

FAMILY DETENTION PRACTICES IN THE INTERNATIONAL CONTEXT

To complement the October 2014 report, *Locking Up Family Values, Again*, the following is a snapshot of current immigrant family detention and confinement practices from around the world. It is an update to *Appendix C* (found at p. 57) in the 2007 report, *Locking Up Family Values*, and covers new practices and directives that have emerged in the last seven years. For background on family detention and international law, see *Appendix B* of that report.

The European Union: A Unified Policy on Asylum and Family Detention

Historically, each EU Member State has designed and implemented its own asylum laws.¹ But some EU countries, starting in the 1980s and 1990s, began to enter separate agreements to harmonize their asylum policies, in part to stop asylum seekers from “shopping” for the country with the most lenient and receptive laws.² The EU also adopted several directives and regulations setting forth standards for a uniform migration process.³ For instance, in 2008, the EU issued the “Return Directive,” which has been adopted by all Member States except for Ireland and the United Kingdom.⁴ The Directive outlines procedures and standards for removing “illegally staying third-country nationals” (excluding asylum seekers).⁵ The Return Directive states that detention is only justified when preparing migrants for return or carrying out the removal process, and only when less coercive measures than detention are insufficient.⁶ The directive also generally forbids countries from detaining any person awaiting removal for longer than six months.⁷

Under Article 17 of the Return Directive, governments may detain families and children during removal proceedings only as a last resort and for the “shortest appropriate period of time.”⁸ Furthermore, families detained pending removal must be housed in “separate accommodation guaranteeing adequate

¹ European Council on Refugees and Exiles, *History of CEAS*, <http://ecre.org/component/content/article/36-introduction/194-history-of-ceas.html>.

² *Id.*

³ Not all EU directives bind all EU member states. See European Union Agency for Fundamental Rights, *Handbook on European Law Relating to Asylum, Borders and Immigration* 12 (June 2014).

http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf.

⁴ 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 (hereinafter “Return Directive”), 2008 O.J. (L348) 98, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN>; see also European Union Agency for Fundamental Rights, *Handbook on European Law Relating to Asylum, Borders and Immigration* at 263.

⁵ Return Directive, 2008 O.J. (L348) at 106.

⁶ *Id.* at 105.

⁷ *Id.* The Directive allows Member States to extend this six-month detention period to up to 12 months in certain circumstances, “in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to: (a) a lack of cooperation by the third-country national concerned, or (b) delays in obtaining the necessary documentation from third countries.” *Id.*

⁸ *Id.* at 106.

privacy,” and the best interests of the child must be a “primary consideration” when detaining minors.⁹ Detained minors must also be presented with opportunities to engage in age-appropriate play and recreational activities, and they must have access to education (depending on the length of their confinement).¹⁰

Since 1999, the EU has also been working toward a Common European Asylum System (CEAS) for all EU Member States.¹¹ In June 2013, the European Parliament approved the latest package of asylum legislation establishing the CEAS, which EU Member States must implement through national law by fall of 2015.¹² The CEAS includes updated directives and regulations defining the asylum application process, the rights of applicants to housing and medical care, and the grounds for granting international protection.¹³ Although many NGOs have acknowledged that the CEAS improves upon asylum law, they have also criticized it for failing to ban the detention of children or to expand the availability of free legal assistance to asylum seekers.¹⁴

As part of the package of legislation approved in June 2013, the EU adopted an amended version of its 2003 “Reception Conditions Directive,” which outlined standards for the detention of migrants seeking asylum or international protection.¹⁵ The 2013 Reception Conditions Directive states that countries may only detain minors “as a measure of last resort” and only if “other less coercive alternative measures cannot be applied effectively.”¹⁶ The directive further mandates that “detention shall be for the shortest period of time and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors.”¹⁷ Additionally, the best interests of the minor must be “a primary consideration” when determining the placement of the minor.¹⁸ If governments deem it necessary to detain families, they must preserve family unity by housing families in “separate accommodation

⁹ *Id.*

¹⁰ *Id.*

¹¹ Cecilia Malmström, The European Commission, *EU puts common asylum system in place* (June 2013) http://ec.europa.eu/commission_2010-2014/malmstrom/news/archives/2013/06/20130612_en.htm.

¹² *Id.* The new package includes recast versions of the Asylum Procedures Directive, Reception Conditions Directive, and Qualification Directive, as well as the Dublin Regulation (clarifying the process for establishing state responsibility for asylum seekers) and the Eurodac Regulation (related to the EU database of asylum seekers’ fingerprints). European Commission, *A Common European Asylum System 1* (2014), http://ec.europa.eu/dgs/home-affairs/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf.

