceptional circumstances involving an overwhelming urgency, a person may be allowed to respond by breaking the law.<sup>392</sup> The defence of necessity (*nødrett*) is articulated in Article 47 of the Norwegian Penal Code, which reads as follows:

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385 In respect to provisions contained in these legal statutes, precedence must be given in favour of a binding rule of international law if that rule comes into conflict with a domestic rule. See the discussion of ‘sector-monism’ in Section 1.4 above (page 20).

386 Arts. 8 and 21, Norwegian Immigration Act (*utlendingsloven*).

387 Article 171 of the Norwegian Criminal Procedure Act (*straffeprosessloven*) permits arrest of a person suspected on reasonable grounds of committing an act punishable by imprisonment exceeding six months. The phrase “or both” in Article 108 (2) of the Immigration Act implies a higher penalty, hence allowing arrest in this context.

388 Øyvind Dybvik Øyen (Ed), *Lærebok i utlendingsrett*, Universitetsforlaget, 2013 p. 402.

389 Those who otherwise provide information that indicates the need for protection against *refoulement* are also exempted.

390 Ot.prp. nr. 90 (2003–2004), p. 226. See also: Art. 108 (2) (c), Norwegian Immigration Act (*utlendingsloven*).

391 *Ibid*, pp. 106, 211–212.

392 See Ståle Eskeland, *Strafferett*, 3. utg., Cappelen Damm Akademisk, 2013, pp. 256–260; and in general, Kjell V. Andorsen, *Straffettslig nødrett*, Universitetsforlaget 1999.

## Norwegian General Civil Penal Code

### Art. 47

No person may be punished for any act that he has committed in order to save someone's person or property from an otherwise unavoidable danger when the circumstances justified him in regarding this danger as particularly significant in relation to the damage that might be caused by his act.

Accordingly, the value of saving one's own life and fleeing persecution should be weighed against the interests protected by the provisions penalising irregular entry and the use of falsified documents. At the same time, one must assess whether the danger is unavoidable, although this cannot be interpreted in a literal sense. Unfortunately, Norwegian literature on criminal law concludes that the defence of necessity is not a practical defence in cases regulated by Articles 166 and 182 of the Penal Code.<sup>393</sup>

Interestingly, the defence of necessity was accepted in a district court case from 2011, which concerned an attempt to leave Norway with a falsified passport.<sup>394</sup> A Ugandan asylum seeker, whose application for asylum had been rejected, attempted to use a falsified passport to leave Norway in order to avoid being sent back to Uganda. The majority found that his subjective fear of persecution was a valid defence for attempting to leave Norway with the falsified passport.

The possibility of defence of necessity in cases involving illegal entry or presence has previously been acknowledged by the Supreme Court.<sup>395</sup> The Court has referred to the preparatory works of the old Immigration Act, which state that the obligation to exempt asylum seekers from penalisation imposed by Article 31 (1) of the Refugee Convention would also follow from the application of the defence of necessity.<sup>396</sup> Unfortunately, for the reasons discussed below, this is often not done in practice.

### 3.4.2 Domestic practice

Asylum seekers who arrive to Norway in an irregular manner are in practice often penalised in contravention of Article 31 (1) of the Refugee Convention. There are two main reasons why Norway fails to protect asylum seekers in line with this provision. First, the international obligation is not well known among the responsible authorities. Second, on the occasional instances when the provision has been mentioned or applied, its terms have been interpreted without any regard to the rules of treaty interpretation contained in the Vienna Convention on the Laws of Treaties (VCLT). There have been particular issues with interpretation of the terms 'coming directly' and 'without delay'.

#### 3.4.2.1 Lack of knowledge of the international obligation

In NOAS' experience, the practice of penalising asylum seekers for illegal entry or presence varies from district to district, depending on the approach chosen by the police and the respective court. From providing legal aid in asylum cases, NOAS noticed that asylum seekers who arrive with a falsified passport are often convicted to a prison sentence of 45 days, which is normally served before the

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393 See, e.g., Johs. Andenæs, *Spesiell Strafferett og formuesforbrytelsene*, samlet utgave ved Kjell V. Andersen, Universitetsforlaget, 2008, p. 225; See also: Håvard Kampen in Vigdis Vevstad (ed.), *utlendingsloven kommentarutgave*, Universitetsforlaget, 2010, p. 605.

394 TOVRO-2011-107104, 2011-07-08.

395 Rt-1995-1218, 28.08.1995. See also: Rt-1995-1218. In Rt-2010-801, where the Supreme Court Appeals Committee considered a case of accessory to people smuggling, which is a violation under the Immigration Act Section 108 (4). The provision penalises helping "a foreign national to enter the realm or any other state illegally." However, this does not apply "if the intention is to help a foreign national coming under section 28 of this Act to enter the first safe country he or she comes to." Article 31 is discussed in the case, but the analysis is not directly relevant for the present purposes.

396 See Ot.prp. nr. 90 (2003–2004), p. 202-204.

asylum procedure is initiated.<sup>397</sup> NOAS has also registered cases where asylum seekers were penalised only financially for not possessing travel documents. An example of the latter is provided below.

An Eritrean asylum seeker was issued a fine of NOK 5000 when he arrived to Norway without a valid travel document. He had left Eritrea for Sudan, and from there flown to Sweden. Once in Sweden, he immediately boarded a train to Norway and was subsequently encountered by the police at the first train station across the Norwegian border in Kongsvinger. He immediately informed the police about his intention to apply for asylum. The police nevertheless issued a fine, since he did not possess any valid travel document. It is interesting to note that the police continued to demand the payment even after he was granted refugee status. After a written complaint, NOAS was successful in convincing the police to drop the fine based on arguments relying on Article 31 (1) of the Refugee Convention.

In connection to the case described above, the Police District of Hedmark informed NOAS that there was a common practice of fining all asylum seekers who arrive without documents. According to the submitted view, asylum seekers who travel through Sweden will have already been to a first safe country, and that is where they should have applied for asylum to avoid penalisation.

Furthermore, NOAS has also spoken to police prosecutors at the Police District of Romerike, which is responsible for Gardermoen airport and receives a high number of asylum seekers. The conversations have likewise indicated that the knowledge is insufficient both among the police and other officials working at Norway's borders. Neither Article 31 (1) of the Refugee Convention nor the guidelines issued by the Director of Public Prosecutions are well known.

An Assistant Chief of Police at the District of Romerike shared his views on interpretation of Article 31 (1) during a meeting with NOAS.<sup>398</sup> There is a general understanding that fleeing for one's life should not be punished. However, the views indicated that if an asylum seeker travels through a European country, he or she should not be excluded from penalisation. An asylum seeker should also not be exempted if he or she illegally walks through the passport control without asking for asylum immediately on the spot. The Assistant Chief of Police was not aware of any case where an asylum seeker was exempted from penalisation.

The National Police Directorate does not know the extent of penalisation for illegal entry or presence. In NOAS' opinion, there is a need for better registration procedures and registration of cases where exemption from penalisation has been applied on the basis of Article 31 (1). It should be reiterated in this context that information on detention of asylum seekers should be registered and notified to the UNHCR.<sup>399</sup>

Irregular entry cases are normally tried as summary judgments on confession.<sup>400</sup> This requires the consent of the person charged and a confession of guilt, and means the Court can adjudicate the case without an indictment and main hearing. In return, the sentence is routinely reduced from 60 to 45 days in prison. NOAS has spoken to defence attorneys working at Øvre Romerike District Court, which is responsible for cases from Gardermoen airport. The defence attorneys were not familiar

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397 The amount and detail of information provided in asylum cases is often insufficient to establish whether the penalisation was in line with the requirements of Article 31 (1) of the Refugee Convention.

398 Meeting with Assistant Chief of Police, Romerike Police District, 29.05.2013.

399 Cambridge University Press, *Summary Conclusions: Article 31 of the 1951 Convention*, June 2003, p. 258. See also: Art. 98, Norwegian Immigration Act (utlendingsloven).

400 Art. 248, Criminal Procedures Act, (straffeprosessloven).

with Article 31 (1), although the defence of necessity had been raised on rare occasions. When neither the prosecution nor the defence are aware of the possible ground for exempting an asylum seeker from penalisation on the basis of Article 31 (1) of the Refugee Convention, it can be doubted whether the person charged has given an informed consent and understood what a summary judgment on confession entails.

In December 2013, one of the defence attorneys informed NOAS about a recent change of practice at Gardermoen airport. Due to scarcity of prison places and resources, asylum seekers may be issued a fine instead of a prison sentence. The penal measure chosen will reflect the current number of inmates, and the reaction to the same offence can therefore vary, depending on the day an asylum seeker arrives.

In case of violations of Article 182 of the Penal Code (presenting a falsified travel document), the prosecution now offers the charged person to either accept a fine of NOK 15,000 or face the court.<sup>401</sup> For violations of Article 166 of the Penal Code (where an asylum seeker uses another person's original document and passes himself off as that person), the normal penalty is still 45 days in prison, if the person agrees to a summary judgment on confession.

