

**ECRE SUMMARY OF KEY RECOMMENDATIONS
ON
THE DETENTION OF ASYLUM SEEKERS**

1. The European Council on Refugees and Exiles (ECRE) supports the well established position of the UN High Commissioner for Refugees and other human rights organisations that, as a general rule, asylum seekers should not be detained. Detention may only be used in exceptional cases, and should carry full procedural safeguards.
2. The grounds for detention prescribed by national law should, inter alia, reflect the fact that illegal entry to the territory of a European State is in itself unacceptable as grounds for the detention of an asylum seeker.
3. Alternative, non-custodial measures such as reporting requirements should always be considered before resorting to detention.
4. The detaining authorities must assess a compelling need to detain that is based on the personal history of each asylum seeker.
5. An absolute maximum duration for any such detention should be specified in national law.
6. Any review body should be independent from the detaining authorities.
7. Unaccompanied minors should never be detained.
8. Detainees should be given a clear understanding of the grounds for their detention and their rights while in detention.
9. Detainees should have unrestricted access to independent, qualified and free legal advice.
10. Specialised NGOs, UNHCR and legal representatives should have access to all places of detention, including transit zones at international ports and airports.
11. Conditions in detention should reflect the non-criminal status of the detainees and be consistent with all international standards.
12. All staff should receive training related to the special situation and needs of asylum seekers in detention.
13. National authorities should provide detailed information on relevant policy, practice, and statistics in order to ensure transparency.
14. Any forthcoming efforts to harmonise the practice of European states in the area of detention of asylum seekers should reflect the standards which ECRE here advocates.

**POSITION PAPER
ON
THE DETENTION OF ASYLUM SEEKERS**

BY THE EUROPEAN COUNCIL ON REFUGEES AND EXILES¹

General Remarks

1. ECRE believes that, as a general rule, asylum seekers² should not be detained. The right to liberty and security of the person is a fundamental principle of international human rights law.
2. ECRE urges European States to consider the full range of alternative, non-custodial measures available to them, which are both more humane and more effective³.
3. Deprivation of liberty obstructs and undermines the operation of a fair and efficient procedure for the determination of refugee status. For example, detention can physically interfere with the provision of legal advice to an asylum seeker and creates an intimidating atmosphere for persons undergoing the interview process.
4. Asylum seekers may have already suffered imprisonment and torture in the country from which they have fled. Therefore, the consequences of detention may be particularly serious, causing severe emotional and psychological stress and may amount to inhuman and degrading treatment.
5. Detention of asylum seekers should never be used as a deterrent, either indirectly to deter possible future arrivals or directly to deter the detainee from pursuing his or her asylum claim.
6. Systematic use of detention as a part of reception or determination procedures in any European state is strongly condemned by ECRE.
7. ECRE notes with particular concern the connection between the detention of asylum seekers which is increasing in nearly all European states and the introduction of the “safe third country” practice. The fact that in many cases asylum seekers have been repeatedly detained during chain deportations on “safe third country” grounds provides a further powerful argument against that deportation practice⁴.
8. ECRE welcomes the recent UNHCR Guidelines on Detention as a very useful contribution to international standard setting. However, these Guidelines elaborate upon the UNHCR EXCOM Conclusion No. 44 (XXXVII)-1986 which ECRE feels is now an insufficient

statement, given the serious erosion of refugee protection through the use of detention in the 1990s.

9. It should therefore be noted that ECRE's position extends the position of UNHCR in a number of important ways:
- ECRE does not accept as adequate the grounds for detention as set out in point (b) of EXCOM Conclusion No. 44 and in the recent "Guideline 3", feeling that they are too general and can therefore be interpreted by States as providing the basis for detaining large numbers of asylum seekers;
 - ECRE's position contains greater detail regarding the conditions of detention and statements concerning the psychological effects of detention upon asylum seekers;
 - ECRE emphasises the vital role of NGOs and suggests practical ways to improve the current situation of those in detention (eg. para 29);
 - ECRE calls for greater transparency with regard to this practice at both the national and international level;
 - ECRE does not find it advantageous to emphasise the refugee/migrant distinction when advocating the reform of detention conditions (see Annex).

Exceptional Grounds for Detention⁵

10. Asylum seekers should only be detained, as a last resort, in exceptional cases and where non-custodial measures have been proven on individual grounds not to achieve the stated, lawful and legitimate purpose.