¹³ European Commission, *supra* note 13, at 3, 5.

¹⁴ See NGO Statement on the Occasion of the Final Vote on the Asylum Package, Establishing a Common European Asylum System: Still a Long Way to Go (June 2013), http://www.caritas.eu/sites/default/files/jointngostatementasylumpackage_10june2013.pdf. See also Asylum Information Database, *Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System* (Sept. 2013), <http://www.refworld.org/pdfid/52442af54.pdf>.

¹⁵ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection, 2013 (L180) 96 (hereinafter “Reception Conditions Directive”), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>.

¹⁶ *Id.* at 103.

¹⁷ *Id.*

¹⁸ *Id.* 103, 107. The Directive also includes provisions related to leisure activities and rehabilitation services. *Id.* at 107.

guaranteeing adequate privacy.”¹⁹ The 2013 Reception Conditions Directive has been adopted by all EU countries except for Denmark, the United Kingdom, and Ireland.²⁰

Britain: Family Detention Policies, on Paper and in Practice

In December 2010, Deputy Prime Minister Nick Clegg announced that the British Coalition Government had forged an agreement to stop the detention of children for immigration purposes.²¹ The Coalition Agreement created a new “family returns process,” and established other guidelines for family detention. But government detention of migrant children continued through 2012, when more than 200 children were detained. Most of those children were held at a “secure pre-departure accommodation. The Immigration Act of 2014, enacted in May of that year, codified parts of the Coalition Agreement’s guidelines into law. The policy gives families several opportunities to depart voluntarily, before enforcing their removal with increasing levels of government intervention, and eventually, detention.²² Under the Act, the government must consult an Independent Family Returns Panel whenever proposing to detain a family facing removal in “pre-departure accommodations.”²³ The Panel must advise the government about the appropriateness of the family’s return plan or proposed detention, particularly in light of the “need to safeguard and promote the welfare of the children of the family.”²⁴ If the government decides to detain the family, it must house the family in “pre-departure accommodations” for no more than 72 hours, unless a ministerial declaration authorizes detention for one week.²⁵

In practice, NGOs report that British agencies tasked with shepherding detained families through the returns and removals processes do not engage substantively with the families.²⁶ Such government engagement would include more meaningful dialogue with families and personalized case process, which the government has thus far failed to address.²⁷ NGOs have also expressed concern with the conditions at the Cedars “accommodation” facility, which they claim still resembles a detention center in all but name.²⁸

In addition, advocates are concerned that families with children continue to be held in short-term holding facilities at UK ports of entry (or at an existing Immigration Removal Center) when immediately

¹⁹ *Id.* at 103–04.

²⁰ European Union Agency for Fundamental Rights, *supra* note 5, at 262.

²¹ Cabinet Office, Deputy Prime Minister’s Office, and The Rt Hon Nick Clegg MP, *Deputy Prime Minister’s speech on child detention* (Dec. 2010), <https://www.gov.uk/government/speeches/deputy-prime-ministers-speech-on-child-detention>.

²² Home Affairs Section, Ending child immigration detention, SN/HA/5591 at 1 (Sept. 2014), *available at* <http://www.parliament.uk/briefing-papers/SN05591.pdf>.

²³ Immigration Act 2014, c. 22, §3, sch 54A(2) (U.K.), <http://www.legislation.gov.uk/ukpga/2014/22/introduction/enacted>.

²⁴ *Id.*

²⁵ *Id.* at § 6, sch 157A.

²⁶ Jerome Phelps, *Alternatives to Detention in the UK: From Enforcement to Engagement?*, Forced Migration Review, Sept. 2013, at 45, 47, *available at* <http://www.fmreview.org/en/detention.pdf>.

²⁷ *Id.*

²⁸ Complaints include that the facility is still surrounded by fences, and that families cannot leave or receive visitors at free will. See Home Affairs Section, *supra* note 24, at 5-6.

arriving at or departing from the country.²⁹ In 2010, the government stated that these facilities would only be used sparingly (for a few dozen families per year, and for stays generally under 24 hours).³⁰ However, far more children have continued to be held in the facilities.

