

ALTERNATIVES TO IMMIGRATION DETENTION IN THE EU MADE REAL NEWSLETTER 3

THE FINAL MADE REAL REPORT IS ONLINE !

Our research entitled 'Alternatives to immigration and asylum detention in the EU: Time for implementation' is now available online. This report is an integral part of the project MADE REAL 'Making Alternatives to Detention in Europe a Reality by Exchanges, Advocacy and Learning' which was co-financed by the European Commission and implemented by the Odysseus Academic Network together with 13 national partners. It constitutes a significant pooling of knowledge on the law and practice on detention decision-making and alternatives to detention in 6 EU Member States (Austria, Belgium, Lithuania, Slovenia, Sweden and the United Kingdom). In addition, it includes legal research on the scope of Member States' obligations to implement alternatives to immigration detention under international, European (i.e. Council of Europe) and EU law. It advances an understanding of what alternatives to immigration detention are, bearing in mind the above-mentioned legal frameworks and in particular the precisions that were brought about by the Return Directive and the Recast Reception Conditions Directive. The critical analysis of the legal frameworks as well as of the significant mass of information on national law and practice has led to the identification of underlying principles and good practices for fair decision-making on, and effective implementation of, alternatives to detention. However, the research also reveals defective practices, which contravene the legal obligations of Member States and are ineffective in achieving Member States' objectives. It is hoped that the present study will contribute to factual-based and legally sound advocacy and will act as guide for policy and decision-makers throughout the EU.

The results of the research were presented at a conference which was held on Friday 6th February at the ULB in Brussels. Panelists included civil society representatives, judges, academics, EU policy-makers and representatives of international organizations. All presentations are available online.

The report, the presentations made at the conference and the training module are available online on the Odysseus Network website:

<http://odysseus-network.eu>



MAIN CONCLUSIONS OF THE REPORT

Overall, our research revealed that alternatives to detention are underused and only a small number of individuals are submitted to these schemes. The only Member State that is using alternatives to detention almost as much as detention is Austria. However, some good practices are in place in all six Member States we researched. The successful implementation of open accommodation for families, sponsorship programs and reporting schemes have shown that it is possible to develop solutions outside detention which are functional, less costly and compliant with human rights.

Nevertheless, setting up alternatives to detention cannot be considered an end in itself. Developing alternatives to detention must go hand in hand with the rationalisation of the national migration control systems thereby reducing detention, or else they lose their purpose. In this vein, policies to reduce or outlaw the detention of families in Belgium, Austria and the UK have clearly led to reductions in the overall numbers of people detained. In addition, alternatives to detention should only be applied to those who are exceptionally liable to detention in the first place; such control measures should not be extended to those who are currently not liable to detention. When evaluating the “success” of alternatives to detention and their efficiency, such elements should be part of the analysis.

1. Highlights from the research findings

i. Scope of the term “alternative to detention”

There was confusion around the meaning of the alternatives to detention. Alternative forms of detention are considered alternatives to detention in Slovenia, a Member State which also considers tolerated stay - a temporary status which allows an alien who cannot be deported to remain in the country- as an alternative to detention. The use of electronic tagging was also considered by some partners as an alternative form of detention because of the level of coerciveness it entails. Confusion also arises from the fact that some alternatives to detention take the same form as restrictions or conditions imposed on asylum seekers or returnees, notably during the voluntary departure period or during their stay in a reception centre.

ii. Decision-making

➤ Responsible bodies

In the countries researched, decision-making on detention and alternatives to detention is undertaken by administrative bodies under the responsibility of the Ministry of Interior or by courts and tribunals. Courts

are in charge of appeals, apart from Lithuania and Sweden where they validate decisions of administrative authorities who only propose recourse to detention or an alternative.

