

## United Nations High Commissioner for Refugees (UNHCR)

### Inquiry into the use of Immigration Detention

#### Written evidence to the Parliamentary Joint Committee

#### Introduction

1. UNHCR is pleased to submit its views to the All-Party Parliamentary Group on Refugees and the All-Party Parliamentary Group on Migration Inquiry into the Use of Immigration Detention. UNHCR's submission focusses on alternatives to detention; time limits on immigration detention; and decisions to detain and support for the needs of persons in situations of vulnerability or at risk.

#### UNHCR's Mandate

2. UNHCR has been entrusted with the responsibility for providing international protection to refugees, and together with governments, to seek permanent solutions to their plight. As set out in the 1950 Statute of the Office of UNHCR (paragraph 8(a)), UNHCR fulfils its mandate by, *inter alia*, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.” UNHCR's supervisory responsibility over the implementation of international instruments is also reflected in Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol, obliging State Parties to cooperate with UNHCR in the exercise of its functions; and is further found in EU law.<sup>1</sup> It is noted that the United Kingdom (UK) is bound by all the original EU directives, including the Reception Conditions Directive, as well as the Dublin III Regulation.<sup>2</sup>
3. UNHCR has also been formally mandated by the UN General Assembly to prevent and reduce statelessness around the world, as well as to protect the rights of stateless people.<sup>3</sup>
4. As part of its mandate, UNHCR has a direct interest in the situation of asylum-seekers, refugees and stateless persons in detention. UNHCR has identified the

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<sup>1</sup> See, for example, European Union, *Declaration on Article 73k of the Treaty establishing the European Community*, OJ C 340/134 of 10.11.1997, Declaration 17; *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, OJ L 326/13 of 13.12.2005, Article 21(c).

<sup>2</sup> Articles 1, 2 and Article 4a(1) of the Protocol (No 21) on the position of the UK and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the *Treaty on European Union* and to the *Treaty on the Functioning of the Union*.

<sup>3</sup> See UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, <http://www.refworld.org/docid/5268c9474.html>

detention of asylum-seekers and refugees as a corporate priority, recently launching a 5-year Strategy to address practices not in conformity with international human rights standards.<sup>4</sup> The UK has been selected as a focus country to participate in the Strategy and we welcome the opportunity to present on related matters before the Parliamentary Inquiry.

5. UNHCR has a substantial repository<sup>5</sup> of materials on the issue of detention, including but not limited to the following:

- UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012 (UNHCR Detention Guidelines): <http://www.refworld.org/docid/503489533b8.html>
- UNHCR, Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014-2018, 2014: <http://www.refworld.org/docid/536b564d4.html>
- UNHCR Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), Monitoring Immigration Detention: Practical Manual, 2014: <http://www.refworld.org/docid/53706e354.html>
- UNHCR and Office of the High Commissioner for Human Rights, Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions, July 2011 (UNHCR Global Roundtable): <http://www.refworld.org/docid/4e315b882.html>
- UNHCR, Canada/USA Bi-National Roundtable on Alternatives to Detention of Asylum Seekers, Refugees, Migrants and Stateless Persons, February 2013 (UNHCR Canada/USA Roundtable): <http://www.refworld.org/docid/515178a12.html>
- Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva, June 2013, PPLA/2013/02 (UNHCR 2013, Empirical Research), research conducted by Cathryn Costello and Esra Kaytaz, University of Oxford: <http://www.refworld.org/docid/51a6fec84.html>
- Back to Basics: The Right to Liberty and Security of Person and “Alternatives to Detention” of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants, April 2011, PPLA/2011/01.Rev.1 (UNHCR 2011, Back to Basics), research conducted by Alice Edwards, University of Oxford: <http://www.refworld.org/docid/4dc935fd2.html>

6. In summary, UNHCR’s position is that the detention of asylum-seekers should normally be avoided and be a measure of last resort. According to international law, the detention of asylum-seekers is justified only as far as it is determined to be necessary and proportionate for the pursuit of a legitimate purpose in each individual

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<sup>4</sup> UNHCR, *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees*, 2014-2018, 2014, <http://www.refworld.org/docid/536b564d4.html>

<sup>5</sup> See, <http://www.refworld.org/detention.html>

case. While liberty must always be considered, alternatives to detention are part of the necessity and proportionality assessment of the lawfulness of detention. Appropriate screening/detention review mechanisms need to be in place. The detention of asylum-seekers should be regulated by law, carefully circumscribed, and subject to prompt and periodic review.