Germany: National and State-Based Family Detention Policies

Asylum seekers in Germany are generally not detained unless their application for asylum is rejected and they receive a deportation order.³¹ However, upon applying for asylum, asylum seekers must stay in an initial reception center for up to three months.³² If their asylum application is still pending after three months, asylum seekers are placed in either collective accommodation centers or decentralized accommodations, which are usually apartments.³³

There is no federal legal obligation to provide separate spaces for families housed in any reception centers or later accommodations.³⁴ Some reception facilities have attempted to implement policies to accommodate families in separate wings, but these policies have not been consistently followed because of overcrowded facilities.³⁵

An individual or family receiving a deportation order may be detained.³⁶ The prison authorities of the Federal States of Germany are responsible for detention of immigrants pending deportation, with national law providing only basic rules for detention centers.³⁷ While conditions vary throughout the country, most immigrants detained pending deportation are held in prisons, and families are not kept together.³⁸ In a study conducted by German NGOs in the latter half of 2012, only two of the thirteen detention centers visited had units where families or spouses could reside together, and detention centers in some states separated families and/or spouses by gender for detention in different facilities.³⁹

However, German law allows the detention of children only under the conditions stipulated in the EU Return Directive, *i.e.* that child migrant detention should occur “only as a measure of last resort and for the shortest appropriate period of time.”⁴⁰ Since the Directive was put into force in 2008, the number of

²⁹ See *id.*

³⁰ Cabinet Office, Deputy Prime Minister’s Office, and The Rt Hon Nick Clegg MP, *supra* note 22.

³¹ Michael Kalkmann, Asylum Information Database, *National Country Report: Germany* 68-69 (May 2014), available at <http://www.asylumineurope.org/reports/country/Germany>.

³² *Id.* at 55.

³³ *Id.* at 56.

³⁴ *Id.* at 57.

³⁵ *Id.* at 57, 59.

³⁶ *Id.* at 68.

³⁷ *Id.* at 71–73.

³⁸ *Id.*

³⁹ *Id.* at 73.

⁴⁰ *Id.* at 73. However, Germany’s Youth Welfare Act considers any person under the age of 18 to be a child, while the Asylum Procedure Act states that individuals ages 16 and older have the capacity “to perform procedural acts” on their own behalf in asylum procedures. Because of this discrepancy, many children between 16 and 18 years of age are treated as adults. See *id.* at 47.

detained migrant children has dropped, from 214 children in 2008 to 61 in 2011.⁴¹ German courts have also repeatedly relied on these provisions to declare the detention of children to be illegal.⁴²

Australia: Backtracking on Reform

Under Australia's Migration Act of 1958, individuals who are not Australian citizens and who do not have a valid visa are required to be detained.⁴³ The Australian government's stated policy is that children and, where possible, their families, will not be held in immigration detention centers.⁴⁴ However, in practice the government does detain both unaccompanied minors and children with families in immigration detention facilities.⁴⁵ In February 2014, the Australian Human Rights Commission began a national inquiry into the detention of migrant children.⁴⁶ In the July 2014 update on the national inquiry, the Commission found that there were 983 children in immigration detention facilities, and 54 of those children were unaccompanied.⁴⁷ The Commission also found that the average length of time a child spent in an immigration detention facility was 231 days.⁴⁸

In August 2014, the Australian government announced plans to transfer children on the mainland into alternative community-based arrangements.⁴⁹ The new policy will allow children under the age of 10 and their families to live in the community while their refugee applications are processed.⁵⁰ This is consistent with existing Australian law, which allows the Minister for Immigration and Border Protection to approve a detainee for community detention.⁵¹ However, the new policy will not specifically apply to children who arrived on the mainland after July 2013 or those detained in offshore detention centers on Nauru and Christmas Island.⁵² Human rights advocates have criticized the limited scope of the government's new policy, especially as the national inquiry has shown poor conditions for children in

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Fact Sheet 82 – Immigration Detention*, Australian Government: Department of Immigration and Border Protection, <https://www.immi.gov.au/media/fact-sheets/82detention.htm#fam>.

⁴⁴ *Id.*; see also *Annual Report 2008-2009*, Australian Government: Department of Immigration and Citizenship, <http://www.immi.gov.au/about/reports/annual/2008-09/html/outcome1/output1-4.htm#detention>. However, there are three other types of immigration detention facilities: immigration residential housing, immigration transit housing, and alternative places of detention. See *Fact Sheet 82 – Immigration Detention*, *supra* note 46.

⁴⁵ *National Inquiry into Children in Immigration Detention 2014: Key Statistics from July 2014*, Australian Human Rights Commission, <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014>.

⁴⁶ *Moves towards ending child detention in Australia*, International Detention Coalition, <http://idcoalition.org/news/moves-towards-ending-child-detention-australia/>.

⁴⁷ *National Inquiry into Children in Immigration Detention 2014: Key Statistics from July 2014*, *supra* note 48.