Alternative, non-custodial measures include:

- supervision systems;
 - a regime of reporting requirements;
 - bail or guarantee systems (However, consideration must be given to the very limited financial assets of most asylum seekers. Such systems would only be reasonable if the amounts were regulated to not exceed a relatively low level and if there were organisations or community groups willing and able to help offer these securities on behalf of asylum seekers);
 - the promotion of voluntary return through intensive and personalised counselling work prior to and during detention for all rejected asylum seekers.
11. Detention must not be imposed arbitrarily and never purely for the convenience of the authorities. It must be lawful (in accordance with a procedure and based on grounds prescribed by law), reasonably predictable (asylum seekers should be clearly told if detention is a consequence of failing to comply with alternative restrictions, for example), necessary, and applied without discrimination⁶.
12. ECRE accepts that detention may be resorted to on the following grounds:
- if the asylum seeker is liable for prosecution for a serious non-political offence, other than an offence under national aliens or immigration law;
 - as a measure of last resort if there is a repeated and unjustified failure to comply with reporting requirements imposed by the authorities;
 - if, following a fair and efficient refugee determination procedure, there is a failure by

a rejected asylum seeker to comply with an order to leave the territory. This is also on condition that there has been a possibility to appeal against the order to leave the territory and that there are no humanitarian grounds to grant a permit to stay.

13. A demonstrable threat to “national security” or “public order”, as those terms have been defined by the jurisprudence of the European Court and Commission of Human Rights, may be grounds for detention of an asylum seeker. It is preferable if the provision for detention on such grounds is located within the general law applying to all nationals and aliens, rather than specifically within the asylum law.

Unacceptable Grounds for Detention

14. Asylum seekers may have unwittingly or out of necessity infringed immigration laws in their effort to reach safety, but detention is not an appropriate response to such an infringement. Nor is verification of identity and/or travel route sufficient grounds for the detention of an asylum seeker. What must be demonstrated is that there has been an unjustifiable failure to co-operate with the process of verification.

Asylum seekers are often forced to resort to illegal channels and false documentation in order to flee and gain access to the territory in which they seek international protection. For reasons which ECRE has often highlighted, it may be impossible for an asylum seeker to approach the authorities in his or her country of origin in order to obtain the necessary travel documents. Measures such as carrier sanctions and visa restrictions increasingly force genuine asylum seekers to enter illegally. The powers to detain illegal immigrants therefore must take account of the special situation of asylum seekers.

15. Rejected asylum seekers should not be detained for prolonged periods as a result of states failing to cooperate in the deportation process (for example, refusals by embassies or consulates to issue the necessary travel documents) or for any other reasons beyond the detainee’s own control.

Persons who are unable to return to their countries of origin due to the situation in these countries and/or the risk of being “subjected to torture or to inhuman or degrading treatment or punishment” (ECHR Article 3) should not be detained while the host state waits for a change of situation which would allow return.

16. Expression by the asylum seeker of a particular political opinion or his/her unwillingness to co-operate with deportation to another country should not form part of the grounds for detention but rather may be central elements in the asylum claim itself⁷.
17. ECRE emphasises that the grounds for detaining asylum seekers should be narrowly defined, as above, in order to discourage the growth of xenophobic attitudes which cast all asylum seekers as fraudulent and as presenting a threat to their host society.
18. **If** states continue to detain asylum seekers on grounds other than those listed above — for example, to verify identity or because the individual is deemed “likely to abscond” — the recommendations of this paper also apply, particularly the standards of evidence described in paragraph 19.

The initial decision to detain

19. The initial decision to detain should always be based on the individual circumstances and personal history of each asylum seeker. They should always contain clear reasons why other non-custodial measures would be inadequate for the purpose and, in the light of existing alternative measures, there should be clear proportionality between the detention and the end to be achieved. There should be a presumption in favour of release.

Information on the decision to detain

20. The asylum seeker should be informed promptly and in a language s/he understands of the grounds for his or her detention, his/her rights and how to exercise them. This information should be provided in writing both to the asylum seeker and to his/her legal representative. In addition, the written statement should always be explained verbally to the asylum seeker in a language s/he understands.

Adequate possibilities for review⁸

21. All initial decisions to detain should be automatically and promptly referred for review to a judicial or other competent body independent of the detaining authorities and prescribed by law. The detention should thereafter be reviewed periodically in order to ascertain whether the detention still serves the stated purpose and is proportional. Reviews should consider not only the legality of the decision to detain but also the substantive grounds for the detention, with the authorities required to prove the compelling need to prolong detention. The periodic reviews should take place regardless of whether the asylum seeker has exercised their right to appeal. Detainees and their legal representatives should have the right to attend any review hearings and to present their case. The reviews should include an opportunity for the detainee to rebut any assertions made by the detaining authorities. Interpretation, if required, should be available at such hearings.

