**Questionnaire of the Special Rapporteur on the human rights of migrants: Ending immigration detention of children**

**and seeking adequate reception and care for them**

**Please provide information on any legislation or policy that prohibits or restricts the use of immigration detention of children and their families in your country.**

Borders

The Schengen Borders Code, including the Practical Handbook for Border Guards, does not cover ‘detention’ of children, it only describes how border guards have to treat children when performing checks.

The European Border and Coast Guard (EBCG) Regulation 2019/1896, in Article 80(3) states: “In the performance of its tasks, the EBCG shall take into account the special needs of children, unaccompanied minors, persons with disabilities, victims of trafficking in human beings, persons in need of medical assistance, persons in need of international protection, persons in distress at sea and other persons in a particularly vulnerable situation, and shall address those needs within its mandate. The European Border and Coast Guard shall in all its activities pay particular attention to children’s rights and ensure that the best interests of the child are always respected.

Asylum

The Reception Conditions Directive (2013/33/EU[[1]](#footnote-1)) establishes the rules for the detention of applicants for international protection. According to recital 20 of the Directive, detention should be a measure of last resort and may only be applied after all non- custodial alternative measures to detention have been duly examined. Any alternative measure to detention must respect the fundamental human rights of applicants. Article 11 contains rules concerning the detention of vulnerable persons and of applicants with special reception needs, including minors.

Children shall be detained only as a measure of last resort and after determination that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time and all efforts shall be made to release the detained child and place them in accommodation suitable for children. The child best interests shall be a primary consideration for EU Member States, in accordance with the guiding principle of the UNCRC. Where children are detained, they shall have the possibility to engage in educational and leisure activities, including play and recreational activities appropriate to their age. Detained families shall be provided with separate accommodation guaranteeing adequate privacy and appropriate delivery of services.

Unaccompanied children shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied child as soon as possible. Unaccompanied children shall never be detained in prison or prison-like accommodation. As far as possible, unaccompanied children shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs and interests of persons of their age. Where unaccompanied children are detained, Member States shall ensure that they are accommodated separately from adults.

Return

The Return Directive (2008/115/EC[[2]](#footnote-2)) establishes the rules applicable to illegally staying third-country nationals, including children. This Directive allows Member States to use detention for the purpose of removal in relation to children (accompanied or unaccompanied), taking as ‘primary consideration’ the best interests of the child and provided that a set of specific safeguards are respected. Member States are allowed to establish more favourable provisions in national legislation, provided that they are in line with the objective of the Directive.

When executing return procedures, Member States shall assess each case individually and shall take into account the best interest of the child, family life and the state of health of the third country national concerned, in line with Article 5 of the Directive.

The Return Directive contains general rules on detention, which also concern the detention of unaccompanied children and families with children :

* Recital 16 of the Return Directive states that the use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.
* Recital 17 states that third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law.
* Article 15(1) states that unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

1. there is a risk of absconding or;
2. the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

Concerning unaccompanied children and families with children specifically, the Return Directive in Article 17(1) states that unaccompanied children and families with children shall only be detained as a measure of last resort and for the shortest appropriate period of time. Furthermore, according to Article 17(5) of the Directive the best interests of the child shall be a primary consideration in the context of the detention of children pending removal.

External Action

Revised in 2017, the EU Guidelines on the Promotion and Protection of the Rights of the Child in external action underline the importance of developing quality alternative care for children and providing them with appropriate support to participate in community life and to access services. The Guidelines refer to the 2016 New York Declaration and its commitments to protect the human rights of all refugees and migrants, regardless of their status. Those commitments include ensuring that all refugee and migrant children are, among others, receiving education within a few months of arrival; preventing and responding to sexual and gender-based violence and working towards ending the practice of detaining children for the purposes of determining their migration status; protecting the rights of women and girls and promoting their full, equal and meaningful participation in finding solutions.

Every year, at both the Human Rights Council and UNGA Third Committee sessions, the EU, in cooperation with GRULAC, is tabling a resolution on the rights of the child, underlining that children shall not be deprived of their liberty unlawfully or arbitrarily and that 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, and that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

**Please provide information on existing non-custodial alternatives to immigration detention of children in your country (e.g. community-based reception solutions) and elaborate how these alternatives effectively enhance the protection of the rights of migrant children and their families.**

Different EU institutions have debated on providing quality alternatives to detention measures for children.