7. In the UK, UNHCR has had longstanding concerns with the Detained Fast Track (DFT) procedure which have been raised directly with the Immigration Minister. UNHCR's Quality Initiative Project and Quality Integration Project have monitored the operation of the DFT procedure with the cooperation of the Home Office since 2006 and have issued two reports.<sup>6</sup> These reports have identified serious shortcomings in the procedure including the lack of clarity in Home Office policy as to the scope and criteria for applying the DFT procedure; the undefined time limit on detention under DFT, leaving open the possibility of applicants being detained well beyond the period of time required to reach a decision; and significant and repeated errors in refugee status determination (RSD) decision-making within the DFT procedure.
8. UNHCR's observations in this written evidence are made in the broader context of UNHCR's ongoing work with the UK authorities aimed at improving the country's asylum system, and address four of the issues before the Parliamentary Inquiry.

**A. How effective are the current UK alternatives to detention (e.g. bail, reporting requirements)?**

9. UNHCR's own commissioned research<sup>7</sup> supports the views held by other stakeholders that in the UK the alternatives currently offered - temporary admission, release on restrictions and bail – have not always been effective or sufficiently accessible to asylum-seekers. UNHCR welcomes the express reference in the Home Office's Enforcement Instructions and Guidance (EIG) that alternatives to detention should be used wherever possible so that detention is used only as a measure of last resort and, further, that there should be a presumption in favour of temporary release.<sup>8</sup> UNHCR encourages the UK authorities, and stands ready to offer its support, to explore how to make existing alternatives more accessible, as well as to

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<sup>6</sup> UNHCR, *Quality Initiative Project Fifth Report to the Minister: UNHCR Representation to the United Kingdom in London*, March 2008, [http://www.unhcr.org.uk/fileadmin/user\\_upload/pdf/QI\\_Fifth\\_Report.pdf](http://www.unhcr.org.uk/fileadmin/user_upload/pdf/QI_Fifth_Report.pdf) and UNHCR, *Quality Integration Project First Report to the Minister: UNHCR Representation to the United Kingdom in London*, August 2010, [http://www.unhcr.org.uk/fileadmin/user\\_upload/docs/Quality\\_Integration\\_Project\\_First\\_Report\\_FINAL\\_PDF\\_VERSION.pdf](http://www.unhcr.org.uk/fileadmin/user_upload/docs/Quality_Integration_Project_First_Report_FINAL_PDF_VERSION.pdf)

<sup>7</sup> See UNHCR 2011, Back to Basics.

<sup>8</sup> Home Office, Enforcement Instructions and Guidance Chps. 55.1.1, 55.20, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/307995/Chapter55.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307995/Chapter55.pdf)

investigate other concrete and effective alternatives to detention to complement them.

10. The UK has in the past experimented with a number of community-based and -supported pilot alternatives to detention, albeit without sustainable success. As part of its empirical research, UNHCR’s findings in respect of the Glasgow “Family Return Project”<sup>9</sup> matched the government’s evaluation of the project.<sup>10</sup> In particular, it was considered that the pilot failed not because of any flaw in the possibility of such alternatives working [not least because they work effectively in other countries], but because of several fundamental failures in the design and implementation of the UK pilot, which could have been remedied. Some of the problems included the failure to select carefully the participants in the pilot and the related issue of the suitability of the family for an “intervention”; the view that the families had a perception that their treatment during the asylum process had been unfair and so having felt disempowered by that process, were not ready to engage constructively in return discussions; and the return-only focus meant that families were not willing to engage fully – the latter is to be compared with the Belgium “family return houses” in which the exploration of all possible legal avenues to remain with appropriate “coaching”/counselling services actually improved return and compliance rates – in part because families understood that they were at the “end of the road”.<sup>11</sup>
11. Other studies have also shown that the lack of automatic bail hearings or detention reviews in the UK – unlike many other jurisdictions, such as Canada, where reviews take place within 24-48 hours – contribute to the inaccessibility of alternatives to detention and/or release.
12. UNHCR’s Detention Guidelines elaborate a number of examples of alternatives to detention which include:
  - Deposit/surrender of documents;
  - Directed residence;
  - Reporting conditions;
  - Residence at open or semi-open reception or asylum centres;
  - Community supervision arrangements;
  - Provision of a guarantor/surety; and
  - Release on bail/bond.

