

## Detention of third-country nationals in return procedures

*Article 6 of the Charter of Fundamental Rights of the European Union guarantees the right to liberty.*

**Grounds for pre-removal detention should be clearly defined and listed exhaustively in national legislation.**

The list of grounds should not go beyond those listed in Article 5.1 of the European Convention on Human Rights.

The fact of being an irregular migrant should never be considered a sufficient ground in itself for detention.

**Detention should only be resorted to after examining if it is necessary and proportionate in the individual case.**

Pre-removal detention should only be resorted to if there is a risk that the individual may abscond or otherwise seriously interfere with the return or removal process, such as by tampering with evidence or destroying documents.

A presumption *against* pre-removal detention could be introduced into national legislation for *de facto* stateless persons, where past experience has shown that the country of nationality will not cooperate in establishing citizenship or in issuing travel documents.

### Good practice example

In some Member States, domestic law stipulates that a person's individual characteristics, such as age, gender or history of torture, must be taken into account when making a decision about detaining them. This helps ensure that caution is taken before depriving the liberty of particularly vulnerable individuals or persons with specific needs.

The presence of persons who are not removable should be acknowledged, and pragmatic solutions should be found for them, thereby avoiding situations of protracted legal limbo.

**Maximum periods of detention should not extend beyond six months.**

National legislation should ensure that individual circumstances are evaluated in each case, making the systematic application of the maximum time limit for detention unlawful.

Where national law provides for the possibility of detention for more than six months, it should also establish safeguards to ensure that prolonged detention is used only in extremely exceptional cases.

A delay in obtaining necessary documentation should not justify extending the detention, if it is clear from the outset that the third country concerned will not cooperate, or where there is no reasonable expectation that the documents will be issued in time. In such cases, detention no longer pursues the legitimate objective of facilitating the removal.

### FRA research

The EU Agency for Fundamental Rights examined law and practice in the EU 27 on the deprivation of liberty of irregular migrants pending their removal against the applicable international human rights law framework.

Read the report, Detention of third-country nationals in return procedures (September 2010)

Suggestions have been formulated to help ensure that fundamental rights are protected in the implementation of the detention provisions of the Return Directive, which must be transposed by Member States by the end of 2010.



## Exercise of the right to judicial review of the detention order should be made possible in practice.

The reasons for detention and information about how to instigate a judicial review of the decision should be provided to the detainee in a language that he/she understands. This information should be provided in written form and read out with the help of an interpreter, if necessary.

Judicial review procedures should be simplified and subject to reasonable deadlines. The courts or tribunals reviewing the lawfulness of the detention order must be equipped with the powers and resources to do so.

Information about claiming asylum should be readily available in detention facilities.

NGOs and those who provide legal advice should be allowed access to detention facilities.

Member States are encouraged to engage in dialogue with civil society organisations and bar associations to identify solutions to the practical barriers faced by irregular migrants in accessing legal assistance.

Automatic judicial reviews should be carried out by a court, preferably not less than once a month, to ensure that detention is kept as short as possible.

### Good practice example

Many Member States require a judge to endorse each detention order, thereby guaranteeing a judicial review of the decision.

## National legislation should provide for alternatives to detention.

National legislation should oblige the authorities to examine, *in each individual case*, whether the objective of securing removal can be achieved through less coercive measures. Legislation should require that reasons be provided if detention is deemed necessary.

### Good practice example

In Belgium, families with children are not placed in detention facilities, but in open housing and provided with a coach, who talks to them about their immigration situation. Absconding rates have remained relatively low at about 20%.

## National legislation should include a strong presumption against detention of children, including when they are with their families.

Children should not be deprived of their liberty if they cannot be held in facilities that can cater for their specific needs.

Under no circumstances should separated children be deprived of their liberty if it is not possible to ensure that they are kept in appropriate facilities where separate accommodation from adults can be guaranteed.

Where national legislation exceptionally allows for the deprivation of liberty of a separated child, it should require the appointment of a legal representative, immediately and at no cost, in addition to an independent guardian.

In exceptional cases where it is deemed necessary to detain a child, the detention should not be unduly prolonged. Safeguards to guarantee this include lower maximum time limits for detention, or more frequent reviews.

National legislation should make it clear that the best interests of the child are of paramount importance. Where, exceptionally, a child's parent(s) or primary carer is detained, the child should only be deprived of their liberty if it is in his/her best interests.

### Good practice example

Hungary, Italy and Ireland have a provision in their national legislation explicitly prohibiting keeping children in pre-removal detention.