### 3.4.2.2 Misinterpretation of the term 'coming directly'

In 2008, the Director of Public Prosecutions issued guidelines to the police that contain a mention of Article 31 (1) of the Refugee Convention.<sup>402</sup> According to the guidelines, a criminal case should not be initiated against a refugee who arrives to Norway as the "first safe country" (første trygge land). The guidelines are not binding, but are authoritative and influence practice. The relevant passage reads as follows (unofficial translation):

In line with the obligations in article 31 of the UN Refugee Convention of July 28th 1951, a criminal procedure for illegal entry or presence shall not be initiated against a refugee who has come directly to Norway as the first safe country. Exemption from penalisation is assumed to also cover the use of a falsified travel document that was necessary to carry out the flight, but not the continued use of such document after arriving in the country.

The guidelines interpret the term 'coming directly' contained in Article 31 of the Refugee Convention without regard to the rules of treaty interpretation contained in the VCLT. As discussed in Section 2.4.3 above, the notion of 'first safe country' is inconsistent with the rest of the treaty's terms, its object and purpose, as well as the preparatory works.

Further insight into application of Article 31 (1) of the Refugee Convention in recent practice has been provided by Hans-Henrik Hartmann, who worked as an Assistant Director General at the Norwegian Directorate of Immigration (UDI). The following text has been published in the commentary to the Immigration Act, a well-known publication among the Norwegian practitioners in the field:

[I]t is possible that no one who has passed through a Schengen country or other safe third countries, will be able to rely on this provision. The foreigner must also show good cause for the illegal entry or presence. It is however not clear whether good cause relates to the illegal entry or to the necessity of the flight. It is at least a fact that UDI processes applications from quite a few registered asylum seekers who have been penalised with a fine or even a

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401 It should be noted that when a fine is imposed (as opposed to a prison sentence), a defence attorney is not provided.

402 Riksadvokaten, *Retningslinjer for påtalebehandling av straffbare handlinger som avdekkes i utlendingssaker*, Ra 05-370 KHK, 01.12.2008, p. 6, available at: <http://www.riksadvokaten.no/filestore/Dokumenter/2008/utlendingssaker.PDF>



prison sentence for having entered without travel documents. Some of these are later given asylum – even if they have served a prison sentence for illegal entry.<sup>403</sup>

The author of the text presented above, and presumably also the Directorate of Immigration, do not consider the practice of penalising asylum seekers who pass through a Schengen country to be in violation of the Refugee Convention. Again, the analysis does not take into account the rules of treaty interpretation. Instead, it appears that the domestic practice of penalisation is taken as a confirmation that the strict interpretation of the treaty rule is correct.<sup>404</sup>

The fact that the term ‘coming directly’ has so far not been interpreted by referring to the rules of treaty interpretation contained in the VCLT is unfortunate. In recent years, the Supreme Court has repeatedly referred to the customary rules of treaty interpretation contained in the VCLT as the point of departure for determining the meaning of obligations contained in the 1951 Refugee Convention.<sup>405</sup> Shortly before this report was to be printed, the Eidsivating Court of Appeal adjudicated a case citing Article 31 (1) as a defense. An appeal to the Supreme Court is now pending. It is expected that the Court will apply the VCLT rules of interpretation in that case, possibly changing Norwegian practice.<sup>406</sup>

### 3.4.2.3 Misinterpretation of the term ‘without delay’

In 1995, the Supreme Court commented on the term ‘without delay’ contained in the Article 31 (1) of the refugee Convention. The case has been referred to in the guidelines by the Director of Public Prosecutions (mentioned above) and influenced practice. The case concerned a Sri Lankan asylum seeker who entered Norway with a falsified passport. The Court did not exempt the asylum seeker from penalisation but noted that:

The situation would, in relation to Article 6 of the Immigration Act, have been different if the convict had approached Norwegian authorities upon arrival and applied for asylum, instead of attempting to enter the country with the falsified travel document.<sup>407</sup>

The Court thus implied that an asylum seeker should apply for asylum directly at the border. The view expressed is an *obiter dictum* and should therefore not be accorded much weight. The Court mentioned the unofficial Norwegian translation of article 31 (1), which uses the term ‘immediately’ (straks), instead of ‘without delay’, but did not conclude on how the terms should be interpreted.

After the enactment of the new Immigration Act, the law no longer requires that an application for asylum be lodged immediately. Instead, it is enough if the application is lodged “without undue delay”.<sup>408</sup> The preparatory works to the new Immigration Act mention Article 31 (1) of the Refugee Convention in this context:

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403 Vigdis Vevstad (ed.), *utlendingsloven kommentarutgave*, Universitetsforlaget, 2010, p. 521 (translation).

404 A similar strict interpretation of Article 31 of the Refugee Convention has been provided by Håvard Kampen, also in the above mentioned commentary to the Immigration Act. The analysis relies primarily on the Director of Public Prosecutions’ interpretation. There is no independent critical enquiry as to whether the Director of Public Prosecutions’ interpretation is correct. See: Vigdis Vevstad (ed.), *utlendingsloven kommentarutgave*, Universitetsforlaget, 2010, pp. 605-606

405 See, e.g., Rt-2010-858 para. 38, Rt-2012-139 para. 38 and Rt-2012-494 para. 33.

406 LE-2013-176917, 12.12.2013. An earlier draft of relevant parts of this report was attached to the appeal. UNHCR will provide an amicus curiae brief in the case.

407 Rt-1995-1218, 28.08.1995 (unofficial translation).

408 Art. 93 (1), Norwegian Immigration Act (utlendingsloven).

An important clarification of this general rule relates to foreigners who apply for protection in Norway. The Refugee Convention Article 31(1) confirms that it should not have penal consequences if refugees enter illegally into the country or reside here without permission, provided they have come “directly from an area where their life or freedom was threatened” and “immediately present themselves to the authorities and show good cause for their illegal entry or presence”.

[...]

Furthermore, there is no longer a requirement that a foreigner “immediately” presents himself to the police upon crossing the border in this way.

It must still be expected that a person who considers himself to have a need for protection when crossing the border, applies for protection without undue delay. If an application for asylum is not delivered at the border, the Refugee Convention requires that the asylum seeker immediately presents himself to the authorities, cf. Article 31(1).<sup>409</sup>

The passage from the preparatory works above acknowledges the possibility that an asylum may apply for asylum also after crossing the border. However, the passage does not offer any guidance about when to exempt asylum seekers from penalisation. In fact, penalisation is not mentioned at all.

A 2008 case from Sandefjord District Court is a good example of how little leeway is given to an asylum seeker who presents himself with a falsified passport at the border (the following is a summarised version of the verdict):

An Iraqi asylum seeker arrived at Sandefjord airport with a falsified passport. He had fled from persecution in Iraq, and had left for Norway as he had heard human rights were respected there. He left Iraq for Syria, and then Turkey, where he paid a smuggler 10.000 dollars to get to Norway. Two weeks later he was given a passport. He was put in the back of a trailer in Turkey, and thinks he spent about two days there. He was given a phone, and a number to call when he got off the trailer. He did not know where he was when the trailer stopped. He phoned the number and was met by a person who took him to an apartment. This person took the passport and told him not to ask questions. He spent a short time in the apartment, before the same person took him to the airport. When he was near the airplane, he was given back the passport which had been taken from him in Turkey. This was when he first noticed it was an Egyptian passport with his picture, but with another person's name.

When he came to Norway, he has explained that he did not know what to do, but that he tried to look for the police to explain his case. After a while he met some people in dark clothes. He claimed in court that he thought they were civilians until they took his bag and the passport he was carrying. After a little while he tried to explain that he was from Iraq

This happened in the ‘green zone’ of customs at Torp airport, when a customs official picked the accused out for a customs control. The official tried to communicate with the accused, but it was difficult. When the official asked in English about an “ID” or a “passport”, the accused responded by showing a falsified passport. The Court finds the customs official very credible on this point. After about 10 minutes, the customs official asked the accused if he wanted to apply for asylum. He replied “Iraq”. The accused was given a piece of paper to write his name on, which he did in Arabic. The customs official did not understand the letters, but did not think the name looked like the name written in the passport. As the passport was Egyptian, he became suspicious and alerted the border control.

The accused has admitted that he did not have a valid passport or other travel document when he came to Norway, but he stressed that he never “used” the passport, as required by Section 182 of the Penal Code. He is of the opinion that the passport was taken by the customs official and that he did not attempt to use it to enter Norway. On the contrary he tried to find the police to explain his story.

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409 NOU 2004: 20, p. 165 (unofficial translation).

