

## JRS Europe Policy Position on Alternatives to Detention

### Context

For years JRS offices in Europe have focused on the issue of immigration detention as a top strategic priority. This focus has been, and continues to be, based on our regular visits to persons held in detention centres all around Europe. In parallel to this we have conducted several research projects on conditions in detention centres, national detention policies and laws and regional studies on detention and vulnerability.<sup>1</sup> The latter study, *Becoming Vulnerable in Detention*, concluded that detention deteriorates the physical and mental health of people to such an extent that its use can hardly be justified in most cases. Moreover, it concluded that non-custodial alternatives must be seriously explored and used extensively by governments in order to prevent unnecessary harm from being done to migrants.<sup>2</sup>

Knowing that detention negatively affects nearly everyone who experiences it, JRS offices in Europe have long been interested to explore alternatives to detention. But it has been difficult to find a consensus on what exactly constitutes an alternative to detention. In large part this has been due to not having a common policy position as a guide. Until recently, there has not been much research on this topic. Also, we and other organisations have faced formidable obstacles from governments, who typically view detention as a common-sense norm.

Nevertheless over time we have learned about particular alternatives to detention such as release on bail, regular reporting to the authorities and even electronic tagging. While these methods technically release people from a detention centre, their basis in fundamental rights and human dignity has been put into question. Electronic tags usually causes distress for the people who are forced to wear them, not only from the physical discomfort that comes with wearing a tag but also the mental stress that comes from being tracked at all times. Bail is a sure way to release people from detention but good legal resources and support are often needed to obtain it. Regular reporting to the authorities may appear to have few restrictions, but as exemplified by our recent research in the United Kingdom, people who report are subject to unannounced and sudden detention and deportation.<sup>3</sup> These and other concerns have left JRS and other organisations without a firm idea on what to advocate to governments as an alternative to detention. However, the occurrence of four factors in recent years has significantly impacted the discussion, as well as the policy position of JRS, on this issue.

First is a Belgian government programme that places undocumented migrant families in private housing situated in communities around the country.<sup>4</sup> Prior to this, families with children were typically detained, until the European Court of Human Rights ruled that this could no longer be done because the existing facilities were not appropriate for children.<sup>5</sup> This alternative to detention – which Belgian NGOs call *maisons de retour* and the authorities, *unites d'habitation* – links families to a case manager who provides comprehensive support to each family.<sup>6</sup> Families are required to resolve their cases as they would in a detention centre, with the key difference being they are in an open environment and are able to move freely, albeit with some restrictions.<sup>7</sup> Importantly, this alternative has shown that even in a freer environment most people are keen to respect official procedures rather than abscond from the authorities.<sup>8</sup> It has also shown that an alternative to detention works well if the people involved are given comprehensive, individualised support such as legal assistance, healthcare, child care and living allowances.

<sup>1</sup> See, *Detention in Europe* (2005) by JRS Europe; *Civil Society Report on Administrative Detention of Asylum Seekers and Illegally Staying Third Country Nationals in the 10 New Member States of the European Union* (2007) by JRS Malta.

<sup>2</sup> JRS Europe (2010), *Becoming Vulnerable in Detention*.

<sup>3</sup> See *From Deprivation to Liberty* by JRS Europe, pp. 29-36. Most of the people interviewed in the UK had their asylum applications rejected by the UK Border Agency.

<sup>4</sup> The Belgian authorities have since opened this alternative to detention, which began as a pilot project in 2008, to families who apply for asylum at the border and asylum seekers in Dublin procedures.

<sup>5</sup> In the case of *Muskhadzhiyeva and others v. Belgium* (2010), the European Court of Human Rights found Belgium guilty of violating Articles 3 and 5 of the European Convention of Human Rights for detaining four Chechen children and their mother in detention centre 127bis. While the Court ruled that the mother had been lawfully detained, it ruled that the detention of her children was not lawful. Article 3 (prohibition of inhuman treatment) was violated because the centre was not designed to hold children and because of the children's poor health at the time; Article 5 (right to liberty and security) was violated on similar grounds. See Para. 63, 74-75 of the Court's decision.

<sup>6</sup> More information on the Belgian alternative to detention, as well as information on other countries, can be found at: [http://www.detention-in-europe.org/index.php?option=com\\_content&view=article&id=309&Itemid=262](http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=309&Itemid=262)

<sup>7</sup> These restrictions on personal liberty and freedom of movement include the obligation for families to have one person in the house at all times.