The EU Directorate for Justice dedicated to these issues the 11th Forum on the rights of the child[[3]](#footnote-3), organised in 2017. Among the key messages from the discussion:

* Results can be achieved only through a multi-agency approach, through systemic collaborations between NGOs, prison administration, social workers, schools and professionals.
* There is an urgent need to raise public awareness on children of incarcerated parents; this should happen through cooperation with civil society organisations and associations who can engage local communities, but also by targeting society at large, via journalists and media, who should play a role to combat stereotypes and should be mindful about children when writing or talking about their parents involved in legal proceedings and crimes;
* Work has to be done to raise awareness of judges on the importance of taking into account the need of children and their best interests when sentencing their fathers and mothers, and to prioritise and extend alternative types of sentences for parents, where possible and available (e.g. probation).
* Surveys such as the one conducted in Romania or in Hungary on experiences of parent-child relations in the context of detention are a good practice as they contribute to improve the evidence base on the added value of e.g. alternatives forms of detention for the parents, of enhanced child-parent contacts, etc.;
* Schools are also crucial because it is where children may find support and comfort outside the problems experienced at home after parental incarceration. Good practices have to be promoted to support and train teachers, such as the "Twilight Sessions" by Families Outside in Scotland, which bring teachers inside a prison, so they can become aware of and feel the impact of a child’s visit, of the identification procedures and the security controls.
* There is a need to ensure the protection of children whose parents are imprisoned abroad. The Italian initiative on family homes is a good practice as it is open to foreign national mothers. The Swedish NGO BUFFF in these cases establishes a direct contact with local NGOs or any other local counterparts who can help in supporting the child even from a distance, or by favouring cross-country visits. Yet, big gaps remain and it is unclear who bears the responsibility on the protection of the children in such circumstances;
* Child friendly spaces in prisons were often mentioned as a key point of attention, where considerable work has to be done and resources should be made available to the penitentiary systems. In addition, these spaces should be adapted to the various age groups of children. They often target smaller children but young teenagers should also have protected areas which fit their needs.
* New communication technologies should be made available to enable contacts with parents in prison, through video conference tools for example. This is helpful to reduce the stress and obstacles related to long travelling, which often require missing school or leisure activities. The impact of visits procedures on children’s lives should be minimised. However, virtual communication should not replace physical meetings and should not be used as a solution to reduce the resources allocated to them.

The EU Directorate for Migration and Home Affairs organised in April 2019, together with the Council of Europe, a Conference on Alternatives to Detention[[4]](#footnote-4). Among the key messages from the Conference:

* + Effective alternatives to the detention of migrants potentially have **manifold benefits** compared to the use of detention. These can include: respect for human rights; individual compliance with procedures; reduced costs as compared to detention; decreased pressures on national detention systems; greater engagement and cooperation in resolving migration status; and increased well-being of the persons concerned.
  + To encourage greater use of alternative measures there is a need for more **empirical evidence of their effectiveness** as well as **increased practical and pragmatic know-how** to address persistent challenges in their implementation.
  + The **effectiveness** of alternatives to detention can be measured against **three key indicators: upholding fundamental rights** and meeting basic needs; **ensuring compliance** with immigration procedures; improving the **cost-effectiveness of migration management.**
  + There is a **variety of alternative measures** other than detention available that can, *inter alia*, be grouped in the following categories: surrendering the identity document and/or passport; regular reporting to authorities; use of bail/money deposit; designated residence either at a home address or other facilities; family-based care arrangements; supervision; return counselling; case management or case worker support, etc.
  + To be effective, alternatives to detention should adopt a **holistic and person-centred approach** based on **responsibility and trust**.
  + In order to **establish trust and dialogue with persons undergoing immigration procedures**, it is preferable if case-managers and/or other support mechanisms are not the authority making decisions on migration status. Representatives regarded as more neutral may, for example, include social workers, city administrations, NGOs and/or independent services that are more likely to be considered as trusted interlocutors by the persons concerned, thereby enhancing constructive cooperation.
  + A **multi-level coordinated approach** around shared objectives, involving both local and European institutions as well as NGOs can strengthen the effectiveness of alternatives to detention and should be promoted.