The Court commented that the passport was obviously falsified, and the accused was aware of it when he came to Norway. It furthermore found that he understood what he was asked when the customs official asked for an "ID", as he immediately presented the falsified passport. The Court bases this on the customs official's explanation. There was no indication that the accused attempted to inform the police that the document was falsified when he presented it. This fact was first implied after 10 minutes, after they went in to a search room. The Court believes the accused must have understood that he had met a public official. Even if he did not understand, the Court unanimously considers him to have used the document with the unlawful intent of entering Norway, as prescribed by Article 182. The crime was completed when he, after having been asked to identify himself, presented the falsified passport and did not simultaneously try to explain that something was wrong. It is also clear that had the accused passed the customs, he would be free to roam around Norway. As there was a Schengen visa in the passport, he must have come from a Schengen country.

These cases are commonly decided as summary judgments on confession at the first court hearing. It is almost a standardized sentencing, which includes a reduction in the sentence because of the confession, of 45 days in prison. Without a confession, the normal punishment is 60 days in prison. The accused was sentenced to 45 days in prison.<sup>410</sup>

In the reasoning above, the Court gave no consideration to Article 31 (1) of the Refugee Convention. Instead, the Court focused on the delay between handing the falsified passport and confessing that it was falsified. As the confession was not articulated "simultaneously" with handing the passport, but ten minutes afterwards, the Court concluded that the asylum seeker had an unlawful intent. While the court did not explicitly require from the asylum seeker to inform the customs official about the intention to apply for asylum immediately, the requirement to admit guilt simultaneously with handing the passport over can hardly lead to a different conclusion.

The requirement to both confess to the fact that the passport is falsified and articulate the intention to apply for asylum immediately upon encountering a customs official was indicated in a 2012 Moss District Court case:

The Court considers it proven beyond any doubt that the accused upon arrival at Moss airport Rygge, on June 12th this year, presented a falsified Italian passport when he was stopped in a customs control. The Court does not find the explanation, that he did not know that the passport was falsified, credible. The accused has explained that he paid 800 Euros for the passport to a Ghanaian man he met in Naples. Even if the Court had found the explanation; that he is illiterate, credible, the Court considers that the accused has understood without doubt that a valid passport cannot be obtained in such a way. The accused has also explained that he did not check the passport before he received it, two days prior to the departure to Norway.

The accused has explained that he informed about his wish to apply for asylum simultaneously as he handed his passport over to the customs official. The Court does not believe this, and refers to the explanation given by the customs official, who has informed the Court that he has never experienced such information being given at the start of the customs control. The Court therefore finds that it must be considered proven that the accused, by handing over the falsified passport to the customs official, has behaved as if the passport was genuine. That he shortly afterwards acknowledges that the passport does not contain his name, and informs about his wish to seek asylum in Norway, cannot as the Court sees it, exempt him from penalisation.

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410 TSAFO-2008-73221, 03.06.2008 (unofficial translation).

The Court adjudicates a significant number of similar cases each year, and it seems illegal entry by the use of falsified documents is an increasing problem. It is therefore necessary in these cases to give a substantial reaction.<sup>411</sup>

It seems that Norwegian Courts give asylum seekers very little time to explain that a passport is falsified and inform about the intent to apply for asylum. Providing such information “ten minutes” after handing a falsified passport or “shortly afterwards” has been considered to be too late. The court failed to consider the applicability of Article 31 (1) of the Refugee Convention in both cases. The defence of necessity (nødrett) was also not raised.

The strict approach taken by the courts is inconsistent with the terms of Article 31 (1) of the Refugee Convention. The provision requires that asylum seekers “present themselves without delay to the authorities”. The terms indicate that presenting oneself to the authorities must be voluntary. However, an asylum seeker should not be denied the benefit of Article 31 (1) if the individual is arrested or detained before he or she could be reasonably have been expected to seek asylum.

Asylum seekers cannot be reasonably expected to be aware that their obligation under Norwegian domestic law is to raise an asylum claim to the first border patrol officer that stops them, or that they must provide a falsified passport simultaneously with an explanation that the passport is falsified. An asylum seeker may have good reasons for heading for a larger city to apply for asylum, for example due to fears of rejection at the border, or for the purposes of securing information about the asylum procedure. The requirements are too strict also given the circumstances that often surround the flight of asylum seekers: An asylum seeker may be affected by exhaustion after a long and dangerous journey, serious physical and psychological problems, or lack of comprehension of the language if no interpreter is present.

### 3.4.3 Implications of penalisation

Penalisation of asylum seekers for illegal entry or presence has serious negative consequences – both for the penalised individual and the public interest. In cases where an asylum seeker is eventually granted refugee status, the criminal conviction may negatively impact his or her future employment opportunities and otherwise complicate social integration. Imprisonment of an already traumatised asylum seeker can negatively impact his or her physical and mental health. A criminal conviction for use of falsified documents may negatively influence the credibility assessment of the asylum claim. It may also result in expulsion and a re-entry ban to Norway and Schengen.<sup>412</sup> This may subsequently become a hindrance to a future application for family reunification.

Furthermore, penalisation of asylum seekers for illegal entry or presence can hardly be considered a sensible use of public resources, especially when it leads to detention. Involvement of lawyers, prosecutors and judges involves high financial costs; cases clog court dockets; and prisons are not filled with criminals but asylum seekers, who are only rarely able to reach a country of refuge in a regular manner.

### 3.4.4 Practice in the UK, Denmark and Finland

In the United Kingdom, the *Adimi* case led to an amendment of domestic legislation and direct incorporation of Article 31 in the Immigration and Asylum Act.<sup>413</sup> As a result, ‘presumptive refugees’ who

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<sup>411</sup> TMOSS-2012-104288, 9.7.2012 (unofficial translation).

<sup>412</sup> The actual extent to which foreigners are expelled due to illegal entry or presence is unknown. The Directorate of Immigration does not maintain statistics on the frequency of expulsion disaggregated by breaches of specific penal provisions.

<sup>413</sup> Vladislava Stoyanova, *Smuggling of Asylum seekers and Criminal Justice*, Working paper no. 5, Refugee Law Initiative, June 2012, p. 9.

apply in good faith are exempted from penalisation. An asylum seeker is presumed to be a refugee if he claims to be one, and the burden of proving otherwise rests on the prosecution. This approach is not without problems. In a criminal case, the prosecution will attempt to prove that an asylum seeker is not a refugee, a task which should be accorded to the immigration authorities. The asylum seeker's defence is that he has fled directly from a place where his life or freedom was threatened in the sense of article 1 – in effect a determination of refugee status. This approach raises several problems in practice, including submission of evidence before the asylum procedure is initiated, issues of self-incrimination, as well as shifting standards and burden of proof.<sup>414</sup>

In Denmark, an asylum seeker will not be penalised until the assessment of his or her asylum claim by the immigration authorities is completed. Asylum seekers who are granted refugee status are subsequently exempted from penalisation. This practice has been suggested in the guidelines issued by the Danish Director of Public Prosecutions.<sup>415</sup> The instructions regarding interpretation of the terms 'coming directly' and 'without delay' are less strict than those suggested by his Norwegian counterpart. In particular, there is no requirement to arrive to Denmark as the 'first safe country' or to ask for asylum immediately at the border control. If a falsified passport is presented, the authorities do not require the asylum seeker to confess that the passport is falsified simultaneously while handing it over. Instead, the guidelines simply suggest that authorities check the plane tickets for the date of arrival.

Only asylum seekers who are determined to be convention refugees are exempted from penalisation. Those who are granted a subsidiary form of protection are not exempted.<sup>416</sup> The Danish Supreme Court has accepted this practice.<sup>417</sup> The case concerned an unaccompanied minor who was not granted refugee status but was nevertheless allowed to stay on humanitarian grounds. The fact that the individual was an unaccompanied minor constituted mitigating circumstances. As a result of this fact, the court exempted the individual from penalisation.

In Finland, a recent Supreme Court decision can be considered as best practice, setting a precedent for a non-restrictive interpretation of Article 31 (1) of the Refugee Convention. The defendant, an Afghan asylum seeker, had arrived in Finland after traveling through four other countries. After six days in Finland he attempted to continue his flight to Canada and possibly to the UK, but he was stopped at the border. First, the Court considered his passage to fall within the meaning of 'coming directly'. Second, the fact that he had not applied for asylum during the six days he spent in Finland did not preclude his application from being considered as presented 'without delay'. Third, he was considered to have 'good cause' to leave Finland, since he had a reasonable fear of persecution for leaving Afghanistan.<sup>418</sup>

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414 Ibid, pp. 20-21. See also: *R v. Asfaw*, [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), 21 May 2008, para 26.

415 Meddelelse nr. 9/2005 Rettet juni 2010, J.nr. RA-2005-609-0003, available at: <http://www.krim.dk/undersider/straffesager/strafferet/285-287-tyveri-berigelse-mv/rigsadvokatmeddelelse-straftaastande-straffelov-juni-2010.pdf>

416 As the Norwegian Immigration Act affords the same rights to both types of refugees, this approach should not be followed in Norway.