<sup>8</sup> The absconding rate since 2008 has hovered between 20-25%; see the chapter on Belgium in the JRS Europe report, *From Deprivation to Liberty*. This figure is based on correspondence with staff in the Belgian Immigration Office.

The second factor was the publication of two separate studies in 2011 by the International Detention Coalition (IDC)<sup>9</sup> and the UN High Commissioner for Refugees (UNHCR).<sup>10</sup> The IDC study examined alternatives from around the world and concluded that governments and NGOs should think less about individual methods, and instead about a new model of immigration procedures. The “Community Placement and Assessment model”, or CAP, foresees a set of procedures that keeps people away from detention at the start and instead implements a series of assessments that identify people’s needs, the appropriate support to be provided and their placement in a non-custodial setting in the community. Similarly, the UNHCR study examined alternative to detention models in several countries and concluded that the most successful alternatives are those that are based on a legal and practical presumption against detention at the start of people’s immigration cases. Both of these studies have been highly acclaimed by NGOs and even governments.

A third factor has been a JRS Europe study released in December 2011.<sup>11</sup> It examined the alternative to detention programme in Belgium, one for unaccompanied minors in Germany and regular reporting schemes in the United Kingdom.<sup>12</sup> Ours differs from the IDC and UNHCR studies because it is wholly based on migrant interviews. Despite the difference of our methodology, we reached similar conclusions: alternatives that work well for migrants and governments alike are those that provide comprehensive, person-oriented, support delivered by a case manager, and are based on some type of systemic change in the way that governments conduct asylum and immigration procedures.

The fourth factor has been the adoption of the EU Return Directive.<sup>13</sup> Article 15(1) obliges EU governments to first use “other sufficient but less coercive measures” before resorting to detention. Despite the controversy that has surrounded the adoption of the Return Directive,<sup>14</sup> this particular legal provision requires governments to lay down alternative to detention measures in their national law. The most important question, however, is not only whether alternatives are found in national law but whether they are actually practiced. The EU Fundamental Rights Agency reported that while two-thirds of EU member states have alternatives in law, statistics on the actual use of alternatives could only be provided by a few countries; for these countries alternatives were implemented much less frequently than detention.<sup>15</sup> Nevertheless, the inclusion of the phrase “less coercive measures” is a first in EU immigration law, and has thus inspired relevant stakeholders to direct more attention to the issue of alternatives to detention.

Overall, the combination of these four factors has led to a significant increase in momentum for supporters of alternatives to detention in the last few years. Whereas just five years ago merely bringing this issue to the discussion table with governments was daunting enough, now more and more governments are expressing an openness to at least explore how migration management systems can be used in a less coercive manner. While detention is still widely used, the surge of new research and practical examples have better equipped governments and NGOs alike with persuasive arguments and policy recommendations, which have a strong potential to change the perception of detention as a common-sense norm to an abnormal and inappropriate reaction to migrants.

The improved understanding of what constitutes an alternative to detention has empowered the JRS Europe region to develop a well-defined policy that can guide our accompaniment, service and advocacy for migrants and refugees. The principles and positions enumerated below have been adopted by all of the JRS country offices in Europe. The purpose of this policy position is to orientate and guide JRS Europe in its reflections and analyses of alternatives to detention, as well as to equip JRS Europe with the means to advocate for the implementation of alternatives in law and practice.

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<sup>9</sup> Sampson, R., Mitchell, G. and Bowring, L. (2011). *There are alternatives: A handbook for preventing unnecessary immigration detention*. Melbourne: The International Detention Coalition.

<sup>10</sup> UN High Commissioner for Refugees, *Back to Basics: The Right to Liberty and Security and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1

<sup>11</sup> JRS Europe (2011), *From Deprivation to Liberty*.

<sup>12</sup> The alternative researched in Germany is run by Diakonisches Werk, a Protestant church-based agency, and is an open facility for unaccompanied minors located in Brandenburg State, comparable to facilities for German youths in need of protection. In the UK, JRS Europe interviewed migrants obliged to frequently report to the UK Border Agency; these interviews took place in the office of JRS UK.

<sup>13</sup> DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on common standards and procedures in Member States for returning illegally staying third-country nationals.