⁴⁸ *Id.*

⁴⁹ *Children in detention: Government takes a step in the right direction*, Amnesty International (Aug. 19, 2014, 10:29 AM), <http://www.amnesty.org.au/news/comments/35322/>.

⁵⁰ *Id.*; see also *Feds to Release Asylum Seeker Children from Detention*, Pro Bono News Australia (Aug. 19, 2014, 12:12 PM), <http://www.probonoaustralia.com.au/news/2014/08/feds-release-asylum-seeker-children-detention#>.

⁵¹ *Fact Sheet 83 – Community detention*, Australian Government: Department of Immigration and Border Protection, <https://www.immi.gov.au/media/fact-sheets/83community-detention.htm>.

⁵² *Feds to Release Asylum Seeker Children from Detention*, *supra* note 53.

offshore detention facilities on Nauru and Christmas Island and Australia’s continued practice of interdictions (and subsequent detention) at these offshore facilities.⁵³

Belgium: “Open Family Units”

In 2006, the European Court of Human Rights found Belgium’s detention of unaccompanied children to be in violation of the European Convention on Human Rights.⁵⁴ In the wake of that case—and in light of an impending one that would also find Belgium’s family detention system in violation of the Convention,⁵⁵ the Migration and Asylum Policy Minister reformed the family detention system in 2008.⁵⁶ Following these reforms, families are no longer detained in closed, prison-like detention centers.⁵⁷

Families who arrive at Belgium’s borders and who are not removed within 48 hours are housed in individual apartments or houses.⁵⁸ In these “open family units,” families generally maintain freedom of movement subject to certain limitations.⁵⁹ Families may leave the units to bring their children to school, purchase groceries, visit their attorneys, or participate in religious services.⁶⁰ Further, families receive weekly coupons from local supermarkets, can apply for pro bono attorneys, and are entitled to medical, social, and legal aid.⁶¹ Government agencies reimburse all educational and medical costs, though doctor visits are only reimbursed when the appointment has been made through the government.⁶²

The country also has an established case management system. The Belgian government appoints case managers or “coaches” to help migrant families explore their potential immigration outcomes and prepare the family for removal if necessary.⁶³ This policy is designed to foster trust between the government and the migrant family, and to ensure that the asylum process is timely and efficient (to the benefit of both families and the government).⁶⁴ NGOs have reported positive results with the Belgian model, finding that most migrant families did not leave Belgium and remained in contact with their case

⁵³ Children in detention: Government takes a step in the right direction, *supra* note 52.

⁵⁴ Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, App. No. 13178/03, Eur. Ct. H.R. (Oct. 12, 2006).

⁵⁵ Muskhadzhieva v. Belgium, App. No. 41442/07, Eur. Ct. H.R. (Jan. 19, 2010). Another case by the European Court of Human Rights decided the next year also found Belgium’s old detention system to have been in violation of the convention. Kanagaratnam and Others v. Belgium, App. No. 15297/09, Eur. Ct. H.R. (Dec. 13, 2011).

⁵⁶ Fanny Declercq, Bigham Centre for the Rule of Law, *Immigration Detention and the Rule of Law, National Report: Belgium* 22–25 (May 2013), http://www.biicl.org/files/6560_belgian_national_report_-_final_bc_edit.pdf. The reforms were also prompted by a government study examining the impacts of family detention and recommendations for alternatives to detention. *See* Declercq, *supra* note 59, at 25.

⁵⁷ *Id.*

⁵⁸ Asylum Information Database, *National Country Report: Belgium* 69 (June 2014), http://www.asylumineurope.org/files/report-download/aida_-_belgium_second_update_uploaded.pdf.

⁵⁹ Liesbeth Schockaert, *Detention, alternatives to detention, and deportation: Alternatives to detention: open family units in Belgium*, *Forced Migration Review*, Sept. 2013, at 53, 53, available at <http://www.fmreview.org/en/detention.pdf>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

managers.⁶⁵ NGOs have also suggested, however, that families should be placed in units with fewer restrictions on movement.⁶⁶ The increase in freedoms for Belgium's migrants, though positive, is not absolute. Families can still be detained if they are non-cooperative during return procedures or if they leave the open family units without authorization.⁶⁷ New developments include a September 2014 royal ordinance that allows increasingly coercive measures to ensure "cooperation" in the return process, including additional conditions while in the community, use of open return houses, and including the possible detention of a family member.⁶⁸ In addition, the government recently indicated a desire to detention capacity specifically for migrant families.⁶⁹

Sweden: Better – But Not Best – Practices?