➤ Detention grounds

National jurisprudence confirmed that in order to impose an alternative to detention, authorities must first prove there are grounds for detaining the individual. It was further found that, even in countries where the practice of detaining asylum seekers is rare, people subject to Dublin procedures were more regularly detained, especially during the transfer phase. The risk of absconding is often cited to justify detention of asylum seekers and migrants. Our comparative study of national legislation and judicial practice revealed a multitude of criteria that are employed at national level to assess the risk of absconding, some of which are legally vague or lack objectivity. In addition to legal rules, practical considerations also influence decisions on whether to implement an alternative scheme or not, for example, the perceived administrative convenience for processing the claim or the lack of alternative accommodation through own resources or through a guarantor.

➤ The necessity and proportionality requirements

Most national partners expressed concerns with regards to the initial quality of decision-making on both detention and alternatives to detention, especially when conducted by the national administration, and reported the use of stereotypical and non-substantiated decisions. Only three Member States, namely Austria, Sweden and the UK, have adopted legislation establishing a legal obligation to consider detention as a measure of last resort. In Lithuania, constitutional jurisprudence rather than law establishes this obligation. In all six Member States studied there was no specific identification procedure or mechanism in place to identify vulnerable asylum seekers. Although there are legal provisions to restrict, to a greater or lesser extent, the detention of vulnerable groups, it appears that, in the countries of study, the existence of vulnerability does not hamper detention, except in cases of extreme or “visible” vulnerability, such as unaccompanied minors and women at the end of their pregnancy.

➤ Right to an effective remedy

The right to an effective remedy is an important guarantee to address potential shortcomings in the initial decision-making process; for example in Austria, around 30% of the detention decisions appealed were found unlawful in 2013 because the proportionality assessment was inadequate. All Member States provide for the possibility to appeal detention before courts and tribunals through, however, different means such as specialised bail hearings. In all Member States examined, there is no specific procedure to object to placement in detention instead of the imposition of an alternative, but such arguments can be raised before judicial or administrative authorities that assess the legality of detention or a request for bail. Finally, a specific procedure allowing asylum seekers to object to 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 as are used to object to detention.

iii. Implementation of specific schemes

Schemes operationalised so far in the Member States of study can be classified into the following categories:

1. reporting;
2. sponsorship by the citizen of the country or by a permanent foreign resident;
3. personal financial guarantee;
4. designated residence (which includes: designation to reception centres for asylum seekers, publicly-run centres with or without a coaching component, centres for unaccompanied minors and private accommodation); and
5. electronic tagging.

All Member States researched have included alternatives to detention in their national law; however, they are, on the whole, poorly regulated, except for the UK and Belgium. Most existing alternatives to detention are applicable to all groups (irrespective of gender, age, whether it concerns asylum seekers at the border, in Dublin procedures or people in return procedures). Alternatives to detention are developed more in return than in asylum procedures, either because asylum seekers are rarely detained (such as for example in Sweden) or because of national specificities. The research found that very few external actors – private or non-governmental organisations - were involved in implementing these schemes.

There is no uniform approach regarding the maximum length for the imposition of an alternative to detention with some Member States equating this with the maximum permissible period for detaining an individual and others subjecting third country nationals to alternatives to detention for longer periods. Regarding access to rights and more specifically to economic rights, to information and to free legal assistance the research revealed that, in practice, some differences in treatment exist between asylum seekers who are subject to an alternative to detention and other asylum seekers.

Overall, we observed a lack of monitoring tools and regular evaluations of alternative schemes. In all researched countries, collecting accurate and comparable figures is challenging. The only figure which is easily exploitable comes from Belgium where the return houses, although providing a wide array of services and high accommodation standards, present significantly lower running costs (about 50% less) than detention centres. Similarly, absconding rates were rarely publicly available and usually unreliable. When analysing absconding figures at our disposal, a stark contrast appeared in rates between Lithuania and Slovenia on the one hand which were elevated, and the UK, Sweden and Belgium on the other hand, which were relatively low. Beyond the characterisation of these countries as “countries of transit” or “countries of destination” within Europe, one has to analyse these figures with caution as several factors come into play such as the presence of home communities, the quality of reception conditions, the types of alternatives implemented, the profile of the individuals who are placed in such schemes, and future integration prospects.