417 Case number 179/2011 (1. afdeling), 3 February 2012, available at: <http://www.domstol.dk/hojesteret/nyheder/Afgorelser/Documents/179-2011.pdf>

418 The information on Finland is based on an English summary of the decision received by e-mail from UNHCR. The case is available in Finish at <http://www.finlex.fi/fi/oikeus/kko/kko/2013/20130021>

### 3.4.5 Summary

Asylum seekers who enter Norway in an irregular manner are often penalised for illegal entry or presence with fines or imprisonment. This practice violates Article 31 (1) of the Refugee Convention, which, subject to certain requirements, exempts asylum seekers from such penalisation. The reasons behind the practice are twofold. First, the relevant authorities are not sufficiently aware of the international obligation. Second, the existing guidelines on this subject provide interpretation of the provision without sufficient regard to the customary rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties. The practice adversely affects the right to seek asylum and unnecessarily complicates subsequent integration of asylum seekers into society.

## 3.5 Access to asylum procedure from detention

Access to asylum procedure is not complicated by any time limits or unnecessary obstacles. Late applications are processed according to the standard rules. Nevertheless, a late application may negatively affect credibility of the asylum claim. Applications for asylum and any additional documentation can be sent by post, handed to a legal representative, or simply passed to the personnel of the holding centre. Furthermore, telephone calls with a lawyer or relevant organisations are not limited and are free of charge.

Detainees placed in the holding centre for foreign nationals have a good connection with the outside world. They are entitled to receive visitors, make telephone calls and receive and send mail.<sup>419</sup> Mobile phones are not allowed, and access to internet or e-mail is not available, despite initial plans to provide it. This can be compared to Sweden, where detainees have access to the internet in a library, which they may visit at any time.<sup>420</sup>

An information brochure distributed in the detention centre does not contain any mention about the asylum procedure. On the positive side, there is contact information for organisations providing assistance with asylum issues, such as NOAS and the UNHCR. Common areas in the detention centre display information posters about the services provided by the Red Cross, the Salvation Army and the holding centre's supervisory board. During our visit in November 2013, the management of the facility encouraged NOAS to inform about its services in a similar way.

Pursuant to the Directive on Trandum Detention Centre, civil society organisations and other organs "shall have the possibility to visit the holding centre".<sup>421</sup> All visits are in practice subject to prior authorisation. In NOAS experience, the management of the detention centre has been very forthcoming with facilitating such *ad hoc* visits. However, except the Norwegian Red Cross, no other organisation has a regular presence at the detention centre.<sup>422</sup>

A preliminary enquiry by NOAS about the possibility of establishing a regularised presence at the detention centre has been met with resistance. In particular, reluctance has been expressed by the National Police Immigration Service (PU), a body responsible for administration of the detention centre as well as carrying out deportations. The reluctance seems to stem from the fear that interfer-

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419 Art. 107 (3), Norwegian Immigration Act (utlendingsloven).

420 Asylum Information Database, *National Country Report: Sweden*, May 2013, p. 43.

421 Art. 18 a, Directive on Trandum Detention Centre (utlendingsinternatforskriften).

422 After several years of negotiation, the Norwegian Red Cross renewed a formalised regular presence in 2013. The scope of their responsibilities at the detention centre does not involve legal assistance with asylum claims.

ence by NOAS in individual asylum cases could negatively affect the ability of the authorities to carry out deportations in an effective manner. In NOAS opinion, such fears are unfounded.<sup>423</sup>

In Sweden, by contrast, NOAS has observed that a primary concern of the authorities responsible for administration of detention centres is the prevention of *refoulement*.<sup>424</sup> The authorities responsible for administration of detention centres and representatives of the civil society dealing with asylum cases reported a high degree of mutual cooperation. A possible explanation of the differing attitudes in Norway and Sweden may lie in differences between organisational structures and division of responsibilities. First, the responsibility for administering detention centres in Sweden rests with the Swedish Migration Board, not the police. Second, the responsibilities for administering detention centres and carrying out deportations are divided between two separate institutions, the Swedish Police being responsible for the latter. Efforts of the Migration Board thus do not come into conflict with the efforts of the civil society, as both share similar aims.

### 3.5.1 Summary

Access to asylum procedure from detention is not complicated by any time limits, special rules or unnecessary restrictions. However, detainees are not automatically informed about the procedure.

Potential asylum seekers must seek relevant information about the asylum procedure on their own initiative. This is facilitated in a number of ways: contact details for relevant organisations are stated in a brochure distributed within the facility, and phone calls to lawyers or civil society organisations are unrestricted and free of charge.

Civil society organisations may visit the detention centre subject to prior authorisation. The management of the detention centre has been very forthcoming with facilitating *ad hoc* visits.

The degree of regular cooperation between the authorities responsible for administration of the detention centre and the civil society is rather low. This may stem from a variety of factors, including from the fact that responsibilities for administration of the detention centre and for carrying out deportations are both assigned to a single institution.

## 3.6 Safeguards against arbitrary detention

This Subsection analyses legal safeguards against arbitrary detention guaranteed under Norwegian law. The structure again closely follows the international legal framework set out in the previous Section of the report.

### 3.6.1 Permissible grounds

Article 106 (1) of the Norwegian Immigration Act contains a number of provisions that allow administrative arrest and detention of a foreigner in a number of contexts. A foreigner may be detained if there are doubts about his or her identity, for the purpose of deportation where there is a risk of absconding, for crime prevention purposes, and in national security cases. The provision was amended

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423 Intervention in asylum cases by NOAS has led to a reversal of the decision in about 40% of cases in the last two years. See: <http://www.noas.no/noas-far-gjennomslag/>

424 This observation is based on a visit by NOAS of a detention facility in Sweden and consultations with the responsible authorities from the Swedish Migration Board.

in March 2012,<sup>425</sup> expanding the number of permissible grounds from three to seven. In addition, evidence requirements under the first two grounds were revised.

Under paragraph (a), a foreign national may be arrested and detained where he or she “is not cooperating on clarifying his or her identity [...] or there are specific grounds for suspecting that the foreign national has given a false identity.” The standard of proof contained in the expression ‘specific grounds for suspecting’ is not particularly clear, raising potential issues in regard to the principle of legal certainty. What is clear is that simply not possessing ID documents does not in itself constitute non-cooperation.<sup>426</sup>

Under paragraph (b), a foreign national may be arrested and detained where “there are specific grounds for suspecting that the foreign national will evade the implementation of an administrative decision entailing that the foreign national is obliged to leave the realm.” Similarly as under the previous paragraph, the standard of proof contained in the expression ‘specific grounds for suspecting’ is not very clear. However, in this case there is further guidance as to the way the assessment must be performed, contained under a separate provision, Article 106 a. Both the standard of proof and the assessment of the risk of absconding are discussed further below under the section dealing with the principle of legal certainty.

Under paragraph (c), a foreign national may be arrested and detained where he or she “fails to comply with the obligation to report or an order to stay in a specific place”. This provision allows arrest and detention of a foreigner who fails to comply with a previously issued restriction on his or her freedom of movement.<sup>427</sup>

Under paragraph (d), a foreign national may be arrested and detained where he or she “has been expelled on account of being sentenced to a penalty and [...] there is a risk, in view of the foreign national’s personal circumstances, that the foreign national will commit new criminal offences.” This new provision has been included with the intent of crime prevention. It applies to persons who are expelled<sup>428</sup> and against whom measures have been taken with a view to deportation. This issue is discussed separately below.

Under paragraph (e), a foreign national may be arrested and detained where “the foreign national does not do what is necessary to fulfil his or her obligation to procure a valid travel document, and the purpose is to bring the foreign national to the foreign service mission of the country concerned so that he or she can be issued a travel document.” This is the only paragraph where the wording has remained identical after the Article’s amendment. The paragraph only applies in the context of deportation, which cannot be practically carried out if the individual does not have a travel document.<sup>429</sup> Its purpose is thus to enable the police to justify a short-term detention of a foreigner for the purpose of bringing the individual to his or her embassy.

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425 The change has been proposed by the Ministry of Justice and Public Security in Prop. 138 L (2010–2011).

426 Ot.prp. nr. 75(2006-2007), p. 447.

427 See Art. 105, Norwegian Immigration Act (utlendingsloven).

428 Article 66 (1) (c) of the Norwegian Immigration Act (utlendingsloven) allows expulsion of those who “received a penalty or special sanction for an offence which is punishable by imprisonment for a term exceeding three months, or has on several occasions in the course of the last three years received prison sentences”.