Appeal rights

22. Detained asylum seekers should have the right to appeal against the first instance and the review decisions and should be provided with the means, through legal assistance, to exercise this right. Again, detainees should have the right to attend any appeal hearings and to present their case. If the periodic review rights described in paragraph 21 are not fully provided, the right to appeal must at least be guaranteed.

Duration of detention

23. Detention of asylum seekers should be for the minimum period necessary. An absolute maximum duration for any such detention should be specified in national law.

The right of access to legal counsel

24. Detained asylum seekers should be given the unrestricted assistance of a qualified, impartial legal counsel of his/her own choice⁹.
25. Legal counsel should be assigned by the competent authority if the detainee does not have a legal advisor of his/her own choice or does not have the means to obtain legal advice.

26. The detainee should be informed, immediately upon detention, of his/her right to legal advice, including a full written and oral explanation of this right and how to exercise it, in a language which s/he understands.
27. A qualified and impartial interpreter should be available for all visits between the detainee and his/her legal advisor, and during all contact between the asylum seeker and the national authorities.

Other rights in detention

28. Detained asylum seekers should also benefit from the following rights, including a full written and oral statement of these rights and how to exercise them, in a language which s/he understands:
 - the right to contact UNHCR and/or NGOs;
 - the right to communicate freely and in privacy with family, friends, members of a trained and recognised visitors group, and social or religious counsellor. (Supervised visits are acceptable practice only in cases involving criminal grounds or a threat to national security and where there is concrete evidence to suggest that the right to privacy would be abused).

As a general principle, the rights of detained asylum seekers should never be fewer than or inferior to those enjoyed by nationals of the state detained on criminal charges.

29. ECRE recommends that the following measures be taken in order to ensure asylum seekers can effectively exercise the above rights (paras 24-28):
 - access to telephones in places of detention at times which allow detainees to contact and be contacted by the persons and agencies listed in paragraphs 24-28;
 - access to free telephones for the purpose of contacting a legal representative and/or UNHCR in all international ports and airports;
 - exchange of correspondence, unopened and without interference from the detaining authorities, between legal representatives and detainees;
 - prompt notification of legal representatives when their client is to be transferred between places of detention;
 - places of detention not to be geographically isolated but instead should be easily accessible for visitors;
 - access to independent and qualified interpreters in order to avoid the use of other detainees for this purpose.

Access to detained asylum seekers¹⁰

30. UNHCR, designated NGOs and legal representatives should be granted access to places where asylum seekers are detained, including transit zones at international ports and airports.
31. UNHCR, a legal representative or a designated NGO should be automatically contacted by the authorities if an asylum claim is withdrawn during the claimant's detention. The detainee should receive counselling from UNHCR or the designated NGO and be allowed to reconsider

their decision.

Children

32. Children (under the age of eighteen) who are unaccompanied should never be detained¹¹.
33. Children and their “primary care-givers” should not be detained unless the government authorities can prove that this is the only means of maintaining family unity. Such detention should occur only in the most exceptional cases. Nursing mothers and women in the later stages of pregnancy should not be detained.
34. Asylum seekers should be given the benefit of the doubt when their age is uncertain or disputed. Medical certificates should only be issued if the age can not be established through the information of family members or if genuine documents can not be obtained.

Conditions in detention¹²

35. ECRE recognises that within Europe there is significant regional variance regarding the capacity of state authorities and other agencies to provide social assistance to asylum seekers and to improve the conditions of detained asylum seekers. The following recommendations should be read in this context as normative statements towards which states should strive in accordance with the concept of “progressive implementation”. ECRE, however, asserts that all current EU member states are capable of taking immediate action to implement the following recommendations, and that no state should undertake to detain unless capable of ensuring conditions in detention which respect the inherent dignity of the person.
36. ECRE emphasises that even when physical conditions are acceptable, detention often inflicts unnecessary psychological suffering on asylum seekers who in many European states remain uncertain as to either the grounds for, or the likely duration of, their detention. Asylum seekers may have undergone traumatic experiences in their country of origin, such as torture during arbitrary detention, and therefore detention in the country of reception is a particularly disproportionate response to, for example, arrival at a border without a visa.
37. As a general principle, the place and conditions of detention for asylum seekers should reflect their status as unconvicted persons and certainly should not be inferior to the conditions provided for nationals of that state detained on criminal charges.
38. Neither asylum seekers nor rejected asylum seekers should be detained together with other prisoners detained on criminal charges.
40. Separate facilities should be made available for men and women. On the other hand, husbands and wives and other family members in detention should be permitted to live together.
41. Medical and health screening should be introduced at the beginning of detention to detect, where possible, persons who may already be suffering from trauma due to experiences in the country they have fled, and/or to detect suicidal risk. Where such cases can be identified, release should be strongly recommended by the examining doctor and should be granted.