2. Alternatives to detention: towards an effective implementation

Ultimately, alternatives to detention should always be analysed in their context. There is no “fit for all” solution. Building alternatives to detention is a complex task, which requires a good knowledge of the national reception and detention system. To understand what kind of alternatives fit best in the national context, one needs to first understand the rationale behind the use of detention and formulate clearly the objectives of setting up alternatives to detention. Concerns about alternatives to detention could stem from the fact that national authorities feel they cannot achieve their migration control objectives outside detention. Alternatives to detention need, to the extent possible, to address these objectives while respecting individuals' human rights. Then, one has to identify the advantages of the existing approaches and to pool existing financial and human resources at national level, including resources from institutions, civil society, local communities and diasporas. In Europe, civil society is very active in the field of migration and asylum and heavily involved in providing support to individuals.

In such a process, the EU legal framework establishes basic principles which lay a good basis for the use of detention as a last resort and the development of alternatives. The ongoing transposition of the recast Reception Conditions Directive provides a good opportunity to enhance the implementation of additional alternatives for asylum seekers who are currently detained. Discussions at national level, which involve a wide array of actors, such as representatives of relevant institutions, judicial authorities, and civil society, need to be initiated so that common solutions can be identified.

Another important element is the gradual development of clear guidelines that could support fair decision-making and ensure better transparency and consistency in the implementation of such schemes. These should be coupled with awareness-raising sessions and training of both national administrations and judges on the implementation of alternatives to detention. The end result should be the reform of the decision-making process so as to become a case-by-case assessment on both the needs the individual has and the risks they pose. Such a process entails the establishment of whether grounds for detention exist, the assessment of the personal situation and eventual vulnerability of the individual in a motivated decision. The right to an effective remedy against a detention decision or one imposing an alternative should always be available to safeguard control over the quality and legality of the initial decision-making.

In terms of the practical implementation of schemes, a wide range of possibilities should be made available to the decision-maker so as to ensure that the type of alternative chosen corresponds to the individual's profile. It should also be born in mind that conditions such as reporting, financial guarantees and designated residence cannot be taken as stand-alone measures. Legal assistance, interpretation and meeting basic needs constitute conditions for a successful program of alternatives to detention. We highlight that in any case, providing access to legal, social, medical and psychological support for asylum seekers is a legal obligation under the recast RCD, applicable to all asylum seekers, including those under an alternative scheme. More generally, the authorities should engage with the migrants or asylum seekers as much as possible as previous research has shown that the person would comply more

if she felt empowered and listened to. In time, regular evaluation of the functioning of existing schemes would be necessary in order to measure their efficiency objectively in an effort to improve them.

Without political will to make alternatives to immigration detention work effectively and proper analysis of the local context, they could become political tokens, used only when detention centres are full, or exclusively for particular groups such as children, or even remain a dead letter in EU law. It is hoped that the findings and analysis of the present study can support the process of gradual realisation of alternatives to immigration detention.

FOR THE MADE REAL PROJECT, THE ODYSSEUS ACADEMIC NETWORK IS WORKING IN PARTNERSHIP WITH DIAKONIE FLUCHTLINGSDIENST (AUSTRIA), COORDINATION ET INITIATIVES POUR ET AVEC LES RÉFUGIÉS ET ÉTRANGERS (BELGIUM), LEGAL CLINIC FOR REFUGEES AND IMMIGRANTS (BULGARIA), FRANCE TERRE D'ASILE (FRANCE), GREEK COUNCIL FOR REFUGEES (GREECE), HUNGARIAN HELSINKI COMMITTEE (HUNGARY), CENTRE FOR SUSTAINABLE SOCIETY (LITHUANIA), JESUIT REFUGEE SERVICE (MALTA), JUSTITIA ET PAX NEDERLAND (THE NETHERLANDS), SLOVAK HUMANITARIAN COUNCIL (SLOVAKIA), INSTITUTE FOR LEGAL RESEARCH, EDUCATION AND COUNSELLING (SLOVENIA), SWEDISH RED CROSS (SWEDEN), BAIL FOR IMMIGRATION DETAINEES (UK).