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<sup>9</sup> UNHCR 2011, Back to Basics, Part 4.3.2 Glasgow: “Family Return Project”.

<sup>10</sup> Evaluation of Family Return Pilot, Final Report, Glasgow City Council, UKBA and Scottish Government, May 2011, <http://www.wsmg.org.uk/documents/wsmg/UK%20Border%20Agency%20associated/evaluation-family-return-project.pdf>

<sup>11</sup> UNHCR 2011, Back to Basics, Part 4.3.1 Belgium’s “Return Houses”.

13. In UNHCR's experience, supported by empirical research drawn from a number of jurisdictions including Australia, Canada and Hong Kong SAR (China),<sup>12</sup> alternatives to detention are most effective where asylum-seekers are:

- treated with dignity, humanity and respect throughout the asylum procedure;
- informed clearly and concisely at an early stage about their rights and duties pertaining to the alternative to detention and the consequences of non-compliance;
- given access to legal advice throughout the asylum and returns procedures;
- provided with adequate material support, accommodation and other reception conditions, or access to means of self-sufficiency (including the right to work); and
- able to benefit from individualised case management services in relation to their asylum claim.

14. UNHCR's research has found that stringent detention regimes do not deter irregular migration.<sup>13</sup> Moreover the alternatives explored in the research found that less than 10 per cent of asylum applicants abscond when released to proper supervision and facilities, meaning up to 90 per cent comply with the conditions of their release. In the case of the Toronto Bail Program, for example, the cooperation rate, including through to departure from Canada, continues to be at around 97 per cent. Other projects also enjoyed high cooperation rates, including the UK's previous Liverpool Key Worker Pilot which was 95.5 per cent.<sup>14</sup> Many alternatives are relatively inexpensive and provide comprehensive services in the community to asylum-seekers, while supporting the efficient operation of the asylum system.<sup>15</sup>

15. On costs, there is also evidence to show that detention costs considerably more than most alternatives to detention, even when the short- and long-term negative health consequences of detention on detainees or the impact on their later integration are excluded from the costing.<sup>16</sup>

**B. There is currently no time limit on immigration detention – in your view what are the impacts (if any) of this?**

16. UNHCR observes that, in comparison with other European countries, the UK uses detention in asylum procedures in a disproportionately high manner. This sets a worrying negative precedent and is inconsistent with the UK's rich human rights

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<sup>12</sup> See, UNHCR 2011, Back to Basics and UNHCR 2013, Empirical Research.

<sup>13</sup> UNHCR 2011, Back to Basics and UNHCR 2013, Empirical Research. See, also, UNHCR Global Roundtable.

<sup>14</sup> See, UNHCR 2011, Back to Basics, Table 1: Compliance or cooperation rates, p. 82-83.

<sup>15</sup> UNHCR Canada/USA Roundtable.

<sup>16</sup> UNHCR 2011, Back to Basics, Table 2: Detention versus alternatives to detention costs, p. 85.

heritage. The absence of a maximum limit on detention can contribute to delays in release or even lead to indefinite detention and is one of the reasons why UNHCR recommends that maximum periods be set in law.<sup>17</sup> Further, without a maximum period stipulated by law, the rights of detained asylum-seekers are protected only to the extent that they can exercise rights of judicial review. UNHCR's 2013 research confirmed that the perceptions of asylum-seekers are also an important aspect to understand why alternatives work and noted that "*delay and the prolonged periods of uncertainty [detention] brought, were widely seen as unfair [by asylum-seekers]*."<sup>18</sup>

17. UNHCR has, through its global network, compiled and reviewed information relating to immigration detention timeframes from 43 industrialised countries.<sup>19</sup> It was not, however, always possible to distinguish maximum periods between forms of immigration detention at the entry or pre-departure phases of the process, which may affect the results. Of these countries, UNHCR notes that the large majority set maximum time limits in national law or, alternatively, the courts have imposed them. Only seven have no maximum period set in national legislation or policy.<sup>20</sup> Within a context of important safeguards, it is noted that all EU Member States except Denmark, the UK and Ireland are bound by the EU Returns Directive, which requires them to set in law a maximum period not exceeding six months. Only if the individual is uncooperative or there are delays in the obtaining of documentation from third countries is it possible to extend the period exceptionally for a further 12 months, also to be regulated by national law.<sup>21</sup> While the Returns Directive does not apply to the UK, it does give an indication of what is an acceptable maximum limit for pre-departure detention in comparable countries, that of six months. It is arguable that maximum allowable periods in detention for asylum-seekers upon entry should be even more carefully circumscribed, in recognition of the fundamental right to seek asylum, the right to non-penalisation for illegal entry or stay recognized in Article 31 of the 1951 Convention and the vulnerable predicament of asylum-seekers. Many countries have found suitable alternative arrangements such that asylum-seekers do not need to be detained at all (see above).