**Please provide information on any existing good practices or measures taken in your country to protect the human rights of migrant children and their families while their migration status is being resolved, including inter alia their rights to liberty, family life, health and education(e.g. by ensuring effective access to *inter alia* adequate reception, healthcare, education, legal advice, family reunion).**

In the 2017 *Communication on the protection of children in migration* (COM(2017) 211 final of 12.4.2017[[5]](#footnote-5)), the European Commission emphasized that “Given the negative impact of detention on children, administrative, detention should be used, in line with EU law, exclusively in exceptional circumstances, where strictly necessary, only as a last resort, for the shortest time possible, and never in prison accommodation. Moreover, where there are grounds for detention, everything possible must be done to ensure that a viable range of alternatives to the administrative detention of children in migration is available and accessible, including through support provided by the EU funds.”

Consequently, the Member States were called to ensure, with support from the EU and its agencies, that a range of alternative care options for unaccompanied children, including foster/family-based care, are provided.

The European Commission provided funding for cross-border projects aimed at creating, developing or strengthening alternatives to the detention of migrant children in the context of the 2018 AMIF Annual Working Program and the 2019 AMIF Annual Working Program.

**Please indicate any challenges and/or obstacles in the development and/or implementation of non-custodial alternatives to immigration detention of children and their families.**

Member States are responsible for the implementation of effective alternatives to detention. In line with Article 15(1) of the Return Directive (2008/115/EC) and Article 8(4) of Reception Conditions Directive, Member States have an obligation to provide for alternatives to detention in their legislation and to use them in practice. The Reception Conditions Directive (2013/33/EU) establishes that minors shall be detained only as a measure of last resort and after establishing that other less coercive alternative measures cannot be applied effectively.

However, developing and implementing alternatives to detention that are actually effective remains a challenge. Therefore the European Commission is studying how to support Member States to encourage greater use of alternative measures as well as increased practical and pragmatic know-how.

For further information on the challenges and obstacles to the creation of effective non-custodial alternatives to the detention of children and their families, see proceedings of the 11th Forum on the rights of the child organised in 2017 by DG Justice[[6]](#footnote-6)

**What support could other stakeholders (other than your Government) provide to strengthen the development and/or implementation of non-custodial alternatives to immigration detention of children and their families that enhance the protection of their rights?**

On 29th November 2019 the European Parliament adopted resolution 2019/2876(RSP) on children’s rights on the occasion of the 30th anniversary of the UN Convention on the Rights of the Child. Unaccompanied children were given particular attention and **the need to step up action to end the detention of children in the context of migration** and to work out community-based alternatives to detention, as well as prioritising integration, education and psychological support were underscored.

Together with Member States and civil society organisations, the European Union is studying effective alternatives to detention. This is done, inter alia, within the framework of the European Migration Network (EMN) and the EMN Return Expert Group (EMN-REG). The International Organisation for Migration (IOM) is a partner in the EMN-REG. The challenge is to find alternatives to detention that are as effective as detention, in prevent absconding whilst taking into account the best interest of the child.

The European Migration Network is an EU network of migration and asylum experts who work together to provide objective, comparable policy-relevant information. The EMN was legally established under Council Decision 2008/381/EC, as amended. The European Commission (Directorate-General for Migration and Home Affairs) coordinates the European Migration Network.

The EMN Return Expert Group functions as a platform for practical cooperation and sharing of good practice and expertise on return. The EMN REG provides a structure for planning, follow-up and monitoring of return activities in the EU. The EMN REG connects key stakeholders from Member States, and representatives of EU funded programmes and when appropriate, civil society.

1. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033> (NB a "directive" is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals) [↑](#footnote-ref-1)
2. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008L0115> [↑](#footnote-ref-2)
3. <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=128349> [↑](#footnote-ref-3)
4. <https://ec.europa.eu/home-affairs/content/conference-effective-alternatives-detention-migrants_en> [↑](#footnote-ref-4)
5. <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170412_communication_on_the_protection_of_children_in_migration_en.pdf> [↑](#footnote-ref-5)
6. <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=128349>

   See also: <https://europe.ohchr.org/Documents/Publications/Paper-ChildImmigrationDetentionintheEU-EN.pdf>

   [https://fra.europa.eu/sites/default/files/fra\_uploads/fra-2018-february-migration-report-focus-five- challenges\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-february-migration-report-focus-five-%20challenges_en.pdf) [↑](#footnote-ref-6)