<sup>14</sup> Much of the controversy has centred on the maximum time length of detention in the directive, which permits member states to detain for as long as six months with a possible extension for a further 12 months in exceptional circumstances (Article 15(5) and 15(6)).

<sup>15</sup> European Union Agency for Fundamental Rights (2011), *Detention of third-country nationals in return procedures*, pp.49-50.

The principles and positions enumerated below are without prejudice to the JRS Europe common position on *The Administrative Detention of Asylum Seekers and Irregular Migrants in Europe* (2008).<sup>16</sup>

### Principles

- A. Anyone fleeing from severe human rights violations has an inalienable right to seek protection in another country.
- B. All migrants should be treated in a humane and dignified manner with respect to their fundamental rights and in compliance with national, EU and international law.
- C. Asylum seekers should never be detained, and the detention of other migrants is inherently undesirable. Measures that ensure freedom of movement and the right to liberty and security of person must always be a primary consideration.
- D. Individuals and their families must not be penalised, administratively or criminally, on the sole basis of their legal status by the national authorities of the country to which they emigrate to.
- E. Authorities of the country of reception shall take the utmost care to provide for the well-being and safety of asylum seekers and other migrants under its care.
- F. Migrant children, whether they are accompanied or not and by reasons of their physical and mental integrity, require the provision of special safeguards and care, including appropriate legal protection and the unity of the family, so as to the extent that it is in the best interests of the child.

### JRS Europe definition of 'alternatives to detention'

An alternative to detention is any policy, practice or legislation that allows asylum seekers and migrants to live in the community with freedom of movement, in respect of their right to liberty and security of person, while they undertake to resolve their migration status and/or while awaiting removal from the territory.

### Positions

1. A presumption against detention should be laid down in law and implemented in practice.
2. States must actively seek and incorporate the expertise and experiences of asylum seekers, refugees and migrants, as well as relevant and qualified civil society organisations, when developing alternatives to detention.
3. Case resolution in a community-based, non-custodial, setting should be a standard first step in all cases, save those in which objective criteria can verify that a person poses a specific threat to public order and security.
4. Persons who are already in detention should have full access to procedures that would lead to their release into the community. Procedures for release into the community should be based upon the fulfilment of objective criteria. Persons taking part in such procedures should have access to qualified lawyers who can provide legal assistance, and counsel from relevant and qualified non-governmental organisations and staff from the United Nations High Commissioner for Refugees, if appropriate.
5. Alternatives to detention should lead to a systemic reduction in the detention estate, and not merely used to create additional capacity for detention.

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<sup>16</sup>Available at [www.detention-in-europe.org](http://www.detention-in-europe.org).

6. Alternatives to detention should not be taken as alternative forms of detention, such as electronic tagging, which may substantially restrict or completely deprive a person's freedom of movement and right to liberty and security of person.
7. Everyone participating in alternatives to detention should receive comprehensive and individualised support at the beginning of their asylum or migration case until it is completely resolved. Persons should be immediately and completely informed in a language they understand and be empowered to take action on all possible outcomes for case resolution for the entire duration of their case.
8. Everyone participating in alternatives to detention should have access to qualified legal assistance that is free of charge from the beginning of their asylum or migration case until it is completely resolved.
9. Alternatives to detention shall provide all participating individuals and families with comprehensive reception conditions, including access to decent accommodation, medical care, psychological care, social welfare support, education and other basic needs. Reception conditions shall comply with basic human rights and should not resemble a prison- or detention-like environment.
10. Appropriate medical and psychosocial screening procedures should be implemented for all persons in alternatives to detention, in order to identify at the earliest stage particular vulnerabilities such as illnesses and signs of trauma, and appropriate measures to address them.
11. Unaccompanied children shall be placed in community-based and non-custodial settings that are age-appropriate, and which provide comprehensive and individualised support.
12. States shall give preference to voluntary compliance with a return decision for people in alternative to detention programmes who are in removal procedures.
13. Persons participating in alternatives to detention should have full access to relevant and qualified non-governmental organisations and staff of the United Nations High Commissioner for Refugees, if appropriate.
14. States shall establish bodies to regularly monitor the conditions of alternatives to detention, evaluate processes and outcomes, as well as the human, social and financial costs of such programmes. This information shall be regularly communicated to relevant national bodies in the respective member state, the European Union, and made available to the broader public.

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Paris, France  
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