

ALTERNATIVES TO DETENTION IN THE EU

Galina Cornelisse
VU University Amsterdam

MADE REAL PROJECT



Co-funded
by the European Union



REPORT ON DECISION- MAKING: OUTLINE

- 1. Existence of a ground for detention**
- 2. Necessity and proportionality**
 - The obligation to conduct an individualised assessment
 - Detention as a measure of last resort
 - Assessment of vulnerability
 - Selecting the type/variant of the alternative
- 3. Judicial control and right to an effective remedy**

OVERVIEW

❑ Actors of decision-making at national level:

-1st instance: National administrations (apart from LT and SE where detention or an alternative can only be judicially imposed after a proposal by administrative authorities)

-2nd instance: Courts and Tribunals are in charge of hearing appeals

1. EXISTENCE OF A GROUND FOR DETENTION

- Assessing the existence of a ground for detention is an essential step in the decision-making process.
- **Alternatives to detention cannot be applied if there is no valid ground for detention**
- Alternatives to detention should be considered regardless of the nature of the ground for detention
- Grounds such as public health and public order/national security: how do these relate to article 5(1)(f) ECHR?
- ❖ Eg. non-established identity is not a ground for failing to consider alternatives to detention. (Supreme Administrative Court of Lithuania, case no 143-3536/2008).

1. THE EXISTENCE OF A GROUND FOR DETENTION

- Special procedures (border, Dublin or accelerated) are not a reason not to apply alternatives!

- ❖BUT: practice of excluding the application of ATDs to all asylum applicants at the border (AT).

- ❖How does a border procedure (where entry to the territory is decided upon) relate to the possibility of alternatives?

1.1. Focus on the risk of absconding

- ❖ Risk of absconding as:
 - Ground for detention (AT, BE, UK)
 - Part of individual assessment by the authorities to decide on detention (SI, LT and SE).
- Transparent and individualised assessment, based on objective criteria set in law.
- ❖ (Declaration of) unwillingness to return voluntarily is not sufficient basis for a detention decision (Swedish Supreme Migration Court, case no MIG 2008:23 UM1610-08).

2. THE NECESSITY AND PROPORTIONALITY REQUIREMENTS

1st instance decision-making by administration:

- ❖ Inadequate examination of the principles of necessity and proportionality in initial decision-making.
- ❖ Use of stereotypical and non-substantiated initial decisions.

1st or 2nd instance decision-making by Courts and Tribunals:

- ❖ National courts as watchdogs of the practical implementation of the principles of necessity and proportionality in detention decision-making (e.g. AT: 30% of initial detention decisions overturned in 2013).

2.1. The obligation to conduct an individual assessment

- Principles of necessity and proportionality entail an assessment which should take the form of a general appreciation of the individual profile
- ❖ Obligation established in the all MS studied (either by law or through national jurisprudence).

- ❖ In practice shortcomings

“no individual assessment is made about whether the mildest measure for the individual [...] can be employed instead of detention”.

(Swedish Red Cross, ‘Detention under scrutiny – A study of the due process for detained asylum seekers’).

2.2. Detention as a last resort

- Even if there is a ground for detention, this measure should be conceived as a last resort, only if less coercive measures could not achieve the same result, bearing in mind the individual profile (such as age, gender and diversity, physical and mental health, family situation and any known past behaviour).
- ❖ Legal obligation to consider detention as a measure of last resort in AT and the UK; in SE only for minors and in BE only for families with minor children.
- ❖ Jurisprudential establishment of the obligation in LT.

2.3. The assessment of vulnerability

- In this framework, the assessment of vulnerability and its consequences are of great importance as in many circumstances detaining vulnerable individuals can be unlawful.
- For this safeguard to be effective, the authorities must first identify vulnerability and assess the special reception needs of an individual.
- ❖ No specific identification procedure or mechanism in place to identify vulnerable asylum seekers.
- ❖ Tendency towards outlawing (BE, AT), or at least severely restricting, detention of minors.
 - Return Houses in Belgium
 - Family Return Process in the UK

2.3. The assessment of vulnerability

- ❖ Tool of interest: detailed guidelines on factors influencing a decision to detain to assist administrators in initial decision-making (UK).
- ❖ However in practice... failure to take vulnerability into account in the decision-making process on detention and alternatives to detention (2012 HM Inspectorate of Prisons report).
- ❖ As a main rule, there is a failure to take into consideration other forms of vulnerability in the detention decision-making process; only cases of visible vulnerability taken into account (e.g. late stage of pregnancy).

2.3. The assessment of vulnerability

What does the RRCD say about the assessment of vulnerability in the context of the reception of asylum seekers?

- It contains a non-exhaustive list of types of vulnerability.

Art. 21



- It links the notion of vulnerable persons with “applicant with special reception needs”, a sub-category of vulnerable persons.

Art. 2(k)



- It contains an implicit obligation for Member States to identify vulnerable individuals as it is a prerequisite to responding to specific reception needs.

Arts. 23-25



- It contains a set of specific guarantees for minors, unaccompanied minors and victims of torture and violence.

2.4. Selecting the type/ variant of the alternative

- Obligations involving different levels of coerciveness
- Often: Restrictions on freedom of movement.
- Necessary and proportional (Art. 12, § 3 ICCPR).
- individualised assessment
- Type, duration, effect on the individual and manner of implementation.

3. JUDICIAL CONTROL/RIGHT TO AN EFFECTIVE REMEDY

- The right to liberty incorporates *judicial control* of detention
- Article 5(4) ECHR
- Judicial review of detention also protected in RD en Recast RCD
- in the context of alternatives: Article 13 ECHR and Article 47 EUCFR guarantee the right to an effective remedy.

3. JUDICIAL CONTROL/RIGHT TO AN EFFECTIVE REMEDY

- ❖ All MS studied provide for judicial review of detention
- ❖ Also administrative appeals or specialised bail hearing
- ❖ High rates of detention decisions overturned by national Courts:
 - *practical importance of this safeguard*
 - *structural deficiencies in the initial decision-making*
- ❖ How should judges deal with the question of a less coercive measure?

3. JUDICIAL CONTROL/RIGHT TO AN EFFECTIVE REMEDY

- ❖ A specific procedure allowing asylum seekers to object being subjected to an alternative to detention exists only in Austria, although in the other Member States it is possible to contest this using the same appeal procedures to object detention.
- ❖ Tool of interest: UK Bail guidance for judges, concrete criteria on when to grant bail.

PRINCIPLES OF DECISION-MAKING ON DETENTION AND ATD

**General assessment
of the individual
profile (needs and
risks assessment)**

**Is there a ground
for detention ?**

NO.
This means that there
is also no legal basis to
impose an alternative.

YES.
Can the aims pursued be
achieved through a less
coercive measure,
according to the
individual profile?

YES.
The individual is subject
to an ATD.

NO.
Detention is imposed. It can
be challenged and should be
regularly reviewed.

**The type of alternative and the variation
is decided on the basis of the individual
profile. It can be challenged and should
be regularly reviewed.**

SOME CONCLUSIONS

- need to improve the quality of first instance decision-making
- Decisions relating to detention or alternatives should be in written form, duly motivated, informing the individual about possibility for appeal
- Guidelines of factors that should be taken into account when deciding on placement on detention or the use of alternatives to detention could assist decision-makers.
- Identification of vulnerability is a factor of paramount importance when deciding on the imposition of detention or alternative schemes
- Different schemes involve various levels of coerciveness the individual profile must be taken into account when choosing and implementing them.
- If individual does not comply with the obligations imposed, there should be a new review of the case. Detention should be not imposed automatically.



THANK YOU