429 See Art. 90 (7), Norwegian Immigration Act (utlendingsloven).



Under paragraph (f), a foreign national may be arrested and detained where he or she “is in transit in a Norwegian airport, with a view to removal”. This provision has been added in light of the obligations following from the EU Transit Directive,<sup>430</sup> which allows a state to request a Schengen country for transit by air when carrying out a return of a third-country national.<sup>431</sup>

Under paragraph (g), a foreign national may be arrested and detained where he or she “poses a threat to fundamental national interests and this has been determined in an administrative decision in the immigration case or in instructions issued by the Ministry, and measures are adopted in respect of the foreign national with a view to removal.” The Ministry of Justice proposed this provision with the intention to cover national security cases of a particularly serious nature.<sup>432</sup> In the view of the Ministry, such cases could be considered as being outside the scope of the EU Returns Directive, pursuant to the exception clause in Article 72 TFEU. As a result, detention under this ground is subject to a lower protective standard. Detention does not need to be extended by a Court four weeks at a time, and there is no limit on the maximum duration of detention.

### 3.6.1.1 Crime prevention

Paragraph (d) has been included to help prevent income-generating crime by foreigners, especially crime related to the possession and sale of drugs.<sup>433</sup> The provision does not necessitate an individualized assessment of the risk of absconding<sup>434</sup> and requires instead assessment of the risk of commission of future crimes.

Inclusion of the provision goes against the recommendation by the European Union Agency for Fundamental Rights that domestic immigration laws should not regulate detention based on crime prevention.<sup>435</sup>

The implication is creation of two different standards related to the power to arrest and detain in the context of preventing crime. One standard is for non-nationals with an irregular immigration status, whose detention may be based on a mere risk of commission of future crimes. Another is for Norwegian nationals and those with a regular immigration status, who fully benefit from the protective standard under the Criminal Procedure Act. Here, arrest and detention cannot be based on the ground of a mere risk of commission of future crimes.<sup>436</sup> Indeed, as eloquently stated by the ECtHR, such an approach would “lead to conclusions repugnant to the fundamental principles of the Convention.”<sup>437</sup>

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430 European Union: Council of the European Union, *Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air*, 25 November 2003, 2003/110/EC. Hereafter referred to as ‘EU Transit Directive’.

431 Art. 3, EU Transit Directive.

432 Prop. 138 L (2010–2011), p. 52

Following a recent amendment to the Immigration Act (effective 1.1.2014), paragraph (g) has been repealed and the provisions covering national security cases have been moved under a separate chapter in the law. Although this report does not cover the changes, the substance of the relevant rules referred to in the report has largely remained the same. See: prop. 141 (2012-2013)..

433 *Ibid*, p. 31.

434 This does not go against the EU Returns Directive, as Article 2 (b) of the Directive allows states to exclude from its scope those who are “subject to return as a criminal law sanction or as a consequence of a criminal law sanction”.

435 European Union: European Agency for Fundamental Rights, *Detention of third country nationals in return procedures*, 30 November 2010, p. 20.

436 See Chapter 14 of the Norwegian Criminal Procedure Act (straffeprosessloven).

437 *Lawless v Ireland*, ECtHR, 1961, para. 14 of ‘The Law’; for a brief summary of this case see page 37 of the report.

### 3.6.1.2 Summary

In the context of immigration control, a foreigner may be administratively detained in a number of situations, including where there are doubts about his or her identity, for the purpose of deportation where there is a risk of absconding, in national security cases, and for crime prevention purposes. Inclusion of the last ground leads to the application of different standards based on the legal status of the person in the country. This goes against the recommendation by the European Union Agency for Fundamental Rights that domestic immigration laws should not regulate detention based on crime prevention.

### 3.6.2 The principle of legal certainty

The principle of legal certainty in relation to detention is guaranteed under Article 99 of the Norwegian constitution, which states that, “[n]o one may be taken into custody except in the cases determined by law and in the manner prescribed by law”. In addition to the requirement that detention must always be based on law, the constitutional provision sets up a requirement pertaining to the quality of the law.<sup>438</sup> This reflects the position of the ECtHR, which has reiterated on numerous occasions that law must be “sufficiently accessible and precise, in order to avoid all risk of arbitrariness.”<sup>439</sup>

This Section discusses three main issues: (i.) uncertainty in the standard of proof related to detention in situations where there are doubts about a foreigner’s identity and for the purpose of deportation where there is a risk the individual will abscond; (ii.) uncertainty in assessing the risk of absconding; and (iii.) uncertainty in regard to applicable procedural safeguards.

#### 3.6.2.1 Uncertainty in the standard of proof

The police may arrest and detain irregular immigrants by relying on less evidence than had been previously required. Following the legislative change in 2012, the new wording of Article 106 (1) (a) and (b) no longer requires preponderance of the evidence (*sannsynlighetsovervekt*). The revision aimed at increasing the effectiveness of ‘returns politics’ (*returpolitikk*) and of immigration control generally.<sup>440</sup> The government relied mainly on the argument that other countries within the region, particularly Sweden and Finland, had a lower evidence threshold than Norway.<sup>441</sup>

Under paragraph (a) instead of ‘specific grounds for suspecting’ (*konkrete holdepunkter for å anta*), the evidence requirement was previously worded under Norwegian legislation as ‘reasonable grounds for suspicion’ (*skjellig grunn til å mistenke*). The wording of paragraph (a) thus used to correspond to the wording of Article 171 of the Criminal Procedure Act, which regulates resort to arrest and detention under criminal law.<sup>442</sup>

Similarly, under paragraph (b), instead of ‘specific grounds for suspecting’ (*konkrete holdepunkter for å anta*), the evidence requirement was previously worded ‘it is most probable’ (*det er mest sannsynlig*).

Application of the two provisions previously entailed placing the probability of the identity being false, or of the chance of absconding, on an imagined scale ranging from 0% to 100%.<sup>443</sup> Deten-

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438 NOU 2004: 6, pp. 42-43; NOU 2009: 15, pp. 64-65.

439 *Amuur v. France*, ECtHR, 1996, para. 50; *Dougoz v. Greece*, ECtHR, 2001, para 55; *Conka v. Belgium*, ECtHR, 2002, para. 39.

440 Prop. 138 L (2010–2011), pp. 25-26.

441 *Ibid.*, p. 23.

442 The requirement of ‘reasonable grounds for suspicion’ in Article 171 of the Norwegian Criminal Procedure Act (*straffeprosessloven*) is only a supplementary condition and does not in itself allow resort to arrest and detention.

443 Prop. 138 L (2010–2011), p. 26.

tion would be justified only if the probability was more than 50%. In practice, however, specific cases cannot be easily placed on a probability scale. In relation to paragraph (a), the National Police Immigration Service (PU) has referred to a number of scenarios where the situation was not easy to assess without further information.<sup>444</sup> Things were even more complicated in relation to paragraph (b), as the assessment here implied forecasting future conduct. The current evidence requirement avoids such issues. The new wording ‘specific grounds for suspecting’ shifts the focus from probability of a current or future situation to the quality of available evidence.

A question may be asked, especially in relation to a risk of absconding, whether an improbable risk may now lead to detention. The Ministry of Justice and Public Security has recently answered to the negative: “a possible or improbable risk of absconding will not be sufficient for arrest and detention.”<sup>445</sup> This conclusion was reached in the context of assessing the current domestic law against the recast Dublin III Regulation, which requires ‘a significant risk of absconding’.<sup>446</sup>

In January 2014, the Dublin III Regulation entered into force and became domestic law through an amendment to the Immigration Act.<sup>447</sup> As a result, paragraph (b) under Article 106 now contains a second sentence, which only applies to Dublin cases. It contains a distinctively worded threshold whereby the risk of absconding in Dublin cases must be ‘significant’ (vesentlig).

An important question is whether the terms ‘significant risk’ and ‘specific grounds for suspecting’ imply any differences as to the standard of proof. According to the Ministry, it is clear that the term ‘significant risk’ does not imply the requirement of the preponderance of evidence. The Ministry has further maintained that practical implications of the terms ‘significant risk’ and ‘specific grounds for suspecting’ are the same, the latter expression being a closer specification of the former.<sup>448</sup> The reason for adding the term ‘significant risk’ into the second sentence of paragraph (b) was to ensure compliance with the Dublin III Regulation once the CJEU and other states further develop practice as to its correct interpretation.<sup>449</sup>

The weakness of the standard of proof, as currently (un)specified, lies in the fact that a lot is left to the subjective assessment of the police. The amount and quality of evidence that may justify detention is not clearly prescribed by law. There is not much guidance beyond the specification that evidence must be concrete and that mere assertions do not suffice. The lack of specification or further guidance may render judicial control ineffective in practice. It remains to be assessed how much evidence domestic courts actually require for authorising detention requests. The risk that authorisation of detention may develop into a mere formality is real, as evidenced by the current situation in Denmark.<sup>450</sup>

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444 In the first scenario, a foreigner gives certain information about his identity in one country, and then different information in Norway; in a second scenario, a foreigner receives mail addressed to a different name; in a third scenario, a foreigner receives a family phone call from a different country than he or she had indicated as a home country. See: Prop. 138 L (2010–2011), p. 25.