The overall health and mental health of every detainee should subsequently be monitored.

Monitoring for suicidal risk should not become punitive in that it should not involve isolation or transfer of the detainee to a prison wing.

42. Detainees should have access to 24 hour emergency medical services and regular access to general medical treatment. Doctors should be independent and where possible there should be a choice of doctor, including a choice between a male and female doctor. All medical staff should receive special training on the situation of asylum seekers in detention and should have the use of interpreters when meeting the detainees. Detainees should, where necessary, be referred for specialist treatment.

Detainees and, with patient permission, their legal advisers should have access to medical records.

43. Places of detention should have natural light and sufficient space.
44. Detainees should have the opportunity for physical exercise and should never be placed in isolation.
45. In those rare cases where children have to be detained in order to maintain family unity, they should never be held in prison-like conditions and they should benefit from appropriate recreational and educational facilities. Special provision should be made for their particular cultural and linguistic needs.
46. During prolonged detention, adult education and training should be provided and it should attend to cultural and linguistic needs. Such activities should help to prepare detainees both for the process of integration in host societies and for the process of reintegration in their countries of origin.

It is crucial for the mental health of detainees that they are not deprived of access to constructive activities during a prolonged period of detention.

47. Detainees have the right to freedom of religion which implies not only the right to be visited by a representative of their denomination but also, for example, the right to wear religious clothing or follow a religious diet. Detainees should be given the space to celebrate, to grieve or to otherwise express their cultural identity.
48. Asylum seekers should not be transferred to prisons as a punitive measure unless they have been convicted of a criminal offence.
49. There should be a mechanism allowing detainees to submit complaints regarding the conditions of their detention, including complaints about abuse inflicted by other detainees.

Detaining authorities and their staff

50. ECRE notes with concern the practice in several European states of contracting private security companies to administer places in which asylum seekers are detained. Such companies must be regulated in such a way as to be held accountable for actions taken on behalf of the state.

51. All staff should receive proper training on basic matters relating to the right of asylum, on the causes of refugee movements relevant to the main countries of origin, on relevant cultural factors, and on methods of recognizing and responding appropriately to the symptoms of stress-related illness which asylum seekers in detention may exhibit. Authorities should seek assistance from UNHCR and specialised NGOs in order to provide such training.
52. There should be a channel for any complaints by detainees concerning misconduct by staff. All complaints should be thoroughly investigated and appropriate action taken. Serious allegations involving racist or physical abuse should be investigated by an impartial body.
53. Where a detainee dies in custody, legal aid should be made available to the family or friends of the deceased so that they can be represented at an inquest. Relevant records, reports and statements should be made available.

Transparency¹³

54. ECRE urges national governments to make publicly available information regarding asylum seekers held in detention. Such information should be published periodically and not only as a result of parliamentary questions. It should include:
 - the total number of asylum seekers in detention, including those held at international ports and airports
 - the total number of rejected asylum seekers¹⁴ in detention, including those held at international ports and airports
 - the range of lengths of detention

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ANNEX - DEFINITIONAL ISSUES

Throughout this paper, the term “asylum seeker” has been used for the sake of convenience. ECRE considers its recommendations on detention to be applicable to all the following persons:

- a) Refugees as defined by the 1951 Convention and 1967 Protocol relating to the Status of Refugees
- b) Those persons, often termed *de facto* refugees in the European context, who are in need of international protection but fall outside of the 1951 Convention definition
- c) Refugees protected by Temporary Protection arrangements
- d) Asylum seekers who may be refugees in the sense of (a), (b) or (c)
- e) Asylum seekers who have been rejected by a refugee status determination procedure on purely formal grounds without an examination of the substance of their claim, particularly asylum seekers awaiting removal on “safe third country” grounds¹⁵
- f) Asylum seekers who have received an initial rejection but are still in the process of appealing the negative decision or of appealing against their removal

Naturally, ECRE has additional concern for the detention of rejected asylum seekers who have not benefitted from an examination of their claim under fair and efficient procedures, as defined

elsewhere by ECRE¹⁶, and also with rejected asylum seekers in cases where the 1951 Convention has been interpreted in a restrictive manner with which ECRE and UNHCR would not concur. The exclusion of persons persecuted by non-governmental agents would be an example of such restrictive interpretation¹⁷. Many of this position paper's recommendations are therefore also applicable to these persons.