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<sup>17</sup> UNHCR Detention Guidelines, Guideline 6.

<sup>18</sup> UNHCR 2013, Empirical Research, p. 5: Executive Summary.

<sup>19</sup> Armenia; Austria; Belgium; Bosnia and Herzegovina; Bulgaria; Canada; Croatia; Czech Republic; Denmark; Estonia; France; Finland; Georgia; Germany; Greece; Hungary; Ireland; Israel; Italy; Japan; Latvia; Lithuania; Macedonia; Malta; Moldova; Montenegro; Netherlands; New Zealand; Poland; Portugal; Romania; Russian Federation; Serbia; Slovakia; Slovenia; Spain; South Africa; South Korea; Sweden; Switzerland; Turkey; Ukraine; and United States of America.

<sup>20</sup> Countries with no time limits for immigration detention are: Canada, Denmark, Estonia, Israel, Japan, New Zealand, South Korea.

<sup>21</sup> Articles 15(5) and (6), European Union: Council of the European Union, *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*, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, <http://www.refworld.org/docid/496c641098.html>.

18. Annex A further shows that of the 12 countries depicted, several non-EU countries have adopted a six month maximum limit, while a number of EU Member States have adopted shorter periods than six months. Of the 12 countries depicted in Annex B that are either not following the EU Returns Directive, or are not EU Member States, only Latvia and the Russian Federation have limits beyond 18 months.
19. It is UNHCR's view that based on comparative state practice a maximum period for detention of asylum-seekers at the entry phase needs to be prescribed and that this should be for the shortest possible period of time. Shorter timeframes, for example, for the purposes of border procedures and the initial investigation into the elements of the claim where this cannot be collected in the absence of detention should also be regulated.<sup>22</sup> UNHCR advises that individuals should be brought promptly to have their detention reviewed (within 24-48 hours) and thereafter subject to periodic reviews taking place every seven days until the 1 month mark, and thereafter every month until the maximum period is reached, assessing at all times the necessity of the continuation of detention.<sup>23</sup> Further, as outlined above, UNHCR is of the view that detention can generally be avoided.

### **C. Are the current arrangements for authorizing detention appropriate?**

20. In UNHCR's view, the list of factors for authorizing detention in Chapter 55.3.1 of the EIG, are relatively comprehensive and that, properly applied, should minimise the number of persons in detention. However, independent monitoring reports have shown that in 25 per cent of the cases reviewed, "*...decisions to detain a person, or to maintain their detention, had not been made with reference to all relevant factors.*"<sup>24</sup> UNHCR's own audit of the DFT procedures also showed that a high number of individuals who were initially detained under the DFT were later released, with most being referred to organisations caring for victims of torture, thus indicating that the initial decision to detain may not have been appropriate.
21. According to the UNHCR Detention Guidelines, decisions to detain should be based on a detailed and individualized assessment of the necessity to detain in line with a legitimate purpose. Appropriate screening and assessment tools as well as detention reviews can guide decision-makers, and should take into account the special circumstances or needs of particular categories of asylum-seekers (such as children,

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<sup>22</sup> Seven days for the purposes of administrative processing has been allowed by the European Court of Human Rights in *Saadi v United Kingdom*, Applic. No. 13229/03, European Court of Human Rights, 29 January 2008, <http://www.refworld.org/docid/47a074302.html>.

<sup>23</sup> UNHCR Detention Guidelines, Guideline 7, para. 47(iv).

<sup>24</sup> The effectiveness and impact of immigration detention casework: A joint thematic review by HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration, December 2012, <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/thematic-reports-and-research-publications/immigration-detention-casework-2012.pdf>

victims of trauma or torture, women, victims of trafficking and others in situation of vulnerability or at risk).<sup>25</sup>

22. UNHCR would further recommend explicit exemptions to detention measures for children, nursing mothers and pregnant women, survivors of torture or sexual violence, and traumatized persons, in view of their special needs. As a matter of principle, UNHCR advocates that asylum-seeking children should not be detained and notes the UK's commitment to this objective.