445 *Høring om forslag til endringer i utlendingsloven og utlendingsforskriften – gjennomføring av Dublin-forordningen i norsk rett*, 12/8109 – DHA, 12.07.2013, p. 15, [unofficial translation].

446 Art. 28 (2), EU Dublin III Regulation; cf. EU Returns Directive Art. 15 (1) (a), which only requires ‘a risk of absconding’.

447 *Lov 17. desember 2013 nr. 132 om endringer i utlendingsloven (gjennomføring av Dublin III-forordningen)*.

448 Prop. 26 L(2013–2014), pp. 28–29.

449 *Ibid.*, p. 35.

450 UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: addendum: mission to Denmark*, 18 February 2009, A/HRC/10/44/Add.2, para. 48.

### 3.6.2.2 Uncertainty in assessing the risk of absconding

Pursuant to Article 106 a of the Immigration Act, the risk of absconding must be assessed “on a case-by-case basis”. Accordingly, “an overall assessment must be carried out” in which “weight may be given” to a number of factors included in a fairly long but non-exhaustive list set out by the provision.<sup>451</sup>

The provision does not strictly require that the risk of absconding be based on one or more of the listed factors. Instead, the provision simply aims to regulate the process of establishing whether the risk of absconding exists or not. The fact that the list is non-exhaustive allows for inclusion of arguments unrelated to the factors included on the list – both for and against the existence of the risk.

The above point can be exemplified by a widely publicised Maria Amelie case, which was adjudicated by the Supreme Court of Norway.<sup>452</sup> The case concerned Maria Amelie, who has received considerable media attention after publishing a book about her experience of living illegally in Norway for several years. One of the main issues was whether the police had the right to detain her with a view to deportation. The Supreme Court upheld the reasoning of the appellate court, where one of the key arguments was that Maria Amelie was a publicly known person. Given the media attention, it was unlikely that she would go into hiding. Based on this factor, not listed under Article 106 a, the risk of absconding was held to be insufficient to justify detention.

The fact that the provision does not strictly require establishing the existence of the risk of absconding pursuant to an exhaustive list of factors is unfortunate. The list of relevant factors should adhere to the ‘objective criteria defined by law’ standard, which is required under the EU Returns Directive.<sup>453</sup>

Problematic is also the second paragraph of Article 106 a, which states that in the assessment of the risk of absconding “weight may also be given to general experience relating to evasion by foreign nationals.” This has been intended to allow the police to include in their assessment the experience with foreigners of the same nationality or foreigners in similar situation.<sup>454</sup> Whether this fits the notion of ‘objective criteria’ is open to doubt.

The Ministry of Justice and Public Security stressed in the proposal of the legislative enactment that each assessment must be specifically related to the individual foreigner and that “there is no contradiction between emphasizing general experience and considering each case individually.”<sup>455</sup> Arguably, such contradiction would nevertheless arise if nationality or social background were to be a deciding factor leading to detention. Furthermore, such practice would be particularly difficult to justify in light of the prohibition of discrimination under Article 14 ECHR.<sup>456</sup>

### 3.6.2.3 Uncertainty in applicable procedural safeguards

Article 106 (3) of the Immigration Act simply states that Articles 174 to 191 of the Criminal Procedure

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451 These include prior evasion of deportation; explicit refusal to leave; prior sentence to a penalty or a sanction; demonstrated lack of cooperation in establishing one’s identity; avoidance or complicating preparations for deportation; submittal of false information in connection with application for a permit; failure to give notification of a change of abode in cases where this is required; causing disturbances against peace at a reception centre; or posing a threat to fundamental national interests.

452 HR-2011-141-U - Rt-2011-41.

453 Art. 3 (7), EU Returns Directive.

454 Prop. 138 L (2010–2011), p. 28.

455 Ibid, [unofficial translation].

456 Bente Puntervold Bø, ‘Fengsling av utlendinger: den nye utlendingsloven og rettsikkerhetsprinsipper’ in Katja Franko Aas, Nicolay B. Johansen, Thomas Ugelvik (eds.), *Krimigrasjon? Den nye kontrollen av de fremmede*, Universitetsforlaget, 2013, pp. 152-155.

Act shall apply “insofar as appropriate.” This causes various kinds of difficulties with interpretation. Since Article 106 of the Immigration Act already incorporates some procedural safeguards, there are issues in regard to the extent of applicability of the corresponding safeguards under the Criminal Procedure Act. Furthermore, difficulties of interpretation also arise in cases where there is no overlap. Namely, it is not always clear from the specific wording of the provisions under the Criminal Procedure Act to what extent they are applicable in the context of administrative detention. Problematic is also the fact that certain provisions within the range 174-191 refer to further provisions outside this range. As emphasised in a recent study commissioned by the Ministry of Justice and Public Security, at minimum the legislature must specify which paragraphs and sentences are applicable.<sup>457</sup> The study details all necessary changes to the Criminal Procedure Act. However, these have so far not been adopted. The lack of further specification creates a number of interrelated reasons for concern.

The resulting standard lacks a sufficient level of clarity and precision, as it may not always be clear whether certain safeguards in the Criminal Procedure Act apply to administrative detention, and if so to what extent. The wording of a number of procedural guarantees covered by the Criminal Procedure Act does not fit well with the context of administrative detention. The wording of some provisions seemingly excludes the applicability of a basic safeguard entirely. An example of this is the wording of the right to be informed of the reasons for arrest contained in Article 177, which only grants a detainee the right to be informed “of the offence of which he is suspected”. Yet, arrest and detention pursuant to Article 106 of the Immigration Act does not require such suspicion.

Furthermore, there is a tendency in practice to process the cases of those detained under immigration law in a manner that portrays, without basis, asylum seekers and other irregular immigrants as criminals. Where an immigrant is administratively detained under Article 106 of the Immigration Act, the detention is in practice registered by the police in the penal registry and the file is thereafter submitted to a court, where it gets categorized as a criminal case. The immigrant facing the court is then often erroneously referred to as a ‘suspect’ or ‘accused’.<sup>458</sup>

Annika Suominen suggests that a different terminology in Article 106 of the Immigration Act would make the differentiation between immigration cases and criminal cases clearer.<sup>459</sup> Currently, the provision refers to ‘arrest’ (pågrepelse) and ‘imprisonment’ (fengsling), which makes it difficult to identify the proper procedural rules in the Criminal Procedure Act.

Laws in Denmark, Sweden and Finland define procedural safeguards applicable to immigration detention in a clearer way than Norwegian law. In Denmark, immigration legislation related to detention<sup>460</sup> also refers to legislation on criminal procedure,<sup>461</sup> but the reference is restricted to rules on remand in custody (varetægtsfængsling). In Sweden, all provisions on the use of coercive measures in immigration cases are contained in legislation on immigration.<sup>462</sup> Administrative detention is referred to as ‘förvar’ and detention under criminal law as ‘häktning’. The same solution has been adopted in Finland.<sup>463</sup>

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457 Erling Johannes Husabø and Annika Elisabet Suominen, *Forholdet mellom straffeprosesslovens og utlendingslovens regler om fengsling og andre tvangsmidler*, En utredning avgitt til Justisdepartementet, 02.03.2011, p. 13.

458 *Ibid.*, p. 10.

459 Annika Suominen ‘Forholdet mellom utlendingslovens og straffeprosesslovens regler om fengsling’, *Krimigrasjon? Den nye kontrollen av de fremmede*, Katja Franko Aas, Nicolay B. Johansen, Thomas Ugelvik (eds.), Universitetsforlaget, 2013.

460 Arts. 35-37, Danish Aliens Act (udlændingeloven).

461 Arts. 762-779, Danish Administration of Justice Act (retsplejeloven).

462 Chapter 10, Swedish Aliens Act (utlänningslag).

463 Chapter 7, Finnish Aliens Act (ulkomaalaislaki).

#### 3.6.2.4 Summary

The actual requirements of the new standard of proof implied by Article 106 (1) (a) and (b) of the Immigration Act are unclear and subjective. What will constitute ‘specific grounds for suspecting’ that an individual has provided a false identity or that he will evade deportation in a specific case is largely left to the subjective evaluation by the police. This may in practice undermine the effectiveness of judicial review.

The process of establishing whether the risk of absconding exists in a particular case is regulated under the Immigration Act, Article 106 a. The provision does not strictly require that the risk of absconding be based on one or more of the listed factors. The list is non-exhaustive and “weight may also be given to general experience relating to evasion by foreign nationals.”

Immigration detention is not subject to a clear set of procedural rules. Administrative detention of irregular immigrants justified under Article 106 of the Norwegian Immigration Act is subject to application of Articles 174-191 of the Criminal Procedure Act “insofar as appropriate”. Unfortunately, the wording of the provisions in the Criminal Procedure Act does not always make it clear whether certain safeguards apply to administrative detention, and if so to what extent.