Sweden's immigration laws are relatively generous compared to the laws of other European countries. It is still possible, however, for the Swedish government to detain adult migrants when their identity is unclear, when doing so is necessary to investigate the migrants' rights to be in Sweden, or when they are likely to be refused entry or expelled (or those orders must be enforced).⁷⁰ The latter cause for detention is used only when there is some reason to presume a migrant will attempt evasion or commit a crime.⁷¹ Detention is meant to be limited, extendable only with exceptional circumstances.⁷² Although detention is meant to be limited, 5% of asylum seekers in 2013 were detained.⁷³ The number of migrants seeking asylum so far in 2014 is up 70% from last year.⁷⁴

Asylum seekers can either choose to reside with a relative or friend, or to live in an apartment or another housing center provided by the Swedish Migration Board.⁷⁵ A family can be provided with its own room in an apartment, but is expected to share the apartment with other people.⁷⁶ Asylum seekers also receive a living allowance from the Swedish government to cover daily expenses.⁷⁷ The government can reduce this living allowance if the asylum seeker refuses to cooperate in the asylum process.⁷⁸ Lack

⁶⁵ *Id.* at 54.

⁶⁶ *Id.*

⁶⁷ Declercq, *supra* note 59, at 26.

⁶⁸ Arrêté royal déterminant le contenu de la convention et les sanctions pouvant être prises en exécution de l'article 74/9, § 3, de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers. September 2014. Available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2014091702&table_name=loi.

⁶⁹ "Theo Francken veut plus d'expulsions de sans-papiers." *Radio Télévision Belge Francophone*. October 2014.

Available at http://www.rtb.be/info/belgique/detail_theo-francken-veut-plus-de-places-dans-les-centres-fermes-et-plus-d-expulsions?id=8376737

⁷⁰ Asylum Information Database, *Grounds for Detention: Sweden* 42–43 (Jan. 2014),

http://www.asylumineurope.org/files/report-download/aida_sweden_-_update_-_29-1-2014_-_final.pdf.

⁷¹ *Id.* at 43

⁷² *Id.*

⁷³ Asylum Information Database, *Sweden: Increasing Number of Asylum Seekers Seek Protection in Sweden* (Sept. 9, 2014), http://www.asylumineurope.org/files/resources/one-pager_se.pdf.

⁷⁴ *Id.*

⁷⁵ Asylum Information Database, *supra* note 73, at 28.

⁷⁶ *Id.* at 35.

⁷⁷ *Id.*

⁷⁸ *Id.* at 37.

of cooperation includes “refusing to take measures to obtain identity documents” and “refusing to turn up to arranged appointments with the Migration Board.”⁷⁹ Asylum-seeking children are also entitled to attend regular Swedish school if they so wish.⁸⁰

Sweden does not permit the separation of a child from his or her guardian via detention.⁸¹ If a child under the age of 18 is detained, he or she may never be placed in a prison or police holding center and must be released within three days.⁸² In practice, the government rarely detains children.⁸³ From January through April of 2013, 40 children were detained – 35 for up to 48 hours and 5 for up to 14 days.⁸⁴ Any individual detained longer than three days is entitled to free legal counsel.⁸⁵

Swedish law also lays out numerous provisions to guarantee the humane, respectful, and dignified treatment of all migrant detainees.⁸⁶ In practice, however, many detainees have expressed dissatisfaction with a lack of responsiveness from staff, attorneys, and police officials regarding detention conditions.⁸⁷ Detainees report that facility employees possess wide discretion regarding the extent of services offered at each facility.⁸⁸ Furthermore, detainees have complained about a high degree of uncertainty in the status or outcome of their cases, pointing to a potential detachment on the part of attorneys and government officials.⁸⁹

⁷⁹ *Id.*

⁸⁰ *Id.* at 40.

⁸¹ *Id.* at 43.

⁸² *Id.* at 43, 45.

⁸³ *Id.* at 43.

⁸⁴ *Id.*

⁸⁵ *Id.* at 48.

⁸⁶ *Id.* at 45-47.

⁸⁷ Soorej Jose Puthooppambal, Beth Maina-Ahlberg & Magdalena Bjerneld, *Detention, alternatives to detention, and deportation: Do higher standards of detention promote well-being?*, Forced Migration Review, Sept. 2013, at 39, 39, available at <http://www.fmreview.org/en/detention.pdf> (information based on interviews with detainees in a 2012-2015 research study).

⁸⁸ *Id.*

⁸⁹ *Id.*