**D. How far does the current detention system support the needs of vulnerable detainees, including pregnant women, detainees with a disability and young adults?**

23. UNHCR's DFT reports, mentioned above, showed that DFT safeguards to identify vulnerable and traumatised individuals are not adequate. UNHCR noted that a high number of individuals who enter the DFT are later released. Even among those who remained within the DFT, UNHCR identified that vulnerable people and applicants with complex cases which are not suitable for being decided quickly were routed into the DFT. This includes individuals who claim to be victims of rape or trafficking. UNHCR considers that the DFT is not a suitable procedure for RSD, and as it is accompanied by detention, is particularly inappropriate for certain categories of asylum-seekers (see C. above).
24. UNHCR recommends that a proper screening and assessment process be used by decision-makers to identify persons in situations of vulnerability and to identify appropriate alternatives to detention. When detention is considered necessary, as a last resort, this can also assist to ensure detention conditions are appropriate to their particular circumstances.

**UNHCR London**  
**1 October 2014**

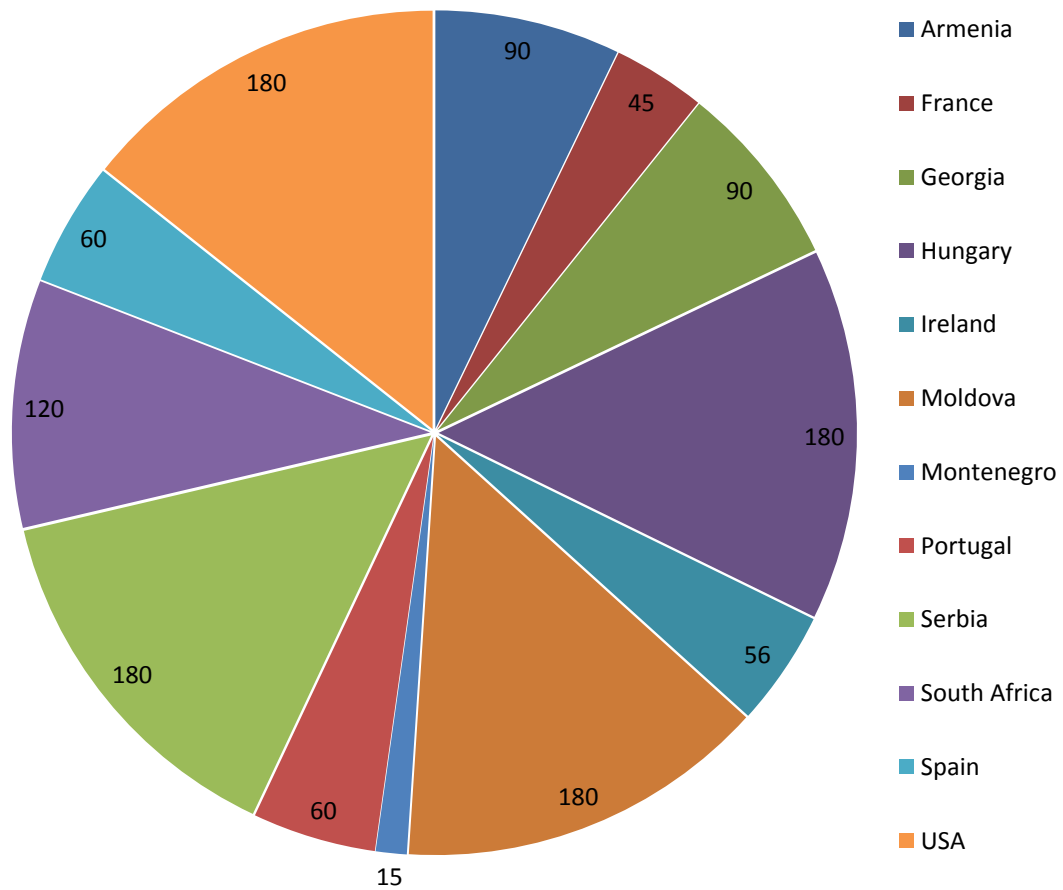
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<sup>25</sup> For more details, see UNHCR Detention Guidelines, Guideline 9.



**Annex A**

**Detention Time Limits by Country  
(6 Months or Less in Days)**



## Annex B

### European Detention Time Limits by Country (Longer than 6 Months in Months)

Countries following the EU directive and countries with no time limits are not included.