#### 3.6.3 The principles of necessity, proportionality and reasonableness

Article 99 (1) of the Norwegian Immigration Act provides that a coercive measure may only be applied where there is “sufficient reason to do so.” Furthermore, the provision specifies that a coercive measure may not be applied where doing so would constitute “a disproportionate intervention in light of the nature of the case and other factors.” Identically worded provision is contained in the Criminal Procedure Act.<sup>464</sup>

The second paragraph of the provision further specifies that use of coercive measures is permitted only “where an administrative decision has been made entailing that a foreign national must leave the realm, and during the processing of a case which may lead to such an administrative decision.”

The Immigration Act does not contain any provision that would explicitly require that deportation proceedings be in progress and in compliance with the principle of due diligence in order for detention to be justified.<sup>465</sup> The requirement that there must be “a real prospect” that the deportation can be carried out successfully<sup>466</sup> is also not explicitly set out. Nevertheless, domestic courts have established relevant case-law on these issues.<sup>467</sup>

According to the preparatory works to Article 99 of the Immigration Act, whether a coercive measure constitutes ‘a disproportionate intervention’ must be determined on a case-by-case basis.<sup>468</sup> Weight may be given to factors connected to the specific person, such as age, illness, or whether the person is responsible for the provision of care (e.g., to his or her child). Weight may also be given to the circumstances of the case, including their scope and seriousness.

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464 Art. 170 a, Norwegian Criminal Procedure Act (straffeprosessloven).

465 This requirement follows from the jurisprudence of the ECtHR, see, e.g., *Chahal v. United Kingdom*, ECtHR, 1996, para. 113; *Saadi v. United Kingdom*, ECtHR, 2008, para. 77.

466 See Art. 15 (4), EU Returns Directive; see also *Kadzoev*, CJEU, 2009, para. 65.

467 See, e.g., LB-10-198205.

468 Ot.prp. nr. 75(2006–2007), p. 345.

The principle of necessity is further reflected in Article 106 (2) of the Immigration Act, which provides that, “[n]o decision to arrest or remand in custody shall be made if an obligation to report or an order to stay in a specified place will be sufficient”. Consequently, each decision to arrest or detain must be subject to an individual assessment of whether the stated aim could not be achieved by an alternative measure.

It remains a question, however, whether the required assessments are actually carried out in practice and whether alternative measures are actively used.<sup>469</sup> Experience from neighbouring countries suggests that this may not necessarily be the case.

In Sweden, a recent analysis by the Swedish Red Cross of 953 decisions and rulings found that “in the absolute majority of the decisions, no individual assessment is made about whether the mildest measure for the individual, i.e. supervision, can be employed instead of detention.”<sup>470</sup> A similar study should be commissioned in Norway.

In Denmark, a study by Amnesty International’s Doctors Group has also revealed issues with application of the principle of proportionality, as many asylum seekers held detained in Ellebæk prison had previously been tortured and suffered from post-traumatic stress disorder.<sup>471</sup>

### 3.6.3.1 Summary

Article 99 (1) of the Immigration Act permits resort to detention only in cases where there is “sufficient reason to do so” and prohibits the measure where it would constitute “a disproportionate intervention in light of the nature of the case and other factors.” The provision has been interpreted in line with the principles of necessity, proportionality and reasonableness required under international law. However, whether the required assessments are actually carried out in practice is unclear. Experience from neighbouring countries suggests that this may not necessarily be the case.

The Immigration Act does not set out the ECHR requirements that deportation proceedings be in progress and in compliance with the principle of due diligence. The requirement that there must be a real prospect that the deportation can be carried out successfully is also not explicitly spelled out. Domestic courts have nevertheless developed practice in line with the ECtHR case-law.

### 3.6.4 Permissible duration

After the recent amendment, Article 106 of the Immigration Act now contains two explicit limits on the maximum allowed period of detention. It sets a general limit of 12 weeks and an exceptional limit of 18 months.

The general limit of 12 weeks may be exceeded in exceptional cases where “the foreign national does not cooperate on implementing the removal or there are delays in procuring the necessary documents from the authorities of another country”.<sup>472</sup> A longer period can also be justified in national security cases even if none of these two conditions are fulfilled.

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469 Statistics on the frequency of use of alternatives to detention are not yet complete; see Section 3.2 on alternatives to detention for further details.

470 Svenska Röda Korset, *Förvar under lupp: En studie av rättssäkerheten för asylsökande i förvar*, 2012. See English translation of the summary of the findings: Swedish Red Cross, *Detention Under Scrutiny: A study of the due process for detained asylum seekers*, 2012, p. 1, available at: [http://www.redcross.se/PageFiles/5738/Forvar\\_under\\_lupp\\_enligshFINAL%5B1%5D.pdf](http://www.redcross.se/PageFiles/5738/Forvar_under_lupp_enligshFINAL%5B1%5D.pdf)

471 Amnesty International, *Frihedsberøvede asylansøgere i Ellebæk: Traumatiseringsgrad og helbredstilstand blandt frihedsberøvede asylansøgere i Institutionen Ellebæk*, 2013.

472 Art. 106 (4), Norwegian Immigration Act (utlendingsloven).

The exceptional limit of 18 months corresponds to the upper limit prescribed by the EU Returns Directive. However, it should be noted that the exceptional limit is shorter in several other European countries. For example, in Belgium it is 8 months, in Austria 10 months, and in Poland and Slovenia it is 12 months.<sup>473</sup>

The exceptional limit of 18 months set out by the Norwegian Immigration Act does not cover all cases. Excluded are national security cases and cases where the foreign national has been expelled due to being sentenced to a penalty.<sup>474</sup> In respect to the former type of cases, the Ministry of Justice and Public Security has argued that the EU Returns Directive is not applicable in serious national security cases, referring to Article 72 TFEU.<sup>475</sup> In respect to the latter type of cases, application of the EU Returns Directive is excludable pursuant to Article 2 (2) (b) of the Directive.

### 3.6.4.1 Summary

Article 106 of the Immigration Act sets the maximum period of detention to 18 months. This period is permitted if “the foreign national does not cooperate on implementing the removal or there are delays in procuring the necessary documents from the authorities of another country”. The maximum period does not cover national security cases and cases where the foreign national has been expelled due to being sentenced to a penalty.

### 3.6.5 Procedural safeguards

This Section examines procedural safeguards afforded to foreigners detained for the purposes of immigration control. The structure follows the international legal framework set out in the previous part of the report, focusing on the specific implementation under Norwegian law of the right to be informed of the reasons for arrest, the right to have access to legal assistance, and the right to challenge the legality of detention at a court.

#### 3.6.5.1 Reasons for arrest

The Norwegian Immigration Act does not itself contain the right to be informed of the reasons for arrest. Instead, Article 106 of the Act simply refers to Articles 174-191 of the Criminal Procedure Act, and these shall apply “insofar as appropriate”.

The right to be informed of the reasons for arrest is contained in Article 177 of the Criminal Procedure Act, but the wording is unfortunate. The provision grants to every arrested person the right to be informed “of the offence of which he is suspected”. The wording does not fit the context of immigration detention, since detention pursuant to Article 106 of the Immigration Act does not actually require suspicion of an offence.

A foreigner arrested for the purposes of immigration control must be provided the reasons for arrest in a written form “if there is a written decision for his arrest”. In practice, the arrested individual is often informed about the reasons for arrest by a legal counsel, who is automatically appointed by a court.

Although the use of interpreters is not explicitly required under the provision, their services are in practice used when needed. However, at times an interpreter may not be available.

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473 European Union: European Agency for Fundamental Rights, *Detention of third country nationals in return procedures*, 30 November 2010, p. 33.

474 Defined respectively under paragraph (g) and (d) of Article 106 (1) of the Immigration Act.

475 Prop. 138 L (2010–2011), p. 52.



### 3.6.5.2 Legal assistance

Foreigners detained under Article 106 of the Norwegian Immigration Act are automatically assigned a legal counsel appointed by a court to represent them during the proceedings concerning review of the legality of detention.<sup>476</sup> The same applies to those whose freedom of movement is restricted under Article 105, “unless appointing legal counsel would entail particular inconvenience or waste of time, or the court has no misgivings about not appointing counsel”.<sup>477</sup>

Legal counsel is provided free of charge and without any investigation into the financial well-being of the detainee.<sup>478</sup> Any written and oral communication with legal counsel must be unrestricted.<sup>479</sup>

The actual benefit of free legal representation by an appointed counsel is questionable. In practice, the legal counsel will normally not spend much time studying the case. A legal counsel meets a detainee in person 30 minutes before the hearing, although a court may grant more time upon request when this is needed. The legal counsel may also be unfamiliar with the specific immigration issues relevant to the case.