It should be noted that although ECRE seeks to advocate specifically on the detention of refugees and asylum seekers, not all of ECRE's recommendations are dependent upon acceptance of ECRE's definitional terms. Thus, although the acceptable grounds for detention should be much more limited where an asylum claim is involved, many of the recommended rights and conditions apply equally to all migrants who are detained. Rejected asylum seekers therefore deserve to be treated in accordance with human dignity during pre-deportation detention **even if** they have been rejected on substantive grounds by a fair procedure.

ECRE recognises a qualitative difference between detention and other restrictions on an asylum seeker's freedom of movement. ECRE endorses UNHCR's recent comments on what constitutes detention, particularly the inclusion of transit zones at international ports on the list of detention locations, and believes that definitions of the deprivation of liberty developed under wider human rights law are applicable.

The present recommendations are concerned with detention and not with any other restrictions on freedom of movement. However, ECRE recognises the very real problems arising from reception centres that are located too far from towns or transport, and from residence restrictions that may present obstacles to asylum seekers enjoying their right to family unity.

ECRE realizes that camps may have to be used in some mass influx situations, however such camps should be "open" rather than "closed". Closed camps are clearly places of detention, and therefore all camps should be open unless a threat to national security is involved, such as an armed group using the camp as a base for cross-border attacks.

¹ In general, the provisions in international law which form the basis of many of ECRE's recommendations have not been cited. Readers are referred to the 'Summary of International Legal Standards' and the footnotes attached to Guidelines in UNHCR's recent publication: 'Detention of Asylum Seekers in Europe' (1995).

² "Asylum seekers" is here used as a term of convenience, and includes many *de facto* refugees. Please see the attached Annex for a full explanation of this paper's scope.

³ See below ("Exceptional Grounds for Detention" para 10), and also a forthcoming paper by ECRE elaborating upon the issue of alternatives.

⁴ For further information, please see the ECRE report: '*Safe Third Countries - Myths and Realities*' , London, February 1995.

⁵ See ECRE policy paper: '*A European Refugee Policy in the Light of Established Principles*' Recommendation (i) paras 48-49.

⁶ With regard to non-discrimination: asylum seekers should not be detained on medical grounds, unless a national of the host state would be similarly confined under a mental health code or similarly held as part of the treatment of a communicable disease.

⁷ In the United States, there have been cases in which asylum seekers' political activities in their countries of origin, as a result of which they claimed to have suffered persecution, was produced as justification for their detention by the US authorities. ECRE wishes to guard against the spread of such practice to Europe.

⁸ See '*A European Refugee Policy in the Light of Established Principles*', Recommendation (ii) paras 48-49.

⁹ See '*A European Refugee Policy in the Light of Established Principles*' Recommendation (iii) paras 48-49.

¹⁰ See '*A European Refugee Policy in the Light of Established Principles*' Recommendation (v) paras 48-49.

¹¹ Guardianship arrangements and other orders of the authorities to care for child asylum seekers are not to be confused with measures depriving the child of his/her liberty.

¹² See ECRE's '*Working Paper on Airport Procedures in Europe*', February 1993 - III, Recommendation 3.

¹³ See also: Conclusion 8 adopted by ECRE in 1982 at a seminar on detention which rightly connects the issue of transparency of official information with the issue of access by NGOs and UNHCR to asylum seekers in detention.

¹⁴ See Annex. The government authorities should accompany any statistics with a note as to whether "rejected" applies strictly to those who have received a final rejection after a full and substantive examination of their claim.

¹⁵ See '*Safe Third Countries - Myths and Realities*', February 1995.

¹⁶ See ECRE's Report: '*Fair and Efficient Procedures for Determining Refugee Status*', October 1990.

¹⁷ See ECRE's '*Note on the Harmonisation of the Interpretation of Article 1 of the 1951 Geneva Convention*', June 1995.