An asylum seeker may already have an advocate at public expense before he or she is detained. Free legal assistance is provided, for example, to unaccompanied minors when they apply for asylum; to asylum seekers in case they want to appeal rejection of their asylum application or application for protection against *refoulement*; and in certain cases concerning expulsion.<sup>480</sup> For the purposes of review of the legality of detention, a court will normally appoint the advocate to represent the asylum seeker. This is a better alternative, since the advocate will already be familiar with asylum seeker’s situation and have more experience with immigration law, including refugee and asylum law.

### 3.6.5.3 Review of detention

Under Norwegian law the review of the legality of detention by a court is automatic. A foreigner arrested under Article 106 of the Norwegian Immigration Act must be brought before the district court “at the earliest opportunity, and if possible on the day following the arrest”.<sup>481</sup> The decision may be appealed within two weeks.

Detention may be decided for a maximum of four weeks at a time, with the exception of national security cases.<sup>482</sup> Detention of children may be decided for a maximum of two weeks at a time (see Section 3.7 below).

The possibility to extend detention only for a limited period at a time is an important safeguard, unless the review by a court is merely formal. The practice in Denmark has shown that the safeguard becomes ineffective when the court does not scrutinize the requests sufficiently. In 2009, a UN Special Rapporteur expressed concerns over the fact that for the past five years the court did not

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476 Art. 92 (4), Norwegian Immigration Act (utlendingsloven); See also Art. 11 (1), Norwegian Legal Aid Act.

477 Art. 92 (4), Norwegian Immigration Act (utlendingsloven).

478 However, full or partial recovery of the public authorities’ outlay in connection with the legal aid may be requested provided the foreign national has the necessary financial capacity.

479 Art. 186 (1), Norwegian Criminal Procedure Act (straffeprosessloven).

480 Free legal counsel is not provided in certain cases, for example where the expulsion follows as a result of the foreigner being sentenced to a penalty.

481 Art. 106 (3), Norwegian Immigration Act (utlendingsloven).

482 Ibid.

confirm the prolongation of detention when requested by the police only on two occasions.<sup>483</sup> This issue should also be examined in Norway, especially given the recent legislative changes that lowered the standard of proof (see Section 3.6.2.1 above).

The initial decision regarding authorisation of detention always takes place within the premises of a court, with both the detainee and legal counsel physically present at the hearing.

When the police request a court to prolong detention of a detainee, the detainee will also have the right to be present at the hearing.<sup>484</sup> The subsequent hearings take place over a video link, with both the detainee and the legal counsel sitting in a special room inside the detention centre.

In a recent case the Supreme Court of Norway ruled that a detainee does not need to be brought to the initial hearing against his will, “provided that the court finds his presence unnecessary to decide the custody issue.”<sup>485</sup> In a later case related to subsequent reviews of detention, the Court further clarified that the detainee must be informed about the right to be present at the hearing, and his consent to waive it must be unequivocal.<sup>486</sup>

Interpreting during the hearings and translation is regulated under a separate piece of legislation, the Courts of Justice Act.<sup>487</sup> According to Article 135 of the Act, it is the responsibility of the court to either appoint or approve an interpreter. In practice, there are no special precautions to ensure the competence of interpreters. Currently the use of interpreting services in the specialised detention centre is under review.

In regard to translation of decisions, there is no obligation to translate every word. Nevertheless, the main part of decisions is always translated. Competency of translation is guaranteed, as translators must meet certain requirements to be designated as official translators.

#### 3.6.5.4 Summary

The right of a foreigner arrested for immigration control purposes to be informed of the reasons for arrest is contained in the Criminal Procedure Act. The wording of the relevant provision does not fit the context of immigration detention, as it only provides for the right to be informed “of the offence of which he is suspected”. Nevertheless, the unfortunate wording does not seem to have led to any serious problems in practice. Interpreters are frequently used. However, in some cases an interpreter may not be available.

Legal counsel is provided free of charge and without any investigation into the financial well-being of the detainee. An asylum seeker may already have an advocate at public expense before he or she is detained. The advocate will already be familiar with asylum seeker’s situation.

Judicial review of the legality of detention is automatic, normally taking place in first instance within 24 hours. Detention may be extended only for a maximum of four weeks at a time, but this safeguard does not apply to national security cases.

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483 UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: addendum: mission to Denmark*, 18 February 2009, A/HRC/10/44/Add.2, para. 48.

484 Art. 185 (4), Norwegian Criminal Procedure Act (straffeprosessloven).

485 HR-2013-1153-U - Rt-2013-766, 2013-05-31, para. 11, (unofficial translation).

486 HR-2013-2325-U - Rt-2013-1448, 2013-11-06, para. 18.

487 Arts. 135 and 136, Courts of Justice Act (domstolloven).

The detainee has the right to be physically present at the hearing within the premises of a court. Subsequent hearings take place over a video link, with both the detainee and the legal counsel sitting in a special room inside the detention centre.

The responsibility to either appoint or approve an interpreter rests with the court. However, in practice there are no special precautions to ensure competence of interpreters present at the hearings. The main part of written decisions is always translated by officially certified translators.

### 3.7 Detention of children

The Norwegian Immigration Act does not contain special rules on arrest and detention of children. Article 99 of the Act generally prohibits resort to coercive measures where doing so would constitute “a disproportionate intervention in light of the nature of the case and other factors.” The preparatory works clarify that arrest and detention of children is “generally not desirable”.<sup>488</sup> Article 106 of the Immigration Act, regulating arrest and detention in the context of immigration control, contains general rules applicable to both adults and children. The Article refers to a range of rules contained in the Criminal Procedure Act that must be applied “insofar as appropriate”

Arrest of children under 18 years of age is prohibited under Article 174 of the Criminal Procedure Act unless it is “especially necessary” (særlig påkrevd). In practice, arrests are carried out at night only when this is the only option. Furthermore, the police is required to schedule arrest so that unaccompanied minors or families with children have enough time to pack their belongings.<sup>489</sup>

Detention of children is prohibited under Article 184 of the Criminal Procedure Act, unless it is “absolutely necessary” (tvingende nødvendig). The implication is that children may only be detained when no other alternative is possible.<sup>490</sup> The threshold for detention is thus higher than the threshold for arrest.<sup>491</sup>

The Child Welfare Service must be notified when a child under 18 years of age is detained pursuant to Article 183 (3) of the Criminal Procedure Act. The wording of the provision seems to only impose the obligation of notification on the prosecution authorities. This doesn’t fit administrative detention cases, since arrest under Article 106 of the Immigration Act is ordered by the police. Nevertheless, in practice the Immigration Police always notifies the Child Welfare Service.

The Child Welfare Service has the obligation to comment on the need for detention.<sup>492</sup> The Service must always be present at the first court hearing. Presence during subsequent hearings is not required when a court finds that this would be clearly unnecessary. The role of the Child Welfare Service is very limited in immigration detention cases, since children are detained under Immigration Act only for a very limited period, normally not exceeding 24 hours.

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<sup>488</sup> Ot.prp. nr. 75 (2006–2007), pp. 345–346 (unofficial translation).

<sup>489</sup> Meld. St. 27 (2011–2012), p. 89.

<sup>490</sup> Prop. 135 L (2010–2011), p. 171.

<sup>491</sup> The thresholds were identical until 2012.

<sup>492</sup> Arts. 3-5, Child Welfare Act (barnevernloven).

Children who are detained must be brought before a court “at the earliest opportunity, and latest on the day following the arrest.” This absolute wording of Article 183 (2) of the Criminal Procedure Act does not allow any exception, unlike Article 106 (3) of the Immigration Act.

Norwegian courts are only allowed to authorise detention for a limited period at a time. The general rule under Article 106 (3) of the Immigration Act is that detention may not be authorised for more than four weeks. However, the new wording of Article 185 (2) of the Criminal Procedure Act, which was amended in 2012, prescribes that the period must be “as short as possible and not exceed two weeks.” This applies to the first decision to detain as well as to further extensions.<sup>493</sup> Although there may be some doubts as to whether the latter provision applies to administrative detention cases, the National Police Immigration Service has in practice considered this provision to apply.

The official policy of the immigration police has been that children should not be detained for a longer period than 24 hours.<sup>494</sup> A proposal to introduce a formal limit of 48 hours into legislation was dismissed however.<sup>495</sup>

### 3.7.1 Summary

The Immigration Act permits administrative detention of children for immigration control purposes. Children may be arrested only when it is ‘especially necessary’ and detained only when it is ‘absolutely necessary’. In practice, children are normally not detained for a longer period than 24 hours.

When a child is detained, the Child Welfare Service must be notified. The service has the obligation to comment on the need for detention. Since the period of detention is usually very short, its role has in practice been minimal.

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493 Prop. 135 L (2010–2011), p. 171.

494 Meld. St. 27 (2011–2012), p. 89.

495 Ot.prp. nr. 28 (2006–2007), p. 14.